

her employment has ceased, practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which was under the official responsibility of such person, as defined in 18 U.S.C. 202, while in the service of the Commission.

(c) Nothing in paragraphs (a) and (b) of this section prevents a former member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission with outstanding scientific or technological qualifications from practicing before or acting as an attorney or representative in connection with a particular matter in a scientific or technological field if the Chairman of the Commission makes a certification in writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or representation.

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

§ 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)(1)(ii) of this section, 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.

(e) *Exempt off-the-record communications.* (1) Except as provided by paragraph (e)(2) of this section, 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 dis-

closure 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 (e)(1) of this section, 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 paragraph (f)(2) of this section. 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.

(2) The provisions of this section are not intended to limit the authority of a decisional employee to decline to engage in permitted off-the-record communications, or where not required by any law, statute or regulation, to make a public disclosure of any exempted off-the-record communication.

[Order 607, 64 FR 51234, Sept. 22, 1999]

§ 385.2202 Separation of functions (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

PART 388—INFORMATION AND REQUESTS

- Sec.
- 388.101 Scope.
- 388.102 Notice of proceedings.
- 388.103 Notice and publication of decisions, rules, statements of policy, organization and operations.
- 388.104 Informal advice from Commission staff.
- 388.105 Procedures for press, television, radio, and photographic coverage.
- 388.106 Requests for Commission records available in the Public Reference Room.
- 388.107 Commission records exempt from public disclosure.
- 388.108 Requests for Commission records not available through the Public Reference Room (FOIA requests).
- 388.109 Fees for record requests.
- 388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room, denial of requests for fee waiver or reduction, and denial of requests for expedited processing.
- 388.111 Procedures in event of subpoena.
- 388.112 Requests for privileged treatment of documents submitted to the Commission.

AUTHORITY: 5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352.

SOURCE: Order 488, 53 FR 1473, Jan. 20, 1988, unless otherwise noted.

§ 388.101 Scope.

This part prescribes the rules governing public notice of proceedings, publication of decisions, requests for informal advice from Commission staff, procedures for press, television, radio and photographic coverage, requests for Commission records, requests for confidential treatment of documents submitted to the Commission, procedures for responding to subpoenas seeking documents or testimony from Commission employees or former employees, fees for various requests for documents, and requests for reduction or waiver of these fees.

§ 388.102 Notice of proceedings.

(a) Public sessions of the Commission for taking evidence or hearing argument; public conferences and hearings before a presiding officer; and public conferences or hearings in substantive rulemaking proceedings, will not be held except upon notice.

(b) Notice of applications, complaints, and petitions, is governed by Rule 2009 (notice) in part 385 of this chapter. Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is governed by §157.9 of this chapter (notice of application). Notice of public sessions and proceedings and of meetings of the Commission is governed by Rule 2009 (notice) in part 385 of this chapter. Notice of hearings and of initiation or pendency of rulemaking proceedings is governed by Rule 1903 (notice in rulemaking proceedings) in part 385 of this chapter. Notice of application under Part I of the Federal Power Act for preliminary permits and licenses is governed by §§4.31 and 4.81 of this chapter (acceptance or rejection and contents). Notice of proposed alterations or surrenders of license under section 6 of the Federal Power Act may be given by filing and publication in the FEDERAL REGISTER as stated in Rule 1903 (notice in rulemaking proceedings) in part 385 of this chapter, and where deemed desirable by the Commission, by local newspaper advertisement. Notice of rates charged and changes therein is governed by the filing requirements of subchapters B and E of this chapter (regulations