

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Gulf South Pipeline Company, LP

(FY07-13)¹

ORDER REJECTING REQUEST FOR REHEARING AND APPEAL
OF COMMISSION STAFF ACTION

(Issued April 9, 2007)

1. Gulf South Pipeline Company, LP (Gulf South or Petitioner), pursuant to the Federal Energy Regulatory Commission's (Commission) rules of practice and procedure, Rules 1902 and 713,² requests rehearing and appeals the determination of the Director, Office of External Affairs (Director), to release, pursuant to a request made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), an Environmental Mailing List (EML) in Docket No. CP06-446-000. For the reasons stated below, the Petitioner's request shall be rejected because the Director's decision to release the document is not subject to rehearing or appeal to the Commission.³

Background

2. On January 11, 2007, pursuant to 18 C.F.R. § 388.112(e) (2006), the Director, over objections raised by Gulf South, issued a determination to release the EML. Section 388.112(e) provides a period of at least five calendar days between the Director's notice of a determination to release and the actual release of any documents. The purpose

¹ The Petitioner captioned its request for stay as "Docket No. CP06-446-000." But this is a request for action concerning a matter that arose under the Freedom of Information Act. As a result, FY07-13 is the proper tracking number.

² 18 C.F.R. §§ 385.1902 and 385.713 (2006).

³ Petitioner filed a previous motion entitled "Motion for Stay of Proceedings Pending Appeal of Staff Action" on January 26, 2007. That motion shall be denied as moot.

of the delay is to allow an interested person to seek in an appropriate United States District Court an injunction to block release of the documents.

3. On January 16, 2007, Gulf South filed a request for reconsideration with the Director in which it reiterated its objection to the release of the EML, and on January 25, 2007, the Director denied this request.

4. On January 26, 2007, Gulf South filed a motion seeking a stay of the Director's determination pending possible appeal of this determination to the Commission. On February 12, 2007, the Petitioner filed its instant request for rehearing and appeal.

Discussion

5. The Commission is rejecting the request for rehearing and appeal. Review of the Director's decision to release the EML is available through a court action, not through appeal to the Commission. Petitioner has erroneously conflated separate regulations: Sections 388.108 - 388.110, which govern requests for documents under FOIA; and section 388.112, which governs requests by submitters to maintain the confidentiality of documents in the face of FOIA or other requests for them. There is no right to appeal to the Commission actions taken under section 388.112.

6. Specifically, Petitioner cites 18 C.F.R. § 375.311 (delegating to the Director authority "to take all actions required or permitted under §§ 388.108 through 388.110") and avers that pursuant to section 375.301(a), actions of staff under delegated authority of section 375.311 may be appealed to the Commission pursuant Rule 1902(a). Rule 1902(a) provides for rehearings under Rule 713 of delegated staff actions. Rule 713(a) applies to any request for rehearing, if the rehearing is provided for by statute, rule, or order. There is no statute, rule, or order, however, that provides for rehearing of the Director's determination to release documents pursuant to section 388.112(e).⁴ The Director, in this instance, is acting independently under section 388.112, and not from authority delegated pursuant to section 375.311. Therefore, the Director's decision to release the EML pursuant to section 388.112(e) is not subject to Rule 1902 and, consequently, is not subject to rehearing and appeal under Rule 713.

⁴ In its request, Petitioner cites no case law in support of its proposition that Commission rules provide for rehearing and appeal of the Director's determination to release documents in a FOIA matter. Cases Petitioner does cite address its underlying substantive argument that the EML should not be disclosed because it either falls within FOIA Exemptions 4 and 6, 5 U.S.C. § 552(b)(4) and (6), or disclosure would set a precedent harmful to the public interest. Due to our holding that the Director's decision is not subject to rehearing and appeal, there is no need to address Petitioner's substantive arguments.

7. The Petitioner, however, has other means at its disposal. As stated above, section 388.112(e) provides a period of at least five calendar days in which a person may seek an injunction in the appropriate United States District Court in an effort to block release of documents. That is the forum that is available to the Petitioner.

The Commission orders:

- (A) Petitioner's request for rehearing and appeal is rejected.
- (B) Petitioner's request for stay of proceedings pending appeal is denied as moot.
- (C) The EML will be released no sooner than five (5) days from the date of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.