Federal Energy Regulatory Commission
2015 Biennial Staff Memo Concerning Retrospective Analysis of Existing Rules
Docket NoAD12-6-001
April 10, 2015

On November 8, 2011, staff of the Federal Energy Regulatory Commission (FERC or Commission) issued in Docket No. AD12-6-000 a Plan for Retrospective Analysis of Existing Rules (the Plan).[1] The Plan outlined additional steps for the future to identify regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and may warrant streamlining, expansion, repeal or modification, or strengthening, complementing, or modernizing where necessary or appropriate. This Plan is in addition to the Commission's current voluntary review of its regulations.

Consistent with the 10-year review cycle set forth in the Plan, Staff identified the following Commission regulations as ripe for evaluation in 2015:

Subject Matter	18 CFR Part(s) or Order No.	Last Revision
Oil Pipeline Uniform System of Accounts	352	2003
Hydropower-prefiling	4,5,16	2003

As described in this memo, Commission Staff has reviewed the Commission's regulations in 18 C.F.R. Part 352, which details the Uniform Systems of Accounts prescribed for oil pipeline companies, and 18 C.F.R. Parts 4, 5, and 16, which deal with hydropower prefiling and requirements. Staff has concluded that the oil pipeline Uniform System of Accounts does not require revision, and that it may be appropriate to modify sections of the aforementioned hydropower regulations because they no longer serve their intended purpose. In addition to the regulations ripe for evaluation in 2015, WSPP, Inc. sent a letter to Chairman LaFleur asking that the Commission review the requirement imposed in 2001 that Western public and non-public utilities offer available real-time electric energy capacity into the markets and post the availability on their websites and the WSPP website. Commission Staff will also consider this request in this memo. Consistent with the Plan, this memo will be made available for public comment, providing an opportunity for public input on whether the existing regulations listed above warrant a formal public review. Such public input will be due at least 30 days after the memo is made available for public comment. This input, in addition to Staff's recommendation,

[1] *See Retrospective Review under Executive Order 13579 - Plan for Retrospective Analysis of Existing Rules*, 76 Fed. Reg. 70,913 (Nov. 16, 2011), FERC Stats. & Regs. ¶ 29,663 (2011), *available at* http://www.ferc.gov/legal/maj-ord-reg/retrospective-analysis.asp.

will inform the Commission's decision as to which regulations, if any, will be the subject of a formal public review as part of the 2015 retrospective analysis conducted pursuant to the Plan. This public review could be initiated by a Notice of Inquiry seeking public comment on whether the regulations continue to meet their original objectives or by a proposal of specific changes to the regulations through a Notice of Proposed Rulemaking.

The Plan also emphasized that in addition to this retrospective analysis initiative, the Commission would continue its practice of voluntarily and routinely reviewing its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. To that end, in addition to those regulations ripe for review pursuant to the 10-year review cycle set forth in the Plan, in 2014, the Commission considered other areas in which the regulatory burden may have been outmoded, ineffective, insufficient, or excessively burdensome and took action to review the regulations. For example, the Commission proposed to revise its current standards for market-based rates for sales of electric energy, capacity, and ancillary services to reduce the administrative burden on applicants and the Commission, such as by allowing sellers in RTO markets to address horizontal market power issues in a streamlined manner and by eliminating certain filing requirements.[2] In addition, the Commission found that its existing policy of treating Interconnection Customer's Interconnection Facilities the same as other transmission facilities for OATT purposes, including the requirement to file an OATT following a third-party request, creates undue burden for Interconnection Customer's Interconnection Facilities owners without a corresponding enhancement of access given the ICIF owner's typical ability to establish priority rights. Therefore, the Commission issued a rule that provided a more efficient process for generators to obtain priority rights to use transmission capacity on their interconnection facilities.

The Commission is also considering other ways to reduce burdens or otherwise update its regulations. For example, the Commission proposed to revise its regulations and eliminate several filing requirements to reduce the regulatory burden of compliance on public utilities.[3] Additionally, a recently proposed Policy Statement, sought to provide greater certainty concerning the ability of interstate natural gas pipelines to recover the costs of modernizing their facilities and infrastructure to enhance the efficient and safe operation of their systems.[4] In 2015, the Commission proposed to amend its rules to eliminate the requirement that participants

[2] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 147 FERC ¶ 61,232 (2014).

[3] *Revisions to Part 46 Filing Requirements*, 149 FERC ¶ 61,229 (2014).

[4] *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 149 FERC ¶ 61,147 (2014).

in Commission trial-type evidentiary hearings must provide paper copies of all exhibits introduced as evidence. The Proposed Rule would facilitate a shift toward electronic hearing procedures, which should improve the efficiency and administrative convenience of the Commission hearing process, reduce the burden and expense associated with paper exhibits, and facilitate the compilation and transmittal of the hearing record to the Commission in electronic format.[5] Staff is not seeking comments on these proceedings through this memo.

Background

On July 11, 2011, the President issued Executive Order 13579, requesting that independent regulatory agencies follow the key principles of Executive Order 13563. These principles were designed to promote public participation, improve integration and innovation, promote flexibility and freedom of choice, and ensure scientific integrity during the rulemaking process in order to create a regulatory system that protects public health, welfare, safety, and the environment while promoting economic growth, innovation, competitiveness, and job creation.

As part of this effort, Executive Order 13579 requested that independent agencies issue public plans for periodic retrospective analysis of their existing "significant regulations." Retrospective analysis should identify "significant regulations" that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in order to achieve the agency's regulatory objective. The Plan was made available to the public on November 8, 2011, in accordance with Executive Order 13579.

The Plan summarized the Commission's continuing efforts to identify regulations that warrant repeal or modification, or strengthening, complementing, or modernizing where necessary or appropriate. The Commission voluntarily and routinely, albeit informally, reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. In addition, the Commission considers the spirit of the above-noted Executive Orders when evaluating possible new regulations.

The Plan also outlined additional steps for the future to identify regulations that warrant repeal or modification, or strengthening, complementing, or modernizing where necessary or appropriate. The Plan stated that it is in addition to the Commission's current voluntary review of its regulations.

Executive Order 13579 asked independent agencies to review "significant regulations." Executive Order 13579 does not define what should be considered "significant regulations." In developing the Plan, staff considered the definition of a "significant regulatory action" provided in Executive Order 12866.[6] Staff also considered the Office of Management and Budget's

[5] Revised Exhibit Submission Requirements for Commission Hearings, 80 Fed. Reg. 15,700 (2015).

[6] Section 3(f) of Executive Order 12866 defines "significant regulatory action" to be one that is likely to result in a rule that may:

(OMB) definition of "major rules" in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[7] In particular, section 3(a) of the Regulatory Flexibility Act provides for a 10-year review of rules that have a "significant economic impact upon a substantial number of small entities."[8] However, the Commission, in consultation with OMB, has determined that a very limited number of the Commission's rules are "major rules" because they do not have a significant economic impact upon a substantial number of small entities."[9] FERC's rules, likewise, are typically not considered a "significant regulatory action."

Because the Commission has relatively few "major rules" or "significant regulatory actions," the Plan established a process for reviewing both those Commission actions and other Commission rules that nonetheless would be considered of particular importance to the industry regulated by the Commission and the public. The Plan requires staff to prepare a biennial memo identifying such regulations that are ripe for evaluation based on a 10-year review cycle. As described in the Plan, before staff identifies candidate regulations to review, it will consider a number of factors, including measures to effectively carry out the Commission's statutory responsibilities; staff resources; market dynamics; the effect of regulations on small businesses; comments from other agencies, stakeholders, and regulated entities; stakeholder actions; government actions; technological developments; and the public interest.

The Plan also stated that staff will make its memo available for public comment, providing an opportunity for public input as to which of the regulations that are ripe for evaluation warrant a formal public review. This input, in addition to staff's recommendation,

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(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;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel, legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

[7] 5 U.S.C. § 804(2) (2006).

[8] *Id.* §610.

[9] The following rules have been considered "major rules:" Order Nos. 888 and 889 (considered together) adopting a pro forma open access transmission tariff (OATT) and a related open access same-time information system (OASIS), Order No. 693 approving the first batch of Reliability Standards, and Order Nos. 706 and 791 approving the first version and a major revisions to Commission-approved cyber security standards. In addition, the Smart Grid Policy Statement was considered a major rule by OMB.

will inform the Commission's decision as to which regulations, if any, will be the subject of a formal public review. The Plan stated that this public review could be initiated by a Notice of Inquiry seeking public comment on whether the regulations continue to meet their original objectives or by a proposal of specific changes to the regulations.

In addition, the Plan states that members of the public and industry participants always may suggest the need for revisions in existing regulations, even outside of existing proceedings. The Commission seriously considers such input. Input from the public and industry participants is often part of the Commission's determination to reevaluate existing policy and rules.

Potential Regulations for Formal Review

Staff has identified the following regulations for potential inclusion in the 2015 retrospective analysis based on the last revision date and the process set forth in the Plan to review all regulations within a 10-year cycle:

Subject Matter	18 CFR Part(s) or Order No.	Last Revision
Oil Pipeline Uniform System of Accounts	352	2003
Hydropower-prefiling	4,5,16	2003

Oil Pipelines, 18 C.F.R. Part 352

18 C.F.R. Part 352 prescribes the proper accounting treatment required by the Commission for Oil Pipeline Companies. It consists of general instructions, instructions for the various categories of accounts, the accounts themselves, and the definitions of those accounts.

The Commission's regulations in 18 C.F.R. Part 352 operate smoothly and have had only minor and infrequent revisions over the years. Jurisdiction over oil pipeline companies was shifted to the Commission from the Interstate Commerce Commission (ICC) in 1977 and the ICC's regulations prescribing the Uniform Systems of Accounts for Pipeline Companies were kept in effect by the Commission in Order No. 1.[10] The regulations were moved from Title 49 of the CFR to Title 18 in Order No. 119, issued in 1981.[11]

[10] *Interim Regulations for the Operations of the Federal Regulatory Energy Commission*, Order No. 1, FERC Stats. & Regs. Preambles ¶ 30,002 (1977); *see Revisions to and Electronic Filing of the FERC Form No. 6 and Related Uniform Systems of Accounts*, Order No. 620, FERC Stats. & Regs. Preambles ¶ 31,115, at 31,953 (2000).

[11] *Regulation of Interstate Oil Pipelines*, Order No. 119, FERC Stats. & Regs. Preambles ¶ 30,226 (1981).

The Commission conducted a comprehensive review of its reporting requirements for oil pipelines in Order No. 260, where the Commission revised ICC Form P and re-designated it as FERC Form 6.[12] In Order No. 620, the Commission revised its regulations to revise Form 6 and to accommodate its electronic filing.[13]

In Order No. 627, the Commission revised its regulations to modify the Uniform Systems of Accounts, including those for oil pipelines, to address derivatives and other hedging activities.[14] In Order No. 631, the Commission again revised its regulations to modify the Uniform Systems of Accounts, including those for oil pipelines, to address financial reporting and rate filing requirements for asset retirement obligations.[15]

For the purposes of this review, Staff conducted a review of the instructions and the accounts within 18 C.F.R. Part 352 and interviewed Commission Accounting and Audit Staff. Accounting Staff regularly meets with the Association of Oil Pipe Lines to discuss accounting issues and also responds to specific requests from oil pipeline companies for clarification on proper accounting practices. Audit Staff is currently undertaking three audits of oil pipeline companies, which include accounting as a major focus area.

After reviewing the Commission's existing regulations in 18 C.F.R. Part 352 and how they have operated, Staff is not aware of any gaps in these regulations and finds that the regulations are still relevant and necessary for the proper administration of the Commission's authority over oil pipeline companies. Therefore, Staff finds no cause to recommend revisions to these regulations. However, this memo will be subject to public comment and the Commission will consider all views presented on whether these regulations require modification before making its decision on how to proceed.

Hydropower – Prefiling, 18 C.F.R. Parts 4, 5, and 16

18 C.F.R. Part 4 describes the requirements for conducting prefiling activities and filing applications using the Commission's traditional and alternative processes for licenses and exemptions. It was recently revised to eliminate the requirement to submit copies of certain

[12] *Revision of Annual Report of Carriers by Pipelines: Form P*, FERC Stats. & Regs. Preambles ¶ 30,397 (1982).

[13] Referenced in n.11 *supra*.

[14] *Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, FERC Stats. & Regs. Preambles ¶ 31,134 (2002).

[15] *Accounting, Financial Reporting, and Rate Filing Requirements for Asset Retirements Obligations*, Order No. 631, FERC Stats. & Regs. Preambles ¶ 31,142 (2003).

project maps and drawings in microfilm format on aperture cards,[16] to recognize the expansion of qualified projects eligible for exemptions, and to make certain other revisions[17] in response to the Hydropower Regulatory Efficiency Act of 2013.[18]

Part 5 describes the requirements for conducting prefiling activities and filing applications for licenses pursuant to the Commission's Integrated Licensing Process (ILP). Part 16 describes the requirements for conducting prefiling activities and filing applications for projects at relicensing.

Currently under all three parts, a license applicant must use the ILP procedures described in Part 5 unless it applies for and receives a waiver from the Office of Energy Projects to use either the traditional or alternative process.

Staff has identified the following provisions in Part 5 as possibly ineffective, outmoded, or overly burdensome, and they, therefore, may warrant review. The Commission will consider public input on this memo as well as staff's recommendation in determining whether to propose any changes to these regulations. This public review could be initiated by a Notice of Inquiry seeking public comment on whether the regulations continue to meet their original objectives or by a proposal of specific changes to the regulations through a Notice of Proposed Rulemaking.

Process Selection

Section 5.3 allows a license applicant to request to use the traditional or alternative process instead of the ILP at the same time that it files its notice of intent to file a license application and pre-application document, and describes the issues to be addressed in any such filing. Over the past 10 years, the majority of requests to use the traditional or alternative process have been granted based on a showing of good cause. In light of this approval level and a concern that the current approval process can delay initiation of the traditional or alternative process by 60 days, this process may be outmoded, ineffective, and excessively burdensome, and may warrant review. One option staff is considering would to be to allow a properly supported request to use the traditional licensing process or alternative licensing process to be automatically granted unless Staff issues a letter within 15 days of filing stating that Staff will review the request and issue a decision within 60 days of filing.

Landowner Notification

Sections 5.5(c) and 5.6(a)(1) require that a potential license applicant distribute its notice

[16] *Format and Dimensions of Maps and Drawings required by the Commission's Hydropower Program*, Order No. 798, 148 FERC ¶ 61,036, 79 Fed. Reg. 42,973 (July 24, 2014).

[17] *Revisions and Technical Corrections to Conform the Commission's Regulations to the Hydropower Regulatory Efficiency Act of 2013*, Order No. 800, 148 FERC ¶ 61,197, 79 Fed. Reg. 59,105 (Oct. 1, 2014).

[18] Pub. L. No. 113-23 (2013), 127 Stat. 493 (2013).

of intent to file a license application (NOI) and its pre-application document (PAD) to appropriate Federal, state, and interstate resources agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding. Section 4.32(a)(3)(A) requires an applicant, when it files its license application, to notify affected property owners that it is filing a license application. Although property owners as described in 18 C.F.R. Section 4.32(a)(3)(A) would fit within the category of members of the public likely to be interested in the prefiling process, there have been instances where such property owners have not been notified leading to a delay in addressing issues raised. Therefore, Staff believes that that sections 5.5(c) and 5.6(a) may be ineffective and insufficient as currently drafted to serve their intended purpose. These sections could be modified to include a requirement that a potential license applicant distribute its NOI and PAD to property owners, as described in 18 C.F.R. Section 4.32(a)(3)(A). Similarly, section 5.6(d)(5) could be modified to include such property owners in the summary of contacts required to be filed with the Commission.

Comments on the Revised Study Plan

Pursuant to section 5.6, an applicant files, with its pre-application document, a list of potential studies intended to fill in any gaps of information needed for the Commission to evaluate its license application. Pursuant to section 5.9, interested participants may submit study requests. Pursuant to section 5.11, the applicant files a proposed study plan and holds a study plan meeting. After holding the meeting and receiving comments on its proposed study plan, the applicant files its revised study plan pursuant to section 5.13. Section 5.13(b) allows participants 15 days to file comments on the revised study plan. The intent of this regulation is to allow participants to explain why their concerns have or have not been met by the revisions to the study plan. However, in some cases, participants are using this opportunity to raise new issues and seek modifications or new studies that could have been raised and requested during the comment period on the proposed study plan. Therefore, Staff believes that section 5.13(b) may be ineffective and warrant modification to clarify the intent of the regulations and prohibit the request for modifications or new studies that could have been made during the proposed study plan comment period.

Timing of Study Plan Determination

An applicant must provide the Commission a study plan that fills in any gaps of information needed for the Commission to be able to evaluate its license application. The Commission's regulations allow for comments on this study plan, and the applicant must file a revised study plan after receiving those comments. Section 5.13(b) sets a 15-day deadline for comments on the potential applicant's revised study plan, and section 5.13(c) sets a 30-day deadline for the Director of the Office of Energy Projects to issue the study plan determination after the revised study plan is filed. When the ILP was developed, it was envisioned that the process leading up to the study plan determination would resolve most study issues, and that the comments on the revised study plan and the study plan determination itself would be limited in scope. However, in many cases there are extensive issues to be addressed causing the revised study plan to be voluminous and complex. To ensure adequate time is given for stakeholders and Staff to fully review the proposed study plan and consider all of the issues, additional time is occasionally needed to evaluate the study needs and make the study plan determination.

Therefore, this section may be outmoded and need to be revised to allow more time for both public comment and for the Director's decision on the study plan.

Dispute Resolution Panel

In cases where a federal or state agency with mandatory conditioning authority files a notice of study dispute in response to the Director's study plan determination, a dispute resolution panel is convened within 20 days of the notice of dispute, pursuant to section 5.14(d). Pursuant to section 5.14(k), the panel must deliver to the Director, within 50 days of the notice of dispute, a finding with respect to each study request in dispute. Section 5.14(j) requires the panel to hold a technical conference prior to engaging in deliberative meetings, which in some cases can be a time consuming and possibly unnecessary action. While recognizing that the Commission can waive the regulations in appropriate situations to forego a technical conference, this provision may be outmoded, ineffective, or excessively burdensome, and may warrant review. One way to update this provision would be permit, but not require, a panel to hold a technical conference if the panel believes it is necessary.

Request from WSPP

As stated above, on March 16, 2015, Chairman LaFleur received a letter from WSPP requesting that the Commission clarify that a certain requirement imposed on utilities as part of the Western energy crisis mitigation is no longer in effect. WSPP states that the requirement, in which Western public and non-public utilities were told to offer available real-time electric energy capacity into the markets and post the availability on their websites and WSPP's website, is no longer necessary because the market dysfunction that necessitated the obligation in the first place, the Western power crises, no longer exists. Based on the description filed by WSPP, this requirement may be outmoded and excessively burdensome. We therefore request comment on whether the Commission should consider modifying or removing this requirement.