



Office of the General Counsel

B-271810.4

May 24, 1996

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

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

Subject: Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Federal Energy Regulatory Commission (Commission), Department of Energy, entitled "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities" (Docket Nos. RM95-8-000 and RM94-7-001; Order No. 888). The Commission issued the final rule on April 24, 1996, and we received it on April 25, 1996. The final rule was published in the Federal Register on May 10, 1996. 61 Fed. Reg. 21540.

A companion rule entitled "Open Access Same-Time Information System and Standards of Conduct" (Docket No. RM95-9-000; Order No. 889) was also published in the Federal Register on May 10, 1996. 61 Fed. Reg. 21737. Today, we are issuing a separate report, captioned B-271810.3, GAO/OGC-96-12, on the Commission's companion rule. On May 1, 1996, Representative Bob Franks introduced a joint resolution to disapprove both final rules pursuant to section 802(a) of title 5. 142 Cong. Rec. H4397.

This rule would require all public utilities that own, control, or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs containing minimum terms and conditions of non-discriminatory service. The rule would also permit public utilities and transmitting utilities to seek recovery of "stranded costs" associated with providing open access services and transmission services under section 211 of the Federal Power Act, 16 U.S.C. § 824j.

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

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

Robert P. Murphy
General Counsel

Enclosure

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

ANALYSIS UNDER 5 U.S.C. §§ 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE FEDERAL ENERGY REGULATORY COMMISSION
ENTITLED
"PROMOTING WHOLESALE COMPETITION THROUGH OPEN ACCESS
NON-DISCRIMINATORY TRANSMISSION SERVICES BY PUBLIC UTILITIES;
RECOVERY
OF STRANDED COSTS BY PUBLIC UTILITIES AND TRANSMITTING UTILITIES"
(DOCKET NOS. RM95-8-000 AND RM94-7-001; ORDER NO. 888)

(i) Cost-Benefit Analysis

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

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

Section 603: Initial Regulatory Flexibility Analysis

The preamble to the proposed rule stated that the entities that would be required to comply with the rule are public utilities and transmitting utilities that do not fall within the Regulatory Flexibility Act's definition of small entity.¹ 60 Fed. Reg. 17721. Accordingly, the Commission certified, pursuant to 5 U.S.C. § 605(b), that the rule would not have a significant economic impact on a substantial number of small entities and did not prepare an initial regulatory flexibility analysis. *Id.* Section 605(b) states that the certification and explanatory statement shall be provided to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In response to our inquiry, Commission officials explained that the Commission did not provide a separate certification and statement to SBA because it considers publication of the certification in the Federal Register to be notice to SBA. An SBA official has confirmed that some agencies follow this practice, and that SBA has not objected to it.

Section 604: Final Regulatory Flexibility Analysis

¹Section 601(3) of title 5, United States Code, provides that the term "small business" generally has "the same meaning as the term 'small business concern' under section 3 of the Small Business Act." Section 3 of the Small Business Act defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. § 632(a).

According to the preamble to the final rule, SBA questioned the Commission's conclusion and requested that the Commission conduct a regulatory flexibility analysis if, upon reconsideration, the Commission determined that the rule would have a significant economic impact on a substantial number of small entities. 61 Fed. Reg. 21690. The Commission discussed SBA's comments in the preamble and again certified that the rule would not have a significant economic impact on a substantial number of small entities. *Id.* Accordingly, the Commission did not conduct a final regulatory flexibility analysis under 5 U.S.C. § 604(a). By letter of May 9, 1996, the Commission informed SBA of its certification.

Addressing SBA's comments, the Commission explained that the total number of public utilities affected by the open access rule that would qualify under SBA's definition of small electric utility is 19, or 11 percent of the total number of public utilities required to file open access tariffs. The Commission asserted that this was not a "substantial number." Further, the Commission explained that, under the open access rule, public utilities would only need to develop and file rates. The Commission stated that it did not view the attendant costs as "significant." Finally, the Commission explained that the open access rule would not impose any burden on non-public utilities. *See* 61 Fed. Reg. at 21690-1.

With respect to the recovery of stranded costs, the Commission reiterated its assertion that there are not a "substantial number" of public or non-public utilities subject to the rule that would qualify under SBA's definition of small electric utility. Moreover, since utilities will recover stranded costs in connection with rate filings and such costs will be just one element considered, the Commission did not believe that the rule would impose a "significant economic impact" on small electric utilities. *See* 61 Fed. Reg. at 21691.

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

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

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

(iv) Other Relevant Information Under Acts and Executive Orders

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

The Commission promulgated the open access and stranded costs rule under the notice and comment procedures of 5 U.S.C. § 553. A notice of proposed rulemaking

regarding stranded costs was initially published on July 11, 1994. See 59 Fed. Reg. 35274. The proposed rule on stranded costs was ultimately consolidated with the proposed rule on open access. A notice of proposed rulemaking and supplemental notice of proposed rulemaking covering open access and stranded costs was published on April 7, 1995.

See 61 Fed. Reg. at 17662. The Commission received comments on the proposed rule from 409 commenters. In the preamble to the final rule, the Commission responded to issues raised during the comment period.

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

The rule requires public utilities to file new pro forma tariff non-price minimum terms and conditions of non-discriminatory transmission. Utilities will continue to propose their own rates for transmission and may seek to recover stranded costs through such rates. In the preambles to the proposed and final rules, the Commission explained that this information collection requirement was attributable to FERC-516 "Electric Rate Filings," the preexisting information collection requirement for rate filings and tariffs. See 60 Fed. Reg. at 17665, 17721; 61 Fed. Reg. at 21543. See also 59 Fed. Reg. at 35276, 35286 (initial notice of proposed rulemaking for recovery of stranded costs by public utilities and transmitting utilities). The Commission did not separately identify its "review" of the information collection. However, the preambles to the proposed and final rules contained a discussion of the modified information collection requirement, which explained the Commission's need for the information, plan for collecting the information, and burden estimate.

In addition, the Commission solicited and evaluated comments on the proposed information collection, particularly with respect to the accuracy of its burden estimate and suggestions for reducing this burden. See 60 Fed. Reg. at 17665. In the preamble to the final rule, the Commission responded to a variety of comments on its proposed information collection. The preamble to the final rule indicated that, with respect to the open access component, the Commission received no comments on its burden estimate. However, on its own initiative, the Commission increased the number of public utilities expected to be subject to the rule from 137 to 166. Therefore, the Commission adjusted its estimate of the annual burden from 41,100 hours to 49,800 hours. See 61 Fed. Reg. at 21543. The Commission similarly received no comments on its burden estimate for the stranded costs component of the rule. Accordingly, the Commission reiterated its estimate of 500 hours annually contained in the initial and supplementary notices of proposed rulemaking. See 61 Fed. Reg. at 21543.

The preambles to the proposed and final rules set forth significant information about the Commission's proposed collection of information. As discussed, they informed potential respondents of the Commission's reasons for collecting the

information and burden estimates. In addition, the preambles cited OMB's clearance requirements, though not specifically 44 U.S.C. § 3507.² See 60 Fed. Reg. at 17721; 61 Fed. Reg. at 21691. The preamble to the final rule set out, among other things, a title and summary of the information collection, a description of the respondents, and the frequency of responses. 61 Fed. Reg. at 21543, 21691. As discussed above, the Commission solicited comments on the information collection in the notice of proposed rulemaking. The Commission did not invite comments in the preamble to the final rule.

The Commission submitted its proposed collection of information to the Office of Management and Budget (OMB) at the same time as it requested public comments. See 60 Fed. Reg. at 17721. In response to our inquiry, Commission staff have advised that OMB had no comments and approved the proposed information collection requirement. The Commission also submitted the final rule to OMB. See 61 Fed. Reg. at 21691. On May 1, 1996, the Commission certified to OMB that the information collection complied with each of the objectives identified in 44 U.S.C. § 3506(c)(3).

Statutory Authorization for the Rule

In the preamble to the proposed and final rules, the Commission stated that sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, require it to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. 60 Fed. Reg. at 17664; 61 Fed. Reg. at 21541. The Commission analyzed pertinent case law and concluded that its remedial authority under sections 205 and 206 is very broad and includes the ability to order industry-wide non-discriminatory open access. See 60 Fed. Reg. at 17666; 61 Fed. Reg. at 21560.

The proposed and final rules reflect the Commission's determination that non-discriminatory open access tariffs are necessary to prevent public utilities from engaging in unduly discriminatory practices. In the preamble to the final rule, the Commission responded to comments supporting and refuting its assertion that the rule is well within its remedial authority. See 61 Fed. Reg. at 21560-70.

The Commission did not identify any other statute or executive order imposing procedural requirements relevant to the open access and stranded cost rule.

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