

In Support of Equitable Treatment of Public Power Utilities Under the Regulatory Flexibility Act

1 The Regulatory Flexibility Act (RFA) was enacted on September 19, 1980, to address the unique
2 problems faced by small entities that must comply with federal regulations targeting larger entities.
3 Under the RFA, federal agencies must consider the impact of new rules, regulations, and requirements on
4 “small entities.” The law states “agencies shall endeavor, consistent with the objectives of the rule and of
5 applicable statutes, to fit regulatory and information requirements to the scale of the businesses,
6 organizations and government jurisdiction subject to regulation.” The RFA defines a “small
7 governmental jurisdiction” as one with a population of less than 50,000, but allows federal agencies to set
8 their own standard for “small,” if appropriate. Public power utilities are considered “governmental
9 jurisdictions” under the RFA.

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11 When the RFA was enacted, the Small Business Administration (SBA) had already set a “small business”
12 size threshold for a for-profit electric power utility: total electric output of 4 million megawatt hours or
13 less per year. As a result, the Federal Energy Regulatory Commission (FERC) elected to use a 4 million
14 megawatt hour standard for all electric power utilities, including public power utilities, when assessing
15 regulations under the RFA. Other agencies, including the Environmental Protection Agency, the
16 Occupational Safety and Health Administration, and the SBA itself, instead have used the 50,000
17 population standard to determine whether a public power utility is “small.”

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19 Under a 4 million megawatt hour standard, just 43 of the nation’s more than 2,000 public power utilities
20 were considered large. Under the 50,000 population standard, approximately 90 additional public power
21 utilities could be considered “large”—including one public power utility with just 22 megawatt hours in
22 ultimate sales to customers.

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24 In 2012, SBA proposed increasing “small business” size standards for electric utilities due to
25 consolidation in the electric power industry. The largest fifth of electric power utilities were responsible
26 for 73 percent of electric power output when the 4 million megawatt hour standard was set in 1974. By
27 2009, the largest fifth of electric power firms were responsible for 97 percent of electric output. SBA
28 initially proposed increasing the 4 million megawatt hour standard to 8 million megawatt hours, but on
29 December 23, 2013, it instead changed the size standard for small electric utilities to 500 employees.
30 This final rule also stated that all of a business’s employees, not just employees working in a business’s
31 electric utility department or division, would be counted when determining whether the business qualified
32 as a “small business.”

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34 In the wake of the SBA size standard change, FERC adopted (without clarification) a 500-employee
35 standard when conducting its RFA analysis of proposed and final physical security regulations. It is
36 unclear how FERC applied this standard to public power utilities. Specifically, FERC did not clarify
37 whether it counted only electric utility employees of a public power utility to determine whether it was
38 “small,” or whether it included other city, county, or district employees in the calculation. Just 23 public
39 power utilities could be considered large if the standard for small were 500 or fewer electric utility
40 employees. Conversely, more than 130 public power utilities could be considered large, if the calculation
41 were to include other city, county, or district employees.

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43 Many of the utilities that were considered small under a 4 million megawatt hour standard, but large
44 under a population or employee standard are “mid-sized” public power utilities – generally serving from
45 20,000 to 60,000 homes and businesses. These utilities are likely to be affected by more rules,
46 regulations, and requirements than utilities serving fewer than 20,000 meters, but the marginal benefit of
47 imposing these rules, regulations, and requirements is likely miniscule relative to the benefits from
48 imposing them on truly “large” utilities. As a result, the current RFA standard allows agencies to ignore
49 the potential concerns of the public power utilities from whom they might most benefit from hearing.

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51 **NOW, THEREFORE, BE IT RESOLVED:** That the American Public Power Association (APPA)
52 supports the Regulatory Flexibility Act (RFA) and its requirement that federal agency rules, regulations,
53 and requirements be assessed to determine their effect on small entities, including small public power
54 utilities, and to appropriately weigh the costs against the benefits of imposing these rules, regulations, and
55 requirements; and

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57 **BE IT FURTHER RESOLVED:** That APPA believes the RFA standard for determining whether a
58 public power utility, as a governmental jurisdiction is “small” should be reformed to reduce the number of
59 public power utilities that are considered large and properly reflect the status of the vast majority of
60 public power utilities, which are indeed physically and functionally "small" in the context of the current
61 consolidation in the electric power industry; and

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63 **BE IT FURTHER RESOLVED:** That APPA believes that any employee-based standard of a small
64 public power utility should count only electric utility employees, and not other non-electric utility
65 governmental employees.

As adopted June 9, 2015, by the membership of the American Public Power Association at its annual meeting in Minneapolis, Minnesota.