1–April 30: 6,000 feet MSL to but not including FL 180.

Times of use. May 1–August 31: 0800–1700 Monday–Friday; other times by NOTAM. September 1–April 30: 0800–2200 Monday–Friday; other times by NOTAM.

12. Tupper South MOA, NY [New]

Boundaries. Beginning at lat. 43°53′00″ N., long. 75°03′00″ W.; to lat. 43°53′00″ N., long. 74°12′00″ W.; to lat. 43°40′00″ N., long. 74°12′00″ W.; to lat. 43°30′00″ N., long. 74°21′00″ W.; to lat. 43°30′00″ N., long. 75°03′00″ W.; to the point of beginning.

Altitudes. May 1–October 31: 8,000 feet MSL to but not including FL 180; November 1–April 30: 6,000 feet MSL to but not including FL 180.

Times of use. May 1–August 31: 0800–1700 Monday–Friday; other times by NOTAM. September 1–April 30: 0800–2200 Monday–Friday; other times by NOTAM.

13. Tupper East MOA, NY [New]

Boundaries. Beginning at lat. 44°36′00″ N., long. 74°21′00″ W.; to lat. 44°36′00″ N., long. 74°12′00″ W.; to lat. 44°06′00″ N., long. 74°12′00″ W.; to lat. 44°14′00″ N., long. 74°21′00″ W.; to the point of beginning.

Altitudes. 10,000 feet MSL to but not including FL 180.

Times of use. May 1–August 31: 0800–1700 Monday–Friday; other times by NOTAM. September 1–April 30: 0800–2200 Monday–Friday; other times by NOTAM.

The Rule

The FAA is amending Title 14 Code of Federal Regulations (14 CFR) part 73 to establish two new restricted areas, R–5202A and R–5202B, in the vicinity of Fort Drum, NY. The new restricted areas supplement the existing restricted area, R–5201, to enable aircrews to train in high altitude, long range weapons delivery and other modern tactics at the Adirondack Range. In the NPRM, the FAA also proposed to change the designated altitudes of R–5201 from ''Surface to 23,000 feet MSL,'' to ''Surface to but not including 23,000 feet MSL.'' After further discussions between the controlling agency and the proponent, it was determined that this change is not needed; therefore, R–5201 will not be modified as proposed. As a result, the proposed FL 230 base altitude of the new restricted area, R–5202A, which overlies R–5201, is changed to 23,000 feet MSL to be consistent with the ceiling of R–5201. In addition, the NPRM contained an incorrect date in the time of designation for R–5202A and R–5202B. The portion of the time of designation stated in the NPRM as ''May 1–August 21'' should read ''May 1–August 31.'' The correct dates are included in this rule. Except as noted above, the restricted area descriptions are the same as proposed in the NPRM.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies special use airspace in New York.

Environmental Review

The FAA has determined that the Final Environmental Assessment (FEA) prepared by the Air National Guard associated with the proposed project is adequate for adoption in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' Paragraph 404d. The FAA has independently evaluated the information contained in the FEA and takes full responsibility for the scope and content that addresses FAA actions. Further, the FAA has issued its own Finding of No Significant Impact.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.52 [Amended]

■ 2. § 73.52 is amended as follows:

* * * * *

R–5202A Fort Drum, NY [New]

Boundaries. Beginning at lat. 44°01′05″ N., long. 75°37′14″ W.; to lat. 44°03′20″ N., long. 75°40′49″ W.; to lat. 44°06′55″ N., long. 75°42′09″ W.; to lat. 44°10′50″ N., long. 75°38′59″ W.; to lat. 44°16′07″ N., long. 75°32′41″ W.; to lat. 44°11′24″ N., long. 75°22′59″ W.; to lat. 44°07′10″ N., long. 75°26′49″ W.; to the point of beginning.

Designated altitudes. 23,000 feet MSL to FL 290.

Time of designation. May 1–August 31: 0800–1700 local time, Monday–Friday; other times by NOTAM. September 1–April 30: 0800–2200 local time, Monday–Friday; other times by NOTAM.

Controlling agency. FAA, Boston ARTCC.

Using agency. NY ANG, 174FW/Det 1, Fort Drum, NY.

* * * * *

R–5202B Fort Drum, NY [New]

Boundaries. Beginning at lat. 44°10′18″ N., long. 75°41′18″ W.; to lat. 44°20′32″ N., long. 75°32′04″ W.; to lat. 44°14′00″ N., long. 75°17′00″ W.; to lat. 44°06′00″ N., long. 75°25′10″ W.; to lat. 44°06′00″ N., long. 75°28′49″ W.; to lat. 44°07′10″ N., long. 75°26′49″ W.; to lat. 44°11′24″ N., long. 75°22′59″ W.; to lat. 44°16′07″ N., long. 75°32′41″ W.; to lat. 44°10′50″ N., long. 75°38′59″ W.; to lat. 44°09′34″ N., long. 75°40′00″ W.; to the point of beginning.

Designated altitudes. 6,000 feet MSL to FL 290.

Time of designation. May 1–August 31: 0800–1700 local time, Monday–Friday; other times by NOTAM. September 1–April 30: 0800–2200 local time, Monday–Friday; other times by NOTAM.

Controlling agency. FAA, Boston ARTCC.

Using agency. NY ANG, 174FW/Det 1, Fort Drum, NY.

* * * * *

Issued in Washington, DC, on September 12, 2008.

Edith V. Parish,

Manager, Airspace & Rules Group.

[FR Doc. E8–22646 Filed 9–25–08; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 260, 284 and 385

[Docket No. RM07–10–001; Order No. 704–A]

Transparency Provisions of Section 23 of the Natural Gas Act

Issued September 18, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing and Clarification.

SUMMARY: The Federal Energy Regulatory Commission affirms its basic

determinations in Order No. 704, while granting rehearing in part and clarification regarding requirements that certain natural gas market participants report information regarding their reporting of transactions to price index publishers and their blanket sales certificate status. These natural gas market participants must report annually certain information regarding their physical natural gas transactions for the previous calendar year. As clarified in the Order on Rehearing and Clarification, certain market participants engaged in a *de minimis* volume of transactions will not be required to report information regarding their transactions for the calendar year. The reported information will make it possible to assess the formation of index prices and the use of index pricing in natural gas markets. These regulations facilitate price transparency in markets for the wholesale sale of physical natural gas in interstate commerce as contemplated by section 23 of the Natural Gas Act, 15 U.S.C. 717t–2.

DATES: *Effective Date:* This rule will become effective October 27, 2008. The revisions to FERC Form No. 552 are applicable for the reporting of transactions occurring in calendar year 2008.

FOR FURTHER INFORMATION CONTACT:
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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

I. Introduction

1. On December 26, 2007, the Commission issued Order No. 704, which imposed an annual reporting requirement on certain natural gas market participants.[1] The order requires certain natural gas buyers and sellers to file annually FERC Form No. 552 and report summary information about physical natural gas transactions for each calendar year.

2. Order No. 704 has its genesis in the Energy Policy Act of 2005 (EPAct 2005).[2] EPAct 2005 added section 23 of the Natural Gas Act (NGA), 15 U.S.C. § 717t-2 (2000 & Supp. V 2005) to authorize the Commission ''to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, and the protection of consumers.'' Section 23 further provides that the Commission may issue such rules as it deems necessary and appropriate to ''provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.''

3. Section 23 of the NGA enhances the Commission's authority to ensure confidence in the nation's natural gas markets. The Commission's market-oriented policies for the wholesale natural gas industry require that interested persons have broad confidence that reported market prices accurately reflect the interplay of legitimate market forces. Without confidence in the fairness of price formation, the true value of transactions is very difficult to determine. Further, price transparency makes it easier for us to ensure that jurisdictional prices are ''just and reasonable.''[3]

4. The performance of Western electric and natural gas markets early in the decade shook confidence in posted market prices for energy. In examining these markets, the Commission's staff found that some companies submitted false information to the publishers of natural gas price indices, so that the resulting reported prices were inaccurate and untrustworthy.[4] As a result, questions arose about the legitimacy of published price indices, remaining even after the immediate crisis passed. Moreover, market participants feared that the indices might have become even more unreliable, since reporting (which has always been voluntary) declined to historically low levels in late 2002.

5. One of the Commission's responses to these developments was the issuance, on July 24, 2003, of a *Policy Statement on Electric and Natural Gas Price Indices* (Policy Statement) that explained our expectations of natural gas and electricity price index developers and the companies that report transaction data to them.[5] The Policy Statement, among other things, directed the Commission's staff to continue to monitor price formation in wholesale markets, including the level of reporting to index developers and the amount of adherence to the Policy Statement standards by price index developers and by those who provide data to them.[6] In adhering to this directive, Commission staff documented improvements in the number of companies reporting prices from back offices, adopting codes of conduct, and auditing their price reporting practices.[7] These efforts resulted in significant progress in the amount and quality of both price reporting and the information provided to market participants by price indices.[8] It is against this backdrop that Congress passed EPAct 2005 and provided us with expanded authority to mandate additional reporting and improve market confidence through greater price transparency.

6. In an April 19, 2007 Notice of Proposed Rulemaking, the Commission proposed regulations consistent with these new responsibilities.[9] The April 2007 NOPR contained both an annual transaction reporting requirement for market participants as well as a daily posting requirement for pipelines. On December 26, 2007, the Commission issued Order No. 704 regarding the annual reporting requirement. The daily pipeline posting requirement proposal was separated from the annual filing requirement and a new Notice of Proposed Rulemaking regarding the pipeline posting requirement was issued concurrently in Docket No. RM08–2–000.[10]

[1] *Transparency Provisions of Section 23 of the Natural Gas Act*, Order No. 704, 74 FR 1014 (Jan. 4, 2008), FERC Stats. & Regs. ¶ 31,260.

[2] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

[3] *See* sections 4 and 5 of the Natural Gas Act, 15 U.S.C. sections 717c and 717d.

[4] *See* Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies—Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02–2–000 (August 2003).

[5] *Price Discovery in Natural Gas and Electric Markets*, 104 FERC ¶ 61,121 (2003).

[6] *Id.* P 43.

[7] Federal Energy Regulatory Commission, Report on Natural Gas and Electricity Price Indices, at 2, Docket Nos. PL03–3–004 *et al.* (2004).

[8] *See, e.g.*, GENERAL ACCOUNTING OFFICE, NATURAL GAS AND ELECTRICITY MARKETS: FEDERAL GOVERNMENT ACTIONS TO IMPROVE PRIVATE PRICE INDICES AND STAKEHOLDER REACTION (December 2005).

[9] *Transparency Provisions of Section 23 of the Natural Gas Act*, 72 FR 20791 (Apr. 26, 2007), FERC Stats. and Regs. ¶ 32,614 (2007) (April 2007 NOPR).

[10] *Pipeline Posting Requirements under Section 23 of the Natural Gas Act*, 73 FR 1116 (Jan. 7, 2008),

Continued

7. Order No. 704 required natural gas wholesale market participants, including a number of entities that may not otherwise be subject to the Commission's traditional NGA jurisdiction, to identify themselves and report summary information about their physical natural gas transactions on an annual, calendar year basis. To facilitate such reporting, Order No. 704 created FERC Transaction Report FERC Form No. 552: Annual Report of Natural Gas Transactions (Form No. 552) and various implementing regulations. Form No. 552 is to be filed by May 1, 2009, for transactions occurring in calendar year 2008 and by May 1 of each year thereafter for each previous calendar year.

8. Thirteen requests for rehearing or clarification of Order No. 704 were timely filed. No request for rehearing or clarification argues that the rule is unnecessary or should not have been issued. Rather, the requests seek modification or clarification of specific aspects of Order No. 704. Commission staff held two technical conferences during which potential filers of Form No. 552 and other industry stakeholders discussed the form. Stakeholders at these two technical conferences represented a broad spectrum of market participants and observers, including producers, interstate pipelines, intrastate pipelines, natural gas marketers, commodities traders, local distribution companies (LDCs), electric generation end-users, industrial end-users, and natural gas price index developers. Many conference participants filed comments following one or both of these conferences.

9. As discussed below, we largely affirm Order No. 704, granting a limited number of rehearing requests and clarifying the order.

II. Discussion

A. The Value of Aggregated Annual Data Regarding Volumes That Utilize, Contribute to, or Could Contribute to the Development of Price Indices

10. Order No. 704 focused primarily on ''price formation in spot markets'' and accordingly sought information about the ''amount of daily or monthly fixed-price trading that [is] eligible to be reported to price index publishers as compared to the amount of trading that uses or refers to price indices.'' [11] As we stated in the order, the ''information collected under this requirement is focused specifically on daily and monthly physical spot or 'cash' market activity and the contracting based on the prices developed in those markets.'' [12] The rationale for this focus is that a ''[b]etter understanding of the role and functioning of wholesale natural gas spot markets can increase confidence that posted market prices of natural gas accurately reflect the interplay of legitimate market forces.'' [13] Additionally, information on price index utilization and formation would greatly enhance the Commission's efforts to monitor price formation in the wholesale markets in support of the Commission's market-oriented policies.[14] As we explained, ''without confidence in the basic processes of price formation, market participants cannot have faith in the value of their transactions, the public cannot believe that the prices they see are fair, and it is more difficult for the Commission to ensure that jurisdictional prices are 'just and reasonable.' '' [15]

11. Our recognition of the importance of price formation on market confidence is, of course, not new. The Commission has often remarked on the need to ensure price transparency and accurate price reporting, including, for example, our 2003 Policy Statement on price reporting to index developers. As we there recognized:

> Price indices are widely used in bilateral natural gas and electric commodity markets to track spot and forward prices. They are often referenced in contracts as a price term; they are related to futures markets and used when futures contracts go to delivery; basis differentials in indices are used to hedge natural gas transportation costs; indices are used in many gas pipeline tariffs to settle imbalances or determine penalties; and state commissions use indices as benchmarks in reviewing the prudence of gas or electricity purchases. Since index dependencies permeate the energy industry, the indices must be robust and accurate and have the confidence of market participants for such markets to function properly and efficiently.[16]

We continue to believe that ensuring price transparency is a vital policy goal, especially as it relates to transactions that utilize, contribute, or could contribute to a price index.

12. Section 23(a)(4) of the NGA requires us to ''consider the degree of transparency provided by existing price publishers and providers of trade processing services, and [] rely on such publishers and services to the maximum extent possible.'' We have reviewed existing price index publications and, while the Commission recognizes the substantial value that these publications have enhancing market transparency, we determine that the additional data required on Form No. 552 is necessary. Section 23 is consistent with our belief that transparency is furthered by shedding light on price indices and their formation.

13. The Commission reiterates that the focus of Form No. 552's data collection is transactions that utilize an index price, contribute to index price formation, or could contribute to index price formation. Specifically, the Commission finds that volumes reportable on Form No. 552 should include volumes that utilize next-day or next-month price indices, volumes that are reported to any price index publisher, and any volumes that could be reported to an index publisher even if the respondent has chosen not to report to a publisher. By ''could be reported to an index publisher,'' we mean bilateral, arms-length, fixed price, physical natural gas transactions between non-affiliated companies at all trading locations.[17] Transactions that do not occur at a specific location currently designated by an index developer as a reporting location are nonetheless reportable on Form No. 552.

14. This focus on index price-related transactions will increase market participant confidence by providing greater transparency in the use of index prices and how well index prices reflect market forces. This data will also allow the Commission's staff, state commissions, and all other industry observers to evaluate the level of index price usage at both a company level and nationally.[18] Data on index development and use would be of substantial value in the Commission's transparency and market monitoring missions.

15. We also clarify that Form No. 552 does not seek the broader range of transaction data necessary to evaluate the size of the national physical natural gas market. While Order No. 704 mentioned such a calculation as one result of the data to be collected,[19] we elect not to craft Form No. 552 to

FERC Stats. and Regs. ¶ 32,626 (2007). A technical conference has been held in Docket No. RM08–2–000 and the pipeline posting requirement is pending further action by the Commission.

[11] Order No. 704 at P 3. *See also id.* P 13.

[12] *Id.* P 67.

[13] *Id.*

[14] *Id.* P 7 and 62.

[15] *Id.* P 66 (citing sections 4 and 5 of the NGA, 15 U.S.C. sections 717c and 717d).

[16] Policy Statement at P 6.

[17] We note that this understanding tracks closely with our discussion of transactions that are reportable to index developers in the Policy Statement. *See* Policy Statement at P 34.

[18] Further, as discussed in greater detail below, observers will be able to parse data to compare activities of purchasers and sellers in the market.

[19] Order No. 704 at PP 18 and 69. Similarly, P 5 of the order indicates that an understanding ''in broad terms'' of the extent of the natural gas market is a goal of the rule.

capture the data necessary to calculate a national market. At this time, we do not believe that such data would further the transparency of the natural gas markets other than determining an aggregate approximation of the entirety of physical gas transactions. Further, unless volumes that utilize price indices or that could contribute to such indices were separately reported on Form No. 552 (with an additional, substantial reporting burden), the analytical benefits noted above would be lost. Lastly, any attempt to rationally estimate the size of the physical gas market on a national level would require reporting from a substantially larger group of respondents than the narrower focus adopted in Order No. 704. Respondents would necessarily include smaller market participants for whom the reporting burden would be undue. For these reasons, we reiterate and emphasize our determination that data provided on Form No. 552 should be limited to transactions that utilize, contribute to, or could contribute to index price formation. However, the Commission understands that the natural gas market is ever evolving and dynamic. At a future date we may elect to amend Form No. 552 to obtain additional information necessary to facilitate transparency of the market.

B. Both Sales and Purchase Data Are To Be Included on Form No. 552

16. Order No. 704 required the annual reporting both of relevant natural gas sales and purchases. We explained that purchase information was the opposing side of a sale transaction and, thus, was as relevant to the Commission's transparency mission as the reporting of sales.[20] Further, we noted that we have often found the reporting of purchase information beneficial both independent of sales figures and as a cross-check on such volumes.[21]

17. Although we understand that some participants in the technical conferences objected to the collection of purchase data in various contexts, we continue to believe that purchase data is a vital component to Form No. 552 and the Commission's transparency goals. Not only is purchase information important as a cross-check on reported sales volumes, but it has independent value. If only sales were reported on Form No. 552, Commission staff, state commissions, and other market observers would be unable to discern, for example, whether significant numbers of gas purchasers were transacting under contracts referencing an index price. Analysis of Form No. 552 purchase information will also provide trend data regarding purchase activity, which would be very useful for those charged with monitoring the natural gas markets. With purchase data, the public will be able to discern which purchasers are utilizing index-based contracts, whether there is geographic disparity regarding use of price indices among purchasers, the overall reliance upon gas price indices by purchasers, and other information relevant to market analysis and market confidence. While we acknowledge that removing purchases from volumes that must be reported on Form No. 552 would somewhat reduce the reporting burden on certain market participants, we continue to believe that the substantial benefits of having such data publicly available outweigh this burden.

C. The De Minimis Reporting Threshold

18. Section 23(d)(2) of the NGA requires the Commission to exempt from new transparency reporting requirements ''natural gas producers, processors or users who have a *de minimis* market presence.'' [22] Consistent with this directive, Order No. 704 provided that most buyers or sellers of less than a *de minimis* volume of natural gas are not required to submit Form No. 552.[23] The order set the *de minimis* threshold at 2.2 million MMBtus; that is, annual sales plus annual purchases of more than 2.2 million MMBtus required a market participant to report transaction information. In setting this threshold, the Commission ''sought to require reporting from a sufficient number of significant market participants to ensure, in the aggregate, an accurate picture of the physical natural gas market as a whole.'' [24] The Commission explained that:

> [T]he [2.2 million MMBtu] figure was based on the simple calculation of one-ten thousandth (1/10,000th) of the annual physical volumes consumed in the United States, which is approximately 22 trillion cubic feet (Tcf) (or roughly 22 billion MMBtus). Looked at another way, a *de minimis* market participant would trade the equivalent of less than one standard NYMEX futures contract per day. Although a market participant that contracts for 1/10,000th of the nation's annual physical volume may appear to have little effect on natural gas prices, that participant may be transacting only at one location and, thus, have a much greater pricing effect there.

Requests for Clarification or Rehearing

19. Copano Energy L.L.C. (Copano) requests rehearing of the *de minimis* threshold and argues that 2.2 million MMBtu is such a low threshold so as to render meaningless the NGA's directive that the Commission exempt from annual reporting requirements market participants that have a *de minimis* market presence.[25] Copano argues that the Congressional purpose behind the *de minimis* threshold was to exclude entities that are too small to have an impact on market prices in the interstate, wholesale gas market. Copano states that a threshold one-hundred times as large (*i.e.*, 220 million MMBtu/year) would represent less than 1 percent of annual physical volumes of gas consumed in the country and ''would therefore have no ability to impact prices in the wholesale, interstate natural gas market.'' [26] Copano notes that Order No. 704 justifies the selected threshold by noting that even small amounts of gas purchases can have a price effect at certain locations.[27] Copano believes that this reinforces its conclusion that a threshold should be established that measures market presence at market hubs.[28] Instead of a single-number *de minimis* threshold, Copano suggests a two-pronged approach that considers both the impact of a market participant's transactions on the overall wholesale gas market (a twenty-two million MMBtu threshold) and the impact of a market participant's transactions at market hubs (5 percent of the total jurisdictional sales at the hub).[29]

20. American Public Gas Association (APGA) requests clarification of section 260.401(b) of the Commission's regulations. As currently written, the regulation exempts an entity that does not hold a blanket sales *or* marketing certificate from the reporting requirement if the entity either made fewer than 2.2 million Dth of wholesale sales *or* 2.2 million Dth of wholesale purchases. APGA proposes that the Commission clarify this language so as to ensure that an entity with fewer than 2.2 million MMBtu of purchases is exempted from reporting purchases and an entity with fewer than 2.2 million

[20] *Id.* P 86.

[21] *Id.* PP 85–86.

[22] 15 U.S.C. section 717t–2(d)(2).

[23] Form No. 552 must be submitted by any section 204.402 or section 284.284 blanket certificate holder even if the entity has aggregate purchases and sales less than the *de minimis* threshold. Such an entity must provide identification information on Form No. 552 and must answer questions regarding price reporting to price index publishers, but need not submit Form No. 552's aggregate volume data. Order No. 704 at P 60.

[24] *Id.* P 78.

[25] Copano comments at 8.

[26] *Id.* 5.

[27] *Id.* at 6.

[28] *Id.* at 7.

[29] *Id.* at 7–8.

MMBtu of sales is exempted from reporting sales.[30]

21. Shell requests that the Commission clarify whether purchases and sales should be aggregated for purposes of calculating an entity's total reportable volumes.[31] Additionally, Shell seeks guidance regarding how market participants are to determine whether they fall into the *de minimis* exception when part of the relevant total sales or purchases are to an affiliate or under other circumstances.[32] Shell also requests clarification as to whether volumes that total *exactly* 2.2 TBtu fall into or out of the *de minimis* exception as the rule references amounts above and below the threshold, but not precisely at the threshold.[33]

Commission Determination

22. Regarding the appropriate *de minimis* threshold, we affirm our findings in Order No. 704 and retain the 2.2 million MMBtu level. As the Commission stated in Order No. 704, even market participants with total reportable volumes slightly above the threshold may have a significant effect on local wholesale markets.[34] While it is possible that a respondent that exceeds the *de minimis* threshold exemption does not actually contribute to price formation, it is certain that some do and, in any event, market observers cannot yet know with any degree of assuredness which market participants have or do not have local price relevance. Likewise, these entities may rely upon price indices for a sizeable portion of their natural gas transactions. Form No. 552 seeks data only for volumes that either reference price indices or could contribute to the formation of price indices. A number of transactions are not reportable (as identified on Form No. 552, as discussed in Order No. 407, and as clarified in this order). Market participants should bear in mind that the Commission is not seeking data on all gas sales and purchases made by an entity, but rather a subset of these transactions.[35]

23. Nothing in Copano's request for rehearing provides new information regarding the establishment of a proper *de minimis* threshold. While we acknowledge that there are a number of rational ways to establish a *de minimis* threshold consistent with our Congressional mandate, we continue to believe that 2.2 million MMBtu is an appropriate threshold for the reasons expressed herein and in Order No. 704.

24. Regarding APGA and Shell's requests involving how volumes are to be calculated to determine whether an entity meets or exceeds the *de minimis* threshold, the Commission clarifies that an entity that has 2.2 million MMBtu of reportable sales or purchases must file Form No. 552. That is, a potential respondent with either reportable purchases equal to or greater than 2.2 million MMBtu or reportable sales[36] equal to or greater than 2.2 million MMBtu must submit the form. The following table, regarding reportable purchase and sale volumes, explains how the *de minimis* threshold will apply:

Reportable sales volumes	Reportable purchase volumes	Does the entity report?
≥ 2.2 million MMBtu	≥ 2.2 million MMBtu	Yes, both sales and purchases.
≥ 2.2 million MMBtu	< 2.2 million MMBtu	Yes, both sales and purchases.
< 2.2 million MMBtu	≥ 2.2 million MMBtu	Yes, both sales and purchases.
< 2.2 million MMBtu	< 2.2 million MMBtu	No (unless the entity has a blanket certificate, in which case it will provide non-volume information only).

25. We also clarify that sales and purchase volumes do not ''net each other out'' for purposes of determining whether an entity meets or exceeds the *de minimis* threshold. Additionally, an entity that must file Form No. 552 must report both reportable sales and reportable purchases regardless of the total volumes associated with each component volume. For example, if a potential respondent has annual reportable sales of 2.0 million MMBtu and reportable purchases of 3.0 million MMBtu, then it must file Form No. 552 as its purchases exceed the *de minimis* threshold of 2.2 million MMBtu. Further, it would report both its sales and purchases on the form.[37]

26. We further clarify that, if a transaction is reportable on Form No. 552, then volumes associated with the transaction should be counted towards the threshold. The converse is also true: if a transaction volume would not be included on the form, then volumes associated with it should not be counted towards the threshold. We emphasize that not all physical natural gas purchases and sales count towards the threshold.[38]

27. If a company chooses to aggregate volumes from affiliates, then such volumes are aggregated for purposes of determining whether the corporation meets or exceeds the *de minimis* threshold. In response to Shell's requested clarification, Order No. 704 already makes clear that ''a company with multiple affiliates may choose to report separately or in aggregate, as best meets its needs.''[39] A company with multiple affiliates that chooses to aggregate must, however, aggregate all of its affiliates' data (*i.e.*, it may not choose to aggregate some affiliates but not others). Consistent with Shell's other requests, we have modified Form No. 552 to make clear that entities that meet or exceed the *de minimis* volume must submit the form.

28. Regarding the format of amounts reported on Form No. 552, the Commission will require that volumetric entries on Form No. 552 be rounded to the nearest tenth of a TBtu. We understand that there was some confusion among participants at the technical conferences regarding the rounding of volume figures on Form No. 552. Form No. 552 currently requests reporting of volumes to the nearest TBtu (*i.e.* , a reportable volume of 2.499 TBtu would be reported as 2.0 TBtu). We

[30] APGA comments at 2.

[31] Shell is, collectively, Shell Gulf of Mexico, Shell Offshore, Inc., Shell Rocky Mountain Production LLC, and SWEPI LP. Shell comments at 28.

[32] *Id.* at 28–29.

[33] *Id.* at 29.

[34] Order No. 704 at P 81.

[35] For example, we clarify below that a bundled retail transaction made at a state-approved tariff rate is not reportable. We anticipate that this clarification will significantly limit the reporting obligation on smaller market participants.

[36] Reportable sales include off-system, balancing, and other assorted reportable sales as discussed elsewhere in this order.

[37] APGA's request for clarification on this point is therefore denied.

[38] As detailed herein, physical transactions of companies that fall below the *de minimis* threshold are excluded from the data collected by Form No. 552. Physical transactions need not be reported if they are not Next-Day or Next-Month transactions as those terms are defined in Form No. 552. In this same vein, financial transactions, transactions between affiliates, and traditional retail transactions (as discussed below), are not reportable on Form No. 552.

[39] Order No. 704 at PP 60 and 97.

direct respondents to round volumes up or down, as appropriate, to the *nearest tenth* of a TBtu. Rounding to the nearest tenth of a TBtu will make the reporting obligation consistent with the proposed *de minimis* threshold volume calculation, which is measured to the nearest tenth of a TBtu. Further, more precise reporting of data would allow for a more accurate review of market activity and we believe that aggregating volumes to the nearest tenth of a TBtu would be no more burdensome for respondents than the rounding currently required in the form.

D. Certain End-Use Transactions Should Be Reported on Form No. 552

29. Several commenters to the April 2007 NOPR objected to the inclusion of end-use transactions in the annual report.[40] Order No. 704 addressed these concerns by exempting certain types of transactions from the reporting requirement. The order states that the rule ''focuses the reporting requirement solely on wholesale buyers and sellers by excluding retail transactions.'' [41] The order did not require ''end-use customers or retail buyers'' to report transaction information unless those entities also made wholesale sales or purchases that were greater than the *de minimis* threshold.[42] Likewise, the order stated that ''a transaction made to an end-user is not to be included in the volumes reported on the form.'' [43]

30. However, the order did not adequately distinguish between two distinct types of end-use transactions (*i.e.* transactions that utilize or could contribute to a price index and transactions to customers as part of a bundled retail sale). The American Gas Association (AGA) and the National Energy Marketers Association (NEM), for example, specifically argued in comments on the April 2007 NOPR that end-use sales *at retail* should be excluded from the reporting requirement.[44] These types of end-use transactions involved retail service provided by a LDC to consumers subject to the LDC's state commission-approved tariff. Other commenters argued for a broader exemption, including all end-use transactions.[45] These types of transactions would include not only bundled retail service subject to traditional state jurisdiction, but also direct end-use deliveries by interstate pipelines (an activity traditionally subject to the Commission's jurisdiction).

31. Order No. 704 correctly, though summarily, describes these participants' comments,[46] but then proceeded to utilize the term ''retail'' interchangeably with ''end-use'' when describing transactions that would be exempt from the reporting requirement.[47] For example, under a section entitled, ''Exclusion of Retail Transactions,'' the order states that ''[a]lthough some transactions reported to indices may include purchases by large end-users, the Commission is generally interested in wholesale prices.'' [48] Our exclusion in Order No. 704 is aimed at traditional retail transactions (*i.e.*, those that are in markets functionally separate from the wholesale markets) rather than other end-use transactions involving volumes in the wholesale market—although the language of the rule's exclusion could easily be read so as to reach to all end-use transactions.

Requests for Clarification or Rehearing

32. NGSA requests clarification or rehearing regarding a seller's obligation to exclude end-use volumes from volumes reported on Form No. 552. NGSA quotes paragraph 90 of Order No. 704 indicating that ''a transaction made to an end-user is not to be included in the volumes reported on the form.'' [49] NGSA argues that requiring the seller to delineate between end-use and non-end-use customers is unduly burdensome and that requiring such disclosure to sellers from purchasers would limit market liquidity.[50] NGSA requests that the Commission clarify that, when in doubt, it is acceptable for a seller to include end-use volumes in Form No. 552.[51] Any exclusion of end-use transactions should be applied from the buyers' perspective, argues NGSA.[52]

33. We understand that a number of participants at the technical conference (including AGA, Encana,[53] and others) had both substantive and technical questions regarding Order No. 704's references to ''end-use'' transactions and ''retail'' transactions. There was significant confusion regarding whether certain types of transactions to consumers of natural gas were reportable. AGA filed supplemental comments in the docket requesting various clarifications regarding an LDC's responsibility to report sales to end-users, among other transactions.[54]

Commission Determination

34. The Commission clarifies here that there will be no categorical exclusion of end-use transactions from Form No. 552. Nevertheless, Form No. 552 will collect only information regarding that subset of end-use transactions that relies upon price indices or that could be utilized to form a price index. Accordingly, as we explain below, reporting of traditional, bundled retail transactions made by an LDC at a state-approved tariff rate (*i.e.*, the majority of transactions to retail customers) would not contribute to the Commission's transparency mission and are not subject to reporting. We believe that this is a ''bright-line'' rule easily understood by potential respondents.[55]

35. While Order No. 704 utilized the phrase ''retail'' transactions interchangeably with ''end-use'' transactions,[56] the overall thrust of our order was that transactions that are typically perceived to be at retail are not reportable while transactions that utilize, contribute to, or may contribute to price indices should be reportable. Depending upon the type of transactions involved, end-use transactions can have a substantial impact on price formation and the functioning of the wholesale markets, particularly in localized areas.

36. While precise data is not readily available (indeed, obtaining that data is one of the goals of Form No. 552), it is our experience and industry common knowledge that many end-use transactions utilize price indices and/or could be relied upon to form price indices. End-use transactions, specifically transactions involving large consumers of natural gas that compete directly with wholesale market participants, are very relevant to the Commission's transparency mission. For example, use of natural gas for power generation has increased markedly since 2000. According to annual figures from the Energy Information Administration (EIA), natural gas used to produce electric power is up from 14.2 Bcf/d in 2000 to 18.8 Bcf/d in 2007, an increase of 32 percent. As a result, natural gas generation's share of overall gas use is up, too. In 2000, EIA figures indicate

[40] These commenters included American Forest & Paper Association (AF&PA), Industrial Energy Consumers of America (IECA), and Natural Gas Supply Association (NGSA).

[41] Order No. 704 at P 3.

[42] *Id.* P 90.

[43] *Id.*

[44] AGA NOPR comments at 3; NEM NOPR comments at 5. *See also* NGSA NOPR comments at 12.

[45] AF&PA NOPR comments at 5.

[46] Order No. 704 at PP 39–40.

[47] *See, e.g.*, Order No. 704 at PP 60, 89, and 90.

[48] *Id.* P 90.

[49] NGSA comments at 3.

[50] *Id.* 4.

[51] *Id.*

[52] *Id.* 5.

[53] Encana Marketing (USA) Inc. (distinct from its joint rehearing request as part of the Canadian Suppliers).

[54] AGA supplemental comments at 3–5.

[55] NGSA's request for rehearing or clarification of this issue is, therefore, denied.

[56] *See, e.g.*, Order No. 704 at PP 60, 89, and 90.

that natural gas used for power generation accounted for 18 percent of total U.S. natural gas consumption; by the end of 2007 it represented 30 percent.[57] On a peak day in the summer, natural gas generation's share of gas use can be much higher. According to EIA, the U.S. delivered a total of 21.3 Tcf of natural gas to consumers in 2007 or on average about 58.3 Bcf per day.[58] On August 8, 2007, estimates of gas use for power generation reached 38 Bcf/d or 65 percent of 2007 average daily gas use.[59] Moreover, in many regional power markets, natural gas is the marginal fuel during the majority of hours power plants are being dispatched, therefore a better understanding of how natural gas indices are formed will aid the Commission and the public in understanding power market dynamics. For these reasons, we conclude that where a transaction could contribute to the formation of price indices and/or relies upon a price index, the transaction should be reportable even if the reporting entity is a natural gas end-user.

37. Requiring end-users to supply transaction data if the transaction utilizes, contributes to, or could contribute to price index formation is well within EPAct 2005's Congressional mandate. The Commission accurately stated in Order No. 704 that price formation in natural gas markets makes no distinction between transactions that are traditionally jurisdictional to the Commission and those that are not.[60] Congress, recognizing this fact, gave the Commission expansive jurisdiction under the transparency provisions of EPAct 2005. The Commission's traditional jurisdiction under sections 4, 5, and 7 of the NGA is limited to ''natural gas companies.''[61] In contrast, section 23(a) of the NGA directs the Commission ''to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce''[62] including obtaining information from ''any market participant.''[63] There is no applicable statutory limitation on the collection of information that may involve transportation through distribution-level facilities, as applies to the Commission's traditional jurisdiction.[64]

38. In addition, the first sentence of section 23(a)(2) gives the Commission broad authority to ''prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section,'' *i.e.* facilitating price transparency. This broad grant of authority is followed, in the second sentence of the section, with the requirement that the ''rules shall provide for the dissemination on a timely basis of information about the availability and prices of natural gas sold at wholesale and in interstate commerce.'' The requirement in the second sentence, including the reference to ''gas sold at wholesale,'' does not limit the broad authority granted by the first sentence. Rather, the rules required by the second sentence should be viewed as a subset of the rules the first sentence of section 23(a)(2) authorizes the Commission to adopt. Put another way, section 23(a)(2) should be interpreted as providing that the Commission *may* adopt rules collecting information about any transactions, including non-wholesale end-use transactions, if necessary to facilitate price transparency, but such rules *must* include the collection of information about wholesale transactions in interstate commerce.

39. This interpretation is buttressed by the fact that section 23(a)(3)(A) expressly permits the Commission to obtain ''the information described in paragraph (2) from any market participant,'' a term which includes end-users. EPAct 2005's *de minimis* threshold requirement in section 23(d)(2) provides further support for this position. That provision states:

> The Commission shall not require natural gas producers, processors, *or users* who have a *de minimis* market presence to comply with the reporting requirements of this section.[65]

The logical corollary to this Congressional directive is that a user that has greater than *de minimis* market presence could be made subject to the reporting requirement. By establishing a *de minimis* threshold volume of 2.2 million MMBtu (and, as further explained herein, exempting traditional retail transactions from reporting), the Commission appropriately limits reporting by end-users only to those users with a more than a *de minimis* market presence and only to those end-use transactions that utilize, contribute to, or could contribute to price index formation.

40. While a large industrial end-user may not be a customer ''at wholesale,'' it is doubtless a ''market participant'' in the interstate wholesale energy market and its actions may have a direct impact on the wholesale market or market indices, especially in a localized area. We also note that the collection of information on an annual basis is qualitatively different than our customary regulation of rates, terms, and conditions applicable to natural gas companies. Requiring reporting from large end-users that engage in 2.2 million MMBtu of annual sales or purchase transactions (other than transactions associated with bundled retail tariff service) is a conservative outcome compared to the broad authority granted to us by Congress in section 23 of the NGA. Our approach strikes a balance between the data that the Commission requires to meet its transparency-related obligations and the burden placed upon market participants to provide this data.

41. However, not all end-use transactions have the potential to contribute to the formation of price indices or rely upon price indices. For example, traditional retail transactions, even those involving annual volumes greater than the *de minimis* threshold, neither utilize an index for a price nor contribute to index price formation. These retail transactions are not relevant to the Commission's transparency goals. A bundled retail transaction through an LDC at a state-approved tariff rate is properly excluded from purchase and sales volumes to be reported on Form No. 552.[66] The reporting burden on retail consumers would greatly outweigh any minimal transparency benefit. To the extent that a potential respondent purchases or sells gas at a bundled retail tariff rate, it should not

[57] Derived from information provided by EIA on their Natural Gas Navigator Web site, *http://tonto.eia.doe.gov/dnav/ng/hist/n3045us2a.htm.*

[58] Derived from information provided by EIA on their Natural Gas Navigator Web site, *http://tonto.eia.doe.gov/dnav/ng/ng_sum_lsum_dcu_nus_a.htm.*

[59] Derived from the ''U.S. Power Burn Report'', Bentek Energy, LLC.

[60] Order No. 704 at P 6.

[61] 15 U.S.C. section 717b–717i.

[62] 15 U.S.C. section 717t–2(a)(1).

[63] 15 U.S.C. section 717t–2(a)(3)(A).

[64] Section 1(b) of the NGA, 15 U.S.C. section 717(b), provides in part that the Commission's jurisdiction generally does not apply to ''the local distribution of natural gas.''

[65] 15 U.S.C. section 717t–2(d)(2) (emphasis added).

[66] We have drawn a parallel distinction in the electric context. In Order No. 888, the Commission exercised its jurisdiction over unbundled transmission to end-users in interstate commerce, yet declined to exert jurisdiction over bundled retail transmission. *See 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 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at p. 31,781 (1996). The U.S. Supreme Court approved of this distinction in *New York* v. *FERC,* 535 U.S. 1, 28 (2002). While not a jurisdictional question, in this rulemaking, we incorporate a similar distinction between unbundled natural gas transactions to consumers (which are reportable in Form No. 552 if they utilize or contribute to the formation of a price index) and bundled transactions through an LDC subject to state-approved tariff rates (which are not reportable).

count those volumes towards the *de minimis* threshold and, if required to submit Form No. 552, it would not include those volumes in its report.[67] We note that this ''bright-line'' clarification would also resolve NGSA's concerns regarding a selling entity's ability to identify what purchasers are consuming gas—if gas is sold by an LDC under a bundled retail tariff rate, then it need not be reported.

42. This proposed approach is similar, though not identical, to the Commission's jurisdictional reach over natural gas transportation service to end-users. FERC exerts its customary jurisdiction over direct transportation of natural gas from an interstate pipeline to an end-user.[68] However, the Commission has traditionally declined to exercise jurisdiction over transportation to ''retail customers in a localized geographical area behind either a town border station or behind facilities * * * that connect to rural delivery points outside the boundaries of towns.'' [69] Where transportation to an end-user occurs in interstate commerce and not as part of local distribution, the Commission has jurisdiction.

43. We conclude that exempting from reporting those volumes associated with bundled retail transactions made at state-approved tariff rates, while including volumes associated with direct pipeline-to-end-user and other end-user transactions, is appropriate. This modification regarding the reportability of certain end-use transactions necessitates changes to the language of Form No. 552.[70]

E. Respondents Need Not Distinguish Between Transactions Based Upon Location

44. Order No. 704 provided that a market participant must categorize transaction volumes by whether each transaction was made at a ''reportable location.'' Reportable locations are locations where index developers currently collect fixed-price information for transactions with Next-Day or Next-Month Delivery obligations, and produce index prices. Thus, Order No. 704 tied the meaning of ''fixed-price'' reported volumes to volumes that may be reported to index developers at specific points. To this end, we directed our staff to list on the Commission's Web site all reportable locations at which fixed-price volumes were to be reported on Form No. 552.[71]

Requests for Rehearing and Clarification

45. NGSA requests rehearing of Order No. 704 so as to require submission of data at all trading locations rather than limited to specific reportable locations.[72] NGSA argues that this approach would be consistent with the Policy Statement on price reporting.[73] Further, NGSA states that designated ''reportable locations'' will change over time, hampering the Commission's long-term analysis of the market.[74] NGSA argues that limiting reported data only to specific reportable locations would be more burdensome to most respondents than reporting all aggregate, relevant data.[75] Lastly, NGSA asserts that different index developers utilize different means to collect data at the same index point and, thus, data collected from market participants for particular reportable points will not offer a reasonable comparison to reported indices.[76]

46. Participants at the technical conferences echoed some of these themes. The NiSource Companies (NiSource) and Encana, for example, questioned how reporting was to be accomplished for certain reportable locations given that different reporting services defined the locations in multiple ways.

Commission Determination

47. We grant rehearing of Order No. 704 on this issue and provide that respondents need not categorize volumes based upon whether such volumes relate to transactions at specific price index locations. We agree with NGSA that: (1) It would be substantially less burdensome for market participants to provide aggregate data regarding their transactions than to differentiate between volumes that occur within or outside reportable locations; (2) defining workable ''reportable locations'' would be difficult, would require substantial detail regarding geographic scope and types of transactions at specific locations, and would unduly complicate respondents' Form No. 552 responses; and (3) specific reportable locations would change on a yearly basis, limiting the value of data collected by location. We also understand that participants at the technical conferences indicated a substantial preference for this modification.

48. The Policy Statement provides that the minimum standards for data providers include a commitment to report ''each bilateral, arm's-length transaction between non-affiliated companies in the physical (cash) markets *at all trading locations*.'' [77] Modification of Form No. 552 to eliminate data collected at specific reporting locations would make the annual reporting obligation consistent with the Policy Statement. Consequently, for respondents that already comply with the Policy Statement standards, data collection and reporting on Form No. 552 would be significantly less burdensome. In fact, we believe that it would be easier for most entities that *do not* comply with the Policy Statement standards to provide aggregate data for all reportable transactions rather than to segregate data regarding transactions at specific locations.

49. Further, comments by conference participants and NGSA's request for rehearing make clear that it would be administratively difficult to geographically define each reportable location in a way that would capture all transactions that were eligible for reporting to the various price indices. This is due to the fact that different data collection methodologies are used by index developers at the same point as well as the fact that different index developers accept different transactions from these points to form indices.

50. For these reasons, we grant rehearing of Order No. 704 and determine that respondents need only provide aggregated data for reportable transactions at all transaction locations. Respondents need not provide data segregated by reportable location.[78]

F. Balancing, Cash-out, Operational, and In-Kind Transactions Are Reportable

51. In Order No. 704, we required market participants to report sale and purchase volumes related to cash-outs,

[67] One caveat is that, if the end-user or other market participant holds a blanket certificate from the Commission, it must, at a minimum, submit the identification and price reporting data required on Form No. 552.

[68] *See, e.g.*, *Public Utilities Commission of the State of California* v. *FERC,* 900 F.2d 269 (D.C. Cir. 1990).

[69] *Kinder Morgan Interstate Gas Transmission LLC,* 99 FERC ¶ 61,186, at n.30 (2002).

[70] One such modification is the definition of ''Physical Natural Gas Transactions'' in the Definitions portion of current Form No. 552. The definition clearly indicates that reportable volumes are *only* those that utilize, contribute to, or may contribute to the formation of price indices. The definition also explicitly excludes volumes associated with bundled retail sales and purchases at state-approved tariff rates.

[71] Order No. 704 at PP 60 and 101–102.

[72] NGSA comments at 5.

[73] *Id.* at 6 (citing the Policy Statement).

[74] *Id.* at 6–7.

[75] *Id.* at 7.

[76] *Id.*

[77] Policy Statement at P 34 (emphasis added).

[78] Consistent with the determination, we will no longer direct the Commission's staff to retain a list of reportable locations on the Commission's Web site.

imbalance make-ups, and operations.[79] We noted that, while some volumes related to such transactions are not utilized to create price indices, many volumes do refer to or utilize such indices.[80] The Commission concluded that the data collected from such transactions is useful in assessing how spot prices are being used commercially. Specifically, the order required market participants to include on Form No. 552 volumes related to royalty-in-kind transactions and purchases and sales related to production and gathering functions.[81]

Requests for Rehearing or Clarification

52. Regarding transactions on interstate pipelines, Shell and NGSA seek rehearing of Order No. 704 so as to exclude cash-out, imbalance makeup, and operational volumes from the realm of reportable transactions. Both Shell and NGSA argue that such transactions do not affect the interstate natural gas market, though they may often rely upon natural gas indices for their price.[82] Shell states that data regarding such transactions may not reflect actual market activity as prices may vary according to whether the pipeline or shipper owes gas and there is a one-month lag on the timing of many makeup transactions.[83] For this reason, the use of index prices in makeup transactions, Shell argues, does not reflect the value of natural gas for purposes of assessing wholesale natural gas spot markets and will actually distort relevant data received by the Commission.[84] In the alternative, if rehearing on this point is denied, Shell seeks clarification that, if a pipeline provides imbalance cash-out data, then shippers need not provide the identical data on Form No. 552.[85] NGSA reiterates many of these arguments, adds that pipeline balancing transactions are governed by the pipeline's tariff, and argues that balancing should not be considered a purchase or sale in the wholesale market.[86]

53. Regarding intrastate pipelines, Copano seeks clarification or rehearing regarding whether ''non-interstate pipeline'' market participants must report, and include for purposes of meeting the *de minimis* threshold, volumes related to cash-outs and other operational activities.[87] Copano argues, much as does Shell and NGSA regarding interstate pipelines, that these sorts of transactions are operational in nature, are not based on market conditions, and provide no benefit to the Commission's transparency goals.[88]

54. Regarding transactions involving end-users, AF&PA and IECA, in a joint submittal, seek clarification or rehearing to exempt balancing-type transactions from reporting. Additionally, these entities request that blanket certificate holders under section 284.402, that hold such a certificate solely by virtue of their status as a pipeline customer engaged in balancing or cash out transactions pursuant to a consumer level gas service contract, be allowed to forego filing of Form No. 552.[89] AF&PA and IECA argue that the benefit of obtaining this information is minimal compared to the burden of reporting the data. They contend that: (1) Such transactions are often ''involuntary'' and that it may be very difficult for end-users to determine whether their balancing activity exceeds the *de minimis* threshold; (2) the applicable volumes already likely are reported at the pipeline level; and (3) balancing transactions that occur pursuant to individual end-use contracts will not factor appreciatively into wholesale price formation.[90] They also state that it is likely that many end-user blanket certificate holders under section 284.402 do not know that they hold such certificate authority or that balancing provisions in existing contracts with pipelines could trigger the rule's annual reporting requirement.[91]

55. Shell seeks clarification that ''in-kind'' balancing transactions of all stripes are not reportable transactions under the rule as such transactions do not involve a ''sale'' or a ''purchase.''[92] Relatedly, NGSA requests clarification or rehearing, as necessary, that the entity that purchases or sells royalty-in-kind interests is responsible for reporting royalty-in-kind transactions—not well operators.[93] NGSA argues that well operators do not necessarily have knowledge of the contractual relations of royalty interest holders.[94]

56. Shell also seeks clarification regarding the location that cash-out, in-kind, or other imbalance transactions occur for purposes of determining whether the transaction occurs at a ''reportable location.''[95] Shell requests further clarification as to whether such transactions are considered ''next-day,'' ''next-month,'' or ''other'' for purposes of completing Form No. 552.[96] Finally, Shell seeks clarification that all production-related balancing activities, such as those between producers and working interest owners, are not to be reported.[97] We understand that producers at the technical conferences requested similar clarification from staff.

57. In supplemental comments, NGSA suggests that, if the Commission continues to require the submission of cash-out transaction data (including thermal reduction volumes), such data should be reported on a separate line on Form No. 552.[98]

58. A significant number of commenters at the technical conferences raised questions regarding balancing transactions of various types. Commenters wished to know whether balancing transactions were to be reported on a ''net'' basis for each year or whether activity in each direction (cash-ins and cash-outs) should be separately accounted.

Commission Determination

59. We deny the requests for rehearing. Balancing, cash-out, operational, in-kind, and similar transactions must be reported on Form No. 552 if they rely upon, contribute to, or could contribute to a price index.

60. Section 23 of the NGA requires that our data collection have ''due regard'' for ''the integrity of [the physical natural gas] markets, [and] fair competition.''[99] Public confidence in the reporting of natural gas prices to gas price index developers and the reasonable use and reliance on such indices in the market is squarely within the Commission's purview. This includes not just transactions that *directly* impact wholesale price formation, but also transactions that reference indices. As we stated in Order No. 704, one of the goals of Form No. 552 is to allow the Commission to ''not only understand the transactions used to formulate price indices; it is to understand how influential price indices are in the overall transacting of

[79] Order No. 704 at P 107.

[80] *Id.* P 108.

[81] *Id.*

[82] Shell comments at 14–15; NGSA comments at 11.

[83] Shell comments at 14–15.

[84] *Id.* at 15.

[85] *Id.* at 16.

[86] NGSA comments at 9–10. NGSA repeats many of these same arguments in its subsequent supplemental comments at 4–6. *See also* Shell comments at 15–16 (stating in passing that imbalance trading transactions should not be considered a purchase or sale).

[87] Copano comments at 8–9.

[88] *Id.* at 9–10.

[89] AF&PA/IECA comments at 6.

[90] *Id.* at 4–6.

[91] *Id.* at 6–7.

[92] Shell comments at 15–16.

[93] NGSA comments at 12–13.

[94] *Id.* at 12.

[95] Shell comments at 17.

[96] *Id.*

[97] *Id.*

[98] NGSA supplemental comments at 4.

[99] 15 U.S.C. section 717t–2(a)(1).

natural gas in U.S. wholesale markets.'' [100] It has been our experience that a significant number of balancing, cash-out, and similar transactions include references to price indices. Understanding the magnitude of this reliance on price indices is therefore a legitimate policy goal. Form No. 552 will provide this information and we can conceive of no less intrusive way to obtain this relevant data.

61. In any event, we do not agree with the proposition that balancing transactions, as described by commenters, could not themselves contribute to the formation of price indices. The fact that a purchase or sale is made for operational or balancing, rather than market, reasons is irrelevant. This includes, for example, base or cushion gas purchases for storage facilities, balancing between pipelines or between a supplier and a customer, and purchases of gas for compression. Some portion of these transactions could be utilized to establish index prices. Balancing, cash-out, operational, and in-kind transactions should therefore be reportable on Form No. 552 to the same extent as other types of transactions.[101]

62. Further, reporting of balancing transactions by *all* entities subject to the annual reporting requirement is entirely appropriate. Specifically, balancing transactions involving end-users are likely a significant total of natural gas contracts that reference price indices. Understanding the prevalence of such contracts may allow the Commission and other market observers to assess weaknesses in price index development.[102]

63. For all these reasons, we continue to require that reportable sales and purchases on Form No. 552 include balancing, cash-out, operational, and in-kind transactions that utilize, contribute to, or could contribute to the formation of a price index.

G. Safe Harbor

64. In Order No. 704, we noted our intent not to prosecute or penalize companies for inadvertent reporting errors on Form No. 552.[103] However, we drew a clear distinction between the safe harbor provided to voluntary reporting to price index publishers in the Policy Statement and the mandatory annual report required by Order No. 704.[104] The Commission rejected calls to include a similar safe harbor for the submission of Form No. 552.

Requests for Rehearing or Clarification

65. Shell notes that the Commission stated that it ''does not intend to prosecute or penalize parties for inadvertent errors in reporting,'' but did not include a safe harbor provision for market participants that attempt to comply in good faith with Order No. 704. Shell urges the Commission to adopt an explicit, rebuttable presumption of good faith as it did in the Policy Statement on price reporting.[105]

66. Powerex Corporation (Powerex) notes that, in the April 2007 NOPR, the Commission responded to queries from ''several data providers * * * as to whether they may report certain classes of products traded, but not others.'' [106] The April 2007 NOPR stated that ''a data provider remains eligible for the safe harbor provisions if it reports certain products, but not others, provided that it provides all of the same type of transactions and that it notifies the Commission which products it will report in its annual filing or other notification.'' [107] The Commission stated that it would repeat this safe harbor clarification in the final rule. However, no such clarification was included in Order No. 704.

67. In supplemental comments to the technical conferences, AGA requests that the Commission institute a ''pilot program'' for compliance with Order No. 704 for calendar year 2008 data.[108] AGA suggests that the Commission not penalize market participants that make good faith efforts to complete Form No. 552 but ''make errors'' or ''include data that is inconsistent with the way other market participants have completed the form.'' [109] NGSA, in supplemental comments, requests that the Commission adopt a safe harbor for 2008 calendar-year data, including allowing respondents ''to base information * * * on transaction data collected using existing processes and systems.'' [110]

Commission Determination

68. The Commission herein adopts a one-year safe harbor, covering transactions occurring in calendar year 2008 and reported on Form No. 552 on May 1, 2009. However, we decline to extend this safe harbor for additional calendar year reporting.

69. The Policy Statement includes a safe harbor provision that grants a data provider that adopts the Policy Statement standards a rebuttable presumption that data submitted to index developers is accurate, timely, and submitted in good faith.[111] However, a similar perpetual safe harbor is not warranted regarding the reporting of data on Form No. 552. The Policy Statement set forth standards that data providers could choose to adopt should they voluntarily elect to provide data to price index developers. One goal of the Policy Statement was to ''encourage [industry participants] voluntarily to report energy transactions to the providers of price indices.'' [112] The safe harbor that we adopted in the Policy Statement was a direct extension of this policy goal.

70. Form No. 552 is a mandatory annual filing adopted consistent with EPAct 2005, not the voluntary reporting of price data to an index developer. There is no policy need to provide an incentive for the filing of Form No. 552 similar to the encouragement to reporting price data to index developers. Other mandatory forms, such as FERC Form No. 2, do not include such a safe harbor. For this reason, we are not persuaded that a perpetual safe harbor is warranted.

71. However, a one-year safe harbor (including data collected for calendar year 2008 and reported by May 1, 2009) is appropriate. Market participants have begun data collection for the current calendar year without the benefit of an order on rehearing of Order No. 704. We acknowledge that this Order on Rehearing and Clarification is issued well after respondents' data collection has been underway for 2008. Further, we herein offer a number of clarifications of Order No. 704 that may impact such data collection activities. A one-time safe harbor for the 2009 Form No. 552 is, under these unique circumstances, reasonable. Consistent with the Policy Statement, the

[100] Order No. 704 at P 73.

[101] As with the reporting of purchase and sale transactions, we clarify that balancing transactions should be reported for both cash-ins and cash-outs and not on a net basis.

[102] Technical requests regarding how these types of transactions should be reported on Form No. 552 are addressed through clarifications discussed elsewhere in this order. Regarding the request for clarification by AF&PA and IECA on this point, the Commission declines to clarify the Final Rule in the manner suggested by the commenters. While AF&PA and IECA did not supply sufficient detail in their request regarding the transactions of concern to their members for us to offer more specific guidance, we expect that the clarifications provided in this order will allow these organizations' members to determine both whether they must submit Form No. 552 and the transaction volumes that must be reported therein.

[103] Order No. 704 at P 114.

[104] *Id.*

[105] Shell comments at 29–31.

[106] Powerex comments at 5.

[107] *Id.*

[108] AGA supplemental comments at 2–3.

[109] *Id.*

[110] NGSA supplemental comments at 3.

[111] *See* Policy Statement at P 37.

[112] *Id.* P 3.

Commission finds that respondents submitting Form No. 552 in 2009 will benefit from a rebuttable presumption that the data provided is accurate and submitted in good faith. Further, we do not intend to penalize respondents for errors in reporting on Form No. 552 provided that respondents use reasonable efforts to comply with the regulations regarding and instructions for Form No. 552. We emphasize that the Commission expects respondents submitting Form No. 552 in 2009 to do so in good faith and on a timely basis.

H. Additional Clarifications

72. In addition to resolution of the rehearing and clarification issues discussed above, we clarify a number of minor or technical aspects of Form No. 552.

Some Volumes Associated With Transactions Outside the Lower 48 States Should Be Reported

73. The Canadian Association of Petroleum Producers (CAPP), Canadian Suppliers,[113] and Powerex request clarification, or in the alternative, rehearing, that reported data should include only sales or purchases made inside the geographic boundaries of the United States.[114] Marathon Oil Company (Marathon) and NGSA request clarification or rehearing regarding the scope of the rule vis-à-vis natural gas production in Alaska.[115] AGA, in supplemental comments, also requests that the Commission address this issue.[116]

74. Regarding transactions involving possible international transportation, we clarify that: (1) Volumes originating outside the lower 48 states and delivered at locations outside the lower 48 states are not reportable; (2) volumes originating from inside the lower 48 states and delivered outside the lower 48 states are reportable; and (3) volumes delivered inside the lower 48 states are reportable. Thus, any volumes that originate or are delivered into the lower 48 states should be reported on Form No. 552 to the same extent as purely domestic volumes. Form No. 552 is designed to capture all transactions that reference price indices or that could contribute to price indices and these types of international transactions are not categorically excluded.

Transactions Related to Exploration Activities, Production Area Operations, and Gathering Functions Are Not Exempted From Reporting

75. Shell and NGSA request clarification or rehearing of Order No. 704 so as to categorically exclude exploration activities, production area operations, and gathering functions from reporting. They argue that the entirety of the Commission's rationale for including these transactions is that these transactions often make use of price indices.[117] They also argue that these transactions do not impact the wholesale interstate gas market and are excluded from traditional NGA regulation under section 1(b) of the Act.[118]

76. In Order No. 704, the Commission stated that, ''while these transactions may not affect the formation of price indices in wholesale markets, these transactions often make use of price indices * * * to the extent that transfers of value take place based on price indices, it is important that the Commission and other market observers be able to understand the extent of that transfer and its dependency on price indices as well.'' [119] As explained in the order, determining the scope of price index reliance in the market is a significant goal of this rulemaking. The public availability of this data will increase market transparency and confidence. Transactions involving exploration activities, production area operations, and gathering functions that rely upon or could contribute to the creation of price indices are to be reported in the same manner as other types of transactions.

Transactions Involving Unprocessed Gas Are Not Reportable

77. Hess Corporation (Hess) requests rehearing of Order No. 704 so as to exclude entities engaged in transactions behind a processing plant priced pursuant to a percentage-of-proceeds contract under which the producer is entitled to receive a percentage of the proceeds realized by the buyer upon resale of the natural gas.[120] Similarly, the Oklahoma Independent Petroleum Association (OIPA) seeks rehearing of Order No. 704 so as to exempt producers of natural gas that sell wellhead gas at the initial first sales point under a percentage of proceeds contract.[121]

78. We agree with Hess and OIPA that transactions regarding unprocessed gas should not be reported on Form No. 552 and should not be counted when determining whether an entity falls below the *de minimis* threshold. Transactions involving unprocessed natural gas are not relevant to wholesale price formation.

A Customer of an Asset Manager Is Responsible for Reporting Volumes Managed by the Asset Manager

79. Order No. 704 states that asset managers may not aggregate customer volumes and report the same on Form No. 552.[122] NGSA requests that the Commission clarify that individual customers of asset managers are responsible for the submission of Form No. 552 and reporting volumes managed by the asset manager as well as any other reportable sales or purchases.[123]

80. We clarify the rule in the manner suggested by NGSA. In Order No. 704, we stated that asset managers may not report aggregated information for their customers.[124] However, this statement should not be read so as to relieve customers that hire asset managers from their obligation to file Form No. 552 if they are required to do so. Individual customers of asset managers (assuming that their activities do not fall below the *de minimis* threshold) are responsible for reporting volumes both as managed by an asset manager and independently sold and purchased. The Commission also notes that an asset manager, to the extent that its market activities are not undertaken on behalf of an asset management client, may itself be required to submit Form No. 552.

A Public Joint Action Agency May Report an Aggregate of Members' Volumes

81. Order No. 704 does not directly address the filing of Form No. 552 by public joint action agencies. APGA requests clarification that a public joint action agency may aggregate members' annual volume data for purposes of the report.[125] APGA notes that, in Order No. 704, aggregation is permitted between privately-owned affiliates.[126]

82. We clarify that public joint action agencies, such as certain members of APGA, will be allowed to report members' data on an aggregate basis in the same manner as corporate affiliates. We see no reason to treat public joint action agencies differently from private

[113] Collectively, Encana Marketing (USA) Inc., Nexen Marketing (USA) Inc., Petro-Canada Hydrocarbons Inc., and Talisman Energy Inc.

[114] CAPP comments at 1; Canadian Suppliers comments at 3; Powerex comments at 6–7.

[115] Marathon comments at 4–5; NGSA comments at 13–14.

[116] AGA supplemental comments at 6–9.

[117] Shell comments at 9; NGSA comments at 11–12.

[118] Shell comments at 10; NGSA comments at 11.

[119] Order No. 704 at P 108.

[120] Hess comments at 1.

[121] OIPA comments at 2.

[122] Order No. 704 at P 98.

[123] NGSA comments at 15.

[124] Order No. 704 at P 98.

[125] APGA comments at 2–3.

[126] *Id.* at 2 (citing Order No. 704 at P 94).

corporate families. Allowing a public joint action agency to report members' volumes will significantly reduce the reporting burden on those members. Of course, members of public joint action agencies and affiliates within a corporate family remain free to report separately, should they wish. Additionally, we clarify that arms-length transactions between members of a public joint action agency may be reportable transactions.

Physically-Settled Non-NYMEX Options Are Reportable

83. Order No. 704 excluded from reporting NYMEX options that physically settle. The rationale for this exclusion was that data regarding these transactions did not necessarily relate to fixed-price spot price formation, the data was readily available to the public through NYMEX, and reporting these volumes on Form No. 552 would be duplicative and burdensome.[127] However, Order No. 704 does not explicitly address non-NYMEX transactions that result in physical flow. When such options are exercised, they result in physical deliveries in the wholesale market. NGSA requests clarification and, if needed, rehearing to ensure that physically-settled, non-NYMEX options are included in reported volumes.[128]

84. We agree with NGSA and grant the requested clarification. A physically-settled non-NYMEX transaction must be reported on Form No. 552 if it utilizes or could contribute to the formation of a price index.

Certain ''NYMEX Plus'' Contracts Are Reportable

85. Order No. 704 excluded from reporting any type of financially-settled transaction.[129] NEM requests clarification regarding reporting of ''NYMEX Plus'' contract volumes. Specifically, NEM requests clarification regarding the definition of Physical Natural Gas on Form No. 552.[130] The form excludes from reporting ''any type of financially-settled transaction.'' NEM is uncertain whether NYMEX Plus contracts fall into this exclusion. NEM explains that under a NYMEX Plus contract an entity purchases or sells a volume of gas on a wholesale basis at a reportable location for a month or series of months with the price determined by reference to the monthly settlement price of a NYMEX futures contract plus an adder.[131] NEM is unsure whether such volumes should be reported on Form No. 552 line 5 as ''prices that refer to published next-month gas price indices'' or line 6 (the ''other'' category).[132] NEM is also uncertain as to: (1) The calendar year and months in which contract volumes related to a multi-month or multi-year NYMEX Plus contract should be reported; and (2) the price that should be reported on Form No. 552 if a price is to be set at a future date.[133]

86. Based upon the facts as detailed by NEM, the Commission believes that only a subset of NYMEX Plus contracts should be reported. Specifically, we clarify that NYMEX Plus transactions are reportable only when: (1) Executed during bid week and that can contribute to a next-month price index, or (2) they utilize a NYMEX settlement price during bid week that can contribute to a next-month index. In that regard, the Commission is adding a new line between current lines 6 and 7 to page 5 of Form No. 552 for the purpose of reporting data regarding NYMEX Plus and other ''triggered'' physical gas transactions.

87. Further, we clarify that, for all contracts where deliveries occur or may occur over multiple calendar years and such volumes are reportable, only volumes attributable for delivery that use or may contribute to the formation of price indices during the subject calendar year should be reported on Form No. 552. In Order No. 704, the Commission indicated that transactions are to be reported based upon whether their expected delivery dates are within the reporting year—contract formation dates are irrelevant.[134] For example, for a contract that could contribute to the formation of a price index and requires deliveries at times between July of the first year through February of the next, the respondent should report July–December volumes for the Form No. 552 corresponding to the first year's volumes and January–February volumes in the next year's Form No. 552. For a multi-year contract that relies on a price index to establish a price, the relevant volumes should be reported in the year in which the index is referenced.

Bid-Week, Fixed Price Differential Physical Basis Transactions Tied to the Last Day of Settlement Are Reportable

88. NGSA requests rehearing such that the definition of ''Fixed Price'' in Form No. 552 includes bid-week fixed price differential physical basis transactions tied to the last day of settlement.[135] NGSA notes that these agreements form a material portion of the reported transactions at index points.[136] AGA, in supplemental comments in the docket, suggests that physical basis transactions be reported on a separate line on Form No. 552.[137] NGSA argues that including these volumes would ease the administrative burden on respondents as these volumes would not need to be monitored and removed from aggregate volume numbers.[138]

89. The Commission agrees that Form No. 552 should include bid-week, fixed price differential physical basis transactions. These transactions are a significant aspect of wholesale natural gas markets and utilize or could contribute to the formation of price indices. Consistent with AGA's recommendation, we will include a new line item in Form No. 552, requiring the reporting of all physical basis transactions, including fixed differential basis transactions that can contribute to or rely upon a price index.

All Data Provided on Form No. 552 Will Be Publicly Available

90. At least one participant at the technical conference requested that the Commission act to protect allegedly proprietary information contained in completed Form No. 552. Specifically, the concern was raised by Samson Resources Company (Samson) that, by requiring submission of data based upon transactions at specific locations, the form would provide sensitive commercial information to competitors who may already know the point or points where the respondent transacts. Samson also claimed that the names of affiliates should be confidential as well.

91. We reiterate that Form No. 552 data will be publicly available. In Order No. 704, the Commission addressed requests that data included on Form No. 552 be treated as confidential or proprietary.[139] We found that Congress directed the Commission to provide aggregate information to the public. We balanced this transparency goal with the asserted need for confidentiality. Among the factors we considered were: (1) Data would be reported in the aggregate; (2) no specific pricing information would be reported; (3) data

[127] Order No. 704 at P 113.

[128] NGSA comments at 14.

[129] Order No. 704 at P 111 and Form No. 552, Definition VII, Physical Natural Gas.

[130] NEM comments at 4–6.

[131] *Id.* at 3.

[132] *Id.* at 3–4.

[133] NEM comments at 4–5.

[134] Order No. 704 at P 60.

[135] These types of transactions involve transfers of physical natural gas utilizing basis differentials. The transactions are executed during the bid-week at a fixed differential to the last day of settlement.

[136] NGSA comments at 8.

[137] AGA supplemental comments at 5–6.

[138] NGSA comments at 8.

[139] Order No. 704 at PP 82–84.

would be reported on a national level, not locally or regionally; and (4) data would not be reported until four months following the reporting year.[140] We see no reason to modify our determination in this regard. We note, however, that our determination herein to eliminate the reporting of data at specific reportable locations, further reduces any concerns that reported data is commercially sensitive.

We Decline To Modify the Effective Date of the Rule

92. Under Order No. 704, respondents must submit Form No. 552 no later than May 1, 2009 for data collected in calendar year 2008.[141] We understand that one participant at the technical conference requested that the Commission delay reporting of data until 2010 (for calendar year 2009 data). NiSource argued that it did not have the ability to electronically record data required by Form No. 552 and, given that the Commission had yet to issue an order on rehearing, it may be very difficult or impossible for some companies to comply with a 2009 filing date.

93. The Commission declines to modify the effective date of the rule or the date by which Form No. 552 is first to be filed. We note that no entity raised this issue on rehearing or a formal request for clarification. We have confidence in respondents' capabilities to report the general volume data requested on Form No. 552 by the May 1, 2009 filing date. With the adoption of a one-year safe harbor, discussed above, concerns regarding the difficulty of collecting 2008 data for reporting in 2009 should be mitigated.

We Do Not at This Time Establish Additional Formal Procedures To Address Market Participant Questions Regarding Form No. 552

94. NEM requests that the Commission establish ongoing procedures in which staff may offer informal advice to market participants regarding reporting requirements in Form No. 552. NEM proposes a ''technical compliance forum'' to include a combination of measures such as an additional hotline, a designated interactive Web page for industry questions regarding Form No. 552 (including a Frequently Asked Questions page), designation of specific staff members to field questions, and periodic technical conferences leading up to the May 2009 filing deadline.[142] Additionally, AGA and Merrill Lynch Commodities (Merrill Lynch), during the technical conference process, suggested that staff complete and distribute a sample Form No. 552 based upon various types of transactions. AGA also requested in supplemental comments that the Commission commit to provide further guidance on the reporting obligation following submission of annual reports in 2009.[143]

95. We do not believe that additional informational or educational outreach regarding Form No. 552 is necessary at this time. To the extent that additional clarification is necessary following the issuance of this Order on Rehearing and Clarification, requests for further clarification and rehearing are permitted and additional technical conferences may be held at our discretion. Further, we note that, once entities begin to complete Form No. 552 with calendar year 2008 data, respondents may direct informal questions through appropriate means, including the new compliance help desk.[144]

The Reach of the Safe Harbor Provision in the Policy Statement On Natural Gas and Electric Price Indices

96. Referring to the 2003 Policy Statement, Order No. 704 stated, in passing, that ''[a] market participant that does not hold blanket sales certificates is not required to comply with the Policy Statement processes, nor does it receive the safe harbor available in the Policy Statement.'' [145] Southern Company Services, Inc. (SCS) requests clarification of this statement. SCS argues that non-jurisdictional entities have engaged in price reporting while relying on an interpretation of the Policy Statement's safe harbor provision. SCS argues that the Policy Statement safe harbor applies to any ''data provider'' regardless of whether the provider is a certificate holder.[146]

97. SCS's request is effectively a request to clarify the Policy Statement, not Order No. 704. The referenced comment was not a prerequisite to our determinations in the order. SCS's request is inappropriate as a request for clarification of Order No. 704.

III. Information Collection Statement

98. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, recordkeeping, and public disclosure (collections of information) imposed by an agency.[147] The information collection requirements for Form No. 552 respondents were approved under OMB Control Nos. 1902–0242. This order further revises these requirements in order to more clearly state the obligations imposed in Order No. 704, but does not substantively alter those requirements. OMB approval of this order is therefore unnecessary. However, the Commission will send a copy of this order to OMB for informational purposes only.

IV. Environmental Analysis

99. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[148] The actions taken here fall within categorical exclusions in the Commission's regulations for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[149] Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

V. Regulatory Flexibility Act

100. The Regulatory Flexibility Act of 1980 (RFA) [150] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The RFA requires consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on such entities. The RFA does not, however, mandate any particular outcome in a rulemaking. At a minimum, agencies are to consider the following alternatives: Establishment of different compliance or reporting requirements for small entities or timetables that take into account the resources available to small entities; clarification, consolidation, or simplification of compliance and reporting requirements for small entities; use of performance rather than design standards; and exemption for certain or all small entities from coverage of the rule, in whole or in part.

101. The annual reporting requirement set forth in the Order on Rehearing and Clarification will not have a significant economic impact on a substantial number of small entities. The requirement for annual reporting of

[140] *Id.* P 83.

[141] *Id.* P 105.

[142] NEM comments at 2.

[143] AGA supplemental comments at 3.

[144] *See Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157 (2008).

[145] Order No. 704 at P 96.

[146] SCS comments at 2–3.

[147] 5 CFR 1320.

[148] Order No. 486, *Regulations Implementing the National Environmental Policy Act*, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs ¶ 30,783 (1987).

[149] 18 CFR 380.4(a)(5) and (a)(27).

[150] 5 U.S.C. 601–612.

physical natural gas transactions will have minimal impact on small entities. By incorporating a *de minimis* exemption into the regulations, the Commission has reduced the number of small entities subject to the requirements; *de minimis* entities without blanket sales certificates will not be required to report. This reporting requirement will affect small entities but the burden on them will be minimal. For each entity, small or otherwise, that is required to comply with the annual reporting requirement, the Commission estimates that the compliance would require a one-time cost of approximately $4,000 and an annual cost thereafter of $400. Although some costs would increase for market participants with a greater number of transactions, we expect that that increase would be likely offset because such entities would have already compiled information regarding their transactions in the aggregate. This amount is not a significant burden on small entities. The *de minimis* exemption provides a regulatory alternative that will reduce the economic impact on certain small entities from coverage of the rule. Accordingly, the Commission certifies that the order will not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

102. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

103. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

104. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov*.

VII. Effective Date

105. Changes to Order No. 704 adopted in this Order on Rehearing and Clarification will become effective October 26, 2008.

The Commission orders:

The requests for clarification and rehearing are granted in part and denied in part as discussed in the body of this order.

List of Subjects

18 CFR Part 260

Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 284

Continental shelf; Natural gas; Reporting and recordkeeping requirements.

18 CFR Part 385

Administrative practice and procedure; Electric power; Penalties; Pipelines; Reporting and recordkeeping requirements.

By the Commission.

Kimberly D. Bose,

Secretary.

■ In consideration of the foregoing, the Commission amends Chapter I, Title 18, Code of Federal Regulations to read as follows:

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 2. Sec. 260.401 is revised as follows:

■ a. Paragraph (a) is amended by removing the word ''reporting'' between the words ''annual'' and ''report.''

■ b. Paragraph (b)(1) introductory text is amended by removing the word ''wholesale,'' between the words ''in'' and ''physical'' and removing the word ''As'' and inserting the words, ''However, as'' at the beginning of the final sentence.

■ c. Paragraph (b)(1)(i) is amended by removing the word ''and'' at the end of the paragraph.

■ d. Paragraph (b)(1)(ii) is revised and paragraph 260.401(b)(1)(iii) is added to read as follows:

§ 260.401 FERC Form No. 552, Annual Report of Natural Gas Transactions.

* * * * *

(b) * * *

(1) * * *

(ii) It engages in reportable physical natural gas sales that amount to less than 2,200,000 MMBtus for the previous calendar year; and

(iii) It engages in reportable physical natural gas purchases that amount to less than 2,200,000 MMBtus for the previous calendar year.

* * * * *

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

■ 3. The authority citation for Part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

■ 4. Section 284.403(a) is amended by removing the word ''must'' in the final sentence, and inserting the word ''Seller'' in its place.

Note: The following appendix will not be published in the Code of Federal Regulations.

BILLING CODE 6717–01–P

Appendix A to Order No. 704-A:

THIS FILING IS
Item 1: □ An Initial (Original) Submission OR □ Resubmission No. ___

Form No. 552
OMB No. 1902-0242
Expires (mm/dd/yyyy)

FERC TRANSACTION REPORT
FERC FORM No. 552: Annual Report of Natural Gas Transactions

These reports are mandatory under the Natural Gas Act, Section 23(a)(2), and 18 CFR Parts 260.401. Failure to report may result in criminal fines, civil penalties, and other sanctions as provided by law. The Federal Energy Regulatory Commission does not consider these reports to be of a confidential nature.

Exact Legal Name of Respondent (Company)	Year of Report End of

FERC FORM No. 552 (New)

INSTRUCTIONS FOR FILING THE FERC FORM NO. 552

GENERAL INFORMATION

I Purpose

FERC Form No. 552 collects transactional information from natural gas market participants. The filing of this information is necessary to provide information regarding the use of the natural gas spot markets and the use of fixed and index price transactions. This form is considered to be a non-confidential public use form.

II. Who Must Submit

Physical natural gas buyers and sellers must complete and file the form annually if they make use of a blanket sales certificate under § 284.402 or § 284.284, or if their reportable physical natural gas purchases or sales were equal to or greater than 2.2 million (2,200,000) MMBtus (*i.e.*, 2.2 TBtu) in the reporting year. As explained elsewhere in Form No. 552, not all transactions involving physical natural gas are reportable. Potential respondents should review the instructions to determine whether their reportable purchases or their reportable sales meet or exceed this *de minimis* threshold. For example, purchases and sales of natural gas made at retail to a natural gas consumer pursuant to a state commission-approved bundled tariff rate are not reportable.

If a natural gas market participant is required to complete and file Form No. 552 because it makes use of a blanket sales certificate under § 284.402 or § 284.284, but its natural gas purchases and sales were each lower than 2.2 TBtus in the reporting year, then it is not required to report the schedule of Form No. 552 that collects volumetric information.

III. What and Where to Submit

(a) Submit FERC Form No. 552 electronically through the submission software at http://www.ferc.gov/docs-filing/eforms.asp#552.

(b) The Corporate Officer Certification must be submitted electronically as part of the FERC Form No. 552 filing.

(c) Users may obtain additional blank copies of FERC Form No. 552 for reference free of charge from: http://www.ferc.gov/docs-filing/eforms.asp#552. Copies may also be obtained from the Public Reference and Files Maintenance Branch, Federal Energy Regulatory Commission, 888 First Street, NE, Room 2A, Washington, DC 20426 or by calling (202) 502-8371.

IV. When to Submit:

The FERC Form No. 552 must be filed by May 1st of the year following the reporting year (18 CFR § 260.401).

V. Where to Send Comments on Public Reporting Burden.

The public reporting burden for the FERC Form No. 552 collection of information is estimated to average 4 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data-needed, and completing and reviewing the collection of information. This estimate was noted in the Notice of Purposed Rulemaking and in the Final Rule (RM07-10-000) and addressed by commenters.

Filers may send additional comments regarding these burden estimates or any aspect of these collections of information, including suggestions for reducing burden, to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 (Attention: Information Clearance Officer); and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission). No person shall be subject to any penalty if any collection of information does not display a valid control number (44 U.S.C. § 3512 (a)).

GENERAL INSTRUCTIONS

I. All respondents must identify themselves annually by completing the first part of Form No. 552.

II. Aggregation across affiliates (or members of a public joint action agency) is permitted, though not required. If a respondent is aggregating volumes across affiliates, the respondent must complete the “Schedule of Reporting Companies” (page 3) which lists those affiliates and a separate “Price Index Reporting” schedule for each affiliate.

III. Asset managers may not report aggregated information for their customers in Form No. 552. Customers of asset managers are individually responsible for determining whether they must file Form No. 552. An asset manager may itself be required to submit Form No. 552 to the extent that its activities are not undertaken on behalf of an asset management client.

IV. Report all gas quantities in Trillion British Thermal Unit (TBtu) unless the schedule specifically requires the reporting in another unit of measurement.

V. For reported volumes, enter numbers to the tenth of a unit only, except where otherwise noted.

VI. Report volumes of physical natural gas as explained in the definitions.

VII. Complete each question fully and accurately, even if it has been answered in a previous report. Enter the word "None" where it truly and completely states the fact.

VIII. Enter the month, day, and year for all dates. Use customary abbreviations. **The "Date of Report" included in the header of each page is to be completed only for resubmissions** (see IX. below).

IX. For any resubmissions, submit the electronic filing using the form submission only. Please explain the reason for the resubmission in a footnote to the data field.

X. Footnote and further explain as necessary.

XI. Do not make references to reports of previous periods/years or to other reports in lieu of required entries, except as specifically authorized.

XII. Regarding reportable transactions that involve deliveries that occur or may occur over multiple calendar years, only volumes for delivery that use, contribute to, or may contribute to the formation of a price index during the subject calendar year should be reported. For a multi-year contract that relies on a price index to establish a price, volumes should be reported in the year in which the index is referenced.

DEFINITIONS

I. Affiliate– An affiliate means a person who controls, is controlled by or is under common control with another person. For purposes of the completion of Form No. 552, a joint public action agency may submit members' collective information as if those members were affiliates.

II. Blanket Certificate – A blanket certificate means either (i) a blanket marketing certificate granted to a person that is not an interstate pipeline pursuant to 18 CFR § 284.402, or (ii) a blanket certificate for unbundled sales service granted to an interstate pipeline pursuant to 18 CFR § 284.284.

III. Date of Report – The date the report is submitted to the Commission.

IV. Fixed Price – A "Physical Natural Gas Transaction" price determined by agreement between buyer and seller and not benchmarked to any other source of information. For example, physical basis transactions that directly refer to futures prices, for the purpose of this form, are not "Fixed Price" transactions.

V. Next-Day Delivery – Delivery of a transaction executed prior to NAESB nomination deadline (11:30am Central Prevailing Time) on one day for uniform physical delivery over the next pipeline day. Transactions done for Friday are usually for flow on Saturday, Sunday, and Monday inclusive. Trading patterns may vary in the case of holidays or the end of a month that occurs on a weekend.

VI. Next-Month Delivery – Delivery of a transaction executed during the last five (5) business days of one month for uniform physical delivery over the next month.

VII. Physical Natural Gas Transaction – A natural gas transaction that contains an obligation to deliver natural gas at a specified location and at a specified time, with the exception of physically-delivered futures contracts. It is not necessary that natural gas actually be delivered under the transactions, only that the delivery obligation existed in the agreement when executed. Certain Physical Natural Gas Transactions may not remain in existence through the time of delivery because they were traded away or "booked out." For purposes of this form, these transactions should be included whether they went to delivery or not. Order No. 704 and 704-A discuss a variety of particular instances. Physical Natural Gas Transactions are only those transactions for Next-Day Delivery or Next-Month Delivery that refer, contribute, or could contribute to the formation of a price index during the calendar year. The following physical natural gas volumes should be *included* in volumetric data submitted in Form No. 552 if the relevant transactions refer to or could contribute to the formation of a price index:

a. cash-out, imbalance makeup and operational volumes reported by pipelines; and

b. volumes attributable to royalty-in-kind transactions, gas provided for processing such as plant thermal reduction (not including unprocessed gas), and purchases and sales related to the production and gathering function.

Notwithstanding the above, the following volumes should, in all cases, be *excluded* in volumetric data submitted in Form No. 552:

a. sales to and purchases by retail consumers of natural gas pursuant to a state commission-approved bundled tariff,

b. sales or purchases of volumes that originate outside of the lower 48 states of the United States of America and are delivered outside of the lower 48 states,

c. volumes associated with transactions among affiliates,

d. volumes associated with any type of financially-settled transaction,

e. unprocessed gas volumes,

f. volumes traded in futures contracts, even those that go to physical delivery,

g. volumes of imported LNG traded prior to regasification and exported LNG traded after liquefaction, and

h. volumes that are *not* Next-Day Delivery or Next-Month Delivery.

VIII. Price Index Publisher – Companies that report price indices for U.S. wholesale natural gas markets. The list of companies can change over time.

IX. Prices that Refer to (Daily or Monthly) Price Indices – Prices for Physical Natural Gas Transactions that reference directly a daily or monthly index price published by a "Price Index Publisher" rather than a "Fixed Price" or a price that refers directly to some other benchmark.

X. Quantity – Amount of purchases or sales expressed in units of energy "British Thermal Units" (Btu). One million BTUs (MMBtu) are, by definition, the same as one Dekatherm (Dth). A volume of one billion cubic feet (Bcf) of natural gas contains approximately one trillion Btus (TBtu or million MMBtu) of energy depending on the exact energy content of the natural gas. The quantities to be reported in the "Purchase and Sales Information" schedule should be measured in tenths of TBtus.

XI. Reporting Company – The person, corporation, licensee, agency, authority, or other legal entity or instrumentality on whose behalf the report is being submitted by the "Respondent."

XII. Respondent – The person, corporation, licensee, agency, authority, or other legal entity or instrumentality that is submitting the report either on its own behalf, or on behalf of itself and/or its affiliates. A Respondent may choose to either report for all its affiliates collectively, or may choose to have each of its affiliates report separately as their own "Respondent." If reporting collectively, the "Respondent" must report for each "Affiliate" in the "Schedule of Reporting Companies" and the "Price Index Reporting Schedule," and collectively for all its affiliates in the "Purchase and Sales Information" schedule.

XIII. Natural Gas Purchases – The volumetric "Quantity" of "Physical Natural Gas Transactions" purchased by the "Reporting Company" during the "Year of Report."

XIV. Natural Gas Sales – The volumetric "Quantity" of "Physical Natural Gas Transactions" sold by the "Reporting Company" during the "Year of Report."

XV. Year of Report – The calendar year for which the report is being submitted.

ANNUAL REPORT OF NATURAL GAS TRANSACTIONS

IDENTIFICATION OF RESPONDENT		
01 Exact Legal Name of Respondent	02 Year of Report End of	
03 Previous Name and Date of Change (If name changed during year)		
04 Address of Principal Office at End of Year (Street, City, State, Zip Code)		
05 Name of Contact Person	06 Title of Contact Person	
07 Address of Contact Person (Street, City, State, Zip Code)		
08 Email Address of Contact Person		
09 Telephone of Contact Person, Including Area Code	10 This Report is: (1) □ An Original (2) □ A Resubmission	11 Date of Report (MM,DD,YYYY)

ANNUAL CORPORATE OFFICER CERTIFICATION

The undersigned officer certifies that:

I have examined this report and to the best of my knowledge, information, and belief all statements of fact contained in this report are accurate and complete statements of the business affairs of the respondent.

12 Name	13 Title
14 Signature	15 Date Signed

Title 18, U.S.C. 1001, makes it a crime for any person knowingly and willingly to make to any Agency or Department of the United States any false, fictitious or fraudulent statements as to any matter within its jurisdiction.

Name of Respondent*	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report* (Mo, Da, Yr) / /	Year/Period of Report* End of Year/Qtr

List of Schedules

Enter in column (d) the terms "none," "not applicable," or "NA" as appropriate, where no information or amounts have been reported for certain pages. Omit pages where the responses are "none," "not applicable," or "NA."

* An asterisk means that the previous term is explained in more detail in the definitions.

Line No.	Title of Schedule (a)	Reference Page No. (b)	Date Revised (c)	Remarks (d)
1	Schedule of Reporting Companies	3		
2	Price Index Reporting	4		
3	Purchases and Sales Information	5		
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Name of Respondent*	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report* (Mo, Da, Yr) / /	Year/Period of Report* End of Year/Qtr

Schedule of Reporting Companies

If the Respondent* is reporting collectively for multiple Affiliates*, list the exact legal name of those Affiliates* in this form. Respondent* should complete the next schedule, Price Index Reporting, for **each** of these companies separately. Respondent* should complete the "Purchase and Sales Information" schedule only once for these companies collectively.

* An asterisk means that the previous term is explained in more detail in the definitions.

Line No.	List the Exact Legal Names of all Affiliates* Reported by Respondent* below (a)
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Name of Respondent*	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report* (Mo, Da, Yr) / /	Year/Period of Report* End of Year
Name of Reporting Company*	Reporting Company* is: (1) ☐ Same as Respondent* (2) ☐ An Affiliate* of Respondent* (other Affiliates* reported separately)		

Price Index Reporting

Even if the Respondent* is reporting collectively for multiple Affiliates*, the Respondent* still must complete this schedule for each of its Affiliates* separately.

When answering yes/ no questions, to select yes enter 1 in the yes column and 0 in the no column of the appropriate row. To select no enter 1 in the no column and 0 in the yes column of the appropriate row.

* An asterisk means that the previous term is explained in more detail in the definitions.

Line No.	Question (a)	Yes (b)	No (c)
1	At any time during the report year, did the Reporting Company* operate under a Blanket Certificate*?		
2	Did the Reporting Company* report any transaction information to Price Index Publishers* during the Report Year*?		
3	If no on either of lines 1 or 2, skip the question on line 4 and move to line 5.		
4	Did the Reporting Company's* reporting comply with the regulations governing reporting to Price Index Publishers* pursuant to 18 CFR § 284.403?		
5	Were the Reporting Company's* total Natural Gas Purchases* equal to or greater than 2.2 TBtu for the Report Year*?		
6	Were the Reporting Company's* total Natural Gas Sales* equal to or greater than 2.2 TBtu delivered in the Report Year*?		
7	If no on both lines 5 and 6, Reporting Company* is not required to complete the next schedule (*i.e.*, Purchases and Sales Information). If yes on either line 5 or 6, Reporting Company* is required to complete the next schedule, including volumes related both to Natural Gas Purchases* and Natural Gas Sales.*		

Name of Respondent*	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report* (Mo, Da, Yr) / /	Year/Period of Report* End of Year
Name of Reporting Company*	Reporting Company* is: (1) ☐ Same as Respondent* (2) ☐ An Affiliate* of Respondent* (other Affiliates* reported separately)		

Purchase and Sales Information

If the Respondent* is reporting collectively for multiple Affiliates,* the Respondent* should complete this schedule for all of its Affiliate* companies collectively. Volumes should be reported to the nearest tenth of a TBtu.

* An asterisk means that the previous term is explained in more detail in the definitions.

Line No.	Item (a)	Purchases (TBtu) (b)	Sales (TBtu) (c)
1	What was the total volume of Physical Natural Gas Transactions* (sales and purchases) engaged in by the Respondent in the prior calendar year?		
2	Of the amounts reported on line 1, what quantities were contracted at Fixed Prices* for Next-Day Delivery*?		
3	Of the amounts reported on line 1, what quantities were contracted at prices that refer to published Next-Day Delivery* gas price indices?		
4	Of the amounts reported on line 1, what quantities were contracted at Fixed Prices for Next-Month Delivery*?		
5	Of the amounts reported on line 1, what quantities were contracted at prices that refer to* published Next-Month Delivery* gas price indices?		
6	Of the amounts reported on line 1, what quantities were contracted under trigger agreements, such as NYMEX Plus contracts.		
7	Of the amounts reported on line 1, what quantities were contracted as physical basis transactions?		
8	If there is a difference between Respondent's* purchases reported on line 1 and the sum of its purchases on lines 2, 3, 4, 5, 6 and 7, please explain the difference in the space below.		
9	If there is a difference between Respondent's* sales reported on line 1 and the sum of its sales on lines 2, 3, 4, 5, 6 and 7, please explain the difference in the space below.		

[FR Doc. E8–22358 Filed 9–25–08; 8:45 am]
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