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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Availability of E-Tag Information to
Commission Staff

Docket No. RM11-12-001

ORDER NO. 771-B

ORDER ON REHEARING AND CLARIFICATION

(Issued November 19, 2015)

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1. In this order, the Federal Energy Regulatory Commission (Commission) denies rehearing of Order No. 771¹ with respect to access to e-Tag data for the Commission, and for Regional Transmission Organizations (RTOs), Independent System Operators (ISOs), and Market Monitoring Units (MMUs). This order also clarifies certain issues.

I. Background

2. On December 20, 2012, the Commission issued Order No. 771, a Final Rule that amended the Commission's regulations to grant the Commission access, on a non-public and ongoing basis, to the complete electronic tags (e-Tags) used to schedule the transmission of electric power interchange transactions in wholesale markets. Order No. 771 required e-Tag Authors (through their Agent Service) and Balancing Authorities (through their Authority Service), beginning on March 15, 2013, to take appropriate steps to ensure Commission access to the e-Tags covered by this Final Rule by designating the Commission as an addressee on the e-Tags. In response to this rule, requests for rehearing and/or clarification were filed by four entities. The National Rural Electric Cooperative Association (NRECA) individually filed a request for rehearing and also filed, together with Edison Electric Institute (EEI), a joint request for rehearing and clarification that included a motion for an expedited response to its motion for an extension of the compliance deadlines prescribed in the rule. Southern Company Services, Inc. (Southern Companies) similarly filed a request for rehearing and

¹ *Availability of E-Tag Information to Commission Staff*, 77 FR 76367 (Dec. 28, 2012), FERC Stats. & Regs. ¶ 31,339 (2012) (Order No. 771).

clarification that included a request for expedited consideration of a request for a time extension. In addition, Open Access Technology International, Inc. (OATI) filed a request for clarification. A motion for leave to answer and answer was filed by PJM Interconnection, L.L.C. (PJM) and Southwest Power Pool, Inc. (SPP) (collectively, PJM/SPP).²

3. In Order No. 771-A, issued on March 8, 2013, the Commission addressed the issues raised in the requests for rehearing of Order No. 771 that required resolution in order for the industry to comply with the prescribed compliance schedule in Order No. 771.³ In this order, the Commission addresses the issues raised on rehearing and clarification in this proceeding that were not addressed in Order No. 771-A.

A. Order No. 771 and E-Tags

4. E-Tags, also known as Requests for Interchange (RFI), are used to schedule interchange transactions in wholesale markets. Generally, e-Tags document the movement of energy across an interchange over prescribed physical paths, for a given duration, and for a given energy profile(s), and include information about those entities with financial responsibilities for the receipt and delivery of the energy. E-Tags contain

² The Commission rejected PJM/SPP's answer in Order No. 771-A. *See Availability of E-Tag Information to Commission Staff*, 142 FERC ¶ 61,181 at P 7 (2013) (Order No. 771-A).

³ We note that, in a notice issued on February 1, 2013, the Commission granted a limited time extension to Balancing Authorities related to their validation responsibilities under Order No. 771 until Order No. 771-A was issued.

information about the different types of entities involved in moving power across interchanges, including generators, transmission system operators, energy traders, and Load Serving Entities. The entities listed on e-Tags may include public utilities as well as entities covered by section 201(f) of the Federal Power Act (FPA).⁴ In Order No. 771, the Commission found that access to complete e-Tag data⁵ will help the Commission in its efforts to detect market manipulation and anti-competitive behavior, monitor the efficiency of the markets, and better inform Commission policies and decision-making.⁶ Order No. 771 relied on the Commission's anti-manipulation authority under FPA

⁴ 16 U.S.C. § 824(f) (2012). FPA section 201(f) provides:

No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. § 901, et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

⁵ The Commission defined "complete e-Tags" for purposes of this rulemaking proceeding as: (1) e-Tags for interchange transactions scheduled to flow into, out of, or within the United States' portion of the Eastern or Western Interconnection, or into the Electric Reliability Council of Texas and from the United States' portion of the Eastern or Western Interconnection, or from the Electric Reliability Council of Texas into the United States' portion of the Eastern or Western Interconnection; and (2) information on every aspect of each such e-Tag, including all applicable e-Tag IDs, transaction types, market segments, physical segments, profile sets, transmission reservations, and energy schedules. *See* Order No. 771, FERC Stats. & Regs. ¶ 31,339 at n.2.

⁶ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 27.

section 222, in conjunction with its investigative authority under FPA section 307(a), to gain Commission access to e-Tag information related to wholesale electricity market transactions.

5. Order No. 771 required e-Tag Authors, through their Agent Service, and Balancing Authorities, through their Authority Service, to take appropriate steps to ensure that the Commission is included as an addressee on all e-Tags for interchange transactions scheduled to flow into, out of, or within the United States' portion of the Eastern or Western Interconnection, or into Electric Reliability Council of Texas (ERCOT) and from the United States' portion of the Eastern or Western Interconnection; or from ERCOT into the United States' portion of the Eastern or Western Interconnection.⁷ The Commission required that the e-Tag Authors include the Commission on the CC list of entities with view-only rights to the e-Tags described above. Further, the Commission required that the Balancing Authorities (located within the United States) validate the inclusion of the Commission on the CC list of the e-Tags before those e-Tags are electronically delivered to an address specified by the Commission.⁸

6. Order No. 771 also required that RTOs, ISOs and their MMUs be afforded access to complete e-Tags, upon request to e-Tag Authors and Authority Services, subject to

⁷ *Id.* P 1; *see also* 18 C.F.R. § 366.2(d).

⁸ *Id.* P 41. The validation function was clarified in Order No. 771-A.

appropriate confidentiality restrictions. On August 26, 2013, the Commission accepted PJM's tariff revisions to codify the authority and obligations of PJM and its MMU with respect to obtaining and providing access to complete e-Tags under Order No. 771, subject to the Commission's order addressing the remaining requests for rehearing of Order No. 771.⁹ Similarly, the RTO now known as the Midcontinent Independent System Operator, Inc. (MISO) filed revisions to its tariff to codify the authority and obligations of MISO and its MMU under Order No. 771.¹⁰

7. As the Commission explained in Order No. 771, the Commission needs e-Tag data covering all transactions involving interconnected entities listed on the e-Tag because the information is necessary to understand the use of the interconnected electricity grid, and particularly those transactions occurring at interchanges.¹¹ The Commission also found in Order No. 771 that regular access to e-Tags for power flows across interchanges will make it possible for the Commission to identify or analyze various behaviors by market participants to determine if they are part of a potentially manipulative scheme(s).¹² As demonstrated by investigations by the Commission's Office of Enforcement, for

⁹ See *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,152 (2013). This order addresses the remaining requests for rehearing of Order No. 771.

¹⁰ MISO's tariff filing was approved by delegated letter order in Docket No. ER13-2327-000 on October 29, 2013.

¹¹ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 27.

¹² *Id.* P 28.

example, e-Tag information can enable the Commission to investigate whether entities may be engaging in manipulative schemes involving the circular scheduling of imports and exports into a market to benefit other positions held by these entities.¹³ The Commission also noted that e-Tag access will help the Commission to understand, identify, and address instances where interchange pricing methodologies or scheduling rules result in inefficiencies and increased costs to market participants collectively.¹⁴ The Commission also noted that access to e-Tag information will allow the Commission to determine whether the requirements of the mandatory business practice standards related to e-Tags have been met.¹⁵

8. Since issuance of Order No. 771, the Commission's experience with obtaining and reviewing e-Tags has shown that this information is helpful in determining whether entities are engaged in certain manipulative schemes, such as the circular scheduling of imports and exports into a market to benefit other positions held by these entities or the false designation of transactions to ensure awards of bids at multiple interties. In

¹³ *Id.* P 28, n.72 (citing *Gila River Power LLC*, 141 FERC ¶ 61,136 (2012)). *See also Constellation Energy Commodities Group, Inc.*, 145 FERC ¶ 61,062 (2013) (where the Commission approved a settlement agreement resolving an admitted violation of the Commission's regulation at 18 CFR 35.41(b) and related California Independent System Operator Corporation (CAISO) tariff provisions for falsely designating transactions as "Wheeling Through" transactions to improperly ensure awards of bids at multiple interties).

¹⁴ *Id.* P 29.

¹⁵ *Id.*

addition, the Commission has used e-Tag data to better understand certain aspects of market design and to inform the Commission about various proceedings.¹⁶

9. Requests for rehearing and/or clarification of Order No. 771 were filed by four entities.¹⁷ On March 8, 2013, the Commission issued an order on rehearing and clarification, Order No. 771-A, addressing requests for extensions of time and certain other issues raised in the rehearing and clarification requests, and clarified: (1) the specifics of the e-Tag validation requirements of Order No. 771; (2) the prospective effect of the requirement that the Commission be included in the CC field on e-Tags created on or after March 15, 2013; (3) the privileged and confidential treatment to be afforded to e-Tag information made available to the Commission under Order No. 771; (4) that the Commission is to be afforded access to the Intra-Balancing Authority e-Tags in the same manner as for interchange e-Tags; and (5) that the requirement that Balancing Authorities ensure the Commission access to e-Tags pertains to the Sink Balancing Authority and not to other Balancing Authorities that may be listed on the e-Tag.

10. As these issues were already addressed in Order No. 771-A, we will not address them again in this order. This order addresses the remaining issues raised on rehearing,

¹⁶ See, e.g., *San Francisco Bay Area Rapid Transit v. Pacific Gas and Electric Co.*, 151 FERC ¶ 61,030 (2015) (complaint proceeding involving e-Tags associated with importing power into the CAISO Balancing Authority Area); *Public Service Co. of New Mexico*, 153 FERC ¶ 61,060, at P 65 (2015) (where the Commission used e-Tag data to analyze certain aspects of Public Service Company of New Mexico's application for market-based rate authority.)

¹⁷ Identified in *supra* P 2.

including the Commission's legal authority to access e-Tag data, the notice and comment procedures used in this proceeding, and what confidentiality restrictions should apply to requests for e-Tag data by RTOs, ISOs and MMUs.

II. Discussion

A. Legal Authority to Require E-Tag Access

1. Requests for Rehearing and Clarification

11. NRECA argues that Order No. 771 reads sections 222 and 307 of the FPA too expansively.¹⁸ NRECA argues that, even if FPA sections 222 and 307(a) give the Commission the authority to obtain e-Tag data in connection with a Commission investigation of a violation of its regulations implementing section 222, Order No. 771 requires market participants to turn over information to the Commission on an ongoing basis without initiating an investigation of a statutory violation.¹⁹ Furthermore, NRECA argues that, even if FPA sections 222 and 307(a) give the Commission the authority to impose this blanket reporting requirement on market participants that are public utilities, these provisions do not give the Commission the authority to extend that reporting requirement to the entities listed in FPA section 201(f).²⁰

12. NRECA also argues that Order No. 771 erroneously concludes that the Commission's surveillance efforts are encompassed within the Commission's

¹⁸ NRECA at 2.

¹⁹ *Id.* at 2.

²⁰ 16 U.S.C. § 824(f). NRECA at 2-3.

investigative authority under FPA section 307 because section 307(a) does not use the term “surveillance” or imply a power to conduct permanent surveillance outside of an actual investigation.²¹ NRECA contends that the Commission’s reading of section 307(a) reads the word “investigate” out of the statute, contrary to principles of statutory construction.²²

13. NRECA states that, by ordering access to e-Tag data on an ongoing basis, the Commission did not “investigate” a matter as Congress used that term in FPA section 307.²³ NRECA adds that the dictionary meaning of “investigate” is “[t]o observe or inquire into in detail” or “examine systematically”²⁴ or “to observe or study closely” or “inquire into systematically,” and “to subject to an official probe.”²⁵ NRECA also states that Black’s Law Dictionary defines “investigate” as “To inquire into (a matter) systematically” or “make an official inquiry.”²⁶ NRECA argues that Order No. 771 does not use the word in this traditional sense because it orders the “blanket release of a broad class of information on an ongoing basis for purposes of permanent surveillance of an

²¹ *Id.* at 9.

²² *Id.* (citing *Duncan v. Walker*, 533 U.S. 167 (2001); *United States v. Menasche*, 348 U.S. 528 (1955)).

²³ *Id.* at 10.

²⁴ *Id.* at 9 (citing American Heritage Dictionary of the English Language 920 (4th ed. 2000)).

²⁵ *Id.* (citing Webster’s Third New International Dictionary 1189 (1961)).

²⁶ *Id.* (citing Black’s Law Dictionary 902 (9th ed. 2009)).

entire industry” rather than conducting a systematic, or detailed inquiry, observation, study or examination of a matter, or official probe or inquiry.²⁷

14. NRECA states that Order No. 771’s reading of section 307(a) ignores another canon of statutory construction that a particular provision must be read in its context in the overall statute.²⁸ NRECA argues that the FPA’s procedural and administrative provisions in Part III of the FPA distinguish between investigations by the Commission, which are the subject of FPA section 307, and periodic and special reporting, the subject of FPA section 304. NRECA states that the structure suggests Congress did not intend the grant of investigative authority in section 307 to carry an implied authority to require the ongoing reporting of information to the Commission without conducting an investigation under section 307 and without complying with the reporting requirements of section 304.²⁹

15. NRECA states that FPA section 307(a) only gives the Commission authority to investigate a section 201(f) entity if the Commission independently has jurisdiction to act – i.e., if the investigation relates to a FPA provision or Commission regulation that applies to a section 201(f) entity. NRECA contends that, because the Commission’s anti-manipulation rules under FPA section 222 apply to section 201(f) entities, section 307(a)

²⁷ *Id.* at 10.

²⁸ *Id.* (citing *Crandon v. United States*, 494 U.S. 152 (1990); *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988)).

²⁹ *Id.*

authorizes an investigation “in order to determine whether” a section 201(f) entity “has violated or is about to violate” those Commission rules. NRECA states that Order No. 771, however, does not initiate or authorize an investigation “in order to determine whether” any entity “has violated or is about to violate” those rules; it imposes an ongoing reporting requirement and does not provide for determinations of such violations. Therefore, concludes NRECA, FPA section 307(a) does not authorize the Commission to impose reporting requirements on section 201(f) entities. NRECA states that, even if section 307(a) authorizes investigations “in order . . . to aid . . . in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce,” which may justify obtaining e-Tag data from public utilities about their sales at wholesale and transmission service, it does not give the Commission the authority to gather e-Tag data from section 201(f) entities because Part II of the FPA does not give the Commission such general regulatory or information-gathering authority as to section 201(f) entities.

16. NRECA adds that Order No. 771’s focus on section 307(a) ignores sections 307(b), 307(c) and 307(d), which grant the Commission the power to administer oaths, subpoena witnesses, and require the production of records under FPA section 307(b), the power to seek the aid of courts to compel testimony or production of

documents under section 307(c), and the power to order the taking of testimony by deposition under 307(d) in connection with Commission investigations.³⁰

17. In addition, NRECA argues that the Final Rule's reading of section 307(a) is inconsistent with the Commission's rules relating to investigations contained in Part 1b of its regulations.³¹ NRECA states that these rules apply to all "investigations conducted by the Commission," including those instituted under FPA section 307(a). NRECA contends that these rules provide for "formal" and "preliminary" investigations and that the Final Rule does not order an investigation. NRECA takes issue with the Final Rule's statement that the Commission need not follow the procedures set forth in Part 1b of the Commission's regulations because section 307(a) does not prescribe the manner in which the Commission must obtain such information.³² NRECA states that this suggests the Commission is not bound by its own regulations, but only by statute and that it ignores that Part 1b of the Commission's regulations applies to all investigations conducted by the Commission.³³

18. NRECA also argues that the precedent cited in Order No. 771 does not support the Commission's reading of its authority under FPA section 307 because those cases did not

³⁰ *Id.* at 10-11.

³¹ *Id.* at 11.

³² *Id.* at 13 (citing Order No. 771, FERC Stats & Regs ¶ 31,339 at P 19).

³³ *Id.*

rely on section 307 as the sole or primary legal authority for imposing an ongoing reporting obligation on industry participants and the Commission's authority in those cases was not challenged. Furthermore, NRECA contends that *United States v. Morton Salt Company*³⁴ is not precedent for Order No. 771 because it involved a specific investigation by the Federal Trade Commission (FTC), not an agency order requiring ongoing reporting by market participants unconnected to any particular investigation.³⁵

19. NRECA also argues that FPA sections 222 and 307(a) do not give the Commission authority to require section 201(f) entities to provide information to the Commission except in connection with a Commission investigation or enforcement proceeding under section 222.³⁶ NRECA states that, under FPA section 201(f), no provision in Part II of the FPA applies to FPA section 201(f) without a specific reference to a provision and that FPA section 201(b)(2) confirms that section 222 applies to section 201(f) entities. NRECA states that FPA section 307, contained in the procedural and administrative provisions of Part III, does not specifically refer to section 201(f) entities. NRECA states that, while section 307(a) authorizes an investigation by the Commission to determine whether a section 201(f) entity has violated or is about to

³⁴ 338 U.S. 632 (1950).

³⁵ NRECA at 15.

³⁶ *Id.* at 19.

violate the Commission's rules under FPA section 222, section 307(a) does not authorize the Commission to gather information from section 201(f) entities on an ongoing basis.

2. Commission Determination

20. We deny rehearing. After reviewing the arguments advanced on rehearing, as well as the statutory language of FPA sections 222 and 307(a), we find without merit the arguments that the Commission lacked authority to promulgate the regulations that it adopted in Order No. 771. We believe that Order No. 771 is based on a reasonable interpretation of the statutes.³⁷ The arguments on rehearing on this topic raise two main issues. First, they point to one type of investigation (i.e., an investigation initiated under 18 C.F.R. § 1b) and argue that all Commission investigations must fit this model. Second, they assert that the Commission may only collect information concerning public utilities and not information about other entities participating in wholesale electric markets subject to the Commission's jurisdiction. For the reasons discussed below, we find neither of these arguments persuasive. As to the argument that the Commission may not conduct ongoing investigations, this argument ignores the purposes for which Congress enacted the Energy Policy Act of 2005 (EPA 2005) and the tasks that Congress set forth for the Commission to accomplish, including the prevention of market manipulation in energy markets. To accomplish these tasks, Congress granted the Commission greater authority to investigate and prevent market manipulation and to

³⁷ *Chevron, U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-45 (1984) (Chevron).

assess substantial civil fines and criminal penalties, when necessary, to address market manipulation.

21. Following the restructuring of the wholesale natural gas and electric power industries in the 1990s and 2000s, the Commission's enforcement mission became much more complicated. In particular, the Commission needed to address a new set of enforcement challenges, including the emergence of new market participants, such as sophisticated energy traders, electronic trading tools and platforms, and new markets involving both physical and financial products related to the power and natural gas industries. Enron and other companies developed manipulation schemes that took advantage of the more limited investigative and penalty authorities that the Commission possessed at that time. Partly as a result of these manipulation schemes and the Western Energy Crisis of 2000-2001, Congress directed the Commission to take its enforcement responsibilities in a "far bolder" direction.³⁸ At a Congressional hearing on the Commission's oversight of Enron, the Chairman of the Senate Governmental Affairs Committee stated that: "Members of both parties on the Committee [share the interest]

³⁸ *Examining Enron: Developments Regarding Electricity Price Manipulation in California: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation, 107th Cong. 140 (2002) (statement of Sen. Wyden to Patrick Wood III, Chairman, Federal Energy Regulatory Commission); see also id. at 144 (statement of Sen. Byron Dorgan to Patrick Wood III, Chairman, Federal Energy Regulatory Commission, "[B]e a tiger . . .").*

that FERC learn . . . from the Enron scandal and . . . [be] as aggressive and sophisticated as the players out in the deregulated energy market”³⁹

22. In response to these developments, Congress enacted EAct 2005, which gave the Commission significant new authority to police energy markets and energy market manipulation. Congress also enhanced the Commission’s penalty authorities to ensure that adequate sanctions could be levied for unlawful conduct. It was in response to this Congressional direction that the Commission undertook its new enforcement responsibilities and interpreted its anti-manipulation authority under FPA section 222 and its investigative authority under FPA section 307(a), as revised by EAct 2005.⁴⁰

23. We believe that Congress intended to give the Commission more powerful tools to proactively investigate and prevent market manipulation by enacting EAct 2005. At the same time that Congress granted the Commission significant anti-manipulation authority, it also amended section 307(a) of the FPA to expand the Commission’s investigative authority.⁴¹ In particular, Congress authorized the Commission to investigate in order to

³⁹ *Asleep at the Switch: FERC’s Oversight of the Enron Corporation: Hearing Before the S. Comm. On Gov’t Affairs*, 107th Cong. 59 (2003) (statement of Joseph Lieberman, Chairman, Senate Committee on Governmental Affairs).

⁴⁰ We also note that the Commission’s authority to issue a rule requiring that it be afforded access to e-Tags is also supported by its authority under FPA section 309, which gives the Commission authority to perform necessary acts and prescribe such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Federal Power Act.

⁴¹ Section 1284 of EAct 2005.

“obtain[] information about the sale of electric energy in interstate commerce and the transmission of electric energy in interstate commerce” and to determine whether any person, “electric utility, transmitting utility, or other entity” has violated or is about to violate any provisions of the FPA, Commission rules, regulations or orders.⁴² Thus, under FPA section 307(a), the Commission “may investigate any facts, conditions, practices, or matters which it may find necessary or proper” in furtherance of the following goals: (1) to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provisions of the FPA or Commission rules, regulations or orders; (2) to aid in the enforcement of provisions of the FPA or in prescribing rules or regulations; (3) to obtain information to serve as a basis for recommending legislation; or (4) to obtain information about the sale and transmission of electric energy in interstate commerce. Congress provided these tools so that the Commission could more effectively investigate and prevent market manipulation.

⁴² Section 307(a), 16 U.S.C. § 825f (a), as revised by EAct 2005, provides in relevant part:

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provisions of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy in interstate commerce and the transmission of electric energy in interstate commerce.

The broad language in the statute clearly reflects a Congressional directive to be proactive in understanding the markets and deterring manipulation.

24. As explained in Order No. 771, e-Tag data, which is used to schedule the transmission of electric power interchange transactions in wholesale markets, provides information about the sale and transmission of electric energy in interstate commerce covered by FPA section 307(a).⁴³ E-Tag data falls squarely within the scope of information about electric sales and transmission described in section 307(a) that the Commission is authorized to obtain. In addition, as explained in Order No. 771, e-Tag data will help the Commission ascertain whether “any person, electric utility, transmitting utility, or other entity has violated or is about to violate” the FPA or any Commission rule, regulation or order.⁴⁴ In so doing, the Commission will also further the goal in section 307(a) of conducting investigations to assess whether the Commission needs to take further actions to enforce provisions of the FPA, particularly the anti-manipulation rule in FPA section 222.

25. Regular access to e-Tags for power flows across interchanges has made it possible for the Commission to identify and analyze various behaviors by market participants to determine if they are part of a potentially manipulative scheme.⁴⁵ For example, e-Tag

⁴³ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 16.

⁴⁴ *Id.* P 16.

⁴⁵ *Id.* P 28.

information has enabled the Commission to investigate whether entities may be engaging in manipulative schemes involving the circular scheduling of imports and exports into a market to benefit other positions held by these entities or whether entities are falsely designating transactions to ensure awards of bids at multiple interties, as demonstrated by investigations by the Commission's Office of Enforcement.⁴⁶ Without access to e-Tags, the Commission's ability to identify such manipulative schemes would be hampered. In short, without the ability to obtain e-Tag data, the Commission would lack the information necessary to carry out its statutory responsibility under FPA section 222 to prevent energy market manipulation.

26. The Commission concluded in Order No. 771 that its "surveillance efforts are encompassed within its broad investigative authority as they are precisely what section 307 is designed to permit- i.e., 'to determine whether any person [or entity] . . . has violated or is about to violate any provisions of the [FPA] . . . or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce.'" ⁴⁷ NRECA argues that section 307(a) does not specifically use the word "surveillance" and that section 307(a) does not imply a power to conduct ongoing market surveillance "in lieu of an actual

⁴⁶ See *id.* P 28 (citing *Gila River Power, LLC*, 141 FERC ¶ 61,136 (2012); see also *Constellation Energy Commodities Group, Inc.*, 145 FERC ¶ 61,062 (2013)).

⁴⁷ *Id.* P 16.

investigation.”⁴⁸ In addition, NRECA argues that the use of the term “surveillance” reads the word “investigate” out of the statute, thereby violating a cardinal principle of statutory construction that a “statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.”⁴⁹ We disagree. The Commission’s reading of the word “investigate” as encompassing its “surveillance” activities in Order No. 771 was meant to include the Commission’s initial close observation or inquiry into behavior by market participants to determine whether further investigation is needed. The definition of “investigation” is “the act of examining something carefully, especially to discover the truth about it.”⁵⁰ Nothing in this definition limits the examination to a specific incident that the agency already has learned about from another source. Just as the Commission’s responsibilities cover the entire wholesale electric industry on an ongoing basis, so must its examination and investigation of market conditions to assure that the energy markets are operating properly, and without market manipulation. There is no inconsistency in conducting surveillance as part of the fact gathering of an investigation. “Surveillance” consists of “the act of carefully watching someone or something especially in order to prevent or

⁴⁸ NRECA at 11.

⁴⁹ *Id.* at 9 (citing *Duncan v. Walker*, 533 U.S. 167 (2001); *United States v. Menasche*, 348 U.S. 528 (1955)).

⁵⁰ *Id.*

detect a crime” or a “close watch kept over someone or something (as by a detective).”⁵¹

Surveillance is part and parcel of many investigations. Without access to complete e-Tag data to help conduct surveillance and properly investigate interchange transactions, the Commission will be hampered in carrying out its statutory responsibilities to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate the anti-manipulation rule in FPA section 222.

27. The Commission’s reading of the term “investigate” in this proceeding to include access to the information necessary to conduct an investigation into a particular matter is also consistent with the use of the term “investigation” found in other provisions in Part III of the FPA. For example, FPA section 311, titled “Investigations Relating to Electric Energy,” provides that “[i]n order to *secure information* necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct *investigations*” into the generation, transmission, distribution and sale of electric energy, regardless of whether it is jurisdictional.⁵²

28. We also believe that the Commission has the authority under FPA sections 222 and 307(a) to require the market participants listed in FPA section 201(f) to turn over information on an ongoing basis. FPA section 222 prohibits energy market manipulation by “any entity (including an entity described in section 201(f))” in connection with the

⁵¹ Merriam-Webster Dictionary *available at*: <http://www.merriam-webster.com>.

⁵² 16 U.S.C. § 825j (2012) (emphasis added).

purchase or sale of electric energy or the purchase or sale of transmission services subject to the Commission's jurisdiction. The application of this provision to "any entity" is further evidenced by FPA section 201(b)(2), which explicitly states that certain provisions, including section 222, shall apply to entities that fall within the scope of FPA section 201(f).⁵³ As explained in Order No. 771, regular access to e-Tags for power flows across interchanges makes it possible for the Commission to identify or analyze various behaviors by entities to determine if they are part of a potentially manipulative scheme(s) in violation of FPA section 222.⁵⁴ This information is used as part of investigations of possible violations of section 222.⁵⁵ EPCRA 2005 also revised the first sentence of section 307(a) to authorize the Commission to obtain information about wholesale electricity sales and transmission and does not restrict the Commission to obtaining such information only in the context of a particular investigation of a statutory violation.

29. The Commission also interprets FPA section 307(a) to authorize the Commission to obtain information about the sale and transmission of electric energy in interstate commerce from both public utilities and entities listed in section 201(f) that will help the Commission determine whether there is a possible violation by any person or entity,

⁵³ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 15.

⁵⁴ *Id.* P 28.

⁵⁵ *See infra* n.45.

including entities listed in section 201(f). In doing so, the Commission's interpretation of section 307(a) conforms to the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant."⁵⁶ By contrast, NRECA's interpretation of section 307(a) as limiting the Commission to obtaining information only from jurisdictional public utilities ignores or, at best, renders the information collection clause superfluous because, as NRECA notes, the Commission can already require jurisdictional public utilities to report e-Tag information under FPA section 304. NRECA's interpretation would require us to conclude that when the statute referred to "any person, electric utility, transmitting utility, or other entity," it really only meant to refer to public utilities. We find this interpretation implausible and reject it. Congress could have written the statute to only allow the collection of information from public utilities, if Congress had so desired. It did not do so.

30. NRECA also argues that FPA section 307, contained in the procedural and administrative provisions of Part III, does not specifically refer to section 201(f) entities and, therefore, does not apply to them. We disagree. EPA 2005 expanded the entities that the Commission could investigate under section 307(a) from "any person" to include any "electric utility," any "transmitting utility," or any "other entity." The FPA defines an "electric utility" as "a person or Federal or State agency (including an entity described

⁵⁶ See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); see also *Corley v. U.S.*, 556 U.S. 303, 314 (2009).

in section 201(f)) that sells electric energy.)”⁵⁷ The FPA defines a “transmitting utility” as “an entity (including an entity described in section 201(f)) that owns, operates, or controls facilities used for the transmission of electric energy” in interstate commerce or for the sale of electric energy at wholesale.⁵⁸ Although the FPA does not specifically define “other entity,” the term clearly reaches beyond electric utilities and transmitting utilities. By expanding the scope of entities that may be investigated under FPA section 307(a) to include section 201(f) entities, EAct 2005 empowered the Commission to investigate section 201(f) entities that are not defined as “person[s]” for purposes of the FPA. Consistent with this expansion in the types of entities that the Commission may investigate, Congress added the clause at the end of the first sentence in section 307(a) enabling the Commission to obtain information about wholesale sales and transmission of electric energy that is needed to conduct those investigations. Moreover, as noted above, other provisions in Part III of the FPA, particularly section 311, enable the Commission to investigate and “secure information” for the purpose of recommending legislation, whether or not the entities are otherwise subject to the Commission’s jurisdiction. This provision indicates that Congress contemplated that the Commission could obtain information from section 201(f) entities in Part III of the FPA.

⁵⁷ See FPA section 3(22)(A).

⁵⁸ See FPA section 3(23).

31. NRECA also contends that Order No. 771's reading of section 307(a) ignores the canon of statutory construction that a particular provision must be read in its context in the overall statute⁵⁹ because the FPA's procedural and administrative provisions in Part III of the statute distinguish between investigations by the Commission under section 307 and periodic and special reporting under section 304.⁶⁰ NRECA contends this structure indicates that Congress did not intend the grant of investigative authority to carry with it an implied authority to require the ongoing reporting of information to the Commission without conducting an investigation under section 307 and without complying with the reporting requirements of section 304. As discussed above, the Commission's interpretation of section 307(a) requires e-Tag data from public utilities as well as entities listed in section 201(f) within the context of the Commission's broad investigative authority under that provision to enable it to investigate to determine if there are possible violations of section 222 by public utilities or section 201(f) entities. The Commission's ability to require special or periodic reporting of e-Tag data from public utilities under section 304 is separate and distinct from the Commission's authority under section 307. Furthermore, if the Commission were to obtain necessary e-Tag data in a piecemeal

⁵⁹ NRECA at 10 (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990), *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

⁶⁰ FPA section 304(a) requires every licensee or public utility to file with the Commission annual or other periodic or special reports as the Commission may prescribe as necessary or appropriate to assist the Commission in the proper administration of the FPA. 16 U.S.C. § 304.

manner through periodic, *ad hoc* reports, the Commission would not be able to carry out its statutory obligations under FPA section 222 effectively. E-Tag data cannot be easily used, if at all, to investigate instances of market manipulation when the data can only be accessed in a truncated or incomplete form from a subset of market participants.

Moreover, the ongoing, automated data delivery process currently required under Order No. 771 reduces administrative burdens on market participants when compared with the possible use of periodic, *ad hoc* reports or data requests for e-Tag data.

32. We also reject NRECA's claim that Order No. 771's focus on section 307(a) to allow the Commission to obtain information ignores or is inconsistent with other provisions in that section, specifically sections 307(b), 307(c) and 307(d). Sections 307(b) through 307(d) set forth processes that the Commission may employ when it uses its investigative authority under section 307(a). These processes enable the Commission to, among other things, administer oaths, subpoena witnesses, seek the aid of courts to require the attendance and testimony of witnesses, and order the taking of witness testimony by deposition. As noted in Order No. 771, although FPA sections 307(b) through 307(d) enable the Commission to use subpoenas or other processes when necessary in connection with an investigation, it does not follow that all Commission investigations initiated under section 307(a) are limited to particular matters and cannot be used to collect information more broadly.⁶¹ This broader interpretation of

⁶¹ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 17.

the Commission's investigative authority under section 307 is evidenced by the wording in FPA sections 307(b), 307(c) and 307(d) themselves. These provisions do not limit the availability of processes to particularized investigations initiated under section 307(a), as suggested by NRECA. Rather, these provisions refer more generally to the Commission's ability to employ these processes in connection with either an "investigation" or a "proceeding" under the FPA.⁶²

33. NRECA also argues that Part 1b of the Commission's regulations⁶³ applies to all investigations conducted by the Commission, including those instituted under FPA section 307(a), and that the Commission did not order an investigation in Order No. 771. Section 307(a) grants the Commission a general investigative authority, including the authority to obtain information about the wholesale sale and transmission of electric energy. Section 307(a) does not prescribe the manner in which the Commission must obtain such information and the Commission has previously used its investigative authority under section 307(a) to collect information⁶⁴ or initiate inquiries⁶⁵ without

⁶² See 16 U.S.C. §§ 825f(b), 825f(c) and 825f(d).

⁶³ In particular, section 1b.2 of the Commission's regulations, 18 C.F.R. 1b.2, provides that Part 1b "applies to investigations conducted by the Commission but does not apply to adjudicative proceedings."

⁶⁴ See, e.g., *Reporting on North American Energy Standards Board Public Key Infrastructure Standards*, 140 FERC ¶ 61,066 (2012) (where the Commission instituted a section 307(a) proceeding to investigate the facts and practices surrounding the implementation of certain NAESB standards by requiring entities, including those not otherwise subject to the Commission's jurisdiction as a public utility, to submit a report).

initiating enforcement investigations pursuant to Part 1b of the Commission's regulations.⁶⁶ NRECA argues that the Commission orders cited in Order No. 771⁶⁷ as cases where the Commission relied on section 307(a) to collect data are not precedent because section 307(a) was not the sole or primary legal authority used in those cases and the Commission's authority in those cases was not challenged. However, even though section 307(a) was not the only authority relied upon in the cited cases and those cases were not challenged in court, they nonetheless serve as precedent where the Commission previously relied on its authority under section 307(a) to collect data that was not linked to an investigation of a specific entity.

34. The Commission's authority under FPA section 307(a) to investigate any facts, conditions, practices, or matters it may find necessary or proper to determine if any

⁶⁵ See, e.g., *Policy Statement on the Commission's Role Regarding the Environmental Protection Agency's Mercury and Air Toxics Standards*, 139 FERC ¶ 61,131 (2012) (where the Commission stated that it will use its general investigative authority under FPA section 307(a) to examine whether there might be a violation of a Commission-approved Reliability Standard in connection with advising the Environmental Protection Agency on requests by certain generating units to operate in noncompliance with EPA's Mercury and Air Toxics Standards).

⁶⁶ See Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 19 & n.47 (citing, e.g., *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators*, Order No. 760, FERC Stats. & Regs. ¶ 31,330 (2012)).

⁶⁷ See *id.* P 17, n.47. The Commission also relied on its investigative authority under FPA section 307(a) in a recent proposal to collect certain information about entities connected to market participants. See *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, Notice of Proposed Rulemaking, 152 FERC ¶ 61,219 (2015).

person, electric utility, transmitting utility, or other entity has violated or is about to violate provisions of the FPA, taken together with the prohibitions against energy market manipulation in FPA section 222, enable the Commission to gather information on e-Tags on an ongoing basis. The Commission uses this e-Tag information to investigate whether any of the entities identified in FPA section 307(a) are engaged in unlawful market manipulation. Therefore, we affirm our finding in Order No. 771 that these provisions together authorize the Commission to gather information on e-Tags on an ongoing basis to investigate whether any of the entities identified in FPA section 307(a) are engaged in unlawful market manipulation and deny NRECA's request for rehearing of this finding. The fact that FPA sections 307(b)-(f) provide authority to use certain processes in conducting investigations in no way dictates that section 307(a) only authorizes investigations that use those processes.

35. NRECA also takes the position that the *Morton Salt* case⁶⁸ is not precedent for the Commission's actions in Order No. 771 because *Morton Salt* involved a specific investigation by the FTC. In *Morton Salt*, the Supreme Court addressed the FTC's power to require the respondents to file reports showing how they had complied with a cease and desist order issued by the FTC and a court decree enforcing that order. In addressing respondents' argument that the FTC was "engaged in a mere 'fishing expedition' to see if

⁶⁸ See Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 18.

it can turn up evidence of guilt,”⁶⁹ since the FTC had not charged them with a violation, the Court stated that, even assuming the FTC was engaged in a “fishing expedition”:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated or even because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is a probable violation of the law.⁷⁰

36. Thus, the Court recognized that, when an administrative agency is given investigative duties by Congress, the agency has the power to obtain information and investigate entities not only within the context of a particular “case or controversy” but also to investigate “merely on suspicion that the law is being violated or even because it wants assurance that it is not.”⁷¹ Moreover, the Court rejected respondents’ arguments in *Morton Salt* that the FTC could better have used its power under section 9 of the Federal Trade Commission Act to “send investigators to examine their books, copy documents

⁶⁹ 338 U.S. at 641.

⁷⁰ *Id.* at 642-43.

⁷¹ See Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 18 (citing *Morton Salt*, 338 U.S. at 642).

and issue subpoenas . . .”⁷² Similar to the FTC, the Commission holds such powers under section 307 of the FPA.

37. For all these reasons, we deny rehearing. We reject NRECA’s proposed interpretation of FPA sections 307 and 222 as inconsistent with both the language and purposes of EAct 2005. If we were to adopt NRECA’s proposed interpretation of our statutory authority, we would effectively be nullifying or disregarding the additional authorities and responsibilities given to the Commission under EAct 2005 and returning the Commission to its pre-EAct 2005 statutory authority.

B. Opportunity to Comment on Proposals Adopted in Final Rule

1. Requests for Rehearing and Clarification

38. Southern Companies⁷³ state that the Commission’s procedures were flawed in issuing Order No. 771 because the Commission “dramatically changed” its original proposal from the NOPR⁷⁴ and adopted an alternate proposal without providing a meaningful opportunity to comment on the rule, especially the burden estimates, before

⁷² 338 U.S. at 648.

⁷³ Southern Companies consist of Southern Company Services, Inc. acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company.

⁷⁴ *Availability of E-Tag Information to Commission Staff*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,675 (2011) (E-Tag NOPR).

its issuance.⁷⁵ Southern Companies argue that, while the “final rule did not amount to a complete turnaround from the [proposed rule],” the D.C. Circuit Court has held that “the [Administrative Procedure Act (APA)] simply requires more.”⁷⁶ Southern Companies state that, by not providing a burden analysis of the new proposal in the NOPR, interested parties were not afforded the level of opportunity to comment required by the APA.⁷⁷ Southern Companies argue that parties did not have an opportunity to comment on the burden estimates adopted in Order No. 771 and, therefore, the Final Rule cannot be considered a “logical outgrowth” of the NOPR.⁷⁸ Southern Companies state that the burden analysis in the NOPR assumed that only the North American Electric Reliability Corporation (NERC) would be required to perform any tasks and such tasks were thought to only require seven hours a year of effort by NERC staff (at an estimated cost of \$820 per year).⁷⁹ Southern Companies contend that the burden analysis in

⁷⁵ Southern Companies at 1-2 (citing *Int’l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004)).

⁷⁶ *Id.* at 4 (citing *Ass’n of Private Sector Colleges and Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 at 1081-82 (D.C. Cir. 2009)).

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004)).

⁷⁹ *Id.* at 5 (citing E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 20).

Order No. 771 assumes 1,703 respondents at an estimated cost of \$498,000 per year.⁸⁰

Southern Companies also claim that Order No. 771's burden estimates are based on the premise that e-Tag Authors and Balancing Authorities will use "existing, largely automated procedures," which Southern Companies contend is not the case.⁸¹ Southern Companies state that, if an updated burden analysis had been presented for comment, the industry could have presented information regarding the burdens presented by the requirements ultimately adopted and potential ways to reduce such burdens.⁸²

2. Commission Determination

39. We deny rehearing and affirm that this proceeding was conducted in the manner prescribed in both the APA and the Paperwork Reduction Act of 1995 (Paperwork Reduction Act). The Commission's determination in Order No. 771 that the Final Rule's approach for implementing the E-Tag NOPR's objective of allowing Commission access to e-Tags satisfies the notice requirement under the APA that a meaningful opportunity to comment be provided because the Final Rule's approach is a "logical outgrowth" of the proposed approach in the E-Tag NOPR.⁸³ The APA requires an agency to publish "either the terms or substance of the proposed rule or a description of the subjects and issues

⁸⁰ *Id.* (citing Order No. 771, FERC Stats & Regs ¶ 31,339 at P 65).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 32.

involved”⁸⁴ but does not specify the level of detail that must be included in a Notice of Proposed Rulemaking or supplement thereto.⁸⁵ The D.C. Circuit has applied a “logical outgrowth” standard, which allows “incremental changes [from an original proposal] . . . so long as the final rule is a ‘logical outgrowth’ of the proposals highlighted and discussed during the notice and comment period.”⁸⁶ The D.C. Circuit has explained that the standard for a “logical outgrowth” is whether the interested party, “*ex ante*, should have anticipated that such a requirement might be imposed.”⁸⁷ An agency can make even substantial changes from the original proposal,⁸⁸ but it should provide enough detail that affected parties can anticipate the range of possible proposed methods, and ultimately

⁸⁴ 5 U.S.C. 553(b)(3); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) (*Small Refiner*).

⁸⁵ *Small Refiner*, 705 F.2d at 519, 549; *Nat’l Mining Ass’n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (noting that “[o]ur cases offer no precise definition of what counts as a ‘logical outgrowth’”).

⁸⁶ *Sierra Club v. Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981).

⁸⁷ *Small Refiner*, 705 F.2d at 549; *see also Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 249 (3d Cir. 2010) (the “logical growth” doctrine asks if the “substance of an agency’s rule strays too far from the description contained in the initial notice....”).

⁸⁸ *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988).

final rules, so that one is “aware of the information the agency decides to rely on in taking agency action.”⁸⁹

40. In the E-Tag NOPR, the Commission proposed to require the NERC to make complete e-Tag data available to Commission staff. Comments filed in response to the E-Tag NOPR suggested an alternative means for the Commission to obtain the exact same e-Tag information proposed to be collected in the E-Tag NOPR, rather than obtaining access through NERC.⁹⁰ On February 23, 2012, the Commission issued a notice in this proceeding providing interested parties the opportunity to file reply comments on the E-Tag NOPR, particularly with respect to a proposal that would require entities that create e-Tags or distribute them for approval to provide the Commission with viewing rights to the e-Tags.⁹¹ In response to comments received in response to the E-Tag NOPR and the February 23, 2012 notice seeking reply comments, Order No. 771 modified the original NOPR proposal to require the e-Tag Authors that create e-Tags and the Balancing Authorities that distribute the e-Tags for approval to provide the Commission with access to e-Tags, rather than NERC. The E-Tag NOPR and supplemental notice seeking reply comments issued in this proceeding following the

⁸⁹ *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779 n.2 (D.C. Cir. 1976), quoted in *Appalachian Power Co. v. EPA*, 579 F.2d 846, 852 n.12 (4th Cir. 1978).

⁹⁰ *See* Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 32 (citing Market Monitors' comments at 10).

⁹¹ *See id.*

issuance of the E-Tag NOPR provided interested parties with sufficient detail about the alternative proposals under consideration before issuance of the Final Rule and allowed interested parties sufficient notice and opportunity to comment on these proposals in accordance with the APA. The supplemental notice and the opportunity to file reply comments allowed commenters a full opportunity to respond to NERC's comments that they were not the proper entity to provide the Commission with access to e-Tag information. Any commenter that wished to dispute the burden estimate could have brought the matter to the Commission's attention in reply comments.

41. Southern Companies also contend that the burden estimates provided in Order No. 771 do not comply with the notice and comment requirements of the APA because they differ significantly from the burden estimates included in the E-Tag NOPR. At the outset, we note that the burden estimates in the E-Tag NOPR and Order No. 771 must be provided as part of the information collection statements required by the Paperwork Reduction Act. The Paperwork Reduction Act provides that an agency may not conduct or sponsor the collection of information unless the agency has published an estimate of the burden that shall result from the information collection in advance of adopting or revising such collection.⁹² Agency rules that propose to require information collection are subject to review and approval by the Office of Management and Budget (OMB).⁹³

⁹² 44 U.S.C. § 3507(a)(D)(v).

⁹³ 5 CFR 1320.11(h); 5 C.F.R. § 1320.6.

In accordance with the requirements of the Paperwork Reduction Act, the E-Tag NOPR and Order No. 771 set forth the proposed information collection requirements and associated burden estimates being submitted to OMB for its review and approval.⁹⁴

42. The E-Tag NOPR and Order No. 771 also notified interested parties that they could submit comments concerning the collection of information and associated burden estimates to OMB and provided the relevant OMB contact information. The Commission acknowledged that the burden estimates in the Final Rule were modified from the burden estimates in the E-Tag NOPR, to reflect that e-Tag Authors and Balancing Authorities, rather than NERC, will provide Commission access to e-Tags.⁹⁵ No comment was filed with OMB or the Commission in response to the modified burden estimate in Order No. 771.⁹⁶ We conclude that the burden estimates for information collection required by the Paperwork Reduction Act satisfy the Paperwork Reduction Act's notice and comment requirements. Finally, we disagree with Southern Companies' assertion that the Commission erred by basing its burden estimate calculations on an automated process. Order No. 771 noted that it expected e-Tag Authors and Balancing Authorities to use

⁹⁴ See E-Tag NOPR, FERC Stats. & Regs. ¶ 32,675 at P 19; Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 61.

⁹⁵ See Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 62.

⁹⁶ We also note that, just as the Commission is giving consideration in this order to the arguments presented in the requests for rehearing, we would have given consideration to any contrary estimates of the burden of complying with the Final Rule promulgated in Order No. 771 if Southern Companies advanced any such alternative estimate in either reply comments or in its rehearing request.

existing, largely automated procedures to provide the Commission with access to e-Tags.⁹⁷ However, the Commission made clear that its burden estimate calculations were based on a manual, not automated, process.⁹⁸ Thus, the estimate used in the Final Rule was deliberately very conservative, because wherever an automated process is used, the burden estimate was overstated.

C. Responsibilities of Balancing Authorities

1. Requests for Rehearing and Clarification

43. Southern Companies seek clarification regarding the activities a Balancing Authority should undertake in terms of conforming to the requirements of Order No. 771 and the penalties it will face if e-Tags do not conform to the requirements of Order No. 771. Southern Companies argue that requiring Balancing Authorities to reject e-Tags that do not list the Commission as an addressee could result in significant commercial and reliability disruptions.⁹⁹ Southern Companies also state that the Commission should allow adequate time for the NAESB process to revise the applicable protocols and for Balancing Authorities to apply those protocols once they have been finalized before requiring compliance with Order No. 771. In addition, Southern Companies state that Balancing Authorities should not be held liable for any disclosure of confidential e-Tag

⁹⁷ See Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 63.

⁹⁸ See *id.* PP 64-65.

⁹⁹ Southern Companies at 6.

information, including inadvertent publication of e-Tag information by a recipient of e-Tag data under Order No. 771 and publication of e-Tag data subject to FOIA.¹⁰⁰

2. Commission Determination

44. Order No. 771-A clarified the role of Balancing Authorities with respect to providing the Commission access to e-Tags and found that Balancing Authorities should reject e-Tags that fail to include the Commission on the CC list rather than merely notify the Commission that this requirement has not been met. Order No. 771-A also rejected suggestions that we should delay the implementation of the rule until such time as the industry, through NAESB, can develop a formalized automated process.¹⁰¹ Therefore, we will not address those issues again here. We note, however, that the prediction of significant commercial and reliability disruptions resulting from the inclusion of the Commission on the CC list of e-Tags has not materialized.

45. We cannot make a blanket determination, as requested by Southern Companies, concerning possible liability for the inadvertent disclosure of confidential e-Tag information by a Balancing Authority or a recipient of e-Tag data under Order No. 771 or publication of e-Tag data subject to FOIA. As noted in Order No. 771, some of the information contained in e-Tags is likely commercially sensitive and could result in

¹⁰⁰ *Id.* at 9.

¹⁰¹ *See, e.g.*, Order No. 771, FERC Stats. & Regs. ¶ 31,339 at PP 17-21. NAESB has since developed a process to implement the requirements under Order Nos. 771 and 771-A. *See* NAESB Electronic Tagging Functional Specifications, Version 1.8.2, at Appendix A (Special Interconnection Implementation Requirements).

competitive harm to market participants and the market as a whole if disclosed without reasonable confidentiality restrictions.¹⁰² Furthermore, Order No. 771-A stated that FOIA requests cannot be preemptorily foreclosed, but that, to the extent a person files a request to obtain e-Tag data from the Commission under FOIA, we expect that any commercially-sensitive e-Tag data would be protected from disclosure if it satisfies the requirements of FOIA's exemption 4.¹⁰³ We note that, if there is a disclosure of e-Tag data by a Balancing Authority or other recipient of confidential e-Tag data, any possible liability will be addressed on a case-by-case basis. Factors such as whether the disclosure was inadvertent or whether any harm resulted from the disclosure will be taken into account by the Commission to determine whether any remedy or sanction is appropriate.¹⁰⁴

¹⁰² Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 58.

¹⁰³ See Order No. 771-A at P 28 (citing Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 58). In particular, FOIA exemption 4 protects trade secrets and commercial or financial information that is privileged or confidential from disclosure.

¹⁰⁴ See, e.g., *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280, at P 293 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011).

D. Providing Access to RTOs, ISOs and MMUs

1. Requests for Rehearing and Clarification

46. NRECA contends that even if sections 307(a) and 222 of the FPA give the Commission the authority to require that the Commission be given access to e-Tag data, they do not authorize the Commission to require market participants to provide e-Tag data, on request, to RTOs, ISOs, or their MMUs on an ongoing, confidential basis.¹⁰⁵ NRECA states that Order No. 771 does not show that the Commission has the legal authority to require all market participants to provide e-Tag information on an ongoing basis to the Commission, much less to RTOs, ISOs and their MMUs.¹⁰⁶ NRECA argues that section 307(a) authorizes investigations by the Commission and it does not permit the Commission to deputize third parties for this purpose. NRECA notes that, although the Commission's enforcement staff sometimes elects to share confidential investigative information with RTOs, ISOs or their MMUs, this practice does not authorize the Commission to require that selected private parties be provided access to e-Tag data upon request, on an ongoing basis. NRECA also argues that the Commission's finding that e-Tag data may be helpful to RTOs, ISOs and MMUs in identifying conduct that may violate section 222 does not authorize the Commission's action.

¹⁰⁵ NRECA at 3.

¹⁰⁶ *Id.* at 2.

47. NRECA argues that, in *Electric Power Supply Association v. FERC (EPSA v. FERC)*,¹⁰⁷ the D.C. Circuit Court of Appeals rejected the Commission's attempt to amend Rule 2201 to exempt communications between market monitors and Commission decisional employees from the Sunshine Act's ban on *ex parte* communications. NRECA states that the court held that the Commission's "claim that it has an interest in receiving *ex parte* communications" from market monitors "does not empower it to alter Congress' explicit proscription against such communications."¹⁰⁸ NRECA states that the Commission's interest in getting e-Tag data into the hands of RTOs, ISOs and their MMUs does not authorize the Commission to deputize these entities and use its investigative authority to provide them with data where nothing in the statute confers that power on the Commission.¹⁰⁹

48. Southern Companies request that the Commission clarify that the requirement to provide e-Tag information to RTOs, ISOs, and MMUs, upon request, is limited to interchange transactions that flow into, out of, or across the RTO/ISO footprint. Furthermore, Southern Companies seek clarification that the requirement to provide e-Tag information to RTOs, ISOs and their MMUs, is limited to interchange transactions that may be useful in assessing loop flows or other activities (including market

¹⁰⁷ 391 F.3d 1255 (D.C. Cir. 2004).

¹⁰⁸ NRECA at 21, citing 391 F.3d at 1258.

¹⁰⁹ *Id.*

manipulation) within their markets.¹¹⁰ As an example, Southern Companies state that an MMU for CAISO should not be able to request information for an e-Tag representing a transfer from Southern Companies' Balancing Authority Area to Tennessee Valley Authority, as it would provide the MMU no useful information in assessing the state of the market it monitors or the activities of participants in such market.¹¹¹ Southern Companies argue that, if RTOs, ISOs and MMUs can utilize e-Tag information to assess loop flows or market manipulation within their markets, then the waiver of ordinary confidentiality protections should be carefully tailored to information that can assist them in monitoring such activities within the markets they are charged to monitor.¹¹² Southern Companies add that the Commission should also require e-Tag Authors and Balancing Authorities to forward e-Tag information to the Balancing Authorities, upon request, for data related to transactions that flow into, out of, or across their areas and those that would be helpful in assessing loop flows in the same manner that RTOs and ISOs are provided such information.¹¹³

49. OATI seeks clarification as to what constitutes "appropriate confidentiality restrictions" with respect to RTOs, ISOs and MMUs that are entitled under

¹¹⁰ Southern Companies at 2-3, 10.

¹¹¹ *Id.* at 10.

¹¹² *Id.*

¹¹³ *Id.* at 2-3, 10.

Order No. 771 to complete e-Tags.¹¹⁴ OATI states that there are many separate parties involved in an e-Tag and the logistics involved in all parties obtaining confidentiality restrictions from other parties will have a chilling effect on Order No. 771.¹¹⁵ OATI requests that the Commission consider setting forth an example of what would constitute “appropriate confidentiality restrictions,” attaching an industry-wide confidentiality agreement (the Operating Reliability Data Confidentiality Agreement or ORD Agreement) joined by multiple entities.¹¹⁶ OATI suggests that a multi-entity framework such as this one could be used to implement Order No. 771 and signatories to the document can be tracked in electronic format for validation and verification.¹¹⁷ OATI also seeks clarification of what evidence a requesting RTO, ISO or MMU must provide to show that appropriate confidentiality restrictions exist between the requestor and all interested entities and again points to the ORD Agreement.¹¹⁸

50. OATI also seeks to clarify whether the requesting RTO, ISO or MMU must direct the request for e-Tag data to both the applicable e-Tag Author and the sink Balancing

¹¹⁴ OATI at 2.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 4 (citing to [http://www.nerc.com/files/ORD-Signatory-Status-Version-3%20\(updated%2011-16-2011\).pdf](http://www.nerc.com/files/ORD-Signatory-Status-Version-3%20(updated%2011-16-2011).pdf)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 5.

Authority, or if such request can be made to either the applicable e-Tag Author or the sink Balancing Authority.¹¹⁹

2. Commission Determination

51. Order No. 771 required that RTOs, ISOs, and MMUs are to be provided with access to complete e-Tag data, upon request to e-Tag Authors and Authority Services, subject to appropriate confidentiality restrictions. We affirm the determination made in Order No. 771 to provide RTOs, ISOs and MMUs with greater access to e-Tag information to assist them in identifying and referring to the Commission behavior that may constitute market manipulation under FPA section 222, to assist the Commission in its market surveillance activities, and to more efficiently operate their systems and markets. Prior to issuance of the Final Rule, e-Tag information was available to RTOs and ISOs only for those interchange transactions that flow into, out of, or across their operating footprints, but not for transactions scheduled outside of these entities' footprints.¹²⁰ Order No. 771 stated that, when market participants engage in conduct that constitutes market violations that cannot be detected without e-Tag information, access to the data shown on e-Tags can assist MMUs in identifying behavior that may constitute market manipulation under FPA section 222 and allow them to refer instances of such

¹¹⁹ *Id.*

¹²⁰ *See* Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 52.

conduct to the Commission.¹²¹ Following the issuance of Order No. 771, the Commission has received a referral of potential market manipulation by multiple market participants, which required analysis of the e-Tag data outside of the RTO/ISO footprint by the MMU. Sharing information with MMUs that monitor the markets within the United States can also help the Commission with its own market surveillance activities because the MMUs may provide additional insights to the Commission about potential market violations and market issues. Order No. 771 also stated, similarly, that providing complete e-Tag data to RTOs and ISOs may also assist them in identifying and referring to the Commission behavior that may constitute market manipulation under section 222 and aid the Commission in its own market surveillance activities.¹²² Furthermore, as noted in Order No. 771, effective market monitoring is enhanced by close collaboration between the MMUs, RTOs/ISOs, and the Commission's Office of Enforcement during the referral process and during investigations.¹²³

52. In addition, Order No. 771 stated that the transactions scheduled outside of these entities' footprints can physically flow into their footprints and result in loop flows that

¹²¹ *Id.* P 53.

¹²² *Id.*

¹²³ *Id.* (citing *Southwest Power Pool, Inc.*, 129 FERC ¶ 61,163 (2009), *order on reh'g*, 137 FERC ¶ 61,046, at P 20 (2011)). *See also New York Independent System Operator*, 136 FERC ¶ 61,116 (2011).

impact both the reliability of their systems and the markets that they administer.¹²⁴ Due to congestion and other market impacts caused by loop flows, such transactions can have significant financial consequences. Thus, providing e-Tag information to RTOs and ISOs can assist them in more efficiently operating their systems and their markets.¹²⁵

53. We also disagree with NRECA's argument that the Commission's actions in Order No. 771 to allow RTOs, ISOs and MMUs to gain access to e-Tag data are tantamount to "deputizing" these entities. RTOs, ISOs and MMUs are obligated to ensure the proper functioning of the markets they administer and oversee. One means of accomplishing this goal is by detecting and preventing market manipulation. The Commission has a statutory obligation to ensure that wholesale electricity markets function properly and without market manipulation and thereby result in just and reasonable rates. Although the Commission's obligation to ensure that wholesale markets are functioning properly may be aligned with the obligations of RTOs, ISOs and MMUs to ensure that their markets are functioning properly, it does not follow that the Commission's actions to enable greater access to e-Tags to RTOs, ISOs and MMUs results in "deputizing" these entities. Nor do the Commission's actions in Order No. 771 run counter to the court's holding in *EP SA v. FERC*. NRECA's analogy to *EP SA v. FERC* is flawed because, unlike that case, Order No. 771 does not involve potential ex parte communications.

¹²⁴ *Id.* P 52.

¹²⁵ *Id.*

54. Order No. 771 required that RTOs, ISOs and their MMUs be afforded access to complete e-Tags, upon request to e-Tag Authors and Authority Services, “subject to appropriate confidentiality restrictions.” OATI seeks clarification as to what would constitute “appropriate confidentiality restrictions” and suggests that the Commission consider using a multi-entity framework such as the ORD Agreement to implement Order No. 771. At the outset, we note that the Commission did not intend the reference to “appropriate confidentiality restrictions” to foreclose RTOs and ISOs from proposing confidentiality provisions in their tariffs to protect e-Tag data specifically, similar to the types of provisions contained in RTO and ISO tariffs that protect other types of confidential market data. PJM and MISO took such an approach to effectuate access to e-Tag information under Order No. 771. In particular, PJM revised the PJM Tariff and Operating Agreement to: (1) make clear that PJM and the PJM MMU must maintain the confidentiality of e-Tags or to ensure there are appropriate confidentiality restrictions in place before e-Tags can be received from or disclosed to other RTOs, ISOs and MMUs; (2) require PJM to make e-Tags available to the Commission, and to make e-Tags available to other RTOs and ISOs upon request; (3) give the PJM MMU authority to share e-Tag data with other MMUs upon request; and (4) allow PJM and the MMU to use an agent such as OATI to provide the requested e-Tags to the Commission, RTOs,

ISOs and MMUs.¹²⁶ MISO made similar revisions to its Tariff to effectuate access to e-Tag data under Order No. 771.¹²⁷ We find that the approach taken by PJM and MISO to effectuate access to e-Tag data under Order No. 771 is acceptable.

55. We deny Southern Companies' request for clarification that e-Tag data be limited to interchange transactions that flow into, out of, or across the RTO and ISO footprint or markets. As noted in Order No. 771, RTOs and ISOs already had access to e-Tag information for those interchange transactions that are scheduled to flow into, out of, or across their operating footprints, but they could not access e-Tags for transactions scheduled outside of their footprints.¹²⁸ For the reasons set forth in this order and Order No. 771, we affirm the determination to allow RTOs and ISOs access to e-Tags for transactions scheduled outside of their footprints.

56. In response to Southern Companies' concern that the MMU for CAISO would be able to request information for an e-Tag representing a transfer from Southern Companies' Balancing Authority Area to the Tennessee Valley Authority, we note that we would expect RTOs, ISOs or MMUs that request access to e-Tag data to request this data for transactions within the Interconnection where the RTO or ISO is located. In this

¹²⁶ See revisions to Article I of Attachment M-Appendix of the PJM OATT and Section 18.17 of the Amended and Restated Operating Agreement accepted in *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,152 (2013).

¹²⁷ See revisions to Section 38.9.1(A) and Section 54.4 of the MISO OATT accepted by delegated letter order in Docket No. ER13-2327-000 on October 29, 2013.

¹²⁸ Order No. 771, FERC Stats. & Regs. ¶ 31,339 at P 52.

regard, for example, we would not expect the CAISO MMU to request e-Tag data for transactions taking place in the Eastern Interconnection because that information would likely not be useful for purposes of monitoring the behavior of CAISO market participants or the functioning of the CAISO market.

57. We also disagree that Balancing Authorities, such as Southern Companies, should be able to acquire greater access to e-Tag data in the same manner that Order No. 771 prescribes such information may be provided to RTOs and ISOs.¹²⁹ As explained above, enabling RTOs, ISOs and MMUs to gain greater access to e-Tags for transactions that are scheduled outside of their footprints will assist them in identifying and referring potentially manipulative behavior, assist the Commission in its market surveillance activities, and allow them to more efficiently operate their systems and markets. Unlike RTOs and ISOs, Balancing Authorities are not responsible for detecting and preventing potentially manipulative behavior so as to ensure the proper functioning of their markets. Therefore, we do not see a need to allow greater access to e-Tag data for Balancing Authorities apart from the access they already have.

58. In regard to OATI's request for clarification as to whether the requesting RTO, ISO or MMU must direct the request for e-Tag data to both the applicable e-Tag Author and the sink Balancing Authority, or if such a request can be made to either the applicable e-Tag Author or the sink Balancing Authority, we clarify that the RTO, ISO or

¹²⁹ Southern Companies at 2-3, 10.

MMU may request the relevant information directly from the e-Tag Author or the sink Balancing Authority or through a company, such as OATI, that provides agent services to the E-Tag Authors or authority services to the Balancing Authorities.¹³⁰

E. Clarification of E-Tag Access

1. Request for Rehearing or Clarification

59. OATI seeks clarification that the Final Rule's reference to "complete e-Tags" at P 52 has the same meaning as the definition of "complete e-Tags" in footnote 2 of the Final Rule.¹³¹ OATI also asks for clarification that this includes only those e-Tags which include the Commission as a CC'd entity.

2. Commission Determination

60. Order No. 771 at footnote 2 defined "complete e-Tags" as (1) e-Tags for interchange transactions scheduled to flow into, out of, or within the United States' portion of the Eastern or Western Interconnection, or into the Electric Reliability Council of Texas and from the United States' portion of the Eastern or Western Interconnection; and (2) information on every aspect of each such e-Tag, including all applicable e-Tag IDs, transaction types, market segments, physical segments, profile sets, transmission

¹³⁰ The Agent Service works as an agent for E-Tag Authors by allowing for the creation of an e-Tag and the electronic transfer of that information to the appropriate Authority Service. The Authority Service works as an agent on behalf of the sink Balancing Authority by validating and distributing e-Tags for approval. *See* Order No. 771, FERC Stats & Regs ¶ 31,339, at n.4 and n.6.

¹³¹ OATI at 2.

reservations, and energy schedules. Order No. 771 at paragraph 52 required e-Tag Authors and Balancing Authorities to make available to an RTO, ISO or MMU access to “complete e-Tags,” upon request to the e-Tag Author and Balancing Authority. In response to OATI’s request that we clarify whether the “complete e-Tags” referenced in Paragraph 52 of Order No. 771 refer to the definition provided in footnote 2, we clarify that the reference to “complete e-Tags” at Paragraph 52 has the same meaning as the definition of “complete e-Tags” in footnote 2. As noted above, however, we would expect RTOs, ISOs and MMUs that request access to e-Tags under Order No. 771 to request them for transactions for the interconnection within which they are located. For example, we would expect an RTO, ISO or MMU located in the Western Interconnection to request access to e-Tags only for transactions scheduled in the Western Interconnection rather than requesting access to e-Tags for transactions scheduled in both the Western and Eastern Interconnections.

61. With regard to OATI’s request for clarification that the e-Tags referenced in Order No. 771 only include those e-Tags which include the Commission as a CC’d entity, we note that Order No. 771-A determined that validation of e-Tags means that the Sink Balancing Authority, through its Authority Service, must reject any e-Tags that do not correctly include the Commission in the CC field for any e-Tags created on or after March 15, 2013.¹³²

¹³² Order No. 771-A, 142 FERC ¶ 61,181 at P 18.

The Commission orders:

The Commission hereby denies rehearing and clarifies certain issues, as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.