Various commenters state that any determination of stranded costs should take into account all offsetting benefits realized by the transmission provider upon a customer’s departure. Some commenters describe these costs as “stranded benefits.”

Most commenters favor the removal of avoided variable costs from the calculation of stranded costs on the basis that only fixed costs are truly stranded.

Some commenters support prioritizing stranded cost recovery. These commenters argue that stranded costs should be categorized and ranked by the degree of responsibility that utilities had for their incurrence. Utilities would be allowed the greatest percentage of recovery for those stranded costs over which they had the least control.

Definition and Calculation of the Competitive Market Value

There generally was no consensus among the commenters concerning how to determine the revenues a utility would receive in a competitive market for the stranded assets, that is, the competitive market value. Proposals for calculating competitive market value include using: (1) The marginal cost of the released capacity; (2) the long-run marginal cost of the most competitive incremental generation replacement technology; (3) the marginal cost of requirements service; (4) a combination of the marginal costs of the utility, alternative suppliers, and others; (5) the cost of a combined cycle combustion turbine; (6) the price paid by the departing generation customer; (7) the highest price available in the market; and (8) auctions. In addition, to the extent that a futures market is sufficiently well-developed when the Commission issues a final rule, several commenters believe that futures market prices could be used as an estimate of market value.

MT Com contrasts the effect of using short-term nonfirm prices instead of long-term firm prices as the competitive market value. It states that if short-term nonfirm prices are used, the stranded cost estimate would be higher, because the market price of short-term nonfirm power is lower than both the market price of long-term firm power and the embedded cost price.

Some commenters express concern regarding the difficulty of determining the market value of the displaced capacity under the revenues lost approach. Among other things, commenters note that because a competitive market does not yet exist, the market price cannot be calculated in advance. For this reason, several commenters support an after-the-fact determination of market value.

Snapshot Approach vs. True-Ups

Commenters are split on whether the revenues lost approach should use a one-time snapshot approach or whether true-ups should be required or allowed. The primary rationale offered in support of a snapshot approach is certainty. The New York Mercantile Exchange only recently began trading in electricity futures and that such trading was limited to two delivery points located within the Western Interconnection.

Federal Energy Regulatory Commission

---


824 TDU Systems proposes that the Commission allow for the recovery of stranded benefits in one of two ways: (1) Require direct payment of stranded benefits to a wholesale purchaser whose contract is terminated or (2) allow a party to continue to receive power at cost-based rates for a period sufficient for the purchaser to be "transitioned" into a competitive market.

825 E.g., ELCON, NY Energy Buyers, SMUD, Capers.


827 E.g., WP&L, DOD, Duke, PSNM, ABATE, Houston L&P. The Commission notes that the

Federal Energy Regulatory Commission

---

1882

DOE003-0526
primary rationale offered in support of true-ups is accuracy.

Commenters that support true-ups note the inaccuracy associated with long-term avoided cost estimates contained in PURPA-mandated QF contracts and maintain that the projections required by the revenues lost approach will produce similarly disastrous results if true-ups are not permitted. As a component of the true-up calculation, some commenters favor inclusion of revenues associated with future load growth of remaining customers.43 According to Electronic Data Systems, if these revenues are not included in a true-up calculation, the utility could over- or under-collect stranded costs, depending on whether and what type of load growth is anticipated. CA Energy Co and American National Power recommend consideration of load growth of remaining customers as a mitigating factor because the load increases of these customers allow the sale of the stranded capacity. CSW, on the other hand, opposes using the future load growth of remaining customers as a mitigation device. CSW states that the benefits of growth on the former supplier’s system should flow to the customers who remain customers of that system. Ohio Ed agrees, except where the customer proves that the utility has deferred or cancelled capacity resource additions in response to departing customers.

Other commenters suggest that the Commission should not prescribe one method over the other.44 EGA, for example, states that customers should have the choice of paying either a projected fixed amount or a charge that is periodically trued up.

Mitigation

A number of commenters agree that the revenues lost approach effectively encompasses mitigation.45 Others argue that mitigation should (or could) be accomplished through divestiture of assets or capacity auctions.46 LG&E states that a utility requesting recovery of stranded costs should be required to auction that portion of its system to the highest bidder. The difference between the auction price and the depreciated value of the auctioned assets could be used to determine stranded costs. However, LG&E does not advocate complete recovery of this difference, rather, it argues that this amount could be used as a starting point.

Several commenters argue that the revenues lost approach can produce anticompetitive results if capacity auctions or divestiture are not required.47 A number of these commenters contend that utilities that recover significant stranded costs (while still maintaining control over the stranded capacity) can use the freed capacity to make sales in the market at subsidized prices. They maintain that these utilities do not have to worry about recovery of fixed costs because those costs are recovered by the stranded cost charge. According to these commenters, utilities can then remarket (or “dump”) stranded capacity at artificially low prices (made possible by the subsidy from the stranded cost recovery) and thereby gain a competitive advantage in other transactions.48

If the utilities are permitted to remarket the displaced capacity, CA Energy Co states that market-sensitive floor prices should be set to prevent utilities from reselling power from stranded assets at artificially low prices.

Suggestions as to how to prevent such anticompetitive consequences include allowing the customer to own or control the residual asset or amount of stranded capacity equivalent to the lost revenues. According to EGA, the customer could market the capacity it would have had to pay for through stranded cost charges and...

43 E.g., Electronic Data Systems, Alma, American National Power, CA Energy Co, NARUC, NRECA.
44 E.g., Atlantic City Electric, EGA, Conservation Law Foundation.
46 E.g., NIEP, LG&E, TDU Systems, EGA, NY Energy Buyers, ELCON, American National Power.

131,036

31,836 Regulations Preambles

342 5-23-96

1883

DOE003-0527

Obtained and made public by the Natural Resources Defense Council, March/April 2002
thus prevent the utility from remarketing the capacity after it has been paid stranded costs.

Several commenters take a harder line and would require suppliers seeking stranded cost recovery to offer for sale to the departing customer a "slice" of their system.\(^\text{529}\) TDU Systems states that the purchase of an undivided slice of the system is superior to divestiture of a specific asset because the utility cannot keep the wheat and leave the purchaser with the chaff. TDU Systems would also make purchase rights to the system assignable. According to TDU Systems, this mitigation scheme is the only possible way to justify the revenues lost approach. TDU Systems argues that this proposal would inflict no harm on the utility, which would be fully compensated for the stranded assets. It also suggests that the ability to purchase a slice of the supplier's system would serve as an important bargaining tool in stranded cost negotiations, which would help level the playing field among the parties.

Other mitigation proposals include: (i) requiring each utility to prepare a mitigation plan under the supervision of an independent expert that must be approved by the parties or by the Commission before stranded cost recovery is permitted;\(^\text{540}\) (ii) requiring a utility to report annually for a five-year period its mitigation activities and to identify its stranded costs yet to be recovered;\(^\text{541}\) and (iii) setting the market value of the displaced capacity at a high level (thereby reducing the stranded cost charge) to provide a mitigation incentive.\(^\text{542}\) A number of commenters support customer-controlled mitigation, arguing, among other things, that the entity responsible for paying stranded costs has the best incentive to mitigate them.\(^\text{543}\) Others support some form of utility sharing of stranded costs to give utilities an incentive to mitigate stranded costs.\(^\text{544}\)

b. Reasonable Expectation Period (Period of Expected Continued Service)

Numerous commenters oppose setting absolute limits on the period over which a customer's liability for stranded costs would be determined.\(^\text{545}\) They suggest instead that the Commission should apply the facts of each case, including the facts used to prove a reasonable expectation of continued service, to its determination of a reasonable expectation period. Among the factors commenters propose for consideration are: the utility's planning horizon; the average remaining life of the utility's generating facilities or a specific number of years that coincides with the duration of a utility-specific stranded cost recovery plan; utility projected load growth; dedicated facility construction lead times; estimated time to market stranded assets; the lesser of the utility's need date for new generation or the crossover date when the market generation price is expected to equal a customer's embedded cost less other charges and compensation; and the period for which estimated revenues exceed market values.

Commenters representing the financial community\(^\text{546}\) oppose limiting cost recovery from the departing generation customer based on the term of the contract. They argue that it was reasonable for a utility to expect to continue to serve a customer, or customers who would take its place, through the life of the assets; otherwise, the asset could not have been financed in the first place.

A number of other commenters urge the Commission to prescribe limits on a customer's maximum liability.\(^\text{547}\) Some commenters believe that the utility's planning horizon is the reasonable expectancy.
tation period.\textsuperscript{46} PSE\&G states that since utilities invested and incurred costs to serve customers based on the planning horizon, the planning horizon is the only logical period. Other commenters propose that the reasonable expectation period be limited to one contract extension period, or to the shortest of: (i) One additional contract renewal period; (ii) the utility's planning horizon; (iii) the period it would do to take load growth on the seller's system to absorb the lost load; or (iv) the contractual notice period.\textsuperscript{49}

Other suggested limits include the weighted average remaining life of all generating assets,\textsuperscript{50} the in-service date of the utility's next avoidable generating unit or purchased power contract that is projected to have a capacity factor comparable to the departing generation customer's load factor minus a one-time mitigation effort,\textsuperscript{51} and a rebuttable presumption that two years is the maximum time for a utility reasonably to expect to receive revenue from tariff sales or "opened-ended" contracts.\textsuperscript{52}

Other commenters propose recovery periods that range from three to five years (e.g., Central Montana EC),\textsuperscript{53} five years (e.g., Public Power Council), and eight years (e.g., Allegheny).\textsuperscript{54}

GA Com and AZ Com state that stranded cost recovery should not go on indefinitely. GA Com states that stranded costs should be collected for a sufficient period of time to ensure full recovery and indifference on the part of the utilities' remaining native load customers. AZ Com states that a specific termination period will also create an incentive for utilities to mitigate stranded costs.

c. Proposed Stranded Cost Recovery Procedures

Several commenters\textsuperscript{55} urge the Commission to be flexible in evaluating proposed mechanisms for recovery of stranded costs, including the payment method, noting that an approach suitable to one utility and its customers may not be suitable to another. They say that utilities within a region might find a mechanism that meets their region's unique characteristics.

Some commenters oppose certain aspects of the procedures proposed in the NOPR. For example, TAPS objects that the NOPR procedure aimed at providing advance notice to the customer of its potential stranded cost obligation resembles the procedure rejected in Cajun. It says that "the customer will likely be forced to spend significant time and resources 'litigating' to determine the price of a product[,] thereby 'introducing' deal-killing transactional costs and uncertainties."

(citing Cajun, 28 F.3d at 179). TAPS proposes that the seller be required to produce a stranded cost estimate that reflects a good faith, reasonable estimate of the likely impact of mitigation and that sellers making excessive and unsupported stranded cost claims be penalized. At a minimum, it argues that the seller should be held responsible for the costs reasonably expended by the buyer to mitigate the stranded cost claim.

DE Muni asserts that if filing a complaint to redress grievances related to the recovery of stranded costs is to be a mean-

\textsuperscript{46} E.g., PSE\&G, PSNM, ELCON, Oklahoma G&E. Duke, Oklahoma G&E; supports use of the utility's planning cycle for retail stranded costs and use of the contract term for wholesale stranded costs. Duke states that the Commission should permit the customer and the transmission provider to establish the compensation period at something less than the maximum period.

\textsuperscript{49} E.g., Utlcorp, WP&L, Missouri Joint Commission, TAPS, Municipal Energy Agency Nebraska, TDU Systems.

\textsuperscript{50} E.g., Carolina P&L.

\textsuperscript{52} E.g., UT Industrial.

\textsuperscript{53} Central Montana describes as "excessive" the recovery period offered by Montana.

\textsuperscript{54} Central Montana states that it gave notice under a five-year notice provision and that Montana responded with a stranded cost demand extending 14 years after notice of termination (nine years from the date service would terminate).

\textsuperscript{55} Allegheny would exempt three types of stranded costs from such a limit: (1) Those due to PURPA power purchases (it submits that these were federally-mandated rather than profit-motivated business decisions); (2) those due to regulatory assets (such as deferred taxes); and (3) those due to municipalization. In addition, it favors establishing a rebuttable presumption that these special costs are eligible for stranded cost recovery.

\textsuperscript{56} E.g., EEI, Centerior, PECO, Houston L&P, Salt River.

\textbf{Federal Energy Regulatory Commission}
ingful remedy, the final rule should set a time limit within which the complaint must be resolved.

A number of commenters offer modifications to the recovery procedures set forth in the NOPR, including: (1) extending a utility’s response time for providing stranded cost liability estimates from 30 days to at least 60 days.956 (2) requiring a utility to provide to each wholesale customer within six months of the effective date of the final rule: (a) the formula that the utility proposes to use to calculate the customer’s maximum possible stranded cost exposure without mitigation; and (b) an actual calculation of the customer’s stranded cost exposure assuming the customer left the utility’s system six months after the effective date of the final rule.957 (3) allowing customers that desire to litigate their stranded cost liability to do so in a forum in which all litigating customers participate.958 (4) requiring utilities to disclose their estimated transition cost liabilities (and the nature of those liabilities) before the effective date of the final rule to permit a realistic evaluation of the scope of the transition cost problem and possibly facilitate resolution of some disputes by settlement.959 (5) requiring any utility seeking stranded cost recovery to provide a list of the stranded facilities to the departing generation customer and offer that customer an equity position in those facilities in return for payment of stranded costs, thereby enabling the departing customer to recover some of its stranded costs payment when any of the facilities becomes useful again.960 (6) requiring a “good faith request” for an estimate of stranded costs based on an expected date of departure from the providing utility’s system and mitigation efforts expected to be undertaken by the utility.961 and (7) requiring documented evidence that a utility made a good faith attempt to settle with a departing generation customer before the utility is given the opportunity to recover stranded costs.962

\[ \text{SCO} = \text{RSE} \times \text{CMVE} \]

where:

\[ \text{RSE} = \text{Revenue Stream Estimate} \]

average annual revenues from the departing generation customer over the three years prior to the customer’s departure (with the variable cost component of the revenues clearly identified). Less the average transmission-related revenues that the host utility would have recovered from the departing generation customer over the same three years under its new wholesale transmission tariff.

\[ \text{CMVE} = \text{Competitive Market Value Estimate} \]

—determined in one of two ways, at the customer’s option: Option (1)—the utility’s estimate of the average annual revenues (over the reasonable expectation period “L” discussed below) that it can receive by selling the released capacity and associated energy, based on a market analysis performed by the utility; or Option (2)—the average annual cost to the customer of replacement capacity and associated energy, based on the customer’s contractual commitment with its new supplier(s). L

\[ \text{Length of Obligation (reasonable expectation period)} \]

—refers to the period of time the utility could have reasonably expected to continue to serve the departing generation customer. We reaffirm that we do not believe that a one-size-fits-all approach is appropriate for determining the length of a customer’s

---

856 E.g., Entergy.
857 E.g., Associated Power.
858 E.g., Associated Power.
859 E.g., Texaco.
860 E.g., Heartland.

Federal Energy Regulatory Commission

Commission Conclusion

We reaffirm our proposal that the determination of recoverable stranded costs should be based on the “revenues lost” approach. We find that the revenues lost approach is the fairest and most efficient way to balance the competing interests of those involved.

After careful consideration of the comments submitted, we have decided to adopt the following formula for calculating a departing generation customer’s stranded cost obligation (SCO), on a present value basis, under a revenues lost approach:

\[ \text{SCO} = \text{RSE} \times \text{CMVE} \]

where:

\[ \text{RSE} = \text{Revenue Stream Estimate} \]

average annual revenues from the departing generation customer over the three years prior to the customer’s departure (with the variable cost component of the revenues clearly identified). Less the average transmission-related revenues that the host utility would have recovered from the departing generation customer over the same three years under its new wholesale transmission tariff.

\[ \text{CMVE} = \text{Competitive Market Value Estimate} \]

—determined in one of two ways, at the customer’s option: Option (1)—the utility’s estimate of the average annual revenues (over the reasonable expectation period “L” discussed below) that it can receive by selling the released capacity and associated energy, based on a market analysis performed by the utility; or Option (2)—the average annual cost to the customer of replacement capacity and associated energy, based on the customer’s contractual commitment with its new supplier(s). L

\[ \text{Length of Obligation (reasonable expectation period)} \]

—refers to the period of time the utility could have reasonably expected to continue to serve the departing generation customer. We reaffirm that we do not believe that a one-size-fits-all approach is appropriate for determining the length of a customer’s

---

861 E.g., PSNM, ELCON.
862 E.g., ELCON.
863 In the case of a retail-turned-wholesale customer, subtraction of distribution system-related costs may also be appropriate.
obligation. If the parties cannot reach agreement as to the length of the customer's obligation, this period is to be determined through litigation as a part of the threshold issue of whether the utility had a reasonable expectation of continuing to serve the customer. 

Application of the foregoing formula and collection of the resulting stranded costs are subject to the following conditions:

1. Cap on SCO. The quantity (RSE-CMVE) can be no greater than the average annual contribution to fixed power supply costs (defined as RSE less variable costs) that would have been made by the departing generation customer had it remained a customer.

2. Changes in Customer Revenues. If the customer's rates (or contract demand amounts, if relevant) changed during the three-year period prior to the termination of its existing requirements contract, then the RSE should be calculated using the customer's most recent 12 months of revenue.

3. CMVE Option 2 Conditions. Option 2 (a CMVE equal to the average cost to the customer of replacement capacity and associated energy) would be available to a customer whose alternative purchase(s) runs concurrent with L, or, if longer than L, contains rates that do not fluctuate over the duration of the contract. The customer would be required to demonstrate (at the time it chooses this option) that the replacement capacity contract(s) is for service equivalent to the released capacity (that is, firm power for a period at least equal to L), and must also clearly identify the rates to be paid for the replacement service.

4. Payment Options. The method and form of payment should be negotiated, but is ultimately left to the customer's discretion. Possible payment options include a lump-sum payment, an amortization of a lump-sum payment over a reasonable period of time, or a surcharge on the customer's transmission rate.

5. Applicability. The formula is designed for determining stranded costs associated with departing wholesale generation customers and for retail-turned wholesale customers.604

6. Marketing/Brokering Option. The Commission will allow the customer, at its sole discretion, a choice to market the released capacity and associated energy (or to contract with a marketer for such service). Alternatively, the customer may choose to broker the released capacity and associated energy (or to contract with a broker).605

7. Released Capacity and Associated Energy. A utility requesting stranded cost recovery must indicate the amount of system capacity and the amount of associated energy released by the departing generation customer and used in the revenues lost calculation. This will allow the departing generation customer to fairly consider exercising a choice to market or broker the released capacity and associated energy.

The formula balances a number of goals, including: (1) Ensuring full recovery of legitimate, prudent and verifiable stranded costs; (2) requiring the utility to mitigate stranded costs; (3) providing certainty for departing generation customers; and (4) creating incentives for the parties to renegotiate their existing requirements contracts or otherwise settle stranded cost claims without resort to litigation.

Contrary to the objections of some commenters that the revenues lost approach creates no incentive to mitigate stranded costs, the formula automatically encompasses mitigation by reducing the departing generation customer's stranded cost obligation by the competitive market value of the released capacity and associated energy. Further, the option provided in the formula for a customer to market

604 The formula is not to be used for recovering stranded costs associated with retail wheeling. We believe the formula is unworkable in this scenario because one of its key elements—the option for a customer to market or broker the utility's power—may not be practicable for retail customers. Therefore, stranded costs associated with retail wheeling will be determined on a case-by-case basis.

605 The customer may also decide to remain a requirements customer for L. If the customer elects to remain a requirements customer, the utility will be obligated to continue service to the customer for the duration of L.
or broker the released capacity and associated energy protects the customer from a utility trying to overrecover stranded costs by estimating a low value for the released capacity and associated energy and thereby provides the customer some assurance that stranded costs will be minimized. Specifically, if a customer believes the utility's competitive market value estimate (CMVE) is too low, it can market or broker the released capacity and associated energy and reduce its stranded cost obligation. We accordingly will not impose a separate mitigation obligation on the utility above that which is already subsumed in the revenues lost approach. In addition, a utility will continue to be subject to an ongoing prudence obligation to sell excess capacity off-system and/or to dispose of uneconomic assets.

We recognize that some commenters oppose the revenues lost approach as imprecise. However, any ratemaking method that relies on estimates will be subject to forecasting error. Moreover, in direct response to commenter concerns, we have gone to great lengths in this rule to provide specificity with respect to the calculation of the components of the formula. We believe that use of the formula will narrow the scope of disputes over the calculation of stranded costs, lend precision to the stranded cost amount it produces, and provide certainty to departing generation customers with respect to their stranded cost obligations.

Calculation of the Revenue Stream Estimate (RSE)

The RSE component of the formula is based on revenues paid by the departing generation customer during the last three years of its contract or retail service. We believe that the use of "present" revenues in the calculation of the revenue stream has numerous advantages over other approaches advocated. The use of present revenues eliminates disputes over estimates of future revenues, thereby adding certainty to the calculation. It also eliminates the need for a detailed listing of includable costs, relying instead on the assumption that present rates include all of the utility's costs of providing service. Further, the rates that produce present revenues have been approved by regulators, which strongly suggests that the costs included in them are prudent, legitimate and verifiable.

We reject the suggestion by commenters that a utility be required to calculate the revenue stream using any lower rate being offered by the utility for service comparable to that being taken by the customer when the customer departs the utility's generation system. A revenue stream calculated in this manner could deny a utility the opportunity to fully recover its stranded costs or could shift costs to other customers, a result we find unacceptable. Similarly, the elimination of return-related revenues from the revenue stream effectively would require shareholders to absorb stranded costs, which is contrary to our determination that a utility is entitled to an opportunity to fully recover legitimate, prudent and verifiable stranded costs. Calculation of the Competitive Market Value Estimate (CMVE)

We recognize the difficulty associated with estimating the competitive market value of the capacity and associated energy not purchased by the departing generation customer. However, we believe that an up-front estimate, which provides flexibility to the utility and a measure of certainty to customers, is superior to other proposals, provided the right mix of incentives and options is included in the formula.

A utility requesting stranded cost recovery must estimate CMVE based on a market analysis, with all assumptions and work papers made available to the departing generation customer. This provides a utility with the flexibility to choose the methodology that it feels produces the best estimate of the competitive market value of the released capacity and associated energy. We note that numer-
ous proposals for calculating competitive market value were made in the
comments. The Commission believes that the
flexibility provided by the formula we
adopt in this Rule permits the filing util-
ity to avail itself of many of these recom-

At the same time, a utility may have
an incentive to underestimate CMVE and
thereby increase the stranded costs
cost charge. To address this issue, the formula
contains several features designed to cre-
ate an incentive to produce a good faith
estimate of stranded costs and to safe-
guard customers if a utility fails to do so.
For example, the formula provides a de-
parting generation customer with the op-
tion to market or broker the released
capacity and associated energy if it be-
lieves the utility's estimate is too low. If
the marketing option is chosen, the cus-
tomer would buy the released capacity
from the utility at the utility's market
value estimate. The associated energy
would be purchased at the utility's aver-
age system variable cost. The customer
would then resell the released capacity
and energy and keep the resulting reve-
ues. If the revenues it receives are
greater than the utility's market value
estimate, the customer will have reduced
its stranded cost obligation. If the cus-
tomer chooses the brokering option and
the released capacity and associated en-
ergy are purchased by a third-party for
more than the utility's market value esti-
mate, the difference between the average
annual revenues produced by the sale and
the utility's CMVE estimate will be used
to lower the customer's stranded cost obliga-
tion. The utility may be required to
show in a compliance filing that it has
reduced the customer's stranded cost obliga-
tion under such circumstances.

If the customer chooses CMVE Option
2 and meets its conditions, CMVE will be
set at the average price that the customer
pays its new supplier. The customer will
test the market and choose the best deal
available. Hence, the price the customer
pays its alternative supplier is arguably a
more accurate measure of the competitive
market value of the capacity and associ-
ed energy not taken from the host util-
ity. Whether to exercise Option 2 resides
solely with the customer.

We further note that the sale of all or
part of a utility's generating assets could
be used as a method to determine competi-
tive market value of such assets. Under
the theory that an asset sale price reflects
the highest value for the utility's assets,
the Commission would presume that the
competitive market value established
under an open asset sale (i.e., an offer to
sell assets to any taker) would fully sat-
sify the utility's responsibility to mini-
imize stranded costs. If a stranded cost
claim involves divestiture of assets, the
amount of stranded costs associated with
those assets would be the book value less
the sale price. The Commission would
determine the appropriate stranded cost
charge based on the facts presented.

**Snapshot Approach Versus True-Ups**

The revenues lost formula is based on a
one-time snapshot approach. We favor
this approach over the true-up approach
because it creates certainty and will pro-
duce reasonably accurate results. True-
ups, on the other hand, while theoretically
more accurate, require periodic recalca-
tion of stranded costs, which creates on-
going uncertainty and disputes. In addition,
true-ups will result in additional transac-
tion costs. We believe that an approach
that provides certainty and establishes
cost responsibility up front is best for
what is fundamentally a transition issue.

In the Supplemental Stranded Cost
NOPR, we proposed procedures to
provide a potential departing generation
customer with advance notice of how the
utility would propose to calculate costs
that the utility claims would be stranded
by the customer's departure. These
procedures are modified as follows to
incorporate the findings made in this

---

Notes:

84 These procedures apply to a potential de-
parting generation customer who is an existing
wholesale requirements customer of a public
utility, or a retail customer of a public utility
who is contemplating becoming a wholesale
transmission customer (such as through munici-
palization). They may be used at the option of
the potential departing generation customer. An
existing wholesale requirements customer may
use the procedures in conjunction with, or in lieu
of, a complaint under section 206 to amend its
existing requirements contract to add an ex-
licit stranded cost provision, as discussed in
Section IV.J.S.

85 FERC Statutes and Regulations § 32.514
at p. 33,114-15. 33,126-29.

Federal Energy Regulatory Commission

1889
rule: (1) A customer may, at any time before the termination date specified in its existing wholesale requirements contract, \(^a\) request the public utility to provide an estimate of the customer's stranded cost obligation based on the revenues lost formula contained in this Rule, \(^6\) as of the date set forth in the customer's request. The customer should specify in its request, to the extent possible, pursuant to its rights under its power sales requirements contract with the seller, \(^7\) the date on which the customer is considering substituting alternative generation for the requirements purchased and the amount of the substitute generation. Any remaining generation requirements to be purchased from the existing supplier after this date should be clearly indicated. The customer may seek further information on how the stranded cost charge would vary as a result of different dates or different amounts of substitute purchases. The customer also should indicate its preferred payment method, such as a lump-sum payment, an amortization of a lump-sum payment, or a surcharge (such as monthly or annual) on the customer's transmission rate.

2) The utility shall, within thirty days of receipt of the request, or other mutually agreed-upon period, provide the customer with an estimate of the customer's stranded cost obligation. The response shall include: (i) Estimates of RSE, CMVE, and L according to the revenues lost formula and based on the information supplied by the customer; (ii) supporting detail (including the underlying market analysis that forms the basis for the CMVE estimate) indicating how each element in the formula is derived to enable the customer to understand the basis for each element; (iii) a detailed rationale justifying the basis for the utility's reasonable expectation of continuing to serve the customer beyond the termination date in the contract; \(^9\) (iv) an estimate of the amount of released capacity and the amount of associated energy that would result from the customer's departure, based on the information supplied by the customer, including detailed support for the amount of released capacity and the amount of associated energy, and the market value of each, for each year of the reasonable expectation period, and how those amounts are consistent with the RSE and CMVE estimates; and (v) the utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs. (The proposed modification should also reflect the customer's chosen payment method).

3) If the customer believes that: (i) The utility has failed to establish that it had a reasonable expectation of continuing to serve the customer beyond the contract term; \(^7\) (ii) the proposed stranded cost charge or any of the elements used to compute it is unreasonable; (iii) the amount of released capacity and the amount of associated energy assumed to be sold is unreasonable; or (iv) the utility's proposal for any contract amendment needed to implement the customer's

customer, it should specify in its request, to the extent possible, the date on which the customer is considering becoming a wholesale transmission customer of the utility and the amount of generation, if any, it will continue to purchase from its existing supplier.

\(^6\) If the customer is a retail customer contemplating becoming a wholesale transmission customer, it may at any time request the public utility to provide an estimate of its stranded cost obligation.

\(^7\) Because the formula reduces a customer's stranded cost obligation by the competitive market value of the capacity and associated energy that would be released by the customer's departure, we will not adopt the proposal in the Supplemental Stranded Cost NOPR to allow a potential departing customer to receive an estimate of the customer's "maximum possible stranded cost exposure without mitigation." Requiring the utility to provide an estimate that reflects the competitive market value of the capacity and associated energy to be released will better enable the customer to assess its supply options.

\(^9\) If the customer is a retail customer contemplating becoming a wholesale transmission customer, it may at any time request the public utility to provide an estimate of its stranded cost obligation.

Federal Energy Regulatory Commission

\(\text{\|} 31,036\)

1890

DOE003-0534

Obtained and made public by the Natural Resources Defense Council, March/April 2002
payment of stranded costs is unreasonable, the customer will have thirty days in which to respond to the utility explaining why it disagrees. The Commission expects parties to attempt to resolve any disputed issues.

(4) If the parties are unable to resolve the matter using the procedures in (1)-(3) above, the customer may either: (a) File a petition for declaratory order, or a section 206 filing seeking to amend an existing requirements contract, to seek a Commission determination as to whether: (i) The utility has met the reasonable expectation standard; (ii) the proposed stranded cost charge satisfies the other evidentiary standards set forth in this Rule; (iii) the amount of released capacity and the amount of associated energy proposed by the utility is reasonable; or (iv) the utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs is reasonable; or (b) wait until the proposed stranded cost charge is filed by the utility under section 205 of the FPA, and contest it at that time. In either case, because estimates of RSE and CMVE may change over time, any estimate of stranded costs provided by a utility to a customer will not be considered binding prior to any filing by either party with the Commission. However, any stranded cost estimate filed by the utility in a section 205 or 206 proceeding, or in response to a petition for a declaratory order, shall be considered to be a binding estimate of the customer's maximum stranded cost obligation for purposes of litigation. Similarly, any estimate of stranded cost obligation filed by a customer in a petition for declaratory order or a section 205 or 206 proceeding shall be considered to be a binding estimate of the customer's minimum stranded cost obligation for purposes of litigation. Estimates of stranded cost obligation that are filed by either party with the Commission shall include the information, including the supporting detail, identified in (2) above.

(5) If a utility intends to file for stranded cost recovery from a customer through a stranded cost amendment to its existing contract or a surcharge on transmission rates, it must file its stranded cost estimate no later than 120 days prior to the end of the customer's contract term. The filing shall include the information, including the supporting detail, set forth in (2) above. The customer, of course, may contest the contents of such a filing.

Conditions of the Marketing/Brokering Option

A customer may choose to market or broker a portion or all of the released capacity and associated energy identified by the utility in its stranded cost estimate (or to contract with a marketing/broking agent). Importantly, by exercising the marketing or brokering option, the customer does not relinquish its right to contest any aspect of the utility's stranded cost estimate, including whether the utility is entitled to recover stranded costs for the period that the customer has agreed to market or broker any released capacity and associated energy. To implement this option, a customer must inform the utility in writing of its decision no later than 30 days after the utility files its estimate of stranded costs for the customer with the Commission. Before marketing or brokering of the released capacity and associated energy can begin, the utility and customer must execute an agreement.

As discussed above, retail customers contemplating becoming wholesale transmission customers may use the same procedures. As also discussed above, customers under existing requirements contracts with public utilities have the option of making a filing under section 206 seeking to amend the contract to add an explicit stranded cost provision, without having to go through these procedures.

Although estimates by the utility or the customer may be binding for purposes of litigation, this does not mean that the parties may not settle at any time on another amount.

A customer requesting a section 211 order for transmission services from a transmitting utility also may incur a stranded cost obligation. Any estimate of stranded cost obligation resulting from the requested transmission services should be included as part of the utility's good faith response to the customer's request for transmission services. See 18 CFR 2.20. Because the Commission will apply the revenues lost formula to any request for stranded cost recovery as a part of its determination of the appropriate charge for transmission services ordered in a section 211 proceeding, we encourage non-public utilities to use the revenues lost formula to estimate a customer's stranded cost obligation.

Federal Energy Regulatory Commission
identifying, at a minimum, the amount of capacity and associated energy. The customer is entitled to schedule, the price of capacity and associated energy, and the duration of the customer's marketing/broking of the released capacity and associated energy. Parties are encouraged to settle disputes over these and any other marketing/broking implementation issues. The negotiations should be guided by the principle that the utility must allow the customer to market or broker the released capacity and associated energy under terms and conditions comparable to those for a utility resale of the capacity and associated energy to a third party. If agreement over marketing or brokering cannot be reached, the parties may seek to include the issue as a part of a proceeding initiated at the Commission with respect to the utility's stranded cost estimate for the customer.\(^\text{676}\) Upon issuance of an order resolving the disputed issues, the customer may reevaluate its decision to exercise the marketing/brokering option. The customer also may choose to market or broker any released capacity and associated energy not being marketed or brokered under an earlier agreement with the utility. A customer must notify the utility in writing within 30 days of issuance of the Commission's order resolving the disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

\textit{Payment for Released Capacity and Associated Energy Under the Marketing Option}

If the customer chooses to market released capacity and associated energy, it shall pay the utility's estimate of the competitive market value of the capacity, or, if the marketing option is exercised after a Commission order, it shall pay the competitive market value amount as determined by Commission order. In addition, for all energy scheduled to be delivered, the customer shall pay the utility's average system variable costs. The customer may also choose to market only a portion of the released capacity and/or for a shorter period. In this situation, the customer will also pay the competitive market value for the released capacity plus the utility's average system energy costs. The customer's liability for payment of stranded costs is unaffected by its decision to market released capacity and associated energy.\(^\text{676}\) In addition, to the extent that the customer chooses to market a portion or all of the capacity alleged by the utility to be stranded, a final determination with respect to the customer's stranded cost obligation will not affect any prior marketing agreement.

\textit{Payment for Stranded Costs Under the Brokering Option}

If the customer chooses to broker a portion or all of the released capacity and associated energy, any revenue received from such brokering activity shall be used to offset the utility's estimate of the competitive market value of the brokered capacity and associated energy.\(^\text{680}\) Once a brokering agreement is executed between the customer and the utility, if the customer's brokering efforts fail to produce a buyer within 60 days of the date of that agreement, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula.

10. Stranded Costs in the Context of Voluntary Restructuring

In the Supplemental Stranded Cost NOPR, we noted that the functional unbundling of wholesale services does not require corporate unbundling (such as disposition of assets to a non-affiliate, or establishing a separate corporate affiliate

---

\(^{676}\) Because litigation of stranded costs may extend beyond the date of the customer's departure, the customer may also file a petition for a declaratory order requesting expedited resolution of marketing or brokering implementation issues.

\(^{676}\) If the customer can market the released capacity and associated energy for a higher price than the customer paid for it, the customer effectively reduces its stranded cost obligation, i.e., the incremental revenue received offsets a portion of the customer's stranded cost payment to the utility.

\(^{680}\) For example, if the customer brokers any released capacity and associated energy for a higher price than the utility's estimated competitive market value of that capacity and energy, the difference between the utility's estimate and the brokered price will be used to increase the utility's CME component of the stranded cost calculation, thereby reducing the customer's stranded cost obligation.
to manage a utility's transmission assets). At the same time, we indicated that some utilities may ultimately choose some form of corporate unbundling.\footnote{FERC Statutes and Regulations \$ 32.514 at p. 33,132.} We reaffirm in this Final Rule that we are willing to consider case-specific proposals for dealing with stranded costs in the context of any restructuring proceedings that may be instituted by individual utilities.

11. Accounting Treatment for Stranded Costs Comments

A number of commenters ask the Commission to provide accounting treatment guidance as part of its procedures for implementing its policies on stranded costs and their recovery.\footnote{See, e.g., EEI, NSP, LILCO, Central Hudson, Deloitte & Touche, Centerior.}

NSP states that the Commission will need to provide appropriate accounting guidance for the final stranded cost recovery methodology, including accounting for any portion of stranded cost recovery representing capital costs, the effect of any interperiod differences between the stranded cost calculations and the authorized recovery period, and the effects of differences between book and income implications of the stranded cost recovery mechanism. NSP also asserts that, in addressing the accounting implications of the final rule, the Commission must consider the requirements of the Financial Accounting Standards Board (FASB) Statement of Financial Accounting Standards No. 121, "Impairment of Long-Lived Assets" (SFAS No. 121).

NASUCA states that one of the Commission's stated goals in providing stranded cost recovery is to protect against cost shifting. NASUCA argues that the Commission should adopt an accounting rule that assures that any federal resolution of wholesale stranded costs does not impose any cost shifting to captive customers.

EEI and Centerior argue that the Uniform System of Accounts as presently configured does not support the Commission's proposed policies on stranded cost recovery. Further, EEI states that even with the revenues lost approach, which EEI supports, utilities will still have to account for their assets on a class-of-asset by class-of-asset basis. EEI argues that this is necessary to ensure that the costs of the assets are expensed in the proper accounting period. EEI states that one of the basic principles of financial accounting is that expenses should be matched with the related revenues.

Commission Conclusion

As discussed in Section IV.J.3, this rule adopts a direct assignment approach for the recovery of stranded costs from departing generation customers. Under the revenues lost approach, stranded cost recovery is limited to the departing generation customer's contribution to fixed costs that the utility otherwise would not recover because of the customer's departure.

We recognize that there are certain similarities between the financial reporting objectives of SFAS No. 121 and the determination of stranded costs. However, there are also important differences between SFAS No. 121 and our approach to stranded costs. The revenues lost approach does not attempt to identify specific un-economic assets and is not limited to only long-lived assets. Instead, it uses a for-purpose methodology that encompasses all fixed costs of providing service.

From a financial accounting standpoint, our approach to stranded costs creates the potential for a mismatch between the periods in which the stranded costs are charged to expense and any revenues provided for their recovery are included in net income determinations. This is because the earning process entitling a utility to the benefits of stranded cost recovery and thereby requiring the recognition of revenue may be completed prior to the time that the stranded costs must be charged to expense under generally accepted cost recognition criteria. This circumstance in a cost-based regulated environment creates the undesirable potential for double recovery of the same cost, cost shifting, and inappropriate financial reporting.

In order to avoid this potential, utilities shall not recognize revenues intended to provide for recovery of stranded costs from wholesale requirements customers prior to the time that the stranded costs are charged to expense, unless prior Commission approval to do so has been ob-
tained. Absent Commission approval, utilities shall defer such amounts in Account 253, Other Deferred Credits, and amortize them to Account 456, Other Electric Revenues, consistent with the period the related costs are charged to expense. Also, we will require a utility to submit its proposed accounting for stranded costs and related revenues as part of its rate filing requesting recovery of stranded costs under section 205 of the FPA.

12. Definitions, Application, and Summary

In the Supplemental Stranded Cost NOPR, the Commission described proposed amendments to our regulations to establish filing requirements for public utilities and transmitting utilities that seek stranded cost recovery. We proposed to define "wholesale stranded cost" as "any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service to: (i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility, or (ii) a retail customer, or a newly created wholesale power sales customer, that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility." We sought comments on whether this definition should encompass the situation where a wholesale requirements customer ceases to purchase power from the utility that had been making wholesale requirements sales to such customer without becoming an unbundled transmission services customer of that utility.

We received numerous comments both supporting and opposing revisions to the proposed definition of wholesale stranded costs. Several commenters oppose broadening the definition to include costs stranded by customers that do not become unbundled transmission service customers of the former supplier. For example, EGA argues that the loss of an industrial customer that chooses to self-generate or the loss of a requirements customer as a result of a newly-created municipal system that interconnects with a transmitting utility that is not the customer's former supplier could have happened at any time. EGA states that revenues lost as a result of either scenario have nothing to do with regulatory reforms and should not be considered "stranded" costs.

Other commenters disagree. Puget asserts that permitting departing generation customers to avoid paying stranded costs if they do not take unbundled transmission from their former suppliers would create an incentive for departing customers (or their new electric suppliers) to build unneeded and uneconomic new transmission lines. Puget says that it also could be a disincentive to engage in regional transmission planning and coordination because the existence of new transmission facilities needed to achieve regional reliability and efficiency may increase the likelihood that departing generation customers could import their power supplies over these new facilities and avoid paying the utility's stranded costs.

Louisiana, Southern, WP&L, FL Cer, Utility Investors Analysts, Florida Power Corp, El Paso, Central Louisiana, TDU Systems, NW Conservation Act Coalition, Puget, NUV, EIE.

Several commenters also ask the Commission to expand the definition of wholesale stranded cost to include the situation where a wholesale supplier loses wholesale load as a result of a requirements customer's loss of retail load because of retail wheeling, municipalization or retail taps from another utility's system. E.g., Utilities For Improved Transition, Montana, SC Public Service Authority. In addition, a number of commenters ask the Commission to treat the member of a single G&L cooperative system as a single economic unit and to revise the definition of wholesale.
Some of these commenters propose using an exit fee to collect stranded costs from a customer that does not take unbundled transmission from its former supplier, since a transmission surcharge is not available in this circumstance. Other methods proposed include: (1) Conditioning Commission approval of the transmission rates or wholesale power rates charged by the transmission-providing utility upon the inclusion of a surcharge to recover the former supplier's stranded costs or upon the transmission-providing utility otherwise agreeing to guarantee that it will recover the stranded costs or act as billing agent for the former supplier; (2) authorizing the former supplier to levy a stranded cost charge on the transmission-providing utility (if that utility is interconnected with and has transmission contracts with the former supplier); (3) if a retail customer becomes annexed to a municipal utility and does not take unbundled transmission services from its former supplier, permitting recovery of stranded costs from the municipal utility through its jurisdictional transmission rates; or (4) requiring a public utility providing transmission service for a customer that has left its former supplier to agree, as a condition to recovery of its own stranded costs, to ensure the payment of any stranded costs incurred by the former supplier.

Commenters also address the use of the terms "legitimate, prudent, and verifiable" in the definitions of wholesale and retail stranded costs. Several commenters suggest that the Commission's use of the word "prudent" could imply that utilities have to reclassify the prudence of costs that the Commission and state commissions have already approved; these commenters believe that utilities should not have to reclassify prudence. Some argue that once a regulatory agency (state or federal) has allowed recovery of the costs in rates, or promised future recovery, utilities should not have to undergo a second regulatory review to recover these costs if they become stranded.

Commenters recommend that the Commission address this situation by: Striking the word "prudent" from the definition or specifying that the prudence requirement is satisfied by previous regulatory authorization; dropping the terms "legitimate, prudent and verifiable" from the definition and using instead "allowed," "accepted," or "allowable," or adding "or approved by state commission" after the words "legitimate, prudent and verifiable" in the definitions of both wholesale and retail stranded costs.

(Footnote Continued)

stranded costs to allow a transmitting G&T co-operative (the arm of the co-operative system that provides the transmission) to recover the costs stranded when a retail customer of one of its member distribution cooperatives takes advantage of the open access environment by becoming a wholesale entity. E.g., Big Rivers EC, NRECA, Tri-County EC, TDU Systems.

E.g., Carolina P&L, NU, Florida Power Corp, PUD, Southern, Mountain States Petroleum Assn, FL Com.

In its reply comments, Memphis Light objects to the proposal that the Commission condition approval of all new power contracts for those customers that have a utility's system without using the transmission services of the original utility upon the inclusion of a provision to recover the stranded cost for the previous power supplier. It argues that this proposal could result in nonrecovery from some customers because wholesale customers faced with such a provision would pursue non-jurisdictional contracts and/or generate within the confines of their own systems.

E.g., EEI, El Paso, NU, Atlantic City, PG&E, Coalition for Economic Competitiveness, NRG Conservation Act Coalition, Puget, NRECA, Cain, East Kentucky, EC, Com, Associated EC, Utilities For Improved Transition, TDU Systems, TVA.

E.g., EEI, NSP, Arizona, United Illuminating, Entergy, SCD&E, PECO, NRECA.

E.g., EEI, Centerior, NSP, SCD&E, PECO, Tucson Power, Arizona.

E.g., PECO, Entergy.

E.g., EEI, SCD&E, Carolina P&L.

E.g., Atlantic City. EEI also proposes that at the time of filing of a stranded cost recovery charge (whether as an amendment to a contract or a surcharge to a transmission rate), the Commission limit its inquiry to the issue of the stranded cost charge rather than allowing all aspects of a rate or contract to be opened up. EEI states that this is what the Commission did in the natural gas context, where it permitted limited rate filing cases under section 4 of the NGA.

Federal Energy Regulatory Commission

1895-
Other commenters oppose these proposals, suggesting that the prudence analysis for stranded cost purposes may involve questions of prudence different from those that arise in a ratemaking context. The Muni objects that replacing "legitimate, prudent and verifiable" with "allowed, accepted, or allowable" could enable a utility to recover costs that the utility may not be able to prove were prudent, legitimate, and verifiable.

A number of commenters submit that "legitimate, prudent and verifiable" costs should not include the costs of uneconomic plants or costs resulting from utilities' independent business decisions (as distinguished from costs the utility was forced by regulation to incur).897

Several other commenters address the rule's application to wholesale requirements customers.898 AMP-Ohio asks the Commission to clarify that the reference to "wholesale requirements customer" is to a full requirements customer, not a partial requirements customer. It says that no transmission provider should have any reasonable expectation of continuing to serve loads of partial requirements customers. TAPS suggests that references to "new wholesale requirements contract" in proposed § 35.26(c)(1) should be conformed to the defined term "new contract" in proposed § 35.26(b)(7). In addition, it suggests that the Commission clarify the regulations by clearly forecasting stranded cost claims for "new contracts" without express exit fees, instead of simply failing to provide for such recovery.

Commission Conclusion

We will retain the definition of "wholesale stranded cost" proposed in the Supplemental Stranded Cost NOPR.899 We believe it would be inappropriate to expand the definition to include the situation where a wholesale requirements customer (or a retail-turned-wholesale customer) ceases to purchase power from the utility without using the transmission services of that utility.900 Any costs that the utility might incur as a result of the loss of the requirements customer in this scenario would be outside the scope of this Rule. The premise of this Rule is that, where a customer uses the new open access to obtain power from a new generation supplier, the customer must pay the costs that were incurred on its behalf under the prior regulatory regime. However, if a customer leaves its utility supplier by exercising power supply options (such as access to another utility's transmission system or self-generation) that do not rely on access to the former seller's transmission, there is no nexus to the new open access rules.901 If a customer is able to obtain power from a new supplier by using the transmission system of another utility, it is likely that the customer could have made these arrangements in the absence of the new open access rules. The new transmission provider would have had little incentive to deny transmission services to the customer in order to prevent

---

894 E.g., Aices, Cleveland.
895 E.g., Mountain States Petroleum Assoc., Casper, Wyo.
896 E.g., AMP-Ohio, PA Musks, TAPS.
897 For the reasons articulated below, we accordingly will reject the various revisions to the definition that were proposed by commenters.
898 "Wholesale requirements contract" is defined as "a contract under which a public utility or transmitting utility provides any portion of a customer's bundled wholesale power requirements" (emphasis added). Thus, a "wholesale requirements customer" for purposes of the Rule can be either a full or a partial requirements customer. We reject AMP-Ohio's suggestion that the Commission make a blanket finding that a utility could not have had a reasonable expectation of continuing to serve a partial requirements customer. For example, a partial requirements customer may have met part of its needs with its own generation but because it could not build more of its own generation locally had to depend on the utility for the remainder of its needs in the absence of the new open access. Also, a partial requirements customer may have been able to reach alternative suppliers for only a portion of its requirements due to transmission constraints. If this were the case, the partial requirements supplier may well have had a reasonable expectation of continuing to serve the balance of the customer's load.
899 The definition of "retail stranded cost" contains a similar requirement (i.e., the retail customer must become, in whole or in part, an unbundled retail transmission services customer of the public utility or transmitting utility from which the customer previously received bundled retail services). We will retain it for the same reasons discussed above.
900 As we have said, this Rule is not intended to insulate a utility from the normal risks of competition.
tect an existing power supply arrangement, since it was not the customer's power supplier in the first place. Indeed, it is likely that the neighboring utility would have a positive incentive to provide the transmission service in order to increase its revenues. This incentive is unchanged by open access transmission.

Some commenters have asked us to eliminate the term "prudent" from the definition of stranded costs. We will not do so; we will retain the requirement that stranded costs be "legitimate, prudent and verifiable." A determination that a utility had a reasonable expectation of continuing to serve a customer would not, in all circumstances, mean that costs incurred by the utility were prudent. Prudence of costs, depending upon the facts in a specific case, may include different things: e.g., prudence in operation and maintenance of a plant; prudence in continuing to own a plant when cheaper alternatives become available; prudence in entering into purchased power contracts, or continuing such contracts when buy-outs or buy-downs of the contracts would result in savings. The Commission therefore cannot make a blanket assumption that all claimed stranded costs will have been prudently incurred. However, we clarify that we do not intend to relitigate the prudence of costs previously recovered.402

Thus, this Rule will permit a public utility or transmitting utility to seek recovery of stranded costs as follows. First, for stranded costs associated with new wholesale requirements contracts (that is, any wholesale requirements contract executed after July 11, 1994), the regulations will allow recovery of stranded costs only if the contract contains an explicit stranded cost provision that permits recovery. By "explicit stranded cost provision" we mean a provision that identifies the specific amount of stranded cost liability of the customer(s) and a specific method for calculating the stranded cost charge or rate. We clarify that provisions in requirements contracts executed after July 11, 1994 but before the date on which this Final Rule is published in the Federal Register that explic-

402 As the Commission has previously indicated, however, in the case of formula rates, approval of a formula rate constitutes approval of the formula, and not the underlying costs.

§ 31,036

1897

DOE003-0541

Obtained and made public by the Natural Resources Defense Council, March/April 2002
211-212. Such utility may not seek recovery of stranded costs through a section 211-212 transmission rate if the existing requirements contract does contain an explicit exit fee or other stranded cost provision.

Fifth, for a retail-turned-wholesale customer, a public utility or transmitting utility may file a request to recover stranded costs from the newly-created wholesale customer through that customer’s transmission rates under FPA sections 205-206 or 211-212.

Sixth, for customers who obtain retail wheeling, a public utility or transmitting utility may seek recovery through Commission-jurisdictional transmission rates only if the state regulatory authority had no authority under state law to address stranded costs when retail wheeling is required.

11. Other

1. Information Reporting Requirements for Public Utilities

In the NOPR, the Commission did not propose any changes to its information filing requirements for public utilities.

Comments

Many IOUs argue that the current information filing requirements competitively disadvantage traditional public utilities and utility benefit sellers, such as non-public entities, that are not required to provide comparable information. They urge the Commission to eliminate the requirement for public disclosure of competitively sensitive, proprietary, or otherwise confidential data submitted to the Commission on Form No. 1, as well as on other Commission forms. The information that we collect from public utilities is necessary to carry out our jurisdictional responsibilities and is used, among other things, to evaluate the reasonableness of cost-based rates subject to our jurisdiction and the operation of power markets. Moreover, as we explained in ConEd, reports required to be submitted by Commission rule and necessary for the Commission’s jurisdictional activities are considered public information, 18 CFR 388.106. In addition, the Commission has long required jurisdictional utilities to submit Form 1 data on a form that states on its cover that the Commission does not consider the material to be confidential.

We are sensitive to the lack of symmetry in the information we require from traditional public utilities.

60 E.g., NIPSCO, Illinois Power, Centerior, Ohio Edison, EEL.
61 E.g., NSP, Ohio Edison.
62 See also Minnesota P&L.
64 72 FERC at p. 61,891.
balance the following public interest considerations:
(A) The harm to the intervenor if it is not granted preliminary relief from
the requested CWIP;
(B) The harm to the public utility if, during the interim period of prelimi-
nary relief, the public utility is re-
quired to recover its financing charges
later through AFUDC rather than im-
mediately through CWIP; and
(C) Mitigating bias against invest-
ment in new plants, ensuring accurate
price signals, and fostering rate stabili-
ty.
(ii) Whether or not preliminary relief
is granted at the suspension stage will
not preclude consideration of further
interim or final remedies later in the
proceedings, if warranted.
(iii) If the Commission makes a final
determination that a price squeeze due
to allowance of a lower percentage
of non-pollution control/fuel con-
version CWIP in the public utility's re-
tail rate base than allowed by this
Commission, the Commission will con-
sider an adjustment to non-pollution
control/fuel conversion CWIP in order
to eliminate or mitigate the price
squeeze.
(iv) If an intervenor meets the re-
quirements of paragraph (g)(3) of this
section, the Commission, depending on
the type of showing made including the
likelihood, immediacy, and severity of
any anticompetitive harm may:
(I) Suspend the entire rate increase
or all or a portion of the non-pollution
control/fuel conversion CWIP com-
ponent for up to five months;
(II) Allow all or a portion of the non-
pollution control/fuel conversion CWIP
only prospectively from the issuance of
the Commission's final order on rehear-
sing on the matter; or
(iii) Take such other action as is
proper under the circumstances.

§ 35.26 Recovery of stranded costs by
public utilities and transmitting
utilities.

(a) Purpose. This section establishes
the standards that a public utility or
transmitting utility must satisfy in
order to recover stranded costs.
(b) Definitions—(1) Wholesale stranded
cost means any legitimate, prudent and
verifiable cost incurred by a public
utility or a transmitting utility to pro-
vide service to:
(i) A wholesale requirements cus-
tomer that subsequently becomes, in
whole or in part, an unbundled whole-
seal transmission service customer of
such public utility or transmitting
utility;
or
(ii) A retail customer that subse-
quently becomes, either directly or
through another wholesale trans-
mission purchaser, an unbundled
wholesale transmission service cus-
tomer of such public utility or trans-
mitting utility.
(3) Wholesale requirements customer
means a customer for whom a public
utility or transmitting utility provides
by contract any portion of its bundled
wholesale power requirements.
(3) Wholesale transmission services
means the transmission of electric en-
ergy sold, or to be sold, at wholesale in
interstate commerce or ordered pursuant
to section 211 of the Federal Power
Act (FPA).
(4) Wholesale requirements contract
means a contract under which a public
utility or transmitting utility provides
any portion of a customer's bundled
wholesale power requirements.
(5) Retail stranded cost means any le-
gitimate, prudent and verifiable cost
incurred by a public utility to provide
service to a retail customer that subse-
quently becomes, in whole or in part,
an unbundled retail transmission serv-
cing customer of that public utility.
(6) Retail transmission services means
the transmission of electric energy
sold, or to be sold, in interstate com-
merce directly to a retail customer.
(7) New wholesale requirements contract
means any wholesale requirements con-
tract executed on or before July 11, 1994.
(8) Existing wholesale requirements contract
means any wholesale requirements con-
§ 35.26 18 CFR Ch. 1 (4-1-98 Edition)

allowed to seek recovery of wholesale stranded costs only as follows:

1. No public utility or transmitting utility may seek recovery of wholesale stranded costs if such recovery is explicitly prohibited by a contract or settlement agreement, or by any power sales or transmission rate schedule or tariff.

2. No public utility or transmitting utility may seek recovery of stranded costs associated with a new wholesale requirements contract if such contract does not contain an exit fee or other explicit stranded cost provision.

3. If stranded costs are associated with an existing wholesale requirements contract, and the seller under the contract is a public utility, the public utility may seek recovery of such costs in accordance with the contract, through rates for electric energy under sections 205-305 of the FPA. The public utility may not seek recovery of such costs through any transmission rate for FPA section 205 or 211 transmission services.

4. If stranded costs are associated with a new wholesale requirements contract, and the seller under the contract is a transmitting utility, the transmitting utility may not seek an order from the Commission allowing recovery of such costs.

v. If stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the public utility may seek recovery of stranded costs only as follows:

A. If either party to the contract seeks a stranded cost amendment pursuant to a section 205 or section 206 filing under the FPA made prior to the expiration of the contract, and the Commission accepts or approves an amendment permitting recovery of stranded costs, the public utility may seek recovery of such costs through FPA section 205-305 rates for electric energy.

B. If the contract is not amended to permit recovery of stranded costs as described in paragraph (v)(A), of this section, the public utility may file a proposal, prior to the expiration of the contract, to recover stranded costs through FPA section 205-305 or section 211-212 rates for wholesale transmission services to the customer.

vi. If stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a transmitting utility but not also a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the transmitting utility may seek recovery of stranded costs through FPA section 211-212 transmission rates.

vii. If a retail customer becomes a legitimate wholesale transmission customer of a public utility or transmitting utility, through municipalization, and costs are stranded as a result of the retail-turned-wholesale customer's access to wholesale transmission, the utility may seek recovery of such costs through FPA section 205-305 or section 211-212 rates for wholesale transmission services to that customer.

3. Evidentiary demonstration for wholesale stranded cost recovery. A public utility or transmitting utility seeking to recover wholesale stranded costs in accordance with paragraphs (c)(1) through (c)(7) of this section must demonstrate that:

1. It incurred costs to provide service to a wholesale requirements customer or retail customer based on a reasonable expectation that the utility would continue to serve the customer;

ii. The stranded costs are not more than the customer would have contributed to the utility had the customer remained a wholesale requirements customer of the utility, or, in the case of a retail-turned-wholesale customer, had the customer remained a retail customer of the utility; and

iii. The stranded costs are derived using the following formula: Stranded Cost Obligation = (Revenue Stream Estimate - Competitive Market Value Estimate) × Length of Obligation (reasonable expectation period).
(3) Rebuttable presumption. If a public
utility or transmitting utility seeks recov-
ery of wholesale stranded costs associ-
ated with an existing wholesale re-
quirements contract, as permitted in
paragraph (c)(1) of this section, and the
existing wholesale requirements con-
tract contains a notice provision, there
will be a rebuttable presumption that
the utility had no reasonable expecta-
tion of continuing to serve the cus-
tomer beyond the term of the notice
provision.

(4) Procedure for customer to obtain
stranded cost estimate. A customer under
an existing wholesale requirements con-
tract with a public utility seller may obtain
from the seller an estimate of
the customer's stranded cost obliga-
tion if it were to leave the public util-
ity's generation supply system by fil-
ing with the public utility a request for
an estimate at any time prior to the
termination date specified in its con-
tract.

(i) The public utility must provide a
response within 30 days of receiving the
request. The response must include:

(A) An estimate of the customer's
stranded cost obligation based on the
formula in paragraph (c)(2)(iii) of this
section;

(B) Supporting detail indicating how
each element in the formula was de-
""
§35.27

(1) Obtained and made public by the Natural Resources Defense Council, March/April 2002

(2) Economy energy coordination agreement means any contract, or service schedule thereunder, that provides for trading of electric energy on an "if, as and when available" basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) Non-economy energy coordination agreement means any contract or service agreement, except an economy energy coordination agreement as defined in paragraph (1) of this section.

(a) Notwithstanding any other requirements, any public utility seeking authorization to engage in sales for resale of electric energy at market-based rates shall not be required to demonstrate any lack of market power in general with respect to sales from capacity for which construction has commenced on or after July 9, 1996.

(b) Nothing in this part shall be construed as precluding or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or limiting the authority of a state commission in accordance with state and federal law to establish competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or non-discountary rates for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

§35.28 Non-discountary open access transmission tariffs.

(a) Applicability. This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) Definitions. For the purposes of this section:

(1) Economy energy coordination agreement means a contract or service schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) Economy energy coordination agreement means a contract, or service schedule thereunder, that provides for trading of electric energy on an "if, as and when available" basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) Economy energy coordination agreement means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (1) of this section.

(4) Non-discountary open access transmission tariff—(1) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission a tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the open access pro forma tariff contained in Order No. 586, FERC Stats. & Regs. 1982, at 31,093 (Final Rule on Open Access and Stranded Costs) or such other open access tariff as may be approved by the Commission consistent with Order No. 586, FERC Stats. & Regs. 1982, at 31,093.

(2) Subject to the exceptions in paragraph (c)(3), (c)(4), and (c)(5) of this section, the pro forma tariff contained in Order No. 586, FERC Stats. & Regs. 1982, at 31,093, and accompanying rates, must be filed no later than 60 days prior to the date on which a public utility would engage in a sale of electric energy at wholesale in interstate commerce or in the transmission of electric energy in interstate commerce.

(3) If a public utility owns, controls or operates facilities used for the transmission of electric energy in interstate commerce as of July 9, 1996, it must file the pro forma tariff contained in Order No. 586, FERC Stats. & Regs. 1982, at 31,093, pursuant to section 205 of the FPA and accompanying rates, pursuant to section 206 of the FPA, no later than July 9, 1996. However, if a public utility has already filed, or has on file, an open access tariff and accompanying rates as of April 24, 1996, it may, but is not required to, file new rates with its section 206 pro forma tariff filing.
Today, the contribution that small railroads make to our national transportation system is threatened by the condition of their infrastructure. In one sense this problem has always been with us. These are light density lines that don’t generate enough revenue to make up for the years of deferred maintenance they inherited from their Class I owners. Because of their lower cost structure and their ability to deal with individual shippers in a more flexible way than the Class I’s, they have been able to turn money losing lines into marginally profitable lines. They have made enough money to get by, but not enough to make the kind of one-time capital expenditures needed to remain an efficient feeder system for the national rail network.

**How Large Is the problem and How Should Congress Confront It?**

A recent study by ZETA-TECH Associates concluded that investment in track and structures
How should Congress confront this pressing issue? There are two solutions that I would like to discuss today. One involves loans, and the other involves grants. Both are desperately needed. The first is the Railroad Rehabilitation and Improvement Financing Program, commonly referred to as “the RRIF Loan Program.” The RRIF Loan Program already exists, but steps need to be taken as soon as possible to make this program work the way Congress intended. The second is H.R. 1020, which would authorize grants of $350 million per year for three years for small railroad infrastructure projects.

1. Implementation of the RRIF Loan Program

You have heard from the FRA on this subject and I do not question their good intentions with regard to this program. But the fact is that somehow and somewhere this program is stuck. Somebody in the Department of Transportation needs to get it unstuck.

2. Enactment of H.R. 1020

On March 14th of this year, Congressmen Jack Quinn (R-NY), Bob Clement (D-TN) and Spencer Bachus (R-AL) introduced H.R. 1020, the Railroad Track Modernization Act of 2001. In addition to this strong support from the leadership of this Subcommittee, for which we are grateful, the bill has been sponsored by full Committee Chairman Don Young, by four of the six Subcommittee Chairman and by three of the six Subcommittee ranking Democratic Members.

The bill authorizes General Fund appropriations of $350 million per year for three years for capital grants to rehabilitate, preserve or improve track (including roadbed and bridges) of Class II and Class III railroads. The grants are intended for projects to allow safe and efficient rail operations, particularly when handling 286,000-lb. freight cars. In addition, H.R. 1020 specifically allows grants to be used to supplement the RRIF loan program, to pay credit risk premiums, lower interest rates, or provide a “holiday” on principal payments.

Enactment of H.R. 1020 is a “Win-Win” for Railroads, Employees, Shippers and States.

Certainly the large railroads will benefit from passage of the bill and stabilization of light density rail infrastructure. One way to think of the more than 500 short line and regional railroads in this country is as a very big customer to the mega-carriers. We market business, gather traffic from remote locations and tender it to the AAR member Class I railroads. Our share of the revenues of the traffic we generate and terminate each year is about $3 billion. Theirs is much greater. If we fail, that traffic will be lost to the highways and waterways. At the very least it will move great distances over rural and secondary road systems at great cost to the taxpayers.

This bill is supported by the largest rail union, the UTU. As you have heard, it is opposed by the
Transportation Trades Department of the AFL-CIO, on behalf of its other rail union members. As I understand that opposition, it is based on the fact that many of today’s short line railroads began operation as non-union companies and as such the over 25,000 people we employ today do not merit the attention of the federal government. I want to address that issue head on.

Meeting the Challenge of Infrastructure

The purpose of the infrastructure program ASLRRA is advocating is to provide a one-time fix for light density railroads so they can meet the new requirements of the 21st Century. The need exceeds $7 billion over the next decade. Our railroads can raise part of the money needed, but they are not big enough or wealthy enough to raise it all for the major rehabilitation that is required to meet the heavy car challenge.

There will be many projects with low returns that will not be suitable for loan financing under the RRIF program. H.R. 1020 provides the missing piece of the puzzle. We believe the Quinn-Clement-Bachus grant program leveraging federal loan funds and state assistance, together with private capital, will help to fix the problem.

If this problem is not fixed, then these railroads will gradually lose their business as their shippers are forced to move to truck or relocate. Once that occurs, these lines will deteriorate and ultimately be abandoned and no amount of federal funding will be able to bring them back. Thousands of current rail shippers will close their doors or put their goods on the highway.
FOR IMMEDIATE RELEASE

Enactment of H.R. 1020 will be a “win-win” for railroads, employees, shippers and communities across America. I urge your support and prompt passage of this important legislation.

Thank you.

ASLRRA is a non-profit trade association incorporated in the District of Columbia. ASLRRA represents the interests of its more than 400 short line and regional railroad members in legislative and regulatory matters. Short line and regional railroads are an important and growing component of the railroad industry. Today, they operate and maintain 29 percent of the American railroad industry's route mileage (approximately 50,000 miles of track), and account for ten percent of the rail industry's freight revenue and twelve percent of railroad employment (based on statistics for calendar year 1999).