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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM19-18-001]

Formal Requirements for Filings in Proceedings Before the Commission

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order addressing clarification and arguments raised on rehearing.

SUMMARY: In this order, the Federal Energy Regulatory Commission (Commission) acknowledges a request for clarification of Order No. 862 or, in the alternative, rehearing of that Order. Order No. 862 amended the Commission's regulations to require that the filings and submissions to be delivered to the Commission, other than by the United States Postal Service, are instead to be sent to the Commission's off-site security screening facility. In this order, the Commission grants clarification and, therefore, does not address the arguments raised on rehearing.

DATES: The order addressing clarification is effective [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Christopher Cook, Office of the Secretary, 888 First Street, NE, Washington, D.C. 20426, (202) 502-8102 christopher.cook@ferc.gov. Mark Hershfield, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, (202) 502-8597, Mark.hershfield@ferc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

1. In Order No. 862, the Commission amended its regulations to require that any filings and submissions to be delivered to the Commission, other than by the United States Postal Service (USPS), should be sent to the Commission’s off-site security screening facility.¹ The regulations still permitted USPS mail to be sent directly to the Commission’s headquarters. Spiegel & McDiarmid LLP (Spiegel) requested clarification, or, in the alternative, rehearing in order “to ensure that a legally valid back-up means of timely filing will remain available, in the event the Commission’s electronic filing (“eFiling”) system experiences an unexpected malfunction on the day a filing is due.”² For the reasons discussed below, we grant clarification and, therefore, do not address the arguments raised on rehearing.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a)

¹ *Formal Requirements for Filings in Proceedings Before the Commission*, Order No. 862, 84 FR 46438 (Sept. 4, 2019), 168 FERC ¶ 61,120 (2019).

² Spiegel Request at 1.

³ *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

of the Federal Power Act,⁴ and section 19(a) of the Natural Gas Act,⁵ however, we are modifying Order No. 862 and continue to reach the same result in this proceeding, as discussed below.⁶

II. Discussion

A. Order No. 862

3. The Commission's prior regulations provided that filers should send hard-copy submissions directly to the Commission's principal office, which is located at 888 First Street, NE, Washington, D.C. 20426. In Order No. 862, the Commission determined that sending hard-copy (including hand-delivered) submissions, other than by USPS, to an off-site facility for security screening and processing, prior to being delivered to the Commission's principal office, would better protect the safety of the Commission, its employees, and the public. The revised regulations still permitted USPS mail to be sent directly to the Commission's headquarters.⁷ Deliveries may be made to the off-site

⁴ 16 U.S.C. 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁵ 15 U.S.C. 717r(a).

⁶ *Allegheny Def. Project*, slip op. at 30. The Commission is not changing the outcome of Order No. 862. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ USPS has existing "security, screening, and control processes" that comply with U.S. Department of Homeland Security's best practices. See Alex Dobuzinskis, *Screening for Poisons, Explosives in Mail a Daily Reality After U.S. Threats*, Reuters

facility in-person (by the filing entity or its designee) during the hours of 7:00 AM to 3:30 PM. The Commission explained that revising the Commission's procedures to have hardcopy/hand-delivered submissions delivered to an off-site facility for security screening, before delivery to the Commission, was consistent with government-wide guidance.⁸

4. Moreover, the Commission determined that Order No. 862 would not affect the public's ability to make timely filings. The Commission reiterated that the public is strongly encouraged to submit filings and submissions electronically, through the Commission's eFiling application, at <https://www.ferc.gov/>.⁹ The Commission also explained that the off-site facility would log all deliveries when received and would provide the Commission with the log so that the documents may be stamped and recorded by the Commission as received on that date.

(Oct. 3, 2018) (USPS "has developed a comprehensive approach to protecting the mail system by utilizing a targeted strategy of specialized technology, screening protocols and employee training.").

⁸ See U.S. Department of Homeland Security, *Best Practices for Managing Mail Screening and Handling Processes: A Guide for the Public and Private Sectors*, at 17 (Sept. 2012) <https://www.cisa.gov/sites/default/files/publications/isc-mail-handling-screening-nonfouo-sept-2012-508.pdf>.

⁹ See 168 FERC ¶ 61,120 at P 6 (*citing* 18 CFR 385.2001(a)(1)(iii)); *see also Filing Via the Internet*, Order No. 703, 72 FR 65659, (Nov. 23, 2007), 121 FERC ¶ 61,171 (2007).

B. Request for Clarification or, in the Alternative, Rehearing.

5. Spiegel seeks clarification as to whether the Commission will establish “a legally valid back-up to electronic filing ...in the event the eFiling system experiences an unexpected malfunction on the day a filing is due.”¹⁰ Spiegel offered several options to ensure that the Commission has in place a legally valid back-up to its eFiling system. First, Spiegel recommends that the Commission consider clarifying that, if the eFiling system is malfunctioning during certain hours, the filing deadline will roll over to the next available business day.¹¹ Second, Spiegel proposes that the Commission could formalize its email system to accept filings when they are unable to be filed through normal eFiling. Third, Spiegel suggests combining its first two recommendations, which it considers to be its principal recommendation. Finally, Spiegel states that, if these alternatives are not considered legally and practically feasible, the Commission should allow hand-deliveries to be made at Commission headquarters and logged in before being sent to the off-site facility for screening.¹² To limit security risks, Spiegel suggests that the option of hand-deliveries could be limited to known entities.

6. As an alternative to the Commission providing clarification, Spiegel requests rehearing, asserting that the Commission erred, in Order No. 862, in three aspects. First,

¹⁰ Spiegel Request at 9 (citing 18 CFR 385.2007(a)(2), and *Cities of Batavia v. FERC*, 672 F.2d 64, 72-73 (D.C. Cir. 1982)).

¹¹ *Id.* at 7.

¹² *See id.* at 7-8

Spiegel argues that the Commission erred in determining that the final rule would not “affect the public’s ability to make timely filings.” Second, Spiegel states that the Commission did not adequately consider the implication of changing the filing deadline for hand-deliveries from 5:00 PM ET to 3:30 PM ET. Finally, Spiegel notes that the Commission erred in concluding that the final rule was the best option for balancing physical security against the ability of parties to make timely filings.¹³

C. Commission Determination.

7. In response to Spiegel’s request for clarification, we clarify the practice that the Commission currently uses (and will continue to use) if a filer experiences a Commission eFiling system malfunction while attempting to timely submit a filing. As Spiegel acknowledges, electronic filing will “often suffice.”¹⁴ In fact, based on the Commission’s experience, eFiling system malfunctions are infrequent and typically resolved on the day of their occurrence. However, as explained below, in the rare instance where a Commission eFiling system malfunction prevents a timely filing, the filer may continue to use the Commission’s established practice of contacting the Commission’s Office of the Secretary (OSEC) through ferconlinesupport@ferc.gov to report the eFiling system malfunction. We outline this practice in detail below to provide clarity.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 5.

8. Specifically, should an entity attempt to make a filing during a Commission eFiling system malfunction, the filer shall email OSEC at ferconlinesupport@ferc.gov to notify staff of the malfunction. That email shall: (1) summarize the problem; (2) attach, if feasible, the public version of the filing solely to indicate proof of the filer's attempt to submit a filing;¹⁵ *and* (3) provide any other evidence of timely attempts to file, such as screenshots of error messages. OSEC staff will verify the existence of the reported malfunction and the filer's attempt to make a timely submission. OSEC will also acknowledge and respond to the filer's email.

9. Importantly, however, a filer's email informing OSEC of an eFiling malfunction does not itself constitute a formal submission of the filing and will not be processed as such. If the eFiling system error is not corrected in a manner that permits filing by 5:00 p.m. on the date the filing was attempted, the filer must also comply with the following steps. In addition to notifying OSEC by email, the filer must, at the earliest possible time on the next business day, either: (1) formally submit the filing electronically through the eFiling system; *or* (2) submit the filing by hard copy to the off-site screening facility. Of the foregoing two options, the filer shall choose the most expedient option.

¹⁵ Any information that the filer believes is subject to privileged treatment under the Commission's regulations shall be redacted from the version emailed to OSEC. If the file is too large to send via email the filer should identify that issue in its email to OSEC through ferconlinesupport@ferc.gov.

10. In sum, we note that, should an entity attempt to make a filing during a Commission eFiling system malfunction, in order for a filing to be deemed timely made, the filer must: (i) notify OSEC by email containing the evidence of a timely attempt to file as outlined in paragraph 8 above; *and* (ii) complete the filing as set forth in paragraph 9 above. If the filer meets each of the requirements set forth herein, the filing will be considered timely filed by the Commission.

11. Given that the process outlined above addresses Spiegel's principal concern, we do not address Spiegel's proposed approaches to ensuring the timely submission of filings in the event of an eFiling system malfunction. For the same reason, we do not address Spiegel's alternative request for rehearing.

III. Document Availability

12. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

13. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this

document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

14. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

15. The Commission orders:

In response to Spiegel's request for clarification or, in the alternative, request for rehearing, Order No. 862 is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

Issued: August 18, 2020.

Kimberly D. Bose,
Secretary.

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