

RULEMAKING ISSUE (Affirmation)

June 4, 2002

SECY-02-0096

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations /RA/

SUBJECT: DIRECT FINAL RULE ON ELECTRONIC MAINTENANCE AND SUBMISSION
OF INFORMATION

PURPOSE:

The purpose of this paper is to recommend that the Commission approve publication of a direct final rule and guidance to help bring the NRC's communications regulations into compliance with the Government Paperwork Elimination Act (GPEA).

BACKGROUND:

In October 1998, President Clinton signed the GPEA into law. The Act requires that by October 21, 2003, all Federal agencies provide —

- (1) for the option of electronic maintenance, submission, or disclosure of information, when practicable, as a substitute for paper; and
- (2) for the use and acceptance of electronic signatures, when practicable.

See 44 USC 3504, note.

Contacts:

Brenda J. Shelton, OCIO/IRDMD/RMB
(301) 415-7233

John A. Skoczlas, OCIO/ADD/IMT
(301) 415-7186

Steven F. Crockett, OGC
(301) 415-1622

Geraldine R. Fehst, OGC
(301) 415-1614

Neither the GPEA nor Office of Management and Budget guidance on the GPEA defines “practicable.”¹ There is an informal account of the term in section III of the attached draft Federal Register Notice.

The NRC has already taken some necessary steps to comply with the GPEA:

- Most of the agency’s regulations governing recordkeeping by the regulated community explicitly allow records to be kept in electronic media, and no regulation prohibits recordkeeping in electronic media.
- The agency completed an Electronic Information Exchange (EIE) pilot for submissions under Part 50.
- On January 26, 2001, the agency published a Regulatory Issue Summary (RIS) 2001-05 to let all parties regulated under Part 50 know that they can use EIE to submit electronically signed documents. EIE provides for the submission of documents electronically in a secure Web-based manner that ensures that the person who submits a document has the authority to do so and that the electronic document received by the NRC is identical to the document submitted. The RIS also lists the formats the NRC can accept, explains how to treat nonpublic information, and provides guidance on digital signature procedures.
- On August 10, 2001, the NRC issued a letter to certain fuel cycle facilities giving them the option of voluntary electronic submission in many circumstances.
- Staff plans to conduct a pilot on electronic adjudicatory submissions.
- On August 23, 2000, the agency issued RIS 2000-18, “Guidance on Managing Quality Assurance Records in Electronic Media.”

Nonetheless, the NRC is not yet in full compliance with the GPEA. The existing guidance that is available to licensees regulated under Part 50 must be expanded to cover other licensees, applicants, and vendors. The GPEA requires the NRC, by October 21, 2003, to permit anyone the option to submit documents electronically to the NRC unless the NRC determines that it is not “practicable” for the agency to handle the document electronically. Electronic submission of documents to the NRC remains strictly voluntary; paper documents remain an acceptable form of submission. Following OMB guidance, the NRC must amend its regulations that either explicitly or implicitly prohibit “practicable” electronic submissions.² In the August 31, 1999, SRM on SECY-99-205, the Commission approved a rulemaking plan to accomplish these tasks. The rule changes and guidance document attached to this SECY paper implement that plan.

¹For more about the GPEA, see the General Counsel’s January 4, 1999, memorandum to the Commission. OMB’s guidance is contained in M-00-10, “OMB Procedures and Guidance on Implementing the Government Paperwork Elimination Act” (April 25, 2000). <http://www.whitehouse.gov/omb/memoranda/m00-10.html>.

²OMB says that agencies should “amend regulations or policies to remove impediments to electronic transactions” (M-00-10, Section 3.a.(4).)

Moreover, full compliance with the GPEA will require that the NRC address adjudicatory submissions and also communications from the NRC to outside parties. The statute does not say explicitly that it requires two-way communications, but OMB believes that is the statute's intent. The staff intends to do a separate rulemaking on adjudicatory submissions, after conducting a pilot. The NRC's EIE process is currently designed only for receiving submissions. It will be expanded to meet the Atomic Safety and Licensing Board Panel's requirement to send as well as to receive information electronically. In addition, the Office of Administration has indicated a possible requirement to send secure information via EIE. No other NRC office has identified a requirement to send information electronically. We do not believe outward communications for the majority of NRC's routine business transactions is practicable at this time because it would require disproportionately large resources to acquire the technology and maintain a centralized distribution system for communicating with external entities via the EIE process. Nonetheless, OCIO staff will periodically assess the practicality of outward communications from the NRC that are amenable to the EIE process.

DISCUSSION:

A. Direct Final Rule

The great majority of the amendments in the attachments merely remove any suggestion that electronic submissions are never allowed. The staff has taken care not to write into the rules the existing state of information technology, and so the staff is providing a guidance document (attached) that explains electronic submission in detail—for example, what formats the agency can accept, how electronic signatures are to be made, and how nonpublic information (information that generally is exempt from disclosure under the Freedom of Information Act) is to be treated. The guidance will be changed from time to time to reflect the evolution of the technology, and controls will be put in place to ensure adequate consultation and coordination on the changes. The guidance is designed to supersede the Part 50 RIS and the letter to fuel cycle facilities published earlier this year.

The Federal Register notice seeks comment on both the rule changes and the guidance. The staff expects many comments on the guidance document. However, the staff does not expect significant adverse comment on the regulatory text, because the principal aim of the rule changes is quite simple—to remove impediments to electronic submissions—and because the kinds of changes, described in Section IV of the draft Federal Register notice, are also few and simple. Therefore, the staff recommends that the changes be published as a direct final rule. This was the approach taken by the Federal Energy Regulatory Commission in its GPEA rulemaking.³ However, as is usual in direct final rulemakings, the staff will simultaneously issue a companion proposed rule so that, if the agency receives significant adverse comment, it can withdraw the direct final rule and issue a final rule that addresses the comments. The companion proposed rule is also attached. It is quite short because, with the permission of the Office of the Federal Register, it refers the reader to the text of the direct final rule for the amended regulations and the statement of considerations. Please note that the staff expects many comments on the guidance document.

The direct final rule and guidance document reference NRC Web addresses for making submissions to the agency. The Web addresses contained in these documents refer to the old NRC public Web site, which was recently redesigned. The new structure of the site will result

³ 65 FR 57088 (September 21, 2000).

in changes to these Web addresses. The staff intends to update these addresses before the direct final rule and guidance document are submitted for signature and publication.

The staff is also reassessing the content of information made publicly available through the NRC Web site for safeguards sensitivity. The staff will review the language in the direct final rule and guidance document to ensure that it reflects current agency policy on information available to the public. The staff will make any necessary changes to these documents before they are submitted for signature and publication.

B. Other Issues

The guidance document and the statement of considerations for the direct final rule discuss several issues that are not discussed in this paper:

- whether to retain certain requirements for telephone notification of certain events or licensee actions (yes);
- whether to limit the media that can be used to transmit nonpublic information (yes);
- whether to include filings in NRC adjudications in this rulemaking (no); and
- whether to allow use of telefax and e-mail (yes).

This paper focuses on two issues:

- Should the staff devote a single new part in 10 CFR to communications, deleting communications information in the other parts?
- Should the staff require only a single copy of any submission, whether on paper, on compact disc, or in some other electronic medium?

1. New Part

The staff considered drafting a new part on the single topic of communications. It would have replaced the many sections with titles like “Communications” and the many sections that have no such title but contain useful communications information. At appropriate points in the regulations, the readers would have been referred to the new part, rather than giving communications information on the spot. The result might have been a shorter rulemaking document and perhaps more programmatic consistency. In addition, a new part would have facilitated future amendments.

Instead, the staff opted to try to maintain the level and spread of information in the current rules. For the most part, the current rules do not refer the readers to parts other than the part in which they are reading. Not everyone who deals with the agency needs to have both volumes of the Code of Federal Regulations. Moreover, communications needs vary from part to part. Also, a rulemaking document that deletes most communications information would still be quite long.

2. One Copy

The Part 50 RIS that was published early this year took the bold step of saying that anyone making a submission to the agency, whether in paper or not, need submit only one copy. This was certainly in the spirit of the GPEA and recognized that the agency had the technical means to make multiple copies, whether paper or electronic. However, operational experience indicates that individual paper and CD-ROM copies of voluminous complex Part 50 submissions, particularly those with engineering drawings, may be needed to facilitate document review by multiple staff. Experience also indicates that it is difficult for the agency to make paper copies from CD-ROM submissions because they often contain hundreds of files and special attributes, such as color and engineering drawings, that must be printed separately on special-purpose machines. The agency does not have the technical capability to reproduce paper copies from CD-ROM cost effectively or rapidly enough to meet the needs of the staff and the public. Service bureaus we contacted faced the same technical challenges. Thus, it may not yet be "practicable" for the agency to fully implement the single-copy policy.

The attached amendments allow a person who chooses to submit via EIE to submit a single electronic copy to the NRC Web site. A person who chooses to make a submission on paper will be required to submit the number of copies required by the amended regulations, which may be one copy or multiple copies. Guidance appended to the final rule says that a person choosing to make a submission on CD-ROM should submit the same number of copies that the regulations require of paper submissions, and also one paper copy, to enable the agency to make paper copies available to the reviewers rapidly and cost-effectively.

This approach toward meeting NRC's copy requirements is based on the reproduction technology currently available in the industry. However, as the technology evolves, and staff becomes more comfortable in working in an electronic environment, we will reassess our approach and modify the guidance document, as appropriate.

In addition, we have also reduced copy requirements throughout the regulations. For example, § 51.66 previously required the submittal of 25 copies of the Environmental Report and the retention of an additional 125 copies for later distribution. The submittal requirement is now being reduced to 5 copies, and instead of being required to retain copies, an applicant will be required to maintain the capability to generate additional copies as directed.

TIMING:

Since the GPEA became law, Congress has passed, and the President has signed, the Electronic Signature in Global and National Commerce Act (E-SIGN).⁴ Moreover, Congress continues to consider proposed legislation on e-government.⁵ Should the Commission delay issuing this direct final rule until Congress is closer to completing additional legislation on e-government? The staff believes not. It is highly unlikely that the GPEA requirement addressed by the attached rule will be repealed. To the contrary, the recent legislative activity tends to show that Congress has deepened its commitment to the requirements of the GPEA.

⁴See the General Counsel's September 28, 2000, memorandum to the Commission.

⁵See, for example, the Office of Congressional Affairs' July 18, 2000, memorandum to the Commission on S. 803.

Another possible reason for delaying this direct final rule is that other rulemakings on Parts 20 and 35 may contain communications requirements. Should the Commission wait to issue this direct final rule until these other parts are revised, rather than amend sections that might soon be amended again by other rulemakings? We see no grounds for delay here either. The schedule for at least some of these other rulemakings is uncertain. Moreover, they are for the most part focused on matters other than communications. In any case, the necessary consistency between these rulemakings and the rulemaking that is the subject of this paper can be achieved at the appropriate time.

COORDINATION:

The Office of the General Counsel has no legal objection to the attached rules or guidance. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

RECOMMENDATIONS:

That the Commission:

1. Approve the "Notice of Direct Final Rulemaking" (Attachment 1), the "Notice of Proposed Rulemaking" (Attachment 2), and the "Guidance for Electronic Submissions to the Commission" (Attachment 3) for publication in the Federal Register for public comment.
2. In order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that the proposed rule, if promulgated, will not have a negative economic impact on a substantial number of small entities.

Note:

- a. The rulemaking notices and guidance document will be published in the Federal Register for a 45-day public comment period. If no significant adverse comments are received, the direct final rule will become effective 90 days after publication in the Federal Register.
- b. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding the economic impact on small entities, as required by the Regulatory Flexibility Act.
- c. This rule does not amend information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.). It provides licensees, applicants and members of the public the option to make electronic submissions.

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- d. The appropriate Congressional committees will be informed.
- e. A press release will be issued by the Office of Public Affairs when the rules are filed with the Office of the Federal Register.

/RA by Carl J. Paperiello Acting For/

William D. Travers
Executive Director
for Operations

Attachments:

- 1. Draft Direct Final Rule
- 2. Draft Proposed Rule
- 3. Draft Guidance

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Package -
 Commission Paper -
 Direct Final Rule -
 Companion Proposed Rule -
 Accompanying Guidance Document -

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