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[FR Doc. 2013–01388 Filed 1–24–13; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 11

[Docket No. RM11–6–000; Order No. 774]

Annual Charges for Use of Government Lands

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: In this Final Rule, the Commission revises its regulations for assessing the annual charge for use of government lands by hydropower licensees. Each year, the Commission will create an annual per-acre fee schedule by county using a formula with four components: a per-acre land value by county based on a publicly available index of land values; an encumbrance factor; a rate of return; and, an inflation adjustment.

DATES: *Effective Date:* This rule will become effective February 25, 2013.

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony T. Clark.

Final Rule

Issued January 17, 2013

1. This Final Rule amends Part 11 of the Commission's regulations and implements a new methodology for the calculation of annual charges for the use of government lands. Annually, the Commission will create a per-acre fee schedule by county that will be published in Appendix A of Part 11 of the Commission's regulations. The formula to create the fee schedule has four components: a per-acre land value by county based on a publicly available index of land values; an encumbrance factor; a rate of return; and, an annual inflation adjustment. In this Final Rule, all charges for the occupancy of government lands by hydropower projects will be calculated based on the fee schedule rate. A discount will be applied to all applicable licensees for the first year of this rule's implementation.

I. Background

2. Section 10(e)(1) of the Federal Power Act (FPA) requires the hydropower licensees occupying federal lands to:

> pay to the United States reasonable annual charges in an amount to be fixed by the Commission * * * for recompensing [the United States] *for the use, occupancy, and enjoyment of its lands or other property* * * * and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require * * *.[1]

In other words, where licensees use and occupy federal lands for project purposes, they must compensate the United States through payment of an annual fee, to be established by the Commission.[2]

A. History of Annual Charges for Use of Government Lands

3. Since its inception, the Commission has used or considered a number of methodologies to effectuate this statutory directive. From 1937 to 1942, the Commission based annual charges for the use of federal lands by hydropower licensees on individual land appraisals for each project.[3] In 1942, the Commission rejected this approach in favor of a single national average per-acre land value because it determined that project-by-project appraisals were more costly to administer than the value collected in rent, the values for inundated lands would become distorted, the values could only be maintained with reappraisals, and disputes over values may lead to costly litigation.[4] In 1986, the Commission also rejected use of a single national average per-acre land value because this methodology resulted in an under-collection of over $15 million per year due to the use of outdated land values.[5]

1. 1987 BLM Fee Schedule

4. In 1987, the Commission adopted use of a fee schedule developed by the U.S. Department of the Interior's Bureau of Land Management (BLM) and the U.S. Department of Agriculture's Forest Service (Forest Service) that identified per-acre rental rates by county for linear rights-of-way on federal lands.[6] The BLM and Forest Service produced the fee schedule by taking a survey of market values by county for the various types of land the agencies had allowed to be occupied by linear rights-of-way.[7] The BLM divided the range of per-acre land values into eight zones with the following per-acre values: $50, $100, $200, $300, $400, $500, $600, and $1000. To calculate the rental rate in the fee schedule, the per-acre zone value was multiplied by an encumbrance factor of 70 percent,[8] a rate of return of 6.41 percent,[9] and an annual inflation adjustment factor.[10] The resulting fee schedule assigned all counties to one of eight rental rates.[11]

5. In adopting the 1987 BLM fee schedule, the Commission found that the methodology promulgated by the BLM and Forest Service for linear rights-of-way was the ''*best approximation available* of the value of lands used for transmission line rights-of-way.'' [12] Therefore, the Commission assessed the BLM-generated schedule rate for transmission line rights-of-way on federal lands, and doubled this rate for federal lands occupied by other project works (e.g., dams, powerhouses,

[1] 16 U.S.C. 803(e)(1) (2006) (emphasis added). Section 10(e)(1) also requires licensees to reimburse the United States for the costs of administering Part I of the FPA. These charges are calculated and billed separately from the land use charges, and are not the subject of this Final Rule.

[2] Pursuant to section 17(a) of the FPA, 16 U.S.C. 810(a) (2006), the fees collected for the use of government lands are allocated as follows: 12.5 percent is paid into the U.S. Treasury, 50 percent is paid into the federal reclamation fund, and 37.5 percent is paid into the treasuries of the states in which particular projects are located. No part of the fees discussed in this Final Rule are used to fund the Commission's operations.

[3] *Order Prescribing Amendment to Section 11.21 of the Regulations Under the Federal Power Act,* 56 FPC 3860, at 3863 (1976).

[4] *Id.* at 3863–64.

[5] *See* Assessment of Charges under the Hydroelectric Program, DOE/IG Report No. 0219 (September 3, 1986); *see also* More Efforts Needed to Recover Costs and Increase Hydropower Charges, U.S. General Accounting Office Report No. RCED–87–12 (November 1986). The single national average land value per acre in 1942 was $50 per acre, and by 1976, the value was $150 per acre. 56 FPC 3860.

[6] *Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges,* Order No. 469, FERC Stats. & Regs. ¶ 30,741, at 30,584 (1987).

[7] *Notice of Adoption of Rental Fee Schedule,* 51 FR 44014 (Dec. 5, 1986). BLM explained that the value of timber had not been included, and that the values were not for urban or suburban residential areas, industrial parks, farms or orchards, recreation properties or other such types of land. The agencies tried to avoid using attractive public use areas such as lakeshores, streamsides, and scenic highway frontage.

[8] The encumbrance factor reflects the degree that a particular type of facility encumbers the right-of-way area or excludes other types of land uses. If the encumbrance factor is 100 percent, the right-of-way facility (and its operation) encumbers the right-of-way area to the exclusion of all other uses.

[9] This number was the 1-year Treasury Securities ''Constant Maturity'' rate for June 30, 1986.

[10] The fee schedule was adjusted annually by the change in the Implicit Price Deflator for the Gross National Product index from the second quarter to the second quarter.

[11] In 1987, the per-acre rental fee under the 1987 BLM fee schedule ranged from $2.24 to $44.87. By 2008, due to the inflation adjustments, the per-acre rental fee under the 1987 fee schedule ranged from $3.76 to $75.23.

[12] Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,588 (1987) (emphasis added).

reservoirs) because the Forest Service indicated that its methodology was intended for transmission line rights-of-way, and its market value figures reflected strips of land used for limited purposes, but that reservoirs, streambeds, and other typical hydropower sites should have a higher value.[13]

6. In the 1987 proceeding, the Commission rejected arguments that it should intentionally establish low charges for the use of government lands based on the public benefits provided by hydropower projects. The Commission explained that the public benefits provided by licensed projects are considered in the licensing decision, and these benefits are the *quid pro quo* for the ability to operate the project in a manner consistent with the needs of society. In contrast, the purpose of the rental fee is to establish a fair market rate for the use of government land.[14]

7. The Commission also found no merit to claims that charging fair market value for federal lands is prohibited by the FPA:

> All increases in charges will result in some impact on consumers. The statutory provision bars the Commission from assessing unreasonable charges that would be passed along to consumers. Reasonable annual charges are those that are proportionate to the value of the benefit conferred. Therefore, a fair market approach is consistent with the dictates of the Act. Furthermore, as land values have not been adjusted in over ten years, an adjustment upwards is warranted and overdue.[15]

8. In adopting the 1987 BLM fee schedule, the Commission again rejected a proposal to use individual project appraisals because such appraisals would be too costly and result in time-consuming litigation.[16]

9. From 1987 to 2007, the Commission assessed annual charges for the use of government lands according to the BLM fee schedule. Each year, BLM adjusted the fee schedule for inflation, and each year the Commission published notice of the updated schedule.[17]

2. 2008 BLM Fee Schedule

10. In 2005, Congress passed the Energy Policy Act (EPAct 2005), which required BLM ''to update [the fee schedule] to revise the per acre rental fee zone value schedule * * * to reflect current values of land in each zone.'' [18] Congress further directed that ''the Secretary of Agriculture shall make the same revision for linear rights-of-way * * * on National Forest System land.'' [19]

11. On October 31, 2008, BLM issued a Final Rule promulgating its updated rental schedule for linear rights-of-way to satisfy the congressional mandate in EPAct 2005,[20] and the Forest Service subsequently adopted the 2008 BLM fee schedule.[21] As had been the case with the methodology underlying the 1987 BLM fee schedule, the updated 2008 fee schedule is based on a formula with four components: (1) An average per-acre land value by county (grouped into zones); (2) an encumbrance factor reduction; (3) a rate of return; and (4) an annual adjustment factor for inflation.[22]

12. The per-acre land value for counties (or other geographic regions) is based on 80 percent of the average per-acre land and building value published in the Census of Agriculture (Census) by the National Agricultural Statistics Service (NASS).[23] Updates to the per-acre land values will occur every five years following publication of the NASS Census.[24] The annual adjustment factor will be updated every 10 years, with the first 10-year period occurring from 2006 through 2015. For Puerto Rico, the average per-acre farmland value for the entire Commonwealth of Puerto Rico is used as the per-acre land value. For Alaska, the 2008 BLM rule uses the NASS Census designation Aleutian Islands Area for all lands within the Aleutian Islands Chain; Fairbanks Area for all lands within the BLM Fairbanks District boundaries; Kenai Peninsula Area for all lands within the BLM Anchorage District boundaries excluding the Aleutian Islands Chain, the Anchorage Area, and the Juneau Area; Anchorage Area for all lands within the Municipality of Anchorage; and Juneau Area for all lands within downtown Juneau (i.e., Juneau voting precincts 1, 2, and 3).

13. In addition to the source of the per-acre land values, BLM made additional changes to the components of the formula used to calculate the fee schedule. BLM reduced the encumbrance factor from 70 percent to 50 percent after a review of public comments, industry practices in the private sector, and the Department of the Interior's appraisal methodology for right-of-way facilities on federal lands.[25] BLM revised the fixed rate of return downward from 6.41 percent to 5.27, which it stated was the most recent 10-year average (1998–2007) of the 30-year and 20-year Treasury bond yield rate.[26] To stay current with inflationary or deflationary trends, BLM applied an annual adjustment factor, which is currently 1.9 percent, to the per-acre rental rate in the fee schedule for all years in a 10-year period except the base year.[27] The annual adjustment factor is based on the average annual change in the Implicit Price Deflator for the Gross Domestic Product (IPD–GDP) for the 10-year period immediately preceding the year that the NASS Census data become available.[28] The BLM rule makes clear that the fee schedule is the only basis for determining an annual rental fee for rights-of-way on federal lands.[29]

14. On February 17, 2009, the Commission issued notice (February 17 Notice) of the 2008 BLM fee schedule that had been created from the revised methodology, as it had done for every annual update to the 1987 fee schedule.[30] Because of the land value revisions and methodology adjustments in response to EPAct 2005, the 2008 BLM fee schedule resulted, in some cases, in significantly higher annual charge assessments for Commission licensees.[31]

15. On March 6, 2009, a group of licensees requested rehearing of the February 17 Notice, which the Commission denied.[32] The licensees

[13] *Id.* at 30,589.

[14] *Id.* at 30,587.

[15] *Id.* at 30,589 (footnotes omitted).

[16] *Id.* at 30,590.

[17] *See, e.g., Update of the Federal Energy Regulatory Commission's Fee Schedule for Annual Charges for the Use of Government Lands,* 73 FR 3626 (Jan. 22, 2008), FERC Stats. & Regs. ¶ 31,262 (2008).

[18] 42 U.S.C. 15925 (2006).

[19] *Id.*

[20] *Update of Linear Right-of-Way Rent Schedule,* 73 FR 65,040 (Oct. 31, 2008).

[21] *See Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands,* 73 FR 66591 (November 10, 2008). The Forest Service noted it had given notice, in the preambles to BLM's proposed and final rules, that it would adopt BLM's revised fee schedule.

[22] 43 CFR 2806.20(b) (2012).

[23] 43 CFR 2806.21 (2012).

[24] *Update of Linear Right-of-Way Rent Schedule,* 73 FR 65040, at 65047 (2008).

[25] *Id.* at 65,047.

[26] *Id.* at 65,049. A calculation of the 10-year average of the 30-year and 20-year Treasury bond yield rates for 1998–2007 results in a rate of return of 5.77 percent.

[27] *Id.* at 65,050. The base year is the first year updated per-acre values are applied based on the most recent NASS Census data.

[28] The annual adjustment factor will be updated every 10 years.

[29] If lands are to be transferred out of federal ownership, BLM allows a right-of-way occupier to submit an appraisal report to determine a one-time rental payment for perpetual linear grants or easements.

[30] *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands,* FERC Stats. & Regs. ¶ 31,288 (2009); 74 FR 8184 (Feb. 24, 2009).

[31] However, a handful of licensees, in geographical locations throughout the country, had reduced rates.

[32] *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands,* 129 FERC ¶ 61,095 (2009).

petitioned for review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit. On January 4, 2011, the Court granted the petition for review and vacated the Commission's February 17 Notice.[33] The D.C. Circuit found that the Commission is required by the Administrative Procedure Act to seek notice and comment on the methodology used to calculate annual charges because the Commission's fee schedule is based on the BLM fee schedule, and BLM made changes to the methodology underlying its fee schedule.

B. Notice of Inquiry

16. On February 17, 2011, the Commission issued a Notice of Inquiry (NOI) soliciting comments on its procedures for assessing annual charges for the use of government lands by hydropower licensees.[34] The NOI specifically sought information about existing indices that could be used as the basis for establishing annual land use charges, the adequacy of such indices, and how any new or modified proposed methodology for calculating an annual charge is consistent with five objectives. The methodology must be uniformly applicable to all licensees occupying federal lands, administration of the methodology should not impose exorbitant costs on the Commission, the methodology should not be subject to review on an individual case-by-case basis, the methodology must reflect reasonably accurate land valuations, and the methodology should avoid an unreasonable increase in the price to consumers of power.[35]

17. In response to the NOI, comments were filed by eight entities representing licensees, industry trade groups, and federal agencies. No commenters offered an alternative, existing index to the NASS Census identified in the NOI to determine per-acre rental rates by county. Instead, most commenters proposed modifications or adjustments to the values and components in the 2008 BLM fee schedule.

18. The Forest Service recommended adoption of the 2008 BLM fee schedule because it would result in consistent application of linear rights-of way rental values among federal agencies, parity in rental rates for projects licensed or exempted from licensing under the FPA, and reduced administrative burden because BLM maintains and updates the fee schedule, with periodic revisions.

19. One commenter suggested that even though BLM and Forest Service have updated their fee schedules, for hydropower licensees, the Commission should retain the 1987 fee schedule with annual adjustments for inflation.

20. A number of commenters recommended reducing the NASS Census per-acre land values for counties (or other geographic regions). The proffered suggestions included reducing the NASS Census land values by 50 percent, rather than the 20 percent reduction incorporated into the BLM fee schedule, rejecting the zone system implemented by BLM, or using the ''pastureland'' values from the NASS Census, which commenters advocated would result in reduced land values. A number of commenters also advocated for an opportunity for licensees to conduct individual appraisals to independently determine the fair market value of the federal lands occupied by a hydropower project, but one commenter objected to individual appraisals on a case-by-case basis because of the potential for increased costs in the administration of Part I of the FPA.[36] Commenters also recommended reducing the encumbrance factor significantly to reflect the fact that project lands often incorporate multiple uses, many of which benefit the public at a cost to the licensee.

21. Commenters objected to the Commission's longstanding practice of automatically doubling the linear rights-of-way fee for non-transmission line project lands. Some commenters also proposed specific adjustments to the rate of return and annual adjustment factor components of the annual fee calculation. Several commenters requested that the annual fee resulting from any new methodology be phased-in or discounted initially.

C. Notice of Proposed Rulemaking (NOPR)

22. In the NOPR, the Commission proposed to adopt the 2008 BLM methodology for creating a fee schedule, with some modifications, to assess annual charges for the use, occupancy, and enjoyment of federal lands by hydropower licensees.[37] Like the methodology set forth in the 2008 BLM rule, the formula proposed in the NOPR had four components: (1) An average per-acre land value by county, based on the ''land and buildings'' category from the NASS Census; (2) an encumbrance factor of 50 percent; (3) a rate of return; and (4) an annual adjustment factor.

23. The Commission proposed to use this formula to create its own schedule because it agreed with the underlying premise of the change in the BLM fee schedule that the 1987 fee schedule no longer reflected fair market land values. Thus, the NOPR proposed to use the NASS Census—the only index proferred by commenters—which includes land values from around the country as a basis for the per-acre land values. However, the Commission agreed with commenters that BLM's ''zone system'' inflates the values of all counties in a zone except the highest valued county.

24. Except for rejecting the zone system, the Commission proposed to adopt all other aspects of the BLM methodology for producing a fee schedule to assess rental rates for the use of federal lands, including the encumbrance factor, the rate of return, the annual adjustment factor, and assignment of non-county geographical areas in Alaska and Puerto Rico.

25. The proposed rule eliminated the Commission's longstanding practice of doubling the fee schedule rate for non-transmission line lands. In promulgating the 1987 fee schedule, the Forest Service indicated that its methodology at the time was intended for transmission line rights-of-way, and its market value figures reflected strips of land used for limited purposes, but that reservoirs, streambeds, and other typical hydropower sites should have a higher value.[38] In contrast, the land values in the formula proposed in the NOPR are based on the NASS Census, which is a survey of land values for areas of land rather than strips of land used for limited purposes. Thus, as proposed in the NOPR, it would no longer be necessary to double the fee schedule for non-linear strips of land.

26. The proposed rule did not include a graduated phase-in period for the new fee schedule.

II. Discussion

A. Part 11 Fee Schedule

27. In this Final Rule, the Commission adopts a methodology for creating an annual fee schedule for the use, occupancy, and enjoyment of government lands by hydropower licensees, and amends Part 11 of its

[33] *City of Idaho Falls, Idaho* v. *FERC,* 629 F.3d 222 (D.C. Cir. 2011).

[34] *Annual Charges for Use of Government Lands,* 134 FERC ¶ 61,111 (2011).

[35] *Id.* P 19.

[36] The annual charge for use of government lands is one component of a licensee's annual charges. Another component of the annual charge is the Commission's costs for administering Part I of the FPA, which are allocated, with certain exceptions, among licensees and exemptees according to installed capacity. *See* 18 CFR 11.1 (2012).

[37] *Annual Charges for the Use of Government Lands,* FERC Stats. & Regs ¶ 32,684; 137 FERC ¶ 61,139 (2011).

[38] Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,589 (1987).

regulations accordingly. This methodology is largely based on the methodology proposed in the NOPR, which in turn is based on the methodology expounded in the 2008 BLM rule adopting an updated fee schedule for linear rights-of-way.

28. The fee schedule will be based on a formula with four inputs: (1) An adjusted per-acre land value by county or geographic area; (2) an encumbrance factor; (3) a rate of return; and (4) an annual inflation adjustment. The product of the formula's components will result in a fee for each county or geographic area and will be noticed and published annually as a fee schedule in Appendix A to Part 11 of the Commission's regulations. The Commission will compute a licensee's annual charge for the use of government lands by multiplying the applicable county or geographical area fee in the fee schedule by the number of federal acres reported by a licensee.

1. Projects Occupying Multiple Counties, States, or Geographical Areas

29. Several commenters requested clarification regarding the application of the fee schedule to hydropower projects that occupy multiple counties. If a licensed project occupies multiple counties, states, or geographical areas, the Commission will perform a separate calculation for the proportional amount of acres in each county, state, or geographical area.[39] As discussed more fully below, this includes proportional application of the state-specific reduction to remove the value of irrigated lands from the value of all farmlands reported in the NASS Census.

2. Transmission Line Acres

30. This Final Rule retains the NOPR's proposal to eliminate the Commission's practice of doubling the fee schedule rate for non-transmission line lands. In other words, all federal hydropower project lands will be charged at the fee schedule rate.

31. A number of commenters agreed with the Commission's proposal to eliminate its longstanding practice of automatically doubling the linear fee schedule rate for non-transmission line lands (i.e., non-linear acres). However, Pacific Gas and Electric Company (PG&E) commented that the Commission should reduce a licensee's charges under the Final Rule by 50 percent for federal lands occupied by transmission lines and similar project works (e.g., roads) because the rationale for the Commission's decision to reject doubling of the annual fee for the use of government lands dictates that the Commission accordingly reduce the charges when they are applied to transmission lines.

32. We disagree. As explained above, from 1942 to 1986, the Commission used a national per-acre average land value as the basis for assessing rent for the use of government lands. Throughout this period, the Commission adopted the view that fees for right-of-way usage of federal lands would be less than those for other project uses because land so used remained available for multiple uses.[40] In adopting a new methodology for creating a fee schedule for the use of government lands in 1986, the Commission considered whether to eliminate the practice of charging a lower rate for the use of federal lands occupied by transmission lines than for lands occupied by other project features.[41] The Forest Service commented that its methodology was intended for transmission line rights-of-way, its market value figures reflected strips of land used for limited purposes, and therefore it suggested that reservoirs, streambeds, and other typical hydropower sites should have a higher rental value.[42] Thus, in adopting the 1987 fee schedule, the Commission found that the Forest Service's and BLM's methodology was ''the *best approximation available* of the value of lands used for transmission line rights-of-way,'' applied the 1987 fee schedule rate for transmission line lands, and doubled this rate for other hydropower sites, because, while the existence of transmission lines did not completely preclude other uses, features such as dams and powerhouses did.[43]

33. Both previous methodologies (i.e., the national per-acre average, and the 1987 fee schedule based on surveys of linear rights-of-way) were estimates of the value of lands occupied by hydropower projects based on the data available at that time. Thus, in adopting the 1987 fee schedule, it was reasonable for the Commission to attempt to account for the presumption that more uses could be permitted on linear rights-of-way than on other hydropower sites and the attendant presumption that the lands underlying linear rights-of-way are of lesser value than the lands underlying other hydropower sites.

34. However, we find that this conflates two aspects of the formula for creating the fee schedule. The extent to which a hydropower facility *encumbers* federal lands, or precludes other uses on such lands, is reflected in the encumbrance factor component of the formula. As discussed below, this Final Rule reduces the encumbrance factor from 70 percent (the encumbrance factor used in the 1987 fee schedule) to 50 percent, which lowers the rent for licensees, in recognition of the various degrees of encumbrance caused by different hydropower facilities (e.g., powerhouses, dams, reservoirs, roads, penstocks, or transmission lines). However, the underlying land value component of the formula is independent of the type of infrastructure (transmission line, reservoir, penstock, road) occupying the land. The specificity and detail of the NASS Census allows the Commission to more accurately value parcels of land in particular counties or geographic areas. Thus, it is no longer necessary to rely on the ''best approximation available,'' and the attendant estimated adjustments to discount lands perceived to have differing degrees of encumbrance. Accordingly, the Final Rule makes this distinction and eliminates the rudimentary practice of simply doubling the linear fee schedule rate for non-transmission line lands.

3. Phase-In Period

35. The NOPR did not propose to include a phase-in period for the new schedule of annual charges because licensees have been on notice since issuance of the 2008 BLM rule that the fee schedule would be updated. In response to the NOPR, six commenters requested a 25 percent reduction in the annual charge calculated under any new methodology because of the anticipated higher rates that may result from the Final Rule. Because of the uncertainty about the actual rates that would be charged under the new fee schedule, we agree that a 25 percent reduction in the annual charge for the use of government lands will be applied to all licensees for the first year under this rule.

[39] Throughout this order, any reference to a county or state also applies to the regions termed ''geographical areas,'' even if this term is not explicitly used.

[40] *See, e.g.,* Order No. 560, 56 F.P.C. 3860 (1976).

[41] *Revisions to the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges,* 51 FR 211 (January 3, 1986), FERC Stats. & Regs., Proposed Regulations ¶ 33,278, at 33,282 (1986).

[42] Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,588 (1987).

[43] *Id.* (emphasis added).

B. Components of the Fee Schedule

1. Per-Acre Land Value

36. The NOPR proposed to base the per-acre land value on the applicable county ''land and buildings'' category [44] from the NASS Census, adjusted downward by 20 percent to remove the value of irrigated lands and buildings,[45] and updated with current land values from the NASS Census every five years. This Final Rule changes the adjustment downward in the proposed per-acre value to a state-specific reduction that removes the value of irrigated lands on a state-by-state basis rather than a national basis, plus a seven percent reduction to remove the value of buildings or other improvements.

37. The NASS Census is conducted every five years and there is an 18-month delay before NASS publishes the Census data. The 2008 BLM rule incorporates another 18-month delay to allow notice of any changes in applicable land values. This Final Rule adopts the NOPR's proposed schedule, which is consistent with BLM's implementation of its rule. Thus, the Commission's 2011–2015 fee schedules will be based on data from the 2007 NASS Census, the 2016–2020 fee schedules will be based on data from the 2012 NASS Census, the 2021–2025 fee schedules will be based on data from the 2017 NASS Census, and so on. State-specific adjustments to the per-acre land value will be performed in the first year that the most recent NASS Census data are used in the formula, and remain the same until the next round of NASS Census data are used.

38. To determine the downward adjustment of 20 percent to the per-acre land and buildings value, BLM consulted with NASS on an appropriate methodology to reduce the average per-acre land and building value by an amount that reflects the value of irrigated cropland and land encumbered by buildings.[46] NASS advised BLM that this calculation could be accomplished by comparing the total value of irrigated acres and the acres in the ''other'' category [47] to the total value of all farmland acres. This resulted in a 13 percent reduction for all irrigated acres and a seven percent reduction for all lands in the ''other'' category, for a total 20 percent reduction in the per-acre land value to eliminate the value of all land that could possibly be encumbered by buildings or which could possibly have been developed, improved, or irrigated.[48]

39. In response to the NOPR, seven commenters argued that the per-acre county land values should be reduced by more than 20 percent. Several of these commenters argued that such a further downward adjustment is appropriate because the lands where hydropower projects are located tend to be rocky, steep-sloped, and with little soil, and therefore of lesser value than ''agricultural'' lands. The Federal Lands Group,[49] in particular, believes the per-acre county land values should be reduced by 50 percent to reflect the fundamental difference in character and quality between agricultural lands and hydropower lands. Placer County Water Agency (PCWA) argues that the 13 percent reduction for irrigated cropland, which reflected the national ratio of irrigated croplands to all farmlands in the 2008 BLM rule, should be performed individually for each state because the value of irrigated lands relative to all farmlands varies drastically from state to state. Similarly, Idaho Power argues that a blanket 20 percent reduction is inequitable and overestimates the per-acre land value in the states with a large percentage of irrigated cropland.

40. We agree with PCWA and Idaho Power that the use of a national ratio to remove the value of irrigated lands from the per-acre country value is disproportionate. In this Final Rule, the per-acre value by county or other geographic area will be reduced by a state-specific factor to remove the value of irrigated lands from the per-acre land value. This will be accomplished by comparing the total value of irrigated lands in each state to the total value of all farmlands in each state. For all counties or geographical areas within a particular state, the per-acre land value will be reduced by this state-specific ratio to remove the value of irrigated lands. This state-specific reduction will be performed every five years, or on the same schedule as the introduction of the updated NASS Census values.[50] Appendix A to this order includes a table demonstrating this calculation for each state under the 2007 NASS Census. For each subsequent NASS Census, a table identifying the state-specific factor will be available on the Commission's Web site.

41. In its 2008 rule, BLM specifically consulted with NASS on an appropriate methodology to reduce the average per acre ''land and buildings'' category by an amount that reflects the value of irrigated cropland because BLM- and Forest Service-administered lands generally do not include these land categories. We agree with this assessment and concur that hydropower projects, particularly those occupying BLM- and Forest Service-administered lands, generally do not include irrigated croplands.[51] Thus, it is reasonable to remove the value of irrigated croplands from the per-acre county land value assessment in the NASS Census. Furthermore, using a state-specific ratio to remove the increased value of irrigated lands from the per-acre county land values results in a fairer representation of the value of county lands. Commission staff found that performing such a calculation every five years is administratively feasible. Therefore, in the Final Rule, the per-acre land value from the NASS Census' ''land and buildings'' category will be adjusted individually for each state.

42. Once this percent is determined for each state, the per-acre land value will be reduced by an additional seven percent. According to the BLM rule, the additional seven percent reduction reflects the value added to the ''lands and buildings'' category by buildings and other improvements, as reflected in the ''other'' category. In its rule, BLM acknowledged that seven percent was likely a slight overestimate, but that neither it nor NASS knew of any way to separate out the components of the ''other'' category, which included

[44] The ''land and buildings'' category is a combination of all the land categories in the NASS Census, and includes croplands (irrigated and non-irrigated), pastureland/rangeland, woodland, and ''other'' (roads, ponds, wasteland, and land encumbered by non-commercial/non-residential buildings).

[45] Twenty percent is the sum of a 13 percent reduction to remove the value of irrigated lands based on national averages and a 7 percent reduction to remove the value of lands in the ''other'' category, which include buildings and improvements.

[46] 73 FR 65040, at 65043 (2008).

[47] The ''other'' category includes all improved land or land encumbered by buildings.

[48] 73 FR 65040, at 65043 (2008).

[49] The Federal Lands Group is composed of the following licensees: Bradley Lake Project Management Committee; City of Idaho Falls, Idaho; City of Seattle, Washington; City and Borough of Sitka, Alaska; City of Tacoma, Washington; El Dorado Irrigation District; Eugene Water and Electric Board; PacifiCorp; Portland General Electric Company; Public Utility District No. 1 of Chelan County, Washington; Puget Sound Energy, Inc.; Sacramento Municipal Utility District; Public Utility District No. 1 of Snohomish County; Southeast Alaska Power Agency; Kodiak Electric Association; and Turlock Irrigation District.

[50] The 2007 NASS Census will be applicable through 2015, data from the 2012 NASS Census will apply beginning in 2016, data from the 2017 NASS Census will apply beginning in 2021, etc.

[51] However, this is not always the case. Commenters focused exclusively on licensed hydropower projects in the western United States to argue that hydropower lands are often on steep, rocky, and soilless lands that are fundamentally different than agricultural lands. This is sometimes the case, but it is also true that many licensed hydropower reservoirs are located in the heart of agricultural areas. Therefore, we disagree with the assertion that, by their very nature, lands used for hydropower projects are fundamentally different from those used for agriculture.

buildings and other improvements, but also included wastelands. Because no commenters offered a viable critique or alternative to the calculation for the seven percent reduction to remove the value of buildings and improvements, we retain and find reasonable this reduction as presented in the BLM rule.

a. Per-Acre Land Values for Alaska

43. In the NOPR, the Commission proposed to retain BLM's approach to Alaska per-acre land values such that lands in Alaska would be designated as part of one of the NASS Census geographic area identifiers. Under the 2008 BLM rule, the Aleutian Islands Area includes all lands within the Aleutian Islands chain; the Fairbanks Area includes all lands within the BLM Fairbanks District boundaries; the Kenai Peninsula Area includes all lands within the BLM Anchorage District excluding the Aleutian Islands Chain, the Anchorage Area, and the Juneau Area; the Anchorage Area for all lands within the Municipality of Anchorage, and the Juneau Area for all lands within downtown Juneau (i.e., voting precincts 1, 2, and 3). Currently, Commission-licensed projects occupying federal lands are located only in the Kenai Peninsula Area, as defined above, although there are outstanding preliminary permits for projects that would occupy federal lands in the Fairbanks Area.

44. A number of commenters argued that Alaska should be assessed a per-acre statewide value, which is also a category reported by the NASS Census. Commenters asserted that regional values for Alaska are inappropriate because Alaska does not use the administrative designation of county, the number of farms surveyed for the NASS Census in the entire state of Alaska is less than the number of farms surveyed in most counties in the lower-48 states, and certain per-acre land values near Anchorage and Juneau are very high and result in a substantial increase in annual charges for the use of government lands by hydropower licensees. Despite these objections and concerns, commenters offered no explanation as to why it was appropriate to use a statewide value for Alaska, but not the smallest NASS Census defined area, which in Alaska's case is the geographic area identifier.

45. This Final Rule retains the proposal in the NOPR, but clarifies that the Anchorage Area and the Juneau Area will not be used to assess annual charges for the use of government lands because these high, urban-based rates would not reasonably reflect the value of government lands on which hydropower projects are located.[52] Thus, for purposes of determining a per-acre land value, projects in Alaska will be assessed the Aleutian Islands Area per-acre land value if located in the Aleutian Islands Chain, the Fairbanks Area per-acre land value if located in the Fairbanks BLM district, or the Kenai Peninsula Area land value if located in the Anchorage BLM district, but excluding the Aleutian Islands Area. As with the other states, the Alaska per-acre geographic area values will be reduced to remove the value of irrigated lands and building or improvements.

46. While the NASS Census is based on farmland values—which include pasturelands, woodlands, and other wastelands—and there is a low concentration of farms in Alaska, the NASS Census remains a useful indication of land values. Even under the 1987 fee schedule, projects in Alaska were charged a unique rate that was not the result of surveyed lands. Because this rate was artificially low, the current adjustment is aligning Alaska's charges with the methodology applied to all other licensees. Furthermore, in adopting application of the NASS Census values for the Alaska geographical areas, BLM found that the fee schedule rates under the formula promulgated in its 2008 rule are consistent with the general fee schedule previously developed by the Department of the Interior's Appraisal Services Directorate, Alaska, for the BLM and the U.S. Fish and Wildlife Service. Thus, while the increase to Alaska licensees in annual charges for the use of government lands may seem significant, this is in large part due to the arbitrarily low rate assessed under the 1987 fee schedule. No commenters have proferred a meaningful justification for treating federal lands in Alaska any differently from federal lands administered by the same land management agencies throughout the country.

b. Per-Acre Land Values for Puerto Rico

47. Except for excluding the use of BLM's zone system, the NOPR proposed to adopt all other aspects of the 2008 BLM rule with respect to the components of the formula for creating a fee schedule. Under the 2008 BLM schedule, the Forest Service proposed to use $5,866 as the per-acre land value for projects occupying Forest Service lands in Puerto Rico,[53] which is the NASS average farmland value for the entire Commonwealth Puerto Rico.

48. No comments were received regarding the application of the proposed rule to Puerto Rico. We find the Forest Service's proposal reasonable because Puerto Rico has no counties, and the NASS Census surveys do not convey the same information in the same units and categories as those presented in the NASS Census state tables. The Final Rule will use the NASS average farmland value, adjusted by 20 percent to remove the value of irrigated lands and buildings,[54] as the per-acre value component of the fee schedule formula.

c. Individual Appraisals

49. The NOPR did not propose to allow licensees to challenge an annual charge by presenting independent appraisals based on the Commission's longstanding disfavor of any annual charges methodology that would rely on individual appraisals. A number of commenters objected to this preference and recommended that the Commission should allow licensees to submit individual appraisals at a licensee's expense. One commenter opposed the use of individual appraisals because it may increase the administrative charges for all licensees.

50. This Final Rule does not include a provision for independent appraisals. The adjustments made to this rule ensure that the annual charges are reasonable because they are based on a market value index that surveys down to the county level, adjusts for state-specific increases in value based on the ratio of irrigated lands in each state, and is further reduced by an encumbrance factor that fairly reflects the occupation of federal lands that are also used for multiple purposes. Moreover, the total amount collected by the Commission in annual charges for the use of government lands is less than a one percent increase.[55] We recognize that for some licensees the annual charge for the use of government lands will

[52] As noted, there are no Commission-licensed projects in these geographic areas, as defined in the 2008 BLM rule. However, even if there were projects in these locations in the future, such projects would be assessed annual charges for the use of government lands using the Kenai Peninsula per-acre value.

[53] Puerto Rico has one licensed project that occupies approximately two acres of lands managed by the Forest Service. Under the 2007 NASS Census, the base per-acre land value is $8,829.

[54] The NASS Census information reported for Puerto Rico is not presented in the same units and categories as the information presented for other states. As such, it is not possible to perform the state-specific reduction to remove the value of irrigated lands. Therefore, this Final Rule retains the 2008 BLM rule's adjustment of 20 percent to remove the value of irrigated lands and building and improvements from the per-acre land value.

[55] Under the 1987 fee schedule, 2013 collections were estimated to be $8,227,851. Under the Final Rule, 2013 collections are estimated to be $10,270,471.

increase, but this is because annual charges have not been updated to reflect changes in land values since 1987.[56] We continue to believe that allowing individual appraisals of a licensee's lands would significantly increase the Commission's administrative burden, cause delay in the final determination of annual charges, result in increased costs in the administration of Part I of the FPA, and could lead to unnecessary litigation.

2. Encumbrance Factor

51. The NOPR proposed to adopt a 50 percent encumbrance factor.[57] In response to the NOPR, a number of commenters argued that the encumbrance factor should be less than 50 percent in recognition of the public benefits and enhancements provided by hydropower projects. Specifically, the Federal Lands Group argues that the encumbrance factor should be 30 percent to reflect the actual, physical encumbrance of federal lands, the multiple, non-project uses of federal lands at licensed projects, and the public benefits licensees provide. Similarly, the National Hydropower Association (NHA) and Edison Electric Institute (EEI) assert that the record in this proceeding demonstrates that federal lands at hydropower projects are often used by federal land management agencies for non-project purposes.

52. We disagree and retain the 50 percent encumbrance factor in this Final Rule. The 50 percent encumbrance factor in this Final Rule is a reduction from the 70 percent encumbrance factor incorporated into the 1987 fee schedule. In promulgating its 2008 fee schedule, BLM revisited its survey of the degrees of encumbrance presumed by utility facilities and infrastructure, and determined that 50 percent was more reasonable than 70 percent because lands often can be used for other purposes. BLM made this change as a result of comments received on its proposed rule, a review of industry practices in the private sector, and a review of the Department of Interior's appraisal methodology for right-of-way facilities located on federal lands.[58]

53. A 50 percent encumbrance factor partially reflects commenters' suggestion that hydropower projects are used for non-power purposes. However, the Commission's position remains unchanged in that public benefits provided by licensed projects are considered in the licensing decision, and these benefits are the quid pro quo for the ability to operate the project in a manner consistent with the needs of society. In combination with the decision not to double the fee schedule for non-transmission line lands, and the fact that the different components of hydropower projects represent varying levels of encumbrance on federal lands, on balance, a 50 percent encumbrance factor is reasonable.

3. Rate of Return

54. The rate of return component of the formula converts the adjusted per-acre land value into an annual rental value. The NOPR proposed a rate of return of 5.27 percent, which is the rate of return adopted in the 2008 BLM rule. BLM described 5.27 percent as the most current 10-year average (1998–2007) of the 30-year and 20-year Treasury bond yield rate.[59]

55. In response to the NOPR, Southern California Edison (SCE) commented that the 10-year average of these Treasury bond yield rates will result in no greater certainty than the a one-point-in-time Treasury bond yield rate. SCE proposes that, rather than using a 10-year average, the Commission should use the most recent 30-year Treasury bond yield rate to determine the applicable rate of return for annual charges.[60]

56. In deciding to use the Treasury bond yield rate as a basis for a rate of return, BLM reviewed a number of appraisal reports that indicated the rate of return for land can vary from 7 to 12 percent, and is typically around 10 percent. BLM acknowledged that these rates take into account certain risk considerations, and do not normally include an allowance for inflation. BLM determined that it should use a ''safe rate of return,'' that is, the prevailing rate on insured savings accounts or guaranteed government securities that include an allowance for inflation, because any risk of non-payment is reduced because BLM requires a potential right-of-way holder to show that it is financially able to construct and operate the facility.

57. We agree that, because the annual charge for use of government land is a required payment as a term of a hydropower license, using a ''safe'' rate of return is appropriate. Therefore, as in the 2008 BLM rule, our Final Rule will convert the adjusted per-acre land value into an annual rental value using a rate of return pegged to the 30-year Treasury bond yield rate. Hydropower licenses generally are issued for a period of 30 to 50 years, and the Treasury bond yield rate should match that time frame as closely as possible. The longest bond yield rate available from the Treasury is 30 years. We also agree with BLM's reasoning in its 2008 rule that a 10-year average eliminates a ''one-point-in-time'' high or low rate, and thus we will not adopt SCE's proposal that we use a one-point-in-time Treasury bond yield rate. Therefore, in this Final Rule, the rate of return will be the 10-year average of the 30-year Treasury bond yield rate for the 10 years immediately preceding the most recent NASS Census.[61] The 10-year average (2002–2011) of the 30-year Treasury bond yield rate for the 10 years immediately preceding the 2012 NASS Census is 5.77 percent.[62] Therefore, the applicable interest rate will be 5.77 percent for years 2013 through 2025.[63]

58. Further, for the sake of administrative efficiency, the 10-year adjustments will occur in tandem with the annual adjustment factor, which is also adjusted on a decadal basis. As a result, the 5.77 percent rate of return will apply for 13 years, or through 2025. Both the rate of return and the annual adjustment factor will be recalculated for years 2026 through 2035, and will remain fixed through the 10-year period.

4. Annual Adjustment Factor

59. The annual adjustment factor adjusts the fee schedule annually to reflect inflationary or deflationary trends. The NOPR proposed an annual adjustment factor of 1.9 percent, as adopted in the 2008 BLM rule, which would be adjusted every 10 years.[64] The NOPR proposed to base the annual adjustment factor on the average annual

[56] Based on land trends since 1987, we would expect to see increases in some western states, in suburban areas adjacent to cities, and in Alaska because of the artificially low rate assessed under the 1987 fee schedule.

[57] The encumbrance factor is a measure of the degree to which a particular type of facility encumbers a right-of-way or excludes other types of land uses.

[58] 73 FR 65040, at 65047.

[59] The longest term treasury bond is a 30-year bond. However, from 2003–2005, 30-year treasury bonds were discontinued, and the longest term treasury bond was the 20-year bond.

[60] This rate is 3.91 percent for 2011.

[61] Between 2003 and 2005, the U.S. Treasury Department did not publish a 30-year Treasury bond yield rate. For these years, the 20-year Treasury bond yield rate is used. Should the U.S. Treasury Department discontinue publishing the 30-year Treasury bond yield rate, the longest term bond yield available will be used for applicable years to calculate the rate of return.

[62] Data to derive these calculations is available from the Federal Reserve Web site. This Final Rule uses the nominal 30-year Treasury constant maturity rate available on an annualized basis from the Federal Reserve Web site.

[63] For the years 2026–2035, the rate of return will be the 10-year average of the 30-year Treasury bond yield rate for the 10 years (2012–2021) preceding the 2022 NASS Census.

[64] The first 10-year period will not be a full period so as to ensure that the 10-year track the five year census data updates. Thus, the annual adjustment factor of 1.9 percent would be applied for each calendar year through 2015.

change from second quarter to second quarter in the IPD–GDP for the 10-year period immediately preceding the year (2004) that the 2002 NASS Census data became available. The NOPR proposed to adopt BLM's decadal updates to the annual adjustment factor.[65] BLM chose to use the IPD–GDP over the Consumer Price Index—for all Urban Consumers (CPI–U) because the IPD–GDP index tracks increases in land values as well as, if not better than, the CPI–U, and the IPD–GDP tracks a broader range of economic indicators than does the CPI–U, and can be tracked on an annual basis. BLM chose to update the IPD–GDP every ten years to provide predictability so that rental fees could be anticipated.

60. In response to the NOPR, no comments were received on the proposal to adopt the BLM methodology of using the IPD–GDP for the 10-year period immediately preceding the issuance of the NASS Census data, and updating the annual adjustment factor every 10 years. The IPD–GDP was used from 1987 to 2007 to adjust the fee schedule for the use of government lands without complaint, it is an easily identifiable number for use by the public and federal agencies, and, as explained by BLM, it better aligns with actual inflationary trends when contrasted to the CPI–U. Therefore, the ten-year IPD–GDP for the period immediately preceding issuance of the NASS Census data is a reasonable factor to adjust for inflationary or deflationary trends in the per-acre land values.

61. Through 2015, a 1.9 percent annual adjustment factor will be applied each calendar year. This is the annual change in the IPD–GDP index for the ten-year period immediately preceding the year (2004) that the 2002 NASS Census data became available. For the next ten-year period (2016–2025), the annual adjustment factor will be based on the average annual change in the IPD–GDP for the ten-year period immediately preceding the year (2014) that the 2012 NASS Census data becomes available. The annual adjustment factor will be adjusted in the same manner for subsequent ten year periods.

C. Summary of Schedule

62. Fee schedules through 2015 will be based on data from the 2007 NASS Census, and all adjustments and components identified in this order apply through 2015 (i.e., the per-acre land value adjustment, the 50 percent encumbrance factor, the 5.77 percent rate of return, and the 1.9 percent inflation adjustment).

63. Fee schedules for years 2016–2020 will be based on data from the 2012 NASS Census. The state-specific adjustment to the per-acre land values will be performed for the 2016 base year, the rate of return will remain at 5.77 percent, and the inflation adjustment will be recalculated.

64. For years 2021–2025, the per-acre land value will be based on data from the 2017 NASS Census, the state-specific adjustments will be recalculated, the rate of return will be 5.77 percent, and the inflation adjustment will match that used in years 2016–2020.

65. A schedule of adjustments to the fee schedule is provided in Appendix B to this order, and will be available on the Commission's Web site.

D. Changes to Proposed Regulations

66. The NOPR proposed to retain the general structure of section 11.2 by referring to the completed fee schedule created based on the components described in the rule promulgating the 1987 regulations. However, in response to comments on the NOPR and to reduce the risk of ambiguity, the regulations promulgated by this Final Rule include a description of the individual components of the formula used to create the fee schedule. Furthermore, the first sentence of section 11.2(a) will not be deleted because it helps to clarify the relationship of annual charges for the use of government lands to the annual charges for the use of government dams.

III. Regulatory Requirements

A. Information Collection Statement

67. The Office of Management and Budget (OMB) regulations require OMB to approve certain reporting, record keeping, and public disclosure requirements (collections of information) imposed by an agency.[66] This rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required. The Commission anticipates this rulemaking will make no change in current filing requirements, since licensees already must report to the Commission annually the number of acres per county a licensed project occupies. In addition, this Final Rule does not make any substantive or material changes to requirements specified in the NOPR, where the Commission similarly found no information collection requirements. The Commission will submit a copy of this Final Rule to OMB for information purposes only.

B. Environmental Analysis

68. 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.[67] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[68] The actions taken here fall within categorical exclusions in the Commission's regulations for actions concerning annual charges.[69] Therefore, an environmental review is unnecessary and has not been prepared in this rulemaking.

C. Regulatory Flexibility Act

69. The Regulatory Flexibility Act of 1980 (RFA)[70] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rulemaking while minimizing any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[71] The SBA has established a size standard for electrical utilities stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatts.[72]

70. Section 10(e)(1) of the FPA requires that the Commission fix a reasonable annual charge for the use, occupancy, and enjoyment of federal lands by hydropower licensees.[73] The Commission currently assesses annual charges to 253 licenses for projects that occupy federal lands, which represent

[65] BLM will recalculate the annual adjustment factor in 2014, based on the average annual change in the IPD–GDP from 2004 to 2013 (the 10-year period immediately preceding the year (2014) when the 2012 NASS Census data will become available) and will apply it annually to the fee schedule for years 2016 through 2025.

[66] 5 CFR 1320.12 (2012).

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

[68] 18 CFR 380.4 (2012).

[69] 18 CFR 380.4(1) (2012).

[70] 5 U.S.C. 601–612 (2006).

[71] 13 CFR 121.101 (2012).

[72] 13 CFR 121.201, Sector 22 Utilities & n.1 (2012).

[73] 16 U.S.C. 803(e)(1) (2006).

135 discrete licensees, who will be impacted by this Final Rule. The Final Rule adopts a methodology promulgated by BLM, based on the NASS Census data, to determine the annual charge for the use of federal lands. The methodology for assessing this annual charge under the previous regulations is based on land values from 1987, whereas this Final Rule incorporates current land values, and would update those values every five years. As a result, some of the 135 licensees may experience a one-time increase in their annual charge for the use of federal lands.

71. Nevertheless, based on a review of the licensees with federal lands that will be impacted by the Final Rule, we estimate that less than 10 percent are small entities under the SBA definition. The affected licensees represent utilities, cities, and private and public companies in 30 states or territories. Many of the utilities which may seem to be under the four million megawatt hours per year threshold are also engaged in electricity production through other forms of generation, such as coal or natural gas, or also provide other utility services such as natural gas or water delivery. Similarly, many licensees that are small hydropower generators are affiliated with a larger entity or entities in other industries. Therefore, we estimate that less than 10 percent of the impacted licensees are actually small, unaffiliated entities who are primarily engaged in hydropower generation and whose total electrical output through transmission, generation, or distribution is less than four million megawatt hours per year.

72. Any impact on these small entities would not be significant. Under the Final Rule, there may be a one-time increase for some licensees in the annual charge for the use of federal lands, but because the new methodology for calculating the annual charge will be updated every five years, any future increases or decreases will be incremental.[74] In addition, small, unaffiliated entities generally occupy less federal lands than larger projects that generate more power. Therefore, as a class of licensees, small entities would be less impacted by an annual charge for the use of federal lands. Furthermore, this Final Rule does not incur any additional compliance or recordkeeping costs on any licensees occupying federal lands. Consequently, the Final Rule should not impose a significant economic impact on small entities.

73. Based on this understanding, the Commission certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

D. Document Availability

74. In addition to publishing the full text of this document, except for the Appendices, in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

75. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document, including the Appendices, 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.

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

E. Effective Date and Congressional Notification

77. These regulations are effective February 25, 2013. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[75] This rule is being submitted to the Senate, House, Government Accountability Office, and the Small Business Administration.

List of Subjects in 18 CFR Part 11

Public Lands.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission amends part 11, Chapter I, Title 18 of the Code of Federal Regulations, as follows.

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

■ 1. The authority citation for part 11 continues to read as follows:

Authority: 16 U.S.C. 792–828c; 42 U.S.C. 7101–7352.

■ 2. Revise § 11.2 to read as follows:

§ 11.2 Use of Government lands.

(a) Reasonable annual charges for recompensing the United States for the use, occupancy, and enjoyment of its lands (other than lands adjoining or pertaining to Government dams or other structures owned by the United States Government) or its other property, will be fixed by the Commission.

(b) *General rule.* Annual charges for the use of government lands will be payable in advance, and will be set on the basis of an annual schedule of per-acre rental fees, as set forth in Appendix A of this part. The Executive Director will publish the updated fee schedule in the **Federal Register**.

(c) The annual per-acre rental fee is the product of four factors: the adjusted per-acre value multiplied by the encumbrance factor multiplied by the rate of return multiplied by the annual adjustment factor.

(1) *Adjusted per-acre value.* (i) Counties (or other geographical areas) are assigned a per-acre value based on their average per-acre land and building value published in the Census of Agriculture (Census) by the National Agricultural Statistics Service (NASS). The adjusted per-acre value is computed by reducing the NASS Census land and building value by the sum of a state-specific modifier and seven percent. A table of state-specific adjustments will be available on the Commission's Web site.

(ii) The state-specific modifier is a percentage reduction applicable to all counties or geographic areas in a state (except Puerto Rico), and represents the ratio of the total value of irrigated farmland in the state to the total value of all farmland in the state. The state-specific modifier will be recalculated every five years beginning in payment year 2016.

(iii) The state-specific modifier for Puerto Rico is 13 percent.

(2) *Encumbrance factor.* The encumbrance factor is 50 percent.

[74] Alaska Electric Light and Power Company (AEL&P) commented that it was a small business that would be significantly impacted by the proposed rule because its charges for the Project No. 2307 would rise from approximately $10,000 annually to over $1 million. In fact, under this Final Rule, AEL&P's charges for the use of government lands would be approximately $30,000.

[75] 5 U.S.C. 804 (2006).

(3) *Rate of return.* The rate of return is 5.77 percent through payment year 2025. The rate of return will be adjusted every 10 years thereafter, and will be based on the 10-year average of the 30-year Treasury bond yield rate immediately preceding the applicable NASS Census. For example, for years 2026 through 2035, the rate of return will be based on the 10-year average (2012–2021) of the 30-year Treasury bond yield rate immediately preceding the 2022 NASS Census. If the 30-year Treasury bond yield rate is not available, the next longest term Treasury bond available should be used in its place.

(4) *Annual adjustment factor.* The annual adjustment factor is 1.9 percent through payment year 2015. For years 2016 through 2025, the annual adjustment factor is the annual change in the Implicit Price Deflator for the Gross Domestic Product (IPD–GDP) for the ten years (2014–2023) preceding issuance (2024) of the most recent NASS Census (2022). Each subsequent ten year adjustment will be made in the same manner.

(d) The annual charge for the use of Government lands for 2013 will be reduced by 25 percent for all licensees subject to this section.

(e) The minimum annual charge for the use of Government lands under any license will be $25.

Note: Appendix A will not be published in the *Code of Federal Regulations.*

APPENDIX A

State	All Farms 2007 (per acre value)	Irrigated Farms All harvested cropland irrigated 2007 (per acre value)	All Farms 2007 (acres)	Irrigated Farms All harvested cropland irrigated 2007 (acres)	Total Farm Est Mkt Value (per acre all farms value × all farms acres)	Total Harvested Irrigated Cropland Est Mkt Value (irrigated farms acres × irrigated farms per acre value)	% Reduction of Irrigated cropland	% Reduction of irragated cropland + 7% Building
Alabama	2,292	4,406	9,033,537	94,995	20,704,866,804	418,547,970	2.02	9.02
Alaska	391	766	881,585	55,673	344,699,735	42,645,518	12.37	19.37
Arizona	748	4,828	26,117,899	1,983,172	19,536,188,452	9,574,754,416	49.01	56.01
Arkansas	2,343	2,144	13,872,862	1,930,505	32,504,115,666	4,139,002,720	12.73	19.73
California	6,408	9,636	25,364,695	11,417,202	162,536,965,560	110,016,158,472	67.69	74.69
Colorado	1,046	1,426	31,604,911	7,235,306	33,058,736,906	10,317,546,356	31.21	38.21
Connecticut	12,667	25,138	405,616	13,457	5,137,937,872	338,282,066	6.58	13.58
Delaware	10,347	15,326	510,253	10,949	5,279,587,791	167,804,374	3.18	10.18
Florida	5,639	6,583	9,231,570	2,497,529	52,056,823,230	16,441,233,407	31.58	38.58
Georgia	3,117	3,091	10,150,539	500,841	31,639,230,063	1,548,099,531	4.89	11.89
Hawaii	7,688	7,873	1,121,329	264,215	8,620,777,352	2,080,164,695	24.13	31.13
Idaho	1,972	2,374	11,497,383	4,990,872	22,672,839,276	11,848,330,128	52.26	59.26
Illinois	3,792	6,244	26,775,100	43,999	101,531,179,200	274,729,756	0.27	7.27
Indiana	3,583	6,615	14,773,184	29,987	52,932,318,272	198,364,005	0.37	7.37
Iowa	3,388	5,501	30,747,550	14,798	104,172,699,400	81,403,798	0.08	7.08
Kansas	911	976	46,345,827	581,943	42,221,048,397	567,976,368	1.35	8.35
Kentucky	2,682	4,537	13,993,121	55,937	37,529,550,522	253,786,169	0.68	7.68
Louisiana	2,058	1,777	8,109,975	502,057	16,690,328,550	892,155,289	5.35	12.35
Maine	2,203	6,109	1,347,566	23,145	2,968,687,898	141,392,805	4.76	11.76
Maryland	7,034	10,102	2,051,756	31,095	14,432,051,704	314,121,690	2.18	9.18
Massachusetts	12,313	15,069	517,879	47,956	6,376,644,127	722,648,964	11.33	18.33
Michigan	3,409	6,940	10,031,807	144,741	34,198,430,063	1,004,502,540	2.94	9.94
Minnesota	2,569	3,791	26,917,962	100,603	69,152,244,378	381,385,973	0.55	7.55
Mississippi	1,870	1,972	11,456,241	238,386	21,423,170,670	470,097,192	2.19	9.19
Missouri	2,179	3,267	29,026,573	186,134	63,248,902,567	608,099,778	0.96	7.96
Montana	775	1,179	61,388,462	8,244,973	47,576,058,050	9,720,823,167	20.43	27.43
Nebraska	1,159	1,234	45,480,358	4,122,912	52,711,734,922	5,087,673,408	9.65	16.65
Nevada	613	542	5,865,392	4,197,712	3,595,485,296	2,275,159,904	63.28	70.28
New Hampshire	4,929	12,537	471,911	7,834	2,326,049,319	98,214,858	4.22	11.22
New Jersey	15,346	16,131	733,450	83,573	11,255,523,700	1,348,116,063	11.98	18.98
New Mexico	337	609	43,238,049	8,328,784	14,571,222,513	5,072,229,456	34.81	41.81
New York	2,275	12,676	7,174,743	58,992	16,322,540,325	747,782,592	4.58	11.58
North Carolina	4,096	6,923	8,474,671	221,134	34,712,252,416	1,530,910,682	4.41	11.41
North Dakota	771	1,470	39,674,586	46,390	30,589,105,806	68,193,300	0.22	7.22
Ohio	3,528	10,297	13,956,563	27,239	49,238,754,264	280,479,983	0.57	7.57
Oklahoma	1,157	1,102	35,087,269	439,262	40,595,970,233	484,066,724	1.19	8.19
Oregon	1,890	1,648	16,399,647	5,528,995	30,995,332,830	9,111,783,760	29.40	36.40
Pennsylvania	4,775	18,011	7,809,244	35,549	37,289,140,100	640,273,039	1.72	8.72
Rhode Island	16,828	15,665	67,819	6,749	1,141,258,132	105,723,085	9.26	16.26
South Carolina	2,858	4,269	4,889,339	84,908	13,973,730,862	362,472,252	2.59	9.59
South Dakota	896	667	43,666,403	422,908	39,125,097,088	282,079,636	0.72	7.72
Tennessee	3,378	6,291	10,969,798	55,112	37,055,977,644	346,709,592	0.94	7.94
Texas	1,270	1,329	130,398,753	5,146,796	165,606,416,310	6,840,091,884	4.13	11.13
Utah	1,249	1,959	11,094,700	3,751,452	13,857,280,300	7,349,094,468	53.03	60.03
Vermont	2,903	7,011	1,233,313	8,724	3,580,307,639	61,163,964	1.71	8.71
Virginia	4,213	7,062	8,103,925	50,527	34,141,836,025	356,821,674	1.05	8.05
Washington	1,992	3,029	14,972,789	3,284,122	29,825,795,688	9,947,605,538	33.35	40.35
West Virginia	2,385	5,283	3,697,606	6,109	8,818,790,310	32,273,847	0.37	7.37
Wisconsin	3,225	4,586	15,190,804	247,792	48,990,342,900	1,136,374,112	2.32	9.32
Wyoming	513	592	30,169,526	10,496,772	15,476,966,838	6,214,089,024	40.15	47.15
United States	1,892	2,757	922,095,840	87,900,817	1,744,605,329,280	242,342,552,469	13.89	20.89

Note: Appendix B will not be published in the *Code of Federal Regulations.*

APPENDIX B—ADJUSTMENT SCHEDULE FOR FORMULA COMPONENTS

Payment year	Per-acre adjustments		Rate of return adjustments	Inflation adjustments
2013	2007 NASS Census	state-specific adjustment	rate of return update (10-year average of annualized 30-year T-bill yield for years 2002–2011).	
2014				
2015				
2016	2012 NASS Census	updated state-specific adjustment.		inflation update (average IPD–GDP for 2004–2013, 2Q–2Q).
2017				
2018				
2019				
2020				
2021	2017 NASS Census	updated state-specific adjustment.		
2022				
2023				
2024				
2025				
2026	2022 NASS Census	updated state-specific adjustment.	rate of return update (10-year average of annualized 30-year T-bill yield for 2012–2021).	inflation update (average of IPD–GDP for 2014–2023, 2Q–2Q).
2027				
2028				
2029				
2030				
2031	2027 NASS Census	updated state-specific adjustment.		
2032				
2033				
2034				
2035				
2036	2032 NASS Census	updated state-specific adjustment.	rate of return update (10-year average of annualized 30-year T-bill yield for 2022–2031).	inflation update (average of IPD–GDP for 2024–2033, 2Q–2Q).
2037				
2038				
2039				
2040				
2041	2037 NASS Census	updated state-specific adjustment.		
2042				
2043				
2044				
2045				
2046	2042 NASS Census	updated state-specific adjustment.	rate of return update (10-year average of annualized 30-year T-bill yield for 2032–2041).	inflation update (average of IPD–GDP for 2034–2043, 2Q–2Q).
2047				
2048				
2049				
2050				
2051	2047 NASS Census	updated state-specific adjustment.		

[FR Doc. 2013–01373 Filed 1–24–13; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2 and 35

[Docket Nos. AD12–9–000 and AD11–11–000]

Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects; Priority Rights to New Participant-Funded Transmission

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Final Policy Statement.

SUMMARY: The Commission issues this final policy statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. Under this policy statement, the Commission will allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity, when the developers broadly solicit interest in the project from potential customers, and demonstrate to the Commission that the developer has satisfied the solicitation, selection and negotiation process criteria set forth herein. The Commission is making these clarifications and refinements to fulfill its statutory responsibility of preventing undue discrimination and undue preference while providing developers the ability to bilaterally negotiate rates, terms, and conditions for the full amount of transmission capacity with potential customers. These clarifications and refinements will be implemented within the Commission's existing four-factor analysis used to evaluate requests for negotiated rate authority for transmission service. The Commission will apply this policy statement on a prospective basis to filings received after this issuance.

DATES: These policies became effective January 17, 2013.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Jon Wellinghoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony T. Clark.

Final Policy Statement

(Issued January 17, 2013)

I. Introduction

1. The Commission issues this final policy statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. Under this policy statement, the Commission will allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity, when the developers (1) broadly solicit interest in the project from potential customers, and (2) demonstrate to the Commission that the developer has satisfied the solicitation, selection and negotiation process criteria set forth herein. The Commission is making these clarifications and refinements to fulfill its statutory responsibility of preventing undue discrimination and undue preference while providing developers the ability to bilaterally negotiate rates, terms, and conditions for the full amount of transmission capacity with potential customers. These clarifications and refinements will be implemented within the Commission's existing four-factor analysis used to evaluate requests for negotiated rate authority for transmission service.[1] The Commission will apply this policy statement on a prospective basis to filings received after this issuance.

II. Background

2. The Commission first granted negotiated rate authority to a merchant transmission project developer over a decade ago, finding that merchant transmission can play a useful role in expanding competitive generation alternatives for customers.[2] Unlike traditional utilities recovering their costs-of-service from captive and wholesale customers, investors in merchant transmission projects assume the full market risk of development.[3] Over the course of a number of early proceedings, the Commission developed ten criteria to guide its analysis in making a determination as to whether negotiated rate authority would be just and reasonable for a given merchant transmission project.[4] Two of these criteria were that (1) an open season process should be employed to initially allocate all transmission capacity and (2) the results of the open season should be posted on an Open Access Same-Time Information System (OASIS) and filed in a report with the Commission.[5]

3. In recent years, a number of merchant and nontraditional transmission developers have sought guidance from the Commission regarding application of open access principles to new transmission facilities through petitions for declaratory orders. As the Commission addressed these requests, its policies evolved over time to provide potential customers adequate opportunities to obtain service while also providing transmission developers adequate certainty to assist with financing transmission projects. As a result of these evolving policies,

[1] *See infra* note 6 and P 15.

[2] *TransEnergie U.S., Ltd.,* 91 FERC ¶ 61,230, at 61,838 (2000) (*TransEnergie*).

[3] *Id.* at 61,836.

[4] *Id.; Neptune Regional Transmission System, LLC,* 96 FERC ¶ 61,147, at 61,633 (2001) (*Neptune*); *Northeast Utilities Service Co.,* 97 FERC ¶ 61,026, at 61,075 (2001) (*Northeast Utilities I*); *Northeast Utilities Service Co.,* 98 FERC ¶ 61,310, at 62,327 (2002) (*Northeast Utilities II*).

[5] The ten criteria were: (1) The merchant transmission facility must assume full market risk; (2) the service should be provided under the open access transmission tariff (OATT) of the Independent System Operator (ISO) or Regional Transmission Organization (RTO) that operates the merchant transmission facility and that operational control be given to that ISO or RTO; (3) the merchant transmission facility should create tradable firm secondary transmission rights; (4) an open season process should be employed to initially allocate transmission rights; (5) the results of the open season should be posted on the OASIS and filed in a report to the Commission; (6) affiliate concerns should be adequately addressed; (7) the merchant transmission facility not preclude access to essential facilities by competitors; (8) the merchant transmission facilities should be subject to market monitoring for market power abuse; (9) physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTO; and (10) merchant transmission facilities should not impair pre-existing property rights to use the transmission grids of inter-connected RTOs or utilities. *E.g., Northeast Utilities I,* 97 FERC ¶ 61,026 at 61,075.