

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ex Parte Contacts and
Separation of Functions

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Docket No. RM08-8-000

Comments of the
National Association of Regulatory Utility Commissioners,
the California Public Utilities Commission, the Nevada
Public Utilities Commission, and the South Dakota Public
Utilities Commission

The National Association of Regulatory Utility Commissioners (“NARUC”), the California Public Utilities Commission (“CPUC”), the Nevada Public Utilities Commission (“NV PUC”), and the South Dakota Public Utilities Commission (“SD PUC”) appreciate the opportunity to provide comments to the Federal Energy Regulatory Commission (“FERC or the “Commission”) in response to its May 15, 2008 Notice of Proposed Rulemaking (“NOPR”) in the *Ex Parte Contacts and Separation of Functions* proceeding (Docket No. RM08-8-000).

COMMUNICATIONS

All pleadings, correspondence, and other communications related to this proceeding should be addressed to the following person:

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BASIS FOR PARTIES' INTEREST

NARUC is the national organization of the State commissions responsible for economic and safety regulation of the retail operations of utilities. Specifically, NARUC's members have the obligation under State law to ensure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, as well as ensuring that such services are provided at just and reasonable rates. NARUC's members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and terms and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. Both Congress¹ and the Federal courts² have long recognized NARUC as the proper party to represent the collective interest of State regulatory commissions. The CA PUC, NV PUC, and SD PUC are NARUC members that were considering filing separate pleadings, but decided instead to just join in the arguments presented by the Association.

DISCUSSION

The Commission is proposing to revise its regulations to clarify its rules governing ex parte contacts and separation of functions as they apply to proceedings arising out of investigations initiated under 18 C.F.R. §1b.1-16 ("Part 1b") of FERC's regulations. This proposal is intended to provide guidance to both FERC litigation staff and persons outside the

¹ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Boards to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns); *Cf.*, 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir. 1994) (where the Court explains "...Carriers, to get the cards, applied to...[NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the [rules] the ICC issued to create the "bingo card" system).

² See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985).

Commission on when FERC decisional employees can be contacted in a further proceedings on matters investigated under Part 1b. The NOPR also proposes clarifying FERC's regulations to specify that intervention is not permitted as a matter of right in proceedings arising from Part 1b investigations. These comments focus on the intervention proposal.

INTERVENTION PROPOSAL

The NOPR suggests revising Rule 214³ to specify that intervention is not permitted as a matter of right in enforcement proceedings arising from Part 1b investigations.⁴ Because Rule 214 makes no specific reference to proceedings arising from Part 1b investigations, the NOPR contends the current rules may be read to allow intervention in such proceedings on the same basis as any other FERC adjudication.⁵ The NOPR reasons that the “more sensible view is that, once an enforcement proceeding is established, intervention should not be available *except under limited circumstances.*” (emphasis added).⁶ The Commission seeks comment on this proposal. To the extent this revision is read to eliminate a State Commission's ability to join as a party to such proceedings via filing a notice, it is poor policy and inefficient - as well as inconsistent with the special role both Congress and Courts have accorded FERC's State colleagues.

³ 18 C.F.R. § 285.214.

⁴ Notice of Proposed Rulemaking, *Ex Parte Contacts and Separation of Functions*, Docket No. RM08-8-000, at P 16 (May 15, 2008). The Commission's rules currently provide that intervention is not appropriate in Part 1b investigations. *Id.* at P 15. Part 1b specifically states, “There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.” *Id.*

⁵ *Id.*

⁶ *Id.* This would leave open the possibility that intervention in an enforcement proceeding might be appropriate in some circumstances, such as where a third party wished to determine the impact of a sanction or other resolution upon its own interests. *Id.* at P 16.

The Federal Power Act explicitly recognizes the special role of State Commissions to protect the public interest.

The critical duty of State Commissions⁷ to protect the public is recognized under federal law. Under the Natural Gas Act (“NGA”), 15 U.S.C. §§ 717, *et seq.*, and the Federal Power Act (“FPA”), 16 U.S.C. §§ 791a, *et seq.*, FERC is given authority over wholesale sales and transmission of natural gas and electric power in interstate commerce to supplement, not supplant, State commission authority over retail natural gas and electric rates and service. Indeed, throughout the NGA and FPA, there are specific provisions directing FERC to cooperate with, and receive and consider the views of State commissions.⁸

Section 308 of the FPA authorizes FERC to admit a State Commission as a party to any proceeding in which the State is interested, see 16 U.S.C. 825g(a). This section contains *no qualifiers* regarding the type of FERC proceedings a State may be granted party status. Indeed, the FPA reflects a "special solicitude" for State agencies "designed to recognize precisely the interest of the [S]tates in protecting their citizens in this traditional governmental field of utility regulation." *Md. People's Counsel v. FERC*, 760 F.2d 318, 320-21 (D.C. Cir. 1985).

⁷ The term “State commission” is explicitly defined in section 2(8) of the NGA, 15 U.S.C. § 717a(8), and in section 3(15) of the FPA, 16 U.S.C. § 796(15), as “the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for sale of natural gas [electric energy] to consumers within the State or municipality.”

⁸ State commissions are explicitly provided authority under various provisions of the NGA and the FPA: (1) to file complaints at the FERC and request hearings over applications concerning rates and charges of natural gas companies (15 U.S.C. § 717c(e)) or of electric utilities (16 U.S.C. § 824d(e)); (2) to file complaints at the FERC and request hearings for the FERC to investigate costs or order the reduction in rates of natural gas companies (15 U.S.C. § 717d) or electric utilities (16 U.S.C. § 824e(b)&(d)); (3) to present its views to the FERC concerning accounts, records or depreciation or amortization rates of natural gas companies (15 U.S.C. § 717h(b)) or electric utilities (16 U.S.C. § 825a); (4) to apply to the FERC by petition complaining of anything done or omitted to be done by any natural gas company in contravention of the provisions of the NGA (15 U.S.C. § 717i) or by any electric utility in contravention of the provisions of the FPA; (16 U.S.C. § 825e); (5) to be appointed to a joint board, conduct a joint conference with the FERC or receive information and reports from the FERC to assist the State commission in its regulation of natural gas companies (15 U.S.C. § 717p(a),(b)&(c)) or electric utility companies (16 U.S.C. §§ 824(g)(1) and 824h(a),(b)&(c)); and (6) to apply for rehearing of any FERC order, and thereafter to file a petition for review with the United States Court of Appeals of FERC orders under the NGA (15 U.S.C. § 717r(a)&(b)) or under the FPA (16 U.S.C. § 825l(a)&(b)). *See, e.g., Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 517-21 & n.18 (1947); *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515, 527 (1944).

Consistent with that special solicitude, FERC's current Intervention Rule provides that a State Commission *is a party to any proceeding* upon filing a timely *notice* of intervention:

§ 385.214 Intervention (Rule 214).

(a) * * *

(2) *Any* State Commission, ... *is a party to any proceeding upon filing a notice of intervention in that proceeding*, if the notice is filed within the period established under Rule 210(b).....

18 C.F.R. § 385.214(a)(2) (emphasis added).⁹

The Commission proposes to amend the Rule, as follows:

§ 385.214 Intervention (Rule 214).

(a) * * *

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) [State Commissions] of this section, may intervene as of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

Imposing limitations on State involvement in FERC enforcement proceedings is not only bad policy, it is inefficient and unnecessary. States are not just another stakeholder. They, like the FERC, are public servants charged with overseeing the operations of regulated entities “in the public interest.” A State Commission that is a party to a proceeding is a *completely different* proposition than that of an intervention request by a market participant. In enforcement proceedings, the regulatory commissions of the States in the market where the alleged market misbehavior has taken place have an undeniable *direct and compelling* interest in such proceedings because of the potentially adverse impact of such misbehavior on ratepayers. The overarching interests of the State are essentially the same as FERC's - to protect ratepayers from

⁹ Order No. 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order No. 376, 49 FR 21705, May 23, 1984; Order No. 2002, 68 FR 51142, Aug. 25, 2003.

unjust and unreasonable rates. Requiring unnecessary proceedings – and potentially extended litigation - *at taxpayer or ratepayer expense* – over specific State notices to be a party is inefficient and inappropriate. Given their expertise and interest in protecting affected ratepayers, they are far more likely to provide information of use to the FERC in its enforcement efforts, than to detract from it. Affected States should be parties as a matter of right in all FERC enforcement cases.

State regulator involvement is crucial to leverage unique State regulatory oversight and to assure a properly functioning market.

The NOPR notes that FERC in *Energy Transfer Partners*¹⁰ addressed the question of intervention in enforcement proceedings arising from Part 1b investigations.¹¹ Without categorically stating that intervention in an enforcement proceeding is impermissible, the Commission stated that, “[a]s a general proposition,” intervention should not be allowed.¹² The NOPR reasons that an enforcement proceeding necessarily focuses on the conduct and culpability of the subject party and does not directly implicate the rights of third parties in the same manner as, for example, a rate proceeding.¹³

The NOPR’s rationale is not a basis for restricting State involvement in such proceedings. As described *supra*, States are not any other third party. State concerns and interests are not the same as any ordinary party. The increase in volume and type of investigations militate for State involvement. The number of firms in the energy markets has increased substantially since the mid 1990s. Even with FERC’s enhanced market manipulation and civil penalty authority under the Energy Policy Act of 2005 (“EPAAct 2005”), players will still test the rules. The

¹⁰ *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007).

¹¹ Notice of Proposed Rulemaking, *Ex Parte Contacts and Separation of Functions*, Docket No. RM08-8-000, at P 14 (May 15, 2008).

¹² *Id.*

¹³ *Id.*

Amaranth/Energy Transfer Partners cases are a prime example. Indeed, these cases are great importance to all State commissions.¹⁴ It is important to energy consumers that competitive markets work unfettered by unethical traders engaged in market manipulation to distort markets, deteriorate legitimate competition, and harm the supply and price of electric and gas service. The number of increasing potential violations certainly affect the interests State commissions are charged with protecting.

The NOPR concludes that intervention by third parties could delay or complicate an enforcement proceeding and sidetrack it from its purpose.¹⁵ However, State regulator involvement will be beneficial to these proceedings. The Commission can leverage the States' unique market oversight while giving State regulators the access to data *they need* to fulfill their statutory responsibilities.¹⁶ States can collaborate with, support, and enhance FERC's own enforcement efforts. Properly informed State Commission actions can complement FERC efforts to avoid potentially inconsistent outcomes and duplicative efforts.

States and FERC have shared responsibility for overall market oversight and regulation. Enhanced information exchange is a critical element of this joint oversight responsibility. States need access to the same scope of data as the Commission and its staff to carry out their own

¹⁴ Amaranth and Energy Transfer Partners attempted to limit the jurisdiction granted to FERC in EPCRA 2005 to address market manipulation with potential to affect my customers wherever they find it. Their claims that the Commodity Futures Trading Commission alone has jurisdiction in certain markets runs contrary to EPCRA 2005 and the needs of the nation's gas and electric consumers. The intent of Congress was to provide the FERC with the tools and jurisdiction to play a primary role in wholesale energy market regulation and oversight, while leaving regulation of the exchanges themselves and terms of exchange-traded instruments to other federal agencies. The statutory provisions establishing FERC's jurisdiction are especially important to the State regulators and our consumers because the FERC has the expertise and relationship with the State regulatory bodies to delineate the important effects of the financial markets on the physical energy markets. This State/federal relationship is continuing to work well as to the implementation of the numerous complex EPCRA 2005 provisions required by Congress. Because NARUC has a direct and significant interest in those cases, we filed amicus briefs supporting FERC's jurisdiction in the various court appeals.

¹⁵ *Id.*

¹⁶ See NARUC's National Electricity Policy (November 2001)(Whether a State has competitive retail markets or more traditional regulatory structures, federal, State and regional agencies and organizations overseeing the development of wholesale energy markets in those States require comprehensive and timely market information.).

legitimate market oversight responsibilities. Increased transparency can only improve regulatory oversight and increase confidence in energy markets. The Commission should continue to assure that its natural partners in market oversight – the States - have the same degree of involvement in these enforcement proceedings.

The NOPR does note that intervention might be appropriate once the enforcement proceeding has reached the stage of determining a sanction.¹⁷ The NOPR says that this might, for instance, allow third parties to participate in determinations that might *directly affect* them, such as the allocation of disgorged profits.¹⁸ As discussed *supra*, State commissions are directly affected before the sanction stage. However, to properly implement this proposal, FERC must have a process that requires specific notification of parties that could have an interest in these determinations, including affected State commissions. A generalized public notice such as the typical Federal Register notice is not sufficient to enable those affected States to participate.

Also, FERC should clarify that the resolution of an enforcement proceeding arising from an investigation under Part 1b does not affect the rights of States to pursue all legal and administrative remedies for the alleged wrongdoing that was the subject of such an investigation.

CONCLUSION

We respectfully request that the Commission incorporate the foregoing proposals in its final rule.

¹⁷ Notice of Proposed Rulemaking, *Ex Parte Contacts and Separation of Functions*, Docket No. RM08-8-000, at P 14 (May 15, 2008).

¹⁸ *Id.* Another situation that differs from the “classic” Part 1b investigation can arise where an entity files a complaint. *Id.* at P 17. The Commission may conduct a complaint proceeding while at the same time ordering a Part 1b investigation. *Id.* In such situations, the Commission has allowed intervention more readily in the complaint proceeding, although intervention would not be proper in the Part 1b investigation. *Id.* This proposed revision is not intended to restrict the Commission’s ability to determine the appropriateness of intervention in individual cases. *Id.*

Respectfully submitted,

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July 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list via electronic mail compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 21st day of July, 2008.

By: _____/s/_____
Grace D. Soderberg