

RULEMAKING ISSUE

(Affirmation)

August 1, 2003

SECY-03-0130

FOR: The Commissioners

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

SUBJECT: 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 final rule and guidance to help bring the NRC's communications regulations into compliance with the Government Paperwork Elimination Act (GPEA). The attached final rule and guidance respond to comments on a proposed rule and guidance published in the *Federal Register* on September 6, 2002 (67 FR 57083).

BACKGROUND:

In October 1998, then-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.

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Neither the GPEA nor Office of Management and Budget guidance on the GPEA formally defines “practicable.” However, OMB’s guidance does in practice take a cost-beneficial approach to the term. For example, at one point the guidance advises agencies to “conduct a cost-benefit analysis to determine if an electronic transaction is practicable.”¹ There is an informal discussion of the term in the statement of considerations for the final rule (Attachment 1).

To further comply with the GPEA, the staff proposed a rule text and draft guidance in SECY-02-0096, June 4, 2002. On July 23, 2002, the Commission approved publication of the proposed rule and guidance, with editorial changes.

As that SECY paper noted, the NRC had already taken several steps to comply with the GPEA (see page 2 of the SECY paper). These steps included, among other things, an Electronic Information Exchange (EIE) pilot for submissions under Part 50, and the publication of guidance to certain classes of licensees on making electronic submissions.

Nonetheless, the NRC is not yet in full compliance with the GPEA. Most of the rules that explicitly or implicitly prohibit electronic submissions must be revised, and the existing guidance must be expanded to cover other licensees, applicants, and vendors. The attached rule and guidance accomplish these tasks.

To more fully implement the purposes of the GPEA, the NRC will address adjudicatory submissions in a separate rulemaking. In addition, the NRC will continue to improve its existing technology. While NRC’s EIE process is designed for both receiving and sending electronic communications, continued work will be necessary to improve the existing technology and to develop a centralized distribution system so that it will become “practicable” to conduct more business electronically.

DISCUSSION:

A. The “Direct Final Rule” and the Draft Final Rule

The agency published the Commission-approved rule text as a “direct final rule.” The staff had recommended this approach because the staff had not expected significant adverse comments on the regulatory text. The principal aim of the rule changes was, and is, quite simple—to remove impediments to electronic submissions—and the kinds of changes were, and are, also few and simple (they are described in the statement of considerations for the draft final rule). At least one other agency had taken a similar approach in its GPEA rulemaking. Nonetheless, as is typical in direct final rulemaking, the agency asked for comment on the rule text, with the express intent of withdrawing the direct final rule if the agency received “significant adverse comments” on the rule text. The agency did receive a few such comments, though most of the adverse comments were on the details of the draft guidance. Consequently, on December 4, 2002, the agency withdrew the direct final rule and promised to consider the comments and publish a final rule later. See 67 FR 72091.

¹See Part II, Section 3.b., of OMB’s memorandum M-00-10, “OMB Procedures and Guidance on Implementing the Government Paperwork Elimination Act” (April 25, 2000). For more about the GPEA, see the General Counsel’s January 4, 1999 memorandum to the Commission.

The staff received 19 sets of comments, most of them on the draft guidance. The significant comments are discussed in the statement of considerations for the draft final rule.

In the draft final rule, as in the published direct final rule, most of the amendments merely remove any suggestion that electronic submissions are never allowed. Similarly, the draft final rule tries to maintain the detail and spread of information in the current rules, so that readers of one part of the Commission's regulations will not have to refer to another part to find out how to submit documents to the agency. The staff has also taken care not to write into the rules the existing state of information technology. Details that reflect current technology are saved for the guidance. The guidance covers, for example, what formats the agency can accept, how electronic signatures are to be made, and how nonpublic information 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 already published guidance on electronic submissions.

B. Other Issues

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

- whether to retain certain requirements for prompt 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).

We focus here on the single issue that most affected the text of the direct final rule: Should the staff require only a single copy of any submission, whether on paper, on CD, or in some other electronic medium?

The guidance that was issued to Part 50 licensees after the EIE pilot was completed had taken the bold step of saying that any Part 50 licensee 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. However, the staff found that multiple copies of voluminous, complex Part 50 submissions on paper or CD-ROM, particularly those with engineering drawings, were needed to facilitate document review by multiple staff and to provide information to members of the public who did not have access to computers or the Internet, or did not use technology for other various reasons. It was also difficult for the agency to make paper copies from some CD-ROM submissions because the CDs often contained hundreds of files and files with special attributes (color, engineering drawings), which must be printed separately on special-purpose machines. Service bureaus we contacted faced the same technical challenges. Thus, the *Federal Register* notice for the direct final rule said that the agency had concluded that it was not yet "practicable" for the agency to fully implement the single-copy policy.

Most commenters objected to this conclusion. The Commission too, in its July 23, 2002, SRM on SECY-02-0096, urged the staff to move toward a more electronic environment:

The staff should address the cultural and technical barriers that prevent the staff from using electronic files rather than paper as the means for the conduct of NRC business so that the burdens associated with requirements for paper submission and multiple copies can be eliminated or reduced.

Therefore, nearly all the various requirements for submission of multiple copies have been deleted from the attached draft final regulations and guidance. Submitters will generally be authorized to submit a single paper copy or a single CD-ROM to the NRC. However, the current requirement that the Department of Energy submit multiple paper copies of its application for a license for Yucca Mountain has been retained, and a requirement for multiple CD copies of the application has been added, for the reasons given in Section II of the statement of considerations.

This single-copy policy will represent a major change in the way the NRC does business. The expectation is that NRC employees will begin to work from electronic media to a greater degree and rely less on paper. Therefore, we anticipate that OCIO will need to reproduce more CD-ROMs and that the staff will request more paper copies of portions of documents (e.g., engineering drawings). The GPEA requires agency compliance by October 21, 2003, where practicable. By that time, the staff will have published the final rule and guidance (assuming that the Commission approves publication). However, the staff has established January 1, 2004, as the effective date of the rule and guidance document. It is not practicable to implement fully the rule and guidance any sooner. The guidance document has been updated to include several new sections on organizing and segmenting files. These new sections will facilitate the NRC's capability to produce paper copies. In the meantime, the delayed effective date for the rule and guidance will allow additional time for the OCIO to develop its implementation plan and procedures, assess its resource requirements, communicate with the offices, and prepare to meet the staff's requirements for on-demand paper and CD-ROM copies. Staff believes that increased use of electronic communications by agency stakeholders will be a gradual process, and that this delay will also allow both the NRC staff and submitters (particularly NRC licensees) more time to become familiar with the guidance and to modify their business processes (as appropriate) to achieve a successful transition to the electronic environment. The existing guidance documents on electronic submissions, Regulatory Issue Summary 2001-05 (which was directed toward Part 50 licensees and applicants) and the August 10, 2001, letter (which was directed toward certain fuel cycle facilities), will remain in effect during the period between the required GPEA compliance date (October 21, 2003) and the effective date of this final rule (January 1, 2004).

COORDINATION:

The Office of the General Counsel has no legal objection to the attached rule and 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 draft notice of final rulemaking (Attachment 1) and the draft final guidance on electronic submissions to the agency (Attachment 2) for publication in the *Federal Register*.
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 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.
- b. 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.
- c. The appropriate congressional committees will be informed.
- d. A press release will be issued by the Office of Public Affairs when the rules are filed with the Office of the Federal Register.
- e. A yellow announcement will be prepared to explain the rule and guidance document to agency employees, and meetings will also be scheduled to explain the changes and respond to staff questions.

/RA Carl J. Paperiello Acting For/

William D. Travers
Executive Director
for Operations

Attachments:

1. Final Rule
2. Guidance Document

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| RES | Mark Flynn | Comments on Commission Paper RE Publication of Guidance Document, 07/07/03 |
| SECY | Emile Julian | Two minor comments, (1) Resolution of Comments, 5 th line, Requiring a paper copy (2) Guidance document, pg 26, change Portable Document Format to Portable Data format, 07/08/03 |
| SBCR | Noble Greene | No Comments, 07/14/03 |
| NMSS | Gary Janosko | Part 63.22 Paper copies, 07/17/03 |
| NRR | Gene Suh | Elimination of multiple copies and requirement to submit the complete living document when revisions are submitted, 07/02/03 |
| NSIR | Phil Brochman | Concurred w/changes, 07/14/03 |
| RI | Thomas Harrison | Agree with the document as written, 07/07/03 |

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| RII | July Coleman | Simplify e-mail addresses (RidsRgn2MailCenter), 07/03/03 |
| RIII | Reggie Mitchell | Concurred by phone, No Changes, 07/14/03 |
| RIV | Kathleen Hamill | No Comments, 07/03/03 |