

# Rules and Regulations

Federal Register

Vol. 79, No. 227

Tuesday, November 25, 2014

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## FEDERAL TRADE COMMISSION

### 16 CFR Part 424

#### Retail Food Store Advertising and Marketing Practices Rule

**AGENCY:** Federal Trade Commission (“Commission” or “FTC”).

**ACTION:** Final rule.

**SUMMARY:** The FTC has completed its regulatory review of its Retail Food Store Advertising and Marketing Practices Rule (“Unavailability Rule” or “Rule”). After reviewing public comments regarding the Rule’s overall costs, benefits, and regulatory and economic impact, the Commission retains the Rule. The Commission, however, takes this opportunity to issue guidance concerning the Rule’s coverage. The Commission also corrects a typographical error, and ceases to publish dissents to the Rule’s previous amendment.

**DATES:** This action is effective on December 10, 2014.

**ADDRESSES:** This document is available on the Internet at the Commission’s Web site, [www.ftc.gov](http://www.ftc.gov). Relevant portions of this proceeding, including the public comments received in response to the Advance Notice of Proposed Rulemaking, are available at: <http://www.ftc.gov/policy/public-comments/initiative-387> and the related News Release is available at: <http://www.ftc.gov/opa/2011/08/retailfood.shtm>.

**FOR FURTHER INFORMATION CONTACT:** Jock Chung, (202) 326–2984, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., CC–9528, Washington, DC 20580.

#### SUPPLEMENTARY INFORMATION:

### I. Background

The Unavailability Rule prohibits retail food stores<sup>1</sup> from advertising prices for food, grocery products, or other merchandise unless those stores have the advertised products in stock and readily available at, or below, the advertised prices. The Commission issued the Rule in 1971 to prevent unavailability and overpricing of advertised items.<sup>2</sup> The Rule was based upon extensive research finding that retail food stores frequently did not make food readily available at advertised prices.

In 1989, the Commission amended the Rule.<sup>3</sup> These amendments provide an exception where “the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets.” Furthermore, these amendments provide four defenses: Retail food stores do not violate the Rule if they (a) order advertised products early enough and in sufficient quantities to meet “reasonably anticipated demand,” (b) issue rainchecks for the advertised products, (c) offer comparable products at comparable prices to the advertised products, or (d) offer other compensation at least equal to the advertised value. These amendments eliminated the costs of excessive overstocking, which were passed on to consumers and greatly exceeded any benefits to consumers,<sup>4</sup> while minimizing consumer losses associated with wasted trips to retail food stores.<sup>5</sup>

### II. Regulatory Review

The Commission reviews its rules and guides periodically to seek information

<sup>1</sup> Retail food stores are stores that advertise food prices and sell more than incidental or minimal amounts of food. *Federal Trade Commission: Part 424—Retail Food Store Advertising and Marketing Practices*, 36 FR 8777 at 8781 (May 13, 1971) (“Rule Promulgation”).

<sup>2</sup> *Id.*

<sup>3</sup> *Federal Trade Commission: Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices: Final Amendments to Trade Regulation Rule*, 54 FR 35456 (Aug. 28, 1989) (“Rule Amendment”).

<sup>4</sup> Excessive overstocking caused retail food stores to carry excess inventory, including perishables, and to incur monitoring, recordkeeping, legal and survey costs, and indirect costs to document Rule compliance. *Id.* at 35460–35461. The record indicated that the costs imposed by the original rule exceeded benefits by ratios from over 2½ to one to nearly eight to one. *Id.* at 35461.

<sup>5</sup> *Id.* at 35459.

about their costs and benefits, as well as their regulatory and economic impact. This information assists the Commission in identifying rules and guides that warrant modification or rescission.

Pursuant to this process, on August 18, 2011, the Commission sought comment on whether there is a continuing need for the Unavailability Rule.<sup>6</sup> The Commission also invited comments suggesting modifications to the Rule.<sup>7</sup> Additionally the Commission sought specific comments and evidence concerning whether it should broaden the Rule to include stores not currently covered by the Rule, such as drugstores, department stores, or electronics retailers.<sup>8</sup>

### III. Regulatory Review Comments

The Commission received comments from two organizations and fifty individuals.<sup>9</sup> The Food Marketing Institute (“FMI”) identifies itself as a national trade association with 1,500 members, consisting of food retailers and wholesalers, in the United States and other countries.<sup>10</sup> FMI states that its members operate 26,000 retail food stores and 14,000 pharmacies, make three-quarters of all retail food store sales in the United States, and have combined annual sales of \$680 billion.<sup>11</sup> The Heritage Foundation (“HF”) describes itself as a nonprofit corporation with a mission “to formulate and promote conservative public policies . . .”

Forty-eight individuals explicitly or implicitly supported the Rule by relating personal benefits from retail food store rainchecks.<sup>12</sup> For example,

<sup>6</sup> *Federal Trade Commission: Retail Food Store Advertising and Marketing Practices Rule: Advance Notice of Proposed Rulemaking; Request For Public Comment*, 76 FR 51308 (Aug. 18, 2011) (“Request for Public Comment”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> All comments are available at: <http://www.ftc.gov/policy/public-comments/initiative-387>. This document cites to these comments by indicating the surname or short form for the commenter, e.g., “FMI” for the Food Marketing Institute, and, for comments of more than one page, the page of the comment unless the citation refers to the entire comment. Cites to “John K” reference the comment signed in that way.

<sup>10</sup> FMI at 1.

<sup>11</sup> *Id.*

<sup>12</sup> Hawthorne, DeWitt, Cosser, Dexter, Lewis, Marshall, Thompson, Ash, Herman, Hellmueller, Wright, Ickes, Gregory, Harris, Heiser, Nealy, Haass,

one commenter stated that he accumulated 50 rainchecks in a 6-month period due to stockouts.<sup>13</sup>

Two individual commenters joined the organizational commenters in questioning whether the Commission should retain the Rule.<sup>14</sup> FMI commented that the Rule is unnecessary because competition forces retail food stores to avoid stockouts and to compensate customers even without the Rule.<sup>15</sup> Nonetheless, FMI stated that the Rule imposes no significant costs on retail food stores. FMI also cautioned that if the Commission retains the Rule, it should keep the 1989 amendments to avoid the costs eliminated by those amendments.

HF recommended repealing the Rule, arguing increased competition should protect consumers.<sup>16</sup> In support of this argument, it asserted that the number of grocery stores in America has grown substantially since the Rule was amended in 1989, noting that today there are 92,300 grocery stores nationwide and that large chains run thousands of stores each. It did not provide data on the number of stores in 1989. HF also stated that the number of farmers' markets increased between 1994 and 2011. Finally HF commented that state regulation is adequate to protect consumers where competitive pressure is insufficient.

Fitzsimmons recommended repealing the Rule generally while expanding it in "food deserts."<sup>17</sup> For areas other than food deserts, he argued market competition is sufficient to protect consumers. Fitzsimmons also recommended that the Commission expand the Rule to cover non-traditional retail food stores in food deserts, where competition is insufficient to protect consumers.

Finally, Lunsford recommended repealing the Rule because market competition and state regulatory

agencies adequately protect consumers.<sup>18</sup>

#### IV. Retention of the Unavailability Rule

The Commission retains the rule in its existing form. To determine whether the Rule should be amended, repealed, or retained, the Commission has evaluated a number of factors, including the relative costs and benefits of the Rule and its effect on competition and consumer choice. The Commission has determined that the Rule imposes no significant costs on retail food stores, and it benefits consumers as there is evidence that market or state regulatory forces would not adequately protect consumers without the Rule. Given this record, the Commission has no basis to repeal or amend the Rule at this time.

None of the comments identified any specific costs or burdens associated with complying with the Rule. To the contrary, FMI—which represents grocery companies and thus would have the clearest understanding of any burdens the Rule might impose—commented that it "does not believe the Rule imposes significant costs on retailers."<sup>19</sup> Furthermore, even the comments that opposed retention favored the consumer-friendly practices required by the Rule, including restrictions on overpricing and unavailability.<sup>20</sup> These comments simply opined that, even if the Rule were eliminated, market forces would result in the same arrangements the Rule requires. If this is true, the Rule cannot impose any significant cost.

Conversely, the record lacks factual support to conclude that market forces alone would be sufficient to protect consumers without the Rule.<sup>21</sup> Although comments state that the

number of grocery stores in America has increased, they do not provide any market analysis of the level of competition in this industry.<sup>22</sup> The market may have many participants nationwide, but there is no indication that competition exists sufficient to preserve the benefits of the Rule for all, or even most, local markets throughout the country.

Two commenters that questioned the general need for the Rule asserted that there are geographic areas of lower food marketplace competition, and demographic groups with limited food shopping options.<sup>23</sup> Thus, even if, as asserted, the national-level food marketplace were sufficiently competitive, the Rule would still be necessary to protect groups with limited food shopping options.

Further, there is evidence that even with the Rule, some stores do not respond to the current level of competition by avoiding stockouts and providing rainchecks or other compensation. Eleven commenters complained of difficulties obtaining rainchecks, or of inadequate rainchecks that, for example, expired before sale items were restocked.<sup>24</sup> Thus, the weight of the evidence shows that market forces are not sufficient to ensure that retail food stores make useful rainchecks conveniently available.

HF and Lunsford commented that state consumer protection agencies provide sufficient recourse when retailers deceptively advertise the availability of sale items.<sup>25</sup> They did not, however, submit evidence about actions taken by state agencies. Notably, no state or local regulatory agencies submitted comments. The record, therefore, does not support the argument that state regulations supplant the continued need for the Rule.<sup>26</sup>

Because the Rule does not impose significant costs, the practices it requires benefit consumers,<sup>27</sup> and there is evidence that those practices would not continue in the absence of the Rule,

Skaggs, Pritchard, Goodman, Frame, Cummings, DelSole, Wheat, Marino, John K, Rasley, Bacher, Samuel, Purcell, Dickey, Crofoot, Sinex, Aikins, Anonymous/Mad in Miami, Thorson, Angelo, Bates, Burleson, Boyd, Black, Marcuse, Steenhoven, Gettz, Millison, Nardo, Rose, and Doyal.

<sup>13</sup> Angelo.

<sup>14</sup> FMI, HF, Lunsford, Fitzsimmons.

<sup>15</sup> FMI commented that it did not believe that there is a continuing need for the rule because competitive pressures induce retailers to respond to the needs of their customers, and "[t]here is no incentive for grocery retailers to engage in the types of activity the Unavailability Rule was intended to address." FMI at 2-4.

<sup>16</sup> HF asserted that "market competition clearly can police against any grocery businesses that advertise products that they do not have for sale at the advertised price." HF at 3.

<sup>17</sup> Fitzsimmons recommended that the Rule define food deserts as low-income areas where the nearest grocery store is more than a mile away. Fitzsimmons at 3.

<sup>18</sup> Lunsford argued that "market competition should deter most business from deceptive practices."

<sup>19</sup> FMI at 5.

<sup>20</sup> FMI stated that stockouts hurt retailers because they increase costs while also decreasing customer satisfaction. *Id.* at 3-4. HF stated that "[n]o-one would condone the commercial conduct prohibited by the Unavailability Rule." HF at 2. Lunsford indicated that unavailability and overpricing are not "honest business." Fitzsimmons proposed retaining and expanding the Rule for certain geographic areas to prevent "predatory business practices." Fitzsimmons at 2-3. This support contrasts with the evidence that compliance with the Commission's original Rule was costly and wasteful. *See Rule Amendment*, 54 FR 35460-35462 (noting, for example, that retail food stores stocked excessive inventory and incurred monitoring and recordkeeping costs to comply with the original Rule).

<sup>21</sup> In *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 987-988 (D.C. Cir. 1985), the court found that it was not unreasonable for the Commission, in promulgating the Credit Practices Rule, to discount "abstract or . . . theoretical arguments . . . which have little or no factual support in the record."

<sup>22</sup> HF and Fitzsimmons comment that there are 92,300 grocery stores in America, but do not provide evidence that this number is above a threshold for a sufficiently competitive marketplace. HF at 2, Fitzsimmons at 1.

<sup>23</sup> HF at 3, Fitzsimmons at 2-3.

<sup>24</sup> Dexter, Harris, Heiser, Haas, Pritchard, Cummings, Wheat, John K, Dickey, Crofoot, Burleson.

<sup>25</sup> HF at 4 & n.14, Lunsford.

<sup>26</sup> The four state laws cited by HF do not establish that most states directly regulate retail food store advertising. Indeed, one of those laws broadly prohibits unfair and deceptive practices but does not address specifically the advertising of sale items. Wash. Rev. Code § 19.86.020.

<sup>27</sup> Forty-eight consumer commenters supported continuing to require rainchecks.

the Commission retains the Rule in its present form.

## V. Coverage of the Unavailability Rule

The Commission asked whether it should broaden the Rule's coverage beyond retail food stores.<sup>28</sup> In response, thirty two comments<sup>29</sup> favored extending coverage to include, for example, retail stores generally,<sup>30</sup> Black Friday retailers,<sup>31</sup> and electronics retailers.<sup>32</sup> One comment favored expanding the Rule to include nontraditional food stores located in food deserts.<sup>33</sup> None, however, provided evidence about the effects of amending the Rule's coverage, or evidence that the Rule's present coverage is inadequate. Therefore, the Commission is not proposing to extend the coverage of the Rule.

However, the Commission notes that the Rule is not limited to "traditional" retail food stores. For example, supercenters, warehouse clubs, dollar stores, and drug stores increasingly offer food or grocery products and advertise discounts for these items. Such stores constitute a significant portion of the retail food marketplace. According to the U.S. Department of Agriculture, the proportion of American food sales for home consumption by nontraditional food retailers rose from 13.7 percent in 2000 to 21.5 percent in 2011.<sup>34</sup> The Rule covers these types of stores.

<sup>28</sup> Request for Public Comment, 76 FR at 51309.

<sup>29</sup> See Dexter, Lewis, Marshall, Thompson, Ash, Hellmueller, Wright, Ickes, Gregory, Harris, Heiser, Nealy, Skaggs, Pritchard, Frame, Cummings, DelSole, John K. Bacher, Samuel, Purcell, Crofoot, Sinex, Anonymous/Mad in Miami, Thorson, Bates, Burleson, Boyd, Steenhoven, Gettz, Rose, and Doyal. Several comments suggested amending the Rule to cover specific retailers. See Wright (Walgreens), Ickes (CVS, Rite-Aid, Target), Gregory (Target), Heiser (Target, Wal-Mart), Haas (Walgreens), Frame (CVS), Bates (Wal-Mart, Fred Meyer), Gettz (Walgreens, CVS, Rite-Aid), and Rose (Walgreens, Wal-Mart, Target). The Commission declines to amend the Rule to name specific retailers because, among other things, their business models could change, taking them out of the ambit of the Rule.

<sup>30</sup> See Thompson, Ickes, and Harris.

<sup>31</sup> See Ash.

<sup>32</sup> See Wright, Heiser.

<sup>33</sup> Fitzsimmons.

<sup>34</sup> "Since the late 1990s, nontraditional retailers have steadily increased their relative share of food-at-home sales, compared with traditional retailers. Nontraditional stores' share of food-at-home sales increased from 13.7 percent in 2000 to 21.5 percent in 2011 (traditional foodstores and nonstore food sales—such as mail order, home delivery, and direct sales by farms, processors, and wholesalers—account for the remaining shares). Most of the growth in food sales is due to supercenters and warehouse club stores, whose sales more than doubled over the period. More recently, dollar stores—such as Dollar General and Family Dollar—and drugstores—such as Rite Aid, CVS, and Walgreens—have increased sales by expanding retail food offerings." U.S. Dept. of Agriculture, Econ. Res. Serv., Retail Trends, February 5, 2014,

## VI. Other Suggested Rule Changes

In its request for public comments, the Commission invited suggested Rule changes. In response, comments suggested amending the Rule to:

(1) Prohibit: (a) failure to conspicuously display advertised items, e.g., positioning products so that sale priced items are difficult to identify or locate, and (b) overpricing, e.g., scanning merchandise at full price rather than at the sale price;<sup>35</sup>

(2) require retail food stores to provide rainchecks promptly upon demand;<sup>36</sup> and

(3) require retail food stores to compensate consumers for consequential losses caused by unavailability.<sup>37</sup>

As set forth below, the first and second suggestions are unnecessary because they are already encompassed by the Rule, and the Commission declines to propose the third because the record lacks evidence to support such a change.

### A. Display of Advertised Items and Overpricing

The Rule already prohibits failure to conspicuously display advertised items and overpricing. Consequently, no amendment is necessary to address concerns about these issues.<sup>38</sup>

The Commission has entered two cease and desist orders against retail food stores solely for overpricing,<sup>39</sup> and three for overpricing and unavailability.<sup>40</sup> These orders demonstrate that merely stocking advertised items was not sufficient to comply with the original Rule.

The Commission amended the Rule in 1989 to eliminate explicit display and pricing requirements.<sup>41</sup> At that time, however, the Commission stated "the simple requirement that advertised items be 'readily available to customers'

available at <http://www.ers.usda.gov/topics/food-markets-prices/retailing-wholesaling/retail-trends.aspx>.

<sup>35</sup> Ash, Ickes, Sinex at 1, Black.

<sup>36</sup> Dexter, Heiser, Haas, Cummings, Pritchard, Dickey, Crofoot, Burleson.

<sup>37</sup> Cummings, Boyd, Thorson, Ickes.

<sup>38</sup> Ash, Ickes, Sinex at 1, Black.

<sup>39</sup> *Fred Meyer, Inc.*, 87 F.T.C. 112, 115 (1976); *Safeway Stores, Inc.*, 91 F.T.C. 975 (1978).

<sup>40</sup> *Fisher Foods, Inc.*, 90 F.T.C. 473 (1977); *The Kroger Co.*, 90 F.T.C. 459 (1977); and *Shop-Rite Foods, Inc.*, 90 F.T.C. 500 (1977).

<sup>41</sup> Paragraph 424.1(b)(1)(i) of the original Rule required that where advertised items are not readily available to customers, i.e., displayed for consumers, retail food stores provide "clear and adequate notice that . . . items are in stock and may be obtained upon request." *Rule Promulgation*, 36 FR at 8781. Paragraph 424.1(b)(2) of the original Rule prohibited any failure "to make the advertised items conspicuously and readily available for sale at or below the advertised prices." *Id.*

implicitly includes a requirement that items be stocked in such a way that a reasonable consumer would not be precluded from obtaining them."<sup>42</sup> The Commission further stated that the prohibition against overpricing "is implicit in the requirement that products advertised for sale at a stated price be available."<sup>43</sup> Consequently, the Rule already requires proper display and prohibits overpricing.<sup>44</sup>

### B. Rainchecks

The raincheck defense, 16 CFR 424.2(b), provides that a store complies with the Rule if it offers consumers a "raincheck" when the advertised product is out of stock. Commenters requested two amendments to address barriers they have encountered in the market. First, they asked the FTC to require stores to provide rainchecks during a consumer's initial visit to a store.<sup>45</sup> Second, they requested an amendment to prohibit rainchecks that expire before the store restocks the advertised merchandise.<sup>46</sup> Because the Rule already prohibits these practices, there is no need for amendments.

The raincheck defense only provides protection if the store "offers" a raincheck at the time a consumer attempts to purchase the sale item.<sup>47</sup> By definition, a raincheck is a guarantee to sell an item in the future at its current advertised price.<sup>48</sup> If, at the time of the violation,<sup>49</sup> a store promises to offer a raincheck in the future, it has merely promised to make the requisite offer at a future date. It has failed to offer a

<sup>42</sup> *Federal Trade Commission: Retail Food Store Advertising and Marketing Practices: Notice of Proposed Rulemaking*, 50 FR 43224 at 43226 (Oct. 24, 1985) ("Notice of Proposed Rulemaking").

<sup>43</sup> Paragraph 424.1 of the amended Rule. *Id.* at 43225.

<sup>44</sup> Moreover, advertising one price and charging a higher price is an unfair or deceptive act or practice in violation of Section 5(a) of the FTC Act. See, e.g., *Budget Rent-A-Car System, Inc.*, FTC Docket C-4212 (Jan. 2, 2008).

<sup>45</sup> Heiser, Pritchard, Dickey, Crofoot, and Burleson stated that stores had made them wait excessive periods during a visit to receive a raincheck. Dexter, Heiser, Haas, and Cummings stated that stores had refused to provide rainchecks prior to the final date of sales.

<sup>46</sup> Dexter, Harris, Wheat, John K recommended that the Commission amend the Rule to require rainchecks with no expiration date. The Commission does not have evidence on the costs or benefits of such an amendment, and therefore declines to propose it at this time.

<sup>47</sup> 16 CFR 424.2(b)

<sup>48</sup> *Rain Check Definition*, Oxford Dictionaries, [http://www.oxforddictionaries.com/us/definition/american\\_english/rain-check](http://www.oxforddictionaries.com/us/definition/american_english/rain-check) (last visited Nov. 12, 2014).

<sup>49</sup> The violation occurs when a store advertises a sale price for an item but does not have it in stock and readily available for consumers during the advertised sale period. 16 CFR 424.1.

raincheck at all, and the defense is not available to it.<sup>50</sup>

Similarly, a store that offers a “raincheck” that expires before the store restocks the advertised item cannot use the defense. The raincheck must provide “compensation equal to that of the advertised savings.”<sup>51</sup> A raincheck that expires before consumers can use it has no value, much less value equal to the advertised savings. Therefore, it is not a “raincheck” at all.

These clear requirements are consistent with the purpose of the “raincheck” defense.<sup>52</sup> The defense protects consumers’ ability to purchase items at advertised sale prices without “needless transportation cost[s].”<sup>53</sup> Using a raincheck, a consumer can purchase an item at the sale price during the consumer’s next trip to the store, thereby avoiding extra travel time or expenses. Failing to offer rainchecks at the time it cannot make advertised products readily available to consumers, such as when a store refuses to provide rainchecks until a sale ends, would require consumers to make additional trips and pay extra travel costs, thereby undermining the purpose of the Rule.<sup>54</sup>

### C. Consequential Costs From Unavailability

Four comments noted that consumers may not realize all savings even when offered rainchecks or comparable merchandise under the defenses in paragraphs 424.2(b), (c), or (d) of the Rule.<sup>55</sup> For example, promotions such as “Register Rewards” or coupon doubling may expire before consumers can use rainchecks, or manufacturers’ coupons may not apply to similar products offered under the defense in 16 CFR 424.2(c). Therefore, these comments proposed amending the Rule to require retail food stores to compensate consumers for

consequential costs caused by unavailability.<sup>56</sup>

The record, however, does not contain evidence regarding the nature or extent of any such consequential losses. Nor does it contain evidence to support a factual determination regarding the potential costs or benefits of amending the Rule to require compensation for consequential costs from unavailability. Consequently, the Commission does not propose amending the Rule at this time to require compensation for consequential losses.

### VII. Conclusion

For the reasons described above, the Commission has determined to retain the current Retail Food Store Advertising and Marketing Practices Rule, issue a Rule amendment correcting a typographical error,<sup>57</sup> and cease publishing dissents to the Rule’s previous amendment.<sup>58</sup>

#### List of Subjects in 16 CFR Part 424

Advertising, Foods, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission amends 16 CFR part 424, as follows:

#### PART 424—RETAIL FOOD STORE ADVERTISING AND MARKETING PRACTICES

- 1. The authority citation for part 424 is revised to read as follows:

**Authority:** 15 U.S.C. 41–58.

##### § 424.1 [Amended]

- 2. Amend § 424.1 by removing the words “In connection with the sale of offering for sale” and adding, in their place, the words “In connection with the sale or offering for sale”.

##### § 424.2 [Amended]

- 3. Remove the two statements that follow the text of § 424.2(d).

<sup>50</sup> 16 CFR 424.1.  
<sup>51</sup> *Rule Amendment*, 54 FR at 35463.  
<sup>52</sup> To the extent that there is any ambiguity about the meaning of “raincheck,” it is proper to interpret the term consistently with the purpose of the Rule. See *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 455 (1989).

<sup>53</sup> *Notice of Proposed Rulemaking*, 50 FR at 43230. See also *Id.* at 43225 (“the Rule could produce benefits by saving shoppers an extra trip back to the same store or to another store to purchase the advertised item (the ‘trip gain’).”); *Rule Amendment*, 54 FR at 35459 (the Rule benefits consumers “through the avoidance of trip losses (‘the trip gain’), which are losses that result from the expense of wasted trips to retail outlets for advertised items that are unavailable.”); *Id.* at 35463 (“Savings that have been realized by consumers [from the Rule] are principally the result of reduction in the number of unsuccessful trips made to purchase items that are not in stock.”).

<sup>54</sup> Cosser, Dexter, Lewis, Wright, Ickes, Heiser, Cummings, John K, Rasley.

<sup>55</sup> Cummings, Boyd, Thorson, Ickes.

<sup>56</sup> Thorson proposed amending the Rule to require retail food stores to “duplicate conditions at the time of the sale . . .” Thorson at 1.

<sup>57</sup> Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. The Commission has determined that there is good cause for making this technical correction final without prior opportunity for comment, because this is merely a technical change to correct a typographical error and is not a substantive change.

<sup>58</sup> This will harmonize the Rule with the Commission’s normal practice, which is not to publish dissents in the Code of Federal Regulations. The dissents will remain available to the public at 54 FR 35468.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2014–27798 Filed 11–24–14; 8:45 am]

BILLING CODE 6750–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Parts 2, 157, and 380

[Docket No. RM12–11–002; Order No. 790–A]

#### Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations

**AGENCY:** Federal Energy Regulatory Commission, Energy.

**ACTION:** Final rule; order on rehearing and clarification.

**SUMMARY:** On rehearing, the Federal Energy Regulatory Commission (Commission) reaffirms its basic determinations in Order No. 790 and modifies and clarifies certain aspects of the Final Rule. Order No. 790 amended the Commission’s regulations to clarify that auxiliary installations added to existing or proposed interstate transmission facilities under the Commission’s regulations must be located within the authorized right-of-way or site for existing facilities or the right-of-way or site to be used for facilities proposed in a pending application for case-specific certificate authority or in a prior notice filing under the Commission’s blanket certificate regulations, and use only the same temporary work space that was or will be used to construct the existing or proposed facilities. Order No. 790 also codified the common industry practice of notifying landowners prior to coming onto their property to undertake projects, or certain replacements, or certain maintenance activities.

**DATES:** This rule is effective January 26, 2015.

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