

123 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 1b

(Docket No. RM08-10-000; Order No. 711)

Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause

(Issued May 15, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Commission is amending its regulations to expand and clarify the right of an entity to submit a written response to the Commission in the event staff intends to recommend that the Commission initiate a proceeding governed by 18 CFR Part 385, or make the entity a defendant in a civil action to be brought by the Commission. Subjects of investigations currently have the right under 18 CFR 1b.19 to be informed in the latter instance, but only in the event staff finds it appropriate and in the public interest. The amendment would grant that right, for both types of proceedings, in all cases except those in which extraordinary circumstances make prompt Commission review necessary to prevent detriment to the public interest or irreparable harm. The amendment also clarifies the timing requirements for such submissions. These changes codify current staff practice regarding recommendations for orders to show cause, and will allow subjects of investigations a fuller opportunity to present their positions to the Commission.

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EFFECTIVE DATE: The rule will become effective immediately upon publication in the
FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Submissions to the Commission upon
Staff Intention to Seek an Order to Show Cause

Docket No. RM08-10-000

ORDER NO. 711

FINAL RULE

(Issued May 15, 2008)

I. Background

1. The procedural rule set forth in 18 CFR .1b.19 (2007) governs the procedures to be followed regarding submissions to the Commission in the event Commission staff recommends that the subject of an investigation be made a defendant in a civil action to be brought by the Commission. Before enactment of the Energy Policy Act of 2005,¹ this provision rarely came into play, as most investigations have been resolved either through closure without further action or by settlement. Indeed, at a recent technical conference on enforcement held by the Commission,² it appeared that many energy practitioners were unaware of the submission process set forth in this regulation, and expressed a desire for more clarity regarding the due process rights of the subjects of staff investigations.

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EPAct 2005).

² Conference on Enforcement Policy, Docket No. AD07-13-000, Nov. 16, 2007.

2. In light of the comments at the technical conference and the need to ensure due process in our investigations, the Commission has reexamined 18 CFR 1b.19 and determined to clarify its provisions and expand the procedural rights it provides.

3. The current language in the regulation provides that staff need only advise the subject of an investigation of staff's intent to seek an order to show cause in the event staff determines that it is appropriate in the interest of the proper administration of the law to do so. However, it is staff's practice to advise the subject of an investigation of such intent in all cases, except where exigent circumstances, such as the danger of irreparable harm, require prompt Commission action. Therefore, we believe it appropriate to codify the current practice and provide subjects the right to be informed of staff's intent, with the concomitant ability to present a response to be provided to the Commission for its consideration along with staff's recommendation.

II. Commission Determination

4. This Final Rule amends 18 CFR 1b.19 to provide that in the event Commission staff intends to recommend to the Commission that it initiate a proceeding under 18 CFR Part 385 against the subject of an investigation being conducted under the provisions of 18 CFR Part 1b, or to recommend that the Commission make the subject of an investigation a defendant in a civil action to be brought by the Commission, the subject of that investigation shall have the right, in all but extraordinary circumstances, to be so informed and to have the opportunity to provide the Commission with a written non-public response to staff's recommendation. The Final Rule also provides that staff's notification to the subject of its right to make a response shall provide sufficient

information and facts to enable the subject to make such a response, and further provides that within 30 days of such notice, the subject may submit its response to staff, which response staff will submit to the Commission together with its own recommendation.

5. Section 1b.19 currently provides that staff may inform the subject of an investigation³ of staff's intent to recommend that the subject be made a defendant in a civil proceeding to be brought by the Commission only when staff determines it is appropriate in the interest of the proper administration of the law. However, as noted above, it is staff's practice to notify the subject of an investigation when it determines to seek an order to show cause in all situations except where exigent circumstances make immediate consideration by the Commission necessary. The current regulation also does not specify the time period by which the subject is to provide its response, providing instead that staff shall inform the subject of the due date. The amended regulation codifies staff's current practice regarding notification and will provide subjects of an investigation with a fuller opportunity to present their positions to the Commission.

III. Information Collection Statement

6. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.⁴ This Final Rule contains no information reporting requirements, and the filings permitted under the

³ The current regulation refers to the subject as a "person." The amended regulation refers to the subject with the broader term "entity," consistent with the meaning of that term as used in 18 CFR Part 1c.

⁴ 5 CFR Part 1320.

regulation are collected during the course of an investigation and, as such, are exempt from the provisions of the Paperwork Reduction Act.⁵

IV. Environmental Analysis

7. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁶ Issuance of this Final Rule does not represent a major federal action having a significant adverse effect on the human environment under the Commission's regulations implementing the National Environmental Policy Act.⁷ Part 380 of the Commission's regulations lists exemptions to the requirement that an Environmental Analysis or Environmental Impact Statement be done. Included is an exemption for procedural, ministerial or internal administrative actions.⁸ This rulemaking is exempt under that provision.

V. Regulatory Flexibility Act Certification

8. The Regulatory Flexibility Act of 1980⁹ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number

⁵ 44 U.S.C. 3518(c); 5 CFR 1320.4.

⁶ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

⁷ Order No. 486, 52 FR 47897 (Dec. 17, 1987); FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (Dec. 10, 1984) (codified at 18 CFR Part 380).

⁸ 18 CFR 380.4(1) and (5).

⁹ 5 U.S.C. 601-612 (RFA).

of small entities. This final rule concerns a matter of internal agency procedure and the Commission therefore certifies that it will not have such an impact. An analysis under the RFA is not required.

VI. Document Availability

9. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426

10. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

11. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov

VII. Effective Date

12. These regulations are effective immediately upon publication in the FEDERAL REGISTER. In accordance with 5 U.S.C. § 553(d)(3), the Commission finds that good cause exists to make this Final Rule effective immediately. It concerns a matter of administrative procedures and expands rather than diminishes the rights of persons appearing before the Commission. There is therefore no reason to make it effective at a later time.

13. The provisions of 5 U.S.C. § 801 regarding Congressional review of Final Rules do not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties, other than to expand the ability of subjects of an investigation to present their views to the Commission before deliberations by the Commission on whether to initiate a proceeding governed by 18 CFR Part 385 against them.

14. The Commission is issuing this as a final rule without a period for public comment. Under 5 U.S.C. § 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. This rule concerns only matters of agency procedure and will not significantly affect regulated entities or the general public, other than to expand the rights of subjects of an investigation to make certain submissions to the Commission.

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List of subjects in 18 CFR Part 1b:

Rules relating to Investigations.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission amends Section 1b.19, Part 1b, Chapter I, Title 18, Code of Federal Regulations, as follows:

Part 1b – RULES RELATING TO INVESTIGATIONS

1. The authority citation for Part 1b continues to read as follows:

Authority: 15 U.S.C. 717 *et seq.*; 16 U.S.C. 792 *et seq.*; 49 U.S.C. 60502;

49 A.P.U.S.C. 1-85; 42 U.S.C. 7101-7352; E.O. 12009, 42 FR 46297.

§ 1b.19 Submissions.

In the event the Investigating Officer determines to recommend to the Commission that an entity be made the subject of a proceeding governed by part 385 of this chapter, or that an entity be made a defendant in a civil action to be brought by the Commission, the Investigating Officer shall, unless extraordinary circumstances make prompt Commission review necessary in order to prevent detriment to the public interest or irreparable harm, notify the entity that the Investigating Officer intends to make such a recommendation. Such notice shall provide sufficient information and facts to enable the entity to provide a response. Within 30 days of such notice, the entity may submit to the Investigating Officer a non-public response, which may consist of a statement of fact, argument, and/or memorandum of law, with such supporting documentation as the entity chooses, showing why a proceeding governed by part 385 of this chapter should not be instituted against said entity, or why said entity should not be made a defendant in a civil action brought by the Commission. If the response is submitted by the due date, the Investigating Officer shall present it to the Commission together with the Investigating

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Officer's recommendation. The Commission will consider both the Investigating Officer's recommendation and the entity's timely response in deciding whether to take further action.

Document Content(s)

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