

129 FERC ¶ 61,247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enforcement of Statutes, Regulations, and Orders

Docket No. PL10-2-000

ORDER AUTHORIZING SECRETARY TO
ISSUE STAFF'S PRELIMINARY NOTICE OF VIOLATIONS

(Issued December 17, 2009)

1. In this order, the Commission authorizes the Secretary of the Commission to issue a Staff's Preliminary Notice of Violations (Notice) upon direction from the Director of the Office of Enforcement. This order extends the Commission's efforts to provide the public with notice of and information about enforcement activities. The Notice is designed to increase the transparency of staff's nonpublic investigations conducted under Part 1b of our regulations.¹ The Notice will identify the entity or entities that are the subject of the investigation, the time and place of the alleged conduct, and the rules, regulations, statutes or orders that staff alleges were violated, and also will contain a concise description of the alleged wrongful conduct. The Notice will not confer a right on third parties to intervene in the investigation or any other right with regard to the noticed investigation.

Background

2. Section 1b.9 of the Commission's regulations² requires that information obtained in the course of an investigation remain nonpublic subject to certain exceptions. One of these exceptions applies when the Commission authorizes the public disclosure of information. Specifically, Section 1b.9 provides in pertinent part as follows:

All 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

¹ 18 C.F.R. Part 1b (2009).

² 18 C.F.R. § 1b.9 (2009).

disclosure of the investigation; (b) the information or documents are made a matter of public record during the course of an adjudicatory proceeding; or (c) disclosure is required by the Freedom of Information Act, 5 U.S.C. 552.

3. Currently, most investigations conducted under Part 1b are nonpublic and persons may not intervene in them as a matter of right.³ Generally, there is no public notification of investigations until either the investigation is resolved through a settlement or the Commission issues an order to show cause. Thus, the public does not learn about the nature of the investigation or staff's views of the conduct under investigation until the end of staff's investigation. By this order, and pursuant to 18 C.F.R. §1b.9, the Commission is directing that earlier notice of such investigations be provided in the Notice at the time and under the conditions set forth below.

Discussion

4. Staff in the Office of Enforcement initiates investigations when it has reason to suspect violations or when it has received credible information about potential violations from a variety of sources, both internal and external. Prior to opening an investigation, staff reviews the information received and typically conducts a preliminary examination of the identified activity. Staff may consult publicly or commercially available sources of data, seek input from the Commission staff with expertise in the subject matter, contact the entity involved for an explanation of its actions, or take a combination of these actions. Staff considers a number of factors to determine whether an investigation is warranted, including the nature and seriousness of the alleged violation, the nature and extent of the harm, and others. Once opened, an investigation involves fact-gathering through customary discovery methods such as data and document requests, interrogatories, interviews and depositions. After the fact-finding phase of an investigation, staff develops an opinion regarding whether the investigation should be terminated without further action or instead that the subject may have violated one or more Commission requirements. If staff concludes that the investigation should be terminated, it notifies the subject that staff is closing the investigation. If staff believes the subject may have violated one or more Commission requirements, it seeks authorization from the Director of the Office of Enforcement to provide a letter to the subject that sets forth staff's preliminary findings and the facts and reasons in support of those findings. The subject may then respond to this preliminary findings letter. This practice provides the subject an opportunity to challenge or rebut staff's preliminary findings. Based on the subject's response, staff may re-evaluate its analysis, modify its allegations, or take other action, such as seek authorization from the Commission to commence settlement discussions to attempt to obtain remedies and/or sanctions for the

³ 18 C.F.R. § 1b.11 (2009).

alleged violations.⁴ We note that the majority of investigations terminate without further action and without a preliminary finding of violation.⁵ In such circumstances, staff does not issue a letter containing its preliminary findings. In our experience, when investigations reach the stage of a preliminary findings letter, there is a much greater likelihood that they will culminate in a public settlement or a public order to show cause.

5. As noted, public disclosure does not now generally occur until a settlement is reached or the Commission issues an order to show cause. The timing of any public disclosure of an investigation conducted under Part 1b prior to the conclusion of the investigation is important because premature disclosure could adversely affect the reputation of the subject. Public disclosure at the outset of an investigation would risk exposing 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.

6 One cost of accelerated public disclosure is that the entity under investigation is placed in the public eye, with possible adverse consequences to its reputation. However, in our experience, once staff provides its preliminary conclusions to a subject, the existence of the investigation is likely to become public in any event, through a negotiated settlement, an order to show cause, or, in the case of a publicly traded company, a securities filing.⁶ The absence of disclosure means that a greater amount of time passes before the public becomes aware of potential violations that enforcement staff is investigating. Public disclosure after the subject has had an opportunity to respond to the preliminary findings letter balances the need to protect the subject's confidentiality in the early stages of an investigation with the public interest of promoting additional transparency during investigations. We believe that this order strikes a balance between these competing interests. Accordingly, as part of our ongoing efforts to

⁴The process set forth in this paragraph is discussed in greater detail in the Revised Policy Statement on Enforcement. *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 P 23-32 (2008).

⁵ See, e.g., *2009 Report on Enforcement*, Docket No. AD07-13-002 at 14-17 (2009).

⁶ Publicly traded companies or their affiliates generally reveal in a public filing with the Securities and Exchange Commission any potential liability that could have a material impact on their financial condition. See 17 C.F.R. § 229.330(a)(4)(ii) (2009). In matters involving substantial potential disgorgement or penalties, these filings are often made shortly after the time that staff provides its preliminary conclusions to the subject.

promote transparency and good government,⁷ the Commission is directing the Secretary to issue Staff's Notice of Preliminary Violations, upon direction of the Director of Enforcement, after the subject of the investigation has had the opportunity to respond to staff's preliminary findings letter.⁸

7. The public disclosure in the Notice issued by the Secretary will include (1) the identity of the entity or entities that are the subject of the investigation; (2) the time and the 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. The Notice should be sufficient to inform members of the public regarding the basic facts surrounding the investigation. In the event enforcement staff decides to terminate an investigation after a Notice has been issued, the Commission authorizes the Secretary, upon direction of the Director of the Office of Enforcement, to issue a public notice of termination of investigation. The Notice will not confer a right on third parties to intervene in the investigation or any other right with respect to the noticed investigation.⁹

The Commission orders:

The Secretary shall issue Staff's Preliminary Notice of Violations, upon the direction of the Director of Enforcement, after staff has informed the subject that staff has preliminarily determined from its investigation that one or more violations of applicable rules, regulations, statutes or orders may have occurred and the subject of the investigation has had an opportunity to respond to staff's preliminary findings letter. That Notice shall disclose (1) the identity of the entity or entities that are the subject of the investigation; (2) the time and the place of the alleged conduct; (3) the rules,

⁷ Since the Commission was granted authority to impose sizeable monetary penalties under the Energy Policy Act of 2005, the Commission has implemented multiple measures to provide additional information and guidance to the public about its enforcement program. Among others, these measures have included (1) a November 2007 Enforcement Conference; (2) a Policy Statement on Compliance, *Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058 (2008); (3) a Revised Policy Statement on Enforcement, *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008); and (4) a *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006).

⁸ See *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at P 32 (2008).

⁹ The Commission's rule limiting participation in investigations, 18 C.F.R. § 1b.11 (2009), will continue to apply. See also *American Public Power Ass'n v. FERC*, No. 09-1051, 2009 U.S. App. LEXIS 12327 (D.C. Cir. 2009).

regulations, statutes or orders that staff alleges were violated; and (4) a concise description of the alleged wrongful conduct. The Notice shall not confer a right on third parties to intervene in the investigation or any other right with respect to the noticed investigation.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.