This rule does not contain a collection of information for purposes of the Paperwork Reduction Act (Pub. L. 96–511).

List of Subjects in 13 CFR Part 309

Community development, Grant programs—community development, Loan programs—community development, Penalties.

Accordingly, for the reasons set forth above, 13 CFR Part 309 is revised to read as follows:

PART 309—[AMENDED]

1. The authority citation for Part 309 is revised to read as follows:

Authority: Sec. 701, Pub. L. 89–136, 79 Stat. 570 (42 U.S.C. 3211); Sec. 1–105, DOC Organization Order 10–4, as amended (40 FR 56702, as amended).

2. 13 CFR 309.7 is amended by revising paragraph (c) introductory text as follows:

§ 309.7 Employment of expediters or administrative employees; compensation of persons engaged by or on behalf of applicants.

* * * * *

(c) EDA will participate in such costs of facilities receiving financial assistance under the Act as are deemed to be reasonable as fees or compensation for services actually rendered by persons engaged by or on behalf of the EDA applicant for the purpose of rendering professional or other services necessary, as determined by EDA in connection with such facilities or with the extension of financial assistance by EDA. Provided that, no funds appropriated or otherwise made available under Pub. L. 99–180, December 13, 1985, may be used directly or indirectly for attorneys' or consultants' fees in connection with securing grants and contracts made by EDA, such as for example, preparing applications for EDA financial assistance; however; attorneys' and consultants' fees for meeting grant requirements, such as for example, conducting a title search or preparing plans and specifications, could be eligible project costs and paid for out of funds appropriated or otherwise made available under Pub. L. 99–180. No fee or compensation will be allowed if it appears that the person charging such fee or compensation has:

* * * * *

Dated: June 27, 1986.

Orson G. Swindle III,

Assistant Secretary for Economic Development.

[FR Doc. 86–15102 Filed 7–2–86; 8:45 am]

BILLING CODE 3510–24–M

FEDERAL TRADE COMMISSION

16 CFR Part 444

Trade Regulation Rule; Credit Practices Granted to Wisconsin

AGENCY: Federal Trade Commission.

ACTION: Exemption from Trade Regulation.

SUMMARY: The Federal Trade Commission hereby publishes its decision to grant the State of Wisconsin an exemption from the Commission's trade regulation rule on credit practices, 16 CFR Part 444 (1984) ("Credit Practices Rule" or "Rule") as to transactions subject to the Wisconsin Consumer Act.

EFFECTIVE DATE: July 3, 1986.

FOR FURTHER INFORMATION CONTACT: Sandra M. Wilmore or Ruth R. Amberg, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, (202) 724–1100 or (202) 724–1187.

SUPPLEMENTARY INFORMATION:

List of Subjects in 16 CFR Part 444

Consumer credit, Trade practices.

The Credit Practices Rule states that it is unfair for a creditor in a transaction subject to the Rule [1] to include in a contract a provision that constitutes or contains a confession of judgment or similar waiver; a waiver of exemptions; an assignment of wages (with certain limited exceptions); or a non-purchase money security interest in certain types of household goods. The Rule also states that it is deceptive for a creditor to misrepresent a cosigner's liability and unfair for a creditor to fail to disclose the cosigner's liability. The Rule requires that a particular notice be provided to potential cosigners and states that a creditor complying with that disclosure provision does not violate the prohibition against unfair and deceptive statements concerning the cosigner's liability. The Rule states that it is an unfair practice for a creditor to assess multiple late fees when only delinquency is the failure to pay a previously assessed late fee.

The Credit Practices Rule provides (16 CFR 444.5) that if a state applies for an exemption from a provision of the Rule, such exemption will be granted if the Commission determines that: (1) There is in effect a state requirement or prohibition that applies to any transaction to which a provision of the Credit Practices Rule applies; and (2) the state requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by the Rule's provision. Such an exemption will continue for so long as the state effectively administers and enforces its law. The result of the exemption is that the exempted provision of the Credit Practices Rule is not in effect in that state.

The State of Wisconsin has filed a petition for exemption from the Rule, asserting that the Wisconsin Consumer Act ("the Act") and the State enforcement scheme for that Act meet the standards for exemption contained in the Rule. The request was published in the **Federal Register** for 60 days of public comment.[2]

After evaluating the request and the comments received, the Commission has determined to grant the exemption as to most transactions, but to deny the exemption as to transactions that would not be covered by the Wisconsin Act because they involve more than $25,000.

As set forth in § 444.5, the Commission evaluated, in the context of an exemption proceeding, the Wisconsin petition for exemption to determine whether the level of protection to consumers under the state law is substantially equivalent to the Credit Practices Rule and whether the state law is administered and enforced effectively. The exemption proceeding was conducted pursuant to § 1.16 of the Commission's Rules of Practice.

As indicated in the Rule's Statement of Basis and Purpose, the requirement in § 444.5 that a comparable state requirement be "substantially equivalent" to the Commission's Rule provision does not, in the Commission's view require that the state requirement mirror exactly the Commission provision. Any differences that exist, however, should be so minor as not to deprive consumers of the level of protection guaranteed by the Commission Rule nor to complicate significantly compliance by interstate creditors. In determining whether an exemption is warranted, the Commission also considered factors such as the resources committed by the state to enforce its provisions and the extent of private rights of action

[1] The Federal Trade Commission does not have jurisdiction over banks or federally-chartered or insured savings and loan associations, so transactions by those creditors are not subject to the Rule. However, the Federal Reserve Board and the Federal Home Loan Bank Board have adopted substantially similar rules for those institutions. These rules became effective January 1, 1986. The FRB's rule and the FHLBB's rule may be found at 50 FR 11695 (April 29, 1985) and 50 FR 19325 (May 8, 1985), respectively. The State of Wisconsin has requested an exemption from those rules as well.

[2] 50 FR 46082, November 6, 1985.

available to aggrieved consumers, 49 FR 7740, 7783.

Contents of the Wisconsin Submission

Wisconsin provided a copy of the relevant state statutes and a narrative statement comparing the state law with the corresponding provisions of the Credit Practices Rule. The statement also explains how state law and the Rule would apply to the same transaction. The Annual Reports of the Banking Commission for each of the past three years were also provided. They contain summaries of cases brought under the Wisconsin Consumer Act and show what the Banking Commission has done to enforce the Wisconsin Consumer Act during the last three years. The petition is signed by the Commissioner of Banking, who is the Administrator of the Wisconsin Consumer Act.

Comments: Comments were received from the Governor of Wisconsin, the Attorney General of Wisconsin, and the Wisconsin Banking Commissioner. No comments were received from the credit industry or consumers.

Governor Anthony S. Earl stated that the "remedies and penalties available both to the State and to consumers under the Wisconsin Consumer Act are considerably broader and offer more alternative mechanisms for enforcement of the Act than are available under the Rule." He also stated that resources available to enforce the Wisconsin Act exceed "the resources which the federal government could reasonably commit toward the enforcement of the Rule in a single state."

The Attorney General stated that he concurred with the Banking Commission's legal analysis of the Wisconsin Consumer Act as described in the submission and agrees with the conclusion that the Wisconsin Act affords a level of protection that is substantially equivalent to, or greater than, that of the Rule. The Attorney General stated his intention to continue working with the banking Commission to enforce the Wisconsin Consumer Act.

Banking Commissioner Richard C. Galecki responded in his comments to issues raised in the Commission's Federal Register Notice. The Notice referred to the fact that the Wisconsin Act does not cover transactions in which the amount financed exceeds $25,000. He mentions that a separate act prohibits the pyramiding of late charges in first mortgage loans regardless of the loan amount.[3] With respect to enforcement, he explains that the absence of complaints regarding the contract provisions covered by the rule is due to the fact that Wisconsin officials review most consumer contract forms before they are used and potential violations are identified at that point.

With regard to specific provisions, he states that, not only is a confession of judgment unenforceable in Wisconsin, but the contract containing it would be void in its entirety. He states that Wisconsin's confession of judgment provision, as well as its late fee provision, offers broader protection than does the Rule and that the cosigner provision offers equivalent protection by giving the cosigner the right to a free copy of all relevant documents as well as the cosigner notice required by state law.

The Wisconsin Consumer Act and the Rule

A. General

1. Coverage

Sections 421.301(10), (20), and (30) of the Wisconsin Consumer Act provide that an extension of consumer credit to which the Wisconsin Consumer Act applies includes any sale, lease, or loan with a consumer on which a finance charge is or may be assessed, or which is payable in more than four installments. The Rule applies to an agreement between a consumer and a lender or retail installment seller. The Rule's definition of a retail installment seller includes a person who sells goods or services to a consumer pursuant to a lease-purchase arrangement. The Rule defines a debt as money that is due or alleged to be due from one to another and does not require that a covered obligation be subject to a finance charge or payable in more than four installments.

The Wisconsin Consumer Act covers agricultural credit, as well as credit for personal, family, or household use and applies only to transactions in which the amount financed does not exceed $25,000. The Rule covers credit for personal, family, or household use and sets no dollar limit on covered transactions. (See section 421.202(6), WIS. STAT.) The Commission has determined that to apply the dollar limit contained in the Wisconsin Act would exclude significant consumer transactions that now have the protection of the Rule, and that such transactions should continue to be covered. Though the coverage of Agricultural Credit means that some transactions not covered by the Rule are covered by the Act, the Commission finds that this does not compensate for the exclusion of consumer transactions from the protections of the Rule.

2. Enforcement

The Wisconsin Consumer Act is administered by the Commissioner of Banking. Among his functions, the Commissioner is authorized to receive and act on complaints, adopt administrative rules, review and approve contract forms, and commence actions through the Department of Justice. Administration of the Act includes the direct examination of certain creditors by a field staff of five examiners. In addition, there are two consumer credit examiners who handle complaints received against creditors not subject to routine examinations.

From March 1, 1981 to February 28, 1982, according to its annual report, the Wisconsin Banking Commission reviewed 546 complaints under the Wisconsin Consumer Act of which one pertained to the taking of a security interest in exempt property. Others did not appear to pertain to practices covered by the Rule. During that time period, the Wisconsin Banking Commission received 112 additional complaints pertaining to practices not covered by the Wisconsin Consumer Act. According to the summaries provided in the annual report, the practices complained of do not appear to be covered by the Rule either. During that same time period, the state completed seven enforcement actions involving alleged violations of the Act. Three of the seven charged the creditor with the assessment of excessive delinquency charges, but it is not clear from the summaries provided whether the excessive charges included the pyramiding of late charges, a practice prohibited by the Rule. The remaining four enforcement actions did not appear to involve practices that would violate the Rule.

From March 1, 1982 to February 28, 1983, the Wisconsin Banking Commission received 393 complaints of violations of the Wisconsin Consumer Act including one complaint involving the use of a prohibited confession of judgment, a practice that would violate the Rule. Four other complaints involved excessive delinquency charges which, if the excessive charges included the pyramiding of late fees, would violate the Rule. The Wisconsin Banking Commission also received 105 complaints of practices not covered by the Wisconsin Consumer Act that do not appear to be covered by the Rule either. Enforcement proceedings brought under the Act during that time period included three completed cases, two of which

[3] See section 138.052, Wis. Stats. However, the Rule does not apply to the first lien real estate mortgage loans cover by this provision.

alleged contracting for delinquency charges in excess of that permitted by the statute. Again, if the excessive charges included the pyramiding of late fees, that would also violate the Rule. Other practices alleged were not covered by the Rule.

From March 1, 1983 to February 29, 1984, the Wisconsin Banking Commission processed 364 complaints to violations of the Act of which one involved the failure to provide the required notice to a cosigner, a practice that would also violate the Rule. Seven other complaints involved excessive delinquency charges. The Banking Commission received 171 complaints regarding practices not covered by the Act. The practices complained of do not appear to be covered by the Rule. Enforcement proceedings brought during that time period included two completed cases, neither of which appeared to involve practices covered by the Rule. The state also had four cases pending during that time period, two of which included allegations of contracting for excessive delinquency charges, a practice that would violate the Rule if those charges included the pyramiding of late fees.

The Wisconsin Banking Commissioner has the authority to adopt administrative rules to carry out the purposes of the Act, and has done so. Rules under the Wisconsin Act that are relevant to the Credit Practices Rule are: a rule describing language to be used in making an assignment of wages revocable;[4] a rule stating that a purchase money security interest may cover repairs and replacement parts for the item purchased;[5] and rules modifying the notice given to obligors.[6]

To assist creditors in designing forms that comply with the Act, the Wisconsin Banking Commissioner reviews forms used in consumer credit transactions. From the time that the Wisconsin Consumer Act became effective through the time covered by the 1984 report that we received, 780 business and trade associations had submitted forms for approval. Approval of a form or procedure by the Banking Commission protects a creditor from potential civil penalties. The Wisconsin petition asserts that this examination and approval procedure results in a high level of compliance with the Act.

The information provided about Wisconsin's enforcement scheme caused the Commission to conclude that the State of Wisconsin is effectively administering and enforcing its laws.

3. Remedies

The damages provided for individual violations of the Wisconsin law are generally either $100, twice the finance charge, or the amount of the consumer's actual damages.[7] Furthermore, under specific provisions of the Act discussed below, certain nonconforming obligations are void or unenforceable. In addition to the private right of action under the Act, the State may recover civil penalties of $100 to $1,000 for negligent violations of the Act, and penalties of $1,000 to $10,000 for willful and knowing violations. Either the State or an aggrieved consumer may sue for an injunction or declaratory relief. Either the State or any consumer affected by a violation may bring a class action on behalf of all persons similarly situated for actual damages, penalty damages not to exceed $100,000, reasonable attorney's fees, and other relief to which consumers are entitled under specific provisions of the Act.

The Rule provides for civil penalties of up to $10,000 per violation. However, the Rule does not make a nonconforming obligation void or unenforceable by the creditor and contains no private right of action. The Commission has concluded that the private right of action under the Act coupled with the fact that the Act bars a creditor from enforcing certain violative contracts provides consumers with a substantially equivalent level of protection despite the lower civil penalties that can be obtained for violations under the Act.

B. Confession of Judgment

Section 422.405 of the Wisconsin Act provides that a creditor may not obtain from a consumer any authorization that would enable the creditor to confess judgment on behalf of the consumer. If a contract contains such a prohibited provision, the consumer may void the contract, may retain the goods or services provided without any further obligation to pay, and may obtain a refund of all monies paid to the creditor. The Rule prohibits a creditor from taking or receiving a Confession of Judgment, but does not void contracts containing Confessions of Judgment or provide for the other remedies of the Act. With respect to Confessions of Judgment, the Commission has concluded that the prohibited practice appears to be the same and that remedies for violations provided under the Wisconsin Act appear to afford protection at least as great as that of the Rule.

C. Waiver of Exemptions

Wisconsin law exempts certain real and personal property and a portion of a debtor's wages from execution. (See Sections 421.06, 425.06, and 425.107(1)(e), WIS. STAT.) Wisconsin law also provides that it is an unconscionable practice to include in a contract a provision that requires the consumer to waive legal rights. (See sec. 421.106 (1), Wis. Stats.) The state contends that it would be unconscionable for a creditor to include in its contract a waiver of exemptions clause, but waivers of exemptions are not expressly prohibited under Wisconsin law as they are under the Rule. An unconscionable contract provision is not enforceable in Wisconsin, and a creditor who includes such a provision in contract is, furthermore, subject to penalty damages of $100 and any actual damages sustained by the consumer.

The Commission has concluded that a reasonable reading of the Wisconsin Act's prohibition aganist the inclusion of waivers of legal rights would include a prohibition against waiving exemptions granted by state law. As noted in the Rule's Statement of Basis and Purpose, at common law, all property of a judgment debtor was subject to execution in order to satisfy a judgment debt. The ability to retain certain possessions determined to be necessities is a specific right granted to consumers by statute in most states and the District of Columbia.[8] That being the case, the Act prohibits the same practice that the Rule prohibits. The Commission has also concluded that because the Wisconsin law would render such a contract provision unenforceable and provide the consumer with the right to sue for damages, it provides remedies that afford greater protection than that of the Rule.

D. Wage Assignments

Section 422.404 of the Wisconsin Consumer Act prohibits wage assignments unless revocable, and requires that a consumer be given notice of the assignment's revocability. The Rule prohibits wage assignments unless revocable, but does not require a notice of revocability. The Wisconsin Banking Commission states in its petition that, while Wisconsin law does not expressly address payroll deductions, such a

[4] Wisconsin Administrative Code, Bkg. 80.361.

[5] Wisconsin Administrative Code, Bkg. 80.391.

[6] Wisconsin Administrative Code, Bkg. 80.35, 80.341.

[7] The specific remedies available to a consumer for violations of the Wisconsin law provisions that correspond to the provisions of the Rule are discussed in the provision-by-provision analysis below.

[8] Statement of Basis and Purpose, 49 FR 7740, 7768.

payment mechanism would be permissible only if the consumer could revoke it at any time. The Rule permits certain payroll deductions, whether or not they are revocable. The state contends in its submission that the Wisconsin provision on wage assignments offers greater protection than the Rule does. A creditor who violates the Wisconsin provision must pay damages of twice the finance charge or the consumer's actual damage, whichever is greater, in a private suit.

With respect to wage assignments, the Wisconsin Act prohibits the practice prohibited by the Rule, imposes additional requirements such as the notice of revocability, which is not required by the Rule, and provides for damages to a consumer injured by the practice, which the Rule does not. The Commission concludes that, taken together, the wage assignment provisions of the Wisconsin Act afford greater protection than that of the Rule.

E. Household Goods Security Interests

Section 422.417 of the Wisconsin Act provides that, in general, a seller may take only a purchase money security interest. If the extension of credit is in the amount of $500 or more, a seller may take a security interest in goods upon which the property sold is installed or to which it is amended. The creditor may also take a security interest in goods upon which any services that are the subject of the sale are performed. A lender that is not a seller may take a non-purchase money security interest, except in household goods as defined by Wisconsin law.

The Rule prohibits the taking of a non-purchase money security interest in certain household items. The list of items that may not be taken as security in Wisconsin is somewhat different from the Rule's definition of household goods. The Wisconsin Act prohibits taking security interest in particular items of furniture and appliances: A dining table with chairs, beds, a couch and chairs, a refrigerator, a heating stove and a cooking stove. The Rule uses the general terms furniture and appliances, which would include those items. The Rule also specifically protects one television and china, items not mentioned in the Wisconsin Act. There is no "personal effects" category in the Wisconsin law as there is in the Rule.

If a prohibited security interest is taken, under the Act, the consumer may sue to obtain twice the amount of the finance charge or actual damages, whichever is greater. The Commission has concluded that, while the list of items that may not be taken as security is somewhat less inclusive under the Wisconsin Act than under the Rule, the Act with its private right of action does afford substantially equivalent protection to that of the Rule.

In the Statement of Basis and Purpose, it was specifically contemplated that states having a different definition of household goods than that employed in Rule, but providing substantially equivalent or greater protection than the Rule's provision, would petition for exemption from this part of the Rule.[9] As we stated, "This [exemption] provision can be invoked with respect to any provision of the Rule, but we are particularly mindful of the state's role in defining what items are considered necessities, in the context of the Rule's household goods definition."

The limitations on the use of household goods as security imposed under the Wisconsin Act serve to prevent the primary abuse that the Commission identified and that the Rule provision is intended to cure, the practice of taking a blanket security interest in a consumer's household goods.[10] As we noted in the Statement of Basis and Purpose, the law in effect at the time the Rule was enacted afforded, "creditors with maximum flexibility as to the terms contained in security interests, including coverage, description of property, and circumstances under which seizure may take place. The description of property required is minimal. Creditors can often retain a security interest in all of a debtor 'household goods' by simply checking a box on a standard form."

The Wisconsin Act has no equivalent category to that of "personal effects." Although this category is very narrowly limited by the Commission's Statement of Basis and Purpose,[11] it represents a class of items about which the Commission was specifically concerned when we spoke of items having little economic value to the creditor, but being very important to the consumer. We grant the exemption nontheless because we perceive that abusive repossession or threats of repossession of items in the "personal effects" category in particular is linked to the use of blanket security interests and find no evidence in the rulemaking record that creditors specifically enumerated nonpurchase money security interests in items such as family photographs, or pets, for example.

The Commission has concluded that the fact that fewer items are covered by the Wisconsin Act is more than compensated by the private right of action given to consumers by the Wisconsin Act, but not by the Rule, and by the overall enforcement scheme in effect in Wisconsin that should serve to deter creditors from the abuses that led us to enact the Rule provision.

F. Cosigner Provisions

The Rule prohibits a creditor from misrepresenting the nature and extent of a cosigner's liability or failing to inform the cosigner prior to the time that the agreement creating the cosigner's liability is executed of the nature of that liability. The Rule requires that a particular disclosure be provided to a consumer prior to the time that the consumer becomes obligated, and states that a creditor providing that disclosure does not violate the prohibition against misrepresenting or failing to inform the cosigner of his or her liability.

The Wisconsin Act's notice and the notice required by the Rule are similar but not identical. The notice required by the Rule states: (1) That the creditor can collect from the cosigner without first trying to collect from the borrower; (2) that the notice is not the contract that makes the cosigner liable; (3) that the same collection remedies may be used against the cosigner as against the borrower; (4) that if the debt goes into default that fact could become a part of the cosigner's credit history; and (5) that the cosigner should think carefully before becoming obligated.

Section 422.305 of the Wisconsin Act provides that a cosigner must receive a notice called "An Explanation of Personal Obligation" or a copy of all documents evidencing the obligation. The Explanation describes: (1) The cosigner's obligation to pay even though the cosigner may not be entitled to any of the goods or services or the loan provided to the borrower; (2) the fact that the cosigner may be sued even though the borrower may be able to pay; (3) the fact that the notice is not the agreement that makes the cosigner liable; and (4) the fact that the cosigner is entitled to a free copy of any document the cosigner signs endorsing the transaction. The Rule does not require that the cosigner be provided with documents evidencing the obligation as an alternative to providing the notice, as Wisconsin law does.

Wisconsin law prohibits false, misleading, or deceptive statements generally. The state contends that this prohibition covers misrepresenting or failing to disclose a cosigner's liability

[9] Statement of Basis and Purpose, 49 FR 7740, 4469, 7783 (March 1, 1984).

[10] Statement of Basis and Purpose, 49 FR 7740, 7762, 7785 (March 1, 1984).

[11] Personal effects include "those which an individual would ordinarily carry about on his or her person and possessions of uniquely personal nature, such as family photographs."

although misrepresenting or failing to disclose a cosigner's liability is not specifically prohibited by Wisconsin law as it is by the Rule. The Rule provides that a creditor who furnishes the cosigner notice does not violate the prohibition against misrepresenting or failing to disclose a cosigner's liability; the Act has no comparable provision.

The Commission has concluded that the Wisconsin Act differs from the Rule Primarily in that it offers the creditor the alternative of providing the consumer with the loan documents rather than providing the notice. In requiring the notice, the Commission made a finding of fact that consumers usually do not receive the loan documents and determined that creditors were generally not required by law to provide such documents. The Commission perceived this as an important part of the problem that requiring the notice is intended to cure.[12] In adopting the Rule, the Commission declined to include a requirement that cosigners be provided with copies of the loan documents. While we felt that cosigners would benefit from having the documents, we felt that the cost that such a requirement would impose on creditors would be substantially greater that the cost of providing the notice alone.[13] Wisconsin has determined that creditors should be provided with the opportunity to provide the notice or the documents, a choice that permits the individual creditor to determine which option is less costly to the creditor. The Commission concludes that, if a creditor is required, as is the case in Wisconsin, to provide either the loan documents, or the notice and also to refrain from false, misleading, or deceptive statements concerning the cosigner's liability, these two elements, taken together, should address the injury we identified.

Under Wisconsin law, a cosigner who does not receive the required documentation may sue the creditor and recover twice the amount of the finance charge or actual damages, whichever is greater. Here again, the Commission concludes that the existence of a private right of action under the Wisconsin Act, which does not exist under the Rule, makes the Act's enforcement mechanism substantially equivalent to that to the Rule.

G. Late Charges

Sections 422.202(2m)(a) and 203(2) of the Wisconsin Act prohibit the pyramiding of late charges as the Rule does. A creditor who violates the State's prohibitions is subject to damages of the greater of twice the finance charges or the consumer's actual damages. Since the prohibited practice is the same, and the Wisconsin Act provides a private right of action where the Rule does not, the Commission concludes that state law offers protection substantially equivalent to that of the Rule in this instance.

Action Taken

Based on the submission by the Wisconsin Banking Commission in support of its request for an exemption and upon the comments received, the Commission concludes that the State of Wisconsin has in place a comprehensive consumer credit regulatory scheme [14] containing protections against the specific abuses that the Rule is intended to eliminate and providing effective enforcement mechanisms including compliance audits and litigation. The Commission has determined to grant the requested exemption, except as noted, on that basis. The exemption will remain in effect as long as state law continues to afford substantially equivalent protection to that of the Rule.

We note, however, that the protections offered to consumers by the Wisconsin Act as to practices covered by the Rule are limited to credit transactions subject to the Rule in which the amount financed does not exceed $25,000.[15] Thus, there is no state law provision applicable to consumer credit transactions where the amount financed is greater than $25,000. The Commission, therefore, finds that this requirement for exemption under the Rule is not met and the exemption is not granted as to these transactions.

The exemption is denied as to transactions not subject to the Wisconsin Consumer Act. Because the Act in its present form applies to transactions in which the amount financed does not exceed $25,000, the effect of the Commission's action is to deny the exemption for transactions in which the amount financed is greater than $25,00. However, should the Act be amended in the future to apply to transactions in which the amount financed is greater than $25,000, the exemption would automatically extend to such transactions without the necessity of further Commission proceedings.

As contemplated in the staff guidelines, the exemption will continue only for so long as the state effectively administers and enforces its law. To ensure that the conditions for an exemption continue to be met, we require the State of Wisconsin to provide notice to the Commission of any change in its law, policies or procedures, including court decisions, that would significantly affect whether the state law continues to afford substantially equivalent protection and whether the state is effectively enforcing the Act. The Commission reserves the right to revise this reporting requirement at a later date if circumstances warrant or to request additional information if the Commission determines that this is needed.

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 86-14872 Filed 7-2-86; 8:45 am]

BILLING CODE 6750-01-M

[12] "In most jurisdictions, the creditor has no obligation to give the cosigner a copy of the contract or advise the cosigner of the extent of his or her liability." Statement of Basis and Purpose, 49 FR 7740, 7773. "Moreover, most cosigners are not provided with copies of the documents they sign or of documents received by the primary debtor." Statement of Basis and Purpose, 49 FR 7740, 7775.

[13] Statement of Basis and Purpose, 49 FR 7740, 7787.

[14] In the Statement of Basis and Purpose, the Commission noted that, during the rulemaking proceeding, Wisconsin was identified as being one of three states having legal regimes comparable to (or stricter than) the Rule as proposed. 49 FR 7740, 7780.

[15] As noted above, a separate Wisconsin law does prohibit the pyramiding of late charges in first mortgage loans without regard to the amount financed. However, first mortgage loans are not subject to the Rule.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 11, 13 and 375

[Docket No. RM83-57-000; Order No. 453]

Payments for Benefits From Headwater Improvements

Issued: June 24, 1986.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is adopting a final rule that sets forth a generic formula and procedures for determining and assessing headwater benefits payments. Under section 10(f) of the Federal Power Act, the Commission is required to divide among downstream projects the interest, maintenance and depreciation portion of the cost of facilities at the headwater project which result in increased power generation (the "headwater benefit") at the downstream projects. The headwater project costs to be recovered are referred to as the "section 10(f) costs."

The final rule codifies the "energy gains" method of apportioning the headwater project's section 10(f) costs to each downstream project according to its share of the total extra power generation made possible by the headwater project.

The rule excludes from the energy gains methodology projects that are part of a coordination agreement under which the Commission has approved headwater benefits payments and projects for which headwater benefits payments have been established in a Commission-approved settlement. The rule waives headwater benefits payments for all projects with generating capacity of 1.5 megawatts or less. Projects which currently are being assessed headwater benefits charges under another method will be grandfathered under that method until changes occur in the river basin that affect headwater benefits.

The rule specifies procedures for assessing headwater benefits payments, including provisions for conducting investigations to determine the amount of headwater benefits, streamlined data filing requirements, procedures for the assessment and payment of interim and final charges, and procedures for raising objections to assessments.

Generally, the rule will maintain headwater benefits charges at the current, or a slightly lower level.

EFFECTIVE DATE: Because the reporting requirement of the rule are being submitted to the Office of Management and Budget under the Paperwork Reduction Act, this rule will be effective September 16, 1986.

FOR FURTHER INFORMATION CONTACT: Janet Oakely, Federal Energy Regulatory Commission, Office of the General Counsel, 825 North Capitol Street NW., Washington, DC 20426, (202) 357–5771.

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt, and C.M. Naeve.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is adopting a final rule that sets forth a generic formula and procedures for determining and assessing headwater benefits payments. These are payments required by section 10(f) of the Federal Power Act (FPA) [1] to be made by certain downstream hydroelectric power projects that directly benefit from headwater projects. The payments are based on an equitable apportionment of the annual cost of interest, maintenance, and depreciation for headwater projects that increase electric generation downstream.

Under the rule, the Commission will determine the cost of facilities at the headwater project which create benefits in the form of electric generation both at the headwater project and downstream from it. This so-called "joint-use power cost" is primarily derived from the costs of the dam and reservoir. The portion of this cost attributable to interest, maintenance, and depreciation is referred to as the "section 10(f) cost" and is apportioned among the headwater and downstream projects based on the respective amounts of energy which they derive from the pertinent headwater project facilities.

The rule also specifies procedural mechanisms for the assessment of headwater benefits charges.

II. Background

On December 29, 1983, the Commission issued a Notice of Proposed Rulemaking (Notice) to amend 18 CFR 11.25–11.31 and 13.1,[2] which implement section 10(f) of the FPA, requiring payments for benefits from headwater improvements. Thirty-two commenters submitted comments in response to the Notice. This final rule implements, with some changes, the proposal discussed in the Notice.

Under section 10(f), the licensees or owners of unlicensed non-Federal hydroelectric power projects that are directly benefited by a headwater project [3] constructed either by the United States or by a Federal licensee or pre-1920 permittee must pay an "equitable" portion of the annual costs of interest, maintenance, and depreciation of the headwater project. This payment is called the headwater benefits payment.

The Commission has identified approximately 60 licensees with projects downstream from Federal headwater projects. There are an undetermined but much larger number of downstream projects benefitting from non-Federal headwater projects. Annual payments for headwater benefits from Federal projects total approximately $5 million; payments approved by the Commission for benefits from non-Federal projects also total approximately $5 million per year.

A. The Statute

Section 10(f) of the FPA provides, in pertinent part, as follows:

> [W]henever any licensee [under Part I of the EPA] is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for *such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable.* The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission. [Emphasis added.]

Another part of section 10(f) imposes a similar obligation to pay headwater benefits charges on unlicensed downstream beneficiaries.

B. Calculation of Headwater Benefits Charges

Historically, headwater benefits charges have been calculated by first determining the costs of the facilities at the headwater project that enhance electric generation and then apportioning among the beneficiaries the interest, maintenance, and depreciation portion of those costs.

1. Allocation of headwater project costs

Determining the costs of headwater project facilities that enhance electric generation is a two-step process. The first step is allocation of the total costs of the headwater project among the various authorized purposes of the project. These purposes may include flood control, navigation, irrigation, and power production.

The second step is to identify those headwater project costs attributable to facilities that provide power benefits to the downstream projects and also may provide power benefits to the headwater project.[4] The annual interest, maintenance and depreciation costs allocated to these facilities constitute the section 10(f) cost that the Commission must apportion equitably among the beneficiaries.[5]

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[1] 16 U.S.C. 803(f) (1982).

[2] Notice of Proposed Rulemaking, Payments for Benefits from Headwater Improvements, 49 FR 1067 (Jan. 9, 1984).

[3] Upstream (headwater) projects can directly benefit downstream power projects chiefly by storing or releasing water from a headwater storage facility so as to make possible additional electric power generation at a downstream project.

[4] This allocation excludes the costs of facilities that benefit only the upstream project, such as its own powerhouse.

[5] The section 10(f) cost includes *only* costs that are assigned to the power function of the headwater project. There are a few unique situations where, for example, a statutory provision directs non-power facilities, such as irrigation facilities, to be included with the power-related facilities and to be paid for by power revenues. If the legislation authorizing the

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During the life of the headwater project, the allocation ratio of the section 10(f) cost to the total project costs, as well as the total project costs themselves, ordinarily will not change significantly unless a new purpose is authorized for the project or the project maintenance costs or operation are significantly modified. Thus, the dollar amount of the section 10(f) cost remains generally stable. This means that, as a rule, a downstream project's headwater benefits charge will change only if the project is being apportioned a greater or lesser percentage of the relatively fixed section 10(f) cost because of variations in its energy gains.[6]

2. Apportionment of section 10(f) costs

Once the section 10(f) cost has been determined, it must be apportioned among the headwater and downstream parties. The Commission has used a variety of methods to apportion section 10(f) costs pursuant to its regulatory scheme in 18 CFR 11.26–11.32. The methods used are described below.

(a) *Value method.* Until recently, the most frequently used method was the "Allatoona" or "value" method.[7] Under this method, section 10(f) costs are apportioned according to the monetary *value* of the power benefits (energy and dependable capacity) at the headwater site and at downstream projects.[8]

When the headwater project is a Federal project, the value of power benefits provided to it is calculated as the cost of producing that power, since Federal power is sold at cost.[9] The value of power benefits to a downstream project is determined by pricing the gains in energy and dependable capacity[10] realized at that project at the cost of obtaining an equivalent amount of energy and capacity from the most likely alternative source, which is generally a steam electric generating plant. The "value" method of apportioning section 10(f) costs has been unheld as a reasonable, but not the sole, method of equitably apportioning these costs.[11]

Since 1974, use of the value method has caused a significant increase in the percentage of section 10(f) costs apportioned to downstream projects when the headwater project is a Federal facility. As inflation and the cost of alternative fuels increased dramatically, the value of the energy and capacity gains to downstream projects increased concomitantly, while the value of power benefits to the Federal headwater projects, where value is calculated as the cost of producing the power, remained relatively stable.[12] The difficulty with the value method lies not only in the assignment to the downstream project of an increasing percentage of the section 10(f) cost that is disproportionate to the benefits derived from the headwater project, but also in the complexity of calculating dependable capacity gains.

(b) *Other methods previously employed.* The Commission has used variations of the value method and variations of the energy gains method adopted by this rule. For a few river basins where the downstream project is assured of scheduled water releases, generally by a coordination agreement for operation of projects within a basin, the Commission has also used the "critical period" procedure set forth in § 11.28(a) of the current regulations. Under that method, the section 10(f) costs are apportioned according to the value of the power benefits realized from storage during the "critical period."[13]

In addition, under § 13.1 of the Commission's regulations, non-Federal owners of headwater projects (licensees and pre-1920 permittees) may arrive at a settlement with downstream project owners, subject to Commission approval, in lieu of a Commission investigation and proceeding.

(c) *The energy gains method.* In 1983, in *Virginia Electric and Power Co. and Dan River, Inc.* (*"Roanoke"*),[14] the Commission departed from the value method and apportioned the section 10(f) cost based on the comparative gains in energy produced at the headwater project and at the downstream project, rather than on the monetary value of energy and dependable capacity gains. Payments were based on actual energy gains for a portion of the study period and on average annual energy gains over the remainder of the period and for the future. The order provided that the payments would be continued until a new investigation is performed because of changes in the economy, in project operation, or in the development of the river basin. The *Roanoke* case was the impetus for a rulemaking that would apply the energy gains method.

III. Comment Analysis and Description of the Rule

A. General Discussion

The primary provision of the final rule is the codification of the apportionment method used in the *Roanoke* case. After reviewing the various ways of apportioning section 10(f) costs as a basis for headwater benefits charges, the Commission has determined that the *Roanoke* (or energy gains) method best fulfills the requirements of law while providing administrative ease. The energy gains method is designed to achieve several goals: (1) An equitable apportionment of the section 10(f) cost that is not subject to potentially volatile economic factors, such as the price of oil and the rate of inflation; (2) expeditious assessment of headwater benefits charges through adoption of a methodology more easily administered and less subject to disputes over complex fact determinations; (3) a greater degree of predictability for developers and potential developers; and (4) a reduction in the costs of headwater benefits investigations.

This method apportions section 10(f) costs based on the energy gains of the headwater and downstream plants. The rule is generally applicable, with certain exception discussed below.

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project specifies that certain non-power costs are to be borne by power revenues, these costs would be apportioned under section 10(f). The proposed term, "headwater benefits costs," which was defined similarly to "10(f) costs," has been deleted from the final rule to avoid duplication and confusion.

[6] "Energy gains," as defined in the rule, means the difference between the energy a downstream project would produce with the headwater project and the energy it would produce without that project. *See* § 11.10(b)(1).

[7] The method was first used to apportion section 10(f) costs from the Federal Allatoona project. *See* Alabama Power Co., 13 F.P.C. 1317 (1954).

[8] The Allatoona formula reads as follows:

$P_n = C_p \times (V_n / V_f \times V_d)$

In which:

P_n = annual payment to be made for headwater benefits received at a downstream non-Federal plant (or group of plants),

C_p = total annual section 10(f) costs of the headwater improvement,

V_n = net annual monetary value of benefits received at a downstream plant (or plants),

V_f = annual monetary value of the headwater improvement to at-site power production, and

V_d = net annual monetary value of benefits received at all downstream plants.

[9] Flood Control Act of 1944, 16 U.S.C. 832s (1982), and other legislation.

[10] Dependable capacity gains relate to increased ability to meet load requirements because of the headwater project.

[11] Alabama Power Co. v. FPC, 450 F.2d 716 (D.C. Cir. 1971); South Carolina Electric and Gas Co. v. FPC, 338 F.2d 898 (4th Cir. 1964).

[12] In other words, while the V_n and V_d figures in the Allatoona formula have increased due to inflation and the increase in alternative fuel costs, the C_p and V_f figures, where the headwater project is a Federal project, have remained fairly constant.

[13] "Critical period" means the time during which all water storage at a reservoir would be released for power production, assuming recurrence of the most adverse stream flow conditions of record for the area (§ 11.26(b)(1)).

[14] 22 FERC ¶ 61,351 (1983).

B. Applicability of the Rule

The final rule, in § 11.11(a), sets forth the general applicability of the energy gains method, with exceptions as follows:

(1) If the Commission has approved headwater benefits charges pursuant to an existing coordination agreement among the parties;

(2) If the parties reach, and the Commission approves, a settlement with respect to headwater benefits charges, pursuant to § 11.14(a) of the final rule; or

(3) If previous charges for a project are "grandfathered" under § 11.14(b) of the final rule.

While § 11.11 of the final rule governs charges for benefits provided by headwater projects owned by the Federal government, the energy gains method is also applicable for charges for benefits provided by non-Federal headwater projects [15] for which the Commission is requested to make a determination.

1. Approved Headwater Benefits Charges Pursuant to an Existing Coordination Agreement Among the Parties.

Several utilities in Washington, Oregon, and Montana with projects located in the Columbia River basin oppose the implementation of this rule in their region, citing the Pacific Northwest Coordination Agreement (PNCA). The comments discuss the unique nature of the Columbia River basin. The firm energy load-carrying capability of the Columbia River system is derived on the basis of a "critical period" analysis, and the various arrangements among parties in the Northwest are designed to ensure that storage will be operated to provide each party with the capability to meet its firm energy load. The comments argue that the coordination provisions of the PNCA recognize that unique nature of the system, and that the energy gains method as proposed in the Notice does not.

The final rule, at § 11.11(a)(1), addresses these concerns by excluding from the energy gains methodology any projects that are subject to an existing coordination agreement under which the Commission has approved headwater benefits charges. The PNCA is such an agreement. Although these projects are excluded by the rule from application of the energy gains method of determining headwater benefits, the rule does not limit the Commission's authority to determine headwater benefits for these projects using other methods.

2. Approved Settlements

Under the provision of § 11.14(a), projects that are subject to a settlement that is approved by the Commission will not be subject to a Commission determination under the energy gains method.

The Edison Electric Institute (EEI) suggests that the Commission revise proposed § 11.29 of the rule so that it expressly applies to settlements to which Federal as well as non-Federal entities are parties. Section 11.14(a) in this final rule has been modified to indicate that the Commission will consider settlements with Federal headwater projects as well as settlements between non-Federal projects. Settlements between downstream projects and Federal headwater projects must result in approximately the same payment that would result from a Commission determination under the energy gains method using the Headwater Benefits Energy Gains (HWBEG) Model. The Commission, therefore, strongly suggests that parties to a settlement involving a Federal headwater project adhere to the energy gains method as applied in the HWBEG Model when negotiating such a settlement. The HWBEG Model and its availability are discussed more fully below.

3. Payments Based on Previous Determinations

Section 11.14(b) of the order "grandfathers" projects that are currently being assessed headwater benefits charges according to the method by which those charges are being determined at the time the rule becomes effective. It also "grandfathers" the current final charge for projects for which charges have been established prospectively under a Commission order or pursuant to § 11.31 of the current regulations. For projects that are grandfathered, additional calculations pursuant to the energy gains method prescribed by this rule will not be made until changes occur in the river basin that affect headwater benefits.

Most Commission orders establishing payments for future years state that certain payments are to be made annually until changes in conditions warrant reappraisal of the headwater benefits charge.[16] Many of these payments have not reflected recent significant changes in section 10(f) costs or changes in energy gains. The Commission believes that a significant change in section 10(f) costs or energy gains warrants reappraisal of the headwater benefits payment. In those circumstances, therefore, the rule will apply to the determination of charges made pursuant to a reappraisal. For the limited number of orders establishing prospective charges that, by the terms of the order, may not be changed, there will be no redetermination of payments.

Municipal Systems [17] request that the rule be modified to provide guidance on redetermination of prospectively established charges when a new downstream project is built or a project is retired.

Even though they are not expressly addressed in the rule, the building of a new downstream project or the retirement of one would constitute a change in the development of the basin warranting a new investigation to determine if the headwater benefits charges should be changed. The new investigation would include examining what effect the change has on the amount of energy gains received downstream and could lead to the establishment of a new final charge.

4. Waiver for Downstream Projects With Generating Capacity of 1.5 MW or Less

The rule, at § 11.10(b), provides a waiver from headwater benefits payments for downstream projects having an installed generating capacity of 1.5 MW (2,000 horsepower) or less. This provision reflects the Commission's longstanding practice of waiving section 10(f) [18] (and certain other sections) of the FPA in issuing licenses for minor projects—*i.e.*, those having 1.5 MW or less of installed capacity—pursuant to section 10(i) of the FPA.[19]

The City of Redding (Redding) urges the Commission to exempt from the rule projects of 30 MW or less of installed capacity. The Commission recognizes the desirability of minimizing the regulatory burden for small projects. For example, under the provisions of section 405 of the Public Utilities Regulatory Policies Act (PURPA), the Commission

[15] These non-Federal projects are headwater projects contructed by a licensee of pre-1920 permittee. A commenter has suggested that the term "permittee," as used in the Notice might be confused with a Commission preliminary permit holder. The final rule substitutes the term "pre-1920 permittee" in order to clarify that it refers to developments with valid pre-1920 permits from other Federal agencies. *See* section 23 of the FPA, 16 U.S.C. 816–17 (1982).

[16] *E.g.*, South Carolina Electric and Gas Company (Savannah River, Headwater Benefits Determination), 40 F.P.C. 306 (1968).

[17] Municipal Systems are the cities of Anaheim, Riverside, Azusa, Banning, and Colton, California; Gillette, Wyoming; the Northern California Power Agency; and Sacramento Municipal Utility District.

[18] *See* § 11.27 (a) and (b) and § 11.28 of the current regulations.

[19] 16 U.S.C. 803(i) (1982).

exempts certain projects with generating capacity of 5 MW or less from the licensing requirements of Part I of the FPA, including payment for headwater benefits under section 10(f). In addition, the Commission exempts from Part I, including section 10(f), certain projects with capacity of 15 MW or less under section 30 of the FPA. In this rule, the Commission has exercised the extent of its authority to waive the section 10(f) requirement when licensing small projects by providing an across-the-board waiver for all projects with capacity of 1.5 MW or less. The Commission has no authority to exempt from or waive the requirements of section 10(f) of the extent Redding desires.

Pacific Gas and Electric Company (PG&E) urges that the rule must not exclude from headwater benefits charges any projects on the basis of installed capacity. The comment contends that the headwater project owner's right to collect headwater benefits assessments cannot be waived under section 10(i) of the FPA. The Commission, however, has clear authority to waive the section 10(f) requirement for minor projects,[20] and has done so in project licenses for many years.

C. Allocation of Section 10(f) Costs

Redding, EEI, Minnesota Power and Light Company (MP&L), Northern States Power Company (NSP), Alabama Power Company, and Montana Power Company noted that the regulations proposed in the Notice did not address how the section 10(f) cost would be determined, and requested that the Commission identify the methods to be used to allocate headwater project costs (the total costs of an upstream project) among the headwater project functions.

If a party requests the Commission to determine charges for benefits from a non-Federal headwater project, the Commission will determine on a case-by-case basis what portion of the annual interest, maintenance, and depreciation [21] costs of the headwater project constitutes the section 10(f) cost. *See* § 11.12(a).

The final rule incorporates the existing methodology for allocating Federal headwater project costs so as to derive the section 10(f) cost. Section 11.12(b) sets forth the general allocation scheme the Commission has historically used. The method, as described through the definitions of terms used in § 11.12(b), is generally the separable cost/remaining benefits method widely employed by Federal water resource agencies in assigning costs and benefits to the various functions of a water resource project. In describing the allocation, the Commission has replaced the terms "joint-use facility," "joint-use power facility," "specific facility," and "specific power facility" with "joint-use costs," "joint-use power costs," and "specific power costs" to more accurately define the concepts. The terms "separable costs" and "remaining benefits" are added to the definitions.

In most cases the Federal agency responsible for the project authorization, such as the Bureau of Reclamation and the Corps of Engineers, is also responsible for the allocation of costs among the several purposes of the project. Where power is an authorized purpose of a Federal headwater project, the Commission solicits from the Federal owner a breakdown of the costs allocated to the power function of the headwater project. Excluded from these costs are costs for facilities that do not serve the power function of the headwater project (*e.g.*, intake structure for consumptive water supply, recreation piers). The Commission carefully examines but generally adopts the administering agency's allocation for the purposes of its headwater benefits determinations.

As requested by the National Wildlife Foundation, MP&L, NSP, and EEI, the final rule describes, at § 11.12(b)(2), the allocation of headwater project costs for headwater projects which do not themselves generate power but which benefit power production at downstream projects. The Commission will continue its practice of allocating a portion of the costs of such headwater projects to a power function and apportioning that cost to downstream projects to account for the energy benefits they receive. The Commission believes that such allocation is appropriate in order to recoup the section 10(f) costs. Whether or not the headwater project has power generation has no bearing on the fact that downstream projects may obtain benefits from the headwater project and on the statutory requirement to pay an equitable share of the headwater project costs.

The provision at § 11.26(b)(2) addresses the concerns of MP&L NSP, and EEI that the valuation of downstream energy gains, for purposes of designating a joint-use power cost for a headwater project with no power function, be on the same basis, in time or dollars, as the valuation of the headwater project's authorized purposes.

In those cases where allocation is not made by the administering agency or where power is not a purpose of the project, the Commission will use the separable cost/remaining benefits method to make the allocation unless inadequate or insufficient data available to the Commission make use of that method infeasible.

Some commenters propose that, for the sake of equity, the Commission should allocate joint-use power costs not only to congressionally authorized purposes of a project, but also to other beneficial functions of the headwater project. These comments, from Ford Motor Company, MP&L, EEI, and NSP, suggest that Federal headwater projects provide significant public interest benefits for which no charges are assessed, such as recreation and fish and wildlife enhancement. Quantification of these benefits would however be very difficult, would increase the cost of headwater benefits investigations, and would most likely sharply reduce the potential for settlements. For these reasons, except in those cases where costs are allocated to power at projects with no authorized power function, the Commission believes that it is not appropriate to allocate section 10(f) costs to unauthorized purposes of the headwater project.

D. Apportionment of Section 10(f) Costs

The section 10(f) costs will be apportioned among the headwater and downstream projects on the basis of each downstream project's share of the total downstream energy gains resulting from the headwater project and energy produced at the headwater project attributable to the joint-use power costs. The formula is:

$$P = C_P \times \frac{E_n}{E_j + E_d}$$

In which:

P = annual payment to be made for headwater benefits received by a downstream project,

C_P = annual section 10(f) cost of the headwater project,

E_n = annual energy gains received at a downstream project, or group of projects if owned by one entity,

[20] Section 10(i) provides only two limitations on the Commission's authority to waive the provisions of Part I for projects of 1.5 MW or less: It cannot issue a license for more than a 50-year term, and it cannot waive annual charges for use of lands within the Indian reservations.

[21] PG&E requested definitions of interest, maintenance, and depreciation. The Commission believes these terms to be so commonly used that definitions for them are unnecessary.

E_d = annual energy gains received at all downstream projects not exempted or waived from section 10(f),[22] and
E_j = portion of the annual energy generated at the headwater project attributable to the joint-use power costs.

The total annual energy generation of the headwater project that is to be attributable to the joint-use power cost is derived as follows:

$$E_j = E \times \frac{C_j}{C_s + C_j}$$

In which:

E_j = annual energy generated at the headwater project to be attributed to the joint-use power cost,
E = total annual generation at the headwater project,
C_j = project investment cost [23] assigned to the joint-use power costs, and
C_s = project investment costs assigned to specific power costs.

Of the commenters that oppose a generic application of the energy gains method of apportionment, all but one (considered in the next section) are concerned that it is not a feasible method for projects in the Northwest that are subject to a coordination agreement regulating flow to assure firm energy production. Under the final rule these projects are not subject to application of the energy gains method.

1. Energy Gains Calculations

Alabama Power Company and Arkansas Power and Light Company comment that the Notice did not sufficiently explain what methodology the Commission would use to calculate energy gains. Both suggested that specifying in the rule the methodology to be used would increase predictability and administrative efficiency and reduce the potential for litigation. Alabama Power points out that the energy gains determination lends itself to a standardized computer simulation.

The Commission does, in fact, use a computer model, the Headwater Benefits Energy Gains (HWBEG) Model. The HWBEG Model assembles streamflows that would theoretically be available for energy production under varying conditions of upstream reservoir operation. The model eliminates all upstream storage changes to simulate an unregulated flow condition. Upstream storage changes are then added back to the unregulated flow in the sequence in which reservoirs began affecting streamflows. As the effects of each reservoir are added back to the river system, the hydropower generation attributable to that theoretical flow condition is calculated. Energy gains are then determined as differences in generation with and without the chronologically sequenced effects of upstream storage. The model uses an arborescent representation of the river system to assemble unregulated and theoretical streamflows, to invoke reservoir operating rules in proper sequence, and to calculate energy generation using hydropower plant rating equations.[24]

Ford Motor Company's comments are critical of the energy gains method, stating that energy gains received downstream are speculative.[25] While the Commission agrees that complex hydrological factors are involved in the calculation of energy gains, it is satisfied that the energy gains method used, as described in the HWBEG Model, provides a reasonably accurate calculation.

The final rule provides, at § 11.13(a), that energy gains will be determined by application of the HWBEG Model. If the use of the computer model would not be economical in a particular case because the calculations are not complex or the headwater benefits are expected to be small, the Commission may elect not to use the model. Although the model may not be used in such cases, the calculations will, however, be made using the headwater benefits formula set forth above.

Redding proposes that the Commission alter the headwater benefits formula to include the total generation of the headwater project in the apportionment of section 10(f) costs rather than only that portion of headwater project generation attributable to joint-use power costs (*i.e.*, "E_j" in the formula would be replaced by "E"). Redding maintains that including only that proportion of the total headwater project's generation that is attributed to joint-use power costs rewards inefficiencies at the headwater project that may reduce its energy generation potential and penalizes efficiencies at the downstream project that result in greater generation.

The Commission is apportioning the cost of those facilities at the headwater project that benefit power generation downstream. Calculating the headwater project's share based on the cost of all power facilities at the headwater project would skew the apportionment and design a disproportionate share of the cost to the headwater project.

2. Exceptions to Headwater Benefits Formula

There are two exceptions to the method of determining the amount of headwater project energy to be included in the energy gains formula: (1) If the headwater project contains a pumped storage facility,[26] and (2) if no energy is generated at the headwater project.

a. *Headwater projects with pumped storage.* The comments of Union Electric Company state that, if a headwater project includes a pumped storage facility, it is unclear whether the proposed rule adequately distinguishes generation from natural inflow and generation from the pumped water. The commenter also questions whether proposed § 11.28(a) of the Notice covers assessment for headwater benefits supplied by pumped storage facilities.

The final rule applies to the calculation of headwater benefits from a pumped storage headwater project. However, because of the competing considerations that may be involved in the treatment of generation at pumped storage facilities at individual headwater projects, the Commission will calculate on a case-by-case basis the headwater project's share of the total energy benefits resulting from its operation. There are very few pumped storage headwater projects, and therefore this limited exception.

[22] As under present practice, federally-owned downstream plants are included in the E_d term of the apportionment formula, although they are not actually assessed a headwater benefits charge. In those cases, section 10(f) costs are not completely recovered.

[23] In response to a comment from PG&E, the Commission has provided a definition for "investment cost" at § 11.10(b)(13). It includes project construction costs and interest during construction.

[24] A more detailed explanation of the HWBEG computer model is contained in *The Headwater Benefits Energy Gains (HWBEG) Model Description and Users Manual.* A report titled *The Allocation and Apportionment of Joint-Use Cost to Power: A Report on the Assessment of Headwater Benefits Charges* may also be helpful. Both documents were prepared by Oak Ridge National Laboratory for the Commission and are available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

[25] Ford Motor Company suggests the Commission adopt a form of flat rate method of assessment of headwater benefits charges. The Commission has considered this approach and, in fact, bases its charges for use of government dams under section 10(e) of the FPA on a graduated flat rate. *See* 18 CFR 11.22 (1985). The Commission may have discretion to adopt a similar flat rate approach when it sets an "equitable" charge under section 10(f). However, section 10(f) more specifically directs the Commission to require project owners to pay for benefits in terms of identifiable interest, depreciation and maintenance costs. Because section 10(f) provides a more specific scheme than section 10(e), the Commission has determined that its calculation should relate specific facilities and the interest, depreciation and maintenance expenses underlying them, with specific power generation benefits.

[26] A "pumped storage facility" generates electrical energy for peak load use with water pumped into a storage reservoir during off-peak periods.

provided for in § 11.13(b)(2)) of the rule, will detract only minimally from the Commission's purposes in promulgating this rule.

The Commission has defined "generation" to note that, for purposes of headwater benefits determinations, it does not include energy "used for or derived from" pumping in a pumped storage facility. Furthermore, the data submission provisions in § 11.16 specifically require that project owners distinguish pumped storage energy and capacity from total generation and generating capacity.

b. *Headwater projects with no power generation.* For headwater projects where no energy is generated, there is no actual generation to attribute to the joint-use power costs. In such cases, the Commission will attribute to the headwater project's joint-use power costs the total of all downstream energy gains. *See* § 11.13(b)(3).

3. Limitation on Payments

The Notice proposed that the Commission, in using the energy gains method, would establish a limitation or "cap" on the headwater benefits payments. Under the proposed limitation, the Commission would not assess more than the value of the energy gains. The burden would be on the downstream project owner to demonstrate that a charge under the energy gains method exceeded the value of the energy gains.

Union Electric Company, MP&L, NSP and EEI argue that the cap is too high. With the cost of the headwater benefits investigation added to the value of the energy gains, the cost of the project's energy gain could exceed that of energy obtained elsewhere, reducing the incentive to fully utilize the project. The comments suggest that the Commission lower this cap to a percentage of the actual value of the energy gains to the downstream project.

In the Commission's view, any provision for limiting the payments to the value of the energy gains should have little applicability in practice. Downstream power beneficiaries pay only that portion of the interest, maintenance, and depreciation costs of the headwater project that are allocated to power, and no part of the operation costs. Moreover, construction costs of most headwater projects were much less than comparable costs today. Federal projects were constructed with interest rates that are far below the present level. It is likely, therefore, that the section 10(f) costs collected through payments by downstream power beneficiaries are less than half of the actual value of benefits received.

Nonetheless, despite the expected limited application of the cap, the Commission recognizes that the possible disincentive effect of the proposed cap, as pointed out by the commenters, is a valid concern and should be addressed for those projects for which it may apply. With a cap that limits charges to 100 percent of the value of the energy gains, the downstream project would not net any benefit from the operation of the headwater project. Therefore, the final rule, at § 11.11(b)(5), lowers the cap to 85 percent of the actual value of the energy gains. This lower cap will make allowance for the payment of costs of the headwater benefits investigation. However, before this limitation will be implemented by the Commission, the downstream project owner must demonstrate that the Commission's determination exceeds 85 percent of the value of the energy.

4. Application of First-in-Time Principle

The final rule retains the first-in-time principle proposed in the Notice. *See* § 11.13(a)(2). This principle gives recognition to the time sequence in which projects become operational. Two upstream reservoirs are not entitled to share equally in the headwater benefit payments from downstream developers if the first-in-time project, that is, the first project built, was providing, for example, 90 percent of the current benefits to the downstream project before the second-in-time project became operational. The Commission believes it more equitable to credit the first-in-time plant with the benefits historically resulting from it and the second plant with the remaining incremental benefits.

Municipal Systems suggests that the Commission clarify that "first-in-time" refers to the first project built, rather than the most upstream project. The final rule specifies that energy gains will be attributed "according to the time sequence of commencement of operation in which each headwater project provided energy gains at the downstream project. . . ."

Comments of Public Utility District (PUD) Number 1 of Chelan County, PUD of Pend Oreille County, Pacific Power and Light Company, and Washington Water Power Company state that the Commission's "first-in-time" principle cannot be used in all river basins. They explain that, if reservoir operation is based on critical water energy the regulation of the reservoir does not recognize when each project is built, and that the principle is inappropriate, if not unworkable, for projects on a coordinated system. In the final rule, if the Commission has approved payments made pursuant to a coordination agreement, the energy gains method, utilizing the first-in-time principle, will not be applied.

The Commission reaffirms the general applicability of this principle to those situations in which the energy gains method will be used.

5. Netting of Energy Losses

The proposed rule stated that, if a headwater project is built after the downstream project was built, payments will not be assessed until energy losses at the downstream project due to the filling of the upstream reservoir have been offset by subsequent energy gains. Under the proposal, net losses for an annual period could not be carried over to the following year. Georgia Power Company, NSP and EEI argue that this is inequitable and that net losses should be allowed to be carried over and applied against future gains. Georgia Power's comments suggest that the Commission should recognize and allow credit for a headwater project's detrimental effects downstream just as fully as it recognizes and requires payment for the project's benefits.

The Commission has addressed these concerns in the final rule by providing that a net loss in one calendar year will be subtracted from net gains in subsequent years until no net loss remains. Section 11.13(a)(3) reflects this modification.

6. Deletion of Dependable Capacity Gains

Two comments addressed the proposal to delete dependable capacity gains from headwater benefits calculations. Union Electric Company agreed with the proposal. Ebasco Business Consulting Company, the other commenter, stated that a more equitable apportionment would be derived by including dependable capacity gains and that failure to include it in the rule might jeopardize a non-Federal headwater project's ability to negotiate an equitable settlement.

Determining dependable capacity gains and their value has proven to be a highly complex, time-consuming, and expensive undertaking.[27] One of the

[27] For example, in two proceedings involving Commission assessments of headwater benefits payments that included dependable capacity, negotiations between the parties and the Commission on a reasonable assessment spanned a five-year period. The Commission's calculation of dependable capacity gains was the central issue in those proceedings. *See* Alabama Power Co., 55 F.P.C. 100 (1976), 59 F.P.C. 117 (1977); Georgia Power Co., 55 F.P.C. 102 (1976), 59 F.P.C. 165 (1977).

primary purposes of the new rule is to simplify the methodology and procedure for assessing headwater benefits charges so as to reduce investigative time and costs involved and consequently to obtain more prompt payments. On balance, therefore, the Commission believes that deleting dependable capacity gains as a factor in headwater benefits is a reasonable and pragmatic adjustment in the interest of administrative feasibility and a more timely recapture of the costs of benefits bestowed by headwater projects.

E. Investigations and Billings

1. Initiation of Investigations

Section 11.15(c) provides that the Commission will make headwater benefits determinations through investigations. Investigations will be conducted to determine benefits for downstream projects for which a determination has never been made or to determine if a final charge that has been established prospectively, or a variable of the formula that has become a constant, should be changed. Except for the first investigation for a project, investigations generally will occur when there has been some change in a previously stable river basin that affects the amount of energy gains or apportionment of section 10(f) cost, such as a new project commencing operation or major maintenance at the headwater project. The Commission will notify all parties when it commences an investigation.

The final rule requires that parties raise any jurisdictional objections to the assessment of headwater benefits within 30 days of notification of commencement of an investigation. This will allow the resolution of such jurisdictional issues before the Commission or the parties have expended substantial time or resources on the investigation.

Municipal Systems notes that, according to § 11.29(b) of the proposed rule, in response to a request by a headwater licensee or pre-1920 permittee, a preliminary study pursuant to § 11.28(a) of the proposed rule would occur. The comment suggests that the downstream parties should have the same right. The Commission agrees that a downstream party should have the same ability to cause initiation of an investigation as the headwater party, and therefore § 11.15(a) of the final rule incorporates this suggestion by providing that the Commission will investigate and determine charges upon the request of "one of the parties" if the parties are unable to agree to a settlement.

2. Scope of the Investigation

The Notice provided that parties may reach an agreement concerning the detail and amount of data to be collected to perform an apportionment; however, the Commission would not be bound by such an agreement. PG&E argues that the Commission should be bound by agreements limiting investigations if they are fair and reasonable and in the public interest.

The Commission disagrees with this proposition. When the Commission is making the headwater benefits determination, it must retain the discretion to determine the scope of investigation necessary to calculate an accurate final charge. Because the Commission will retain such discretion, it has deleted the provisions referring to agreements among parties.

Municipal Systems urges the Commission to do everything feasible to keep costs of investigations as low as possible. The cost to the parties for an investigation will vary directly with the scope of the investigation. The cost is a factor that the Commission considers in determining the scope of the investigation.

The scope of the investigation will be determined by the Commission based on such criteria as the amount and quality of historical data for the river basin and the stability of development of the basin. The scope will also be influenced by the Commission's objective to promote efficient use of Commission resources and to make the regulatory burden on affected parties commensurate with the nature of the river basin and the projects involved. Since the costs of investigations are paid by project owners, the Commission will balance their interest in limiting those costs with the Commission's responsibility to achieve, and the project owners' interest in, an accurate charge.

The Notice proposed that the Commission may conduct preliminary studies to determine whether a detailed investigation is warranted. The final order does not differentiate in this way; what the Notice referred to as preliminary and detailed studies is encompassed within the final rule's provision for an investigation. The proposed "preliminary" investigation is the equivalent of an investigation with a narrower scope than that envisioned in a "detailed" investigation. The Commission will limit the scope of the investigation whenever possible, but may find, upon entering into the investigation, that a more in-depth investigation than originally planned is necessary. The scope of investigations may, of necessity, be circumscribed by, for example, a lack of historical data. On the other hand, where adequate information is available, the Commission may find it necessary to study that information in greater depth, to study the same information for a greater number of years, or to seek additional information. When the Commission initiates an investigation, it may know that, because of the complexity of the river basin, the absence of well-developed data gained from previous investigations for that project or for other projects in the same river basin, or for other reasons, the investigation will require more data and closer scrutiny of that data than might otherwise be required. Such investigations may take several years to complete. On the other hand, the first investigation of a project in a river basin in which other projects have been investigated previously, or a new investigation for a project that has been itself the subject of a previous investigation, may require a comparatively limited amount of data analysis and time.

If a party objects to a preliminary assessment of a final charge developed through an investigation of limited scope, the Commission may, in lieu of issuing an order and bill at that time, expand the investigation to ensure an accurate charge. An investigation will be determinated when final charges have been established for all years studied in the investigation.

3. Filing of Data

The final rule contains a list of the information that must be filed annually and upon initiation of an investigation. The list of information the owner of the headwater project is required to submit includes identification of the project and the stream, a description of the power plant, characteristics of the reservoir, the annual gross generation at the hydroelectric plant (energy from pumped storage operation must be separately identified), the investment costs, and the annual costs (including information on allocation of these costs among the project functions). The list of information the owner of the downstream plant is required to submit includes identification of the project and the stream, a description of the power plant, and information on the generation at the plant.

The rule notes that these lists of information are not exhaustive and that the Commission may require information in addition to the data

submission requirements specified.[28] The rule also notes that, for both headwater and downstream owners, if data for the current period are the same as data furnished for a prior period, the data need not be resubmitted if the owner identifies the last period for which the data were reported.

These data requirements differ from the requirements in existing § 11.27 in two ways that will reduce the reporting burden for both headwater and downstream project owners. First and most importantly, the requirement contained in the existing rule to supply complete data for every project for every year has been modified. Once the data items for a variable of the headwater benefits formula become stable, so that the variable becomes a constant, or once a final charge is established prospectively, the Commission will notify the project owner that certain data items are no longer required to be supplied.[29] Second, the existing rule contains a more extensive list of required information, some of which was needed for the critical period method. Many items are therefore deleted in the final rule because the energy gains method does not require such data.

Georgia Power Company and EEI point out that downstream project owners whose charges have not yet been established prospectively need the information to be submitted by the headwater projects on a regular basis in order to estimate their headwater benefits payment liability. The Notice had proposed that such information be submitted only upon request from the Commission. The final rule's provisions for annual data submission until certain conditions are met will allow downstream project owners access to current data on the headwater project.

4. Charges and Payments for Headwater Benefits and Costs

a. *Interim and final charges and procedures for payment.* While the Commission is determining a final charge for a given period of headwater benefits, it may assess an interim charge to recover a portion of the section 10(f) costs until a final charge can be assessed.[30] When a final charge is established for a period for which payment of an interim charge has been made, an adjustment will be made to the final change to reflect the amount paid.

An interim charge assessed for a project undergoing an investigation will be based on an estimate of what the final charge for the period for which an interim charge is assessed will be. If the Commission has ever completed an investigation on the project, it is more likely to have a base of knowledge about the project and the river basin to support an estimate that closely approaches the actual final charge. In that case, the interim charge will be 100 percent of the estimate of what the final charge will be. If no investigation has been completed on the project, an estimate of the final charge is likely to be more tentative, and therefore the interim charge will be 80 percent of the estimated final charge. *See* § 11.17(b)(1).

It may be necessary for the Commission to assess interim charges for a number of years, since many factors may delay the determination of a final charge. For instance, instability in the basin may cause an investigation to be extended for a number of years.

Unless a project was assessed a final charge in the previous year, the Commission will provide all parties with a preliminary assessment of a final charge once it is established. The preliminary assessment will be accompanied by a technical report, and an opportunity for the parties to submit written comments in response to the preliminary assessment will be provided. This written response period replaces the protest period provided in the existing regulations. The preliminary assessment and response period are intended to give parties the time necessary to study the complex calculations involved in certain final charge determinations. If a project was assessed a final charge in the previous year, no preliminary assessment or response period are provided for. If a project has received a final charge that recently, it is unlikely that the data analysis and calculations required to determine a final charge for the subsequent year will be so complex as to require a lengthy period of review. If, on the other hand, a final charge was not assessed for the project the previous year, more time may be needed to review what are likely to be more extensive calculations, particularly those resulting from a recently concluded investigation, and therefore 60 days are allowed to respond to the preliminary assessment. *See* § 11.17(b)(2) and (b)(3).

If a preliminary assessment is provided, the Commission will consider the written responses and will, if appropriate, issue an order for the final charge. If no preliminary assessment is provided, an order for the final charge will be issued as soon as the charge for that year is determined. Any order assessing a charge under the delegated authority in § 375.314 of the Commission's regulations is subject to an appeal under § 385.1902. If it is not a delegated order, it is subject to a petition for rehearing. If the Commission applies a final charge prospectively for a project under § 11.17(b)(5),[31] the order establishing the prospective final charge is subject to appeal or petition for rehearing. If a timely appeal or petition for rehearing is filed, payment under protest should be made to avoid any penalty for failure to pay under § 11.21.[32]

Once the Commission has issued an order establishing a prospective final charge for a project, the Commission will issue a bill annually for the amount of the final charge and for costs.

These procedures for the assessment and payment of charges and procedures for raising objections to assessments differ somewhat from the procedures proposed in the Notice, which closely tracked existing regulations and practice. These changes clarify procedures to assure that parties have sufficient time to study proposed assessments and to prepare well-developed comments that may service to obviate the need for costly and time-consuming appeals and rehearings. These procedural changes also are

[28] MP&L, EEI, and NSP comment that the provision may be interpreted to authorize the Commission to make unduly burdensome data requests. Providing for submission of data in addition to listed data is standard procedure to ensure that Commission staff have the information necessary to fulfill the Commission's mandate. Staff is fully aware of the effort required to provide technical information and will request only information that is necessary for a determination. The alternative to this provision would be to develop a comprehensive list of every conceivable item of information that might be needed and require it to be submitted indefinitely, unnecessarily burdening all parties.

[29] Even though final charges have been set prospectively, the Commission will need certain selective data periodically in order to monitor the river basin to determine if changes have occurred which warrant a new investigation.

[30] "Final charge" and "interim charge" are distinguished in definitions of the final rule at § 11.10(b)(11) and (b)(12). "Final charge" is used to apply to all charges, other than costs of determinations, that are final for a specified period of headwater benefits, including periods in the future.

[31] Final charges established prospectively correspond to charges for "average payments" in the existing regulations and charges for "future payments" in the Notice.

[32] The Notice proposed an interest charge on headwater benefits charges that were unpaid after 30 days from issuance of a bill. This provision is deleted from the final rule. An interest charge on unpaid balances may be appropriate not only for headwater benefits charges, but also for other types of annual charges not addressed in this rule. The Commission, therefore, has decided to withhold the provision from this rule and may consider a general interest charge applicable to all annual charges at a later time.

designed to provide sufficient notice before the bill must be paid of the amount the downstream project owner will be expected to pay.

b. *Payment of determination costs.* The final rule retains the provision proposed in the Notice requiring downstream beneficiaries of a federally-owned headwater project to pay the full cost of determining charges, and downstream beneficiaries of headwater projects owned by Federal licensees or pre-1920 permittees to pay a share of the determination costs in proportion to the benefits received. PG&E states that this provision is inconsistent with section 10(f) of the FPA which requires the "licensees or permittees affected" to pay the determination costs.

Under section 10(f) of the FPA, the cost of the investigation must be borne by the headwater and downstream projects involved, unless the project is owned by the Federal government, and then all of the investigative costs must be borne by the downstream project. This view has been affirmed by the U.S. Courts of Appeals in *South Carolina Electric & Gas Co.* v. *FPC*, 339 F.2d 898 (4th Cir. 1964), and in *Public Service Co. of Colorado* v. *FERC*, 754 F.2d 1555 (10th Cir. 1985). The final rule therefore complies with section 10(f).

F. Additional Issues

1. Estimates of Payments

Redding requests that the Commission add a provision to the rule that would require the Commission to provide for a downstream project a reasonable, accurate estimate of its headwater benefits charge at the time a license is issued. The Commission issues licenses to construct proposed hydroelectric projects. At the time a license is issued, the project is not in operation and information essential to the energy gains calculation, such as annual generation and outages, is not available. Not only is essential data from the downstream project unavailable at the time that project is licensed, but there may be no headwater project in operation. A headwater project may be constructed or become operational subsequent to issuance of a license for a project that will be downstream from it. These factors make it impossible for the Commission to provide an estimate of headwater beneftis payments upon licensing, and the final rule does not contain the requested provision.

However, while the Commission cannot, prior to or at the time of licensing, provide an estimate of future charges, this rules does provide the developer or potential developer with a greater degree of certainty regarding the methodology that will be applied to determine the charges. Moreover, once the downstream project is operational, the project owner will be able to develop its own estimate of its headwater benefits liability by applying the annually submitted data to the HWBEG Model.

2. Relationship of sections 10(e) and 10(f) Charges

The Commission proposed to subtract headwater benefits charges assessed under section 10(f) of the FPA from the annual charge a downstream licensee was assessed under section 10(e) of the FPA for the use of the lands or other property (such as a dam and reservoir) of the United States.[33] All comments addressing this issue supported the proposal as necessary to encourage maximum utilization of hydroelectric generation potential, to avoid a "double charge" for government benefits, or to offset charges anticipated if the annual charges proposed in another Notice that was pending at the time were implemented.[34] Ford Motor Company notes, however, that if a flat rate were established for section 10(e) charges, the need for crediting headwater benefits payments against section 10(e) charges is less clear.

On May 24, 1984, the Commission, in Order No. 379, adopted a graduated flat rate method for calculating section 10(e) charges based on annual generation.[35] This method of calculating section 10(e) charges results in far *lower* charges than anticipated at the time the Notice in this docket was proposed and these industry comments were written. This fact offsets concerns of the industry that crediting section 10(e) dam charges is necessary to encourage maximum hydroelectric development.

EEI, NSP, and Alabama Power Company suggest that imposition of both sections 10(e) and 10(f) charges would amount to imposition of a "double charge." This suggestion, however, fails to recognize that, if both sections 10(e) and 10(f) charges apply, the downstream project is able to realize the benefits of additional power generation not only because of the benefit provided by the upstream project (for which the section 10(f) charges applies), but also because of the use of the Federal dam to develop head (for which the section 10(e) applies). The charges represent benefits received from two distinct investments of taxpayers.

For these reasons, the Commission has deleted from this final rule the proposal for crediting section 10(e) charges by section 10(f) payments.

IV. Regulatory Flexibility Act Certification

The Commission is required by section 603 of the Regulatory Flexibility Act (RFA),[36] to prepare a regulatory flexibility analysis of a rule unless the Commission certifies pursuant to section 605(b) of the RFA that the rule will not have a significant economic impact on a substantial number of small entities.

Of a total of approximately 858 hydroelectric project licenses, only about 60 are for projects downstream from Federal headwater projects, and therefore subject to a Commission determination of headwater benefits payments under this rule or subject to a settlement under which payments must approximate those that would be required if determined by the Commission. Of those 60 downstream projects, some are parties to a coordination agreement, and therefore are excluded from a determination under the rule. Approximately 35 of the 60 are owned by major utilities and are not considered small entities.[37] Small projects that are exempt from the requirements of section 10(f) of the FPA under section 30 of the FPA or section 405 of PURPA, and projects with generating capacity of 1.5 MW or less are not subject to the rule. Thus, this rule would not affect a substantial number of small entities.

Moreover, the economic impact of this rule on those project owners who are affected will not be significant. Use of the energy gains method is likely to result in downstream beneficiaries being apportioned a smaller share of the

[33] A downstream power project would be subject to both section 10(e), 16 U.S.C. 803(e) (1982), annual charges and section 10(f) headwater benefits charges if it used a Federal dam to develop head and also received power benefits from another dam and reservoir upstream. The Notice proposed to decrease the section 10(e) charges by the amount of section 10(f) charges for any year for which section 10(f) charges are assessed and paid, regardless of what year the section 10(f) charges were assessed.

[34] Notice of Proposed Rulemaking, Annual Charges for Use of Government Dams and Other Structures Under Part I of the Federal Power Act, 48 FR 15134 (April 7, 1983).

[35] 18 CFR 11.22 (1985).

[36] 5 U.S.C. 601–612 (1982).

[37] 5 U.S.C. 601(d) citing to section 3 of the Small Business Act, 15 U.S.C. 632 (1982). Section 3 of the Small Business Act defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. *See also* SBA's Small Business Size Standards, 13 CFR Part 121 (1985).

section 10(f) cost than does the prevailing value method. In any case, the cap provided for in § 11.11(b)(5) will limit final charges to no more than 85 percent of the value of the energy gains. Therefore, any change in headwater benefits liability will, in most cases, be a decrease.

The rule may result in lower headwater benefits receipts for headwater projects. However, the rule provides that Commission determinations under this rule, or payments under settlement that approximate those that would result from an energy gains determination, are required only for benefits from Federal headwater projects. Such projects are not small entities.

The rule will reduce the uncertainty of downstream beneficiaries regarding what method and procedures the Commission will use in assessing headwater benefits and is expected to save resources now spent by those entities on individual hearings.

V. Paperwork Reduction Act Statement and Effective Date

The information collection provisions in this rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. 3501–3520 (1982) and OMB's regulations, 5 CFR 1320.13 (1984). Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. (Attention: Janet Oakley, (202) 357–5771).

This rule will be effective September 16, 1986.

List of Subjects

18 CFR Parts 11 and 13

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 375

Authority, delegations (government agencies).

In consideration of the foregoing, the Commission amends Parts 11, 13, and 375, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Kenneth F. Plumb,

Secretary.

1. In Part 11, the Table of Contents is revised to read as follows:

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

Subpart A—Charges for Costs of Administration, Use of Tribal Lands and Other Government Lands, and Use of Government Dams

Sec.

Subpart B—Charges for Headwater Benefits

Subpart C—General Procedures

2. The authority citation for Part 11 is revised to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12,009, 3 CFR 142 (1978).

3. Part 11 is amended by redesignating §§ 11.20 through 11.25 as §§ 11.1 through 11.6, respectively, by revising the titles to redesignated §§ 11.3 and 11.4, by redesignating § 11.29 as § 11.7, by redesignating § 11.30 as § 11.8, by designating newly redesignated §§ 11.1 through 11.8 as Subpart A, by removing §§ 11.26 through §§ 11.28, 11.31 and 11.32 by revising newly redesignated §§ 11.7 and 11.8, and by adding a new Subpart B (§§ 11.10 through 11.16) and a new Subpart C (§§ 11.20 and 11.21), to read as follows:

Subpart A—Charges for Costs of Administration, Use of Tribal Lands and Other Government Lands, and Use of Government Dams

§ 11.1 Costs of administration.

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§ 11.2 Use of government lands.

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§ 11.3 Use of government dams, excluding pumped storage projects.

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§ 11.4 Use of government dams for pumped storage projects, and use of tribal lands.

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§ 11.5 Exemption of minor projects.

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§ 11.06 Exemption of state and municipal licensees.

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§ 11.7 Effective date.

All annual charges imposed under this subpart will be computed beginning on the effective date of the license unless some other date is fixed in the license.

§ 11.8 Adjustment of annual charges.

All annual charges imposed under this subpart continue in effect as fixed unless changed as authorized by law.

Subpart B—Charges for Headwater Benefits

§ 11.10 General provision; waiver and exemptions; definitions.

(a) *Headwater benefits charges.* (1) The Commission will assess or approve charges under this subpart for direct benefits derived from headwater projects constructed by the United States, a licensee, or a pre-1920 permittee. Charges under this subpart will amount to an equitable part of the annual costs of interest, maintenance, and depreciation expenses of such headwater projects and the costs to the Commission of determining headwater benefits charges. Except as provided in paragraph (b) of this section, the owner of any non-Federal downstream project that receives headwater benefits must pay charges determined under this subpart.

(2) Headwater benefits are the additional electric generation at a downstream project that results from regulation of the flow of the river by the headwater, or upstream, project, usually by increasing or decreasing the release of water from a storage reservoir.

(b) *Waiver and exemptions.* The owner of a downstream project with installed generating capacity of 1.5 MW (2000 horsepower) or less or for which the Commission has granted an exemption from section 10(f) is not required to pay headwater benefits charges.

(c) *Definitions.* For purposes of this subpart:

(1) "Energy gains" means the difference between the number of kilowatt-hours of energy produced at a

downstream project with the headwater project and that which would be produced without the headwater project.

(2) "Generation" means gross generation of electricity at a hydroelectric project, including generation needed for station use or the equivalent for direct drive units, measured in kilowatt-hours. It does not include energy used for or derived from pumping in a pumped storage facility.

(3) "Headwater project costs" means the total costs of an upstream project constructed by the United States, a licensee, or pre-1920 permittee.

(4) "Separable cost" means the difference between the cost of a multiple-function headwater project with and without any particular function.

(5) "Remaining benefits" means the difference between the separable cost of a specific function in a multiple-function project and the lesser or:

(i) the benefits of that function in the project, as determined by the responsible Federal agency at the time the project or function was authorized; or

(ii) the cost of the most likely alternative single-function project providing the same benefits.

(6) "Joint-use cost" means the difference between the total project cost and the total separable costs. Joint-use costs are allocated among the project functions according to each function's percentage of the total remaining benefits.

(7) "Specific power cost" means that portion of the headwater project costs that is directly attributable to the function of power generation at the headwater project, including, but not limited to, the cost of the electric generators, turbines, penstocks, and substation.

(8) "Joint-use power cost" means the portion of the joint-use cost allocated to the power function of the project.

(9) "Section 10(f) costs" means the annual interest, depreciation, and maintenance expense portion of the joint-use power cost, including costs of non-power functions required by statute to be paid by revenues from the power function.

(10) "Party" means:

(i) The owner of a non-Federal downstream hydroelectric project which is directly benefited by a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(ii) The owner of a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(iii) An operating agency of, or an agency marketing power from, a headwater project constructed by the United States; or

(iv) Any party, as defined in § 385.102(c) of this chapter.

(11) "Final charge" means a charge assessed on an annual basis to recover section 10(f) costs and which represents the final determination of the charge for the period for which headwater benefits are assessed. Final charges may be established retroactively, to finalize an interim charge, or prospectively.

(12) "Interim charge" means a charge assessed to recover section 10(f) costs for a specified period of headwater benefits pending determination of a final charge for that period.

(13) "Investment cost" means the sum of:

(i) Project construction costs, including cost of land, labor and materials, cost of pre- and post-authorization investigations, and cost of engineering, supervision, and administration during construction of the project; and

(ii) Interest during construction.

§ 11.11 Energy gains method of determining headwater benefits charges.

(a) *Applicability.* This section applies to any determination of headwater benefits charges, unless:

(1) The Commission has approved headwater benefits charges pursuant to an existing coordination agreement among the parties;

(2) The parties reach, and the Commission approves, a settlement with respect to headwater benefits charges, pursuant to § 11.14(a) of this subpart; or

(3) Charges may be assessed under § 11.14(b).

(b) *General rule*—(1) *Summary.* Except as provided in paragraph (b)(3) of this section, a headwater benefits charge for a downstream project is determined under this subpart by apportioning the section 10(f) costs of the headwater project among the headwater project and all downstream projects that are not exempt from or waived from headwater benefits charges under § 11.10(b) of this chapter, according to each project's share of the total energy benefits to those projects resulting from the headwater project.

(2) *Calculation; headwater benefits formula.* The annual headwater benefits charge for a downstream project is derived by multiplying the section 10(f) cost by the ratio of the energy gains received by the downstream project to the sum of total energy gains received by all downstream projects (except those projects specified in § 11.10(b) of this chapter) plus the energy generated at the headwater project that is assigned to the joint-use power cost, as follows:

$$P = C_p \times \frac{E_n}{E_j + E_d}$$

In which:

P = annual payment to be made for headwater benefits received by a downstream project,

C_p = annual section 10(f) cost of the headwater project,

E_n = annual energy gains received at a downstream project, or group of projects if owned by one entity,

E_d = annual energy gains received at all downstream projects (except those specified in § 11.10(b) of this chapter), and

E_j = portion of the annual energy generated at the headwater project assigned to the joint-use power cost.

(3) If power generation is not a function of the headwater project, section 10(f) costs will be apportioned only among the downstream projects.

(4) If the headwater project is constructed after the downstream project, liability for headwater benefits charges will accrue beginning on the day on which any energy losses at the downstream project due to filling the headwater reservoir have been offset by subsequent energy gains. If the headwater project is constructed prior to the downstream project, liability for headwater benefits charges will accrue beginning on the day on which benefits are first realized by the downstream project.

(5) No final charge assessed by the Commission under this subpart may exceed 85 percent of the value of the energy gains. If a party demonstrates, within the time specified in § 11.17(b)(3) for response to a preliminary assessment, that any final charge assessed under this subpart, not including the cost of the investigation assessed under § 11.17(c), exceeds 85 percent of the value of the energy gains provided to the downstream project for the period for which the charge is assessed, the Commission will reduce the charge to not more than 85 percent of the value. For purposes of this paragraph, the "value of the energy gains" is the cost of obtaining an equivalent amount of electricity from the most likely alternative source during the period for which the charge is assessed.

§ 11.12 Determination of section 10(f) costs.

(a) *for non-Federal headwater projects.* If the headwater project was constructed by a licensee or pre-1920 permittee and a party requests the Commission to determine charges, the Commission will determine on a case-

by-case basis what portion of the annual interest, maintenance, and depreciation costs of the headwater project constitutes the section 10(f) costs, for purposes of this subpart.

(b) *For Federal headwater projects.* (1) If the headwater project was constructed or is operated by the United States, and the Commission has not approved a settlement between the downstream project owner and the headwater project owner, the section 10(f) cost will be determined by deriving, from information provided by the headwater project owner pursuant to § 11.16 of this subpart, the joint-use power cost and the portion of the annual joint-use power cost that represents the interest, maintenance, and depreciation costs of the project.

(2) If power is not an authorized function of the headwater project, the section 10(f) cost is the annual interest, maintenance, and depreciation portion of the headwater project costs designated as the joint-use power cost, derived by deeming a power function at the project. The value of the benefits assigned to the deemed power function, for purposes of determining the value of remaining benefits of the joint-use power cost, is the total value of downstream energy gains included in the headwater benefits formula.

(3) For purposes of this paragraph, "total value of downstream energy gains" means the lesser of:

(i) The cost of generating an equivalent amount of electricity at the most likely alternative facility at the time the headwater project became operational; or

(ii) The incremental cost of installing electrical generation at the headwater project at the time the project became operational.

§ 11.13 Energy gains calculations.

(a) *Energy gains at a downstream project.* (1) Energy gains at a downstream project are determined by simulating operation of the downstream project with and without the effects of the headwater project. Except for determinations which are not complex or in which headwater benefits are expected to be small, calculations will be made by application of the Headwater Benefits Energy Gains Model, as presented in *The Headwater Benefits Energy Gains (HWBEG) Model Description and Users Manual*, which is available for the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161.

(2) If more than one headwater project provide energy gains to a downstream project, the energy gains at the downstream project are attributed to the headwater projects according to the time sequence of commencement of operation in which each headwater project provided energy gains at the downstream project, by:

(i) Crediting the headwater project that is first in time with the amount of energy gains that it provided to the downstream project prior to operation of the headwater project that is next in time; and

(ii) Crediting any subsequent headwater project with the additional increment of energy gains provided by it to the downstream project.

(3) Annual energy losses at a downstream project, or group of projects owned by the same entity, that are attributable to the headwater project will be subtracted from energy gains for the same annual period at the downstream project or group of projects. A net loss in one calendar year will be subtracted from net gains in subsequent years until no net loss remains.

(b) *Energy generated at the headwater project.* (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, the portion of the total annual energy generation at the headwater project that is to be attributed to the joint-use power cost is derived by multiplying the total annual generation at the headwater project and the ratio of the project investment cost assigned to the joint-use power cost to the sum of the investment cost assigned to both the specific power cost and the joint-use power cost of the headwater project, as follows:

$$E_j = E \times \frac{C_j}{C_s + C_j}$$

In which:

E_j = annual energy generated at the headwater project to be attributed to the joint-use power cost,

E = total annual generation at the headwater project,

C_j = project investment costs assigned to the joint-use power cost, and

C_s = project investment costs assigned to specific power costs.

(2) If the headwater project contains a pumped storage facility, calculation of the portion of the total annual energy generation at the headwater project that is attributable to the joint-use power cost will be determined on a case-by-case basis.

(3) If no power is generated at the headwater project, the amount of energy attributable to the joint-use power cost under this section is the total of all downstream energy gains included in the headwater benefits formula.

§ 11.14 Procedures for establishing charges without an energy gains investigation.

(a) *Settlements.* (1) Owners of downstream and headwater projects subject to this subpart may negotiate a settlement for headwater benefits charges. Settlements must be filed with the Commission for its approval, according to the provisions of § 385.602.

(2) If the headwater project is a Federal project, any settlement under this section must result in headwater benefits payments that approximate those that would result under the energy gains method.

(b) *Continuation of previous headwater benefits determinations.* (1) For any downstream project being assessed headwater benefit charges on or before [insert effective date of rule], the Commission will continue to assess charges to that project on the same basis until changes occur in the river basin, including hydrology or project development, that affect headwater benefits.

(2) Any procedures that apply to § 11.17(b)(5) of this subpart will apply to any prospectively fixed charges that are continued under this paragraph.

§ 11.15 Procedures for determining charges by energy gains investigation.

(a) *Purpose of investigations; limitation.* Except as permitted under § 11.14, the Commission will conduct an investigation to obtain information for establishing headwater benefits charges under this subpart. The Commission will investigate and determine charges for a project downstream from a non-Federal headwater project only if the parties are unable to agree to a settlement and one of the parties requests the Commission to determine charges.

(b) *Notification.* The Commission will notify each downstream project owner and each headwater project owner when it initiates an investigation under this section, and the period of project operations to be studied will be specified. An investigation will continue until a final charge has been established for all years studied in the investigation.

(c) *Jurisdictional objections.* If any project owner wishes to object to the assessment of a headwater benefits charge on jurisdictional grounds, such objection must:

(1) Be raised within 30 days after the notice of the investigation is issued; and

(2) State in detail the grounds for its objection.

(d) *Investigations.* (1) For any downstream project for which a final charge pursuant to an investigation has never been established, the Commission will conduct an initial investigation to determine a final charge.

(2) The Commission may, for good cause shown by a party or on its own motion, initiate a new investigation of a river basin to determine whether, because of any change in the hydrology, project development, or other characteristics of the river basin that effects headwater benefits, it should:

(i) Establish a new final charge to replace a final charge previously established under § 11.17(b)(5); or

(ii) Revise any variable of the headwater benefits formula that has become a constant in calculating a final charge.

(3) *Scope of investigations.* (i) The Commission will establish a final charge pursuant to an investigation based on information available to the Commission through the annual data submission requirements of § 11.16, if such information is adequate to establish a reasonably accurate final charge.

(ii) If the information available to the Commission is not sufficient to provide a reasonably accurate calculation of the final charge, the Commission will request additional data and conduct any studies, including studies of the hydrology of the river basin and project operations, that it determines necessary to establish the charge.

§ 11.16 Filing requirements.

(a) *Applicability.* (1) Any party subject to a headwater benefits determination under this subpart must supply project-specific data, in accordance with this section, by February 1 of each year for data from the preceding calendar year.

(2) Within 30 days of notice of initiation of an investigation under § 11.15, a party must supply project-specific data, in accordance with this section, for the years specified in the notice.

(b) *Data required from owner of the headwater project.* The owner of any headwater project constructed by the United States, a licensee, or a pre-1920 permittee that is upstream from a non-Federal hydroelectric project must submit the following:

(1) Name and location of the headwater project, including the name of the stream on which it is located.

(2) The total nameplate rating of installed generating capacity of the project, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) A description of the total storage capacity of the reservoir and allocation of storage capacity to each of its functions, such as dead storage, power storage, irrigation storage, and flood control storage. Identification, by reservoir elevation, of the portion of the reservoir assigned to each of its respective storage functions.

(4) An elevation-capacity curve, or a tabulation of reservoir pool elevations with corresponding reservoir storage capacities.

(5) A copy of rule curves, coordination contracts, agreements, or other relevant data governing the release of water from the reservoir, including a separate statement of their effective dates.

(6) A curve or tabulation showing actual reservoir pool elevations throughout the immediately preceding calendar year and for each year included in an investigation.

(7) The total annual gross generation of the hydroelectric plant in kilowatt-hours, not including energy from pumped storage operation.

(8) The total number of kilowatt-hours of energy produced from pumped storage operation.

(9) The investigation costs attributed to the power generation function of the project as of the close of the calendar year or at a specified date during the year, categorized according to that portion that is attributed to the specific power costs, and that portion that is attributed to the joint-use power costs.

(10) The portion of the joint-use power cost, and other costs required by law to be allocated to joint-use power cost, each item shown separately, that are attributable to the annual costs of interest, maintenance, and depreciation, identifying the annual interest rate and the method used to compute the depreciation charge, or the interest rate and period used to compute amortization if used in lieu of depreciation, including any differing interest rates used for major replacements or rehabilitation.

(c) *Data required from owners of downstream projects.* The owner of any hydroelectric project which is downstream from a headwater project constructed by the United States, a licensee, or pre-1920 permittee must submit the following:

(1) Name and location of the downstream project, including the name of the stream on which it is located.

(2) Total nameplate rating of the installed generating capacity of the plant, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) Record of daily gross generation, not including energy used for pumped storage, and any unit outage which may have occurred.

(4) The total number of kilowatt-hours of energy produced from pumped storage operation.

(d) *Abbreviated data submissions.* (1) For those items in paragraphs (b) and (c) of this section in which data for the current period are the same as data furnished for a prior period, the data need not be resubmitted if the owner identifies the last period for which the data were reported.

(2) The Commission will notify the project owner that certain data items in paragraphs (b) and (c) are no longer required to be submitted annually if:

(i) A variable in the headwater benefits formula has become a constant; or

(ii) A prospective final charge, as described in § 11.17(b)(5), has been established.

(e) *Additional data.* Owners of headwater projects or downstream projects must furnish any additional data required by the Commission staff under paragraph (a) of this section and may provide other data which they consider relevant.

§ 11.17 Procedures for payment of charges and costs.

(a) *Payment for benefits from a non-Federal headwater project.* Any billing procedures and payments determined between a non-Federal headwater project owner and a downstream project owner will occur according to the agreement of those parties.

(b) *Charges and payment for benefits from a Federal headwater project.*

(1) *Interim charges.* (i) If the Commission has not established a final charge and an investigation is pending, the Commission will issue a downstream project owner a bill for the interim charge and costs and a staff report explaining the calculation of the interim charge.

(ii) An interim charge will be a percentage of the estimate by the Commission staff of what the final charge will be, as follows:

(A) 100 percent of the estimated final charge if the Commission previously has completed an investigation of the project for which it is assessed; or

(B) 80 percent of the estimated final charge if the Commission has not completed an investigation of the project for which it is assessed.

(iii) When a final charge is established for a period for which an interim charge was paid, the Commission will apply the amount paid to the final charge.

(2) *Preliminary assessment of a final charge.* Unless the project owner was assessed a final charge in the previous year, the Commission will issue to the downstream project owner a preliminary assessment of any final charge when it is determined. A staff technical report explaining the basis of the assessment will be enclosed with the preliminary assessment. Copies of the preliminary assessment will be mailed to all parties.

(3) *Opportunity to respond.* After issuance of a preliminary assessment of a final charge, parties may respond in writing within 60 days after the preliminary assessment.

(4) *Order and bill.* (i) After the opportunity for written response by the parties to the preliminary assessment of a final charge, the Commission will issue to the downstream project owner an order establishing the final charge. Copies of the order will be mailed to all parties. A bill will be issued for the amount of the final charge and costs.

(ii) If a final charge is not established prospectively under paragraph (b)(5) of this section, the Commission will issue an order and a bill for the final charge and costs each year until prospective final charges are established. After the Commission issues an order establishing a prospective final charge, a bill will be issued annually for the amount of the final charge and costs.

(5) *Prospective final charges.* When the Commission determines that historical data, including the hydrology, development, and other characteristics of the river basin, demonstrate sufficient stability to project average energy gains and section 10(f) costs, the Commission will issue to the downstream project owner an order establishing the final charge from future years. Copies of the order will be mailed to all parties. The prospective final charge will remain in effect until a new investigation is initiated under § 11.15(d)(2).

(6) *Payment under protest.* Any payment of a final charge required by this section may be made under protest if a party is also appealing the final charge pursuant to § 385.1902, or requesting rehearing. If payment is made under protest, that party will avoid any penalty for failure to pay under § 11.21.

(7) *Accounting for payments pending appeal or rehearing.* The Commission will retain any payment received for final charges from bills issued pursuant to this section in a special account. No disbursements to the U.S. Treasury will be made from the account until 31 days after the bill is issued. If an appeal under § 385.1902 or a request for rehearing is filed by any party, no disbursements to the U.S. Treasury will be made until final disposition of the appeal or request for rehearing.

(c) *Charges for costs of determinations of headwater benefits charges.* (1) Any owner of a downstream project that benefits from a Federal headwater project must pay to the United States the cost of making any investigation, study, or determination relating to the assessment of the relevant headwater benefits charge under this subpart.

(2) If any owner of a headwater or downstream project requests that the Commission determine headwater benefits charges for benefits provided by non-Federal headwater projects, the headwater project owners must pay a pro rata share of 50 percent of the cost of making the investigation and determination, in proportion to the benefits provided by their projects, and the downstream project owners must pay a pro rata share of the remaining 50 percent in proportion to the energy gains received by their projects.

(3) Any charge assessed under this paragraph is separate from and will be added to, any final or interim charge under this subpart.

Subpart C—General Procedures

§ 11.20 Time and payment.

Annual charges must be paid within 45 days of rendition of a bill by the Commission, except that annual charges for headwater benefits must be paid within 30 days of rendition of a bill.

§ 11.21 Penalties.

If any person fails to pay annual charges within the periods specified in § 11.20, a penalty of 5 percent of the total delinquent amount will be assessed and added to the total charges for the first month or part of month in which payment is delinquent. An additional penalty of 3 percent for each full month thereafter will be assessed until the charges and penalties are satisfied in accordance with law. The Commission may, by order, waive any penalty imposed by this subsection, for good cause shown.

PART 13—[REMOVED]

4. 18 CFR Part 13 is removed.

5. The authority citation for Part 375 continues to read as follows:

Authority: Department of Energy Organization Act (42 U.S.C. 7101–7352) E.O. 12009, 3 CFR, 1977 Comp., p. 142; Administrative Procedure Act (5 U.S.C. 553); Federal Power Act (16 U.S.C. 791–828c), as amended; Natural Gas Act (15 U.S.C. 717–717w), as amended; Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.); Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601 et seq.) unless otherwise noted.

6. In § 375.314, the introductory text and paragraph (q) introductory text are republished and paragraphs (q)(1) and (y) are revised to read as follows:

§ 375.314 Delegations to the Director of the Office of Hydropower Licensing.

The Commission authorizes the Director of the Office of Hydropower Licensing or the Director's designee to:

* * * * *

(q) Take appropriate action on:

(1) Uncontested settlements involving headwater benefits.

* * * * *

(y) Determine and assess payments for headwater benefits.

* * * * *

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T.D. 86–123]

Customs Regulations Amendment Adding Austria to List of Countries Whose Pleasure Vessels Are Entitled To Be Issued U.S. Cruising Licenses

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Austria to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from Austrian ports and cruise in the waters of Austria without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to Austrian-flag pleasure vessels.

EFFECTIVE DATE: These privileges became effective for Austria on April 21, 1986.

FOR FURTHER INFORMATION CONTACT: Donald H. Reusch, Carriers, Drawback and Bonds Division (202–566–5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229.

SUPPLEMENTARY INFORMATION:

Background

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provided that U.S.