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"FERC's Proposed Disclosure of the Names of Office of Enforcement Targets"

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The Federal Energy Regulatory Commission ("FERC") issued an Order on December 17, 2009 ("Order") that authorized its Office of Enforcement ("OE") to release the names of parties subject to ongoing investigations before the FERC issues an Order to Show Cause. This proposed change in FERC's procedures would significantly impact the rights of parties subject to OE investigations ("Targets") and would likely increase OE's powers to encourage Targets to settle pending investigations.

The OE (which is responsible for pursuing investigations of potential violations of FERC rules, regulations and Tariffs) does not release the name of a Target until after its investigation has demonstrated sufficient evidence of violations of FERC regulations to convince the Commission to issue a formal Order to Show Cause ("OSC"). The Target then would have the option of either contesting the OSC or entering into settlement discussions with the FERC. As of March 8, 2010, FERC's website confirmed this procedure: "All information and documentation received during an investigation, as well as the existence of an investigation, is treated as non-public and only the Commission can authorize the public disclosure of the existence of an investigation or information obtained during an investigation." (emphasis added).

The current procedure is consistent with Section 1b.9 of FERC's rules, 18 C.F.R. § 1b.9, which provides, in part, that "[a]ll information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff except to the extent that (a) the Commission directs or authorizes the public disclosure of the investigation"

The Order (which was implemented without a Notice of Proposed Rulemaking under the Federal Administrative Procedures Act) explained that the FERC (upon authorization from the Director of the OE) would release the name of a Target, and other information, after the subject of an OE investigation has had an opportunity to respond to a preliminary findings letter from the OE which summarizes the alleged violations. The Director of the OE would then be authorized to direct the Secretary of the FERC to issue a public Preliminary Notice of Violations ("PNOV") consisting of: (1) the identity of the entity or entities under investigation; (2) the time and place of the alleged conduct; (3) the rules, regulations, statutes or orders that staff alleges were violated; and (4) a concise description of the alleged wrongful conduct.

FERC explained in the Order that the PNOV procedure would balance the rights of Targets to remain anonymous versus the right of OE to announce the names and other information regarding potential Targets. The Order arguably would benefit the public interest by informing the regulated community about the views of the OE regarding the matter, which could contribute to a better understanding of FERC compliance obligations. The Order would also increase "transparency" by informing the public of matters under investigation by the OE. (The Order appears to be comparable in some ways to the authority that the Director of Enforcement of the Department of Energy ("DOE") has pursuant to 10 C.F.R. § 820.24(a), which authorizes the DOE Director to issue a PNOV, if the Director has sufficient evidence of a violation of the DOE's rules and regulations).

Each of the FERC Commissioners issued separate statements supporting the Order, including Commissioner Spitzer, who explained that: "I recognize that this action is a departure from prior practice and that this departure may come at some cost to the subject company. As noted in the order, a 'cost of accelerated public disclosure is that the entity under investigation is placed in the public eye, with possible adverse consequences to its reputation.' Nonetheless, on balance, the order finds, and I agree, that public disclosure of staff's preliminary findings promotes transparency and amounts to good government because it provides the regulated community (and the public at large) with information regarding those activities Enforcement Staff believes are violative of Commission policies, rules, and orders."

Many energy organizations (including: Independent Power Association of America, Natural Gas Supply Association, Process Gas Consumers Group, American Forest & Paper Association, Edison Electric Institute, Electric Power Supply Association, American Gas Association, Interstate Natural Gas Association of America, and Financial Institutions Energy Group, hereinafter, "Intervenors") sought clarification and/or rehearing of the Order. The Intervenors raised a variety of

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objections to the substantial departure from FERC's longstanding policies. Many of the Intervenor also sought clarification on how the Order would be implemented. In response to these pleadings, FERC issued an Order Granting Rehearing for Further Consideration on February 16, 2010, which effectively stayed the effectiveness of the Order.

One common theme that Intervenor raised was that the release of the name of a party that is involved in an OE investigation, particularly at a preliminary stage of an OE investigation, can create significant adverse publicity and can harm the reputation of the Target. Even if the FERC later concludes that there is insufficient evidence to issue an OSC or if the final investigation concludes that there were no violations, the Target's reputation will inevitably be damaged. In fact, Paragraph 5 of the Order acknowledges that premature release of the Target's identity would "expose the subject to undue public suspicion without staff having conducted sufficient discovery to reach a preliminary finding that the subject may have violated a Commission requirement." The risk of such unwarranted reputational injury is quite real based upon the percentage of OE investigations that do not lead to violations. For example, the 2009 Report on Enforcement, showed that a majority of OE investigations were terminated without further action.

FERC contends in the Order that disclosure of the Target's identity is likely in any case, in part, because the Security and Exchange Commission's ("SEC") rules would compel a Target to disclose such an OE investigation through periodic public SEC filings. The SEC's disclosure rules, however, would only apply to the investigation of a publicly traded company. In addition, the SEC may not require a Target to disclose an investigation until after the OE has moved from a mere "inquiry" to an actual investigation; this determination may also depend upon the materiality of such an investigation to the publicly traded entity.

Intervenor suggested that disclosure of a Target's name may encourage other parties to intervene and/or to petition the FERC to issue an Order to Show Cause, despite the Order's admonition that issuance of a PNOV will not confer a right on third parties to intervene in the proceeding. The OE's investigation also may be complicated once the name of a Target is released because other parties may want to pursue the Target in other forums (e.g., a state regulatory proceeding) or may want to influence the OE's investigation before the FERC has determined that sufficient evidence exists to issue an OSC.

In addition, while there are benefits to making OE's investigation process more transparent, significant transparency is already being achieved through annual OE Reports. In addition, such transparency could be achieved by the OE releasing the facts of the pending investigation, without also releasing the name of the Target. "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," according to Energy Associations, one of the Intervenor. Energy Associations also argued that "[i]dentification of the particular parties, prior to final enforcement disposition, is largely irrelevant."

It is reasonable to predict that the mere threat of disclosure of the names of a Target would intimidate parties into trying to settle an OE inquiry at an early stage to minimize adverse publicity. In fact, even the name of the notice, "Preliminary Notice of Violation," has the connotation of guilt, as opposed to a more neutral description, such as "Notice of Inquiry" or "Notice of Investigation." Targets will be keenly aware that an OE investigation that has been terminated without further action will rarely be as "newsworthy" as a PNOV and therefore that such retraction of PNOV is much less likely to be equally well published as the original PNOV. In other words, it is impossible to "un-ring the bell" once the PNOV has been issued.

The Order raises many questions regarding implementation of the OE's new procedure, including (among others): (1) How will the Director of OE exercise discretion to publish the Target's name?; (2) Will the Director only issue the PNOV after all discussions with the Target regarding the OE's preliminary findings have concluded or will the Director issue a PNOV immediately after a Target has first responded to an OE's preliminary determination?; (3) Will the Target receive any advance notice of the Director's decision?; and (4) What will be the effective date of the Order?

The Order represents a significant change in the FERC's enforcement policy. Clients should be advised of this development and how it may impact discussions with OE. Unless the FERC concludes on rehearing that the Order should be revised, OE will soon have an effective new lever which will likely intimidate parties to OE proceedings and thereby encourage them to settle, perhaps against their own interests, in order to avoid the stigma of being identified as a Target through a PNOV.

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