

FERC Authorizes Accelerated Public Notice of Nonpublic Investigations and Requires Disclosure of Exculpatory Materials

December 18, 2009

On December 17, the Federal Energy Regulatory Commission (FERC or the Commission) issued an Order and a Policy Statement revising its existing policies on the enforcement of its jurisdictional statutes, orders, and regulations.

Accelerated Public Notice of Nonpublic Investigations

The Order authorizes the Secretary of the Commission to issue a notice titled “Staff’s Preliminary Notice of Violations” upon direction from the Director of the Commission’s Office of Enforcement. Under the current practice, if the fact-gathering process in an investigation has led Enforcement Staff to conclude that the subject of the investigation has violated Commission requirements, Staff provides a letter to the subject detailing Staff’s preliminary findings and supporting facts. The subject then has an opportunity to challenge or rebut Staff’s preliminary findings. Under the prior procedure, however, there is no disclosure of the investigation until the matter is resolved by a public settlement or the Commission issues an order to show cause.

Under the new procedure, after the subject has responded to a preliminary findings letter, but before a settlement or an order to show cause, the Commission Secretary will issue “Staff’s Preliminary Notice of Violations” at the direction of the Director of the Office of Enforcement. This notice will be a public notice that will disclose:

- The identity of the entity that is the subject of the investigation
- The place and time of the alleged conduct
- The rules, regulations, statutes, or orders that the entity allegedly violated
- A description of the alleged wrongful conduct

According to the Commission, “[t]he Notice should be sufficient to inform members of the public regarding the basic facts surrounding the investigation.” However, the Notice will not confer any rights on third parties regarding the investigation. In its Order, the Commission recognized that a subject’s interest in confidentiality needs to be balanced against the need to provide more timely and transparent information on investigations. Nevertheless, the Commission justified the acceleration of such public notice, observing that once Commission Staff provides its preliminary findings to the subject of the investigation, the existence of an investigation often becomes public through a negotiated settlement, an order to show cause, or through the securities filings of publicly traded companies.

Disclosure of Exculpatory Materials Under *Brady*

The Commission also issued a Policy Statement requiring Enforcement Staff to disclose exculpatory evidence in its possession to the subject of an investigation, as is required in criminal prosecutions under existing Supreme Court precedent in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under the Policy Statement, during an investigation Enforcement Staff is required to scrutinize the materials it receives to determine whether any of those materials are exculpatory and should be disclosed to the subject of the investigation. After an enforcement matter has been set for a hearing, Commission Staff must provide the presiding Administrative Law Judge with an affidavit stating whether exculpatory materials were given to the subject. Similarly, in an administrative enforcement hearing, the subject may move for disclosure of materials it reasonably believes to be exculpatory and within the custody of Enforcement Staff.

Materials subject to a Commission privilege or immunity may be subject to disclosure under this policy. However, because the privilege belongs to the Commission and not Enforcement Staff, the disclosure of privileged information requires a Commission vote. Because the *Brady* principle applies to evidentiary materials, this disclosure requirement does not apply to Enforcement Staff work-product, strategies, or legal theories.

Although administrative agencies, such as the Commission, are not required to adhere to the *Brady* principle in administrative proceedings, the Commission believes that applying *Brady* will promote fairness in its investigations and enforcement actions, as well as enhance administrative certainty and efficiency.

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