

134 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Enforcement of Statutes, Regulations, and Orders

Docket No. PL10-2-002

ORDER ON REQUESTS FOR REHEARING AND CLARIFICATION

(Issued January 24, 2011)

1. On January 19, 2010, Energy Associations¹ and the Financial Institutions Energy Group (FIEG)² filed separate requests for rehearing and clarification³ of the Commission's December 17, 2009 order authorizing the Secretary of the Commission (Secretary) to issue a Staff's Preliminary Notice of Violations.⁴ For the reasons discussed below, the Commission denies rehearing of the December 17 Order and clarifies certain aspects of that order.

I. Background

2. In the December 17 Order, the Commission authorized the Secretary to issue, upon direction from the Director of the Office of Enforcement, a Staff's Preliminary Notice of Violations (Notice). The purpose of the Notice, which would be issued only after the subject of an enforcement investigation has either responded, or had the opportunity to respond, to a preliminary findings letter detailing Enforcement staff's (staff) conclusions regarding the subject's conduct, is to provide: (1) the identity of the

¹ Energy Associations is comprised of The Edison Electric Institute, Electric Power Supply Association, American Gas Association and Interstate Natural Gas Association of America.

² FIEG states that it is comprised of investment and commercial banks that provide a range of financial services to all segments of the U.S. and global economy.

³ FIEG also requests reconsideration of the Commission's decision.

⁴ *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009) (December 17 Order).

entity or entities that are the subject of an investigation, (2) the time and 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.⁵

3. The December 17 Order summarizes staff's current process in conducting an investigation under Part 1b of the Commission's regulations.⁶ This process is also described in more detail in the Commission's Revised Policy Statement on Enforcement.⁷ Briefly, staff conducts an investigation and reaches a preliminary conclusion on whether the subject has violated one or more Commission requirements. If staff concludes that the subject has committed a violation, it provides a letter to the subject that sets forth staff's preliminary findings and the facts and reasons in support of those findings. The subject then has the opportunity to respond to staff's letter and may present whatever additional facts or arguments it deems appropriate. If, after review of those materials, staff continues to believe the subject violated a Commission requirement, staff may seek authority from the Commission to enter into settlement negotiations with the subject.

4. Prior to the December 17 Order, information about the investigation was typically not disclosed publicly unless and until the Commission approved a settlement or issued an order to show cause.⁸ The December 17 Order modified this practice by authorizing disclosure at a slightly earlier stage in the proceedings, as noted above. The Commission stated that in reaching its decision to authorize the issuance of a Notice, it weighed the subject's interest in maintaining confidentiality against the public interest in promoting additional transparency with respect to Commission investigations.⁹

⁵ December 17 Order, 129 FERC ¶ 61,247 at P 1. The December 17 Order also stated that if 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. *Id.* at P 7.

⁶ December 17 Order at P 4-5.

⁷ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008) (Revised Policy Statement).

⁸ December 17 Order, 129 FERC ¶ 61,247 at P 4-5.

⁹ December 17 Order, 129 FERC ¶ 61,247 at P 6.

II. Requests for Rehearing and/or Reconsideration and Clarification

Requests for Rehearing

5. Both Energy Associations and FIEG contend that the Commission has struck an incorrect balance between the risk of reputational harm to the subject of an investigation and the public's interest in the transparency of Commission procedures.¹⁰ Energy Associations argues that the December 17 Order does not explain how disclosing the identity of the subject promotes transparency,¹¹ and FIEG argues that the benefits the Commission identified from issuance of the Notice can be achieved without revealing the subject's identity.¹²

6. Both Energy Associations and FIEG state that disclosure of the subject's identity can result in negative consequences for the company, such as lowering its stock price.¹³ And Energy Associations argues that companies will not necessarily have already disclosed the existence of a Commission investigation in a Security and Exchange Commission (SEC) filing, as suggested in the Commission's December 17 Order.¹⁴

7. Energy Associations further contends that revealing the identity of an investigative subject is unfair, because the Commission may ultimately decide not to proceed against the company.¹⁵ And FIEG argues that issuance of the Notice will put pressure on the Commission not to disagree with staff's conclusions, thereby chilling agency deliberations.¹⁶ FIEG also suggests that the Commission may be forced to address comments and complaints filed by third parties, thereby increasing the risk that the Commission's internal deliberative process may be prejudiced or have the appearance of being unfair.¹⁷

¹⁰ Energy Associations Request at 5-6, FIEG Request at 5.

¹¹ Energy Associations Request at 3.

¹² FIEG Request at 5.

¹³ Energy Associations Request at 3, FIEG Request at 5.

¹⁴ Energy Associations Request at 3-4.

¹⁵ *Id.* at 3.

¹⁶ FIEG Request at 4-5.

¹⁷ *Id.* at 5.

8. Energy Associations also requests that the Commission open a comment period of at least 30 days to give all segments of the industries regulated by the Commission and all impacted stakeholders the opportunity to present their views on the Notice procedure and to seek clarification and guidance regarding its implementation.¹⁸

Requests for Clarification

9. Energy Associations requests clarification as to the following: (1) whether a Notice will automatically issue or whether the Director of the Office of Enforcement has discretion not to order issuance of a Notice,¹⁹ (2) whether staff will provide advance notification to the subject that it plans to direct the Secretary to publicly issue a Notice,²⁰ (3) the manner in which the Commission will treat submittals made by third parties and whether subjects of investigations will have notice of such submittals and an opportunity to review and respond to them,²¹ and (4) the point at which the December 17 Order will take effect and how it will apply to ongoing investigative proceedings.²²

10. FIEG requests clarification regarding the timing of the issuance of the Notice.²³ FIEG also requests clarification, at least by implication, as to the role, if any, that the Commission or individual commissioners will have with respect to the issuance of a Notice.²⁴

¹⁸ *Id.* at 13.

¹⁹ Energy Associations Request at 11.

²⁰ *Id.*

²¹ *Id.* at 11-12.

²² *Id.* at 12.

²³ FIEG Request at 7.

²⁴ *Id.* at 4.

III. Discussion

A. Requests for Rehearing

11. The Commission denies rehearing on both procedural grounds and on the merits regarding its decision that the Notice include the identity of the subject.²⁵ Procedurally, the Commission's December 17 Order was an exercise of agency discretion and thus not subject to review.²⁶ The December 17 Order falls within the exceptions to the Administrative Procedure Act's (APA) notice and comment requirements.²⁷ Those exceptions apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.²⁸ These three exceptions to the notice and comment requirements of the APA are sometimes referred to collectively as procedural rules (as opposed to substantive rules that require notice and comment).²⁹ Whether actions or procedures announced by an agency are substantive or not turns on whether they have substantive legal effect, thus foreclosing alternate courses of action or conclusively affecting the rights of parties.³⁰ Here, issuance of a Notice has no substantive legal effect, and does not conclusively or otherwise affect the rights of the subject. Issuance of a Notice is entirely separate and unrelated to any findings the Commission may or may not later make with regard to the investigation. Nor does issuance of the Notice foreclose

²⁵ Either of the procedural grounds is sufficient in itself to deny rehearing, as is the decision on the merits.

²⁶ See *Heckler v. Chaney*, 470 U.S. 821 (1985); *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456 (D.C.Cir. 2001).

²⁷ We note that petitioners did not raise the question of whether the Commission's December 17 Order complied with the requirements of the APA. Matters not raised or squarely presented below are waived and not subject to review. See *Thurman v. Yellow Freight Systems, Inc.*, 90 F. 3d 1160 (6th Cir. 1996); *Building Service Local 47 Cleaning Contractors Pension Plan v. Northeast Ohio Harness*, 46 F. 3d 1392 (6th Cir. 1995). The Commission has prescribed the manner in which issues are to be raised on rehearing, including providing a separate section of the issues, listing each issue in a separate paragraph, and providing the Commission and court precedent relied upon; issues not so raised are deemed waived. 18 C.F.R. §385.713(c)(2) (2010).

²⁸ 5 U.S.C. § 553(b)(A) (2009).

²⁹ See, e.g., *Chamber of Commerce of the U.S. v. U.S. Dept. of Labor*, 174 F.3d 206 (D.C. Cir. 1999); *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994).

³⁰ *American Hospital Assoc. v. Bowen*, 834 F. 2d 1037 (D.C.Cir. 1987), *Batterson v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980).

alternative courses of action or, indeed, any actions at all that the subject may choose to take. Therefore, the Commission's decision to authorize issuance of Notices under certain specified circumstances is not substantive but procedural.

12. Within the three procedural exceptions, the December 17 Order can alternatively be viewed either as a policy statement or as a pronouncement of agency organization, procedure, or practice. The United States Supreme Court has defined statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."³¹ That is exactly the function of the December 17 Order; it announced and described the process whereby the Commission would exercise its discretion under 18 C.F.R. §1b.9 (2010) to release certain non-public information pertaining to an investigation. The Commission has not only exercised its discretion by defining certain circumstances under which it intends to make public the identity of a subject under investigation, but it retains the discretion to make exceptions to this procedure in any given case.³²

13. Alternatively, the December 17 Order can be viewed as a pronouncement of agency organization, procedure or practice. The order described matters of agency organization (empowering the Director of the Office of Enforcement to authorize the Secretary of the Commission to issue a Notice), procedure (the manner and timing of the issuance of such Notices), and practice (the authorization of Notices in investigations which have progressed to the point of staff having sent a preliminary findings letter to the subject and the subject having been given an opportunity to respond).³³ Indeed, the issuance of 18 C.F.R. §1b.9 was itself procedural and for that very reason was issued without notice or comment.³⁴

³¹ *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993).

³² The Director of the Office of Enforcement will notify the Commission prior to issuance of the Notice, thus giving the Commission the opportunity to countermand issuance if it deems it appropriate to do so.

³³ An agency has the authority to delegate matters, whether discretionary or not, to staff. See *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947); *Reynolds Metals Co. v. Rumsfeld*, 564 F. 2d 663 (4th Cir. 1977). The Commission has in the past delegated numerous matters to staff. See, e.g., Delegations for Notices of Penalty, order No. 728, 129 FERC ¶ 61,094 (2009); Delegations of Authority, Order No. 691, 118 FERC ¶ 61,060 (2007); Regulations Delegating Authority, FERC Stats. & Regs. ¶ 30,814 (1988), 53 F.R. 16058 (1988); Delegation to Various Office Directors of Certain Commission Authority, FERC Stats. & Regs. ¶ 30,016 (1978), 43 F.R. 36433 (1988).

³⁴ Subchapter A – General Rules, FERC Stats. & Regs. ¶ 30,012 (1978), 43 F.R. 27174 (1978).

14. Although not required to do so, we also address the merits of the arguments presented by Energy Associations and FIEG, and alternatively deny rehearing on the merits. While we disagree with the requestors' claim that we have struck the wrong balance between confidentiality and transparency, a balance we discussed at some length in the December 17 Order, we do not take their concerns regarding reputational harm lightly. Indeed, the importance of fairly treating an entity's reputation has played an important part in our repeated affirmation of the general principle that our investigations are confidential in nature.³⁵ On the other hand, consistent with our regulations,³⁶ we have made exceptions to the principle of confidentiality where it has been necessary to accomplish some other important Commission goal. As both Energy Associations and FIEG acknowledge, transparency is an example of an important goal;³⁷ the fact that it can at times be in tension with the principle of confidentiality does not diminish our commitment to fairly treating an entity's reputation.

15. The public's strong interest in transparency is served both by our Notice procedure and by disclosure of the subject's identity in the Notice. First, the procedure provides a vehicle whereby market participants can bring to staff's attention additional information relevant to the investigation. By learning of the existence of an investigation and the identity of the subject under scrutiny, entities that may have been injured by the subject because of the same or similar conduct as alleged in the Notice can bring their concerns to staff before the matter has been resolved in a binding settlement. Conversely, entities may bring information to staff's attention that proves exculpatory to the subject, and thus may mitigate the amount of the penalty sought by staff or even cause staff to close the investigation. Such submittals will in general enable staff to consider any additional relevant factors of which it has not already been made aware, which will inform any future settlement negotiations or, if no settlement is reached, litigation with the subject. This additional information may even help reduce the likelihood of third party litigation, insofar as aggrieved entities are able to receive disgorgement for any harm they suffered.³⁸

16. Second, disclosure of the subject's identity prevents unwarranted suspicion from being cast on companies that are not under investigation, which might otherwise occur if the Notice is issued without identifying the subject. Third, disclosure of the subject's

³⁵ See, e.g., *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 at P 465-469 (2008) (Order No. 719).

³⁶ 18 CFR § 1b.9 (2010).

³⁷ Energy Associations Request at 3-4, FIEG Request at 4.

³⁸ See, e.g., *In re Energy Transfer Partners, L.P.*, 128 FERC ¶ 61,269 (2009).

identity in the Notice will better educate the public as to the nature of violations under investigation by the Commission. The Notice will allow other market participants to evaluate themselves and their own activities against what they know about the subject and the conduct alleged in the Notice. This evaluation may induce market participants engaged in similar conduct to cease their conduct and file self reports. It may also give market participants contemplating conduct similar to the conduct discussed in the Notice advance warning that such conduct may constitute a violation. And, it may enable market participants to arm themselves against the type of activity described in the Notice, or alert them as to whether they may be in a group likely to have been victimized by such conduct.

17. The timing of when the Secretary may issue Notices is an additional consideration mitigating the risk of harm from disclosure of the subject's identity. The Secretary will not issue Notices until after all of the following have occurred: (1) staff has completed its fact-finding process, (2) staff has presented the subject of the investigation with its preliminary findings, (3) the subject has had the chance to respond in writing to the facts and arguments in staff's preliminary findings, and (4) staff has had a full opportunity to review and analyze the subject's response.³⁹ As a result, the subject's identity, and indeed the very existence of an investigation, will continue to remain confidential throughout the investigative process, with the Notice issuing only after the investigation is completed.

18. The requestors focus upon the possibility that a publicly-traded company's stock price could be adversely affected by public disclosure. While the Commission does not take this possibility lightly, publicly-traded companies already frequently disclose the existence of Commission investigations in their SEC filings. Although Energy Associations contends that a company might decide not to make such a disclosure, whether because of a materiality calculation or some other factor, the fact remains that such disclosures often are made during the pendency of an investigation.⁴⁰ That being the case, the Notice will generally not be the first public disclosure of the alleged

³⁹ In the event the response brings to light new facts or arguments, staff would continue its investigation in order to consider them, and would not seek to issue a Notice before those new facts or arguments were resolved.

⁴⁰ Of the 42 companies investigated since EAct 2005 in which settlement was reached or a show cause order issued, 32 were subject to the SEC disclosure requirements (either on their own behalf or as subsidiaries of publicly-traded companies). Of those 32 companies, 15 included specific statements in their SEC reports disclosing staff's investigation.

misconduct. In any event, settlement negotiations will soon follow upon the heels of the Notice, and a subject's identity would in any case be disclosed at the time the Commission approves a settlement agreement or issues an order to show cause.

19. Energy Associations also contends that revealing the identity of an investigative subject is unfair, because the Commission may ultimately decide not to proceed against the company. We find this argument to be misplaced. The Notice does not state that the Commission has already determined that a violation has been committed, only that staff at that point believes a violation to have been committed. Furthermore, if staff decides to terminate an investigation after a Notice has been issued, the Secretary will issue a public notice of such termination.⁴¹

20. FIEG argues that issuance of the Notice would have a chilling effect on agency deliberations. It theorizes that the Commission may be less willing to disagree with or reject staff recommendations after a Notice is issued, or may face external or political pressure to issue a show cause order or address comments and complaints of third parties. We reject this argument. FIEG underestimates the Commission's independent review of staff's recommendations and neglects its status as an independent regulatory agency. Certainly, the Commission has in the past publicly disagreed with positions taken by Enforcement staff, and there is no reason we would refrain from doing so in the future should we believe that to be appropriate in any given case. As for external pressure, the Commission has long experience, exercised on a daily basis, with treating in an ethical and considered manner the varying pressures brought to bear by parties advancing one position or another.

21. FIEG also argues that public disclosure of a subject's identity may "spawn unwarranted investigations" by other state or federal governmental authorities or lead to "unwarranted complaints" filed under the Federal Power Act by other market participants.⁴² While our purpose in issuing Notices is not to prompt other governmental agencies to undertake investigations of their own, we recognize that other agencies have the discretion to pursue inquiries that they deem appropriate. However, the possibility that other government actors will launch investigations based on facts initially investigated by the Commission already exists. With respect to the potential for "unwarranted" complaints, we assure FIEG that the Commission will carefully consider the merits of complaints related to conduct described in a Notice, just as we will carefully consider any complaint brought before the Commission.

⁴¹ December 17 Order, 129 FERC ¶ 61,247 at P 7.

⁴² FIEG Request at 6.

22. In sum, the Commission believes that issuance of Notices will provide the public with important transparency concerning its investigations.⁴³ While the Commission believes the non-public nature of these investigations also serves a valuable purpose, we believe we have struck the appropriate balance with respect to these competing interests. However, we will continue to monitor the Notice procedure and are open to considering it again after staff has acquired some experience in its application. We also expect staff to report on its experience with the procedure in the Annual Report on Enforcement for fiscal year 2011.

B. Requests for Clarification

23. Energy Associations requests clarification regarding the extent of the discretion given to the Director of the Office of Enforcement with respect to whether a Notice will be issued. The Commission clarifies that it anticipates that a Notice will issue in every investigation in which staff, after careful consideration of the subject's response to the preliminary findings letter, decides to forward the matter to the Commission for settlement authority. However, the Commission retains the discretion to stay or bar issuance of the Notice in any given matter. (The proposed Notice will be provided to the Commission with the opportunity to review it before issuance.) Conversely, if staff, after review of the subject's response, is persuaded that no violation exists, no Notice would issue. Additionally, in the event a Notice has already been issued and staff subsequently

⁴³ We note that certain other agencies similarly provide the public with notice of and information about their staff's identification of violations, prior to settlement or other Commission or agency enforcement action. These include the Federal Communications Commission, which posts on its website Notices of Apparent Liability or Notices of Violation issued to subjects; the Nuclear Regulatory Commission, which makes public (if directed to a corporation) "Choice Letters" issued to subjects describing the enforcement panel's findings; the Food and Drug Administration, which posts on its website "Warning Letters" issued to subjects to notify them they are in violation (before formal enforcement action is taken); and the Department of Energy, which posts on its website Preliminary Notices of Violations detailing staff's evaluation of the evidence against subjects. *See, e.g., Field Issued Citations, Notices of Apparent Liability and Notices of Violation*, Fed. Comm'n's Comm'n, <http://www.fcc.gov/eb/FieldNotices/> (last visited Jan. 12, 2011); *Web-based ADAMS*, Nuclear Regulatory Commission, <http://wba.nrc.gov:8080/ves/> (search "Notice of Proposed Violation") (last visited Jan. 12, 2011); *Inspections, Compliance, Enforcement, and Criminal Investigations – Warning Letters*, U.S. Food and Drug Admin., <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm> (last visited Jan. 12, 2011); *Office of the General Counsel – Recent Enforcement News*, Dep't of Energy, http://www.gc.energy.gov/enforcement_news.htm (last visited Jan. 12, 2011).

determines to terminate the investigation, the Secretary is authorized upon direction of the Director of the Office of Enforcement to issue a public notice of termination of investigation.⁴⁴

24. Energy Associations requests clarification that the Commission will provide advance notification to a subject that the Director of the Office of Enforcement plans to direct the Secretary to issue a Notice. Energy Associations contends that such advance notification will give the subject an opportunity to prepare for any impacts it may anticipate from public disclosure. The Commission clarifies that staff will give the subject of an investigation advance notification that a Notice will be issued.

25. Energy Associations requests clarification as to the manner in which third party evidence, arguments or other material that may be submitted in response to the Notice will be treated. Energy Associations asks whether these materials will be treated as confidential, by the third parties and by the Commission, and whether the subject will be given an opportunity to respond. As noted above, the Notice will have the salutary effect of providing the public with enough information to enable third parties to inform staff of any additional information that may be relevant to the matter being investigated. The Commission clarifies that in such an event, staff will treat this information as non-public in accordance with section 1b.9 of the Commission's regulations,⁴⁵ and will handle it just as it does any other non-public information obtained during the course of an investigation (or obtained prior to an investigation, as in the case of information received from Hotline callers). Whether the third parties keep their own information confidential is beyond Commission control. The Commission further clarifies that in the event staff determines that any third party allegations may be meritorious, it may engage in further discovery. If the additional information raises any new material issues, either factually or legally, staff will seek the subject's views on the matter. Further, if newly discovered information might affect the subject's culpability, the amount of disgorgement, or the determination of a civil penalty, staff will solicit the views of the subject. We also reiterate, as we stated in the December 17 Order, that the Notice does not confer a right on third parties to intervene in the investigation or any other right with respect to the noticed investigation.⁴⁶

26. Energy Associations requests clarification as to when the Notice procedure will take effect. The Commission clarifies that the Notice procedure authorized in the December 17 Order applies only to those investigations where a subject's response to

⁴⁴ December 17 Order, 129 FERC ¶ 61,247 at P 7.

⁴⁵ 18 C.F.R. § 1b.9 (2010).

⁴⁶ December 17 Order, 129 FERC ¶ 61,247 at P 7.

staff's preliminary findings letter was received after December 17, 2009, or where the time period for such response had passed as of December 17, 2009, except that the Director of the Office of Enforcement may direct the Secretary to issue a notice with respect to an investigation where the subject's response was received before December 17, 2009 if necessary to provide consistent notice in closely-related investigations.

27. FIEG requests clarification as to whether the Notice would issue in a situation in which the subject's response prompts further questions on staff's part and the need for staff to obtain additional information from the subject. FIEG observes that dialogue between staff and the subject is frequently very fluid, even after a preliminary findings letter has been sent. The Commission agrees that communications may very well continue to take place between staff and the subject after issuance of the preliminary findings letter, and that the subject's response may call for additional discovery on the part of staff. The Commission clarifies that the Notice will not issue unless and until Enforcement staff has satisfied itself that, in its view, a violation of a Commission requirement has occurred and it is prepared to seek settlement authority from the Commission. If the results of staff's further discovery and communications with the subject dissuade it from that view, the Notice would not issue and staff would terminate the investigation. If, on the other hand, staff is not dissuaded from that view, we expect that the Director of the Office of Enforcement would authorize issuance of the Notice after Enforcement staff has reached that determination.

28. FEIG also asserts, although without specifically seeking clarification, that the December 17 Order does not indicate what role, if any, the Commission or individual Commissioner will have with respect to issuance of a Notice. The Commission has committed implementation of the Notice procedure to the discretion of the Director of the Office of Enforcement. And, as described in the December 17 Order, Notices will issue upon authorization by the Director of the Office of Enforcement.⁴⁷

29. Energy Associations further requests (presumably as a request for rehearing rather than by way of clarification) that the Commission open a comment period of at least 30 days to receive comments and requests for clarification and guidance regarding implementation of the Notice policy. We decline to open a comment period. All interested entities have already had the opportunity to submit comments or requests for clarification during the pendency of the rehearing period. Energy Associations and FIEG have taken advantage of that opportunity, and their requests have been considered and addressed in this order. Any requests for additional guidance, such as by entities with respect to their specific cases, may be directed to Enforcement staff.

⁴⁷ *Id.* at P 6.

The Commission orders:

(A) Rehearing of the December 17 Order is denied, as discussed in the body of this order.

(B) The Commission clarifies the December 17 Order as discussed in the body of this order.

By the Commission. Commissioner Spitzer dissenting with a separate statement to be issued at a later date.

(S E A L)

Kimberly D. Bose,
Secretary.