

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Ex Parte Contacts and Separation of Functions	)	Docket No. RM08-8-000
	)	
Submissions to the Commission Upon Staff	)	Docket No. RM08-10-000
Intention to Seek an Order to Show Cause	)	

**COMMENTS AND REQUEST FOR CLARIFICATION OF FINAL RULE  
OF THE INDUSTRY ASSOCIATIONS**

In response to the Notice of Proposed Rulemaking (“NOPR”) issued May 15, 2008, by the Federal Energy Regulatory Commission (“Commission”) in Docket No. RM08-8-000,<sup>1</sup> the American Gas Association, the Edison Electric Institute, the Electric Power Supply Association, the Independent Petroleum Association of America, the Interstate Natural Gas Association of America, the Natural Gas Supply Association and the Process Gas Consumers Group (hereinafter referred to as the “Industry Associations”), respectfully submit these comments. Additionally, pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure,<sup>2</sup> the Industry Associations respectfully request clarification of two provisions of Order No. 711,<sup>3</sup> a Final Rule the Commission issued in Docket No. RM08-10-000 concurrently with issuance of the NOPR.

The Industry Associations commend the Commission for taking a number of significant steps to clarify its regulations and improve its overall enforcement program. In initiating these actions, which include the NOPR and Order No. 711, the Commission

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<sup>1</sup> *Ex Parte Contacts and Separation of Functions*, 73 Fed. Reg. 29451 (2008).

<sup>2</sup> 18 C.F.R. § 385.212 (2008).

<sup>3</sup> *Submissions to the Commission Upon Staff Intention to Seek an Order to Show Cause*, 73 Fed. Reg. 29431 (2008).

invited extensive comments from industry participants<sup>4</sup> and thoughtfully and carefully considered them. We applaud the Commission for its responsiveness in working to improve regulatory certainty for industry participants.

The Industry Associations fully support the Commission's goal in the NOPR of ensuring similar treatment as between its own investigative staff ("Investigative Staff") and the subject of an investigation (the "Subject"). To that end, the Commission should ensure fairness by providing for such similar treatment throughout investigation and enforcement proceedings, including during the early stages of an investigation prior to the issuance of a show cause order.

Once a show cause order has been issued, the proposed changes to the Commission's regulations regarding off-the-record communications and separation of functions are designed to ensure parity between Investigative Staff and the Subject with regard to communications to the ultimate decision makers at the Commission. But under the NOPR and the Commission's revised policy statement on enforcement,<sup>5</sup> prior to the issuance of a show cause order, Investigative Staff would have unrestricted access to Commissioners, their assistants, and other decisional employees, while the Subject would be able to communicate only in writing. This would put the Subject at a distinct disadvantage in making its case to decisional employees. The Commission should ensure that the Subject is afforded an opportunity to communicate its case to the Commissioners, their assistants, and other decisional employees in a manner comparable at all times to that afforded Investigative Staff.

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<sup>4</sup> The Commission provided opportunities for both oral comments, *e.g.*, the November 14, 2007, Enforcement Conference, and written comments, *e.g.*, the white paper the Industry Associations submitted November 14, 2007, in Docket No. AD07-13-000.

<sup>5</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, issued in Docket No. PL08-3 on May 15, 2008 ("Revised Policy Statement").

Moreover, the Commission should provide the Subject an adequate opportunity to respond to the investigator's report. Due process requires that the Subject have an opportunity to know the full case being made against it and to be able to respond to it before a show cause order is issued. Accordingly, the Industry Associations request that the Subject be privy to the entire case Investigative Staff is presenting to the Commissioners, *i.e.*, the full set of material facts and legal conclusions appearing in the investigator's report, at the same time the report or draft report is submitted to any decisional employee. In addition, if the investigating officer's initial report is modified to include new findings or draw new conclusions adverse to the Subject, the Subject should have an opportunity to respond to those modifications.

### **IDENTITIES AND INTERESTS**

The American Gas Association ("AGA"), founded in 1918, represents 202 local energy utility companies that deliver natural gas to more than 64 million homes, business and industries throughout the United States. AGA members deliver 92 percent of all natural gas provided by the nation's natural gas utilities.

The Edison Electric Institute ("EEI") is the association of U.S. shareholder-owned electric companies. EEI members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry and represent approximately 70 percent of the U.S. electric power industry.

The Electric Power Supply Association ("EPSA") is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible

facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers.

The Independent Petroleum Association of America (“IPAA”) represents the companies that drill 90 percent of the nation’s oil and natural gas wells. These companies produce 82 percent of American natural gas and 68 percent of American oil.

The Interstate Natural Gas Association of American (“INGAA”) represents North American companies that own and operate interstate and interprovincial natural gas pipeline companies. INGAA’s United States members account for over 90 percent of all natural gas transported and sold in domestic interstate commerce.

The Natural Gas Supply Association (“NGSA”) represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

The Process Gas Consumers Group (“PGC”) is a national association of industrial gas consumers that require natural gas in many of their key operations. Through representation before legislative bodies, governmental agencies, courts, and the general public, PGC works to promote coordinated, rational, and consistent federal and state policies relating to natural gas and its transportation.

The Industry Associations’ members will be directly affected by the outcome of these proceedings. Various aspects of the operations of our members are regulated by the Commission and individual members may thus at some point have to respond to an investigation or enforcement action by the Commission. Our member companies are,

therefore, directly affected by the Commission's rules governing the conduct of its investigation and enforcement proceedings. Accordingly, the Industry Associations' members have a direct and substantial interest in the issues raised in these proceedings.

## **BACKGROUND**

On May 15, 2008, the Commission took a number of significant steps to clarify its regulations and improve its overall enforcement program. In the NOPR, the Commission proposes to revise its regulations governing off-the-record ("*ex parte*") communications (Rule 2201) and the separation of functions (Rule 2202) to clarify their application to proceedings arising out of investigations under Part 1b of the Commission's regulations. More specifically, under the NOPR Rules 2201 and 2202 would apply to Part 1b investigatory proceedings once the Commission issues a show cause order. Concurrent with issuance of the NOPR, the Commission instituted a new policy under which the Subject may not communicate, except in writing, with the Commissioners or their personal staffs about an investigation.<sup>6</sup>

Through Order No. 711, the Commission modified its internal procedures to clarify and expand the rights afforded to the Subject once Investigative Staff determines to submit a report recommending issuance of a show cause order. Under Order No. 711, once this determination is made the Subject shall receive notice and an opportunity to respond. The subject's response will be paired with Investigative Staff's recommendation, and the two will be sent to the Commission for side-by-side consideration.

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<sup>6</sup> NOPR at P 11, *citing* Revised Policy Statement, *supra*, at P 27.

## NOPR COMMENTS

By expanding the application of Rules 2201 and 2202, the NOPR seeks to “ensure similar treatment of investigative staff and respondents to a proceeding.”<sup>7</sup> The Industry Associations support the Commission’s goal of ensuring similar treatment between Investigative Staff and the Subject. Consistent with the overall goal of ensuring such similar treatment, the Industry Associations offer a refinement to the new regulations. Specifically, the Commission should ensure similar treatment of Investigative Staff and the Subject regarding communications with Commissioners and other decisional employees.

As noted above, the NOPR proposes to begin applying the separation of functions and *ex parte* restrictions to investigative proceedings when the Commission issues a show cause order. In effect, once a show cause order has been issued, both the Commission’s non-decisional staff and the Subject are intended to be on par vis-à-vis communications to the Commissioners and other decisional employees. However, under the proposed regulations as currently drafted, the same cannot be said regarding communications prior to the issuance of the show cause order.

The NOPR observes that Commission policy now prohibits the Subject from communicating, in person or by telephone, with the Commissioners or their personal staffs concerning an ongoing staff investigation.<sup>8</sup> Commission policy does not prohibit written communications to Commissioners and their assistants.<sup>9</sup> Under the NOPR, once a show cause order has been issued, all communications between the Subject and any

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<sup>7</sup> *Id.* at P 13.

<sup>8</sup> *See Revised Policy Statement, supra*, at P 27.

<sup>9</sup> *Id.*

decisional employee, including the Commissioners and their assistants, must be on the record.<sup>10</sup> In other words, under the NOPR together with the policy, at all times, including prior to the issuance of a show cause order, the Subject may communicate to the Commissioners and their assistants about the investigation only in writing.

In contrast, the Commission's Investigative Staff does not appear to be similarly limited. To be sure, the NOPR proposes that the staff separation of functions restrictions would apply to investigative proceedings, but only after the issuance of a show cause order.<sup>11</sup> Thus, under the NOPR and policy, it appears that – prior to the issuance of the show cause order – the Commission's Investigative Staff may communicate both in writing and orally with any decisional employee, including the Commissioners and their assistants.

The Industry Associations appreciate the Commission's efforts to clarify its regulations regarding communications to decisional employees about ongoing investigations. The proposed regulations go a long way in helping to ensure that the Commission's roles as prosecutor and adjudicator are not blurred either in actuality or perception, and that the Subject is on an equal footing with the Commission's Investigative Staff in terms of making its case to the ultimate decision makers. However, the Industry Associations contend that more is needed to ensure actual and perceived communication parity for the Subject and Investigative Staff prior to the issuance of a show cause order.

In the final rule, the Commission should ensure that the Subject is afforded an opportunity to communicate its case to the Commissioners, their assistants, and other

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<sup>10</sup> See proposed § 385.2201(c)(1)(i).

<sup>11</sup> See proposed § 385.2202.

decisional employees comparable to that afforded the Commission's own Investigative Staff. If Investigative Staff were to have unrestricted access to the Commissioners and their assistants prior to the issuance of a show cause order, while the Subject could communicate to the Commissioners and their assistants only in writing, the Subject would clearly be at a distinct disadvantage in making its case.

It is not enough to ensure similar treatment after a show cause order is issued. Much goes on in the preliminary stages of an investigation that demands parity between Investigative Staff and the Subject, including, most notably, settlement discussions. As the Commission noted in its Revised Policy Statement on Enforcement, Investigative Staff will attempt to reach a settlement of an investigation before recommending an enforcement proceeding and will seek authority from the Commission to negotiate a range of potential civil penalties and remedies.<sup>12</sup> Obtaining such authority will necessitate a full exploration of the issues and alleged violations being confronted by the Subject. If Investigative Staff were to have unrestricted access to the Commissioners, their assistants, and other decisional employees, who only have access to the written statements of the Subject, the Subject would be at a distinct disadvantage in presenting its views to the Commission regarding the need for a show cause order, enforcement proceedings, and the appropriate range of penalties and remedies if any.

Thus, the Industry Associations urge the Commission to ensure similar treatment for the Commission's Investigative Staff and the Subject in the early stages of an investigation prior to the issuance of a show cause order. Specifically, the Industry Associations encourage the Commission to allow oral communications with Commissioners and other decision-making employees by both Investigative Staff and the

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<sup>12</sup> See *Revised Policy Statement on Enforcement*, at PP 33-34.

Subject. This would promote the free flow of information and open discussions to ensure that decisions on issuance of show cause orders are well founded, and it would reflect that investigative-stage proceedings are sensitive and best allowed to be undertaken with private rather than on-the-record discussions. This solution also would permit the Commission to communicate with Investigative Staff as part of its ongoing management of Commission resources and effort to track progress on pending matters.

### **REQUEST FOR CLARIFICATION OF ORDER NO. 711**

We appreciate the Commission's newly promulgated Order No. 711, which gives the Subject an opportunity to prepare a response that will be submitted to the Commission for side-by-side consideration with the investigator's report recommending issuance of a show cause order. We also appreciate the Commission's detailed explanation of the investigative process as reflected in the Revised Policy Statement. Consistent with the Commission's goal of making its enforcement procedures clear and balanced, a goal running through Order No. 711, the Revised Policy Statement, and the NOPR, the Commission should adopt two clarifications regarding the opportunity to respond.

First, the Subject should receive all of the material facts and legal conclusions being relied on in the investigator's report. Section 1b.19 as amended by Order No. 711 provides that the notice of intent to seek a show cause order "shall provide sufficient information and facts" to enable the Subject to prepare a response. The requirement necessarily raises questions over what is "sufficient." The Commission should allow the Subject to see the entire case that is being presented (more specifically, the full set of

material facts<sup>13</sup> and legal conclusions appearing in the investigator's recommendation). Providing the entire case to the Subject is consistent with the Commission's objective of ensuring similar treatment for Investigative Staff and the Subject. We therefore ask the Commission to clarify that for purposes of Section 1b.19, "sufficient information and facts" means all material facts and legal conclusions appearing in the Investigating Officer's recommendation.<sup>14</sup>

Second, if an investigator's report is revised after a response is tendered, the Subject should be allowed to answer. Section 1b.19 is silent on whether an Investigating Officer may modify his or her recommendation after receiving the Subject's response.<sup>15</sup> To ensure that the Subject has an opportunity to make a complete response to the investigator's report, and to ensure that the Commission receives a full and balanced presentation of the facts and arguments concerning a potential show cause order, the Commission should clarify that if an investigator's report is modified to rebut the response or to make revisions adverse to the Subject, the Subject will be given an additional opportunity to respond. We therefore ask the Commission to clarify that if an Investigating Officer's recommendation is modified after receiving a Section 1b.19 response, and the modification either rebuts the response or makes revisions adverse to the Subject, the Subject would be entitled to receive the material facts and legal

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<sup>13</sup> The material facts consist of all facts appearing in the Investigator's report except for the identity of individual complainants.

<sup>14</sup> If the Commission is inclined, it could amend the second sentence of Section 1b.19 to read: "Such notice shall contain *all material facts and legal conclusions contained in the Investigating Officer's recommendation.*"

<sup>15</sup> The Revised Policy Statement indicates that investigative staff may reconsider its views after the subject of an investigation has had an opportunity to respond to the investigative findings and conclusions and furnish additional information. *See Revised Policy Statement* at P 32 ("If this process alters the complexion of the investigation, staff reconsiders its views.").

conclusions appearing in the amended recommendation, and have 30 days to submit an amended response.<sup>16</sup>

## CONCLUSION

Wherefore, the Industry Associations respectfully request that the Commission consider these comments and requests for clarification in these proceedings.

Respectfully submitted,

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<sup>16</sup> If the Commission is inclined, it could achieve this result by adding the following two sentences to the end of Section 1b.19: *“After receiving a response from the subject of an investigation, if the Investigating Officer’s recommendation is amended to rebut the response or to make revisions adverse to the subject of the investigation, the subject of the investigation shall be given all material facts and legal conclusions contained in the Investigating Officer’s recommendation, as amended. Within 30 days of receiving the amended facts and conclusions, the subject of the investigation may submit to the Investigating Officer an amended non-public response.”* To the extent necessary, the Industry Associations request clarification of Order No. 711 in Docket No. RM08-10-000 to propose these revisions to the regulatory text of Section 1b.19.

**AMERICAN GAS ASSOCIATION**

/s/ Andrew K. Soto  
Andrew K. Soto  
American Gas Association  
400 N. Capitol Street, NW  
Washington, DC 20001  
(202) 824-7215  
[asoto@aga.org](mailto:asoto@aga.org)

**EDISON ELECTRIC INSTITUTE**

/s/ Edward H. Comer  
Edward H. Comer  
Vice President & General Counsel  
Barbara A. Hindin  
Associate General Counsel  
Henri D. Bartholomot  
Director, Regulatory Legal Issues  
701 Pennsylvania, NW  
Washington, DC 20004  
(202) 508-5000  
[ecomer@eei.org](mailto:ecomer@eei.org)  
[bhindin@eei.org](mailto:bhindin@eei.org)  
[hbartholomot@eei.org](mailto:hbartholomot@eei.org)

**ELECTRIC POWER SUPPLY ASSOCIATION**



Nancy Bagot  
Nancy Bagot  
Vice President of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, NW, 11<sup>th</sup> Floor  
Washington, DC 20005  
(202) 628-8200  
[NancyB@epsa.org](mailto:NancyB@epsa.org)

**INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA**

/s/ Susan W. Ginsberg  
Susan W. Ginsberg  
Vice President, Crude Oil and  
Natural Gas Regulatory Affairs  
Independent Petroleum Association  
of America  
1201 15<sup>th</sup> Street, NW, Suite 300  
Washington, DC 20005  
(202) 857-4728  
[sginsberg@ipaa.org](mailto:sginsberg@ipaa.org)

**INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

/s/ Joan Dreskin  
Joan Dreskin  
General Counsel  
Timm Abendroth  
Attorney  
Dan Regan  
Regulatory Attorney  
INGAA  
10 G Street, NE, Suite 700  
Washington, DC 20002  
(202) 216-5928  
[jdreskin@ingaa.org](mailto:jdreskin@ingaa.org)  
[tabendroth@ingaa.org](mailto:tabendroth@ingaa.org)  
[dregan@ingaa.org](mailto:dregan@ingaa.org)

**NATURAL GAS SUPPLY ASSOCIATION**

/s/ Patricia W. Jagtiani  
Patricia W. Jagtiani  
Vice President of Regulatory Affairs  
Natural Gas Supply Association  
805 15<sup>th</sup> Street, NW, Suite 510  
Washington, DC 20005  
(202) 326-9311  
[pjagtiani@ngsa.org](mailto:pjagtiani@ngsa.org)

**PROCESS GAS CONSUMERS GROUP**

/s/ Dena E. Wiggins

Dena E. Wiggins

Michael W. Brooks

SUTHERLAND ASBILL & BRENNAN

LLP

1275 Pennsylvania Avenue, NW

Washington, DC 20004-2415

(202) 383-0100

[dena.wiggins@sablaw.com](mailto:dena.wiggins@sablaw.com)

*Attorneys for*

*The Process Gas Consumers Group*

July 21, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., July 21, 2008.



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Nancy Bagot, VP of Reg. Policy