



N A R U C  
National Association of Regulatory Utility Commissioners

July 9, 2010

Mr. Thomas R. Sheets  
General Counsel  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

**Re: *Request to strike or, alternatively, clarify the record in FERC Docket No. EL10-64-000, In the matter of the Petition of the California Public Utilities Commission Seeking a Declaratory Order from the FERC Finding that the CPUCs Decisions Promoting a Feed-in-Tariff for Combined Heat and Power Systems.***

Dear Mr. Sheets:

The National Association of Regulatory Utility Commissioners (NARUC) submits this letter in response to notification a *proposed* resolution has been placed in the record of Docket No. EL 10-64-000. FERC staff submitted the document for the record and listed NARUC as the author and characterized the document as a NARUC “comment on a filing.” *This is, on its face, an inaccurate and incomplete entry in the record that effectively mischaracterizes NARUC’s current policy, the mode/context in which the FERC received the document, and the “authorship” of the document. It is also inconsistent on its face with the FERC’s own ex parte rules. It should be stricken.*

NARUC always broadly circulates draft resolutions that the authors *may* offer for consideration as association policy in advance of NARUC meetings. FERC personnel are, along with many others, on the distribution lists. Frequently drafts change substantially before they are approved. Sometimes a resolution author will choose not to introduce a previously circulated draft or a resolution that is introduced gets tabled or voted down. In the latter cases, the draft never becomes NARUC policy.

Since the circulated drafts are obviously *not* NARUC policy and *may never be* NARUC policy, the Association was very surprised to discover FERC staff lodged one such draft in the record of Docket No. EL 10-64-000 actually listing it as a NARUC comment – with NARUC as the filing party.

When informed, NARUC’s general counsel immediately contacted FERC officials and specifically requested the entry be stricken. FERC counsel strongly believes inclusion of this draft resolution in the record is required to protect the integrity of FERC’s process in contested cases. NARUC does not agree. Arguably it has already had the opposite impact. Moreover, even if some record entry is required under FERC’s rules, the document FERC staff lodged is deficient as is the current description of the “filing.” It is also inconsistent with FERC’s own regulations. At a minimum, to avoid any confusion, any entry must include the entire 35 page document that FERC received and properly reflect who lodged the document in the record and why.

***NARUC is not yet – and may never become – an APA “interested party.”***

Amendments added to the federal Administrative Procedure Act (APA), 5 U.S.C. §§551-557, §557(d)(1) in 1976 by the Government in the Sunshine Act provides the general statement as to the limitations and procedures governing *ex parte* communications. The statutory text targets only communications by “interested parties” and even indicates, at § 557(d)(1)(D) that the proper sanction for a “knowing” violation is allowing the agency to “require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected” This sanction for “knowing” violations, relevant for determining who exactly falls within the category of an “interested party”, is replicated in the FERC’s rules at 18 C.F.R. §385.2201(i), [http://edocket.access.gpo.gov/cfr\\_2010/aprqrtr/pdf/18cfr385.2201.pdf](http://edocket.access.gpo.gov/cfr_2010/aprqrtr/pdf/18cfr385.2201.pdf).

These rules do not apply to the circulation of draft resolutions because NARUC is not, in any reasonable sense of the word, an “interested party.” NARUC obviously did not circulate the draft resolution with any intent of influencing the merits of this proposal<sup>1</sup> or with any idea that it could constitute a violation of any FERC rule or procedure. FERC staff conceded as much during NARUC counsel’s exchanges with them earlier this week. Indeed, circulating a *proposed* resolution with intent to influence federal policy makers would be flatly inconsistent with not only NARUC’s bylaws and constitution, but also with over 100 years of Association practice. NARUC does not advance any specific *proposed* resolution policy outcomes until they are sanctioned in accordance with our rules. Indeed, NARUC’s counsel is filing this letter precisely because even the appearance that we might have done so undermines NARUC’s policy-making process and positions the Association for justified criticism. One clear import of the APA is that “interested parties” actually have an interest in the proceeding that – in the case of a knowing violation – can be affected. NARUC has no current “claim or interest in the proceeding” available for FERC to “dismiss[] den[y] disregard[] or otherwise adversely affect[.]” The only thing being adversely affected is NARUC internal policy making procedures and the reputation of its advocacy staff. The entry should be stricken.

***The resolution – unless and until it passes - is not either “relevant to the merits” or “capable of affecting the outcome of a proceeding, or of influencing a decision or of providing an opportunity to influence a decision” as required by 18 C.F.R. §385.2201(c)(5).***

No federal agency staffs have ever, until the disputed FERC action, filed a draft resolution circulated for NARUC’s consideration in the docket of any agency proceeding as a result of NARUC’s circulation of the text of those documents by fax, e-mail or hand delivery. There is an obvious reason why.

One or more FERC commissioners attend almost every NARUC meeting where resolutions are considered. On information and belief all of FERC’s commissioners are routinely briefed by the Office of External Affairs on the specific text of every NARUC proposed resolution and would have received a copy of all relevant drafts whether OEA was included on a NARUC electronic circulation list or not.

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<sup>1</sup> NARUC does not currently use the subject listserves – as they are predominately populated by NARUC members and staff – as an advocacy tool. That would make no sense. Instead such lists are used to distribute useful information primarily of interest to the bulk of the names on those lists – which are, as noted earlier – NARUC members and staff. While disagreeing the emailing of draft resolutions to such a listserv should *ever* be considered even an exempt *ex parte* contact, NARUC also indicated its willingness to immediately revise its electronic circulation lists to remove all FERC “decisional” personnel from the list to assure no inadvertent repetition of the current circumstance. We are waiting for a response to that offer.

This practice is also routinely practiced, on information and belief, by FERC's OEA analogues at sister agencies, including at least the Federal Communications Commission. The thrust of proposed resolutions are also routinely included in press accounts and daily clippings received in the office of each federal agency Commissioner.

The fact is some and perhaps all potential FERC decisional employees will undoubtedly hear of the thrust of the proposed resolutions whether included on NARUC's listserve or not. The key decisional employees – the FERC Commissioners – will be informed directly by FERC OEAs. Yet the only reason FERC staff included the entry in the record, is because NARUC circulated the package of draft resolutions. Any possible influence of such a draft proposal will occur whether NARUC circulates the draft electronically to a list that includes FERC or does not. From an influence perspective, there is no difference between (i) FERC staff going to NARUC's website and downloading a draft – with no intent to influence the merits of the docketed proceedings, and (ii) NARUC's electronic circulation of the very same proposals – with an obvious interest in assuring no person believes the resolutions are NARUC policy and warning on the face of the document that the proposals – if they pass – could change substantially.<sup>2</sup> Indeed, if NARUC had chosen to simply publish the proposed resolutions in its newsletter, NARUC's counsel has little doubt the disputed record entry would ever have been made by FERC staff.

However, no matter how the draft resolution is delivered, the idea that a preliminary/draft proposal for consideration at NARUC is going to influence the outcome of a FERC proceeding makes no sense. No rational FERC decisional employee would be influenced by the offering of proposed resolution – unless and until the decisional employee sees how the association reacts. *The only influence a draft resolution could possibly ever have on any agency outcome is AFTER NARUC takes action upon it.* Since the proposed resolution does not meet the definitions under 18 C.F.R. §385.2201(c)(5) it should be stricken.

***If FERC does not strike the entry, it must substitute the document it actually received for the one page resolution lodged in the record.***

The FERC staff lodged only one page of a 35 page document. The originally circulated document places the “resolution” in proper context. Among other things, the cover of that document indicates (i) there are several resolutions enclosed, (ii) that they are all drafts “*for consideration*” at NARUC's upcoming meetings and, finally (iii) in 16 point font notes again that: “*these resolutions are DRAFTS,*” adding “*They can be substantially modified before or during the course of the sponsoring committee's consideration of that draft.*”

To anyone familiar with government associations, it is obvious the draft resolution as lodged is not currently – and may never become – NARUC policy and thereby the basis for NARUC advocacy. But if the FERC believes it should remain in the record as an advocacy document, the entry must be changed to include the entire document that was submitted exactly as submitted. It is wholly inappropriate to take one page out of context and post it separately as a “comment” “authored” and “filed” by NARUC.

Counsel is unaware of any United States agency or court precedent that allows an agency receiving what *they deem to be* an advocacy document to *edit it* before placing it in the record.

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<sup>2</sup> NARUC's intense desire that NO decisional employee be influence in any way by a DRAFT position that could change is further illustrated by NARUC's offer to remove FERC decisional personnel from the current electronic circulation lists.

*If FERC does not strike the entry, it must properly characterize the submitting party.*

The current FERC entry lists NARUC as the “author.” That is simply inaccurate. NARUC did not authorize nor did NARUC’s counsel draft the proposed resolution. Moreover, neither NARUC nor its counsel formally submitted the draft as an adopted NARUC position for the record of this proceeding.

Unfortunately, the obvious implication from any examination of the FERC staff’s record entry is that NARUC did authorize the drafting of the resolution and, in particular, the particular policy stance suggested. NARUC did not. The entry also specifies that NARUC submitted the document as a “comment” on the proceeding. NARUC did not.

Even to FERC savvy lawyers, it indicates NARUC has a current position on the merits in that docket. NARUC does not. Indeed, NARUC became aware of the filing precisely because of this incorrect and improper perception by parties to the proceeding and others with interests. The precursor for NARUC’s call to strike the entry was an e-mail from a member commission effectively asking why NARUC filed a proposed resolution in that docket that is clearly not NARUC policy. Moreover, during the drafting of this letter, NARUC received an additional contact from industry representatives interested in the proceeding asking why NARUC had filed a comment in this proceeding in advance of the Association adopting any policy on the issues.

NARUC respectfully suggests that the confusion engendered by the current entry undermines and does not protect the integrity of the FERC process. It clearly indicates NARUC has weighed in favoring one party in the proceeding. NARUC has not done so. The best way to fix this problem is to strike the item from the record. Leaving it in only foments confusion among those interested in the outcome of that docket. NARUC, who does not yet fall in to the category of those interested in the outcome of this docket, is perhaps the only entity involved, excluding FERC’s counsel and OEA, that is not confused by the entry made by FERC staff. Significantly, no party or industry representative was confused about NARUC’s current neutrality in this proceeding by NARUC’s circulation of the draft resolution. Only the surprising decision by agency staff to file the resolution in the record as a NARUC comment caused that.

The Association is very anxious to assure proposals for NARUC policy do not ever find their way into the records of contested proceedings again. In such cases, their probative value should be zero, but as the confusion engendered over this FERC record entry already illustrates, that is not the likely outcome.

If the entry is not stricken, the second best solution is for the FERC Secretary to be listed as the submitting party – with a cover memo from FERC legal counsel over the originally received document outlining (1) how the document was received and (2) why it was deemed necessary to lodge the document in the record of the proceeding. This is the procedure FERC’s sister agency – the Federal Communications Commission – follows when it receives an inappropriate oral or written ex parte. It is also what the FERC’s own regulations appear to require. Specifically, 18 C.F.R. §385.2201(f)(2), which specifies the treatment of prohibited off-the-record communications, requires the SECRETARY to place the communications in the public file that is associated with, but not a part of, the decisional record of the proceeding. Section 385.2201(g)(2) dealing with exempt off-the-record communications specifies written entries are also to be placed in the record by the Secretary. However, NARUC’s broad circulation of draft resolutions is construed, the FERC’s rules indicate the record entry should specify the FERC Secretary as the person entering the document and should include an explanation of how the document was received.

Although NARUC disagrees with the decision to leave the document in the record, we genuinely appreciate the effort by FERC's counsel and the FERC Office of External Affairs to correct the obvious and acknowledged perception problem.

Given that NARUC has not intervened in this proceeding, and unless some version of the disputed draft resolution actually passes NARUC's Board, will not do so, we are especially thankful for the offer for FERC to ALSO lodge this letter and the document originally circulated by NARUC in the record.

To be clear, NARUC is sending this letter to FERC to clarify the DRAFT resolution lodged by FERC staff in the record of this proceeding is not NARUC's position. AS OF TODAY, NARUC HAS NOT TAKEN ANY POLICY STANCE ON THE RELATIVE MERITS OF THE PETITION FILED BY CALIFORNIA IN THIS DOCKET.<sup>3</sup> We reiterate our requests to strike the item or alternatively correct the existing entry to (1) reflect the full unedited document circulated and (2) note the FERC Secretary as the filer with a cover from FERC legal counsel explaining why it is being included in the docket of that proceeding.

Respectfully Submitted,

/s/

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cc: Sandra Waldstein

Attached: Full text of the original document circulated by NARUC

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<sup>3</sup> If the draft resolution is ultimately submitted and then actually does pass the relevant Committees and finally the NARUC Board of Directors at the upcoming NARUC meetings in Sacramento later this month, only then will the undersigned file a late intervention and seek permission to lodge the final and approved version of the resolution in the record of this proceeding. That document, unlike the draft resolution lodged in the record by FERC staff, will be formally filed in the docket and include the undersigned's signature block and can be properly attributed to NARUC as an advocacy contact.