

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

**MidAmerican Energy  
PacifiCorp**

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**Docket No. EC05-110**

MOTION TO INTERVENE AND PROTEST

September 23, 2005

Public Citizen’s Energy Program hereby provides this motion to intervene and protest the proposed merger between MidAmerican and PacifiCorp because the merger is not in the public interest. This intervention and protest raises concerns that MidAmerican-PacifiCorp held secret, illegal meetings with FERC Commissioners that have undermined the public interest. This issue can only be resolved in an evidentiary hearing and we therefore request that FERC schedule one.

Public Citizen is a nonprofit, nonpartisan consumer rights organization based in Washington, DC with 35,000 dues-paying individual members in Utah, Oregon, Wyoming, Washington, Idaho, California, Iowa, South Dakota and Wisconsin. Our Energy Program does extensive work at the federal and state levels to promote energy policies that best protect consumers.

We represent consumers directly impacted by this proposed merger. Our participation in this proceeding is unique and in the public interest, and we will not be adequately represented by any other party to this proceeding.

According to documents obtained by Public Citizen through the Freedom of Information Act,<sup>1</sup> MidAmerican-PacifiCorp executives held multiple private meetings with FERC Commissioners before the companies’ July 22 filing at FERC and after the companies filed details of the merger with the U.S. Securities and Exchange Commission.

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 Judi Johansen with PacifiCorp, and they met with some or all of the FERC Commissioners. Public Citizen doesn’t know exactly how many secret meetings occurred because the original August 30 response to our FOIA was incomplete. On September 2 Public Citizen appealed to FERC seeking a complete response to our original August 4 request. We therefore respectfully request confirmation of all of the meetings representatives from MidAmerican and PacifiCorp had with FERC Commissioners to discuss the merger.

**Public Citizen requests 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.**

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<sup>1</sup> FOIA No. FY05-109.

Public Citizen makes this request because FERC Commissioners are required by the Administrative Procedure Act to record meetings if they have knowledge that the matter will be “noticed for hearing.” FERC should have known that the MidAmerican-Pacificorp merger would be “noticed for hearing” because on May 27, 2005, the companies filed a “Stock Purchase Agreement” with the U.S. Securities and Exchange Commission.<sup>2</sup>

This official filing with the SEC of a “definitive agreement,” detailing the merger agreement between the two companies, provided the public and FERC notice that the merger was going forward and would have to be filed for approval at FERC. It therefore should have been 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.” As a result, details of the meetings between MidAmerican-Pacificorp executives and FERC Commissioners must be part of the public record.

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.<sup>3</sup> Our filing attracted several high-profile media reports, which noted that “consumer groups also took issue with what they say were private meetings between the FERC commissioners and executives with Exelon and PSEG on Jan. 13”<sup>4</sup>; “Public Citizen and its partners contend that private pre-filing meetings on the Exelon-PSEG merger involved commissioners, violating federal law and constituting ‘a slap in the face to the public and consumer advocates who were offered no such private access to the powerful, unelected government officials’ ...the groups say a private meeting is not legal if a commissioner believes it would be followed by the company making a filing with FERC. In this case, the groups contend, the meetings violated the law because the utilities had announced their merger deal several weeks before their pre-filing meetings.”<sup>5</sup>

Despite Public Citizen’s March 2005 protest of similar private meetings held after companies announced a merger subject to FERC review, and after media reports covering Public Citizen’s protest, FERC still went ahead and held private meetings and failed to record them.

FERC’s failure to record these meetings occurred despite 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 report<sup>6</sup> 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

<sup>2</sup> [www.sec.gov/Archives/edgar/data/75594/000007559405000015/0000075594-05-000015-index.htm](http://www.sec.gov/Archives/edgar/data/75594/000007559405000015/0000075594-05-000015-index.htm)

<sup>3</sup> Docket EC05-43, <http://elibrary.ferc.gov/>

<sup>4</sup> Suzette Parmley, “Exelon’s \$12 billion deal for PSEG is opposed by consumer groups,” *The Philadelphia Inquirer*, March 29, 2005, [www.philly.com/mld/inquirer/business/11253497.htm](http://www.philly.com/mld/inquirer/business/11253497.htm)

<sup>5</sup> Mary O’Driscoll, “Consumer groups want to crash ‘private club’ of regulators,” March 29, 2005, *Greenwire*.

<sup>6</sup> *Special Inquiry: Federal Energy Regulatory Commission Communications*, DOE/IG-0610, [www.ig.doe.gov/pdf/ig-0610.pdf](http://www.ig.doe.gov/pdf/ig-0610.pdf)

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 request<sup>7</sup> 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.

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 parties to a hearing that Commissioners should have known would be contested explicitly discussed the merger.

We assume that FERC justifies holding these multiple private meetings with MidAmerican-Pacificorp under its rules, which prohibit “off-the-record communications” with “decisional” employees during any “contested on-the-record proceeding.”<sup>8</sup> We assume FERC will argue that these multiple private meetings between FERC Commissioners and MidAmerican-Pacificorp executives to discuss the merger application were allowed to be “off-the-record” because the companies had not yet formally filed their merger application, and therefore there was not yet any “contested on-the-record proceeding.”

But it appears as though this FERC rule, as applied in this case, conflicts with federal law. The federal Sunshine 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*”<sup>9</sup> [emphasis added].

So the Sunshine 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 evident to all FERC commissioners that a proposed merger announced on May 27, 2005 to create one of the largest energy companies in the world would be filed at FERC and noticed for hearing, as required by the Federal Power Act. Therefore, these meetings were in violation of federal law and must be included in the public record by having all participants provide testimony under oath detailing the conversations held in private.

The federal courts have recently ruled on this issue, finding that 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 agency’s decision in a contested on-the-record proceeding.”<sup>10</sup>

<sup>7</sup> FOIA No. FY05-110

<sup>8</sup> 18 CFR § 385.2201, [www.gpoaccess.gov/cfr/](http://www.gpoaccess.gov/cfr/)

<sup>9</sup> 5 USC § 557(d)(1)(E), [www.gpoaccess.gov/uscode/](http://www.gpoaccess.gov/uscode/)

<sup>10</sup> *Electric Power Supply v. FERC*, Docket 03-1182, December 10, 2004, [www.cadc.uscourts.gov](http://www.cadc.uscourts.gov)

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.<sup>11</sup>

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.”<sup>12</sup> [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.

Wherefore, the organizations listed below provide this Motion for Intervention and Protest and request an evidentiary hearing in the above-captioned proceedings and respectfully request that the Motion be granted for the reasons set forth herein.

Respectfully submitted,

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<sup>11</sup> *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)

<sup>12</sup> 18 CFR § 388.104, [www.gpoaccess.gov/cfr/](http://www.gpoaccess.gov/cfr/)

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