



SOUTHWEST GAS CORPORATION

Andrew W. Bettwy, Assistant General Counsel

March 20, 2000

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Re: Filing of **Comments of Southwest Gas Corporation**
Docket No. ACC-00000A-00-0030

Accompanying this letter are the original and eleven (11) copies of the above-referenced document. Please accept the original and ten (10) of the copies for filing and date/time stamp the remaining copy and return it to me in the stamped, self-addressed envelope which also accompanies this letter.

Thank you for the usual courtesy.

Respectfully,

Andrew W. Bettwy

Enclosures



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7 IN THE MATTER OF THE GENERIC)
INVESTIGATION OF THE EX PARTE)
8 COMMUNICATION RULES)

Docket No. ACC-00000A-00-0030

9
10 COMMENTS OF SOUTHWEST GAS CORPORATION

11 Pursuant to the February 9, 2000 Procedural Order issued in the above-
12 captioned Docket, Southwest Gas Corporation ("Southwest") respectfully submits
13 comments concerning possible changes to A.A.C. R14-3-113.

14 **Is there a need for *ex parte* communications concerning the substantive merits in
15 any proceeding [other than a rule making proceeding]?**

16 A threshold inquiry should be whether there is a need for *ex parte*
17 communications concerning the substantive merits in any proceeding [other than a rule
18 making proceeding].¹ *Ex parte* means "by or for one party" or [stated another way] "without
19 all of the parties."

20 To the extent that a decision-maker has a question or a concern regarding
21 whether an issue is being addressed adequately by the parties, the question or concern
22 can be communicated to the parties on the public record and then addressed by the
23 parties on the public record. Southwest questions the need for a communication between
24 a party and a decision-maker in the absence of the other parties.

25
26 _____
27 ¹A.A.C. R14-3-113.B states in pertinent part as follows: "The provisions of this rule do not apply to
rule making proceedings." Southwest is not proposing any modification to that language.

1 **When should the *ex parte* prohibition be triggered?**

2 Currently, the *ex parte* prohibition is triggered by the setting of a contested
3 matter for public hearing.² Southwest proposes that the *ex parte* prohibition be triggered
4 by the initiation of a proceeding. An example may be useful:

5 An application for a revenue increase is filed by Company A. From
6 and after the filing, neither Company A nor Staff³ would be permitted
7 to communicate with a decision-maker regarding the substantive
8 merits of the filing in the absence of the other party. However,
9 Company A and Staff would be allowed to communicate with a
10 decision-maker off the public record so long as both are present. The
11 same principles would apply to an intervenor and, as well, to a
12 prospective intervenor, once an application for intervention is filed.

13 Further, currently, the *ex parte* prohibition applies to a decision-maker and "any person" --
14 not just a party. Southwest supports continuation of the broad prohibition. The broad
15 prohibition ensures that a non-party, who may have a financial interest in the outcome of
16 the proceeding, is not in a position to influence a decision-maker in the absence of the
17 parties by simply remaining a non-party.

18 **Proposed Modifications to A.A.C. R14-3-113**

19 Consistent with the foregoing comments, Southwest proposes the following
20 modifications⁴ to A.A.C. R14-3-113:

21 Amend subparagraph B to read as follows:

22 B. Application. The provisions of this rule apply from the time a
23 ~~proceeding is initiated~~ contested matter is set for public hearing. The
24 provisions of this rule do not apply to rule making proceedings.

25 ²See A.A.C. R14-3-113.B.

26 ³Staff would include any Commission employee who has not been designated to be a part of the
27 decision-making process. Inherent in Southwest's proposal is the notion that Staff, automatically [i.e.,
28 without the need to apply for intervenor status], is a party to all proceedings and, accordingly, Staff's status
as a party commences automatically when the proceeding commences.

⁴Language proposed to be deleted appears with strikeouts, and language proposed to be added
appears with redlining.

1 Add a subparagraph C.3.f to read as follows:

- 2 f. Communications between either a party or a person who has
3 filed an application to intervene and a decision-maker, when
4 all parties and all persons who have filed applications to
5 intervene are present.

6 **The *ex parte* prohibitions applicable in Southwest's other jurisdictions**

7 For information only, Southwest accompanies this filing with a copy of the *ex*
8 *parte* prohibitions which are applicable before the California Public Utilities Commission
9 ("CPUC"), the Public Utilities Commission of Nevada ("PUCN") and the Federal Energy
10 Regulatory Commission ("FERC").⁵ Southwest does not suggest that any of them is
11 superior to what is being proposed in these comments. As a pragmatic matter, it is
12 Southwest's view that if all participants in a proceeding respect fundamental notions of
13 fairness, there is no need for formal guidance; and, conversely, if a participant does not
14 respect fundamental notions of fairness, no guidance will stand in the way.

15 Respectfully submitted this 20th day of March, 2000.

16
17 

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26
27 ⁵Also included among the prohibitions by the CPUC and the FERC are copies of the respective
28 Commission decisions adopting the prohibitions. The prohibition applicable before the PUCN is statutory.

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CERTIFICATE OF MAILING

I, Andrew W. Bettwy, the undersigned, hereby certify that a copy of the foregoing document, entitled **COMMENTS OF SOUTHWEST GAS CORPORATION**, is being mailed this 20th day of March, 2000, to each of the following individuals, as indicated:

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Andrew W. Bettwy

CPUC *EX PARTE* PROHIBITION

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3.1 INTRODUCTION

On October 23, 1991, the Commission issued Decision No. 91-10-049 adopting rules to govern *ex parte* communications between parties to a proceeding and decisionmakers. The rules vary from strict prohibition of off the record communication during certain phases of some proceedings to a reporting requirement in other situations.

After holding workshops on the new rules, the Chief Administrative Law Judge, Lynn Carew, prepared a summary of answers to the most frequently asked questions. A copy of this summary is reproduced at the end of this chapter; "Section Headings" have been added to facilitate citations when relied upon in the following description of the *ex parte* communication rules. (See Section 3.13, "QUESTIONS AND ANSWERS ABOUT EX PARTE RULES" on page 3-10.)

3.2 EFFECTIVE DATE/APPLICABILITY OF RULES (Rule 1.7)

The newly adopted rules became effective on January 20, 1992 and apply to all covered proceedings pending on that date or commenced thereafter.

Some proceedings will obviously be covered as pending proceedings, i.e., ones in which the Commission has not taken any action. However, in some cases the Commission may have issued a decision prior to the effective date of the rules, but the proceeding may still be considered pending for the purpose of the *ex parte* communication rules. The definition of "final order" in the *ex parte* communication rules provides guidance for making that determination. Using this definition, it is reasonable to expect that the rules will apply to any covered proceeding in which:

- 1) An application for rehearing has been filed, but the Commission has yet to issue a decision on it;
- 2) A decision or order was issued by the Commission before January 20, 1992, and the 30 day period for filing an application for rehearing had not elapsed before January 20, 1992; or
- 3) Only interim orders have been issued in the proceeding and the docket remains open.

In addition, a proceeding which was closed prior to the effective date of the rules will be covered if a Petition for Modification is filed (Section I, Q&A 4).

3.3 COMMUNICATIONS COVERED (Rule 1.1(g) & 1.3(a))

The new rules apply to any written or oral communication on any substantive issue in a covered proceeding between a party and decisionmaker, off the record and without opportunity for all parties to participate.

Written communications include, but are not limited to, letters, briefing packages or booklets, slides used during a presentation, copies of pleadings, summaries of another party's position, charts, graphs, and tables (Section I, Q&A 5). In other words, virtually everything.

Communication regarding substantive issues clearly includes discussions or presentations about the merits of a party's position, or the outcome of the proceeding.

Procedural inquiries, relating to such things as filing dates, service lists, and hearing dates, are excluded (Rule 1.3(a)). However, there is a gray area.

For example, when scheduling issues are controversial or important to the outcome of the proceeding, such inquiries may be covered by the rules. When in doubt, the Commission recommends that parties err on the side of assuming the rules apply (Section I, Q&A 8).

3.4 DECISIONMAKER DEFINED (Rule 1.1(e))

Communications are covered only when they occur with a "decisionmaker." A decisionmaker is defined by the rules as any

- 1) Commissioner
- 2) Commissioner's personal advisor(s)
- 3) Chief Administrative Law Judge
- 4) Assistant Chief Administrative Law Judge
- 5) Administrative Law Judge assigned to the proceeding

3.5 PARTY DEFINED (Rule 1.1(h))

A party is any applicant, protestant, complainant, defendant, respondent, petitioner, or interested party who has filed an appearance in the proceeding, and their agents and employees. The exception to the definition that one who is on the appearance list is a "party" applies to those on the "State Service and Information Only" listing. These people are not considered parties for purposes of the *ex parte* rules, unless they otherwise qualify under Rule 1.1(b) or (h) (see below).

"Commission Staff of Record" are considered "parties" to the proceeding and covered by these rules. "Commission Staff of Record" is defined in Rule 1.1(b) as meaning all members of the staff organization or division created pursuant to Pub.Util.Code Section 309.5 (divisions or organizations created by the Commission to represent the interests of the public utility customers), and members of other staff organizations or divisions who are appearing as advocates or witnesses for a particular party. Specifically excluded from these rules are the Commission's Executive Director, General Counsel, and Division Directors (except the Director of a division created pursuant to Pub.Util.Code Section 309.5.)

As a result, the staff of the Division of Ratepayer Advocates (DRA) is effectively bound by the *ex parte* communication rules, having been formed pursuant to Pub.Util.Code Section 309.5. On the other hand, staff of divisions such as the Commission Advisory and Compliance Division (CACD) would be subject to the rules only if they were acting as advocates or witnesses in a particular proceeding (Section III, Q&A 3).

An "agent" is anyone employed by a party to act on behalf of the party, or to contact a decisionmaker on behalf of the party (Section III, Q&A 2). A member of the public who is not acting as the agent or employee of a party is not a party (Rule 1.1(h)).

However, if members of the public are urged by a party to contact a decisionmaker and support or endorse its position in a covered proceeding, an agency relationship is

established. Because it would be impractical to require that individual members of the public file notices of *ex parte* communication, the Commission requires that the party to the proceeding make the report (Section IV, Q&A 4).

3.6 APPLICABILITY TO SPECIFIC TYPES OF PROCEEDINGS

In fashioning the *ex parte* communication rules, the Commission attempted to balance its need for full input with protection from unfairness to parties.

3.6.1 Rules Not Applicable (Rule 1.1(e))

3.6.1.1 Rulemakings

In a rulemaking, the Commission is engaged in a legislative, rather than adjudicatory process. In order to have full and open communication between participants, the Commission determined that the *ex parte* communication rules explicitly do not apply to a rulemaking initiated under Rule 14.1, or an order instituting investigation (OII) consolidated with a rulemaking to the extent the OII raises identical issues raised in the rulemaking.

3.6.1.2 Uncontested Proceedings (other than OIIs)

With the exception of OIIs, if no answer, protest, or request for hearing is filed, or if an answer or protest is filed but then withdrawn, the proceeding is no longer covered by the *ex parte* communication rules. If a request for hearing has been filed, the proceeding remains covered by the rules until the request has been denied.

3.6.2 Rules Applicable

When the Commission acts in an adjudicatory role, i.e., retrospective fact-finding, the strictest *ex parte* communication rules apply in order to assure fairness and due process. Proceedings which fall somewhere in between adjudicatory proceedings and legislative proceedings are subject to more lenient requirements.

3.6.2.1 Enforcement-Related Proceedings (Rule 1.1(f))

Enforcement-related proceedings are defined by the Commission as OIIs and complaint proceedings which raise the issue of an alleged violation of any law, or order or rule of the Commission. Complaints challenging the reasonableness of rates or charges are not enforcement-related proceedings.

In an enforcement-related proceeding, *ex parte* communication is:

Reported if it occurs between the commencement of the proceeding and submission of the matter for decision;

Prohibited after submission of the matter until issuance of a final order (Rule 1.3(a)).

3.6.2.2 Other Than Enforcement-Related Proceedings (Rule 1.3(b))

In other covered proceedings, *ex parte* communications are not prohibited but rather must be reported if they occur between the commencement of the proceeding and the issuance of the final order.

3.7 COMMENCEMENT OF A PROCEEDING (Rule 1.1(a))

For purposes of the *ex parte* communication rules, a proceeding commences as of the tender to the Commission of a notice of intention (commonly used in rate case proceedings), the filing of an application or complaint, or the adoption by the Commission of an order instituting investigation.

3.8 SUBMISSION OF A PROCEEDING (Rule 1.1(i))

The general definition of submission of a proceeding in Rule 77 is used for purposes of the *ex parte* communication rules. Rule 77 defines this as the period after taking evidence and the filing of briefs or oral argument.

3.9 FINAL ORDER (Rule 1.1(d))

The date of issuance of a final order is the date when the commission mails a decision after rehearing or denying rehearing, or when the period to apply for a rehearing has expired without such an application being filed, in other words, 30 days after mailing of the decision in question.

When only an interim order has been issued in a proceeding, and, therefore, the docket has not been closed, a final order has not been issued with respect to any issues still outstanding, and the *ex parte* rules still apply to those issues.

3.10 REPORTING EX PARTE COMMUNICATIONS (Rule 1.4)

3.10.1 Time to File Reports

The rules require that any party who engages in *ex parte* communications, whether initiated by the party or the decisionmaker, which are reportable under these rules, must file an original and 12 copies of a report within three working days.

The use of working days in computing the time in which the filing must be made may seem to be at odds with the Commission's Rule 44.2 which includes Saturdays, Sundays, and holidays in the computation of the time in which any filing must be made. However, as a result of the workshops, the Chief ALJ offered this clarification about the coordination of Rule 44.2 and Rule 1.4.

Under Rule 44.2, the computation of time excludes the first day, and includes the last day. This applies to computing the time to file an *ex parte* communication notice. However, the days which are counted are limited to "working days." The following example was offered at the workshops:

Thursday, *ex parte* communication occurs. (Under Rule 44.2, this day is considered the "first" day, and excluded from the computation of time to file.)

Friday is working day 1.

Monday is working day 2.

Tuesday is working day 3, and the filing of the notice is due. (Under Rule 44.2, this is the "last day" and is included in the computation.) (Section IV, Q&A 3)

3.10.2 Late-Filed Reports

According to the Q&A notice circulated after workshops on the *ex parte* communication rules, a party which wants to file a notice after the three-day period has elapsed, must file a formal motion with the Commission requesting acceptance of a late-filed pleading. Such a motion must comply with the requirements set out generally in Chapter 7, and be served on all parties. Other parties then have an opportunity to file responses, and the Commission (not the ALJ) will issue a decision (Section IV, Q&A 9).

However, in practice the Docket Office has been accepting late-filed (and augmented) notices without this procedure being followed.

3.10.3 Where to File

The rules require that the notice be filed with the Commission's San Francisco Docket Office to facilitate prompt inclusion in the Daily Calendar. However, on a trial basis the Commission has established an alternative method for complying with the rule (Section II, Q&A 3).

Parties may tender an original and 13 copies at either the Los Angeles or San Diego locations. The extra copy will be date-stamped by the accepting office. The party filing the notice then must transmit a copy of the date-stamped document by facsimile to the San Francisco Docket Office no later than 3:00 PM on the third working day after the communication occurred. The FAX number of the San Francisco Docket Office is (415) 703-1723.

A copy of the notice should be hand-delivered to the assigned Administrative Law Judge.

3.10.4 Content and Form

The notice must be designated as "Notice of *Ex Parte* Communication" and contain the following information:

- Date, time and location of the communication, and whether it was written, oral, or a combination of the two;
- Identity of the recipient(s) and person(s) initiating the communication, as well as the Identity of any persons present during the communication;
- A description of the party's, but not the decisionmaker's, communication and its contents with an attachment of any written material or text used during the communication.

Although not required by the rules, the Commission urges the filing party to identify in its notice, the name and telephone number of a contact person to facilitate requests for copies of the notice (Section II, Q&A 2).

Additionally, because the content of the notice will be summarized for the daily calendar, the filing party can provide its own summary along with the notice filing to assist the Commission staff in this task.

See Section 3.14.1, "Ex Parte Communication Notice" on page 3-17.

3.10.5 Service of Process

No service of process on the other parties to the proceeding is required when the notice is filed. However, the notice must be simultaneously hand-delivered to the assigned ALJ.

3.10.6 Notice and Availability of Ex Parte Communication Reports

After a party files a "Notice of *Ex Parte* Communication," it will be promptly reported in the Commission's Daily Calendar. Anyone with a computer and modem can access this calendar by following this procedure:

- 1) Using your communications program, dial 1 (415) 703-1297.
- 2) Set communication parameters as follows:
 - Baud rate 300, 1200, or 2400.
 - Seven data bits.
 - Parity EVEN.
 - One stop bit.
- 3) At the CONNECTED TO message, press RETURN KEY twice.
- 4) At LOGIN PLEASE, type in LOGIN PUC. (No password is needed.)
- 5) At TERMINAL TYPE type in the ID which most closely conforms to your terminal type -- VT, PX, TTY, or T5.
- 6) A menu will be displayed giving a selection of
 - 1. News Releases
 - 2. PUC CalendarsChoose #2, which will give you the following options:
 - Daily Calendar
 - Transportation Calendar
- 7) Choose Daily Calendar, then the "Notices" option.
- 8) Once you choose it, to read:
 - Press the Spacebar once to display one screen at a time.

- Hold the Spacebar down to scroll through the document.
- Escape (ESC) or "E" will cancel viewing and return you to the previous menu.

Copies of Notices of *Ex Parte* Communication can be obtained from the Commission's Central Files Room in San Francisco (Room 2002; Telephone (415) 703-2045), or directly from the reporting party, who is obligated to provide a copy without delay.

Providing a copy "without delay" means that responses to requests should be provided in a timely manner and as soon as reasonably possible (Section II, Q&A 4).

The manner of providing a copy of a report can be worked out between the two parties, e.g., by regular mail, other special mailing process such as overnight mail or Federal Express, or FAX.

If the requesting party wants special mailing service, the responding party may require the party to pay the cost of providing it. If the requesting party does not provide the necessary billing information, normal mailing procedures can be used.

If the requesting party wants the copy sent by FAX, and the responding party has facsimile capability, a copy should be FAXed as soon as possible.

3.10.7 Reports Not Part of the Record (Rule 1.2)

The Commission is required to render its decision based on the evidence on the record. Reports of *ex parte* communications, although "filed", do not become part of the record. If a party wants the Commission to consider the information in reaching its decision, the party must introduce it into the record. If the proceeding has already been submitted, a Petition to Reopen the proceeding must be filed. (See Section 7.19, "PETITION TO SET ASIDE SUBMISSIONS/REOPEN PROCEEDINGS (Rule 84)" on page 7-12.)

3.11 MOTIONS

Essentially any type of motion allowed under the Commission's rules may be filed by other parties in response to a notice of *ex parte* communication. These include such things as motions to set aside a submission for the taking of additional evidence (Rule 84), to compel production of documents which should have been attached to the notice but weren't, and to impose sanctions.

In addition, a party may file a motion requesting imposition of an *ex parte* rule specifically tailored to a given proceeding (Rule 1.6). This is most likely in complex proceedings where the party does not believe the general *ex parte* rules are appropriate.

A party can also seek to require another to file a notice of *ex parte* communication by filing a formal motion pursuant to the general Rules of Practice and Procedure.

3.12 SANCTIONS (Rule 1.5)

When they adopted the rules governing *ex parte* communications, the Commission declined to delineate specific sanctions it could impose on a party violating their *ex parte* communication rules. Instead, the Commission may impose such penalties and sanctions "as it deems appropriate."

3.13 QUESTIONS AND ANSWERS ABOUT EX PARTE RULES

R.84-12-028 LTC/klw

January, 1992

COMMONLY ASKED QUESTIONS AND ANSWERS ABOUT THE COMMISSION'S NEW EX PARTE RULE (SECTION I)

WORKINGS OF THE RULE

1. When does the rule go into effect?

The rule takes effect on January 20, 1992. All ex parte communications, as defined in section 1.1(g) of the Rule, made on or after January 20, 1992 must be reported by the filing of a Notice of Ex Parte Communication, as defined in section 1.4(a) of the Rule.

2. What proceedings does the rule affect?

Covered proceedings are defined in section 1.1(c) of the Rule. These proceedings are any formal proceeding other than a rulemaking or an OII consolidated with a rulemaking. This means that OIIs not consolidated with a rulemaking are covered proceedings.

3. When is a case open?

A case is open, or "commences", as discussed in section 1.1(a) of the Rule, when an application or complaint is filed, when a Notice of Intention is tendered or when the Commission issues an OII. Commencement of a proceeding triggers application of the Rule. Issuance of an OIR does not trigger the rule as rulemakings are not covered proceedings.

4. When is a case closed?

A case is closed when the docket is closed. When the docket is closed, the rule is no longer in effect. If a party files a petition to modify a decision in a covered proceeding which is closed, the rule is triggered even if the original proceeding was closed prior to the effective date of the Rule.

5. What is meant by a "written ex parte communication" to a decisionmaker?

A written ex parte communication to a decisionmaker is any written material of a substantive nature provided to a decisionmaker, whether at the request of the decisionmaker or on the initiative of the communicating party. Written ex parte communications include, but are not limited to, the following: letters, briefing packets or booklets, "slides" which accompany an oral presentation, copies of pleadings, summaries of a the party's position, charts, graphs, tables, and FAX transmittals of any type.

6. When does the rule affect advice letters?

The rule does not affect advice letters at all. The filing of an advice letter does not commence a "covered proceeding", so advice letters per se are not covered by the rule. However, if an advice letter is converted to a formal proceeding, the rule would attach.

7. How should consolidated proceedings be handled?

If an OII and rulemaking are consolidated, to the extent that the OII and the rulemaking address identical issues, the OII is not covered. If the OII addresses issues separate from those raised in the companion rulemaking, the OII is covered by the rule, while the companion rulemaking is not. See p. 9, D.91-07-074. The presiding officer will provide guidance if questions should arise about the applicability of the rule to consolidated proceedings (e.g., applications and complaints, etc.).

8. What is the definition of "substantive"?

An ex parte communication is, by definition, confined to a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication. Issues relating to the facts and/or the legal questions in dispute, the merits of the parties positions or arguments, and the outcome of the proceeding are considered substantive. In contrast, communications which are solely related to procedural matters such as the hearing schedule, location, and format, filing dates and identity of parties, are not reportable ex parte communications. However, procedural inquiries are sometimes borderline substantive, especially when scheduling issues are controversial or important to the outcome of the proceeding. When in doubt, or in borderline situations, you are wise to err on the side of reporting the communication.

9. When is the date of submission of a proceeding?

The date of submission of a proceeding for purposes of the rule, is as described in Rule 77 of the Commission's Rules of Practice and Procedure (see section 1.1(i) of the Ex Parte Rule). Rule 77 states that "(a) proceeding shall stand submitted for decision by the commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the commission or the presiding officer".

10. Does the rule now permit ex parte communications with ALJs prior to submission?

ALJs, and other decisionmakers, may of course still choose to rebuff ex parte communications at any stage of the process, notwithstanding that the generic rule does not prohibit such communications. This is a matter of "personal code of conduct" for some, and concerns about legal ethics for others. This issue is likely to arise in complaint cases since some decisionmakers may prefer to engage in no ex parte communications in adjudicative matters.

(SECTION II)

NOTICE

1. If an ex parte communication is initiated by a decisionmaker, must a party report that contact?

Yes. The obligation to report all ex parte communications, whether initiated by the party or by the decisionmaker, rests with the party.

2. What is the form of the Notice? How should the details of the communication be disclosed?

As noted above, we expect the Notice to follow the pleading format. Rule 1.4(a)(1) through (3) sets forth the requirements for reporting the details of a communication. You are expected to make full and complete disclosure, and the notice must contain the following items at a minimum:

- (1) date, time and location of communication, and whether it was oral, written, or a combination;
- (2) identity of recipient(s) and persons initiating the communication, AND identity of any persons present during the communication; and
- (3) a description of the party's (not the decisionmaker's) communication and its content. Attach a copy of any written material or text used during the communication.

Although it is not mandatory, we strongly encourage the filing party to include the name and telephone number of a contact person to facilitate requests for copies of the notice.

3. What are the procedures for handling notices of ex parte communications?

The original and twelve copies of the Notice must be filed in the San Francisco Docket Office within three working days of the ex parte communication (See Rule 44.2 (excluding first day and including last day) to calculate the time for compliance with this requirement). You are also required to submit a copy of the Notice to the Assigned ALJ at the time of filing. You are not required to serve a copy of the Notice on other parties. While Article 2 of the Rules of Practice and Procedure is not applicable to a Notice of Ex Parte Communication, we expect Notices to follow the format of other pleadings, and a title "(Notice of Ex Parte Communication" is sufficient). A sample notice is attached.

Notices will be reviewed and summarized by the ALJ Division for purposes of ensuring their timely inclusion in the Daily Calendar. We encourage you to submit a draft summary to expedite our task. The ALJ Division will advise you by ruling or letter, as appropriate, of any deficiency in your notice that may require augmentation, but this will not delay the calendaring of the original notice. If any augmented notice is required, a notation of its filing will appear in a subsequent Daily Calendar.

Once you read the Notice Summary in the Daily Calendar, you may request a copy of the Notice from the Central Files Room (Room 2002; (415) 703-2045) or from the reporting party's designated contact person, whose name and telephone number will appear in the Daily Calendar.

During the December workshops, several parties noted that the Commission's requirement that Notices to be filed only in San Francisco may burden Southern California parties, effectively reducing the 3-working-day notice period to two working days. Since the San Francisco filing requirement is imposed to facilitate prompt calendaring of the Notices, and in any event is now part of the newly adopted Article 1.5, we are not in a position to modify the requirement at this time. However, on a trial basis we will provide the following alternative mode of compliance with Rule 1.4(a):

1. Parties may tender the original and twelve copies of a notice for filing in Los Angeles or San Diego.

2. Parties must provide an extra copy of the notice at the time of filing. This extra copy will be date-stamped by the Los Angeles or San Diego office.

3. A facsimile copy of the date-stamped notice must be transmitted to the San Francisco Docket Office within the 3-working-day period specified in Rule 1.4. The faxed copy must be received in San Francisco no later than 3:00 PM on the third working day. The responsibility to transmit the copy is that of the party, not the Los Angeles or San Diego Docket Office staff. The fax number is: (415) 703-1723.

Hopefully, this modification will ensure that notices tendered for filing in San Francisco, Los Angeles, and San Diego on a given day are calendared at the same time; however if it does not work, we will suspend the trial in favor of explicit compliance with Rule 1.4. Parties should be aware that notices tendered for filing in Los Angeles and San Diego may not be immediately available in the San Francisco Central Files room and they should contact the reporting party directly if they require a copy of the notice immediately.

4. Rule 1.4(c) states that parties may obtain a copy of the Notice of Ex Parte Communication from the Commission's Central File Room or from the filing party, who must provide it to the requesting party without delay. What does "without delay" mean?

The term "without delay" means exactly what it says. If you have designated a contact person in your notice, you should expect that parties may begin to submit requests to that individual as soon as they read the Daily Calendar summary of your notice. You should respond to all requests in a timely manner and provide a copy of your notice (including any attached written materials or text) as soon as reasonably possible.

The particular mechanics of how you respond to requests are between you and the requesting party. If the requesting party asks you to drop the notice in the mail, you should do so at the next opportunity, consistent with your normal office procedures for mailing other Commission filings. If the requesting party asks for overnight mail or other special mailing arrangements, you are free to request the necessary billing information from the requesting party, and if the requesting party does not provide it, you are free to follow your normal office procedures for mailing other Commission filings. However, if the requesting party asks for a facsimile copy, and you have facsimile capability, you should comply with the request and fax the notice "without delay".

(SECTION III)

DEFINITION OF ISSUES

1. Who is a party?

A party is the person or firm named in the appearance form filed in the all proceedings. Those in the categories of State Service and Information Only on a proceeding's service list are not considered to be parties, unless they would otherwise be covered under Rule 1.1(b) or (h).

2. When is someone an agent of a party?

Someone is an agent of a party if they:

(1) Are employed by the party or its representative and act in that capacity on behalf of the party or the party's position. See also, Black's Law Dictionary, Fifth Edition at p. 59, "Agent.....One who represents and acts for another under contract or relation of agency (q.v.)...."; or

(2) Contact a decisionmaker on behalf of a party to advocate a party's position.

3. What is the status of CACD's Water Branch?

Members of CACD's Water Branch who are appearing as advocates or witnesses for a particular party in contested proceedings are subject to the rule.

4. Will notices be considered as part of the record?

Section 1.2 of the rule provides that notices are not part of the evidentiary record on which the decisionmaker bases their decision.

5. What is meant by sanctions?

The Commission intended the wording of Section 1.5 of the rule to be interpreted broadly in order to preserve maximum flexibility to impose sanctions as appropriate. It specifically did not define categories of sanctions (such as issue sanctions, etc.).

(SECTION IV)

Additional "Most Commonly Asked Questions and Answers"

About Issues Raised in December, 1992 Workshops

1. The definitions of "Party" (Rule 1.1(h) and "Commission Staff of Record" (Rule 1.1(b)(ii) exclude from the rule CACD staff members who do not appear as advocates or witnesses for a particular party. However, CACD Water Branch staff members who appear as advocates or witnesses in a proceeding would be covered by the rule. Are those who supervise CACD Water Branch advocates or witnesses covered by the rule?

Those who supervise CACD Water Branch advocates or witnesses do not by that fact become "parties" under the rule. It is possible that a CACD supervisor could become an "agent" of CACD or some other party (See earlier discussion of agency).

2. Ex parte communications are defined in Rule 1.1(g) as written or oral communications on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication. Are there circumstances where exchanges between decisionmakers and parties in a legislative forum or in a public conference or educational forum could fall within this definition?

This is a gray area, not explicitly addressed by the Commission in its decisions or in the rule. The standard advice when you are in a gray area is to err on the side of reporting the communication. If you do not do so, you risk becoming embroiled in a dispute if some party files a motion seeking to require the filing of a notice reporting the communication. While it is not clear that the Commission intended or wishes to cover such communications under the ex parte rule, the only thing we can say at this point is that the Commission has not decided the issue.

3. The ex parte rule requires reporting within 3 working days; however the Commission's Rule 44.2 which is used to compute time for purposes of filing does not employ the "working day" concept. How is this disparity to be reconciled?

The Rule 44.2 computation "exclude(s) the first day and include(s) the last day." It also specifies that if the last day falls on a Saturday or Sunday or a state holiday, the computation shall omit such day and include the first business day thereafter. As at least one party pointed out during the workshops, strict adherence to Rule 44.2 at times might be inconsistent with the adopted "3 working day" reporting requirement.

For example: Ignoring the Commission's "3 working day" proviso, if an ex parte communication occurs on a Thursday, the three-day period would begin on Friday, and the ex parte communication notice would be due for filing on Monday, under a literal application of Rule 44.2. However it is possible to reconcile Rule 44.2 with the "working day" proviso adopted by the Commission: Using the example above, if the communication occurs on Thursday, the notice would be due for filing on Tuesday (excluding the first day, which is Thursday, and counting Friday as working day 1, Monday as working day 2 and Tuesday as working day 3).

4. On its own initiative, Billie Bob Water Company, a nonparty, contacts a decisionmaker to express concern about the outcome of a generic "gain on sale" issue which will be decided in a proceeding involving Water Company A. Water Company A did not ask Billie Bob Water Co to make the contact, and the latter is not acting on behalf of Water Company A. Is Billie Bob Water Company required to report the communication?

Billie Bob is not acting at the request of a party, but rather on its own initiative. It is not an agent of Water Company A, and has no reporting obligation. Further, since the Commission must base its decision on the record in the gain on sale proceeding, in order for Billie Bob's views to be considered in the decision, Billie Bob should become a party to the proceeding.

5. What types of pleadings might be filed by parties in response to the filing of Notices of Ex Parte Communication?

It is realistic to expect that parties may file motions to cure defects in Notices of Ex Parte Communications; motions to compel production of materials that should have been attached to Notices but were not; petitions to set aside submission to take additional evidence concerning information raised in an ex parte communication (Rule 84); and motions for imposition of sanctions (Rule 1.5). This list is by no means exclusive. In addition, in complex or contentious proceedings, similar to the Diablo Canyon prudency review or the Edison/SDG&E merger application, parties may file motions requesting imposition of an ex parte communications rule tailored to the need of the specific proceeding (Rule 1.6).

6. Are Notices of Ex parte Communications subject to discovery?

This depends upon whether the information sought is relevant to the subject matter of a proceeding or likely to lead to the discovery of admissible evidence (cf. Rule 1.2, which provides that the Commission shall render its decision based on the evidence of record (Rule 1.2).

7. A party sends a mailing to a large constituency, requesting that individuals write to the Commission supporting or endorsing the party's position in a particular proceeding. Such request arguably makes the individual who subsequently engages in an ex parte communication in support of a party's position an agent of the party. Where does the reporting obligation lie?

It is impractical to require that individual members of the public report; therefore while the obligation to report in an agency situation rests with the agent or the party, in this instance it is only practical to require the party to report. The party must make as complete an ex parte Notice filing as is possible in these circumstances.

8. How can a party who uses proprietary information in an ex parte communication protect that information from disclosure?

The Commission must make its decision based on the evidence of record. If the party wishes the Commission to rely upon the information conveyed in an ex parte communication, the information must be made part of the evidentiary record, and if the information is relied upon in the decision it must be public.

9. Can an ALJ approve a Notice of Ex parte Communication that is procedurally defective (eg., is filed late or is incomplete)?

No. The ALJ can only entertain motions (to accept a late filed notice or whatever) and make the appropriate ruling or recommendation to the Commission after hearing from all parties who wish to respond to such a motion.

10. How can parties get quick access to the Daily Calendar if they are not subscribers?

(See Section 3.10.6, "Notice and Availability of Ex Parte Communication Reports" on page 3-7.)

3.14 FORMS

3.14.1 Ex Parte Communication Notice

*BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA*

<i>Highland Electric Company</i>)	
<i>Application for an Order finding</i>)	
<i>its Operations from January 1990</i>)	<i>A.90-02-039</i>
<i>through December 1991 Reasonable</i>)	
)	

NOTICE OF EX PARTE COMMUNICATION

Pursuant to Rule 1.4(a) of the Commission's Rules of Practice and Procedure, Highland Electric Company (Highland) hereby gives notice of the following ex parte communication.

The communication occurred on March 20, 1992 at 10:00 AM in the CPUC's San Francisco Offices. The communication was oral but written materials were also used and provided to each Commissioner in attendance. (Rule 1.4(a)(1))

Highland's Manager of Regulatory Affairs, Ms. Lisa Jones, initiated the communication. Mr. William Johnson of Highland's Department of Regulatory Affairs was also present, as were Commissioners Fessler and Ohanian. (Rule 1.4(a)(2))

Ms. Jones discussed Highland's opposition to DRA's position on allowable depreciation costs. The written materials used during this meeting are attached to this notice.

In expressing Highland's opposition to DRA's position, Ms. Jones relied on three arguments: First, DRA failed to include in its estimate over \$25,000,000 in service vehicles which Highland has yet to fully depreciate. Second, DRA's position is inconsistent with its proposal in Highland's last general rate case, a position which was adopted in total by the Commission. Third, DRA's suggestion that a 40-year service life should be assumed for Highland's gas-fired generating units is inexplicably inconsistent with the uniform system of accounting. In addition, Ms. Jones informed the Commissioners of a recent decision of the FERC affecting its treatment of depreciation costs (FERC 91-107) and invited them to tour several of Highland's gas-fired generating facilities to gain a greater understanding of the challenges involved in trying to extend plant life. (Rule 1.4(a)(3))

To obtain a copy of this notice, please contact:

*Todd Everett
Telephone (719) 555-5555*

Respectfully submitted,

/s/ Amelia Lyon

Attorney for Highland Electric Co.

CPUC DECISION

was withdrawn and relied on April 25, 1990.

⁴D. 91-04-068 authorizes Class C and Class B water utilities, and Class A and Class B utility districts or subsidiaries serving 2,000 or fewer connections, to accept from individual customers amounts in contribution as connection fees covering actual costs to the utility of installing new connections.

⁵Applicants' 2.57 ratio figure includes plant added after the staff audit.

⁶D. 83-12-041, D. 83-01-022, D. 86-05-075, D. 87-10-028, D. 88-01-006.

Order dismissing case at the request of the parties in *Andrew Sawman v. Southern California Gas Co.*

D. 91-07-068, A. 89-04-021 et al.
(July 24, 1991)

Order denying both a stay and rehearing of D. 91-05-007 (*Southern California Gas Co.*).

D. 91-07-069, C. 91-06-044
(July 26, 1991)

Order dismissing case at the request of the parties in *Rhonda J. Lippman v. Southern California Gas Co.*

D. 91-07-070, A. 90-10-057
(July 26, 1991)

Order dismissing application at the request of applicant, Contact Data Corp. dba *Packaging Store*.

D. 91-07-071, A. 89-04-033
(July 26, 1991)

Order correcting clerical error in D. 91-06-053 (*Pacific Gas & Electric Co.*).

D. 91-07-072, C. 91-04-043
(July 29, 1991)

Order dismissing case at the request of the

parties in *Rick Martinez dba Hi-Tech Internat'l Corp. v. Pacific Bell*.

D. 91-07-073, C. 91-06-025
(July 29, 1991)

Order dismissing case at the request of the parties in *Andrew Sawman v. Southern California Gas Co.*

Re Commissioner's Rules of Practice and Procedure

Decision 91-07-074

R. 84-12-028

123 PURA 11

California Public Utilities Commission
July 31, 1991

OPINION proposing new rules governing off-the-record *ex parte* communications in commission proceedings.

1. COMMISSIONS, § 10 — Nature and functions — Legislative versus adjudicatory duties.

[CAL.] The commission is an administrative agency, and as such must perform both legislative and legislative-like functions as well as adjudicatory and adjudicatory-like functions. p. 164.

2. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Formal versus informal proceedings.

[CAL.] New rules governing off-the-record *ex parte* communications apply to formal commission proceedings but not to informal proceedings such as advice letter filings or rulemakings. p. 167.

3. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Substantive versus procedural questions.

[CAL.] New rules governing off-the-record *ex parte* communications apply to substantive communications between parties but not to communications regarding procedural issues. p. 167.

4. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Disclosure versus prohibition.

[CAL.] In developing new rules governing off-the-record *ex parte* communications, the commission chose to opt for disclosure of such communications in most cases rather than a complete prohibition on off-the-record contacts; accordingly, in nonenforcement cases, disclosure of *ex parte* communications must be made for any contact from the date a case commences until the date a final order is issued; in enforcement proceedings, however, *ex parte* communications are barred from the time the case is submitted. p. 168.

5. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Pending versus future proceedings.

[CAL.] New rules governing off-the-record *ex parte* communications apply to both pending and future proceedings. p. 168.

6. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Advocacy appearances.

[CAL.] New rules governing off-the-record *ex parte* communications apply to any party acting in an advocacy role in a commission proceeding, and thus apply to applicants, commissioners, their personal advisors, and the Division of Ratepayer Advocates, but not other commission advisory staff unless they are appearing as an advocate for a particular party in a contested case.

p. 168.

7. COMMISSIONS, § 51 — Investigatory procedure — Bias — *Ex parte* communications — Extent of rules — Discovery and disclosure.

[CAL.] New rules governing off-the-record *ex parte* communications require the party discovering the contact to disclose the communication, rather than require either commissioners or the initiator of the contact to report the contact. p. 169.

BY THE COMMISSION:

Introduction

Today we issue a rule to govern *ex parte* communications in covered Commission proceedings. We define a covered proceeding as "any formal proceeding other than a rulemaking or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking." Since the rule will be added to the Rules of Practice and Procedure, we will forward it to the Office of Administrative Law (OAL) in accordance with applicable provisions of the Government Code. At the conclusion of the OAL publication process, we intend to adopt the rule as set forth in Appendix B.

Because the *ex parte* rule will have a significant impact on this Commission and the parties who appear before it, we make an effort in this decision to describe the Commission's formal decisionmaking process and to draft a rule which is flexibly attuned to the dynamic and diverse nature of that process. As a matter of sound public policy, we believe that any rule applicable to all formal proceedings must be effective, fair (both in reality and in appearance), understandable, and easily administered. However, such clearly beneficial goals must be realized in an environment which accommodates the Commission's various functions.

The Formal Decisionmaking Process

[1] This Commission is an administrative agency. Unlike a purely legislative or purely judicial body, we engage in two types of formal decisionmaking which extend across a spectrum of activity. At one end of the spectrum is pure "legislative" activity, while at the other end is pure "adjudicative". The legislative forum, by its very nature, is one in which the decision-makers seek and receive an array of viewpoints on issues of prospective, and typically general, application. It is an environment in which the decisionmakers must have full and open access to the broadest array of viewpoints if they are to discharge their responsibility fairly and effectively. In contrast, adjudication is a process in which participants expect fair and reasoned treatment in a context devoted to retrospective consideration of specific facts and issues. To achieve the goal of fairness in adjudication, the decisionmakers must restrict the ability of any one participant to circumvent the formal process and thus gain an advantage over others.

Between these two ends of the spectrum lies a great range of formal decisionmaking which may combine elements of both categories. Our task is to develop a rule which recognizes and accommodates not only the two ends of the spectrum, but the range of activities between the two. Below, we examine the characteristics which distinguish these formal decisionmaking processes and the legal basis for fashioning the ex parte rule which we issue today. Our rule will operate differently depending upon decisionmaking contexts, and represents our considered effort to balance the requirements of a multi-faceted process against fairness and due process concerns.

1. *Adjudicatory Functions*

When the Commission is acting in its most adjudicatory capacity, it is engaged in dispute resolution between or among parties about the legal effect of past actions or events. This is an attempt to ascertain the truth regarding past events or facts, so that existing rules, regulations or laws can be applied to decide the merits of the allegations in issue. "Enforcement-related proceedings", as defined in the proposed rule, provide an example of such adjudication

because their subject matter includes the alleged violation of a law, or of an order or rule of the Commission.

The retrospective nature of adjudicatory fact-finding and decisionmaking requires that we regulate off-the-record communications between parties and decisionmakers in adjudicatory proceedings more restrictively than in any other type of covered proceeding. Therefore, we promulgate a rule which, in "enforcement-related proceedings", requires disclosure of ex parte contacts until submission of the case and prohibits ex parte contacts after that time.

We are persuaded that in our purely adjudicatory proceedings it is unnecessary to apply a blanket prohibition of ex parte communications. Such communications made prior to submission of the matter will not be prohibited. However, a fair result requires that any and all ex parte communications be available for review in a file that is publicly accessible. We will require our Central File Room to maintain files of ex parte communications, and to make them available for public inspection. Thus, the rights of all parties will be protected by public disclosure of such communications.

At the same time, we also are persuaded that ex parte communications in adjudication made after the matter is submitted should be prohibited. To allow such communications after submission, we believe, could subject our decision to unfair influence.

2. *Legislative Functions*

When acting as a Constitutional alternative to or delegate of the Legislature, the Commission operates in a proactive mode, formulating new or revising existing policy via a process, which often (though not always) involves assessing facts of a more generalized nature than those which form the basis of an adjudicative case. We believe that the overwhelming majority of our activities involve legislative functions. Some of our proceedings are exclusively legislative; these proceedings include rulemakings. Pursuant to Rule 14.1 of our Rules of Practice and Procedure, rulemakings solicit public comment on the proposed rule but do not

require evidentiary hearings. Because rulemakings constitute a forum for soliciting public comment, they require an open process which affords us the opportunity to hear and consider conflicting viewpoints. This open process is a fundamental characteristic of a rulemaking, as the United States Court of Appeals for the District of Columbia Circuit observed in 1981:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. . . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs. (*Sierra Club v. Costle*, 657 F.2d 298, 400; see also *Administrative Law Treatise*, Kenneth Culp Davis, 2d ed., vol. 1, § 6:18, p. 537.)

We concur with this view. Consequently, to enable us to function efficiently in a rulemaking, we believe full and open communication between the participants in the legislative process and the Commission is mandatory. When the Commission is engaged in rulemaking, it is appropriate in the interest of furthering the Commission's proactive policymaking function to neither prohibit ex parte communications, nor to require their public disclosure. Therefore, we exclude ex parte communications from coverage under the generic rule.

3. *The Difficulty of Readily Classifying All Commission Proceedings According to These Two Functions*

It is possible to classify certain kinds of

Commission proceedings as wholly adjudicatory or wholly legislative (i.e., enforcement-related proceedings and rulemakings as discussed above). However, our application and investigation proceedings are not so easily classified as necessarily lying at one end of the spectrum or at the other. At the same time, in crafting an ex parte rule, we consider it important that the rule be clear and simple in its application. Trying to define whether any particular formal proceeding is legislative or adjudicatory would often demand an inquiry into the case's individual history, scope, or procedural development, thus inviting litigation and uncertainty. Accordingly, rather than develop a rule that turns on the exact nature of a proceeding, we establish a rule that will apply broadly to entire classes of proceedings.

The classes of formal Commission proceedings that do not lie at either end of the decisionmaking spectrum include application cases, complaint cases challenging the reasonableness of the level of a regulated company's rates, and Commission orders instituting investigation (OIRs). Many of these cases involve rulemaking, which is a prospective, legislative function. This point has been repeatedly affirmed by our Supreme Court. (*See Consensus Lobby Against Monopolies v. Public Utilities Comm'n*, 25 Cal 3d 891, 909 (1979)) and the decisions there cited. As we have noted above in discussing our legislative function, the openness and accessibility of decisionmakers in such proceedings is a goal to be sought. On the other hand, these proceedings, unlike rulemakings, involve evidentiary hearings. And, these proceedings may incorporate some elements of adjudication. Consequently, at times it would be impossible to classify particular proceedings as solely legislative or solely adjudicatory, and at times, exceedingly difficult.

We bear in mind two competing considerations in developing an ex parte rule to cover these broad classes of proceedings. First, we wish to foster our ability to hear a range of viewpoints in a more informal setting which encourages an exchange of ideas. Second, we wish to promote fairness and the appearance of fairness in these proceedings. As noted above, these proceedings typically involve hearings,

where different interests compete in a clearly adversarial setting. In such a proceeding, we are concerned that a communication outside of the public record could unfairly influence our decision if other parties are not afforded the opportunity to respond to that communication. (*Compare Pateo v. Federal Labor Relations Authority*, 685 F.2d 547, 564-565, (D.C. Cir. 1982).) On balance we conclude that a rule permitting ex parte contacts, but requiring their disclosure, fully protects the fairness of the process without stifling the exchange of viewpoints.

In short, to ensure that the Commission's decisions are rendered based on the evidence of record (Rule 1.2) and that the decisionmaking process fosters fairness, accuracy, and due process of law, we will require disclosure of ex parte communications in all proceedings other than rulemakings and (as more fully discussed below) in certain cases consolidating rulemaking with OILs. We remind parties to our proceedings that when we function in our legislative mode, communications from the parties are to be desired. Our goal is to make a record of, not discourage, such contacts.

Procedural Background

On March 22, 1991, the Assigned Commissioner issued a ruling inviting comments on a proposed generic ex parte rule. The Assigned Commissioner's proposed rule, which is attached as Appendix A, is a disclosure or "sunshine" rule, which would apply to all contested Commission proceedings at the time of submission. The Assigned Commissioner's proposal specifically exempts rulemakings and non-enforcement Commission investigations from the rule governing ex parte communications.

Twenty-five parties filed written communications in response to the Assigned Commissioner's ruling. The commenting parties are: the Ad Hoc Carriers Committee (Ad Hoc), Professor Michael Asimow (Asimow), Bay Area Teleport (BAT), CACD, the California Water Service Company (Cal Water), the California Cable Television Association (CCTA), California Industrial Group (CIO), California Trucking Association (CTA), the California Water

Association (CWA), the Center for Public Interest Law (CPIL), DRA, GTE California Incorporated (GTEC), MCI Telecommunications Corporation (MCI), Pacific Bell, Pacific Power & Light Company (Pacific Power), Pacific Gas & Electric Company (PG&E), the Commission's Public Advisor's Office (Public Advisor), San Gabriel Water Company (San Gabriel), San Jose Water Company (SJWC), San Diego Gas & Electric Company (SDGE), a group of 10 independent local exchange carriers (the independent LECs), Southern California Edison Company (Edison), Southern California Gas Company (SoCalGas), Toward Utility Rate Normalization (TURN), and Utility Consumers Action Network (UCAN) filing jointly, and US Sprint Communications Company Limited Partnership (Sprint).

The issues raised in these comments fall into several categories, including the scope of the proposed rule, who should be covered under such a rule, the adequacy of the reporting mechanisms, key definitional terms, and enforcement. The parties' comments, summarized below, have assisted us in framing and resolving the issues addressed by our rule.

Scope and Application of the Proposed Rule

1. The Scope

In assessing issues of scope, we have determined which proceedings will be subject to the rule. We also have addressed certain related practical issues, including whether to adopt a disclosure or prohibition rule, and the appropriate duration of any such rule.

Several parties assert that the rule should apply to all Commission proceedings from commencement, rather than submission (e.g., DRA Comments, p. 3; Pacific Bell Comments, p. 2). CPL favors a simpler and more flexible approach under which the Commission would apply the ex parte rule to all proceedings unless the Commission decided that it would be useful to waive the requirement of the rule for a particular proceeding (CPL Comments, p. 3). Sprint's view is that if the Commission adopts ex parte rules, they should apply to all types of Commission proceedings, including

rulemakings and investigations (Sprint Comments, p. 3). Indeed several parties argue against the exemption for rulemakings and investigations proposed by the Assigned Commissioner (TURN/UCAN Ad Hoc, MCI, and CCTA). Several parties including GTEC, the independent LECs, SJWC, PG&E, Edison and Asimow, who favor exempting rulemakings and investigations, maintain that the scope of the ex parte rule is more appropriately limited to matters determined on an evidentiary record after "adjudicatory" hearing (Asimow's Comments, p. 3).

Our proposal does not confine the scope of the rule to the narrow "adjudicatory" category some of the parties prefer. Rule 1.1 (c) defines a "covered proceeding" as:

"any formal proceeding other than a rulemaking or an OIL consolidated with a rulemaking to the extent that the OIL raises the identical issues raised in the rulemaking. An OIL is otherwise a covered proceeding. Except for OILs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied."

[2] Our rule excludes informal Commission processes such as the advice letter process, which do not require development of an evidentiary record (however, a workshop conducted in a covered proceeding would be subject to the rule).

Our rule also specifically excludes rulemakings, where the Commission acts in its most legislative capacity and does not take evidence. We are cognizant, however, that often the Commission consolidates rulemaking and investigatory dockets for the purpose of procedural flexibility in the event that it is necessary to hold evidentiary hearings on issues relating to a rulemaking. Where such consolidation occurs, we do not intend the ex parte rule to apply automatically. In cases where the

consolidated investigatory docket covers the same issues as the rulemaking, the rule will not apply. In cases where the investigatory docket branches out to cover issues not within the scope of the rulemaking, the rule will apply to such portions of the investigatory docket. The ALJ may resolve any dispute about the applicability of the ex parte rule in the case of consolidated rulemakings and investigations.

[3] Several parties addressed the question of whether both procedural and substantive communications between parties and decisionmakers should be covered. For example, SJWC believes that reporting of substantive (but not procedural) communications is sufficient. MCI, which favors a prohibition rule in contested "adjudicatory" proceedings, and a disclosure rule in rulemakings and OILs, confines its recommendation to substantive communications. Such comments are consistent with our experience in proceedings such as the recent A-88-12-035. In that proceeding we adopted an ad hoc ex parte rule which carefully defined "procedural communications", and excluded them from the rule, thereby facilitating necessary communication on such matters as scheduling, filing dates, and service list issues. In the interest of retaining the flexibility to process contested proceedings efficiently, consistent with our past experience, we have confined the proposed rule to substantive issues and have excluded defined "procedural" inquiries.

There is no consensus among the commenting parties on whether the Commission should adopt a disclosure or "sunshine" rule, a prohibition rule, or some combination. For example, DRA favors a sunshine rule from commencement to submission of a proceeding and a prohibition following submission. MCI would prohibit all communications between parties and decisionmakers on substantive matters in contested "adjudicatory" proceedings, while requiring disclosure in rulemakings and OILs. TURN and UCAN suggest that disclosure is appropriate but that prohibition seven days prior to the Commission meeting may be required in order to ensure that last minute ex parte communications are avoided. Sprint also echoes the view that contacts within a specific period before a decision is reached should be

prohibited (Sprint Comments, p. 6). BAT would prohibit ex parte communications in contested matters but permit them under a disclosure requirement in rulemakings and OILs until one week prior to Commission action. Asimow favors prohibition coupled with a narrow definition of the proceedings to which the rule would apply.

[4] After considering these and the other comments filed, it is our view that a disclosure rule from commencement of the proceeding to the date of issuance of a final order in the proceeding is appropriate in most cases. The only exceptions to this rule are enforcement-related investigations or complaints which raise alleged violations of provisions of law or orders or rules of the Commission. In such cases, our rule requires disclosure from commencement until submission, and prohibition from submission until the date of issuance of a final order. This dual approach balances due process concerns in proceedings where alleged violations of law are litigated against the Commission's decision-making needs, by barring ex parte communications only after the matter is "submitted" for decisionmaking purposes, while carefully restricting such communications prior to submission.

At this time, we do not extend the prohibition to other covered proceedings, even in the days prior to issuance of a final order, as suggested by TURN/UCAN, Sprint, and BAT. In appropriate circumstances involving covered proceedings under Rule 1.3(0), the Commission may invoke Rule 1.6 and impose a prohibition upon further ex parte communications for some period prior to issuance of a final order. If ex parte communications occur just prior to issuance of a final order, it may be necessary to postpone final Commission action in order to accommodate the necessary disclosure and any opportunity to respond, but this is a matter which we will handle as it arises.

[5] The rule we issue today is applicable to all covered proceedings pending on the date it is effective, and to all covered proceedings commenced on or after that date. However we will make our final order adopting this proposal (which we will consider at the conclusion of the OAL process) effective within 30-60 days

thereafter in order to allow time for implementation efforts, including staffing augmentation which is necessary to properly and efficiently administer this new rule.

2. Who is Covered Under the Proposed Rule

Several parties have addressed the question of who is a decisionmaker and who is a party under the proposed rule. Most of the comments focus on the question of our staff. For example, CWA, San Gabriel, and SJWC, are concerned about CACD Water Branch's role as an advocate in certain proceedings. Others such as Asimow, believe that if the Commission bans ex parte communications, the ban should not extend to CACD, although CACD should not engage in ex parte communications in any event. For its part, CACD wishes to be excluded from whatever ex parte communication rules the Commission adopts (CACD Comments, p. 10). DRA believes CACD and the Transportation Division must be covered when acting as advocate. DRA also supports a more comprehensive definition of the term "party" vis-a-vis DRA.

[6] As stated previously, our primary concern is to achieve an appropriate balance between fairness and due process requirements and legitimate decisionmaking needs, including access to staff. Our rule adopts a narrow definition of "decisionmaker". It covers Commissioners' personal advisors, but does not cover other advisory staff such as CACD. On the other hand, the rule adopts a comprehensive definition of "party" which effectively includes all DRA staff members as well as those members of other staff organizations and divisions who are acting in an advocacy role in contested proceedings subject to this rule. Thus, the rule encompasses within the definition of "party" the CACD Water Branch acting in an advocacy role; however, it covers only those members of CACD Water Branch who are appearing as advocates or witnesses for a particular party in contested proceedings subject to the rule. Similar treatment is accorded only those Transportation Division staff members or other staff members who appear as advocates or witnesses in

contested proceedings subject to the rule. Inclusion of the term "agents" in the party definition is designed to ensure that other staff members of CACD or Transportation Division, who are neither advocates nor witnesses in a proceeding covered by this rule, will not circumvent this rule. However, specifically excluded from the definition of "Commission Staff of Record" for purposes of determining party status under this rule, are the Executive Director, the General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5), who regularly advise the Commission on a variety of matters, and who perform functions critical to ensuring the flow of expert advice to Commissioners.

Finally, in response to an issue raised by the Public Advisor, the proposed rule specifically provides that a member of the public, who is not acting as the agent or employee of a party, is not a "party".

3. Reporting

[7] In connection with disclosure provisions, several parties favor imposing the reporting obligation on the decisionmaker (e.g., TURN, UCAN, Sprint). Other parties favor disclosure by both the decisionmaker and the party (e.g., DRA, CPL). Still other parties favor disclosure by the initiator of the contact (e.g., GTEC, Pacific Bell). CCTA suggests that decisionmakers should have the opportunity to correct factual errors in disclosure notices submitted by parties.

After assessing the comments, we opt to follow our practice in previously adopted ad hoc ex parte rules, and we impose the reporting obligation on the party.

In order to make such a report as simple and straightforward as possible, we require that notices of ex parte communication be filed in the Commission's San Francisco Docket office within three working days, and be provided simultaneously to the assigned ALJ. We are dispensing with the service requirement set forth in Rule 4.5, in order to minimize the reporting burden. However we carefully specify the type of information to be included in the

notice, consistent with the Assigned Commissioner's earlier recommendation, in order to make the notice complete and adequate to inform other parties of the nature and extent of the communication. In its notice, the party should not characterize or represent the decisionmaker's communication, if any, but rather should describe only the party's communication.

The filing of a notice will be reported promptly thereafter in the Commission's Daily Calendar, and parties may obtain a copy of the notice from the Commission's Central File room or from the filing party, who has an obligation to provide it to the requesting party without delay. To the extent a party wishes to respond to an ex parte communication, the party may do so. The parties must bear in mind, however, that the decisionmaker is bound neither by this rule nor by fairness of process to accord "equal time" to every party who wishes to engage in off-the-record communications.

4. Definitions

Several parties suggest the need to more carefully pinpoint when a proceeding commences and when a proceeding is submitted. Rule 1.1(a) defines commencement of a proceeding as the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint or the adoption by the Commission of an OIL. The proposed rule also defines submission of a proceeding as "described in Rule 77 of the Commission's Rules of Practice and Procedure."

We have also defined "covered proceedings" in a manner which clearly apprises the parties of the proceedings subject to the proposed rule. Our rule differs from the Assigned Commissioner's proposal in that it is effective from commencement of a covered proceeding; therefore, we have considered whether proceedings should be covered during the period between commencement and the filing of an answer or a protest or request for hearing. We have resolved this issue by bringing within the scope of the rule notices of intention, applications, and complaints, during the period

between commencement and the filing of an answer or protest or denial of a request for hearing. If an answer or protest is withdrawn, the proceeding ceases to be a "covered proceeding." OUs are always "covered proceedings", except when consolidated with rulings, as discussed above.

5. Sanctions

Several parties including Pacific Power and Pacific Bell, have urged that if the Commission adopts sanctions, it should do so with specificity. We have addressed this concern in Rule 1.5, where we confirm our authority to impose such penalties and sanctions or to issue other appropriate orders to ensure the integrity of the formal record and to protect the public interest. However, we do not propose more specific provisions at this time. We are concerned that adoption of specific sanction provisions may result in their abuse as a weapon by parties against adversaries in contested proceedings. We believe that the general language contained in Rule 1.5 is sufficient for enforcement purposes, and provides the Commission the enforcement flexibility it needs.

Summary

In drafting today's decision, we have been keenly aware of the fact that our ex parte rule must strike a delicate balance. The rule must be effective in ensuring that no party has unfair access to decisionmakers; only such a rule can promote both the reality and appearance of due process, as well as public confidence in our decisionmaking process. However, in so doing, it must not impede our ability to obtain critical input necessary to fulfill our obligation to act affirmatively in the public interest; our role is not merely to respond passively to the issues presented by parties in our proceedings. The public interest is not served if the Commission is deprived of the knowledge and expertise it needs to function effectively.

Today we issue a rule which we believe will not impede our ability to make sound decisions. It is a rule that favors more access to knowledgeable sources, including Commission

staff expertise, than some would prefer. However, it is a rule which also contains strict disclosure and clearly defined prohibition provisions, coupled with other features which are designed to address the fairness and due process concerns of all parties. In addition, the rule emphasizes the Commission's obligation to render its decision based on the evidence of record in its proceedings. In sum, while our rule will not please everyone, it attempts to strike a reasonable balance in an area of great controversy and difficulty.

Caveat

What we announce today represents our collective judgement, after extensive consultation with our staff, of an ex parte rule best tailored to the needs and responsibilities of this Commission. While we believe that it will function optimally in the public interest we cannot be certain of that outcome. In the final analysis, we will need that perspective which can only be developed through experience. If our interaction with the parties and the public suggests that features of the rule should be modified, it will be our responsibility to do so.

Finding of Fact

The proposal contained in Appendix B represents a realistic balancing of competing goals of ensuring that the Commission has adequate information to discharge its decisionmaking obligations and that the due process rights of parties are maintained.

Conclusion of Law

On completion of the Office of Administrative Law (OAL) publication process, the rule contained as Appendix B should be placed on the Commission's Agenda for adoption as the final rule governing ex parte communications.

INTERIM ORDER

IT IS ORDERED that the Executive Director, in coordination with the Administrative Law Judge Division, should transmit a copy of this

order to the Office of Administrative Law in accordance with the applicable provisions of the Government Code.

This order is effective today. Dated July 31, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

APPENDIX A

ASSIGNED COMMISSIONER'S RULING

After careful consideration, I believe the time has come to revisit the question of adoption of a generic rule governing ex parte contacts in Commission proceedings. This is not a new issue in this rulemaking docket. In 1986 the Commission held workshops, drafted a generic rule, and solicited comments, but deferred final action in order to gain experience with its newly adopted rules governing "Decisions and Proposed Reports" (Rules 77 through 77.5). Since that time, the Commission has adapted ex parte rules in specific proceedings on a case-by-case basis on its own motion or in response to requests by parties.

For a variety of reasons, we now wish to consider a change to the Commission's previous case-by-case approach. We now have extensive experience with the proposed decision/comments process, and it is difficult to see how an ex parte rule would not complement that process. Indeed, parties should address how the Public Utilities Code § 311 comments process might be improved if a generic ex parte rule, along the lines of that proposed in this ruling, is adopted. In addition, as we consider the introduction of competition to many of the industries we regulate, our proceedings are becoming increasingly complex and controversial. Given the high stakes, the participation of many parties representing diverse interests is not unusual. It is important that the Commission

maintain both the full appearance and reality of due process and fair access for all parties appearing before it.

Attached to this ruling is a proposed generic rule governing ex parte communications in defined Commission proceedings. Parties should review the proposed rule and file comments in this docket on or before April 22, 1991. I have requested the Administrative Law Judge Division to review the comments and to make a recommendation for the consideration of the full Commission.

In preparing their written comments, the parties should focus on the following issues, as well as any others they believe the Commission should consider:

1. Scope of the Ex Parte Rule

The proposed rule's primary mechanism is public disclosure of substantive (not procedural) communications BETWEEN Commissioners, Commissioners' advisors, the Chief Administrative Law Judge, Assistant Chief Administrative Law Judges, or any assigned Administrative Law Judge AND any employee, counsel, or agent of any party to any contested proceeding, except rulemaking proceedings and investigations on the Commission's own motion, excluding enforcement proceedings, following submission of a proceeding.

Parties should comment on the proposal's disclosure mechanism, as well as its differentiation between substantive and procedural communications. Parties may wish to comment on the issue of whether ex parte communications should be subject to disclosure from the commencement of a proceeding. To that end, a definition of "commencement of a proceeding" is included in the proposed rule.

In addition, parties should address the proposal's coverage of "contested proceedings" and enforcement proceedings, and its exclusion of rulemaking and other investigations initiated on the Commission's own motion.

Finally, parties should address the adequacy of the decisionmaker and party definitions. The proposed rule covers the Division of Ratepayer Advocates, but does not cover Commission Advisory and Compliance

PUCN *EX PARTE* PROHIBITION

abuse of discretion, the Supreme Court will not hesitate to intervene. *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979).

Oral pronouncement insufficient as final order. — The oral pronouncement of a determination by the Real Estate Advisory Commission suspending the license of a real estate salesman was insufficient to constitute a final decision where specific findings of fact were not included and there was no announcement of an effective date of the suspension of the license. *State, Dep't of Commerce v. Hyt*, 96 Nev. 494, 611 P.2d 1096 (1980).

Unsupported findings presumed unreasonable. — Where an administrative agency made no written findings of fact and conclusions of law to support particular findings, the agency's order should be presumed unreason-

able. *Public Serv. Comm'n v. Continental Tel. Co.*, 94 Nev. 345, 580 P.2d 467 (1978).

State water engineer must serve notice. — Although the state water law does not specifically require the state engineer to serve actual notice of a final decision or order, the Administrative Procedure Act does so require. *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979).

Cited in: *State ex rel. Sweikert v. Briare*, 94 Nev. 752, 588 P.2d 542 (1978); *Gray Line Tours v. Public Serv. Comm'n*, 97 Nev. 200, 626 P.2d 263 (1981); *State Bd. of Psychological Exmrs. v. Norman*, 100 Nev. 241, 679 P.2d 1263 (1984); *Southern Nev. Mem. Hosp. v. State, Dep't of Human Resources*, 101 Nev. 387, 705 P.2d 139 (1985).

LEGAL PERIODICALS

Review of Selected Nevada Legislation, Administrative Law, 1985 Pac. L.J. Rev. Nev. Legis. 1.

233B.126. Limitations on communications of agency's members or employees rendering decision or making findings of fact and conclusions of law.

Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate. An agency member may, subject to the provisions of NRS 233B.123:

1. Communicate with other members of the agency.
2. Have the aid and advice of one or more personal assistants. (1967, p. 809.)

CASE NOTES

Cited in: *Rudin v. Nevada Real Estate Advisory Comm'n*, 86 Nev. 562, 471 P.2d 658 (1970).

233B.127. Applicability of chapter to grant, denial or renewal of license; expiration of license; notice of adverse action by agency; summary suspension of license.

1. When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.
2. When a licensee has made timely and sufficient application for the renewal of a license or for a new license with reference to any activity of a

FERC *EX PARTE* PROHIBITION

PART 385 -- RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 385 continues to read as follows:

AUTHORITY: 5 U.S.C.551-557; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

2. In § 385.101, remove paragraph (b)(4)(ii), and redesignate paragraph (b)(4)(i) as (b)(4).
3. Section 385.915 is revised to read as follows:

§ 385.915 Off-the-record communications (Rule 915).

The provisions of Rule 2201 (prohibited communications and other communications requiring disclosure) apply to proceedings pursuant to this subpart, commencing at the time the Secretary issues a proposed remedial order under 10 CFR. 205.192, an interim remedial order for immediate compliance under 10 CFR.205.199D, or a proposed order of disallowance under 10 CFR. 205.199E.

4. Section 385.1012 is revised in its title and text to read as follows:

§ 385.1012 Off-the-record communications (Rule 1012).

The provisions of Rule 2201 (prohibited communications and other communications requiring disclosure) apply to proceedings pursuant to this subpart, commencing at the time a petitioner files a petition for review under Rule 1004 (commencement of proceedings).

5. Section 385.1415 is removed.
6. Subpart V is revised in its title to read as follows:

Subpart V - Off-the-Record Communications; Separation of Functions

7. Section 385.2201 is revised to read as follows:

§ 385.2201 Rules governing off-the-record communications. (Rule 2201).

(a) Purpose and scope. This section governs off-the-record communications with the Commission in a manner that permits fully informed decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process. This rule will apply to all contested on-the-record proceedings, except that the Commission may, by rule or order, modify any provision of this subpart, as it applies to all or part of a proceeding, to the extent permitted by law.

(b) General rule prohibiting off-the-record communications. Except as permitted in paragraph (e) of this section, in any contested on-the-record proceeding, no person shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person, any off-the-record communication.

(c) Definitions. For purposes of this section:

(1) Contested on-the-record proceeding means

(i) Except as provided in paragraph (c)(i)(ii), any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any

material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing.

(ii) The term does not include notice-and-comment rulemakings under 5 U.S.C. § 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.

(2) Contractor means a direct Commission contractor and its subcontractors, or a third-party contractor and its subcontractors, working subject to Commission supervision and control.

(3) Decisional employee means a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding, but does not include an employee designated as part of the Commission's trial staff in a proceeding, a settlement judge appointed under Rule 603, a neutral (other than an arbitrator) under Rule 604 in an alternative dispute resolution proceeding, or an employee designated as being non-decisional in a proceeding.

(4) Off-the-record communication means any communication relevant to the merits of a contested on-the-record proceeding that, if written, is not filed with the Secretary and not served on the parties to the proceeding in accordance with Rule 2010, or if oral, is made without reasonable prior notice to the parties to the proceeding and without the opportunity for such parties to be present when the communication is made.

(5) Relevant to the merits means capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding, but does not include:

(i) Procedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding;

(ii) A general background or broad policy discussion involving an industry or a substantial segment of an industry, where the discussion occurs outside the context of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding; or,

(iii) Communications relating to compliance matters not the subject of an ongoing proceeding.

(d) Applicability of prohibitions.

(1) The prohibitions in paragraph (b) of this section apply to:

(i) Proceedings initiated by the Commission from the time an order initiating the proceeding is issued;

(ii) Proceedings returned to the Commission on judicial remand from the date the court issues its mandate;

(iii) Complaints initiated pursuant to rule 206 from the date of the filing of the complaint with the Commission, or the date the Commission initiates an investigation, (other than an investigation under part 1b of this chapter), on its own motion; and

(iv) All other proceedings from the time of the filing of an intervention disputing any material issue that is the subject of a proceeding.

(2) The prohibitions remain in force until:

(i) A final Commission decision or other final order disposing of the merits of the proceeding or, when applicable, after the time for seeking rehearing of a final Commission decision, or other final order disposing of the merits expires;

(ii) The Commission otherwise terminates the proceeding; or

(iii) The proceeding is no longer contested.

(c) Exempt off-the-record communications

(1) Except as provided by paragraph (e)(2), the general prohibitions in paragraph

-- (b) of this section do not apply to:

(i) An off-the-record communication permitted by law and authorized by the Commission;

(ii) An off-the-record communication made by a person outside of the agency related to an emergency subject to disclosure under paragraph (g) of this section;

(iii) An off-the-record communication provided for in a written agreement among all parties to a proceeding that has been approved by the Commission;

(iv) An off-the-record written communication from a non-party elected official, subject to disclosure under paragraph (g) of this section;

(v) An off-the-record communication to or from a Federal, state, local or Tribal agency that is not a party in the Commission proceeding, subject to disclosure under paragraph (g) of this section, if the communication involves:

(A) an oral or written request for information made by the Commission or Commission staff; or

(B) a matter over which the Federal, state, local, or Tribal agency and the Commission share jurisdiction, including authority to impose or recommend conditions in connection with a Commission license, certificate, or exemption;

(vi) An off-the-record communication, subject to disclosure under paragraph (g) of this section, that relates to:

(A) The preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement; or

(B) The preparation of an environmental assessment where the Commission has determined to solicit public comment on the environmental assessment, if such communications occur prior to the issuance of the final environmental document.

(vii) An off-the-record communication involving individual landowners who are not parties to the proceeding and whose property would be used or abuts property that would be used by the project that is the subject of the proceeding, subject to disclosure under paragraph (g) of this section.

(2) Except as may be provided by Commission order in a proceeding to which this subpart applies, the exceptions listed under paragraph () (1) will not apply to any off-the-record communications made to or by a presiding officer in any proceeding set for hearing under subpart E of this part.

(f) Treatment of prohibited off-the-record communications.

(1) Commission consideration. Prohibited off-the-record communications will not be considered part of the record for decision in the applicable Commission proceeding, except to the extent that the Commission by order determines otherwise.

(2) Disclosure requirement. Any decisional employee who makes or receives a prohibited off-the-record communication will promptly submit to the Secretary that communication, if written, or, a summary of the substance of that communication, if oral. The Secretary will place the communication or the summary in the public file associated with, but not part of, the decisional record of the proceeding.

(3) Responses to prohibited off-the-record communications. Any party may file a response to a prohibited off-the-record communication placed in the public file under this paragraph, paragraph (f)(2). A party may also file a written request to have the prohibited off-the-record communication and the response included in the decisional record of the proceeding. The communication and the response will be made a part of the decisional record if the request is granted by the Commission.

(4) Service of prohibited off-the-record communications. The Secretary will instruct any person making a prohibited written off-the-record communication to serve the

document, pursuant to Rule 2010, on all parties listed on the Commission's official service list for the applicable proceeding.

(g) Disclosure of exempt off-the-record communications.

(1) Any document, or a summary of the substance of any oral communication, obtained through an exempt off-the-record communication under paragraphs (e)(1)(ii), (iv), (v), (vi) or (vii) of this section, promptly will be submitted to the Secretary and placed in the decisional record of the relevant Commission proceeding, unless the communication was with a cooperating agency as described by 40 CFR § 1501.6, made under paragraph (e)(1)(v) of this section.

(2) Any person may respond to an exempted off-the-record communication.

(h) Public notice requirement of prohibited and exempt off-the-record communications.

(1) The Secretary will, not less than every 14 days, issue a public notice listing any prohibited off-the-record communications or summaries of the communication received by his or her office. For each prohibited off-the-record communication the Secretary has placed in the non-decisional public file under paragraph (f)(1) of this section, the notice will identify the maker of the off-the-record communication, the date the off-the-record communication was received, and the docket number to which it relates.

(2) The Secretary will not less than every 14 days, issue a public notice listing any exempt off-the-record communications or summaries of the communication received by

the Secretary for inclusion in the decisional record and required to be disclosed under paragraph (g)(1) of this section.

(3) The public notice required under this paragraph (h) will be posted in accordance with § 388.106 of this chapter, as well as published in the Federal Register, and disseminated through any other means as the Commission deems appropriate.

(i) Sanctions.

(1) If a party or its agent or representative knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited off-the-record communication.

(2) If a person knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2102 (Suspension).

(3) Commission employees who are found to have knowingly violated this rule may be subject to the disciplinary actions prescribed by the agency's administrative directives.

(j) Section not exclusive.

(1) The Commission may, by rule or order, modify any provision of this section as it applies to all or part of a proceeding, to the extent permitted by law.

FERC DECISION

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Regulations Governing Off- the-Record Communications Docket No. RM98-1-000

ORDER NO. 607

FINAL RULE

(Issued September 15, 1999)

I. INTRODUCTION

The Federal Energy Regulatory Commission is revising its regulations governing communications between the Commission's decisional employees and persons outside the Commission. The revisions clarify the ground rules for communication, consistent with the Commission's outreach goals. The final rule is intended to permit fully informed decision making while at the same time ensuring the continued integrity of the Commission's decisionmaking process.

II. BACKGROUND

The amendments added to the Administrative Procedure Act (APA) in 1976 by the Government in the Sunshine Act provided a general statement as to the limitations and procedures governing *ex parte* communications in matters that statutorily require an on

the record hearing.¹ Except as otherwise authorized by law, the APA prohibits *ex parte* communications relevant to the merits of a proceeding between employees involved in the decisional process of a proceeding and interested persons outside the agency.² The

¹5 U.S.C. 551-557. Section 557 applies "according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title." Section 556 applies to hearings required by sections 553 and 554.

²5 U.S.C. 557(d) provides that:

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of *ex parte* matters as authorized by law -

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral

(continued...)

1976 Act instructed agencies to issue regulations necessary to implement the APA's requirements.³ Shortly thereafter, the Federal Power Commission implemented *ex parte* regulations based on the APA's guidance.⁴ Existing Rule 2201⁵ applies to all covered proceedings before the Commission except those involving oil pipelines. The Commission currently has a separate *ex parte* regulation, Rule 1415,⁶ originally developed by the Interstate Commerce Commission (ICC), which applies only to oil

²(...continued)

responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) 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.

(2) This subsection does not constitute authority to withhold information from Congress.

³5 U.S.C. 559.

⁴FPC Order No. 562, 42 FR 14701 (Mar. 16, 1977).

⁵18 CFR 385.2201.

⁶18 CFR 385.1415.

pipeline proceedings.⁷ Although directed to the same end -- both prohibit certain *ex parte* communications and both describe methods for public disclosure of such communications -- they differ in significant details. The manner in which the existing *ex parte* regulations have been interpreted and applied within and outside of the Commission has led to a great deal of confusion.

In October 1992, upon determining that a proposed negotiated rulemaking effort would be cumbersome and ineffective,⁸ the Commission noticed a Public Conference for the purpose of examining the Commission's *ex parte* regulations and providing, *inter alia*, that the Commission wanted to provide clearer guidance on whether the *ex parte* prohibitions should apply to all Commission employees or be more limited, *e.g.*, to Commissioners, their personal staff, and other decisional employees.⁹ The notice further recited the need for clearer standards governing informal consultations between the Commission's environmental staff and other federal agencies that have environmental responsibilities or interests impacting our decisions, as well as contacts between the

⁷18 CFR 385.1415.

⁸See Determination Not to Establish a Negotiated Rulemaking Committee, Docket No. RM 91-10-000, 57 FR 10621 (Mar. 27, 1992), IV FERC Stats. & Regs. ¶ 35,023 (Mar. 20, 1992).

⁹Notice of Public Conference, Regulations Governing Ex Parte Communications, Docket No. RM91-10-000, 58 FERC ¶ 61,320 (Mar. 20, 1991).

Commission and applicants and other persons for the purpose of obtaining information necessary for environmental analyses.¹⁰

As a result of the March 1992 public conference, participants developed a general consensus favoring a revised rule that would provide the Commission, the industry, and the public with a clearer statement of what communications are prohibited and when the prohibitions apply.¹¹ It is evident from comments on the March 1992 Notice of Public Conference, and from the ongoing experiences of staff and persons outside the agency, that the language and application of our existing *ex parte* rule should be revised for the sake of clarity.

Moreover, the Commission has recognized the benefits of enhancing its access to information from federal and state agencies and other interested persons to the extent consistent with law and fair process. More recently, discussions undertaken as part of the Commission staff's ongoing reengineering effort indicated that many people believe that changes to the current *ex parte* rule could enhance the Commission's operations.

On September 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NOPR) to revise its procedural rules concerning communications between the

¹⁰Id.

¹¹See, e.g., the comments filed by Interstate Natural Gas Association, the Industrial Groups, Pacific Gas Transmission Company, and Environmental Action in Docket No. RM91-10-000. Notice of Public Conference, 57 FR 10622 (Mar. 27, 1992); IV FERC Stat. & Regs. ¶ 35,023 (Mar. 20, 1992).

Commission and its employees and persons outside the Commission.¹² The NOPR requested comments on the proposed changes to the Commission's procedural rules governing communications between the Commission and its employees and persons outside the Commission.¹³ Thirty-two commenters, representing the hydropower, electric power, and natural gas pipeline industries, as well as state and federal resource agencies filed comments generally supporting adoption of the rule as proposed in the NOPR.¹⁴ Their comments offer a number of recommendations and suggestions for improving the proposed rule, some of which are adopted in the final rule, and some which are not, as discussed more thoroughly below.

III. DISCUSSION

The final rule is based on the fundamental APA principles that are the foundation for the *ex parte* prohibition, and furthers the basic tenets of fairness: (1) a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut;¹⁵ and (2) reliance on "secret"

¹²Regulations Governing Off-the-Record Communications, 63 FR 51312 (Sept. 25, 1998); FERC Stats. & Regs. [Proposed Regulations 1988-1998] ¶ 32,534 (Sept. 16, 1998).

¹³The Commission sought comments notwithstanding that, because this is a procedural rule, no opportunity for comment is required by the APA.

¹⁴The commenters are identified in Appendix A.

¹⁵WKAT, Inc. v. FCC, 296 F.2d 375 (D.C. Cir.), cert. denied, 360 U.S. 841 (1961).

evidence may foreclose meaningful judicial review.¹⁶ The final rule sets out when communications between the Commission and Commission staff and persons outside the Commission may take place off-the-record, and when such communications must take place on the record. The final rule also contains directions on how both prohibited and exempted off-the-record communications will be handled by the Secretary's office and how public notice of such communications will be made.

A. Overview

The final rule generally follows the direction of the proposed rule. The final rule applies to off-the-record communications made in a "contested on-the-record proceeding," defined as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing." Proceedings not covered by this rule include informal (*i.e.*, notice and comment) rulemaking proceedings under 5 U.S.C. § 553; investigations under part 1b; public technical, policy, and other conferences intended to inform the public or solicit comments on general issues of interest to the Commission and the public; any other proceeding not having a "party or parties," as defined in Rule 102 of the Commission rules of practice and procedure¹⁷;

¹⁶Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 541-542 (D.C. Cir. 1978).

¹⁷18 CFR 385.102.

and any proceeding in which no party disputes any material issues. Although the APA permits off-the-record communications concerning general background or policy discussions about an industry or segment of an industry, discussions of how such background or policy information might apply to the specific merits of a pending proceeding are not permitted.¹⁸

The NOPR proposed 10 exemptions to the general prohibition against off-the-record communications in contested, on-the-record proceedings at the Commission. Seven of the proposed exemptions are adopted in the final rule largely as proposed in the NOPR -- (1) off-the-record communications expressly permitted by rule or order, (2) off-the-record communications related to emergencies, (3) off-the-record communications agreed to by the parties, (4) off-the-record written communications with non-party elected officials, (5) off-the-record communications with other Federal, state, local and Tribal agencies, (6) off-the-record communications related to National Environmental Policy Act (NEPA) documentation, and (7) off-the-record communications with individual non-party landowners. These are discussed below. As a clarification, the final rule refers to "exempted" rather than "permitted" off-the-record communications in the regulatory text.

Three proposed exemptions are dropped in this final rule because they are unnecessary. The NOPR proposed an exemption for communications taking place prior to the filing of an application for Commission action (generally referred to as a "pre-

¹⁸See H.R. Rep. No. 94-880 (Part I), at 20 (1976), reprinted in 1976 U.S.C.C.A.N. at 2202.

filing" meeting or conference). As more thoroughly discussed below, this exemption is eliminated as unnecessary in the final rule, because pre-filing communications are outside the purview of this rule because they take place prior to the filing of an application, and therefore prior to any "proceeding" at the Commission.

The NOPR proposed an exemption for published or broadly disseminated public information. We subsequently have concluded that, where staff obtains such information of its own volition, no exemption is required to permit Commission staff to access and consider widely available public information. Thus, that exemption has been deleted in the final rule although information relied on by the Commission must be put into the public record.

Finally, the NOPR also proposed an exemption for communications related to compliance matters where compliance was not the subject of a pending proceeding. The final rule addresses this concern by defining such communications as not relevant to the merits, rather than by providing a separate exemption.

The final rule establishes notice and disclosure requirements for both prohibited and exempted communications. These provisions are similar to those proposed in the NOPR.

B. General Comments

The comments received from the 32 commenters generally were supportive of the Commission's efforts to clarify and reform the current rules. Several general comments

are addressed in this section; comments on specific elements of the NOPR are discussed below.

Several commenters expressed concern that the revised rules could operate to the detriment of small entities.¹⁹ It is not our intent to create rules or regulations having a discriminatory effect on any segment of the Commission's constituency, particularly smaller entities that may not have a regular presence in Washington, D.C., or may lack the resources of larger entities. Everybody doing business with the Commission should be assured that the purpose of the final rule on communications is to enhance the ability of all entities involved in a particular proceeding to communicate with the Commission on an equal footing.

One weakness in the prior rule is that it did not expressly apply to off-the-record communications initiated by the Commission and its staff. This deficiency appears to be inconsistent with the approach of the APA that, in general, *ex parte* proscriptions should apply when one party has private off-the-record communications with a decisional authority, regardless of who initiated the contact, so that other parties are not deprived of fundamental fairness and due process. Therefore, the final rule applies to off-the-record communications from decisional Commission employees to persons outside the Commission as well as off-the-record communications from persons outside the

¹⁹See EPSA at 4; Joint Commenters at 3-4.

Commission to Commission decisional employees. The prohibitions apply both to oral and written off-the-record communications.

One commenter opines that, while most of the reforms set out in the proposed rule are generally desirable and will give the Commission more flexibility in communicating with other entities, the rule, if strictly applied, would seem to reduce some of the flexibility commonly practiced under the existing rule.²⁰ This commenter believes that exposing staff to possible recriminations for such off-the-record communications might have a chilling effect on staff and forecloses the type of meaningful dialogue that might otherwise lead to informed decision making, and suggests more extensive use of notice and disclosure procedures to further enhance communications.

The final rule is not intended to reduce communications. Rather, by clarifying some of the confusion that existed with the prior rule, the net result should be to improve meaningful dialogue that is necessary to informed and fair decision making. The final rule defines when a communication is considered off-the-record, and sets forth certain exemptions for when off-the-record communications may be permitted.

C. Definitions in the Final Rule

The final rule provides relevant definitions. These are discussed *seriatim*.

(1) Off-the-record communication.

²⁰Sempra at 3-4.

As proposed in the NOPR, an "off-the-record communication" was defined as "any communication which, if written, is not served on the parties, and, if oral, is made without prior notice to the parties." Several commenters believe that the definition of an oral off-the-record communication should be amended so that even if prior notice is provided for the off-the-record oral communication, it should nonetheless be categorized as prohibited unless there was an opportunity for all parties to be present when the communication was made.²¹ One commenter argues that such an amendment gives context to the nature of prohibited oral communications and tracks the language of the Federal Communication Commission's (FCC's) *ex parte* rule.²²

The Commission agrees that the proposed definition should be modified along the lines suggested. Accordingly, in the final rule, "off-the-record communication" is defined as "any communication relevant to the merits of a contested on-the-record proceeding which, if written, is not filed with the Secretary and not served on the parties to the proceeding pursuant to Rule 2010,²³ and if oral, is made without reasonable prior notice to the parties to the proceeding, and without the opportunity for such parties to be present when the communication is made." Many oral communications are made by telephone conference calls during which all parties may not be physically "present." We will

²¹INGAA at 2 (INGAA's comments are endorsed by Southern Natural Gas Company, Natural Gas Supply Association, and the Williams Companies).

²²*Id.* at 2-3.

²³18 CFR 385.2010

interpret the definition of "present" to include presence by telephone or similar means.

The definition of "written communications" includes communications transmitted by electronic means such as "e-mail."

(2) Contested on-the-record proceeding.

The APA *ex parte* prohibitions apply to adjudications and similar cases required by statute to be decided on the record after an opportunity for hearing.²⁴ Courts generally have treated rules barring private communications as a basic element of a fair hearing -- whether an APA-type oral evidentiary hearing or one involving "paper" exhibits and pleadings -- in any case involving competing private claims to a valuable privilege or benefit.²⁵ Consequently, the final rule extends the prohibitions to all "contested on-the-record proceedings." The NOPR defined a "contested on-the-record proceeding" as "any complaint, action initiated by the Commission, or other proceeding involving a party or parties in which an intervenor opposes a proposed action."

One commenter believes the definition is too narrow because it would attach only in a proceeding in which a party has filed in opposition to an application. The commenter believes that the Commission should deem as contested a proceeding where parties contest legal or factual issues, such as the proper scope of mitigation for environmental harm, even if they do not necessarily contest the propriety of the

²⁴5 U.S.C. 557(d)(1).

²⁵Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); and Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981).

application, and expresses uncertainty over whether the rule would apply in circumstances where the posture of an intervention is unclear and the Commission has not yet issued a formal determination that the proceeding is contested.²⁶ The commenter thus believes that the proposed definition could motivate a party to take a position in opposition to an application merely to prevent off-the-record communications from taking place, a proposition it notes as contrary to the new policy of encouraging collaboration in licensing proceedings.²⁷ As a solution, the commenter suggests amending the proposed definition to include the possibility that the prohibition on off-the-record communications could be invoked by an intervenor's mere request that the rule apply, even in the absence of dispute over a material issue.

The Commission will not rely on intervenor requests to trigger the rule's application. One purpose of the final rule is to permit and encourage more open communications between the Commission and the public, and, therefore, an overbroad definition of when this rule would be triggered would be counter to this goal. The Commission will not treat an intervention as triggering the requirements of this rule when it appears to have been made solely for the purpose of causing the intervenor to be placed on the service list or solely for the purpose of seeking permission to participate in a hearing, should the Commission order that a hearing be held.

²⁶HRC at 2.

²⁷Id. at 2-3.

To clarify, however, the Commission will amend the definition in the final rule so that a "contested on-the-record proceeding" is "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing." Consistent with current practice, a dispute of "any material issue" may include a dispute of fact, law or policy. This amendment to the NOPR's definition of a contested on-the-record proceeding is more consistent with the APA and its legislative history. The explicit requirement that the proceeding be "contested" before *ex parte* rules attach reflects the notion that procedural requirements and constraints originally developed to preserve the rights of parties in an adjudication have no place in an administrative proceeding in which there is no "contest" comparable to the controversy in a judicial case. For purposes of this definition, an "on-the-record" proceeding includes both proceedings set for oral hearings and so-called "paper hearings" where the matter is disposed of on evidence taken only by written submissions.

The definition expressly excludes "notice-and-comment rulemaking under 5 U.S.C. § 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue." With this change, the NOPR's separate definition of "proceeding involving a party or parties" is unnecessary and is omitted.

(3) Decisional employee, contractor, and person.

The NOPR proposed to define a "decisional employee" as " a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee or contractor of the Commission who is or may reasonably be expected to be involved in the decisional process of a particular proceeding, but does not include an employee designated as a part of the Commission's trial staff in a proceeding, a settlement judge appointed under Rule 603 (settlement of negotiations before a settlement judge), a neutral (other than an arbitrator) in an alternative dispute resolution proceeding subject to Rule 604, or an employee designated as non-decisional in a particular proceeding subject to the separation of functions requirements applicable to trial staff under Rule 2202 (separation of functions of staff)."

One resource agency asks whether the definition of "decisional employee" includes the Commission's environmental staff and directors of the program offices.²⁸ It does. As a general rule, we view these employees as involved in the analysis and decisionmaking process so that, to the extent they are assigned to a particular proceeding with the goal of making recommendations for the Commission's consideration, they must be considered as decisional employees. However, specified communications between persons outside the Commission and the Commission's environmental staff and directors of the program offices may take place off-the-record pursuant to one of the exemptions to the prohibition

²⁸ ACHP at 1.

of the general rule discussed below. Another commenter notes that, as proposed, the rule would not apply to staff who are non-decisional employees, focuses on prohibited communications to and from persons outside the Commission, and does not address communications between decisional and non-decisional FERC staff.²⁹ The commenter apparently reads the rule as eroding or modifying the Commission separation of functions rule (18 CFR. §385.2202) and requests the Commission to reaffirm Rule 2202 and specify that decisional and non-decisional staff would not be permitted to engage in prohibited communications in contested proceedings.³⁰ Other commenters specifically request that the definition be amended to include Commission trial staff and other non-decisional employees.³¹ One commenter suggests that these Commission employees be considered as outside of the Commission, and subject to the rule.³²

We find that these proposed modifications are not necessary or practicable. Rule 102(b) of the Commission's Rules of Practice and Procedure sets forth the definition of a "participant" in Commission proceedings as "(1) Any party; or (2) any employee of the Commission assigned to present the position of the Commission staff in a proceeding before the Commission," thus distinguishing between Commission trial staff and a party

²⁹INGAA at 3.

³⁰Id.

³¹WPPI at 4; SCSI at 2-3

³²SCSI at 2-3.

participant to a proceeding.³³ Furthermore, Rule 2202 remains in place and as such adequately regulates the conduct of intra-agency communications that concerns these commenters.³⁴ The Commission reaffirms its commitment to the tenets of the separation of functions rule. This commitment is recognized in the current Commission organizational design, with the new Office of Administrative Litigation encompassing all Commission employees engaged in trial work.

As set forth in the NOPR and reflected in the final rule, the Commission may designate any member of the Commission staff as "non-decisional in a proceeding." As a non-decisional employee, he or she would be subject to the requirements of Rule 2202. This gives the Commission the necessary flexibility to make appropriate allocations of its human resources.

The Commission's administrative law judges fall into a unique category. Consequently, with the addition of a clause to the exemptions provisions discussed below, the final rule prohibits the making of any off-the-record communications to or by a presiding officer in any proceeding set for hearing under subpart E of the Commission's

³³ 18 CFR 385.102(b).

³⁴ 18 CFR 385.2202. The Separation of Functions Rule precludes employees performing investigative or trial functions in a particular case from participating as "decisional employees" in the same matter or in a related matter.

Rules of Practice and Procedure.³⁵ For subpart E proceedings, none of the exemptions for off-the-record communications applies to presiding officers.

In contrast, when an administrative law judge is appointed by the Chief Administrative Law Judge as a settlement judge under rule 603,³⁶ or when an administrative law judge is selected as a neutral under rule 604³⁷ the administrative law judge is not a decisional employee in that proceeding.

Pursuit of alternative dispute resolution by the Commission's Dispute Resolution Service (DRS) is not part of the decisional process and is not subject to these *ex parte* rules. Alternative dispute resolution procedures are set out in Commission Rule 604.³⁸ Communications undertaken in the context of alternative dispute resolution are confidential. Moreover, DRS employees are not decisional employees themselves, nor do they advise decisional employees on matters relevant to the merits of a particular matter.

One commenter opposes including third-party contractors in the definition of decisional employees, asserting that applicants need to have confidential discussions with those preparing their NEPA evaluations.³⁹ To be sure, third-party contracting reflects a scheme by which an applicant is responsible for directly paying and cooperating with a

³⁵18 CFR 385.501 *et seq.*

³⁶18 CFR 385.603.

³⁷18 CFR 385.604.

³⁸*Id.*

³⁹NHA at 2.

contractor selected to perform environmental analyses. However, the selection of the contractor is subject to Commission approval and Commission staff is responsible for directing the work of the contractor.⁴⁰ Thus, in the same manner as direct Commission contractors, a third-party contractor plays the role of a Commission decisional employee, subject to the proscriptions of the rules against prohibited off-the-record communications. Accordingly, merits-related communications between an applicant and a contractor are governed by these rules.

Finally, one resource agency commented that pre-decisional technical involvement by Commission staff should be outside the purview of the rule, so that Federal, state, local or tribal agencies may freely communicate with Commission staff on technical issues.⁴¹ To the extent that the technical issues are not related to the merits of the underlying proceeding, such communications would be permitted. Such communications may also be permitted under the exemptions for communications between Federal agencies having common jurisdictional interests in a particular matter or for NEPA document preparation.⁴²

⁴⁰40 CFR 1506.5.

⁴¹See Interior at 11-12.

⁴²18 CFR 385.2201(e)(1)(v), 385.2201(e)(1)(vi).

(4) Relevant to the merits.

The final rule applies to off-the-record communications relevant to the merits of a Commission proceeding in covered proceedings. The term "relevant to the merits" is taken directly from the APA and its definition is drawn from the legislative history of those provisions.⁴³ The term is defined to mean "capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding." The regulatory text states that purely procedural inquiries or status requests that will not have an effect on the outcome of a case or on the decision on any issue are not "relevant to the merits." Communications relating to purely procedural inquiries, such as how to intervene in a proceeding, the number of days before a responsive filing is due, or the number of copies that must be provided for a

⁴³See H.R. Rep. No. 94-880 (Part I), at 20, reprinted in 1976 U.S.C.C.A.N. at 2202:

The [statute] prohibits an ex parte communication only when it is "relative to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not affected by this section.

required filing are permitted at any time. Where a communication states or implies a preference for a particular party or position, it would be considered as being relevant to the merits. Although simple requests for action by a specific date or for expedited action may be viewed as not relevant to the merits, the Commission strongly encourages that any such requests be made in writing and on the record.

As discussed further below, the definition also excludes communications related to compliance matters if compliance is not the subject of an ongoing proceeding.

D. Exempt Off-the-Record Communications

The final rule sets out seven exemptions from the general prohibitions against off-the-record communications. These exemptions are independent of one another.

Accordingly, if any exemption applies to the circumstances of a particular proceeding, off-the-record communications will be permitted subject to any disclosure requirements. For example, Rule 2201(e)(1)(iii),⁴⁴ provides that the proscriptions of this rule do not apply

where all parties to a proceeding have agreed in writing that off-the-record communications may take place. However, even in the absence of such unanimity, off-the-record communications relating to development of an environmental impact statement would be permitted in accordance with the exemption contained in Rule 2201(e)(1)(vi).⁴⁵

⁴⁴18 CFR 385.2201(e)(1)(iii).

⁴⁵18 CFR 385.2201(e)(1)(vi).

We note that while the final rule exempts certain off-the-record communications from the prohibitions of the rule, the Commission and Commission staff retain the discretion not to engage in permitted communications if, in their judgment, such communications would create the appearance of an impropriety or otherwise seem inconsistent with the best interests of the Commission.⁴⁶

(1) Off-the-Record Communications Expressly Permitted by Rule or Order.

To the extent permitted by law, Rule 2201(a) allows the Commission, by rule or order, to modify any of the *ex parte* provisions as they apply to all or part of a proceeding. Resource agencies commented that statutes such as the Endangered Species Act require interagency consultations, within and outside of the context of preparing an environmental document.⁴⁷ These commenters ask if the rule should consider whether statutes mandating such consultations properly fit within this exemption.

As discussed in the NOPR,⁴⁸ only where there is specific statutory authority permitting or directing interagency consultations to take place on an *ex parte* basis, would such off-the-record communications be construed as "authorized by law." We do not believe that statutes requiring interagency consultations should be viewed as authorizing

⁴⁶See 18 CFR 385.2201(j)(2).

⁴⁷E.g., Interior at p. 6.

⁴⁸Notice of Proposed Rulemaking, Regulations Governing Off-the-Record Communications, 63 FR 51312, 51316 (Sept. 25, 1998).

such communications to take place off-the-record.⁴⁹ Under other exemptions of the final rule, however, the types of communications addressed by resource agencies may often be permissible, subject to a disclosure requirement.⁵⁰

(2) Off-the-Record Communications Related to Emergencies.

The final rule provides an exemption, subject to a notice and disclosure provision, for communications relating to emergencies. The NOPR proposed such an exemption for communications related to emergencies, and specifically requested comments on whether last year's Midwest price spike might qualify as an emergency under such an exemption. Some commenters suggest that an "act of God" emergency would not likely occur in the context of a contested proceeding.⁵¹ Because of the high stakes that might be involved in a contested proceeding, however, it was suggested that, if adopted, the proposed exemption be triggered only after a decision by the Commission or a senior staff official.

⁴⁹In fact, pursuant to NEPA, prior to issuing a detailed environmental statement, an agency must make available, pursuant to the Freedom of Information Act (FOIA), the comments and views of cooperating agencies. See 42 U.S.C. 4233(C.)

⁵⁰See 18 CFR385.2201(e)(1)(v) or (vi). We note however that the disclosure requirement in this rule does not permit the Commission or any resource agency to publicly disclose statutorily protected information. There are statutory prohibitions against disclosing the location of certain historically, culturally, or environmentally sensitive resources, but there is no such prohibition on setting conditions to protect such resources. See, e.g., Section 304 of the National Historic Preservation Act, as amended, 16 U.S.C. 470w-3.

⁵¹E.g., Joint Commenters at 9-10.

Other comments suggest that the final rule better define covered emergencies, and that generic fact-finding would be a better mechanism for handling communications concerning emergencies.⁵² Commenters also noted that, because resource agencies might have specific statutory responsibilities relating to natural disasters, the Commission should promptly disclose off-the-record communications related to such emergencies.⁵³

We agree with the commenters' suggestions that it is unlikely that communications relating to emergencies would take place in the context of a pending contested proceeding, and we also find some merit in the argument that permitting off-the-record communications during "economic" emergencies could have an adverse effect on regulated energy markets in the context of a contested proceeding.⁵⁴ We believe that the Commission's investigative powers under its enabling statutes and part 1b ("Rules Relating to Investigations" under subchapter A "General Rules") of its regulations appear to be sufficiently broad to allow informal investigations into "significant market anomalies," and such investigations are outside the scope of this rule.

However, especially with regard to emergencies affecting a regulated entity's ability to deliver energy, it is imperative that the regulated community be assured that, in the face of an emergency, it may initiate communications with the Commission without fear of

⁵²EEI at 8-9.

⁵³Interior at 7.

⁵⁴Joint Commenters at 9-10.

violating the prohibitions on off-the-record communications, even in the context of a contested proceeding. By their very nature, emergencies do not allow prior opportunity for public participation in meetings addressing issues relating to the emergency.

Concomitantly, Commission staff must be able to receive an emergency communication without fear of violating *ex parte* considerations or other provisions of the Commission's standards of conduct for employees. Therefore, the final rule adopts this exemption.

Because we believe that the Commission can proceed to investigate emergencies, once identified, under its part 1b procedures, the final rule makes clear that this exemption is limited to communications from persons outside the Commission, and requires prompt notice and disclosure of the communication. The prompt disclosure required under this exemption should alleviate any possible detriment occasioned by allowing such communications.

(3) Off-the-Record Communications Agreed to by the Parties.

The NOPR proposed to retain prior Rule 2201(b)(6) permitting communications which all the parties to a proceeding agree may be made without regard to communication constraints. We conclude that agreements to waive this rule must be in writing and subject to Commission approval.⁵⁵

⁵⁵ See *WKAT, Inc., v. FCC*, 296 F.2d 375 at 383 (D.C. Cir. 1961).

The NOPR sought comments on whether pre-filing communications protocols permitted under our collaborative procedures initiatives⁵⁶ should be allowed to remain in effect after a filing is made. The general consensus of commenters is that pre-filing communications protocols agreements should be renewed or otherwise approved by *all* parties to a proceeding once a filing is made and the time for filing interventions has passed.⁵⁷

We agree with the commenters. In order to qualify for this exemption, pre-filing protocols must be renewed by all parties and approved by the Commission after an application is filed with the Commission and the time for filing interventions has expired. At that time, the identities of all parties participating in the proceeding have been determined.

(4) Off-the-Record Written Communications from Non-Party Elected Officials.

The Commission receives numerous letters from Federal and state elected officials requesting expedition and forwarding correspondence from constituents. The NOPR proposed treating such written communications as permitted communications, subject to a notice and disclosure requirement under which the communications would be placed in the

⁵⁶See Order No. 596, Regulations for the Licensing of Hydroelectric Projects, 62 FR 59802 (Nov. 5, 1997), III FERC Stats. & Regs. ¶ 31,057 (Oct. 29, 1997).

⁵⁷See, e.g., ACHP at 2; EEI at 9; Williston at 5-6; SMUD; at 5.

public record.⁵⁸ Various commenters urge that the exemption include any communications from Commission officials to the non-party elected official,⁵⁹ be limited to Congress,⁶⁰ restrict covered officials from forwarding to the Commission the comments of constituents who are parties to a particular proceeding,⁶¹ and extend to Tribal officials.⁶²

The final rule generally adopts the proposed exemption. The exemption covers only written communications. Because such communications may be relevant to the merits, this exemption contains a notice and disclosure requirement.

We agree with commenters that communications from elected, non-party Tribal officials should be included among those communications permitted by this exemption. Indian tribes frequently have interests that may be substantially affected by Commission proceedings.

Any communications from Commission officials to elected officials are not covered by this exemption. Consistent with current practice, Commission responses to

⁵⁸The legislative history of the APA makes clear that members of Congress are "interested persons" subject to the APA restrictions on communications. It also indicates, however, that this prohibition is not intended to prohibit routine inquiries or referrals of constituent correspondence. See H.R. Rep. No. 94-880 (Part 1), (at 21-22), reprinted in 1976 U.S.C.C.A.N at 2203.

⁵⁹INGAA at 4, SoCalEd at 8-9.

⁶⁰Id.

⁶¹BPA at 3-4.

⁶²Interior at 10.

correspondence from elected officials do not address the merits. Nevertheless, such responses will be placed in the record.

(5) Off-the-Record Communications with Other Federal, State, Local, and Tribal Agencies.

Prior Rule 2201(b)(1)⁶³ permitted off-the-record communications from interceders who are Federal, state or local agencies that have no official interest in, and whose official duties are not affected by, the outcome of a covered proceeding to which the communication relates. What was meant by "official duties" or having "no official interest in" a covered proceeding was unclear, at best.

Because many of the agencies with which the Commission works have an interest in Commission proceedings, the NOPR proposed an exemption to permit off-the-record communications, subject to a disclosure requirement, with Federal, state, or local agencies that are not parties in a specific contested proceeding. As proposed, there would be an exemption for off-the-record communications involving: (1) a request for information by the Commission or Commission staff; or (2) a matter over which the other Federal, state, or local agency and the Commission share regulatory jurisdiction, including authority to impose or recommend licensing conditions.

⁶³18 CFR 385.2201(b)(1).

One commenter strongly objects to this exemption and suggests that agencies use memoranda of understanding to define their respective roles.⁶⁴ Three other commenters suggest that government agencies are no different from other parties with specific interests in the outcome of a proceeding and, thus, should not be accorded special treatment, particularly when the Commission may grant late intervention to agencies.⁶⁵ On the other hand, most resource agencies believe the exemption should be expanded to include party, as well as non-party, agencies.⁶⁶

One commenter argues that, because some agencies have authority to make mandatory licensing conditions, interagency off-the-record communications should be prohibited unless applicants have similar access to the Commission.⁶⁷ NARUC urges the Commission to consider its statutory obligations for consultations with its member state utility commissions, and clarify when communications with state commissions are necessary.⁶⁸ At least one state agency believes that excluding party agencies from this exemption would chill their ability to participate fully in some proceedings.⁶⁹ Finally, it

⁶⁴HRC at 5-6.

⁶⁵See, EEI at 3; Joint Commenters at 10-11; NHA at 2-3.

⁶⁶Interior at 11-12; NMFS at 2; EPA at 1-2.

⁶⁷NHA at 2-3.

⁶⁸NARUC at 2-4.

⁶⁹California Oversight at 2.

was suggested that communications with non-party Indian Tribes be covered by this exemption.⁷⁰

The exemption, modeled on similar *ex parte* exemptions adopted by the Federal Communications Commission (FCC), is adopted as proposed.⁷¹ The intent is to recognize that, except when the other Federal, state, or local agency is directly involved in a Commission case as a party, the public interest favors a free flow of information between government agencies with shared jurisdiction. Where agencies are charged with shared jurisdiction and regulatory responsibilities, a cohesive government policy can best be developed and implemented through communication, cooperation and collaboration between agencies and their staff that sometimes can take place most effectively off-the-record.⁷² To ensure that such communications do not compromise the procedural rights of the parties or the integrity of the Commission's decisional record, the exemption as proposed and adopted includes a disclosure provision, requiring that information obtained through off-the-record communications with Federal, state or local agencies, and relied upon by the Commission in reaching its decision, be placed in the public record to allow the public to discern the basis of the Commission's decision.

⁷⁰Interior at 11-12.

⁷¹See, e.g., 47 CFR 1.1204(a)(5).

⁷²Similar exclusions appear in the Federal Communications Commission's *ex parte* regulations. See 47 CFR 1.1204(b)(5), (7) and (8).

We do not believe it appropriate to require disclosure of communications between the Commission and non-party cooperating agencies that exchange views and information in the development of an environmental impact statement or environmental assessment under NEPA. Such cooperation typically involves an interagency sharing of the staff work necessary to prepare an environmental document. This collaboration is most effective when not burdened by notice and disclosure requirements. Where the involved agencies are not parties before the Commission, we believe this collaboration can occur off-the-record without prejudice to the parties. Thus, the final rule excludes such communications from the disclosure requirements.

(6) Off-the-Record Communications Relating to NEPA Documentation.

The NOPR proposed to exclude from the general prohibitions of this rule all off-the-record communications relating to the preparation of either an environmental impact statement (EIS) or an environmental assessment (EA) where the Commission has determined to solicit public comment on the EA. Under the proposed exemption, off-the-record communications would be permitted by the rule if they are made prior to the issuance of a final NEPA document. The proposed exemption provided for notice and disclosure of off-the-record communications.

Several commenters would limit application of the exemption to off-the-record communications leading up to the issuance of a draft environmental impact statement (DEIS) and require all communications occurring after issuance of the DEIS to take place

on the record.⁷³ One commenter expresses concern that if the Commission adopts the rule as proposed, permitting off-the-record communications during the period between issuance of a DEIS and final environmental impact statement (FEIS), an applicant might learn of post-DEIS comments only upon issuance of the final environmental document, thus denying it an opportunity to respond. Accordingly, this commenter asks that, should the Commission permit off-the-record communications until issuance of the FEIS, such communications should be immediately disclosed and parties should be allowed to comment on the substance of the communication prior to the Commission addressing such communication in the FEIS.⁷⁴

Federal agency commenters enthusiastically support this exemption and would broaden it to allow communications related to areas within their jurisdictional expertise even after a FEIS issues.⁷⁵ They cite statutory obligations such as, but not limited to, the Clean Water Act,⁷⁶ Endangered Species Act,⁷⁷ and National Historic Preservation Act of 1966,⁷⁸ as requiring input from their respective agencies even after the Commission

⁷³E.g. INGAA at 4-5, NHA at 3-4, SMUD at 8.

⁷⁴INGAA at 4-5.

⁷⁵Interior at 12, NMFS at 4-5, ACHP at 1-2, BPA at 4-10, CEQ at 1.

⁷⁶33 U.S.C. 1251, et seq.

⁷⁷16 U.S.C. 1632, et seq.

⁷⁸16 U.S.C. 470, et seq.

issues its decisions. Furthermore, CEQ regulations require that Federal agencies integrate related surveys, required by other relevant environmental review laws, into an EIS.⁷⁹

Another commenter responds that government agencies that are also parties to a proceeding should not have access to materials under circumstances where other parties lack such access, but that a disclosure requirement would alleviate such concerns.⁸⁰ One commenter responds that there is no need to share confidential trade secret information with agencies in order to prepare an environmental document.⁸¹

The Commission basically adopts the exemption in the final rule as proposed in the NOPR. The Commission appreciates the concerns raised by the commenters, both those supporting narrowing the scope of the exemption, and those supporting broadening its scope, but we do not believe that they require us to make changes to the rule as proposed. While the Commission prefers that all NEPA-related communications take place on the record, we acknowledge that there will be times when off-the-record contacts may assist in the development of sound environmental analysis.

The public NEPA process provides sufficient opportunity for interested persons to fully participate in the development of the environmental document that will be part of the

⁷⁹Such statutes include, but are not limited to, the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*; Endangered Species Act, 16 U.S.C. 1532 *et seq.*; and section 401, the Clean Water Act, 33 U.S.C. 1341.

⁸⁰Williston at 6.

⁸¹SoCalEd at 2.

Commission's record of decision. In proceedings where the preparation of an EIS is necessary, CEQ rules describe a public scoping requirement that may include noticed, public, on-the-record meetings, and require that all substantive comments (whether written or oral) received on the DEIS, or summaries thereof, where the response has been especially voluminous, should be addressed in the final environmental document, whether or not they are relied upon by the agency.⁸² Just as with the development of an EIS, CEQ regulations provide that, to the extent practicable, environmental agencies, the applicant, environmental interest groups, and the public should be involved in the process of crafting an EA.⁸³ Thus, the process of NEPA document preparation is an open one, with ample opportunities for public participation.

The final rule adopts a notice and disclosure requirement. The disclosure requirement provides that any written communication, and a summary of any oral communication obtained through an exempted off-the-record communication to or from Commission staff, will be promptly placed in the decisional record of the proceeding, and noticed by the Secretary.⁸⁴ Thus, interested persons will have notice of comments received on a NEPA document and be given the opportunity to respond. Such a practice

⁸²40 CFR 1503.4(b).

⁸³40 CFR 1501.4.

⁸⁴As discussed above, the notice and disclosure requirements do not apply to communications with non-party cooperating agencies. See 18 CFR 385.2201(g)(1).

will enhance the openness of the NEPA process and allow the Commission to make the most informed decisions practicable.

Finally, there were two comments related to the timing of this exemption. One commenter asks the Commission to clarify when this exemption would be in effect: from the time an application is received, or from the time of notice that the application is ready for environmental analysis?⁸⁵ The CEQ regulations suggest that the environmental analysis process start at the earliest possible time, including the possibility that such preparation start before an application is filed with an agency.⁸⁶ This exemption will be triggered by the filing of an application, and remain in effect no later than the date on which the final environmental document (either FEIS or Finding of No Significant Impact) is issued.

The second commenter suggests that the exemption provide for disclosure of an off-the-record communication within ten days of the communication.⁸⁷ We believe that the general provision requiring disclosure promptly after receipt is appropriate, and is included in the final rule. While the final rule adopts the exemption for off-the-record communications relating to contested proceedings that require the preparation of environmental documents, any off-the-record communications relevant to the merits taking

⁸⁵Interior at 12.

⁸⁶See, e.g., 40 CFR 1501.2.

⁸⁷SMUD at 8.

place after the Commission's issuance of the final environmental document will be considered prohibited *ex parte* communications under the final rule, unless covered by another exemption.

(7) Off-the Record Communications With Individual Non-Party Landowners.

Subject to a disclosure requirement, the NOPR proposed, and the final rule permits, off-the-record communications with non-party landowners whose property may be affected by a pending proceeding.

Several commenters oppose this exemption and suggest that all landowner communications should be filed and served on all parties.⁸⁸ Other commenters suggest that while some exemption for landowner communications is appropriate, such communications should be limited in number or restricted to those owners whose property is or will be affected by an action over which the Commission has statutory authority.⁸⁹ Another commenter notes that the Commission's Landowner Notification proposal⁹⁰ was intended to make it easier for landowners to participate in proceedings that directly affect them. This commenter asks the Commission to clarify, in this proceeding, when an

⁸⁸E.g., HRC at 7, NGSAs at 11.

⁸⁹Joint Commenters at 12, BPA at 7.

⁹⁰See "Landowner Notification, Expanded Categorical Exclusions and Other Environmental Filing Requirements," Docket No. RM98-17-000 64 FR 27717 (May 21, 1999), IV FERC Stats & Regs. ¶ 32,540 (Apr. 28, 1999).

individual landowner is or is not a party, who may comment without intervening, and whether these landowners need to be served filings by parties to the proceeding.⁹¹

This non-party landowner exemption does not apply to landowners who have intervened as a party to a proceeding. Such a party will be treated as any other party to a contested Commission proceeding. Landowners desiring to become parties may do so in the same manner as any other person desiring to do so: by filing an application or timely intervention or opposition to the proceeding, or at such time the Commission accepts a request to file out of time. Once a landowner becomes a party to a proceeding, all communications between the landowner and the Commission must be made on-the-record and served on all parties to the proceeding. As an intervenor, the landowner will be placed on the service list and will receive copies of all documents of record. Also as an intervenor, the landowner has the right to seek rehearing of any Commission order, and to appeal any final Commission action.

During the NEPA process, landowner comments (as well as comments by others) are placed in the record and, to the extent required by CEQ regulations, responded to in any final environmental document. For purposes of preparing an environmental impact statement or an environmental assessment, such commenters are not deemed to be intervenors, absent their having formally intervened as a party pursuant to the Commission's procedural rules. Thus, they do not receive documents of record, nor do

⁹¹Williston at 5.

they have the right to seek rehearing or appeal of Commission orders. On the other hand, they do not have the burden of serving copies of their comments on all parties on the service list.

The exemption provides an opportunity for individuals who may not have the knowledge of Commission practice and procedure to obtain information from the Commission. The Commission is concerned that in spite of its efforts and those of applicants, many landowners may remain unaware that a project directly affects their property until the time for intervention in a proceeding has passed. A non-party landowner should be able to contact the Commission to determine what is going on and how to participate in the proceeding if he or she so chooses. Further, if a landowner decides not to intervene, that landowner should be permitted to comment without the need to incur the expense of formally intervening in a proceeding. Any possible bias to the parties is mitigated by the notice and disclosure requirement that off-the-record communications with affected landowners be placed in the record of the proceeding and made available for review and comment. While the Commission agrees that an individual non-party landowner should not have an unlimited number of contacts, we believe that it is preferable to rely on the sound judgment of the Commission and its staff to prevent abuse rather than setting "bright line" restrictions on the number of such contacts.

In addition, only those non-party landowners whose property would be used by or whose property abuts property that would be used by the proposed project would qualify for the exemption. This exemption applies throughout the course of the proceeding, even

after the NEPA process has been completed, but does not apply to landowner organizations, or to individual landowners who are parties to the proceeding.

E. Proposed Exemptions Not Adopted in the Final Rule

As indicated above, three of the ten exemptions proposed in the NOPR are not included as exemptions in the final rule.

(1) Pre-filing Communications Outside the Scope of the Final Rule.

The NOPR proposed an exemption that would have permitted off-the-record communications relating to "pre-filing communications, including communications under §§ 4.34(i), 4.38 and 16.8 of this chapter, to take place before the filing of an application for an original, new, nonpower, or subsequent hydropower license or exemption or a license amendment." A clarifying note added that application of this exemption is not limited to the referenced hydropower regulations, but would also include the submission of draft rate schedules for the purpose of receiving suggestions under § 35.6 of the Commission's rules, and certain informal pipeline certificate consultations pursuant to § 157.14(a). Further, the Commission has always encouraged pre-filings by oil pipeline companies. In our work on streamlining the oil regulations in Order No. 561,⁹² we specifically included section 341.12, "Informal Submissions," to allow for this. In addition, the NOPR anticipated additional initiatives permitting pre-filing collaborative

⁹²58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs. [Regulations Preambles 1991-1996] ¶ 30,985 (Oct. 22, 1993).

procedures designed to expedite the process of reviewing applications subsequently filed with the Commission.

There is general support for this exemption; however, several commenters argue in favor of setting conditions on allowing pre-filing communications to take place off-the-record.⁹³ As noted by other commenters, however, pre-filing communications generally fall outside the scope of the APA's definition of *ex parte*.⁹⁴ Except for mandating that *ex parte* provisions take effect no later than the date a matter is noticed for hearing, the APA leaves to the individual agency the decision as to whether *ex parte* proscriptions should attach at an earlier date.⁹⁵ The Commission views pre-filing communications as harmonious with the APA and, consistent with our past practice, does not believe that any bar to communications should exist prior to the time a matter is formally contested, let alone prior to the time a matter is filed for its consideration.

⁹³E.g., SCSII at 4 (supports as long as pre-filing consultations do not address merits of the proceeding to be filed); WPPI at 6-7 (if adopted, permitted communications should be limited to procedure and precedent, and be disclosed); NGSA at 10 (favors exemption but reminds Commission that its decision must be based on record evidence, not pre-filing communications).

⁹⁴HRC at 4, Interior at 5 (requests that the rule reference need for certain interagency communications).

⁹⁵See, 5 U.S.C. 557(d)(1)(E). It should be noted, however, that the APA requires that, when the agency knows that the matter will be set for hearing, *ex parte* prohibitions should be enforced at that point.

We agree with the commenters' assertion that there is no need to provide an exemption for pre-filing communications, as such communications fall outside this rule's applicability. Accordingly, this exemption is deleted from the final rule.⁹⁶

(2) Consideration of Published or Widely Disseminated Public Information.

As articulated in the NOPR, the Commission proposed this exemption to allow the Commission to consider publicly available information such as speeches, articles, and other published or widely disseminated information that may have a bearing on the issues involved in a contested proceeding. For example, Commission staff should be able to consult various regulated companies' electronic bulletin boards such as OASIS sites in order to obtain market information. The Commission can take official notice of that information in making its determination in the contested case. Independent research such as this does not qualify as an *ex parte* communication. This policy is not intended to encourage parties to forward for Commission consideration any published or otherwise broadly disseminated information in any manner other than on-the-record.

Commenters acknowledge that the Commission may take notice of public domain information but urge that parties not be permitted to provide such information to a

⁹⁶Even though we find that pre-filing communications fall outside the scope of this rule, we are nonetheless sensitive to the concerns expressed by some commenters regarding communications that take place before an application is filed. The Commission's pre-filing collaborative procedures address these concerns, typically with communications protocols.

decisional employee without formal notice.⁹⁷ It was also argued that exercising judicial notice is appropriate as long as the Commission identifies and allows parties a chance to rebut any such information it relies upon, and that the Commission clarify that the exemption applies to the document and not to direct communications with its makers.⁹⁸

We agree with the commenters' assertions. However, we do not believe that a specific exemption is necessary to allow the Commission to access and consider in its decision making process any publicly available, widely disseminated materials. Independent research or fact gathering where no oral or written communication is exchanged does not qualify as a communication. Nor do we believe that a specific exemption is warranted to permit parties the opportunity to forward such information for Commission consideration off-the-record. Accordingly, we do not believe that a specific exemption is required for off-the-record communications of published or widely disseminated public information, and this exemption is deleted from the final rule. To the extent persons outside the Commission wish to communicate publicly available information in contexts not otherwise exempt under the rule, those communications must take place on-the-record.

⁹⁷ACHP at 3.

⁹⁸NGSA at 9.

(3) Off-the-Record Communications Concerning Non-Contested Compliance Matters.

The NOPR proposed an exemption for certain staff communications concerning compliance matters where the compliance issue is not a subject of the rehearing. We note that several commenters supporting this exemption suggested that it be subject to a disclosure requirement.⁹⁹ Two commenters opposed lifting any restrictions on off-the-record communications relating to compliance, preferring that all such communications take place on the record.¹⁰⁰ It also was suggested that the exemption be limited to matters concerning environmental and safety concerns as well as to routine audits, and would require that the communication be disclosed with an opportunity for comment.¹⁰¹

The Commission does not believe that a specific exemption is needed to allow the sort of off-the-record communications we envisioned as being permitted by this proposed exemption. If a compliance matter is unrelated to a pending rehearing, it is no longer subject to an on-going Commission proceeding, and communications related to such matters are not relevant to the merits and, therefore, are not subject to the rule in any case. In order to clarify our intent, the definition of "relevant to the merits" has been modified to expressly exclude "communications relating to compliance matters not the subject of an

⁹⁹E.g., HRC at 7; INGAA at 10; Interior at 10; Indicated Shippers at 10, NGSA at 5.

¹⁰⁰NMFS at 4 (suggesting that its role in compliance matters could be adversely affected if it is not provided prior notice of communications between the Commission and the licensee); WPPI at 5-6.

¹⁰¹Indicated Shippers at 10.

ongoing proceeding." With this definitional change, the proposed exemption is not included in the final rule.

Under the final rule, if a hydropower licensee or certificate holder is having difficulty complying with a particular condition imposed by the Commission in its order authorizing the subject facility, and the licensing or certification order is pending rehearing on issues unrelated to compliance issues, the licensee or certificate holder and the Commission may engage in off-the-record communications necessary solely to resolve issues related to the mechanics of compliance. However, communications relating to the need for the particular condition would be considered as relevant to the merits and would have to take place on the record.¹⁰²

F. Application of the Prohibitions on Off-The-Record Communications

The final rule generally follows the proposed rule, stating that the prohibitions on off-the-record communications do not apply prior to the initiation of a proceeding at the Commission. The rule's proscriptions apply: for proceedings initiated by the Commission -- from the time an order initiating the proceeding is issued; for proceedings returned to the Commission on judicial remand -- from the date the court issues its mandate; for

¹⁰²In this example, should the permitted communication result in a conclusion that the condition cannot practicably be met, the licensee would have to seek an amendment to its license, which must be on-the-record, subject to comment by all parties to the proceeding.

complaints initiated pursuant to Rule 206¹⁰³ -- from the date of the filing of the complaint with the Commission, or the date the Commission initiates an investigation, on its own motion; and for all other proceedings -- from the time of the filing of an intervention disputing any material issue that is the subject of a proceeding.

As discussed above, pre-filing communications are not governed by this rule. With respect to licenses and certificates, even though pre-filing communications are not prohibited under the provisions of this rule, our intent and preference is that pre-filing protocols will continue to be used as an element of our collaborative pre-filing procedures.

Several commenters suggest that the Commission should presume that all docketed matters will be contested and, therefore, the prohibition on off-the-record communications should be in effect from the time of filing of an application until the time for interventions and protests has expired. If no opposing pleading has been filed by that time, the Commission could then notice that communications may take place off-the-record.¹⁰⁴

Another commenter requests that the Commission announce that *ex parte* provisions have been triggered at the same time it announces receipt of any filing.¹⁰⁵

The Commission is not adopting these suggestions. The thrust of these comments would be to begin the prohibition on *ex parte* contacts as soon as an application is filed

¹⁰³18 CFR 385.206.

¹⁰⁴Indicated Shippers at 7, WPPI at 3.

¹⁰⁵Interior at 15.

with the Commission. This would mean that there could be no off-the-record communications about any proceeding docketed by the Commission--a result that the Commission finds is too restrictive and is not required by law. To trigger the rule upon application, for example, could prevent the Commission from efficiently obtaining important information necessary to cure an incomplete filing.

As noted above, the prohibitions on off-the-record communications will typically be triggered by the filing of a protest or an intervention that disputes any material issue in an application for Commission action, not by the filing of the application itself. Because a properly filed intervention is recorded on the docket sheet and is available on other public electronic information retrieval systems maintained by the Commission and should be served by the maker on the parties, the Commission does not believe it is necessary to formally notice in any individual proceeding when the prohibitions on off-the-record communications are in effect. However, the Commission will explore electronic tools for indicating, perhaps on the docket sheet, when the prohibitions on off-the-record communications have been triggered.

Once triggered, the prohibitions against off-the-record communications remain in effect until the time for rehearing has expired and no party has filed for rehearing, or the Commission has disposed of all petitions for rehearing or clarification, or the proceeding is otherwise terminated or is no longer contested. If the Commission order is subject to judicial review which results in a remand, the prohibitions against off-the-record

communications once again apply when the court issues its mandate remanding the matter to the Commission.

One commenter suggested that the prohibitions should remain in effect during judicial review.¹⁰⁶ This commenter's concern was that, in the event of a remand, whether voluntarily requested by the Commission or as a result of judicial review, information communicated while the proceeding is before the court by the parties to the case to Commission staff defending the Commission's orders could be improperly used to prejudice any Commission action on remand.¹⁰⁷

The final rule does not adopt this suggestion. During judicial review, there is no matter pending before the Commission that would trigger the *ex parte* communication prohibitions of the APA. During the judicial review process, the record of the Commission's proceedings is closed. In the event of a remand, any further Commission action would be required to be based on that existing record or on additions made to that record after remand and the reopening of the record. As the rule's prohibitions would once again apply on remand, any additional matter made part of the record would be admitted under the protections of the rule.

¹⁰⁶Indicated Shippers at 7-9.

¹⁰⁷Id.

G. Handling Prohibited Off-The-Record Communications

The final rule, as did the proposed rule, differentiates between two types of off-the-record communications: those prohibited by the regulations, and those permitted by the regulations under specific exemptions. This section sets forth the treatment for prohibited off-the-record communications under the regulations, while the next section addresses the handling of exempted off-the-record communications.

The NOPR proposed to depart from the prior Rule 2201,¹⁰⁸ but not the APA, by dropping the requirement that submissions to the public, non-decisional file revealing prohibited off-the-record communications must be served on the parties to the proceeding. The proposed substitution of public notice, rather than requiring the Commission to make individual service on all parties to a proceeding, was modeled on the approach used in the FCC's *ex parte* rule with regard to off-the-record communications.¹⁰⁹

Comments received on this provision of the rule express concern about the adequacy of notice, with a number of commenters arguing that mere "bulletin board" posting is insufficient notice.¹¹⁰ However, several other commenters argue that, although merely posting a notice on the Commission's bulletin board is not sufficient, proper notice

¹⁰⁸18 CFR 385.2201.

¹⁰⁹47 CFR 1.1206(b).

¹¹⁰E.g., NHA at 4-5, Interior at 16-17, EEL, at 4, HRC at 8. "Bulletin board" posting in this context means the posting of a paper document on a public bulletin board at Commission headquarters.

could be accomplished electronically through the Internet, electronic mail, or by posting the notice on the Commission's web page.¹¹¹ The final rule reflects these comments. In addition, in the case of a prohibited off-the-record written communication, the final rule requires the Secretary to instruct the author to directly serve the document on all parties listed on the Commission's official service list.

Commission decisional employees who make or receive a prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, are obligated to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary for submission into a public, non-decisional file associated with the decisional record in the proceeding. This obligation must be met promptly after the prohibited off-the-record communication occurs.

The final rule, under Rule 2201(h),¹¹² requires the Secretary to issue a public notice, at least as often as every 14 days, of the receipt of any prohibited off-the-record communications. Such notice will list the maker of the prohibited off-the-record communication, date of receipt by the Commission, and the docket number to which the prohibited off-the-record communication relates. The notice also will state that the prohibited, off-the-record communication will not be considered by the Commission.

¹¹¹See, e.g., INGAA at 9, BPA at 7, Williams at 2-3, Williston at 6-10.

¹¹²18 CFR 385.2201(h).

Parties to a proceeding may seek an opportunity to respond on the record to any facts or contentions made in a communication and placed in the non-decisional file, and may request that the Commission include the prohibited off-the-record communication and responses thereto in the public decisional record, as well. The Commission will grant such requests only when it determines that fairness so requires. If the request is granted, a copy of the off-the-record communication and the permitted on-the-record response will be made a part of the decisional record.

The public notice will appear on the Commission's web page in a place designated for such notices. The notice will describe the prohibited off-the-record communication in sufficient detail to allow interested persons to ascertain whether it is of interest and how it may be accessed through RIMS or some other means. In addition, the Secretary will periodically, but not less than every 14 days, publish in the Federal Register a list of prohibited off-the-record communications.

H. Handling Exempted Off-The-Record Communications

Many of the exemptions to the final rule require notice and disclosure of off-the-record communications permitted under their terms. Because the exemptions require notice and disclosure of off-the-record communications that are relevant to the merits, one commenter asks that when the Secretary notices an exempted off-the-record communication, whether written or oral, such notice provide details of the contact, such as the related docket number, maker, time and place of a communication, and a summary of

the substance of the communication.¹¹³ Because this section addresses exempted, rather than prohibited communications, this commenter believes that it is very important that notice of the communication be made promptly so as to allow time for a meaningful response.¹¹⁴

These comments have merit. Exempted off-the-record communications subject to a disclosure requirement will be placed in the decisional record and may be used by the Commission in coming to a decision on the merits in a proceeding. Accordingly, such communications must be available for review by all parties to the proceeding, and there must be an efficient and effective method for noticing the receipt of such off-the-record communications and making such off-the-record communications available for public inspection and comment. In the case of exempted off-the-record communications, prompt electronic notice through an electronic service list will be made and the document will be made available through the Commission's public automated information retrieval systems.

¹¹³HRC at 8-9.

¹¹⁴Id.

J. Notice of Prohibited and Exempted Off-The-Record Communications

The NOPR had two different subsections regarding notice of off-the-record communications. Rule 2201(f)(2) required notice of prohibited, off-the-record communications, and Rule 2201(g)(2) required notice of permitted off-the-record communications.¹¹⁵ The final rule consolidates these two subsections into final Rule 2201(h): " Public notice requirement of prohibited and exempted off-the-record communications."

K. Sanctions for Making Prohibited, Off-The-Record Communications

The final rule adopts the NOPR's proposed sanctions. Any party or its agent who knowingly makes or causes to be made prohibited off-the-record communications may be required to show cause why its claim or interest should not be dismissed, disregarded, or otherwise adversely affected because of the improper communication. This particular sanction is already found in our existing *ex parte* regulation,¹¹⁶ and mirrors that provided for in the APA itself.¹¹⁷ An additional sanction subjects to possible suspension or disbarment from practice before the Commission, any individual knowingly making or causing to be made, prohibited off-the-record communications. The final rule allows the Commission to take action against the representative of a party to a proceeding, the party

¹¹⁵The comments relating to the notice requirements were discussed in the previous section.

¹¹⁶18 CFR 385.2201(f).

¹¹⁷5 U.S.C. 557(d)(1)(D).

itself, or both. In those rare instances where a party uses attorneys or other representatives who repeatedly violate Commission procedures, both the party and the individual offender may be subject to Commission disciplinary measures.

The general view of the commenters is that the existing *ex parte* sanction, coupled with Rule 2102 on suspensions from practice before the Commission,¹¹⁸ is already sufficient to dissuade individuals from engaging in improper off-the-record communications.¹¹⁹ One commenter argues that the sanctions set forth in the NOPR seem disproportionate and may discourage contact with the Commission.¹²⁰

To the extent the commenters support the new sanctions, they suggest making clear that this section should be applied in only the most egregious cases, *e.g.*, repeated violations by the same person, and then only after due process requirements have been satisfied.¹²¹ The Commission also is urged not to invoke sanctions for inadvertent violations, and to assure that the sanction of disqualification would apply to an individual representing a party to a proceeding and not the party itself.¹²²

¹¹⁸18 CFR 385.2102

¹¹⁹See, *e.g.*, NGSA at 12.

¹²⁰Indicated Shippers at 14-15.

¹²¹*Id.* See also Process Gas at 6, EEI at 13.

¹²²NGSA at 12.

The final rule retains the sanctions as proposed. In so doing, we acknowledge the overlap with this provision and Rule 2102.¹²³ The *ex parte* sanctions are intended to clarify that persons who engage in prohibited communications are subject to sanctions for the violation of the rule. The final rule properly provides that knowing and willful violations of the prohibitions could result in suspension or disbarment pursuant to the provisions of Rule 2102.

One commenter suggests that the final rule provide that those Commission employees who violate these provisions should be subject to the Commission's disciplinary procedures.¹²⁴ The Commission's standards of conduct¹²⁵ and administrative directives¹²⁶ provide that staff who violate its rules are subject to sanctions ranging from admonishment to removal from Federal service, depending on the severity of the violation. One intent of the revisions to the existing *ex parte* rule is to clarify that the prohibitions apply to communications by Commission decisional employees as well as to communications from persons outside the Commission. Accordingly, the final rule includes a provision that Commission personnel violating this rule may be subject to Commission disciplinary action.

¹²³18 CFR 385.2102.

¹²⁴INGAA at 11.

¹²⁵18 CFR 385.3c

¹²⁶Federal Energy Regulatory Commission, Administrative Directive 3-7B (FERC Work Force Discipline Program).

IV. REGULATORY FLEXIBILITY CERTIFICATION STATEMENT

The Regulatory Flexibility Act¹²⁷ requires rulemakings either to contain a description and analysis of the impact the rule would have on small entities, or to certify that the rule will not have a significant economic impact on a substantial number of small entities. An analysis is not required if a proposed rule will not have such an impact.¹²⁸

The regulations proposed in this rulemaking would revise the Commission's Rules of Practice and Procedure dealing with certain off-the-record communications. The Commission certifies that this final rule will not have a significant economic impact on small entities.

V. ENVIRONMENTAL STATEMENT

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.¹²⁹ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Among these are proposals for rules that are procedural.¹³⁰ The final rule falls under this exception; consequently, no environmental consideration is necessary.

¹²⁷5 U.S.C. 601-612.

¹²⁸5 U.S.C. 605(b).

¹²⁹18 CFR Part 380.

¹³⁰18 CFR 380.4(a)(2)(ii).

VI. INFORMATION COLLECTION STATEMENT

The Office of Management and Budget's (OMB's) regulations require that OMB approve certain information collection requirements imposed by agency rules.¹³¹ However, this final rule contains no information collection requirements and therefore is not subject to OMB approval.

VII. CONGRESSIONAL REVIEW AND EFFECTIVE DATE

The provisions of 5 U.S.C. 801, regarding Congressional review of rulemakings, do not apply to this rulemaking because it concerns agency procedure and practice and will not substantially affect the rights and obligations of non-agency parties.¹³²

The rule is effective [insert date 30 days after publication in the Federal Register].

¹³¹5 CFR Part 1320.

¹³²5 U.S.C. 804(3)(C).

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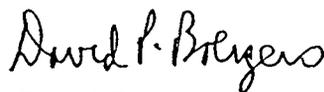
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List of Subjects in 18 C.F.R. Part 385

Administrative practice and procedure, Electric Power, Penalties, Pipelines, and Reporting and record keeping requirements.

By the Commission.

(SEAL)



David P. Boergers,
Secretary.

In consideration of the foregoing, the Commission amends Part 385, Chapter I, Title 18, Code of Federal Regulations, as set forth below.