

# Proposed Rules

Federal Register

Vol. 72, No. 174

Monday, September 10, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## TENNESSEE VALLEY AUTHORITY

### 18 CFR Part 1301

#### Testimony by TVA Employees, Production of Official Records, and Disclosure of Official Information in Legal Proceedings

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** Proposed rule; comment request.

**SUMMARY:** The Tennessee Valley Authority (“TVA”) seeks public comment on a proposed rule that would govern access to TVA information and records in connection with legal proceedings in which neither the United States nor TVA is a party. The rule, tracking similar regulations issued by many other federal agencies, would establish guidelines for use in determining whether TVA employees will provide testimony or records relating to their official duties. The rule would also establish procedures for requesters to follow when making demands on or requests to a TVA employee for official documents or to provide testimony. The proposed rule will standardize TVA’s past practices, promote uniformity in decisions, conserve the ability of TVA to conduct official business, preserve its employee resources, protect confidential information, provide guidance to requestors, minimize involvement in matters unrelated to TVA’s mission and programs, avoid wasteful allocation of agency resources, and avoid spending public time and money for private purpose.

**DATES:** Comments must be received on or before October 10, 2007.

**ADDRESSES:** Send or deliver comments to the Office of the General Counsel, Tennessee Valley Authority, 400 W. Summit Hill Drive, Knoxville, Tennessee 37902 by mail or fax at (865) 632-4528. Comments may also be submitted electronically to

*npgoschy@tva.gov*, with subject heading “Comment on Proposed Regulation.”

**FOR FURTHER INFORMATION CONTACT:**

Nicholas P. Goschy, Assistant General Counsel, Tennessee Valley Authority, 400 W. Summit Hill Drive, Knoxville, Tennessee 37902, (865) 632-8960.

**SUPPLEMENTARY INFORMATION:**

#### Background

TVA regularly receives subpoenas and other informal requests for documents and requests for TVA employees to provide testimony or evidence in cases in which TVA is not a party. Sometimes these subpoenas or requests are for TVA records that are not available to the public under the Freedom of Information Act. TVA also receives requests for TVA employees to appear as witnesses in litigation and to provide testimony relating to materials contained in TVA’s official records or provide testimony or information acquired during the performance of the employees’ official duties.

Although many other Federal agencies currently have regulations in place to address these types of requests, and TVA itself has rules implementing the Freedom of Information Act that govern requests for information from the general public, TVA currently has no official regulations governing subpoenas and other information requests for document production and testimony of TVA employees in legal proceedings. Issues about such requests that have arisen in recent years warrant adoption of regulations governing their submission, evaluation, and processing. Responding to these requests is not only burdensome, but may also result in a significant disruption of a TVA employee’s work schedule and possibly involve TVA in issues unrelated to its responsibilities. In order to resolve these issues, many agencies have issued regulations, similar to the proposed regulation, governing the circumstances and manner in which an employee may respond to demands for testimony or for the production of documents. Establishing uniform procedures for legal processes will ensure timely notice and promote centralized decision making. The United States Supreme Court upheld this type of regulation in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

The proposed rule will formalize those past practices already utilized by

TVA in responding to these types of requests when TVA is not a party to the litigation. Briefly summarized, the proposed rule will prohibit disclosure of official records or testimony by TVA’s employees, as defined in § 1301.52, unless there is compliance with the rule. The proposed rule sets out the information that requesters must provide and the factors that TVA will consider in making determinations in response to requests for testimony or the production of documents. The proposed rule sets forth TVA’s standard practice of providing employee testimony by affidavit only and clarifies those steps requesters must follow in order to obtain official TVA documents, including how to accomplish service of process on TVA. The rule establishes a new practice that service can now be accomplished by United States mail.

This rule applies to a range of matters in any legal proceeding in which TVA is not a named party. Current and former TVA employees will not provide testimony about specific matters involving information which they acquired during the performance of their official duties unless permitted to testify as provided in the rule. They would not be restricted from providing testimony on their own time about general matters unconnected with the specific TVA matters.

This rule will ensure a more efficient use of TVA’s resources, minimize the possibility of involving TVA in issues unrelated to its responsibilities, promote uniformity in responding to such subpoenas and like requests, and maintain the impartiality of TVA in matters that are in dispute between other parties. It will also serve TVA’s interest in protecting sensitive, confidential, and privileged information and records that are generated in fulfillment of TVA’s statutory responsibilities.

This rule is internal and procedural rather than substantive. It does not create a right to obtain official records or the official testimony of a TVA employee nor does it create any additional right or privilege not already available to TVA to deny any demand or request for testimony or documents. Failure to comply with the procedures set out in these regulations would be a basis for denying a demand or request submitted to TVA.

**List of Subjects in 18 CFR Part 1301**

Administrative practice and procedure.

For the reasons stated in the preamble, TVA proposes to amend 18 CFR Chapter XIII, to read as follows:

**PART 1301—PROCEDURES**

1. The authority citation for part 1301 continues to read as follows:

**Authority:** 16 U.S.C. 831–831ee, 5 U.S.C. 552.

2. Part 1301 is amended by adding subpart D to read as follows:

**Subpart D—Testimony by TVA Employees, Production of Official Records, and Disclosure of Official Information in Legal Proceedings**

Sec.

- 1301.51 Purpose and scope.
- 1301.52 Definitions.
- 1301.53 General.
- 1301.54 Requirements for a demand for records or testimony.
- 1301.55 Responding to demands.
- 1301.56 Final determination.
- 1301.57 Waiver.

**Subpart D—Testimony by TVA Employees, Production of Official Records, and Disclosure of Official Information in Legal Proceedings****§ 1301.51 Purpose and scope.**

(a) *Purpose.* This part sets forth the procedures to be followed when TVA or a TVA employee is served with a demand to provide testimony and/or produce or disclose official information or records in a legal proceeding in which TVA or the United States is not a party, and where such appearance arises out of, or is related to, the individual's employment with TVA.

(b) *Scope.* This part applies when, in a judicial, administrative, legislative, or other legal proceeding, a TVA employee is served with a demand to provide testimony concerning information acquired in the course of performing official duties or because of official status and/or to produce official information and/or records.

**§ 1301.52 Definitions.**

The following definitions apply to this part:

(a) *Appearance* means testimony or production of documents or other material, including an affidavit, deposition, interrogatory, declaration, or other required written submission.

(b) *Demand* means a subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority (e.g. an administrative or State legislative body), for the production, disclosure, or release of TVA records or

information or for the appearance of TVA personnel as witnesses in their official capacities.

(c) *Employee* means any members of the Board of Directors, officials, officers, directors, employees or agents of TVA, except as TVA may otherwise determine in a particular case, and includes former TVA employees to the extent that the information sought was acquired in the performance of official duties for TVA.

(d) *General Counsel* means the General Counsel of TVA or a person to whom the General Counsel has delegated authority under this part.

(e) *Legal proceeding* means any and all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature.

(f) *Records or official records and information* means all information in the custody and control of TVA, relating to information in the custody and control of TVA, or acquired by a TVA employee in performance of his or her official duties or because of his or her official status while the individual was employed by TVA.

(g) *Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

**§ 1301.53 General.**

(a) No employee shall appear, in response to a demand for official records or information, in any proceeding to which this part applies to provide testimony and/or produce records or other official information without prior authorization as set forth in this part.

(b) This part is intended only to provide procedures for responding to demands for testimony or production of records or other official information, and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable by any party against TVA and the United States.

**§ 1301.54 Requirements for a demand for records or testimony.**

(a) *Service of demands.* Only TVA's General Counsel or his/her designee is authorized to receive and accept demands sought to be served upon TVA or its employees. All such documents should be delivered in person or by United States mail to the Office of the General Counsel, Tennessee Valley

Authority, 400 W. Summit Hill Drive, Knoxville, Tennessee 37902.

(b) *Time limit for serving demands.* The demand must be served at least 30 days prior to the scheduled date of testimony or disclosure of records, in order to ensure that the General Counsel has adequate time to consider the demand and prepare a response, except in cases of routine requests for personnel and payroll records located on-site in Knoxville, where service 15 days prior will normally be considered sufficient. The General Counsel may, upon request and for good cause shown, waive the requirement of this paragraph.

(c) *Form of Demand.* A demand for testimony or production of records or other official information must comply with the following requirements:

(1) The demand must be in writing and submitted to the General Counsel.

(2) The demand must include the following information:

(i) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved.

(ii) If production of records or other official information is sought, a list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the records sought.

(iii) If testimony is sought, a description of the intended use of the testimony, a detailed description of how the testimony sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony sought.

(iv) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and outweighs the burden on TVA to produce the documents or testimony.

(v) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a TVA employee, such as a retained expert.

(vi) The name, address, and telephone number of counsel to each party in the case.

(d) TVA reserves the right to require additional information to complete the request where appropriate or to waive any of the requirements of this section at its sole discretion.

**§ 1301.55 Responding to demands.**

Generally, authorization to provide the requested material or testimony shall not be withheld unless their disclosure is prohibited by law or for

other compelling reasons, provided the request is reasonable and in compliance with the requirements of this part, and subject to the following conditions:

(a) *Demands for testimony.* TVA's practice is to provide requested testimony of TVA employees by affidavit only. TVA will provide affidavit testimony in response to demands for such testimony, provided all requirements of this part are met and there is no compelling factor under paragraph (c) of this section that requires the testimony to be withheld. The General Counsel may waive this restriction when necessary.

(b) *Demands for production of records or official information.* TVA's practice is to provide requested records or official information, provided all requirements of this part are met and there is no compelling factor under paragraph (c) of this section that requires the records or official information to be withheld.

(c) *Factors to be considered in determining whether requested testimony or records or official information must be withheld.* The General Counsel shall consider the following factors, among others, in deciding whether requested testimony or materials must be withheld:

(1) Whether production is appropriate in light of any relevant privilege;

(2) Whether production is appropriate under the applicable rules of discovery or the procedures governing the case or matter in which the demand arose;

(3) Whether the material requested is relevant to the matter at issue;

(4) Whether allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(5) Whether disclosure would violate a statute, Executive Order, or regulation, including, but not limited to, the Privacy Act of 1974, as amended, 5 U.S.C. 552a;

(6) Whether disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

(7) Whether disclosure would improperly reveal trade secrets or proprietary confidential information without the owner's consent;

(8) Whether disclosure would unduly interfere with the orderly conduct of TVA's functions;

(9) Whether the records or testimony can be obtained from other sources;

(10) Whether disclosure would result in TVA appearing to favor one litigant over another;

(11) Whether the demand or request is within the authority of the party making it; and

(12) Whether a substantial Government interest is implicated.

(d) *Restrictions on testimony or production of records or official information.* When necessary or appropriate, the General Counsel may impose restrictions or conditions on the production of testimony or records or official information. These restrictions may include, but are not limited to:

(1) Limiting the area of testimony;

(2) Requiring that the requester and other parties to the legal proceeding agree to keep the testimony under seal;

(3) Requiring that the testimony be used or made available only in the legal proceeding for which it was requested;

(4) Requiring that the parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure of produced records or official information.

(e) *Fees for Production.* Fees will be charged for production of TVA records and information. The fees will be the same as those charged by TVA pursuant to its Freedom of Information Act regulations, 16 CFR. 1301.10.

#### **§ 1301.56 Final determination.**

The General Counsel makes the final determination whether a demand for testimony or production of records or official testimony in a legal proceeding in which TVA is not a party shall be granted. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requesting party and, when necessary, the court or other authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the production of testimony or records or official information.

#### **§ 1301.57 Waiver.**

The General Counsel may grant a waiver of any procedure described by this part where a waiver is considered necessary to promote a significant interest of TVA or the United States, or for other good cause.

**Maureen H. Dunn,**

*General Counsel.*

[FR Doc. E7-17722 Filed 9-7-07; 8:45 am]

BILLING CODE 8120-08-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[EPA-R01-OAR-2007-0497; A-1-FRL-8463-5]

### **Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Revised Carbon Monoxide Maintenance Plan for Nashua**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This SIP submittal contains revisions to the carbon monoxide (CO) maintenance plan for Nashua, New Hampshire. Specifically, New Hampshire has revised the contingency plan portion of the original maintenance plan. The intended effect of this action is to propose approval of this revision to the Nashua CO maintenance plan. This action is being taken in accordance with the Clean Air Act.

**DATES:** Written comments must be received on or before October 10, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R01-OAR-2007-0497 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail:* [arnold.anne@epa.gov](mailto:arnold.anne@epa.gov), Fax: (617) 918-0047.

3. *Mail:* "EPA-R01-OAR-2007-0497," Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (mail code CAQ), Boston, MA 02114-2023.

4. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114-2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Judge, Air Quality Planning