

REPORT OF THE FERC PRACTICE & ADMINISTRATIVE LAW JUDGES COMMITTEE

This report summarizes certain aspects of the operations of the Federal Energy Regulatory Commission (“the FERC” or “the Commission”). The report also summarizes select decisions that have issued at the FERC in the area of FERC practice and procedure. The time frame covered by this report is the period between July 1, 2011 and June 30, 2012.*

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I. FERC OPERATIONS

A. FERC Budget Request

The FERC submitted its Fiscal Year (FY) 2013 budget request on February 13, 2012.¹

	FY 2010 Actual	FY 2011 Actual	FY 2012 Request	FY 2013 Request
FERC Total Budget	\$ 296,297	\$ 292,350	\$ 304,600	\$ 304,600
Full-Time Equivalent Employees (FTEs)	1,452	1,467	1,500	1,480

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1. FED. ENERGY REGULATORY COMM’N, FISCAL YEAR 2013 CONGRESSIONAL PERFORMANCE BUDGET REQUEST, *available at* <http://www.ferc.gov/about/strat-docs/FY13-budg.pdf>. Congress must approve the Commission’s budget; however, no net appropriation results because “the Commission recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986.” *Id.* at 2. “The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in no net appropriation.” *Id.*

According to the FERC, the FY 2013 budget request supports the agency's two primary goals: (1) to ensure rates that are "just, reasonable and not unduly discriminatory or preferential;" and (2) to "[p]romote the development of safe, reliable and efficient energy infrastructure that serves the public interest."² For FY 2013, the FERC's requested budget remained the same as FY 2012 in the aggregate, although the number of full-time equivalents (FTEs) is reduced by 1.3%.³ The total budget request does reflect changes in the allocation of funds among the FERC's strategic goals. For example, the FERC's FY 2013 budget request reflects a 0.8% increase in funding (and a simultaneous 1.4% decrease in FTEs) related to the oversight and enforcement objective of the just and reasonable rates strategic goal.⁴ The safety objective related to the infrastructure strategic goal also received an increase of 0.7% (and a simultaneous decrease of 1.2% in FTEs).⁵

B. Plan for Retrospective Analysis of Existing Rules

Pursuant to the President's Executive Order calling for a periodic retrospective analysis of a regulatory agency's "significant regulations,"⁶ the FERC issued its Plan for Retrospective Analysis of Existing Rules on November 8, 2011.⁷ The executive order does not define what should be considered a significant regulation.

The FERC consulted with the Office of Management and Budget (OMB) and determined that a very limited number of the Commission's rules are considered "major rules" or "significant regulatory actions." The following rules are considered major rules, which, under the Plan are required to be reviewed at least every ten years:⁸

- Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities⁹
- Mandatory Reliability Standards for the Bulk Power System¹⁰

2. *Id.* at 1.

3. *Id.* at 3.

4. *Id.*

5. *Id.*

6. Exec. Order No. 13,579, 76 Fed. Reg. 41,587, (July 14, 2011).

7. Plan for Retrospective Analysis of Existing Rules, FERC Docket No. AD12-6-000 (Nov. 8, 2011), available at <http://www.ferc.gov/legal/maj-ord-reg/retro-analysis/ferc-ao-13579.pdf> [hereinafter The Plan].

8. *Id.* at 5-7 (discussing all three "major rules").

9. Order No. 888, *Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996) (to be codified at 18 C.F.R. pts. 35, 385), *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997) (to be codified at 18 C.F.R. pts. 35, 62), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998); Order No. 890, *Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Services*, F.E.R.C. STATS. & REGS. ¶ 31,241, 72 Fed. Reg. 12,266 (2007), *order on reh'g*, Order No. 890-A, F.E.R.C. STATS. & REGS. ¶ 31,261, 73 Fed. Reg. 2984 (2008), *order on reh'g*, Order No. 890-B, 123 F.E.R.C. ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 F.E.R.C. ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 F.E.R.C. ¶ 61,126 (2009).

10. Order No. 693, *Mandatory Reliability Standards for the Bulk-Power System*, F.E.R.C. STATS. & REGS. ¶ 31,242, 72 Fed. Reg. 16,416 (2007); Order No. 693-A, 120 F.E.R.C. ¶ 61,053 (2007).

- Smart Grid Policy Statement¹¹

Due to the limited number of FERC major rules, the Plan also includes a plan for a broader review of the Commission's rules. The Commission staff will produce an internal list of other Commission rules that are considered of particular importance to the industry regulated by the Commission and the public.¹² Commission staff will draft a memorandum on a biennial basis detailing which of the listed regulations are ripe for review based on the ten-year review cycle.¹³ The memorandum will be made available for public comment as to which regulations ripe for review warrant a formal public review.¹⁴

II. SELECT DECISIONS RELEVANT TO FERC PRACTICE AND PROCEDURE

A. FERC Orders

1. Treatment of Late-Filed Requests for Rehearing

On April 12, 2012, in *Turtle Bayou Gas Storage Co.*, the FERC reaffirmed its policy regarding rejection of late-filed requests for rehearing.¹⁵ On June 16, 2011, the FERC had denied a request by Turtle Bayou Gas Storage Company, LLC ("TB") for authorization under section 7 of the Natural Gas Act (NGA) to construct and operate a proposed natural gas storage facility.¹⁶ On July 19, 2011, TB filed a request for rehearing of the June 16 Order, which the Secretary rejected on July 20, 2011, "for having been submitted late,"¹⁷ since TB electronically filed the pleading at 6:25 PM on July 18, 2011,¹⁸ and, by operation of Rule 2001(a)(2) of the FERC's Rules of Practice and Procedure, the Secretary deemed it filed the next business day, July 19, 2011, thirty-one days after the June 16 Order.¹⁹ The Secretary rejected the request for rehearing because, pursuant to section 19(a) of the NGA, "a party to a proceeding [may] file a request for rehearing within 30 days after issuance of a final decision or other final order, and this statutory time period for rehearing cannot be waived or extended."²⁰

On July 22, 2011, TB filed a request for rehearing of the July 20 Notice and an alternative request to treat its late-filed request for rehearing as a request for reconsideration of the June 16 Order.²¹ TB argued that, despite NGA section

11. *Smart Grid Policy Statement*, 128 F.E.R.C. ¶ 61,060, 74 Fed. Reg. 37,098 (2009).

12. The Plan, *supra* note 7, at PP 2-3.

13. *Id.* at P 3.

14. *Id.* at PP 3, 8.

15. *Turtle Bayou Gas Storage Co.*, 139 F.E.R.C. ¶ 61,033 (2012) [hereinafter *Turtle Bayou*].

16. *Id.* at P 1 (citing *Turtle Bayou Gas Storage Co.*, 135 F.E.R.C. ¶ 61,233 (2011) [hereinafter June 16 Order]).

17. *Id.* at PP 1, 3 (citing *Turtle Bayou Gas Storage Co.*, 136 F.E.R.C. ¶ 61,052 (2011) [hereinafter July 20 Notice]).

18. *Id.* at P 7.

19. *Id.* (citing 18 C.F.R. § 385.2001(a)(2) (2011)).

20. *Id.* at 2 n.2 (citing NGA § 19(a), 15 U.S.C. § 717r (2006)). *See also* 18 C.F.R. § 385.713(b) (2012) (providing that "[a] request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding").

21. *Turtle Bayou*, 139 F.E.R.C. ¶ 61,033, at PP 1, 4.

19(a), the FERC had “previously accommodated rehearing requests that were not technically in compliance with the statutory deadline.”²² TB further argued that, “because it did in fact submit its request on the 30th day, the Commission’s procedural rules should be waived to accept the rehearing as timely,” and cited several cases in support of such result.²³

In *Turtle Bayou*, however, the FERC noted that it had never waived the Rule 2001 requirement that a document be filed before 5:00 PM on a given day to be considered filed on that day, and found that TB’s cases addressed circumstances not relevant to its situation.²⁴ Specifically, the FERC found that, rather than supporting TB’s arguments that the FERC “might find a means to overlook what [TB] characterizes as its ‘technical noncompliance’ with the filing requirements, the cases cited demonstrate that the Commission can only accept rehearing requests that technically comply in full with its filing requirements.”²⁵ The FERC, therefore, denied TB’s request for rehearing of the Secretary’s July 20 Notice.²⁶

2. Requests for Confidential Treatment of Information Filed with the FERC

On March 15, 2012, in *ISO New England Inc.*,²⁷ the FERC provided some additional color to its regulations regarding requests for privileged treatment of information filed with the FERC. Under 18 C.F.R. § 388.112, any person may request “privileged treatment” of information filed with the FERC “‘by claiming that some or all of the information contained in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act [FOIA], 5 U.S.C. § 552,’” and should be withheld from public disclosure.²⁸ “FOIA, in turn, exempts from disclosure ‘commercial and financial information obtained from a person and privileged or confidential.’”²⁹

In the proceeding at issue, ISO New England Inc. (“ISO-NE”) submitted an annual informational filing, as required by its Forward Capacity Auction process, regarding the qualification (or failure to qualify) of generating capacity resources for a particular ISO-NE Forward Capacity Auction, the mechanism by

22. *Id.* at P 7.

23. *Id.* at PP 7-10.

24. *Id.* at P 7 & n.13.

25. *Id.* at P 11. For example, TB cited two cases in which a party filed at least one copy of a request for rehearing by the statutory deadline. *Id.* at 8, 10 (discussing the holding in *Dayton Power & Light Co. v. FPC*, 251 F.2d 875 (D.C. Cir. 1957) that the FERC improperly rejected a request for rehearing where one copy had been received by the applicable statutory deadline, but the additional copies required by the FERC’s regulations were received late, and *Village of Saranac Lake, N.Y.*, 67 F.E.R.C. ¶ 61,077 (1994) where the FERC accepted a request for rehearing received during business hours on the statutory deadline, but was inadvertently not time-stamped until three days later). The FERC dismissed as inapposite a third case TB cited because it involved a license application rather than a request for rehearing. *Id.* at 9 (discussing *New York State Energy Research & Dev. Auth. v. FERC*, 746 F.2d 64 (D.C. Cir. 1984)).

26. *Id.* at PP 1, 12, and Ordering Para. (A).

27. *ISO New England Inc.*, 138 F.E.R.C. ¶ 61,196 (2012).

28. *Id.* at P 58 (quoting 18 C.F.R. § 388.112(a)(1) (2012)).

29. *Id.* (quoting 5 U.S.C. § 552(b)(4) (2006)). The FERC noted that its regulations incorporate the relevant FOIA exemption in 18 C.F.R. § 388.107(d). *Id.* at n.82.

which ISO-NE procures generating capacity on a three-year forward basis.³⁰ ISO-NE filed a redacted “public” version and separate “privileged” version of its filing; for the latter of which, it requested confidential treatment under 18 C.F.R. § 388.112, asserting that the filing contained “commercially sensitive information.”³¹

Alliance to Protect Nantucket Sound (“Alliance”) filed comments in opposition to ISO-NE’s request for privileged treatment, arguing that the request rested on the conclusory assertion that the filing contained “commercially sensitive” information and that ISO-NE failed to justify privileged treatment.³² Specifically, Alliance argued that ISO-NE’s request failed both prongs of the test set forth in *Critical Mass Energy Project v. NRC* for determining whether to deem commercial or financial information confidential, i.e., that such information should be deemed confidential “if disclosure . . . is likely to (i) impact the Government’s ability to obtain necessary information in the future; or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained.”³³ Alliance claimed, among other things, that the informational filing was not voluntary and that the FERC could require the filing of such information in the future, and that disclosure would not cause competitive harm to ISO-NE or the prospective Forward Capacity Auction resource that provided it.³⁴

ISO-NE countered that the information was “commercially sensitive” since it had been provided to ISO-NE under an expectation that it would not be disclosed, and that disclosure would be unjust, unreasonable, and contrary to FERC precedent in earlier Forward Capacity Auction processes.³⁵ ISO-NE further argued that Alliance’s request for disclosure of the information—as Alliance admitted—was intended to advance its position in litigation unrelated to ISO-NE’s administration of the Forward Capacity Auction process.³⁶ ISO-NE argued that Alliance should avail itself of its discovery rights in such other litigation, rather than seeking to expand the scope of the informational filing proceeding.³⁷ Alliance responded that the fact that the impetus of its request was unrelated to the FERC proceeding in which the information was filed was not a reason to deny disclosure, and the fact that Alliance could obtain the information through other litigation did not alter the FERC’s FOIA obligations.³⁸

Ultimately, the FERC rejected Alliance’s arguments and found that ISO-NE had made a sufficient showing to justify privileged treatment of the

30. *Id.* at PP 1-2, 10.

31. *Id.* at P 46.

32. *Id.* at PP 48, 55.

33. *ISO New England*, 138 F.E.R.C. ¶ 61,196, at P 49 (quoting *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 282 (D.C. Cir. 1987)). The FERC also noted that Alliance made similar arguments relying on a similar standard set forth in *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *Id.* at P 55.

34. *ISO New England*, 138 F.E.R.C. ¶ 61,196, at P 49.

35. *Id.* at PP 50-51.

36. *Id.* at P 52.

37. *Id.*

38. *Id.* at 54.

“commercially sensitive” information.³⁹ The FERC found that the information at issue was “commercial or financial” in nature, since it related to the commercial operations of a resource seeking to qualify in the Forward Capacity Auction, project financing, and equipment orders.⁴⁰ The FERC further found that the information satisfied both prongs of the *Critical Mass* test,⁴¹ i.e., it would “customarily not be released to the public by the person from whom it was obtained” (the resource), and “disclosure [would] harm a specific interest that Congress sought to protect by enacting the [applicable FOIA] exemption.”⁴² Specifically, the FERC found that prospective Forward Capacity Auction resources submitted such information to ISO-NE confidentially and with the expectation that it would not be made public, since such disclosure likely would result in the exploitation of the information by competitors.⁴³ The FERC further found that ISO-NE “made a sufficient showing that [such] information would customarily not be released—and, in fact historically, has not been released—to the public by ISO-NE, i.e., the person from whom the information was obtained.”⁴⁴ With respect to the FOIA-protected interest, the FERC found that since disclosure of information provided by prospective capacity resources could hinder ISO-NE’s evaluation and qualification (or disqualification) of such resources in future Forward Capacity Auction processes, such disclosure could threaten ISO-NE’s ability to procure capacity for New England consumers at just and reasonable rates, terms, and conditions.⁴⁵

Finally, with respect to the *National Parks* standard,⁴⁶ the FERC found that “disclosure of this information is likely to impair the Commission’s ability to obtain necessary information in the future, since both ISO-NE and resources will be reluctant to provide qualification information to the Commission to the fullest extent possible, given the possibility that such information may be disclosed,” and that disclosure could not cause substantial harm to the competitive position of the person from whom the information was obtained, i.e., ISO-NE, “since ISO-NE is not a private enterprise that competes with other private enterprises.”⁴⁷

On these bases, the FERC held that ISO-NE’s request for confidential treatment appropriately fell within the FOIA exemption for privileged or confidential trade secrets and commercial or financial information, as

39. *Id.* at PP 57-64.

40. *Id.* at P 59.

41. *Id.* at PP 60-62.

42. *Id.* at P 60 (quoting *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281-82 (D.C. Cir. 1987)).

43. *Id.* at P 61.

44. *Id.* The FERC noted that the specific type of information at issue had been provided to ISO-NE on a confidential basis in all five prior Forward Capacity Auction processes. *Id.*

45. *Id.* at P 62.

46. *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

47. *ISO New England*, 138 F.E.R.C. ¶ 61,196, at P 63. In any event, the FERC continued, the second prong of *National Parks* “would apply to the resources that are the original source of the confidential information, all of whom are private enterprises competing with one another to sell capacity, and who could be harmed commercially by the disclosure of this information.” *Id.*

incorporated into the FERC's regulations in 18 C.F.R. § 388.107(d), and rejected Alliance's arguments to deny confidential treatment.⁴⁸

3. Electronic Delivery of RTO/ISO Data

On April 19, 2012, the FERC issued Order No. 760, which promulgates new regulations requiring "each regional transmission organization (RTO) and independent system operator (ISO) to electronically deliver to the [FERC], on an ongoing basis, data related to the markets that it administers."⁴⁹ Order No. 760 became effective on July 6, 2012.⁵⁰

Pursuant to a new regulation codified at 18 C.F.R. § 35.28(g)(4), RTOs and ISOs are required to provide, through electronic delivery and on an ongoing basis, the following information to the FERC:

- Supply offers and demand bids for energy and ancillary services;
- Virtual offers and bids;
- Energy/ancillary service awards;
- Capacity market offers, designations, and prices;
- Resource output;
- Marginal cost estimates;
- Day-ahead shift factors;
- Firm Transmission Rights (FTR) data;
- Internal bilateral contracts;
- Pricing data for interchange contracts; and
- Uplift charges and credits.⁵¹

As noted, ISOs and RTOs are required to provide these data on an "ongoing" basis. Specifically, the data must be provided "within seven days after each RTO and ISO creates the datasets in a market run or other procedure."⁵² "For data that are updated less frequently than every day, including capacity market results, estimated marginal costs, and FTR data, each RTO and ISO must electronically deliver such data within seven days after it is created or updated by the RTO or ISO."⁵³ In the event any correction to the data is made after it is delivered to FERC, "the RTO or ISO [must] electronically deliver the corrected data to the [FERC] within seven days after the correction has been made and identify whether that correction is adding to, changing, or deleting data previously delivered."⁵⁴

In general, the new requirements are intended to provide the FERC with a better picture of market activity within ISOs and RTOs. The FERC explained that the additional information would improve its ability to monitor participants' market activity for inappropriate conduct, and lessen the possibility that market

48. *Id.* at P 64.

49. Order No. 760, *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators*, F.E.R.C. STATS. & REGS ¶ 31,330, 77 Fed. Reg. 26,674 (2012) (to be codified at 18 C.F.R. pts. 35, 77).

50. *Id.*

51. *Id.* at PP 49, 57.

52. *Id.* at P 78.

53. *Id.*

54. *Id.*

monitoring and surveillance will result in error.⁵⁵ Furthermore, the additional information is intended to help the FERC assess the effectiveness of existing market rules and market designs.⁵⁶ The FERC stated that the new requirements “are consistent with [its] authority under sections 301(b) and 307(a) of the FPA.”⁵⁷

Several parties expressed concern that the data may contain confidential information.⁵⁸ In response, the FERC stated its expectation that the data would, “by its nature,” be commercially sensitive and potentially subject to FOIA exemption 4.⁵⁹ The FERC also noted that it “may . . . make publicly available analyses derived from the data.”⁶⁰

In terms of the method of electronic delivery, the FERC required that the data must be delivered by Secure File Transfer Protocol⁶¹ in one of two formats: Comma Separate Value or Tab Delimited.⁶² The FERC will not accept deliveries of the data in XML format.⁶³ Each RTO and ISO must provide documentation defining each field in the datasets it provides.⁶⁴ In addition, “each RTO and ISO [must] notify [FERC] staff in writing” of any change in how it collects data “ninety days prior to such a change or as soon as is practicable.”⁶⁵

“Electronic delivery of all the datasets [must] be fully implemented [within] 210 days after the effective date of [the rule],” or by February 13, 2013.⁶⁶ However, the FERC explained that it would require “phased delivery” of the required data, with each RTO or ISO implementing the ongoing electronic delivery of at least one dataset “no later than 45 days after the effective date of [the rule],” or by August 10, 2012, and providing all of the datasets by February 13, 2013.⁶⁷ Unless otherwise determined by the FERC on a case-by-case basis, data must be delivered according to the following phased delivery schedule:

- No later than August 20, 2012: data relating to supply offers for energy.⁶⁸
- No later than October 4, 2012: data relating to virtual offers and bids, and demand bids for energy.⁶⁹
- No later than December 3, 2012: data relating to marginal cost estimates, energy and ancillary service awards, resource output, internal bilateral contracts, and uplift data.⁷⁰

55. *Id.* at P 17.

56. *Id.* at P 18.

57. *Id.* at P 16. Sections 301(b) and 307(a) of the FPA are codified at 16 U.S.C. § 825(b), and § 825f(a), respectively.

58. Order No. 760, *supra* note 49, at PP 32-33.

59. *Id.* at P 34.

60. *Id.* at P 35.

61. *Id.* at P 47.

62. *Id.* at P 42.

63. *Id.*

64. *Id.* at P 43.

65. *Id.* at P 44.

66. *Id.* at P 68.

67. *Id.* at PP 69-70.

68. *Id.* at P 69.

69. *Id.* at P 71.

- No later than February 13, 2013: all remaining data sets, including day-ahead shift factors; supply offer and demand bids for ancillary services; capacity market offers, designations and prices; pricing data for interchange transactions; and financial transmission rights.⁷¹

In addition, “each RTO and ISO [must] submit a compliance filing [by August 20, 2012], amending its open access transmission tariff to reflect the requirement for the ongoing electronic delivery of data” to the FERC.⁷²

4. Requirements for Filings to Extend the Date for FERC Action on Statutory Filings

On February 23, 2012, the FERC issued a notice that procedures had been posted to its website “that public utilities filing under Part 35 [of the FERC’s regulations] must follow if they seek to extend the date by which the [FERC] must act on a rate case or other statutory filing.”⁷³ The procedures note that public utilities “sometimes make filings with the Commission seeking to extend the date by which the Commission must act on a pending statutory filing on which the Commission has not yet acted,”⁷⁴ and that “[o]ne common reason for such filings is to provide an opportunity to discuss a statutory filing with protesters and perhaps reach agreement that may result in the filing of a settlement or other revisions to the filing.”⁷⁵

As explained in the procedures, filings to extend the date by which the FERC must act are required to be made through the FERC’s eTariff system.⁷⁶ According to the procedures, “[f]ilings not made through eTariff, but rather through the . . . electronic filing system or on paper will not affect the date by which the [FERC] must act.”⁷⁷

The procedures offer two options that public utilities may use to request an extension of the date for FERC action, without affecting the requested effective date for the filing.⁷⁸ The procedures caution that if public utilities attempt to use a different approach (other than the two options), this may affect the originally-requested effective date.⁷⁹

The first option would maintain the effective date of a filing, but provide an additional sixty-day period for the FERC to act on the filing.⁸⁰ The first option requires the public utility to “refile a single Pending Tariff Record from [its

70. *Id.* at P 72.

71. *Id.* at P 73.

72. *Id.* at P 57.

73. Electronic Tariff Filings, Notice of Procedures for Public Utilities Seeking to Extend the Date for Commission Action on Statutory Filings, FERC Docket No. RM01-5-000 (Feb. 23, 2012).

74. FED. ENERGY REGULATORY COMM’N, REQUIREMENTS FOR FILINGS BY PUBLIC UTILITIES SEEKING TO EXTEND THE DATE FOR COMMISSION ACTION ON STATUTORY FILINGS, at 1 (2012), available at <http://www.ferc.gov/docs-filing/etariff/comm-order/extend-date.pdf>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 2.

79. *Id.*

80. *Id.*

original filing,] with the same text and proposed effective date as in the original filing.”⁸¹ If the public utility desires additional time, another filing for that Tariff Record would have to be made. Otherwise, the FERC will act after the expiration of the additional sixty-day period.⁸²

The second option would maintain the effective date of a filing, but provide an indefinite extension for the FERC to act on the filing.⁸³ This option requires public utilities to “refile a single Tariff Record pending in the proceeding with a 12/31/9998 [proposed effective] date.”⁸⁴ Such filing must be “accompanied by a transmittal letter explaining that [the public utility] is seeking a delay of [FERC] action on the original filing and that it intends the [originally-requested] effective date to be retained.”⁸⁵ After such filing, and in contrast to the first option, the FERC will not take action on the original filing until the utility makes yet another filing to restart the processing of the original filing.⁸⁶ To do so, the utility would have to make another amendment filing that changes the “12/31/9998 date in the Tariff Record to the [originally-requested] effective date.”⁸⁷

B. FERC Policy Statement Regarding Its Role in EPA’s MATS Rule

On May 17, 2012, the FERC issued a policy statement to “explain how it will provide advice to the Environmental Protection Agency (EPA) for it to rule on requests for Administrative Orders (AO) to operate in noncompliance with the EPA’s Mercury and Air Toxics Standards (MATS).”⁸⁸ The MATS were issued by the EPA pursuant to the Clean Air Act and, among other things, require electric generating units (EGUs) to comply with certain rules limiting “mercury, acid gases and other toxic emissions from power plants” by specified deadlines.⁸⁹ However, an EPA guidance memorandum describes a process whereby an EGU may request an AO seeking to operate in noncompliance, notwithstanding the applicable deadlines, if: (i) the EGU would “affect reliability due to deactivation,” or (ii) the EGU would “affect reliability due to delays related to the installation of controls.”⁹⁰ The EPA guidance memorandum also provides that, “in evaluating a request for an AO, the EPA will seek advice, on a case-by-case basis, from the Commission and/or other entities with relevant reliability expertise.”⁹¹ The Policy Statement describes how the FERC will develop that advice for particular AO requests.

81. *Id.*

82. *Id.*

83. *Id.* at 3.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Policy Statement, *The Commission’s Role Regarding the Environmental Protection Agency’s Mercury and Air Toxics Standards*, 139 F.E.R.C. ¶ 61,131 at P 1 (2012) (citing 42 U.S.C. § 7412(i)(3)(A) (2006)) [hereinafter Policy Statement].

89. *Id.* at P 2.

90. *Id.* at P 5.

91. *Id.* at P 7.

The Policy Statement explains that each AO request should be filed with the FERC.⁹² The FERC will then treat the AO request as an informational filing, with a separate Administrative Docket Number.⁹³ The FERC's Office of Electric Reliability will be designated as the lead office for processing the filing.⁹⁴ The FERC will not allow entities to intervene in the dockets for these filings, but expects that each EGU will provide an opportunity for third parties to provide written comments on whether its facility should continue to operate, and those comments should be included in the informational filing with the FERC.⁹⁵

With regard to the type of information to be included in the informational filing, the Policy Statement explains that the informational filing "should include the same information that the owner/operator submitted to the EPA."⁹⁶ Information essential to the FERC's review includes "system planning and operations studies, system restoration studies or plans, operating procedures, and mitigation plans required by the Reliability Standards."⁹⁷ The FERC clarified, however, that it was "not requiring any specific analysis be done or indicating that this information must be submitted or what the EPA should consider."⁹⁸ Out of concern for expeditiously developing advice for the EPA, the FERC does not anticipate that it would seek additional information from the EGU.⁹⁹

The Policy Statement notes that FERC "review of an informational filing will be conducted pursuant to section 307(a) of the FPA."¹⁰⁰ After reviewing the AO, the FERC intends to provide comments to the EPA that provide advice on "whether, based on [its] review of the informational filing, there might be a violation of a [FERC]-approved Reliability Standard."¹⁰¹ In its comments to the EPA, the FERC may also identify issues raised by the AO request and that are "critical to reliability."¹⁰² However, the FERC will not comment on "the appropriateness of granting or denying an AO."¹⁰³

Finally, the Policy Statement notes that the EPA may look to entities other than the FERC, and it recommends that the EPA look to guidance from the North American Electric Reliability Corporation (NERC) and state commissions regarding reliability in areas not regulated by FERC.¹⁰⁴ "Nothing in [the] Policy Statement," the FERC stated, "precludes NERC, state agencies or others from providing the EPA with information regarding resource adequacy and other local reliability concerns that are not addressed in the [FERC's] comments to the EPA."¹⁰⁵

92. *Id.* at P 14.

93. *Id.*

94. *Id.*

95. *Id.* at P 21.

96. *Id.* at P 15.

97. *Id.*

98. *Id.*

99. *Id.* at P 16.

100. *Id.* at P 17.

101. *Id.* at P 21.

102. *Id.* at P 17.

103. *Id.* at P 21.

104. *Id.* at P 17.

105. *Id.* at P 19.

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