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**Comments of the National Energy Marketers Association**  
**On the Proposed Energy Information Administration (EIA)**  
**Form EIA-411, "Coordinated Bulk Power Supply Program Report," Form**  
**EIA-412, "Annual Electric Industry Financial Report," Form EIA-423, "Cost**  
**and Quality of fuels for Electric Plants," Form EIA-826, "Monthly Electric**  
**Sales and Revenue Report with State Distributions," Form EIA-860, "Annual**  
**Electric Generator Report," Form EIA-861, "Annual Electric Power**  
**Industry Report," and Form EIA-906, "Power Plant Report"**

The National Energy Marketers Association (NEM) hereby submits Comments on the proposed above-referenced forms of the Energy Information Administration ("EIA") as published in the September 11, 2001, Federal Register.

NEM is a national, non-profit trade association representing both wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes: small regional marketers, large traditional international wholesale and retail energy suppliers (as well as wind and solar power), billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers and both manufacturers and

suppliers of advanced distributed generation. Our membership has both affiliated and unaffiliated companies. NEM members will be significantly affected by this rulemaking.

NEM previously submitted comments with respect to the above-referenced surveys pursuant to the March 13, 2001, Federal Register Notice of EIA. By the terms of this proposed rulemaking, EIA proposes the modification and extension of existing electric power surveys as well as the introduction of new surveys. As detailed in NEM's previously filed comments,<sup>1</sup> these changes are improper on a number of grounds. The rulemaking would improperly impose significant and costly new reporting and record-keeping burdens on unregulated entities that were never intended by Congress. Requiring unregulated entities to develop, design and construct the systems necessary to report the data requested by EIA, if and when available, plus the imposition of the significant ongoing costs necessary to produce, verify and store the data required to comply with this rulemaking, exceeds the statutory authority of EIA expressly set forth in the Federal Energy Administration Act of 1974<sup>2</sup> and the Department of Energy Organization Act.<sup>3</sup>

In addition, the microeconomic costs on the energy industry plus the macroeconomic impacts on the U.S. economy of this proposed rulemaking render this proposal a "major rule." EIA maintains that, "[t]here are no capital and start-up cost components or operations and maintenance associated with this data collection. The information is maintained in the normal course of business. Therefore, other than the cost of burden hours, there are no additional costs for generating, maintaining, and providing the information."<sup>4</sup> NEM asserts that this is an erroneous assumption.

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<sup>1</sup> The full text of NEM's Comments is available on the NEM Website at [http://www.energymarketers.com/Documents/NEMCmtsonElectricSurveys\\_5-11-2001.pdf](http://www.energymarketers.com/Documents/NEMCmtsonElectricSurveys_5-11-2001.pdf).

<sup>2</sup> 15 U.S.C.S. § 761 et. seq.

<sup>3</sup> 42 U.S.C.S. § 7101 et. seq.

<sup>4</sup> Energy Information Administration, Supporting Statement for the Electric Power Surveys, September 2001, page 31.

In fact, NEM asserts that this proposed rulemaking will have an impact in excess of \$100 million, increase energy prices to consumers and will have significantly adverse impacts on competition.<sup>5</sup> Consequently, the Regulatory Flexibility Act and Executive Order 12866, require EIA to perform an analysis of the impact of the proposed rule on the industry, small entities, energy prices and competition prior to proposing the rule.<sup>6</sup> NEM asserts that such analyses have not been performed.

Virtually every other industry that has deregulated has experienced an average price reduction of approximately forty-percent. Annual impacts on the U.S. economy associated with energy price competition range in the tens of billions of dollars per year. Energy and energy service providers are the driving force of price competition in a deregulated energy market. The compliance costs of the Proposed Surveys will cause many of the proposed respondents to leave the market, go out of business, be discouraged to enter or delay entry into the market, and/or be unable to effectuate the business plans necessary to implement effective competition in a deregulated energy market. In essence, this proposed rulemaking is a tax directly on competition. As such, the Proposed Surveys could easily have an annual impact on the U.S. economy that exceeds the standards set for a major rulemaking.

In addition, under current competitive conditions, many of the costs of this rulemaking may be passed through to consumers in the form of higher energy prices. Moreover, investments, productivity, competition and innovation in the industry will be negatively impacted. Lastly, resources that would have been

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<sup>5</sup> See Exec. Order 12866, Section 3(f)(1) providing that:

"Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

Exec. Order No. 12866, Section 3(f), 58 Fed. Reg. 51,735 (1993).

<sup>6</sup> 5 U.S.C.S. § 603; Exec. Order No. 12866, Section 6.

directed into developing new products and services to enhance competition will have to be diverted into reporting record-keeping burdens.

As such, EIA has failed to comply with the requirements of Executive Order 12866<sup>7</sup> and the Regulatory Flexibility Act<sup>8</sup> by issuing this proposed rulemaking without a proper cost-benefit analysis required for major rules. Furthermore, EIA failed to comply with Executive Order 13211.<sup>9</sup> Executive Order 13211 requires that a Statement of Energy Effects be submitted by an agency to OMB pertaining to significant energy actions.<sup>10</sup> The statement must discuss the adverse effects of the action on energy supply, distribution and use as well as reasonable alternatives. Consequently, NEM urges that the Proposed Surveys be rescinded and that EIA reformulate and recast its data collection efforts in compliance with its statutory authority, Executive Order 12866, the Regulatory Flexibility Act, and Executive Order 13211.

A matter of particular concern to NEM with respect to the revisions proposed by EIA in response to the initial comments it received pursuant to the March 13, 2001, Federal Register Notice is the treatment of confidential data. EIA had announced its intention to change its 1998 policy on confidentiality and increase the data elements entitled to such protections. However, EIA now proposes to leave its previous policy intact, reasoning that time lags in the release of data are sufficient to protect real-time sensitive data from causing competitive harm.<sup>11</sup>

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<sup>7</sup> Exec. Order No. 12866, 58 Fed. Reg. 51,735 (1993).

<sup>8</sup> 5 U.S.C.S. § 603.

<sup>9</sup> Exec. Order 13211, 66 Fed. Reg. 28,355 (2001).

<sup>10</sup> Executive Order 13211, Section 4(b) provides that:

(b) “Significant energy action” means any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking:

(1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and

(ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or

(2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

Exec. Order 13211, Section 4(b), 66 Fed. Reg. 28,355 (2001).

<sup>11</sup> Energy Information Administration, Supporting Statement for the Electric Power Surveys, September 2001, page 60.

NEM strongly objects to this reversal of position because of the harmful effects it will engender in the competitive market.

EIA has the statutory authority to impose reporting requirements on regulated distribution, transmission and generation entities. These entities are and will continue to be the most statistically reliable and valid sources of the information EIA is seeking. In fact, EIA in its own 1999 Electric Sales and Revenue Report<sup>12</sup> admits that data comparisons from unregulated entities is hampered by the fact that the states have implemented different requirements in their retail choice programs. NEM recommends that EIA should request the data from the utilities, the entities that are best able to immediately comply with the reporting requirements at the lowest marginal costs to the industry, consumers and the economy. Unless a large percentage of consumers in a given marketplace switch, the local distribution company is still the most statistically reliable source of the data EIA purports to require.

Respectfully submitted,

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<sup>12</sup> Energy Information Administration, Electric Sales and Revenue 1999 (October 2000), Appendix C, Unregulated Retail Sales, pages 245-46.