

FERC Staff Proposes Process on Advising EPA on Extension Requests

Industry comments requested on procedures for considering the reliability impacts of generator outages and retirements.

February 3, 2012

On January 30, 2012, Federal Energy Regulatory Commission (FERC or Commission) Staff issued a white paper outlining a proposal to guide the Commission in advising the Environmental Protection Agency (EPA) on requests for administrative orders (AOs) extending the time for power plants to comply with EPA's Mercury and Air Toxics Standards (MATS) based on system reliability concerns.¹ EPA stated in a Final Rule that, in considering such requests, it will seek advice from FERC as well as certain other entities with reliability expertise.² FERC Staff recommends that requests for AOs be filed with the FERC Secretary's office on an informational basis and assigned to the Office of Electric Reliability (OER). OER would consider whether discontinuing operations of the generating unit in question would result in a Reliability Standard violation. The Commission in turn would advise EPA regarding such Reliability Standard violations in written comments. FERC has requested comments on these and other procedural steps recommended in the White Paper. The deadline for filing comments is February 29, 2012.

The MATS Final Rule, which the EPA released on December 21, 2011, pursuant to its authority under section 112 of the Clean Air Act (CAA), limits the emission of mercury, acid gases, and other toxic pollutants from power plants. It focuses on reducing emissions from new and existing coal- and oil-fired electric utility steam-generating units (EGUs). Affected facilities must be in compliance with the MATS Final Rule within three years, though state permitting authorities may grant a one-year extension. In addition, with its authority under CAA section 113(a), EPA may grant requests for AOs to provide an additional one-year extension to address a specific and documented reliability concern.

In the period leading up to the MATS Final Rule, FERC and the North American Electric Reliability Corporation raised concerns regarding the potential for negative effects on system reliability resulting from the MATS Final Rule. EPA acknowledged these concerns, recognizing that, even with a one-year

1. *Staff White Paper on the Commission's Role Regarding Environmental Protection Agency's Mercury and Air Toxics Standards*, Docket No. AD12-1-000 (issued Jan. 30, 2012) (White Paper).

2. *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 40 C.F.R. Part 63, available at <http://www.epa.gov/mats/pdfs/20111216MATSFfinal.pdf> (issued Dec. 21, 2012) (MATS Final Rule).

state extension, the deactivation or retirement of a unit or the delay in installation of controls due to factors beyond the operator's or owner's control could threaten reliability. EPA's Office of Enforcement and Compliance Assurance released a policy memorandum in which it stated that it "intends, where necessary to avoid a serious risk to electric reliability, . . . to issue an expeditious case-specific AO to bring a source into compliance within one year."³ Although EPA will make the final determination for an AO request, EPA stated that it intends to consult with FERC and other entities with relevant reliability expertise in evaluating such requests.⁴

The Policy Memorandum states that EPA will consider AO requests on a case-by-case basis. To qualify for an AO, the owner or operator of the generating unit should, at a minimum, (1) provide written notice of its compliance plans within one year of the effective date of MATS for each EGU to the Planning Authority for the area in which the EGU is located; (2) timely submit a complete AO request for a unit that may affect reliability due to deactivation or due to delays related to the installation of controls; and (3) provide notice of the AO request to the relevant planning authority, state public utility commission or public service commissions, and state, tribal, or local environmental agencies.⁵

In the White Paper, FERC Staff explains its position on the process FERC should follow in providing advice to EPA. It proposes that each AO request be filed with the FERC Secretary, treated as an informational filing, and contain the same information the owner or operator submitted to EPA.⁶ FERC Staff recommends that OER be designated as the lead office tasked with processing these informational filings. It also proposes that the primary consideration should be whether there may be a violation of the Reliability Standards under section 215 of the Federal Power Act (FPA).⁷ Under FERC Staff's proposal, interventions would not be permitted, but FERC may consider comments submitted as part of the informational filing in preparing its recommendation to EPA.⁸ After reviewing the filing, FERC would submit written comments to EPA addressing the potential Reliability Standard violations identified.⁹

In the White Paper and the accompanying notice requesting comments, FERC asks for comments on the overall procedure for the consideration of AOs, as well as certain specific issues. FERC requests comments on whether, in addition to determining if there may be a violation of a Reliability Standard under FPA section 215, its review should be based on other elements outlined in the EPA Policy Memorandum and whether FERC should review reliability issues other than standards violations. FERC also seeks comments on the standard of review it should apply, the level of deference it should afford to the analysis presented by the entity, and the scope of the written comments it will submit to the EPA.¹⁰

3. Memorandum re: The Environmental Protection Agency's Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury and Air Toxics Standard, *available at* <http://www.epa.gov/compliance/resources/policies/civil/erp/mats-erp.pdf> (issued Dec. 16, 2011) (Policy Memorandum).

4. White Paper at 2 (citing Policy Memorandum at 2).

5. A complete request for an AO must include copies of the compliance plan, written analyses of the reliability risk if the EGU is not operational, written comments from third parties, a demonstration that full compliance cannot be achieved prior to the MATS compliance date, and proposed operational limits to minimize emissions during operations not in full compliance with MATS. Policy Memorandum at 6–7.

6. White Paper at 6.

7. *Id.*

8. *Id.* at 6–7.

9. *Id.*

10. *Id.*

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