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Office of the General Counsel

B-271810.3

May 24, 1996

The Honorable Frank H. Murkowski
Chairman
The Honorable J. Bennett Johnston
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

Subject: Open Access Same-Time Information System and Standards of Conduct

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Federal Energy Regulatory Commission (Commission), Department of Energy, entitled "Open Access Same-Time Information System and Standards of Conduct" (Docket No. RM95-9-000; Order No. 889). The Commission issued the final rule on April 24, 1996, and we received it on April 25, 1996. The final rule was published in the Federal Register on May 10, 1996. 61 Fed. Reg. 21737.

A companion rule entitled "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities" (Docket Nos. RM95-8-000 and RM94-7-001; Order No. 888) was also published in the Federal Register on May 10, 1996. 61 Fed. Reg. 21540. Today, we are issuing a separate report, captioned B-271810.4, GAO/OGC-96-13 on the companion rule. On May 1, 1996, Representative Bob Franks introduced a joint resolution to disapprove both final rules pursuant to section 802(a) of title 5. 142 Cong. Rec. H4397.

This rule would require each public utility that owns, controls, or operates transmission facilities used for transmitting electric energy in interstate commerce to create or participate in an open access same-time information system (OASIS).

The OASIS would provide potential customers with information needed to obtain the open access non-discriminatory service required by the Commission's companion rule. This rule would also require public utilities to implement standards of conduct to functionally separate transmission and wholesale power merchant functions.

Enclosed is our assessment of the Commission's compliance with the procedural requirements referred to in sections 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the Commission complied with the applicable requirements.

If you have any questions about this report, please contact Helen T. Desaulniers, Senior Attorney, at (202) 512-4740. The official responsible for GAO's work related to the Commission is Victor S. Rezendes, Director for Energy, Resources, and Science Issues. Mr. Rezendes can be reached at (202) 512-3841.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Elizabeth A. Moler
Chair
Federal Energy Regulatory Commission

ANALYSIS UNDER 5 U.S.C. §§ 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE FEDERAL ENERGY REGULATORY COMMISSION
ENTITLED
"OPEN ACCESS SAME-TIME INFORMATION SYSTEM (OASIS)
AND STANDARDS OF CONDUCT"
(DOCKET NO. RM95-9-000; ORDER NO. 889)

(i) Cost-Benefit Analysis

The Commission indicated in its submission to us that it was not required to prepare and did not prepare a cost-benefit analysis of the rule.

(ii) Agency Actions Relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

Section 603: Initial Regulatory Flexibility Analysis

The preamble to the proposed rule stated that the entities that would be required to comply with the rule are public utilities and transmitting utilities that do not fall within the Regulatory Flexibility Act's definition of small entity.¹ 60 Fed. Reg. 66197-8. Accordingly, the Commission certified, pursuant to 5 U.S.C. § 605(b), that the rule would not have a significant economic impact on a substantial number of small entities and did not prepare an initial regulatory flexibility analysis. 60 Fed. Reg. at 66198. Section 605(b) states that the certification and explanatory statement shall be provided to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In response to our inquiry, Commission officials explained that the Commission did not provide a separate certification and statement to SBA because it considers publication of the certification in the Federal Register to be notice to SBA. An SBA official has confirmed that some agencies follow this practice, and SBA has not objected to it.

Section 604: Final Regulatory Flexibility Analysis

¹Section 601(3) of title 5, United States Code, provides that the term "small business" generally has "the same meaning as the term 'small business concern' under section 3 of the Small Business Act." 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. 15 U.S.C. § 632(a).

In the preamble to the final rule, the Commission reiterated that the rule would only apply to public and transmitting utilities and again certified that the rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. See 61 Fed. Reg. 21762. Therefore, the Commission did not conduct a final regulatory flexibility analysis under 5 U.S.C. § 604(a). One commenter expressed concern that the Commission would extend the requirement for an open access same-time information system (OASIS) to non-public, not-for-profit cooperative utilities and stated that the Commission would then be required to analyze the requirement's effect on those utilities. In response, the Commission emphasized that the rule would only apply to public utilities that own, operate, or control transmission facilities subject to the Commission's jurisdiction. See 61 Fed. Reg. at 21763. By letter of May 9, 1996, the Commission informed SBA of its certification.

In light of the Commission's determination that the rule would not have a significant economic impact on a substantial number of small entities, sections 605(a) and (c), 607, and 609 are inapplicable.

(iii) Agency Actions Relevant to Sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

As an independent regulatory agency, the Commission is not subject to title II of the Unfunded Mandates Reform Act of 1995.

(iv) Other Relevant Information Under Acts and Executive Orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Commission promulgated the OASIS rule under the notice and comment procedures of 5 U.S.C. § 553. A notice of proposed rulemaking was published on December 21, 1995. 60 Fed. Reg. at 66182. The Commission received comments on the proposed rule from 104 commenters. In the preamble to the final rule, the Commission responded to issues raised during the comment period.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The rule requires public utilities to create or participate in an OASIS designed to provide potential customers with information by electronic means about available transmission capacity and prices. According to the preambles to the proposed and final rules, the Commission reviewed its proposed information collection and, among other things, assessed the need for the information, how the information would be used, and the associated burden. 60 Fed. Reg. at 66184, 66198; 61 Fed. Reg. at 21739, 21763.

In addition, the Commission solicited and evaluated comments on the proposed information collection. The Commission specifically solicited public comments on the need for and utility of the information; the accuracy of the burden estimate contained in the preamble to the proposed rule; ways to enhance the quality, utility, and clarity of the information to be collected; and suggested methods for minimizing the burden.

See 60 Fed. Reg. at 66184. In the preamble to the final rule, the Commission responded to comments on various aspects of the OASIS requirement. The Commission also adjusted its burden estimate in response to issues raised by commenters. See 61 Fed. Reg. at 21739, 21763.

Consistent with the requirements of the Paperwork Reduction Act, the preambles to the proposed and final rules set forth significant information about the proposed collection of information. Among other things, the preambles included a title and reasons for the information collection, the proposed use for the information, a description of the respondents, and the frequency of responses. 60 Fed. Reg. at 66198; 61 Fed. Reg. at 21763. The preambles also cited OMB's clearance requirements, though not specifically 44 U.S.C. § 3507.² 60 Fed. Reg. at 66198; 61 Fed. Reg. at 21763.

At the same time as it requested public comments, the Commission submitted its proposed collection of information and certification under 44 U.S.C. § 3506(c)(3) to the Office of Management and Budget (OMB). See 60 Fed. Reg. at 66184. In response to our inquiry, Commission staff advised that OMB approved the information collection requirement. OMB also asked that the Commission examine the burden associated with "third party reporting" and ensure that this burden was reflected in the Commission's final rule. The Commission also submitted the final rule to OMB. See 61 Fed. Reg. at 21763. On May 3, 1996, the Commission again certified to OMB that the information collection complied with each of the objectives identified in 44 U.S.C. § 3506(c)(3).

Statutory Authorization for the Rule

In the preambles to the proposed and final rules on the open access non-discriminatory tariff and "stranded costs," the Commission explained that sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, require it to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. 60 Fed. Reg. at 17664; 61 Fed. Reg. at 21541. In the preamble to the final OASIS rule, the Commission explained that

²Section 3506(c)(1)(B) requires each agency to establish a process to ensure that each information collection indicates the collection is in accordance with the clearance requirements of section 3507.

the information access requirement embodied in the OASIS rule is necessary to meet the requirements of the open access rule.

61 Fed. Reg. at 21739-40.

The Commission did not identify any other statute or executive order imposing procedural requirements relevant to the OASIS rule.