

REPORT OF THE E-COMMERCE COMMITTEE

The past year has brought rapid-fire developments in the information technologies that affect our energy practice. This report summarizes developments in the electric industry, the gas industry, and in other arenas, including technological innovations at the Federal Energy Regulatory Commission (FERC or Commission).

I. E-COMMERCE DEVELOPMENTS IN THE ELECTRIC INDUSTRY

Over the past year, the Commission has issued orders and launched initiatives in an effort to: (1) facilitate paper reduction through electronic filing of Electric Quarterly Reports and FERC Form No. 1; (2) accommodate the Standard Market Design initiative; and (3) provide for streamlined electric business practice standards.

A. Electric Quarterly Reports

On April 25, 2002, the Commission issued Order 2001, a Final Rule that requires public utilities to electronically file quarterly reports that summarize data regarding their currently effective contracts and data regarding wholesale power sales made during the reporting period.¹ Order 2001 covers agreements for jurisdictional service (such as market-based or cost-based power sales and transmission services), transaction information for short-term and long-term market-based power sales, and cost-based power sales within the most recent calendar quarter. With the implementation of the Electric Quarterly Report process, public utilities no longer need to file Power Marketer Quarterly Transaction Reports (for market-based rate transactions), short-term or long-term market based sales agreements, or conforming cost-based agreements. The implementation of Order 2001 was split into two phases: (1) an interim phase through October 31, 2002, and (2) a final phase thereafter.

Briefly, Order 2001 has the following five main features. First, Public utilities with standard forms of service agreements no longer need to “file conforming agreements with the Commission.”² Instead, the requirements of section 205 of the Federal Power Act³ are met through filing the standard form of service agreement and the Electric Quarterly Report.

Second, “agreements for transmission, cost-based power sales, and other

1. Order No. 2001, *Revised Public Utility Filing Requirements*, F.E.R.C. STATS. & REGS. ¶ 31,127, 67 Fed. Reg. 31,043 (2002) (to be codified at 18 C.F.R. pts. 2, 35); *reh'g denied*, Order No. 2001-A, *Order Denying Requests for Rehearing, Requests for Stay and Requests for Extension, and Providing Clarification*, 100 F.E.R.C. ¶ 61,074 (2002); *order on reh'g*, Order No. 2001-B, *Order on Motion to Vacate and Request for Rehearing of Errata Notice and Motion for Reconsidering and Request for Clarification of Order No. 2001*, 100 F.E.R.C. ¶ 61,342 (2002); Order No. 2001-C, *Order Directing List of Conforming Contracts Currently on File in Tariffs and Providing Details on Accessing the Software to Be Used for Electric Quarterly Reports to Be Filed on or Before January 31, 2003 and Thereafter*, 101 F.E.R.C. ¶ 61,314 (2002).

2. Order No. 2001, *supra* note 1, at 30,121.

3. Pub. L. No. 102-486, 106 Stat. 2914 (1992) (codified as amended in scattered sections of 42 U.S.C.).

generally applicable services that do not conform to an applicable standard form of agreement in a public utility's tariff . . . must continue to be filed with the Commission"⁴ Third, requests for market-based rate authority must still be filed on an individual basis and public utilities must include data about their market-based power sales in the Electric Quarterly Reports. Fourth, the Electric Quarterly Report must "include contract data and transaction data."⁵ For the interim period filings, public utilities had to report data for the preceding quarter. Reports filed after October 31, 2002 (beginning with the report due January 31, 2003) must include contract and transaction data, as well as a List of Conforming Service Agreements.⁶ Finally, "book-out" transactions, "the offsetting of opposing buy-sell transactions," must be reported in the Electric Quarterly Reports on a disaggregated basis.⁷

The stated purposes of Order 2001 are "to streamline and reduce the filing burden on public utilities," and to provide "greater transparency and information accessibility to the public and the Commission."⁸ Given the goal of increased transparency, the information provided in the Electric Quarterly Reports will be made publicly available. In response to competitive concerns against public disclosure, the Commission has reasoned that, in light of the fact that most of the information has traditionally been provided in publicly available quarterly reports and contract filings, there is no increased competitive harm that would warrant treating the Electric Quarterly Report filings as confidential.⁹

B. Electronic Filing of FERC Form No. 1

The Commission has also taken steps to move other required electric reports to an electronic filing process. On May 16, 2002, the Commission issued Order 626, a Final Rule that substitutes a required electronic filing for the hard copy "of FERC Form 1 'Annual Report of Major Electric Utilities, Licensees and Others'" as of April 30, 2003.¹⁰ Order 626 also eliminates certain schedules from both "Form 1 and Form 1-F 'Annual Report of Nonmajor Public Utilities, Licensees and Others.'"¹¹ Forms 1 and 1-F collect general corporate information

4. Order No. 2001, *supra* note 1, at 30,121.

5. *Id.* The data templates for contract and transaction data, filing instructions for the Electric Quarterly Report, and a list of common mistakes are available on the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp> (last visited Sept. 9, 2002).

6. Instructions regarding the new software and list of conforming agreements are provided in Order No. 2001-C, *supra* note 1, at 62,270. The filing date for the January 31, 2003 submission was extended to February 14, 2003 by Order issued January 17, 2003.

7. Order No. 2001, *supra* note 1, at 30,149.

8. Order No. 2001-A, *supra* note 1, at 61,285. The Order No. 2001 initiative is also part of the Commission's ongoing commitment to an electronic filing initiative announced in Order No. 619, *Electronic Filing of Documents*, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,107 (2000), 65 Fed. Reg. 57,088 (2000) (to be codified at 18 C.F.R. pt. 385).

9. Order No. 2001, *supra* note 1, at 30,130.

10. Order No. 626, *Electronic Filing of FERC Form 1, and Elimination of Certain Designated Schedules in FERC Forms 1 and 1-F*, F.E.R.C. STATS. & REGS. ¶ 31,130, 67 Fed. Reg. 36,093 (2003) (to be codified at 18 C.F.R. pts. 35, 141, 385); *Electronic Filing of FERC Form 1, and Elimination of Certain Designated Schedules in FERC Forms 1 and 1-F*, 99 F.E.R.C. ¶ 61,179 (2002).

11. Order No. 626, *supra* note 10, at 30,186.

used in reviewing the financial condition of regulated companies during rate proceedings and the Commission's audit program. Significantly, the Commission eliminated eleven schedules from the Form 1 requirement and eight schedules from the Form 1-F requirement.

C. Standard Market Design – Conference on Data Requirements

The Commission has recognized that in order for market participants to implement the initiatives included in its Notice of Proposed Rulemaking for Standard Market Design (SMD NOPR),¹² the Commission would need to develop standard inputs and outputs for the software used to support the electric transmission grid and market operations. The Commission held a technical conference on these data and software requirements on July 18 and October 3, 2002.¹³ The conferences included presentations by software developers, the North American Energy Standards Board (NAESB), the North American Electric Reliability Council (NERC), Independent Service Operators (ISOs), and individual utilities. The first conference focused on: software developments; security issues; ISO software experience; and developing a planning process for software and data standards. Several of the panelists, including NAESB representatives, stressed the need for open and balanced representation of all stakeholders, especially vendors, in developing the standards and flexibility to accommodate regional differences.

The second conference addressed the following issues: (1) which entities have a role in setting standards; (2) the process for setting data and software standards; and (3) the development of the plan for wholesale electric market and grid software consistency. Interestingly, during this conference the panel was comprised of participants from other industries that have been through the process of developing data and software standards. In addition to the NAESB's discussion of the development of gas standards, panelists discussed development of standards, using bar codes as a case study. Examples included Lockheed Martin Corporation's process for integrating large systems, and the process used in Ontario, Canada to develop standards for electronic business transactions for the retail market. Several panelists agreed that if the Commission addresses the policy issues, organizations like the NAESB can work with market participants to apply those policies to business practice standards. There also appeared to be a consensus that the role of the regulator is to monitor the progress of the various work groups and provide further direction when needed, as opposed to waiting until an impasse is reached. The technical conference resulted in a number of goals including markets that reduce costs for all players, promoting efficiency of internal and inter-regional trading, market transparency, and vendor competition to spur innovation. At the close of the second conference, the NAESB staff committed to work with the participants to develop a memorandum of

12. Notice of Proposed Rulemaking, *Remedying Undue Discrimination Through Open Access Transmission Serv. & Standard Elec. Mkt. Design*, F.E.R.C. STATS. & REGS. ¶ 32,563, 67 Fed. Reg. 55,451 (2002) (to be codified at 18 C.F.R. pt. 35).

13. Transcripts and other information regarding the conferences are available on the Commission's website at <http://www.ferc.gov/industries/electric/indus-act/smd/conf-2002.asp> (last modified Aug. 4, 2003).

recommendations to the Commissioners that describes which entities will be responsible for the critical tasks, the accountability for the entities, and a set of priorities and broad schedules for accomplishing the critical tasks.

D. NAESB-NERC Coordination for Development of Electric Business Practice Standards and Communication Protocols

As part of the SMD initiative, the Commission asked the industry to develop electric business practice standards and communication protocols by establishing a single industry-wide standards organization for the wholesale electric industry.¹⁴ By an order issued May 16, 2002, the Commission expressed its pleasure with the NAESB Wholesale Electric Quadrant's (WEQ) efforts to develop business practice and electronic communication standards.¹⁵ The Commission also stressed the need for the NAESB and the NERC to coordinate regarding business practice standards and reliability standards. On August 15, 2002, the NERC and the NAESB signed a letter of intent whereby the two organizations agreed to coordinate the NAESB's efforts to develop business practice standards, electronic communication protocols, and the NERC's development of reliability standards.

Recently, the NAESB and the NERC signed a Memorandum of Understanding (MOU) in which they pledged to coordinate their efforts to develop wholesale electric business practices and reliability standards. The FERC's expectation is that the NAESB will use the consensus standards development process of its predecessor, the Gas Industry Standards Board (GISB), to develop electric business practices that not only meet the needs of the Commission, but also provide all stakeholders an opportunity to participate in developing those standards. Further, coordination with the NERC on its development of reliability standards is expected to provide for harmonized developments on both fronts, in order to avoid the inefficiencies associated with developing electric business practice standards apart from the related development of reliability protocols.

II. E-COMMERCE DEVELOPMENTS IN THE NATURAL GAS INDUSTRY

E-commerce in the natural gas industry has progressed considerably over the past few years, driven by increasing reliance on the Internet and regulatory initiatives by the FERC. Order 587,¹⁶ and, in particular, the implementation of Order 637¹⁷ have caused changes to pipelines' computer systems to accommodate growing utilization of electronic transactions and internet-based information exchange.

14. *Electricity Mkt. Design & Structure*, 97 F.E.R.C. ¶ 61,289 (2001).

15. *Electricity Mkt. Design & Structure*, 99 F.E.R.C. ¶ 61,171 (2002).

16. Order No. 587, *Standards For Bus. Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,038, 61 Fed. Reg. 39,053 (1996) (to be codified at 18 C.F.R. pts. 161, 250, 284).

17. Order No. 637, *Regulation of Short-Term Natural Gas Transp. Servs., Regulation of Interstate Natural Gas Transmission Servs.*, F.E.R.C. STATS. & REGS. ¶ 31,091, 65 Fed. Reg. 10,156 (2000) (to be codified at 18 C.F.R. pts. 154, 161, 240, 284).

Order 637 was issued on February 9, 2000.¹⁸ The order revised existing regulations in an attempt to increase price transparency and improve market efficiency and competition. Among the revisions specified by Order 637 were new reporting guidelines for pipelines, requiring detailed information to be posted and maintained on the pipeline companies' websites. This information included affiliate information, index of customers, available schedule and design capacity, service outages, and transactional information on firm and interruptible transportation.¹⁹ Pipelines were instructed to make the designated reporting changes and to file revised tariff sheets in compliance with Order 637 guidelines regarding scheduling procedures, capacity segmentation, and pipeline penalties.²⁰

To conform to Order 637 regulations, many interstate pipelines completely overhauled their existing computer systems. In late 2000, Williams Gas Pipeline's "1Line" website went into limited service as the initial phase of the company's transition to a single site for its five natural gas pipelines' transactional business and electronic bulletin boards.²¹ Columbia Gas Transmission proposed an interactive, Internet-based pipeline capacity auction and was granted a limited trial period through September 2002.²² In July 2002, Texas Gas Transmission Corporation (Texas Gas) filed revised tariff sheets for the implementation of an interactive web-based auction for short-term firm and interruptible capacity. The FERC issued an order on December 31, 2002 accepting Texas Gas' proposal and requiring that the pipeline file a one-year progress report within 425 days of their Internet auction becoming effective.²³

As individual pipeline companies expanded their electronic presence, trading groups increased their online activities as well. In March 2000, IntercontinentalExchange (ICE) was founded as an internet-based trading platform for over-the-counter oil and precious metals. Six natural gas and electric trading companies purchased an equity position in ICE in July 2000; American Electric Power, Aquila Energy, Duke Energy, El Paso Energy, Reliant Energy, and Southern Company Energy Marketing. The result was the world's largest on-line, over-the-counter market for oil, power, natural gas, and metals.²⁴ In September 2000, Williams, Coral Energy, Dominion Energy, Inc., Koch Trading, Inc., TXU, and Cantor Fitzgerald joined together to create TradeSpark, LP, a comprehensive electronic energy trading marketplace.²⁵ The success of

18. *Id.*; Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18 (D.C. Cir. 2002).

19. Order No. 637, *supra* note 17, at 31,321.

20. *Midwestern Gas Transmission Co.*, 101 F.E.R.C. ¶ 61,310 (2002).

21. *Gas Pipelines's 1Line Electronic Bulletin Board Goes Online*, IN THE LOOP, (Transcon. Gas Pipeline Corp., Houston, Tex.), 4th Quarter 2000, at <http://www.tgpl.twc.com/htm/intheloop/transitloop/loop6.htm> (last visited Sept. 27, 2003).

22. *Columbia Gas Transmission Corp.*, 94 F.E.R.C. ¶ 61,301 (2001).

23. *Texas Gas Transmission Corp.*, 101 F.E.R.C. ¶ 61,408 (2002).

24. Press Release, IntercontinentalExchange, Six New IntercontinentalExchange Partners (July 26, 2000), available at <http://www.intercontinentalexchange.com/press/20000726.html> (last visited Sept. 10, 2003).

25. Press Release, Williams Gas Pipeline, Williams, Industry Partners, form TradeSpark Electronic Energy Trading Platform (Sept. 25, 2000), available at <http://www.williams.com/newsmedia/newsreleases/rel594.html> (last visited Sept. 10, 2003).

ICE and Tradespark was helped by the bankruptcy of Enron and by the decision by UBS Warburg in December 2002 to shut down the Enron Online web exchange, UBSWenergy.com.²⁶

In 1996, the FERC issued Order 587, the first of a series of rules revising the Commission's regulations for business and electronic practices of interstate natural gas pipelines (to date, the FERC has issued Orders 587-A through 587-Q).²⁷ These regulations incorporate standards issued by the NAESB.²⁸ The most recent rule to incorporate the NAESB standards was Order 587-O, enacted by the FERC on May 1, 2002.²⁹ This order amended section 284.12 of the FERC's open access regulations with regard to standards for conducting business and electronic communication.³⁰ In the order, the Commission adopted Version 1.5 of the NAESB standards. These standards include modifications of Internet web page standards, transition of pipeline Electronic Bulletin Boards (EBB) to the Internet, business practices and data sets for imbalance netting and trading, and standards for title transfer tracking.³¹ Since pipelines are required to provide all electronic communications and transactions via the Internet, the FERC removed section 284.12(a) of its regulations, which dealt with pipeline EBBs. The FERC required that all pipelines file compliance with Order 587-O by August 1, 2002, to be effective October 1, 2002.³²

In compliance with Order 587-O requirements, pipelines again changed their tariffs and their websites. The detailed electronic standards set forth in the NAESB's Version 1.5 compelled many pipelines to make extensive changes to their electronic business practices. Williston Basin Interstate Pipeline Company, for example, modified their website to fit the standards set for imbalance trading and netting, and required of their customers that all imbalance trading and netting transactions be submitted via their interactive Customer Activities Website.³³ Kern River Gas' title transfer tracking (TTT) service necessitated modifications to its EBB nomination and scheduling system (RAPIDS II). Kern River requested recovery of the cost of these modifications through a volumetric rate for its TTT service, but the Commission rejected this proposal, requiring charges to be on a transaction basis.³⁴

Although the energy regulatory climate has favored an increasing reliance on the use of the Internet for business transactions and dissemination of

26. *UBS Warburg Indefinitely Shuts Down its Online Trading Platform*, FOSTER ELECTRIC REPORT (FOSTER ASSOCIATES) (Dec. 18, 2002), available at <http://www.fosterassociates.com/electric/article.asp?id=993> (last visited Sept 4, 2003).

27. Order No. 587, *supra* note 16.

28. Federal Energy Regulatory Commission, *North American Energy Standards Board Standards* (2002), available at <http://www.ferc.gov/industries/electric/Indus-act/smd/conf-2002/10-03-02-4.pdf> (last visited Sept. 4, 2003).

29. Order No. 587-O, *Standards For Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. Stats. & Regs. ¶ 31,129, 67 Fed. Reg. 30,788 (2002) (to be codified at 18 C.F.R. pt. 284).

30. 18 C.F.R. § 284.12 (1996).

31. Order No. 587-O, *supra* note 29, at 30,177.

32. *Id.* at 30,185.

33. The Williston Basin Interstate Pipeline Company website can be found at <http://ebb.wbip.com> (last visited Oct. 2, 2003).

34. *Kern River Gas Transmission Co.*, 100 F.E.R.C. ¶ 61,379 (2002).

information to customers and the general public, post-September 11th security concerns may potentially hamper the growth of e-commerce in the natural gas industry. The safety of allowing widespread access to energy information has come under scrutiny, and policies that are currently required of interstate natural gas pipelines may be reconsidered in light of these fears.

III. OTHER E-COMMERCE DEVELOPMENTS

A. *Electronic Registration (Summary of Order 891)*

As the FERC continues to look for ways to make it easier for the public to access information and conduct business electronically, several of its "FERC OnLine"³⁵ initiatives are now being implemented and made available for public use. Electronic Registration (eRegistration) is one such initiative that associates individuals with unique, password-protected user identities on the FERC website.

On August 5, 2002, in Order 891, the FERC issued a final rule to establish its eRegistration system.³⁶ According to the Commission, eRegistration will serve as the gateway to a number of electronic services at the Commission that are designed to transmit documents electronically between the Commission and its customers. eRegistration is designed to enable customers to submit necessary information once, rather than having to register separately to use each system. eRegistration will only apply to certain electronic applications and it will not be required for all submissions to the Commission.

eRegistration will be required for the following services: eFiling, eForms, eReports, eTariffs, and eDistribution (including eService, eList, eNotification, and eSubscription). The Commission states that the registration process will be brief and simple. It will require customers to input a few lines of information, including: name, address, telephone and fax numbers, e-mail address, password, and password hint. Generally, each individual customer, as opposed to an entity such as a company or law firm, will receive a user ID, which will be their e-mail

35. FERC OnLine is a series of measures designed to reduce, and ultimately eliminate, the transmission of paper documents between the Commission and the public. The following is short description of these initiatives: (1) eFiling is the service the Commission has instituted to allow the electronic filing of certain documents in its proceedings on a voluntary basis; (2) eForms is a service designed to allow customers to file structured data (such as FERC Forms 1, 2, 6, and 423) electronically; (3) eReports will provide an interface for customers submitting structured data in connection with Order 2001, issued by the Commission on April 25, 2002; (4) eTariffs will provide an interface for customers filing tariffs with the Commission; (5) eDistribution refers to documents being distributed by the Commission, as opposed to documents being submitted to the Commission. There are several subcategories of eDistribution: (a) eService is the electronic distribution by the Commission of documents to participants in Commission proceedings; (b) eList is service under which the Commission will maintain a list of participants in each Commission proceeding that participants will use to serve documents upon one another; (c) eNotification will permit the Commission to continue to distribute issuances in Commission proceedings to various interested parties who are not participants, such as state and federal elected officials, state commissions, and other state and federal resource agencies; (d) eSubscription will allow interested persons to subscribe to categories of documents published by the FERC and receive e-mails stating when documents are published. Order No. 891, *Electronic Registration*, F.E.R.C. STATS & REGS. ¶ 31,123 (Jan. 15, 2003), 68 Fed. Reg. 7416 (Feb. 14, 2003) (to be codified at 18 C.F.R. pts. 375, 390).

36. *Id.* at 30,198.

address. Each customer will also receive a unique numeric identifier, which may be used in identifying the customer in connection with electronic applications.

In Order 891, the Commission made it clear that an attorney will be able to represent several different clients in multiple proceedings, without registering separately on behalf of each client or in connection with each proceeding. Rather, the attorney will register once as an individual, and if appropriate, also designate a law firm as the entity with which the attorney is associated. Then, whenever the attorney submits a document for filing in a particular proceeding, he or she can designate the appropriate client as part of the eFiling process.

The Commission accommodates those customers that lack the means for submitting and receiving documents electronically by providing for waiver of the mandatory aspects of electronic submissions and distribution. In the Final Rule, the Commission delegated to the Secretary the authority to grant waivers of the eRegistration requirement. In addition, the Commission also exempted from the registration requirement certain situations where registration would not be practical for, or beneficial to, the customer.

eRegistration is not "required for correspondence that does not relate to docketed proceedings from members of Congress or the general public. It will not be required for [customers utilizing] the Federal Energy Regulatory Records and Information System (FERRIS). It will not apply to requests under the Freedom of Information Act," nor will it "apply to certain correspondence in docketed proceedings that the Office of the Secretary finds to qualify for an exemption because the submissions are from members of the public who likely are one-time submitters."³⁷

eRegistration was scheduled to become mandatory on January 7, 2003, but on December 20, 2002, the FERC issued a notice extending that effective date. The Commission stated that eRegistration is not yet fully integrated with the online services with which it will operate, so the effective date will be extended until adequate integration is achieved. Once the system is ready, the Commission will issue a notice setting forth the date on which eRegistration will become mandatory. However, the Commission strongly urges customers to register well in advance of the effective date so as to familiarize themselves with the system before its use becomes mandatory. The eRegistration system became operational and available for use on a voluntary basis in late August 2002.

B. Electronic Service Expanded

The Office of the Administrative Law Judges has made increased use of technology in proceedings, which have been set for hearing. In many cases, this office maintains an electronic version of a restricted service list as a part of the case file that parties can download in many different formats for labels and printing. In addition, for certain larger cases where rapid communication of large amounts of data is necessary, the presiding judges have allowed service through a "listserv," which is a computer program that automatically forwards a copy of any email that it receives to a designated list of recipients.³⁸ A listserv

37. Order No. 891, *supra* note 35, at 30,196.

38. See, e.g., Order Approving Settlement Agreement, *Public Utils. Comm'n*, 104 F.E.R.C. ¶ 61,074

program centralizes responsibility for updating the list of email addresses that receive the correspondence for a proceeding. Ultimately, the planned eService initiative will render the service of paper pleadings unnecessary. However, in the meantime, the increased use of email to supplement hard-copy service has expedited cases litigated before Administrative Law Judges.

C. FERC's New Website and eLibrary

If you haven't visited the Commission's website lately, you will be pleasantly surprised by its "new look" and by the more efficient ways in which information can be accessed and transmitted. The FERC continues to improve its website to make it more user-friendly and to permit the public to electronically transact business with the Commission.

eLibrary is the Commission's new records information system that contains more than twenty years of documents that have been submitted to, or issued by, the Commission. eLibrary replaces the old Records and Information Management System (RIMS), Commission Issuance Posting System (CIPS), and Docket Sheet databases that consumers previously used to access documents, and combines the documents into one location for ease of access. The touted benefits of the new system include enhanced and more powerful search capabilities, a seamless interface to electronic filings, an improved ability to view large format maps, the ability to select from several formats for downloading documents, and the ability to search the text of new scanned documents using optical character recognition. eLibrary also accommodates requests that documents be printed or downloaded to a CD.

While the Commission continues to address issues with the new system, eLibrary is in full production. The RIMS, CIPS, and Docket Sheet databases are no longer being updated. Information formerly available through those systems can only be accessed through eLibrary. Online and video training for eLibrary is available on the Commission website.³⁹

D. Developments Beyond the Energy Industry: Homeland Security Legislation Potentially Impacting E-Commerce

1. USA Patriot Act

On October 26, 2001, President George W. Bush signed into law The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (Patriot Act).⁴⁰ The Patriot Act is aimed at combating terrorism by enhancing law enforcement's surveillance capabilities and anti-money laundering programs,

(2003); *San Diego Gas & Elec. Co.*, 101 F.E.R.C. ¶ 61,186 (2002); *San Diego Gas & Elec. Co.*, 99 F.E.R.C. ¶ 63,029 (2002).

39. The online training session can be found at <http://www.ferc.gov/docs-filing/elibrary/train-demos.asp> (last visited Oct. 3, 2003). The video training demonstrations can be found at <http://www.ferc.gov/docs-filing/elibrary/video-train/video-train.htm> (last visited Oct. 3, 2003).

40. Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 1-50 U.S.C.) [hereinafter Patriot Act].

among other things. The Act primarily amends the Electronic Communications Privacy Act of 1986⁴¹ (more commonly known as the Federal Wiretap Act), the Foreign Intelligence Surveillance Act of 1978 (FISA),⁴² and the Federal Rules of Criminal Procedure. The Act contains a number of provisions that may impact e-commerce activities, particularly with regard to the government's ability to conduct electronic surveillance and access to stored electronic communications and certain transactional records.⁴³ Privacy advocates have been critical of several provisions of the Act and have noted, among other things, the potential chilling impact on e-commerce from consumers fearing more disclosure of their private information when engaged in online transactions. Among the sections with potentially the most direct impact on energy industry e-commerce are sections 215, 220, and 1016.

Section 215⁴⁴ of the Patriot Act amends section 501 of FISA⁴⁵ to authorize law enforcement to apply for court orders compelling the disclosure of any tangible thing, including books, business records, papers, or other documents, where the information sought is part of an investigation to protect against international terrorism, clandestine intelligence activities, or to gain foreign intelligence on non-U.S. citizens. Prior to amendment, this section of FISA had subjected only certain types of entities, namely common carriers, physical storage facilities, public accommodation facilities, or car rental facilities to FISA business record authority. Production of records pursuant to FISA section 501 is to be done without notification to anyone, except any persons necessary to produce the items being requested.⁴⁶ The amendments provide immunity from liability for any business that, acting in good faith, produces tangible things pursuant to a court order under this section. Further, such production may not be considered a waiver of any privilege.⁴⁷ Pursuant to section 224 of the Patriot Act, these amendments, among others, sunset on December 31, 2005 (subject to certain savings provisions). The sunset provisions appear to be a nod from Congress acknowledging privacy and other civil liberties concerns.

Section 220 of the Patriot Act provides for nationwide service of search warrants for electronic evidence.⁴⁸ Any federal court "with jurisdiction over the offense under investigation" may now issue a single search warrant to retrieve stored electronic communications, such as e-mail, regardless of the physical

41. Pub. L. No. 99-508, 92 Stat. 1783 (codified as amended at 18 U.S.C. §§ 2510-2520 (2003)); An Act to authorize electronic surveillance to obtain foreign intelligence information, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 18 U.S.C. §§ 2701-2712 (2003)).

42. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§1801-1811 (2003)) [hereinafter FISA]. FISA was originally enacted in 1978 to regulate electronic surveillance occurring in the U.S. for foreign intelligence purposes.

43. See also Nat'l Inst. of Trial Advocacy Commentary to 18 U.S.C. Chapter 121, Stored wire and electronic communications and transactional records access, which provides useful background information on and context regarding the Patriot Act's amendments to the Electronic Communications Privacy Act.

44. Patriot Act, *supra* note 40, § 215 (codified as amended at 6 U.S.C. § 134 (2003)).

45. FISA, *supra* note 42, § 501 (codified as amended at 50 U.S.C. § 1861 (2003)).

46. Patriot Act, *supra* note 40, § 215 (codified as amended at 50 U.S.C. § 1861(d)).

47. *Id.* (codified as amended at 50 U.S.C. § 1861(e)).

48. Patriot Act, *supra* note 40, § 220 (codified as amended at 18 U.S.C. §§ 2703, 2711 (2003)).

location of the facility where the communications are stored.⁴⁹ This amendment is also subject to the sunset provisions contained in section 224 of the Act.⁵⁰

Those whose e-commerce activities include the provision of remote computing service or electronic communication service should also pay attention to other surveillance and process of service provisions of the Act, which can require greater disclosure of customer/subscriber information.⁵¹ E-commerce entities that qualify as “financial institutions” as defined by section 321 of the Patriot Act and the Bank Secrecy Act⁵² should be aware of additional customer verification and reporting requirements contained in the anti-money-laundering provisions of the Act.⁵³

Section 1016 constitutes the Critical Infrastructures Protection Act of 2001.⁵⁴ In section 1016(b) Congress notes that:

(1) The information revolution has transformed the conduct of business and the operations of government as well as the infrastructure relied upon for the defense and national security of the United States.

(2) *Private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water, and transportation sectors.*

(3) A continuous national effort is required to ensure the reliable provision of cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States.

(4) *This national effort requires extensive modeling and analytic capabilities for purposes of evaluating appropriate mechanisms to ensure the stability of these complex and interdependent systems, and to underpin policy recommendations, so as to achieve the continuous viability and adequate protection of the critical infrastructure of the Nation.*⁵⁵

U.S. policy, set forth in section 1016(c), is that any disruption to the nation’s critical infrastructures should be “rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States.”⁵⁶ To achieve this policy goal, a “public-private partnership involving corporate and non-

49. *Id.* (codified as amended at 18 U.S.C. § 2073).

50. Patriot Act, *supra* note 40, § 224 (codified as amended at 18 U.S.C. § 2510 (2003)).

51. *Id.* § 212 (codified as amended at 18 U.S.C. § 2702) (2003)).

52. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 5, 12, 15, 31 U.S.C.).

53. Patriot Act, *supra* note 40, § 321 (codified as amended at 31 U.S.C. § 5312 (2003)); Bank Secrecy Act of 1970, *supra* note 52; *See, e.g.*, Patriot Act, *supra* note 40, § 214 (codified as amended at 50 U.S.C. § 1843 (2003)) (pen registers and trap/trace devices now include routing and address information of any electronic communications including Internet traffic), § 216 (codified as amended at 18 U.S.C. § 3121 (2003)) (nationwide service of subpoenas), § 311 (codified as amended at 31 U.S.C. § 5318 (2003)) (special record keeping and informational measures for financial institutions), and § 326 (codified as amended at 31 U.S.C. § 5318 (2003)) (financial customer identification and verification).

54. Patriot Act, *supra* note 40, § 1016 (codified as amended at 42 U.S.C. § 5195c (2003)).

55. *Id.* § 1016(b) (codified as amended at 42 U.S.C. § 5195c(b)) (emphasis added).

56. Patriot Act, *supra* note 40, § 1016(c)(1) (codified as amended at 42 U.S.C. § 5195c(c)(1)).

governmental organizations” is necessary.⁵⁷

Section 1016(d)(1) establishes the National Infrastructure Simulation and Analysis Center (NISAC) within the Department of Energy, which is to support activities that relate to counterterrorism, threat assessment, and risk mitigation.⁵⁸ These support activities are to be in the form of “[m]odeling, simulation, and analysis of . . . critical infrastructures [including cyber, telecommunications and physical infrastructures] to enhance understanding of the large-scale complexity of such systems and to facilitate modification of such systems to mitigate the threats to such systems and to critical infrastructures generally.”⁵⁹ Under section 1016(d)(2)(B), state and local governments, as well as the private sector, are to provide the data necessary to create and maintain the models, which will then be used to make recommendations to policymakers, federal government agencies and departments, and the private sector regarding the means to enhance stability and preserve critical infrastructures.⁶⁰ Twenty million dollars were earmarked for the activities of the NISAC in fiscal year 2002.⁶¹

2. Homeland Security Act of 2002

The Homeland Security Act of 2002,⁶² which establishes the Department of Homeland Security, contains provisions related to critical infrastructure information and protection as well as some specific cyber security provisions. Under Title II of the act, titled Information Analysis and Infrastructure Protection, the office of Under Secretary for Information Analysis and Infrastructure Protection is created.⁶³ Functions transferred from other agencies to this new Under Secretary include the National Infrastructure Protection Center of the Federal Bureau of Investigation, the Critical Infrastructure Assurance Office of the Department of Commerce, and the NISAC created under the Patriot Act within the Department of Energy (described above).⁶⁴

While of less direct consequence for e-commerce activities, subtitle B of Title II (sections 211–215), the Critical Infrastructure Information Act of 2002, is of interest for the energy industry generally.⁶⁵ Section 213⁶⁶ provides that either the President or the Secretary of Homeland Security may designate a critical infrastructure protection program, which is defined in section 212(4) as “any component or bureau of a covered Federal agency that has been designated by the President or any agency head to receive critical infrastructure information.”⁶⁷ What constitutes critical infrastructure information subject to

57. *Id.* § 1016(c)(2) (codified as amended at 42 U.S.C. § 5195c(c)(2)).

58. Patriot Act, *supra* note 40, § 1016(d)(1) (codified as amended at 42 U.S.C. § 5195c).

59. *Id.* § 1016(d)(2)(A) (codified as amended at 42 U.S.C. § 5195c).

60. Patriot Act, *supra* note 40, § 1016(d)(2) (codified as amended at 42 U.S.C. § 5195c).

61. *Id.* § 1016(f) (codified as amended at 42 U.S.C. § 5195c(f)).

62. Pub. L. No. 107-296, §201, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 6 U.S.C.).

63. Homeland Security Act, *supra* note 62, § 201(g) (codified as amended at 6 U.S.C. § 121 (2003)).

64. *Id.* § 201(g) (codified as amended at 6 U.S.C. § 121 (2003)).

65. Homeland Security Act, *supra* note 62, §§ 211-215 (codified as amended 6 U.S.C. § 131-134).

66. *Id.* § 213 (codified as amended at 6 U.S.C. § 132 (2003)).

67. Homeland Security Act, *supra* note 62, § 212(4) (codified as amended at 6 U.S.C. § 131 (2003)).

protection is defined in section 212(3) as customarily private, security-related information related to actual, potential or threatened physical or cyber attacks, the ability to resist such attack, and any planned or past problem or solution related to such attack.⁶⁸

Section 214 enumerates a number of protections for voluntarily shared critical infrastructure information. Generally, when a person or entity provides critical infrastructure information “to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose” the submitter is, among other things: exempt from disclosure under the Freedom of Information Act (FOIA);⁶⁹ not subject to *ex parte* communications rules. Such information may not be directly used in civil litigation against the submitter when the information was submitted in good faith.⁷⁰ Pursuant to section 214(a)(1)(F) any such disclosure “does not constitute a waiver of any applicable privilege or protection provided under law, such as trade secret protection.”⁷¹ For these protections to apply, the information must be accompanied by the following or substantially similar statement: “This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002.”⁷²

Section 223, titled Enhancement of Non-Federal Cybersecurity, authorizes the Under Secretary for Information Analysis and Infrastructure Protection (Under Secretary) to provide, upon request, to critical infrastructure owners or state or local governments, analysis and threat warnings related to critical infrastructure systems, crisis management support, and technical assistance with regard to recovery plans for responding to “major failures” of critical infrastructure systems.⁷³ In addition, section 224 further authorizes the Under Secretary to create a national technology guard, to be known as “NET Guard,” which will consist of local teams of expert volunteers “to assist local communities to respond and recover from attacks on information systems and communications networks.”⁷⁴

More directly affecting e-commerce activities is section 225 of the Homeland Security Act, a former House bill that was titled the Cyber Security Enhancement Act.⁷⁵ Section 225(d) authorizes providers of electronic communication service and remote computing service to make good faith, emergency disclosures to local, state or federal government entities of computer-related information, such as certain customer communications or records (but not content) if the provider “believes that an emergency involving danger of death or

68. *Id.* §212(3) (codified as amended at 6 U.S.C. § 131 (2003)).

69. Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. § 552 (2003)).

70. Homeland Security Act, *supra* note 62, § 214(a)(1) (codified as amended at 6 U.S.C. § 133 (2003)).

71. *Id.* §214(a)(1)(F) (codified as amended at 6 U.S.C. § 133 (2003)).

72. Homeland Security Act, *supra* note 62, § 214(a)(2)(A) (codified as amended at 6 U.S.C. § 133 (2003)).

73. *Id.* § 223 (codified as amended at 6 U.S.C. § 143 (2003)).

74. Homeland Security Act, *supra* note 62, § 224 (codified as amended at 6 U.S.C. § 144 (2003)).

75. *Id.* § 225 (codified as amended at 6 U.S.C. § 145 (2003)).

serious physical injury to any person requires” the disclosure be made without delay.⁷⁶ Thus, service providers can make such good faith disclosures lawfully without the customer’s prior consent or a search warrant, and may do so free of the risk of civil litigation.⁷⁷

Section 225 further expands federal, state, and local law enforcement’s authority to employ emergency pen register and trap/trace devices (which was expanded under the Patriot Act) in the event of “an immediate threat to national security” or an attack on a “protected computer.”⁷⁸ This provision allows such devices to be installed to capture e-mail and other online activity information, provided that the government obtains a court order for the device within forty-eight hours of its installation.⁷⁹ Privacy critics complain that the court approval is *ex post facto* because the user’s online anonymity has already been lost.

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76. Homeland Security Act, *supra* note 62, § 225(d)(1)(D)(7) (codified as amended at 18 U.S.C. § 2702 (2003)).

77. The liability exception comes from an expand good faith exception in 18 U.S.C. § 2520(d) (2003).

78. Homeland Security Act, *supra* note 62, § 225(i)(3) (codified as amended at 18 U.S.C. § 3125(a)(1)(C) (2003)).

79. 18 U.S.C. § 3125(a)(1) (2003).