

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

**MidAmerican Energy
PacifiCorp**

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Docket No. EC05-110

REQUEST FOR REHEARING, OR
ALTERNATIVELY, MOTION FOR STAY
OF ORDER AUTHORIZING MIDAMERICAN ENERGY/PACIFICOP
OF
PUBLIC CITIZEN'S ENERGY PROGRAM

January 6, 2005

Pursuant to Section 313 of the Federal Power Act, 16 USC § 8251, and rules 212 and 713 of the Rules and Regulations of FERC, 18 CFR §§ 385.212, .713, Public Citizen's Energy Program hereby requests a rehearing, or alternatively, move for a stay of FERC's December 20 order in the above-captioned proceeding authorizing the MidAmerican and PacifiCorp request for a disposition of jurisdictional facilities resulting from the sale of PacifiCorp to a wholly-owned subsidiary of MidAmerican. "Order Authorizing Disposition of Jurisdictional Facilities," 113 FERC ¶61,298.

The order harms the public interest and consumers in that it results from unlawful *ex parte* meetings with energy company executives and it denies consumers due process of law by authorizing such a huge merger without an evidentiary hearing.

I. SPECIFICATION OF ERRORS

- a. FERC Commissioners are forbidden by the Administrative Procedure Act (APA) to hold off-the-record, secret meetings when the Commissioners know that the parties involved, and the content and subject of those meetings, "will be noticed" for hearing.
- b. The May 27, 2005 filing by the companies with the U.S. Securities and Exchange Commission provided the documentation that the matter would "be noticed" for hearing. Therefore, the multiple off-the-record meetings company executives had with FERC Commissioners from June 7 through June 14, 2005 are in violation of the APA.
- c. An evidentiary hearing is required to allow effective challenges to the subject matter discussed during these multiple off-the-record meetings to determine if FERC Commissioners were unduly prejudiced. Public Citizen requested a remedy of requiring all participants in the *ex parte* meetings to testify under oath as to who said what during all meetings as part of the evidentiary hearing.
- d. FERC must make available to the public records of meetings from the files of all FERC Commissioners, even if those Commissioners have since departed FERC.

II. ARGUMENT

According to documents obtained by Public Citizen through the Freedom of Information Act,¹ MidAmerican-PacifiCorp executives held multiple private meetings with FERC Commissioners before

¹ FOIA No. FY05-109.

the companies' July 22 filing at FERC and after the companies filed details of the merger with the U.S. Securities and Exchange Commission on May 27, 2005.²

Representatives of MidAmerican and Pacificorp held multiple meetings with FERC Commissioners between June 7 and June 14, 2005 to discuss their proposed merger. These company representatives included David L. Sokol, Tom Bonner and Jonathan Weisgall from MidAmerican and Pacificorp 's Judi Johansen, and they met with some or all of the FERC Commissioners. Public Citizen doesn't know exactly how many secret meetings occurred or how many participants there were because documents made available through FOIA do not provide a comprehensive list of such meetings.

Because of the lack of a complete record of such meetings, Public Citizen appealed to FERC on September 2 seeking a more complete response to our original August 4 FOIA request. On October 19, FERC General Counsel John Moot responded to our appeal, claiming "that all responsive documents have been provided."

But at the same time, Moot wrote that at the time of Public Citizen's request (August 4), "former Chairman Pat Wood was no longer employed by the agency, and consequently, his general and personal files are no longer available to us."

How can "all responsive documents" been provided to Public Citizen when FERC admits that relevant records of then-FERC Chairman are no longer available? Just because a FERC Commissioner departs, the records of his/her official meetings remain the property of the American people. Would it be accurate to say that under FERC's apparent interpretation of the Freedom of Information Act, a former FERC Chairman's record at the Commission ceases to exist upon her/his departure? If so, that conflicts with FERC's document retention obligations under federal law.

As a result of FERC's policy of failing to retain records of some of Pat Wood's official meetings, the need for Public Citizen's remedy—requesting all meeting participants, including current and former FERC Chairmen, to testify under oath as to who said what during these meetings—increases in importance in order to satisfy concerns that FERC Commissioners did not prejudice themselves by holding such illegal *ex parte* meetings.

In its December 20 "Order Authorizing Disposition of Jurisdictional Facilities," FERC rejects "Public Citizen's argument that the Commissioners' pre-filing meetings were in violation of either the Commission's regulations or the APA." (at 52)

But Public Citizen never claimed that "Commissioners' pre-filing meetings were in violation of...the Commission's regulations." Rather, we argued that FERC's regulations, as applied in this case, conflict with federal law. The Administrative Procedure Act limits the ability of federal agencies to conduct "off-the-record" private meetings: "the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge*"³ [emphasis added].

² www.sec.gov/Archives/edgar/data/75594/000007559405000015/0000075594-05-000015-index.htm

³ 5 USC § 557(d)(1)(E), www.gpoaccess.gov/uscode/

The Administrative Procedure Act is clear: if any FERC commissioner “has knowledge” that a proceeding “will be noticed” for hearing, then it is unlawful for that Commissioner to meet with the parties in private. It was clear to FERC Commissioners beginning on May 27, 2005 that the merger between MidAmerican and PacifiCorp would have to be “noticed for hearing,” since Section 203 of the Federal Power Act requires an “opportunity for hearing.”

FERC claims that the off-the-record meetings did not violate the Administrative Procedure Act because “when the pre-filing meetings occurred, there was no “proceeding”, so the pre-filing meeting was not an *ex parte* communication. The APA defines an “*ex parte* communication” as “an oral or written communication not on the public record with respect to which reasonable prior notice to all *parties* is not given.” A “party” is “a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency *proceeding*.” Prior to filing, as there was no Commission proceeding, the APA’s prohibition on *ex parte* communication could not apply.” (at 54).

This FERC argument twists the obvious legislative intent of Congress. FERC’s interpretation would have us believe that the definitions of various terms in the Administrative Procedure Act cancel or trump the clear legislative intent of 5 USC § 557(d)(1)(E): “the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.*” [emphasis added]

According to FERC, the definitions of “*ex parte* communication” and “party” require that any “parties” involved in such communications must be already part of a proceeding, thereby nullifying the language of 5 USC § 557(d)(1)(E) that explicitly discuss the circumstances banning such *ex parte* communications once a Commissioner “has knowledge” that the subject matter of the discussions “will be noticed.” FERC’s argument here is so legally absurd that Public Citizen cannot wait to point out this fact to a federal court. The text and intent of the Administrative Procedure Act is crystal clear: off-the-record communications are forbidden once a Commissioner “has knowledge that” the subject of the communication “will be noticed” for hearing. The companies’ May 27, 2005 SEC filing describing the merger provided such notice, and therefore any *ex parte* off-the-record communications after that point are in conflict with the Administrative Procedure Act—regardless of whether FERC’s rules permit such communications.

The public must have a detailed description of what was said by whom of these meetings because they may have served as a de facto negotiation, where Commissioners may have made comments or commitments or suggestions that compromise their objectivity or bias during the public hearing.

Public Citizen therefore renews its request that all participants in any and all of these meetings with FERC Commissioners—including FERC Commissioners themselves—testify under oath what was discussed at the meetings, and this testimony shall be provided as part of the public record of this proceeding.

Furthermore, FERC claims “that Public Citizen makes no effort to explain when, in its view of the APA, a “proceeding” begins. Under Public Citizen’s view, there is no limit to how early a “proceeding” begins.” (at 54).

This claim is simply false. We noted that the May 27, 2005 merger announcement and SEC filing by the two companies was the clear indication to FERC Commissioners that the topic of communication would “be noticed” for hearing. That filing noted that the merger “is subject to a number of conditions, including...regulatory notification and/or approvals from...the FERC.” This official notice describing the merger is when the “clock started ticking”, triggering the clause in the APA that the subject of the meeting would “be noticed” for hearing, and therefore prohibited any off-the-record discussion on the matter.

FERC’s failure to record the conversations of the meetings comes after Public Citizen’s March 28, 2005 filing with FERC where we raised similar concerns with private meetings held between company executives and FERC Commissioners related to the Exelon-PSEG merger.⁴

It also follows a recent Inspector General report that scolded FERC for similar abuses. In June 2003, the U.S. Department of Energy Office of Inspector General released a report⁵ on controversial *ex parte* communications, in which the Inspector General “recommend[s] that the Commission [FERC] carefully consider whether the conduct or contents of communications such as those at issue here expose Commission decision-making to avoidable legal challenge or needless controversy. To the extent the Commission intends to continue engaging in such communications in the future, we believe the Commission should carefully consider whether: (1) Such communications should be tape-recorded or concurrently transcribed, and otherwise made available to the public as soon as possible...[and] other steps should be taken to promote public confidence in Commission proceedings, including, for example, a practice of inviting members of the media or the general public to participate.”

Despite these explicit recommendations by the IG, FERC has failed to adopt a single reform in response. Public Citizen received confirmation of this fact in response to a FOIA request⁶ in which we asked for “all records describing any policy changes the Federal Energy Regulatory Commission implemented in response to recommendations in the” IG report. FERC’s response to Public Citizen stated that no public documents exists to satisfy our request.

FERC also mischaracterizes our citation of *Electric Power Supply Association v. FERC*, claiming that we mention the case to support our “argument that the Commissioners’ pre-filing meetings violated the APA. However, *EPSA* dealt with *ex parte* communications related to a specific “pending on-the-record proceeding” and post-filing meetings...In the situation at hand, there was no “pending on-the-record proceeding” because no application had yet been filed.” (at 56)

But that’s not the reason we cited *Electric Power Supply Association v. FERC*. Rather, we wrote: “FERC’s rules are not the last word on whether an *ex parte* contact is lawful. The U.S. Court of Appeals for the DC Circuit ruled that “the Sunshine Act is a statute of general applicability governing FERC and all other federal agencies within its compass. FERC has no authority whatsoever to change the terms of the Act; rather, FERC must conform its regulatory activities to comply with the overriding terms of the Sunshine Act...The key to exclusion under the Sunshine Act is not the label given the communication, but rather whether there is a possibility that the communication could effect the

⁴ Docket EC05-43, <http://elibrary.ferc.gov/>

⁵ *Special Inquiry: Federal Energy Regulatory Commission Communications*, DOE/IG-0610, www.ig.doe.gov/pdf/ig-0610.pdf

⁶ FOIA No. FY05-110

agency's decision in a contested on-the-record proceeding." We cited *Electric Power Supply Association v. FERC* to remind FERC that the APA trumps whatever rules FERC has on *ex parte* communications.

Regardless of whether or not the Sunshine Act was violated, our due process was violated, along with our rights under the Administrative Procedure Act to an impartial decision maker, since the private meetings with interested parties have left the Commissioners biased.⁷

FERC also argues "that the current proceeding is not the proper venue for Public Citizen to challenge the validity of the Commission's regulations; its arguments are, in fact, a collateral attack on those regulations...If Public Citizen believes that the Commission should amend its regulations, Public Citizen should submit a petition for rulemaking setting forth the changes it believes are necessary." (at 57)

Again, FERC's assertions are misguided. This merger proceeding is absolutely the proper venue to raise the issue of the legality of *ex parte* communications, because these *ex parte* communications play a significant role in creating the perception that FERC Commissioners have been biased. This proceeding is the only relevant venue for us to raise the issue of the illegality of the *ex parte* communications and the only venue to offer our remedy (asking all meeting participants to testify under oath who said what during the illegal meetings).

We also note that FERC has clear rules allowing for interested parties, such as MidAmerican-Pacificorp executives and their lawyers, to meet with FERC to resolve any questions they may have about filing for a merger application: "The Commission *staff* provides informal advice and assistance to the general public *and to prospective applicants for licenses, certificates, and other Commission authorizations*. Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions. Inquiries may be directed to the chief of the appropriate office or division."⁸ [emphasis added]

Note that Public Citizen is not requesting any information about any contacts between MidAmerican-Pacificorp executives and FERC staff. We encourage company executives to utilize the process outlined in FERC's rules to discuss issues with FERC staff. But we object to such private meetings with FERC Commissioners once it is evident that the subject of the conversation—in this case, the recently announced merger between MidAmerican and Pacificorp—will be subject to a hearing.

III. ALTERNATIVE MOTION FOR STAY

If the Commission does not grant rehearing, put its *ex parte* comments on the public record and set the merger application for an evidentiary hearing before an administrative law judge, Public Citizen requests that the Commission stay the effectiveness of the Merger Order pending appeal to the United States Court of Appeals.

⁷ *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)

⁸ 18 CFR § 388.104, www.gpoaccess.gov/cfr/

Under the Commission's stay analysis, the movant must show irreparable harm. Public Citizen will certainly suffer such harm since a multi-billion dollar merger, once completed or even far along the track, is unlikely to be stopped. The Applicants, on the other hand, will simply have to delay a little longer to get their merger, so they will not be irreparably harmed. Finally, the public interest will be protected by ensuring that the proper review of a huge holding company merger has occurred. Under the analysis for stays followed by the courts of appeal, Public Citizen are likely to succeed, because the Commission has denied both the request that accurate accounts of the *ex parte* meeting be placed on the record as required by the Sunshine Act and that an evidentiary hearing be held where numerous facts are in dispute. *Cf., Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (DC Cir. 1985); *Virginia Petroleum Job. Ass'n v. Federal Power Act*, 259 F.2d 921 (D.C. Cir. 1958).

CONCLUSION

For the reasons discussed above, the Commission should grant rehearing of its Merger Order, place an accounting (through testimony under oath by the meeting participants) of its *ex parte* meetings with executives from the merger Applicants on the record, and set the merger for an evidentiary hearing.

Respectfully submitted,

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