

**Federal Energy Regulatory Commission
 2012 Biennial Staff Memo Concerning Retrospective Analysis of Existing
 Rules
 Docket No. AD12-6-000
 October 18, 2012**

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 warrant 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 2012:

Subject Matter	18 CFR Part(s) or Order No.	Last Revision
Natural Gas Pipelines	153, 156, 157, 284 Order No. 636-C	1992
Electric Quarterly Report (FERC-516)	35.10b Order No. 2001	2002

As described in this memo, Commission staff identifies certain minor revisions to the Commission’s Natural Gas Pipeline regulations that may be appropriate to remove reporting requirements that may no longer serve their intended purpose. Consistent with the Plan, this memo will be made 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. Such public input will be due 30 days after the memo is made available for public comment. This input, in addition to staff’s recommendation, 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 2012 retrospective analysis conducted pursuant to the Plan.

The Plan also emphasized that in addition to this retrospective analysis initiative, the Commission would continue its practice of voluntarily and routinely reviewing its

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>.

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, the Commission is considering other areas in which the regulatory burden should be reduced. For example, the Commission has considered areas in which the regulatory burden on natural gas pipelines under the Natural Gas Act (NGA), section 311 pipelines under the Natural Gas Policy Act (NGPA) and oil pipelines could be reduced. Upon review, the Commission has issued three proposals to reduce regulatory burden. One proposal would eliminate approximately 145 annual filings made by NGA pipelines as a result of a change in the annual charge assessment unit surcharge.² Another would streamline the processing of tariff filings by intrastate pipelines performing interstate service under section 311 of the NGPA and Hinshaw pipelines, with no adverse impacts to natural gas pipeline shippers or the public.³ The third would reduce burdens on oil pipelines by eliminating unnecessary filings, updating requirements for service, and updating requirements for posting tariff information.⁴ The Commission is soliciting comments on those proposals.

Background

On July 11, 2011, the President issued Executive Order 13579, requesting 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 requests 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.

² *Annual Charge Filing Procedures for Natural Gas Pipelines*, Docket No. RM12-14-000.

³ *Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines*, Docket No. RM12-17-000.

⁴ *Filing, Indexing and Service Requirements for Oil Pipelines*, Docket No. RM12-15-000.

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 asks 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 12866.⁵ Staff also considered the Office of Management and Budget’s (OMB) definition of “major rules” in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.⁶ 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.”⁷ 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

⁵ Section 3(f) of Executive Order 12866 defines “significant regulatory action” to be one that is likely to result in a rule that may:

(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.

⁶ 5 U.S.C. § 804(2) (2006).

⁷ *Id.* § 610.

have a “significant economic impact upon a substantial number of small entities.”⁸ 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, 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 2012 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

⁸ 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 No. 706 approving the first batch of cyber security standards. In addition, the Smart Grid Policy Statement was considered a major rule by OMB.

Natural Gas Pipelines	153, 156, 157, 284 Order No. 636-C	1992
Electric Quarterly Report (FERC-516)	35.10b Order No. 2001	2002

Natural Gas Pipelines, 18 C.F.R. Parts 153, 156, 157, and 284

Part 153, which covers the siting, construction, and operation of facilities used to import or export natural gas, was revised⁹ in response to the Energy Policy Act of 2005¹⁰ amendment of NGA section 3. Staff finds no cause to recommend revisions.

Part 156 describes the procedure to apply for an order under section 7(a) of the NGA to direct a natural gas company to extend or improve its transportation facilities. Staff finds no cause to recommend revisions.

Part 157 covers the procedure to apply for certificate authorization under NGA section 7. Staff identifies the following provisions in Part 157 that may be ineffective, outmoded, or overly burdensome and, therefore, may warrant review:

Section 157.14 specifies the exhibits to be included with a section 7 application. Staff proposes that sections 157.14(a)(10) and (11), Exhibits H and I, describing gas supply and market data, be modified or removed. While the Commission previously relied on such data to assess the viability of a proposed project, it no longer does. Instead it has established a threshold requirement of no subsidization of a project by existing customers, followed by a balancing of benefits against impacts on identified interest. Thus, the requirement that applicants submit much of the data specified in the regulations may be outmoded.

Section 157.216(a)(1)(i) concludes with “or” – this is a typographical error: “or” should be removed and replaced with “and.”

Section 284.12 establishes standards for interstate natural gas pipeline business practices and electronic communications. As part of an ongoing effort in Docket No. RM96-1, the Commission amends this section periodically to incorporate by reference the most recent version of the standards adopted by the Wholesale Gas Quadrant of the North American Energy Standards Board (NAESB). Section 284.12 was amended in

⁹ *Regulations Implementing Energy Policy Act of 2005; Pre-Filing Procedures for Review of LNG Terminals and Other Natural Gas Facilities, Order No. 665, 70 Fed. Reg. 60,426, 60,440 (Oct. 18, 2005).*

¹⁰ Pub. L. No. 109-58, 119 Stat. 594 (2005).

March 2010¹¹ to incorporate by reference Version 1.9 of NAESB’s business practice standards for gas pipelines, which upgraded practices to increase the efficiency of the pipeline grid and make pipelines’ electronic communications more secure. In a Final Rule issued on July 19, 2012,¹² the Commission incorporated by reference Version 2.0 of NAESB’s standards.

Earlier this year, the Commission modified sections 284.13(e) and 284.126(c) to eliminate the semi-annual reporting requirements for interstate and intrastate pipeline storage providers. Similar information can be obtained from other sources, such as the daily website postings required by section 284.14(a) and reports required by section 284.126(b).

Electric Quarterly Reports, 18 C.F.R. § 35.10b

Staff recommends no additional changes to the Commission’s regulations under 18 C.F.R. § 35.10b, regarding the Electric Quarterly Report (EQR). In evaluating whether these regulations warrant a formal public review as part of the 2012 retrospective analysis, staff looked at: (1) evaluations of EQR regulations since Order No. 2001;¹³ and (2) whether those evaluations may have addressed the Plan’s requirements to identify regulations that may be “ineffective, outmoded, or overly burdensome”.¹⁴

Staff’s view is that, with respect to the Commission’s EQR regulations, the actions described below have met the requirement of the Plan to modify, streamline, expand, or repeal regulations that may be “ineffective, outmoded, or overly burdensome.”¹⁵ Staff also notes that in the proceedings described below, the Commission has encouraged abundant public comment on its EQR activities.

The Commission’s regulations at 18 C.F.R. § 35.10b state that the EQR “must be prepared in conformance with the Commission’s software and guidance posted and

¹¹ 130 FERC ¶ 61,212 (2010).

¹² 140 FERC ¶ 61,036 (2012).

¹³ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh’g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh’g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh’g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

¹⁴ Plan at 13.

¹⁵ *Id.*

available for downloading from the FERC Web site.” This language was included in the regulations to allow the Commission to adapt filing methodologies to meet the changing character of the filing community. In Order No. 2001-G, the Commission stated:

*In Order No. 2001, the Commission also adopted a new section in its regulations, 18 CFR § 35.10b, which requires that the EQRs are to be prepared in conformance with the Commission’s software and guidance posted and available from the Commission website. This obviates the need to revise section 35.10b to implement revisions to the software and guidance. Since the issuance of Order No. 2001, as need has arisen, the Commission has issued orders to resolve questions raised by EQR users and has also directed Staff to issue guidance on how to report certain transactions.*¹⁶

Between the issuance of Order No. 2001 in April 2002 and the issuance of the revised EQR Data Dictionary in Order No. 2001-I in October 2008, the EQR filing program has been a model for stakeholder consultation. Over the course of 15 EQR User Group Meetings, workshops, and technical conferences during that period, staff listened to the concerns of hundreds of data filers, vendors and users to make the filing process easier while still ensuring that the collection met the requirements for which it was designed. Between 2002 and 2008, the Commission issued seven orders and notices¹⁷ for several guidance documents refining the Commission's requirements for EQRs addressing format specifications and instructions for filing EQR data, the use of software provided by the Commission, the establishment of an EQR Users Group, guidance on refiling, filing of physical versus financial transactions, and standardization of formats and names. In March 2004, the Commission directed staff to e-mail to all EQR filers any future changes to the list of allowable entries for restricted fields in the EQR, and to post these changes on the EQR page of the Commission’s web site.¹⁸ In 2007, the Commission adopted an EQR Data Dictionary, which provides in one document the definitions of certain terms and values used in filing EQR data. Also in 2007, the

¹⁶ *Revised Public Utility Filing Requirements for Electric Quarterly Reports*, Order No. 2001-G, 120 FERC ¶ 61,270 (2007), 72 Fed. Reg 56,735 (Oct. 4, 2007), *Order on reh’g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *Order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008), and *Notice Providing Guidance on the Filing of Information on Transmission Capacity Reassignments in Electric Quarterly Reports*, 124 FERC ¶ 61,244 (2008).

¹⁷ *Revised Public Utility Filing Requirements for Electric Quarterly Reports*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh’g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008)), and *Notice Providing Guidance on the Filing of Information on Transmission Capacity Reassignments in Electric Quarterly Reports*, 124 FERC ¶ 61,244 (2008).

¹⁸ <http://www.ferc.gov/docs-filing/eqr/com-order/RM01-8-005.pdf>

Commission in Order No. 890¹⁹ required transmission capacity reassignment to be reported in the EQR. In 2008, the Commission issued guidance on the filing of such information in the EQR.²⁰

Moreover, the Plan cited staff's recent identification of an inefficient requirement for companies to correct previously-filed EQRs.²¹ If there was an inaccuracy in one or more of a company's previously-filed EQRs, staff had required the company to go back and correct all of its previously-filed EQRs affected by the error. Staff determined that correcting errors on all affected prior reports is not particularly useful and imposes a growing burden on filers that serves little purpose. Staff now directs filers to correct the most recent 12 reports (three years of data) with a note placed in the EQR stating that other reports may also contain the error. This approach provides as much useful information to staff and the public as the previous policy of correcting all affected previously-filed EQRs, while being less burdensome to filers. This change did not necessitate a change in the Commission's regulations.

In addition, the Commission currently has three pending or recently finalized generic proceedings that address EQR issues:

1. Electricity Market Transparency Provisions of Section 220 of the Federal Power Act Final Rule (Electric Market Transparency Final Rule) (Docket No. RM10-12-000, September 21, 2012)

In September 2012, the Commission issued a Final Rule, pursuant to section 220 of the Federal Power Act (FPA), to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce.²² The Final Rule revises the Commission's regulations by requiring entities that are excluded from the Commission's

¹⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 817, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2,984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 74 FR 12540 (March 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 Fed. Reg. 61,511 (Nov. 25, 2009), 129 FERC ¶ 61,126.

²⁰ *See, e.g., Revised Public Utility Filing Requirements for Electric Quarterly Reports*, 124 FERC ¶ 61,244 (2008) (providing guidance on the filing of information on transmission capacity reassignments in EQRs); *Notice of Electric Quarterly Reports Technical Conference*, 73 Fed. Reg. 2,477 (Jan. 15, 2008) (announcing a technical conference to discuss changes associated with the EQR Data Dictionary).

²¹ Plan at 4.

²² *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012) (to be published in the *Federal Register* on October 11, 2012).

jurisdiction under FPA section 205²³ and have more than a *de minimis* market presence to file EQRs with the Commission. These entities include such as publicly-owned utilities, municipal utilities, public utility districts, rural cooperatives, and federal entities (*i.e.*, non-public utilities). The Final Rule also revises the existing EQR filing requirements applicable to market participants in the interstate wholesale markets by requiring additional information, such as the trade date and type of rate, whether an exchange or broker was used for a sales transactions, electronic tag ID data, standardized prices and quantities for energy, capacity, and booked out power transactions, and whether sales transactions were reported to an index publisher. The Final Rule also eliminates the requirements to provide certain data related to time zones and the Data Universal Numbering System. This Final Rule builds upon a Notice of Proposed Rulemaking issued in April 2011.²⁴

2. Revised Public Utility Filing Requirements for Electric Quarterly Reports (Docket No. RM01-8-012 March 15, 2012)

The Commission issued a Notice of Proposed Rulemaking that proposing to revise the Data Dictionary to add “Simultaneous Exchange” to the list of available Product Names in the EQR and to require all EQR filers to use this term, when appropriate, in the Contract Data section and the Transaction Data section.²⁵ The refinements to the existing EQR requirements proposed in this Notice of Proposed Rulemaking build upon prior improvements to EQR reporting requirements and enhance the goals of providing greater price transparency, promoting competition, instilling confidence in the fairness of the markets, and providing a better means to detect and discourage discriminatory and manipulative practices. The Commission is considering comments filed in response to the Notice of Proposed Rulemaking.

3. Revisions to Electric Quarterly Report Filing Process (Docket No. RM12-3-000 June 21, 2012)

In this Notice of Proposed Rulemaking, the Commission proposes to amend section 35.10b of its regulations, 18 CFR Part 35, to change the process for filing EQRs. Currently, EQRs are filed by downloading EQR software from the Commission’s website, installing it on the filer’s Microsoft Windows-based computer, entering the EQR data into the software, and then submitting the EQR data to the Commission. The EQR software is designed in Microsoft Visual FoxPro. Technological changes and limitations

²³ 16 U.S.C. § 824d (2006).

²⁴ *Electricity Market Transparency Provisions of Section 220 of The Federal Power Act*, Notice of Proposed Rulemaking, 76 Fed. Reg. 24,188 (Apr. 29, 2011), FERC Stats. & Regs. ¶ 32,676 (2011), 136 FERC ¶ 61,053 (2011).

²⁵ *Revised Public Utility Filing Requirements for Electric Quarterly Reports*, Notice of Proposed Rulemaking, 77 Fed Reg 16,494 (Mar. 21, 2012), 138 FERC ¶ 61,191.

will render the current filing process outmoded, ineffective, and unsustainable. Microsoft has discontinued Visual FoxPro and will not support the software after 2015. Visual FoxPro also is constrained by data size limitations that will soon restrict the Commission's ability to add data fields in the EQR. Therefore, the Commission proposes to allow an EQR filer to file EQR data directly through the Commission's website, either through a web interface or by submitting an Extensible Mark-Up Language (XML)-formatted file.²⁶ By proposing a process with two options for filing EQRs, the Commission seeks to provide the flexibility needed to accommodate EQR filers' technical preferences. The Commission also convened a staff-led public conference on Wednesday, July 11, 2012 to demonstrate the two new options for filing EQRs to industry participants and to assist participants in preparing their comments to this Notice of Proposed Rulemaking.

²⁶ XML is a set of standards for describing and communicating data.