

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Enforcement of Statutes, Regulations,
and Orders**

)
)
)
)

Docket No. PL10-2-000

**REQUEST FOR REHEARING AND CLARIFICATION OF THE EDISON ELECTRIC
INSTITUTE, ELECTRIC POWER SUPPLY ASSOCIATION, AMERICAN GAS
ASSOCIATION, AND INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

The Edison Electric Institute (“EEI”), Electric Power Supply Association (“EPSA”), American Gas Association (“AGA”), and Interstate Natural Gas Association of America (“INGAA”) (collectively referred to as “Energy Associations”) hereby submit this request for rehearing¹ and clarification of the Federal Energy Regulatory Commission’s “Order Authorizing Secretary to Issue Staff’s Preliminary Notice of Violations,” issued December 17, 2009, in this docket.² In the December 17 Order, the Commission established a new procedure that authorizes the Secretary of the Commission, upon the direction of the Director of the Office of Enforcement, to publicly issue “Staff’s Preliminary Notice of Violations” (“Preliminary Notice”) in an investigation conducted under Part 1b of the Commission’s Regulations.³

**Description of Energy Associations Joining This Filing
And Their Interest in This Proceeding**

EEI is the association of U.S. shareholder-owned electric companies. Our members serve

¹ In the event that the Commission determines that rehearing of the December 17 Order does not lie, Energy Associations respectfully request that the Commission treat this pleading as a request for reconsideration. *See, e.g., Allegheny Generating Co.*, 30 FERC ¶ 61,010 at 61,016 (1985) (the Commission “may always entertain motions to reconsider its orders if it so chooses, regardless of whether such motions are properly characterized as requests for rehearing.”); *Northern Border Pipeline Co.*, 92 FERC ¶ 61,243 at 61,771 n.2 (2000) (treating an untimely request for rehearing as a request for reconsideration).

² *Enforcement of Statutes, Regulations and Orders*, 129 FERC ¶ 61,247 (2009) (“December 17 Order”).

³ 18 C.F.R. Part 1b.

95% of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of the U.S. electric power industry. EEI's diverse membership includes companies generating electricity, providing transmission services, and serving retail customers in all regions of the country.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

AGA, founded in 1918, represents 195 local energy companies that deliver clean natural gas throughout the United States. There are more than 70 million residential, commercial and industrial natural gas customers in the U.S., of which almost 91 percent – more than 64 million customers – receive their gas from AGA members. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates. For more information, please visit www.aga.org.

INGAA is a national, non-profit trade association that represents almost all of the interstate natural gas pipeline companies operating in the United States as well as comparable companies in Canada and Mexico. INGAA's member companies, which are subject to regulation by the Commission under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w, operate approximately 217,000 miles of interstate pipeline to transport over 36 trillion cubic feet of

natural gas to customers throughout the United States.

The members of each of these associations are either themselves subject to the regulatory jurisdiction of the Commission under the Federal Power Act (“FPA”), NGA and other statutes, or participate in markets and transactions subject to Commission oversight. As a result, Energy Associations have a vested interest in supporting Commission enforcement procedures that are fair, balanced and transparent. Such procedures will facilitate robust compliance by their members with the statutes, regulations and orders administered by the Commission.⁴

Introduction

Energy Associations, as a group, have long supported robust, firm and fair enforcement procedures to deter violations of the statutes, rules, regulations and orders administered by the Commission. In particular, we have advocated practices and procedures that would: clarify Commission policies, rules and regulations to reduce regulatory uncertainty; provide education and guidance to the regulated community regarding Commission policies and rules to facilitate robust compliance; encourage self-reporting; and provide transparency regarding the Commission’s enforcement priorities.⁵

In this regard, Energy Associations greatly appreciate the recent efforts of the Commission, in the package of orders and reports issued at its December 17 Open Meeting, to

⁴ Because the December 17 Order is in the nature of a generic statement of Commission policy, party status should not be required in order to request rehearing of that order. *See, e.g., Generic Determination of Rate of Return on Common Equity for Electric Utilities*, Order No. 389-A, FERC Stats. & Regs. 30,582 at 61,457 n.2 (1984). Nonetheless, to the extent the Commission considers party status necessary in order to seek rehearing of that order, Energy Associations respectfully move to intervene in the instant proceeding pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure. 18 C.F.R. § 385.212 (2009). For the reasons stated above, Energy Associations each have a vested interest in this proceed that cannot be represented by any other party, making their intervention appropriate and in the public interest.

⁵ *See* “Implementation of the Federal Energy Regulatory Commission’s Enforcement Authority,” White Paper Prepared on Behalf of AGA, EEI, EPSA, Independent Petroleum Association of America, INGAA, Natural Gas Supply Association, and Process Gas Consumers Group, filed in Docket No. AD07-13-000 (Nov. 17, 2007).

provide, as the Commission describes, more transparency regarding its enforcement activities and priorities, and to improve its enforcement procedures to ensure that the subjects of Commission investigations have a full and fair opportunity make their case. In particular, the 2009 Report on Enforcement, and the “Policy Statement on Disclosure of Exculpatory Materials,”⁶ will provide welcome transparency and increased fairness in the Commission’s enforcement program and procedures.

Energy Associations and their members are concerned, however, that the Preliminary Notice procedure laid out in the December 17 Order may not achieve a fair balance between the potential for undue reputational harm to an entity under investigation and the added transparency the Commission suggests this procedure would provide. As a result, Energy Associations request that the Commission grant rehearing of the December 17 Order for the limited purpose of revising the Preliminary Notice to remove the identity of the entity or entities that are the subject of the investigation in question. As explained in the Request for Rehearing below, Energy Associations believe making this targeted change to the new procedure announced in the December 17 Order will better achieve the balance sought by the Commission between “the need to protect the subject’s confidentiality in the early stages of an investigation with the public interest of promoting additional transparency during investigations.”⁷

In addition, Energy Associations seek clarification and guidance from the Commission concerning the mechanics of how it will apply this new procedure in future cases. To date, there has been no opportunity for industry and public comments on the Preliminary Notice procedure, and thus impacted stakeholders have had no opportunity to provide their views or seek

⁶ *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,248 (2009).

⁷ December 17 Order at P 6.

clarifications. As discussed in the Request for Clarification below, Energy Associations suggest that the Commission provide an opportunity for public comments on the new Preliminary Notice procedure announced in the December 17 Order.

Request for Rehearing

I. Statement of Issue Required by 18 C.F.R. § 385.713(c)(2)

Issue: The Commission erred in adopting a Preliminary Notice procedure that includes the identity of the subject of an ongoing, non-public investigation under Part 1b of the Commission's Rules and Regulations. While the Commission states that this new procedure is intended to promote transparency regarding the Commission's enforcement programs, the December 17 Order does not explain how disclosing the identity of the subject of an investigation will achieve this goal, and why a more limited disclosure of the alleged violation (as described below) is not sufficient to achieve the goal of transparency. Additionally, the decision to disclose the identity of the subject of an investigation in the Preliminary Notice does not strike an appropriate balance between the risk of reputational harm to the subject and the public interest in promoting additional transparency during investigations, contrary to the Commission's conclusion. *See* December 17 Order at PP 6-7.

II. To Strike a More Reasonable Balance Between Transparency and the Risk of Undue Reputational Harm, The Commission Should Revise the Preliminary Notice Described in the December 17 Order to Remove From That Notice The Identity of the Subject of an Investigation

In the December 17 Order, the Commission crafted a new procedure for investigations conducted under Part 1b of the Commission's regulations that authorizes the Secretary of the Commission to publicly issue a "Staff's Notice of Preliminary Violations" ("Preliminary Notice"), upon direction of the Director of Enforcement, after the subject of the investigation has

had the opportunity to respond to a preliminary findings letter from Enforcement Staff.⁸ The Preliminary Notice will include:

(1) *the identity of the entity or entities that are the subject of the investigation;* (2) the time and the place of the alleged conduct; (3) the rules, regulations, statutes or order that staff alleges were violated; and (4) a concise description of the alleged wrongful conduct.⁹

This Preliminary Notice “should be sufficient to inform members of the public regarding the basic facts surrounding the investigation.”¹⁰

The Commission correctly acknowledges in the December 17 Order the importance of confidentiality in the enforcement process, and that “accelerated public disclosure” of an ongoing investigation can have “adverse consequences” to the reputation of the subject of that investigation.¹¹ However, the Commission goes on to state that it believes the new Preliminary Notice procedures “strike[] a balance . . . [between] the need to protect the subject’s confidentiality in the early stages of an investigation with the public interest of promoting additional transparency during investigations.”¹²

Energy Associations respectfully submit that disclosing the identity of the subject of an investigation in connection with *preliminary* findings by Staff that the subject *may have* violated a statute, regulation or order does not strike the balance the Commission is seeking. While the Commission states that this new Preliminary Notice procedure will “promote transparency,”¹³ it does not explain how disclosing the identity of the subject of an ongoing enforcement

⁸ December 17 Order at P 6.

⁹ *Id.* at P 7 (emphasis added).

¹⁰ *Id.*

¹¹ *Id.* at P 6.

¹² *Id.*

¹³ *Id.*

investigation will serve the goal of providing greater transparency in the Commission's enforcement program. The purpose of providing transparency is to give notice to all parties of behavior that could violate Commission rules, policies and standards. The facts and circumstances of such behavior should more than suffice to provide adequate notice, especially given that the Commission applies its enforcement policies in a non-discriminatory manner, based on the facts and circumstances involved in a given investigation, regardless of the party engaged in the potential violations. For this reason, identification of particular parties, prior to final enforcement disposition, is largely irrelevant. Preliminary Notices could still contain the other more general information about an investigation that is set forth in the December 17 Order – including the time and place of the conduct Commission Enforcement Staff is investigating, the rules, regulations, statutes or orders that Staff alleges were violated, and a description of the alleged wrongful conduct. Providing this information would give significant information to the public and the regulated community regarding the Commission's enforcement activities, fulfilling the Commission's stated goal in this proceeding of providing increased transparency, while more fairly balancing the risk of ultimately unwarranted reputation harm to an entity under investigation.

The December 17 Order does not cite any evidence that would support a claim that disclosing the identity of the subject of an investigation offers meaningful additional transparency benefits above and beyond the other, more general information regarding the conduct under investigation that would be included in a Preliminary Notice. Further, other than pointing to "its experience" that investigations are "likely to become public in any event" (discussed below), the Commission does not offer any explanation of the factors it considered to arrive at its conclusion that the Preliminary Notice procedure "strikes a balance" between the risk

of reputational harm to the subject of an investigation and the transparency benefits public disclosure would provide.¹⁴

Energy Associations believe that the risk of reputational harm to the subject of an investigation resulting from the disclosure of the subject's identity in a Preliminary Notice significantly outweighs any incremental transparency benefits such disclosure might produce.

As the Commission itself acknowledges, early public disclosure of the existence of an investigation can carry significant adverse consequences for the subject of that proceeding.¹⁵

Public disclosure in a Preliminary Notice under the process outlined in the December 17 Order – which will result in the disclosure of *preliminary* allegations of Enforcement Staff that have not been subject to any Commission review – is in fact likely to inflict significant reputational harm on the subject of an investigation. This reputational harm can carry with it potentially serious negative consequences for that entity's stock price and credit ratings, and consequently its ability to attract capital and finance its operations at a reasonable cost. Given that the Commission will have made no determination as to whether it will bring formal charges against the subject of an investigation at the time a Preliminary Notice is publicly issued – and could very well decide ultimately not to pursue the action at all – it would be unfair to subject entities under investigation to this reputational risk.

¹⁴ December 17 Order at P 6; *see also Pennzoil Co. v. FERC*, 534 F.2d 627 (5th Cir. 1976) (holding that the Commission must weigh three factors when considering whether the benefits of publicly disclosing confidential information will outweigh the potential for harm from that disclosure: (1) whether disclosure would significantly aid the Commission in fulfilling its regulatory functions; (2) the harm to the regulated entities that had provided the information and the public from releasing the information; and (3) whether there are alternatives to disclosure that permit consumers to participate in the Commission's proceedings, while protecting the interests of the regulated entities that had provided the information).

¹⁵ December 17 Order at P 5 (noting that early public disclosure can “risk exposing the subject [of an investigation] to undue public suspicion”).

The December 17 Order suggests that the risk of reputational harm to the subject of an investigation under this new procedure is low because “the existence of the investigation is likely to become public in any event, through a negotiated settlement, an order to show cause, or, in the case of a publicly traded company, a securities filing.”¹⁶ However, in the case of a negotiated settlement or an order to show cause, the investigation only becomes public after the Commission itself has made a *final* decision (which only it is empowered to make) to enter into a settlement agreement and close an investigation or move forward with concrete charges against an entity, taking into account all the relevant factual, legal and policy ramifications that may be present. These circumstances are far different from the *preliminary* stage at which a Preliminary Notice will be issued by Staff, where the Commission has not yet had an opportunity to review the case. At this stage, there is still a possibility that the Commission will ultimately choose not to exercise its authority to take a final action such as entering a settlement or pursuing a Show Cause proceeding.¹⁷ Exposing the subject of an investigation to reputational harm at this early stage would be unfair.

Additionally, the decision of a publicly traded company as to whether it will need to disclose the existence of a Commission investigation in a securities filing is highly dependent on the individual circumstances of that company and the facts of the investigation in question. In general, a company must determine whether the circumstances in question exceed a financial “materiality threshold,” and will consider the potential amount of any penalty that might be assessed, the corporate structure of the company (and its parent corporation, if any), and

¹⁶ *Id.*

¹⁷ The Enforcement Staff’s “2009 Report on Enforcement” includes statistics on the disposition of non-public investigations. The data reported there suggests that a large number of these investigations are closed without further action. *See* “2009 Report on Enforcement,” Prepared by the Staff of the Office of Enforcement, Docket No. AD07-13-002, pp. 14-16 (issued December 17, 2009).

potentially numerous other factors. The determination by Enforcement Staff that the facts of an investigation are sufficient to proceed with a preliminary finding that the subject of that investigation may have violated Commission requirements does not necessarily mean that the investigation rises to a level of financial materiality for that particular subject that would require it to make a Securities and Exchange Commission (“SEC”) disclosure. In short, the likelihood for disclosure of a non-public Commission investigation in an SEC filing before the issuance of a show cause order or the approval of a settlement is not as certain as the Commission suggests in the December 17 Order.

For all of the foregoing reasons, Energy Associations respectfully request that the Commission revise the Preliminary Notice described in the December 17 Order to remove from that notice the identity of the subject of an investigation.

Request for Clarification

Whether or not the Commission grants the above Request for Rehearing, Energy Associations request that the Commission provide further guidance and clarification regarding the Preliminary Notice procedure set forth in the December 17 Order. This new procedure has raised several questions for the energy industries regulated by the Commission with regard to how it will be applied in practice. Energy Associations believe providing more details to the regulated community and the public regarding how the Preliminary Notice procedure will be implemented and applied is essential to ensuring that this new process effectively achieves the Commission’s transparency goals.

In the short window of time since this new policy was announced, Energy Associations’ members have raised questions regarding the practical implementation and operation of the Preliminary Notice procedure. These questions include:

- Discretion to Issue a Preliminary Notice – The December 17 Order is unclear as to whether the decision to direct the Secretary to publicly issue a Preliminary Notice rests within the discretion of the Director of Enforcement, or whether issuance of the notice will occur automatically in all cases that have reached the point where Enforcement Staff has issued a preliminary findings letter, and the subject of the investigation has had an opportunity to respond.¹⁸ Additionally, the Order does not spell out whether a Preliminary Notice will issue in a case where the subject of the investigation has raised significant doubt that the action should go forward, or has in fact convinced Enforcement Staff that it should terminate the investigation based on the subject’s response to the preliminary findings letter or subsequent communications.
- Advance Notification to the Subject of an Impending Preliminary Notice – The December 17 Order also does not indicate whether Enforcement Staff will provide any sort of advance notification to the subject of an investigation that it plans to direct the Secretary to publicly issue a Preliminary Notice. The Commission should clarify that as part of the new Preliminary Notice procedure announced in the December 17 Order, Enforcement Staff will provide advance notice to the subject of an investigation that the Director of Enforcement intends to direct the Secretary to issue a Preliminary Notice. This advance notification would give the subject a fair opportunity to prepare for the likely impacts of public disclosure on their business and operations.
- Treatment of Submittals by Third Parties – In some cases, public disclosure of pending investigations is likely to result in the submission of additional evidence, arguments or

¹⁸ The December 17 Order states only that the Secretary of the Commission shall issue a Preliminary Notice “upon direction” of the Director of Enforcement. *See id.* at PP 1, 7, and the ordering paragraph.

other material by third parties, despite the fact that the December 17 Order makes clear that a Preliminary Notice does not confer on such parties the right to intervene.¹⁹ The order is silent, however, as to how Enforcement Staff will treat such submittals. In particular, the Commission does not explain whether such submittals will remain confidential, whether a third party making such a submittal will be under an obligation to keep that submittal confidential, whether the subject of the investigation will be made aware of the third-party submittal, and whether the subject will be given an opportunity to respond to the third party submittal. The Commission should clarify that such submittals will be kept confidential in all cases, and that the subjects of investigation will have notice of such submittals and fair opportunity to review and respond to them. At a minimum, the Commission should clarify that it will require that the confidentiality of such submittals be maintained against public disclosure.

- Effective Date of the New Notice Procedures – The December 17 Order does not clearly state when the new Preliminary Notice procedures will take effect, and how they will apply to currently ongoing investigative proceedings. Energy Associations believe that these new procedures should take effect only after the Commission has granted clarifications regarding their implementation, as discussed below. At a minimum, the Commission should clarify that these procedures will be in effect only for investigative proceedings begun after the December 17, 2009 date of the Commission’s order announcing this new policy.

There may be additional questions surrounding the mechanics of these new enforcement procedures that Energy Associations have not had sufficient opportunity to collect from their

¹⁹ *Id.* at P 7.

members, given the short period of time since the new policy was announced and the intervening holiday season. As a result, the above-enumerated matters should not be viewed as an exhaustive list of the possible questions that may require clarification.

Unfortunately, to date there have been no announced opportunities for industry or public comments on the Preliminary Notice procedure set forth in the December 17 Order.²⁰ As a result, Energy Associations and the regulated industries they represent have had no opportunity (other than the short 30-day window within which to seek rehearing and clarification) to provide policy input or ask clarifying questions that might assist the Commission in crafting procedures that the regulated community understands and that serve to provide greater transparency regarding enforcement programs and priorities.

The December 17 Order represents a significant change in Commission enforcement policy. Therefore, the Commission should provide an opportunity for industry and public comments and requests for clarification and guidance regarding this new policy. Energy Associations request that the Commission open a comment period of at least 30 days to give all segments of the industries regulated by the Commission and all impacted stakeholders a full and fair opportunity to present their views on the Preliminary Notice procedure and to seek clarification and guidance regarding its implementation. Additionally, as noted above, the Commission should not put the Preliminary Notice procedures into practice until it has issued a subsequent order that clarifies the scope of the process and how it will be implemented in practice, consistent with the suggestions offered here.

²⁰ Energy Associations must note that the Preliminary Notice procedure adopted in the December 17 Order could be construed as a substantive rule amending the Commission's regulations governing investigations. Such a construction of the order would trigger a requirement under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, that the Commission provide notice and an opportunity for comment before adopting the new procedure.

Allowing for this additional process will serve to further the Commission's goal of promoting confidence and transparency with respect to its enforcement programs. Energy Associations and their members stand ready to work with the Commission to help it achieve these important goals.

IV. Conclusion and Contact Information

Energy Associations share the Commission's goals of fairness and transparency in its enforcement programs and, consistent with those goals, hereby request that the Commission revise and clarify the Preliminary Notice procedures announced in the December 17 Order, consistent with the discussion herein. If the Commission has any questions regarding this filing, please do not hesitate to contact any of the undersigned representatives.

Respectfully submitted,

_____/s/_____

David K. Owens, Executive Vice President
Business Operations Group
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 508-5000

Nancy Bagot, Vice President of Regulatory Affairs
Electric Power Supply Association
1401 New York Avenue, NW, 11th Floor
Washington, DC 20005
(202) 628-8200

Andrew K. Soto
American Gas Association
400 North Capitol Street, NW
Washington, DC 20001
(202) 824-7215
asoto@aga.org

Joan Dreskin

General Counsel
Timm Abendroth
Attorney
Interstate Natural Gas
Association of America
10 G Street, NE, Suite 700
Washington, D.C. 20002
(202) 216-5928
Counsel for INGAA

January 19, 2010

Document Content(s)

EnergyAssociationsRequestforRehearing.PDF.....1-15