



December 30, 2009

FERC Issues Policy Statements Regarding the Conduct of Investigations and Enforcement Actions

On December 17, 2009, the Federal Energy Regulatory Commission (FERC) issued two policy statements regarding the conduct of investigations and enforcement actions. The first policy statement, intended to provide greater transparency with respect to FERC's non-public investigations and enforcement activities, authorizes the issuance of public notices concerning ongoing, non-public investigations by FERC's Office of Enforcement (OE).¹ The second provides guidance as to OE's obligations to disclose exculpatory materials to the subjects of its investigations.²

I. The Notice Policy Statement

A. FERC Enforcement Procedures Generally

In the Notice Policy Statement, FERC explains that OE Staff initiates a non-public investigation when it has received credible information or otherwise has reason to suspect that a violation of FERC's requirements has occurred. Once an investigation is opened, OE Staff will use customary discovery methods such as document and data requests, interrogatories, interviews, and depositions to gather relevant facts. If, after the fact-finding phase of an investigation, OE Staff concludes that the subject of the investigation may have violated any FERC requirements, OE Staff will, after receiving authorization from the Director of OE (Director), provide a letter to the subject of the investigation setting forth OE Staff's preliminary findings of fact and the reasons supporting its conclusion that a violation may have occurred (Preliminary Findings Letter). The subject may then respond to this letter and seek to challenge or to rebut OE Staff's preliminary findings (Response Letter).³

Section 1b.9 of FERC's regulations⁴ requires that all investigative proceedings and all information and documents obtained by OE Staff in the course of an investigation remain non-public subject to certain exceptions.⁵ Consequently, FERC's previous policy was not to provide any public notice regarding the existence, subject, or

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nature of an investigation, until the investigation had been resolved, either through a settlement or a show cause order.

B. Preliminary Notice of Violations

In the Notice Policy Statement, FERC authorizes the Office of the Secretary (Secretary) to issue OE Staff's Preliminary Notice of Violations, upon direction of the Director, after OE Staff has issued the Preliminary Findings Letter and the subject has had an opportunity to provide its Response Letter. The Preliminary Notice of Violations will include: (1) the identity of the subject of the investigation; (2) the time and place of the alleged conduct; (3) the rules, regulations, statutes, or orders that OE Staff alleges were violated; and (4) a concise description of the alleged wrongful conduct. If OE Staff decides to terminate the investigation after the issuance of the Preliminary Notice of Violations, the Director may direct the Secretary to issue a public notice of the termination of the investigation. FERC further emphasizes that, consistent with current FERC regulations, the Preliminary Notice of Violations does not confer a right on third parties to intervene in the investigation or any other right with respect to the investigative proceeding.⁶

In the Notice Policy Statement, FERC explains that it believes earlier public notice of such investigations under the specified conditions is appropriate as part of FERC's efforts to promote transparency. FERC acknowledges that premature disclosure could adversely affect the reputation of the subject and could expose the subject to undue public suspicion before OE Staff has conducted sufficient discovery to reach a preliminary finding that the subject may have violated a FERC requirement. In FERC's view, however, public disclosure after the subject has had an opportunity to provide the Response Letter strikes an appropriate balance between the need to protect the subject's confidentiality in the early stages of an investigation with the public interest in promoting additional transparency regarding FERC's enforcement activities.

II. The Disclosure Policy Statement

A. Current FERC Policy and Practice

In the Disclosure Policy Statement, FERC notes the Supreme Court's holding in *Brady v. Maryland*⁷ that, in criminal proceedings, the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence "material to guilt or punishment."⁸ FERC states that it has been the longstanding practice of OE Staff to provide subjects of its investigations such exculpatory evidence, even though FERC does not believe that such disclosure is required in its administrative proceedings.⁹

B. The Disclosure Policy Statement

In the Disclosure Policy Statement, FERC states that it is formalizing its existing practice relating to disclosure of *Brady* materials to promote fairness to regulated entities appearing before it, to set forth a procedural framework within which such exculpatory disclosures are made, and to provide guidance to administrative law judges (ALJs), OE Staff, and the regulated community. The Disclosure Policy Statement



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directs OE Staff to scrutinize materials it receives from sources other than the subject of the investigation for material that would be required to be disclosed under *Brady*.¹⁰ Any such materials or information that are not known to be in the subject's possession will be provided to the subject. OE Staff will not, however, conduct any search for *Brady* exculpatory evidence outside of those that it receives through discovery or obtained as part of its investigatory activities. In particular, FERC emphasized that OE Staff will not be required to conduct any search for exculpatory materials that may be in the possession of other agencies.

In the event that FERC sets an enforcement matter for administrative hearing, OE Staff will provide the presiding ALJ an affidavit stating whether exculpatory materials were provided to the respondent. In addition, the respondent may move for the presiding ALJ to require OE Staff to disclose material or information that the respondents believe may be exculpatory.

FERC notes that exculpatory materials or information may be contained in documents subject to FERC privilege or immunity. FERC states that the disclosure of such materials shall be subject to FERC approval because the privileges belong to FERC, rather than OE Staff, and disclosure of information and documents obtained in non-public investigations requires FERC approval.¹¹ FERC further emphasizes that *Brady* disclosure applies solely to evidentiary material, rather than opinions, so that FERC's *Brady* disclosure policy does not entitle respondents to disclosure of OE Staff's strategies, legal theories, or evaluation of evidence.

¹ *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009) (Notice Policy Statement).

² *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,248 (2009) (Disclosure Policy Statement). In addition to the two policy statements, FERC also released, on December 17, 2009, a report on OE's enforcement activities during fiscal year 2009, with separate discussions of the investigations, audits, and market oversight activities performed by OE's four divisions: the Division of Investigations, the Division of Audits, the Division of Financial Regulation, and the Division of Energy Market Oversight. See *2009 Report on Enforcement*, Docket No. AD07-13-002 (Dec. 17, 2009) (Enforcement Report). The Enforcement Report is the first annual report on enforcement activities pursuant to FERC's Revised Policy Statement on Enforcement. *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156 at P 12 (2008) (Revised Enforcement Policy Statement).

³ See 18 C.F.R. § 1b.19 (2009). The rights of subjects to respond to OE Staff's Preliminary Findings Letter are set forth in more detail in the Revised Enforcement Policy Statement. See Revised Enforcement Policy Statement at P 12.

⁴ 18 C.F.R. § 1b.9 (2009).

⁵ Specifically, such information may be publicly disclosed if FERC authorizes such disclosure, the information or documents are made a matter of public record in the course of an adjudicatory proceeding, or disclosure is required by the Freedom of Information Act, 5 U.S.C. § 552. 18 C.F.R. § 1b.9 (2009).

⁶ 18 C.F.R. § 1b.11 (2009).

⁷ 373 U.S. 83, 88 (1963) (*Brady*).

⁸ Disclosure Policy Statement at P 2 (*quoting Brady* at 88).

⁹ FERC notes that, even though courts have held that the Due Process Clause does not require application of *Brady* and its progeny in administrative proceedings, some agencies, including the Securities Exchange Commission and the Commodity Futures Trading Commission, have applied *Brady* in administrative proceedings. At the same time, FERC explains, other



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agencies, including the Federal Trade Commission and the National Labor Relations Board, have declined to apply *Brady* in administrative proceedings.

¹⁰ Notably, FERC does not state whether, in the event there are multiple subjects of a given investigation, OE Staff will review materials received from one subject to determine if they are exculpatory and must be disclosed to one or more of the other subjects of the investigation.

¹¹ 18 C.F.R. § 1b.9 (2009).

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