

January 9, 2006

BY ELECTRONIC MAIL

The Honorable Jonathan L. Snare
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
OSHA's Electronic Docket Address: <http://dockets.osha.gov>

Re: Docket No. S-215; RIN No. 1218-AB67 - Comments on OSHA's Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule

Dear Assistant Secretary Snare:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Occupational Safety and Health Administration's (OSHA) *Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule*.¹ OSHA's proposed rule would update the existing OSHA standard for the construction of electric power transmission and distribution installations to make it consistent with the more recently promulgated general industry standard for maintenance and repair of electric power lines and equipment. The proposed rule would also make other changes to both standards, including provisions related to host employers and contractors, training, protective clothing, and more.²

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant

¹ 70 Fed. Reg. 34822 (June 15, 2005).

² Id.

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

economic impact on a substantial number of small entities, OSHA is required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁵ which requires Federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

OSHA's proposed electric power rule is designed to improve safety for employees maintaining or constructing electric power transmission or distribution installations. OSHA states that employees working on or near electric transmission lines are exposed to a variety of hazards, including electric shocks, falls, and severe burns that can cause serious injury and death.⁶ OSHA has prepared an Initial Regulatory Flexibility Analysis (IRFA) of its proposed rule in accordance with the RFA. As indicated above, an IRFA is required when a proposed rule is expected to have "a significant economic impact on a substantial number of small entities," and must describe how the proposed rule will impact those small entities and discuss feasible alternatives.⁷ OSHA has included the complete IRFA in the *Federal Register* notice for this proposed rule.⁸

In addition, in May 2003, OSHA convened a Small Business Advocacy Review Panel for this proposed rule under the requirements of SBREFA.⁹ The SBREFA panel included representatives from OSHA, Advocacy, and the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget. The SBREFA panel received input from a group of affected small entity representatives (SERs) who reviewed and commented on an earlier version of the proposed rule. The SERs offered numerous suggestions to improve the proposed rule, many of which were incorporated into OSHA's proposal.¹⁰ A final Report of the findings of the SBREFA panel was published in June 2003 and is available on Advocacy's website.¹¹

Advocacy has reviewed OSHA's proposed rule and supporting documents and is pleased to offer the following comments on how OSHA might improve its proposed rule before proceeding. Advocacy's comments focus primarily on concerns raised by various SERs

⁵ 67 Fed. Reg. 53461 (August 16, 2002).

⁶ 70 Fed. Reg. 34822.

⁷ 5 U.S.C. § 603.

⁸ 70 Fed. Reg. 34919.

⁹ 5 U.S.C. § 609(b).

¹⁰ OSHA accepted a number of the SER recommendations and incorporated them into the proposed rule, such as reducing paperwork burdens on small businesses (e.g., the need to retain training, hazard communication, personal protective equipment, and other records), clarifying the proposed host-contractor provisions, and utilizing industry consensus and performance standards in the proposed rule. 70 Fed. Reg. 34922.

¹¹ *Report of the Small Business Advocacy Review Panel on the Draft OSHA Standard for Electric Power Generation, Transmission, and Distribution* (herein *SBREFA Report*), June 30, 2003 (available at http://www.sba.gov/advo/laws/is_power.html).

during the SBREFA panel process. SBREFA requires that the agency, where appropriate, modify the proposed rule, based upon the comments of the SERs and the findings of the panel.¹² OSHA has interpreted this requirement to mean that, “[i]n general, [OSHA] will accept each recommendation agreed upon by the entire Panel, whether as a modification to the rule, or as an issue to be discussed in the preamble.”¹³

Host-Contractor Provisions

OSHA’s proposed rule would impose new duties on host employers¹⁴ (usually electric utilities) who hire contractors¹⁵ to perform work on the host employer’s installations (usually transmission lines). Specifically, the proposed rule would require the host to report any observed contract-employer related violations to the contractor, and require the contractor to advise the host of measures the contractor took to correct and prevent recurrences of violations reported by the host.¹⁶ Further, the contractor would be required to advise the host of any unanticipated hazards found during the contractor’s work that the host did not mention. The proposal would also compel the contractor to enforce compliance with safety and health rules imposed by the host (i.e., contained in private contracts) as if they were OSHA standards.¹⁷

As OSHA states in the preamble, these new host-contractor requirements have been adopted from OSHA’s Process Safety Management standard,¹⁸ which typically covers contracted work performed in a single industrial facility. However, Advocacy notes that electric power work is usually quite different from work performed at a single industrial facility because the worksite may span many miles and occur in remote locations. Further, the host is usually not present at these worksites and often does not possess expertise in the type of work being performed. For these reasons, many of the SERs questioned whether the host-contractor provisions are appropriate for the electric power industry at all.¹⁹

The SERs raised other concerns about the host-contractor provisions.²⁰ They argued that these provisions would require host employer to identify safety standards in situations where they may be unqualified to do so and could lead to OSHA issuing citations for violations of private contracts, amounting to enforcement by OSHA of non-promulgated regulations. Further, the SERs were concerned that the host-contractor provisions inappropriately expand the scope of OSHA’s multi-employer worksite doctrine, even

¹² 5 U.S.C. § 609(b)(6).

¹³ *OSHA Procedures for Compliance with the Regulatory Development and Review Requirements of the Regulatory Flexibility Act*, SBREFA Panel Procedures, 13 (<http://www.dol.gov/dol/regs/appendix.htm>).

¹⁴ 70 Fed. Reg. 34839. (A “host employer” is defined as an employer who operates and maintains an installation and who hires a contract employer to perform work on that installation.)

¹⁵ *Id.* (A “contract employer” is defined as an employer who performs work covered by Subpart V for a host employer. Examples include painting contractors, line construction contractors, electrical contractors, and other contractors working on the construction of electrical power transmission and distribution lines.)

¹⁶ *Id.*

¹⁷ 70 Fed. Reg. 34840.

¹⁸ 70 Fed. Reg. 34839.

¹⁹ See *SBREFA Report*, p. 7-11.

²⁰ *Id.*

though OSHA states that the proposed requirements “do not affect the Agency’s long-standing multiemployer policy.”²¹ Finally, the SERs told the panel that OSHA’s proposal ignores the reality of business contracting relationships - including the existence of multiple tiers of contractors.²²

The SBREFA panel recommended that OSHA consider, and request comment on, several alternatives, including that of dropping the host-contractor provisions altogether.²³ Advocacy notes that if the host-contractor provisions were removed altogether, OSHA’s existing multi-employer worksite doctrine would continue to apply to work performed on these sites as well as to the relationships between host and contractor employers.

Training Provisions

OSHA’s proposed rule would require that “[e]mployees shall also be trained in and familiar with any other safety practices ... that are not specifically addressed by this subpart but that are related to their work and are necessary for their safety.”²⁴ The scope of this mandatory employee training is not limited to work practices required by the proposed electrical standards, but extends to any other safety practices that are related to their work and necessary for their safety. The SBREFA panel was concerned that this language was overly broad and could be viewed as covering other, non-specified hazards on the worksite, such as ergonomic injuries from overhead work. We echo the SBREFA panel recommendation that OSHA clarify what training is required to comply and to invite comment on this issue.²⁵

The proposed training language remains vague and OSHA should clarify what training is necessary to comply with the standard (as well as what alternative training is acceptable for compliance). By comparison, Advocacy notes that OSHA’s proposed requirements for job briefings are more narrowly tailored than the training language, and specifically apply to the performance of the particular job being performed.²⁶ Advocacy recommends that OSHA re-evaluate the current language and consider whether narrower language limiting the scope of training requirements to the particular hazards being regulated would be appropriate, as recommended by the panel.

Protective Clothing

OSHA’s proposed rule would require the employer to assess the workplace to determine if employees are exposed to hazards from flames or electric arcs.²⁷ Once an employer determines who is exposed to hazards from flames or arcs, the employer must estimate the maximum heat energy to which an employee would be exposed. Based on this

²¹ Id.

²² Id.

²³ See *SBREFA Report*, p. 24.

²⁴ 70 Fed. Reg. 34936.

²⁵ See *SBREFA Report*, p. 16.

²⁶ See 70 Fed. Reg. 34948.

²⁷ 70 Fed. Reg. 34866.

estimate, the employer must then ensure that no employee wears clothing that could melt, ignite, or continue to burn at that exposure level.²⁸

The SERs raised several concerns about the protective clothing provisions from both a risk and a cost perspective, which are detailed in the SBREFA report.²⁹ Specifically, the panel recommended that OSHA consider no further requirements beyond existing 1910.269 for flame resistant clothing and consider alternatives to reduce the burdens of calculating how much protection is needed. OSHA addressed the latter issue by including heat energy tables in the proposed rule that will help regulated entities complete the assessments, but it has not addressed some of the other alternatives requested by the panel.³⁰ OSHA should request comment on these other alternatives, especially in those instances where the agency indicates that it lacked sufficient information to address the concerns of the panel.

Further, Advocacy is concerned about OSHA's treatment of protective clothing as personal protective equipment (PPE), an issue which was not addressed in the panel. First, OSHA declares in a single sentence in the preamble that it now views protective clothing as PPE,³¹ a position that OSHA has previously not asserted. OSHA then engages in a lengthy discussion in the preamble about who should pay for this newly defined PPE and under what circumstances.³² OSHA repeatedly references its proposed PPE standard³³ for the proposition that employers should pay for PPE (and has even built cost estimates for this outcome into its regulatory analysis). However, it should be noted that OSHA's proposed PPE standard is still a proposed rule that has not been finalized. Advocacy is concerned about the agency relying upon a non-promulgated proposed rule (or citing it as an authoritative source), and notes that the cost of PPE is going to be a significant issue in this rulemaking process. Finally, in considering whether employers should pay for protective clothing, OSHA declares that it will rely not only on comments received in response to this proposed electric power rule, but also those from the separate PPE rulemaking docket that is not even part of this rulemaking process.³⁴ Advocacy is concerned that small entities not have had adequate notice and opportunity to comment

²⁸ 70 Fed. Reg. 34868.

²⁹ See *SBREFA Report*, p. 11-12.

³⁰ *Id.*, p 25. (The other alternatives identified in the SBREFA Report include: allowing the employer to estimate the exposure assuming that the distance from the employee to the electric arc is equal to the minimum approach distance; specifying a minimum level of protection for overhead line work for use when the system does not exceed certain limits as an alternative to hazard assessment; allowing the employer to reduce protection when other factors interfere with the safe performance of the work (for example, severe heat stress) after the employer has considered alternative methods of performing the work and has found them unacceptable; allowing employers to base their assessments on a worst-case analysis; and, requiring employers to use appropriate flame retardant clothing without specifying any assessment method.)

³¹ 70 Fed. Reg. 34929. (“OSHA considers the protective clothing required by paragraph (g) to be PPE.”)

³² *Id.* (OSHA discusses several circumstances where employers are required to pay for PPE versus situations where they are not, such as clothing that is personal in nature and worn off the job.)

³³ 70 Fed. Reg. 34869.

³⁴ 70 Fed. Reg. 64869. (OSHA states that it “is also incorporating the record of the employer payment for PPE rulemaking into the record of this [electric power] rulemaking and will give due consideration to all relevant comments.”)

on this issue. Further, Advocacy notes that OSHA certified under the RFA that its PPE rule would not have a significant economic impact on a substantial number of small entities³⁵; however, treating protective clothing as PPE could alter that earlier analysis.

Since the issue of protective clothing as PPE has not been fully vetted in the rulemaking process, Advocacy recommends that OSHA address the issues of protective clothing, PPE, and employer payment for PPE in the PPE rulemaking process and not finalize these provisions prior to that rulemaking's conclusion.

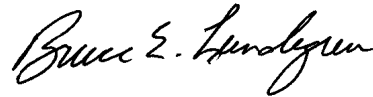
Conclusion

Advocacy appreciates the opportunity to comment OSHA's *Proposed Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment Rule*, and would welcome the opportunity to work with OSHA in any way we can to assist the agency in addressing these comments. Please feel free to contact Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

cc: The Honorable John Graham
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

³⁵ 64 Fed. Reg. 15401 (March 31, 1999)