be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its pre-filing process. No such request will be accepted for filing unless the participant submitting it certifies that the request has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(g) The Commission staff may participate in the pre-filing collaborative process (and in discussions contemplating initiating a collaboration) and assist in the integration of this process and the environmental review process in any case. Commission staff positions are not binding on the Commission.

(h) A potential applicant for gas facilities is not precluded by these regulations from filing an application with the Commission at any time, even if the pre-filing collaborative process for the proposed facilities has not been completed.

PART 375—THE COMMISSION

6. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

7. In § 375.307, a new paragraph (h) is added, to read as follows:

§ 375.307 Delegations to the Director of the Office of Pipeline Regulation.

* * * * *

(h) Approve, on a case-specific basis, and make such decisions as may be necessary in connection with the use of pre-filing collaborative procedures, for the development of an application for certificate or abandonment authorization under section 7 of the Natural Gas Act, or the development of an application for facilities under section 3 of the Natural Gas Act, and assist in the pre-filing collaborative and related processes.

[FR Doc. 99–24615 Filed 9–21–99; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM98–1–000; Order No. 607]

Regulations Governing Off-the-Record Communications

Issued September 15, 1999.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its rules concerning communications between persons outside the Commission and the Commission and its employees. The revised regulations are designed to clarify ambiguities in the existing *ex parte* rules and to provide better guidance on what communications to and from the Commission are permissible and what communications are prohibited.

EFFECTIVE DATE: This rule is effective on October 22, 1999.

FOR FURTHER INFORMATION CONTACT: David R. Dickey, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, (202) 208–2140.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE, Room 2A, Washington, DC 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission from November 14, 1994, to the present. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. Documents will be available on CIPS in ASCII and WordPerfect 8.0. User assistance is available at (202) 208–2474 or by E-Mail to CipsMaster@FERC.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Home Page using the RIMS link or the Energy Information Online icon. User assistance is available at (202) 208–2222, or by E-Mail to *RimsMaster@FERC.fed.us*.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, NE, Washington, DC 20426.

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 1976

[1] 5 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.

[2] 5 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;

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 2201[5] 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 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 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 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'' 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

(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 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.

[3] 5 U.S.C. 559.

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

[5] 18 CFR 385.2201.

[6] 18 CFR 385.1415.

[7] 18 CFR 385.1415.

[8] *See* 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).

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

[10] *Id.*

[11] *See, 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).

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

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

[14] The commenters are identified in Appendix A.

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

[16] *Home 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).

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 procedure [17]; 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-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, DC, 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 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

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

[17] 18 CFR 385.102.

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

[19] *See* EPSA at 4; Joint Commenters at 3–4.

[20] Sempra at 3–4.

[21] INGAA 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.

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 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 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.

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 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

[23] 18 CFR 385.2010

[24] 5 U.S.C. 557(d)(1).

[25] *Sangamon 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).

[26] HRC at 2.

[27] *Id.* at 2–3.

[28] ACHP at 1.

[29] INGAA at 3.

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 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 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 604[37] 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 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]

(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 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.

[30] *Id.*

[31] WPPI at 4; SCSI at 2–3

[32] SCSI at 2–3.

[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.

[35] 18 CFR 385.501 *et seq.*

[36] 18 CFR 385.603.

[37] 18 CFR 385.604.

[38] *Id.*

[39] NHA at 2.

[40] 40 CFR 1506.5.

[41] *See* Interior at 11–12.

[42] 18 CFR 385.2201(e)(1)(v), 385.2201(e)(1)(vi).

[43] *See* 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.

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]

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 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.

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 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]

The NOPR sought comments on whether pre-filing communications protocols permitted under our collaborative procedures initiatives[56]

[44] 18 CFR 385.2201(e)(1)(iii).

[45] 18 CFR 385.2201(e)(1)(vi).

[46] *See* 18 CFR 385.2201(j)(2).

[47] *E.g.,* Interior at p. 6.

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

[49] In 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.)

[50] *See* 18 CFR 385.2201(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.

[51] *E.g.,* Joint Commenters at 9–10.

[52] EEI at 8–9.

[53] Interior at 7.

[54] Joint Commenters at 9–10.

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

[56] *See* Order No. 596, Regulations for the Licensing of Hydroelectric Projects, 62 FR 59802

Continued

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 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 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.

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 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.

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

(Nov. 5, 1997), III FERC Stats. & Regs. ¶ 31,057 (Oct. 29, 1997).

[57] *See, e.g.,* ACHP at 2; EEI at 9; Williston at 5–6; SMUD; at 5.

[58] The 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.

[59] INGAA at 4, SoCalEd at 8–9.

[60] *Id.*

[61] BPA at 3–4.

[62] Interior at 10.

[63] 18 CFR 385.2201(b)(1).

[64] HRC at 5–6.

[65] *See,* EEI at 3; Joint Commenters at 10–11; NHA at 2–3.

[66] Interior at 11–12; NMFS at 2; EPA at 1–2.

[67] NHA at 2–3.

[68] NARUC at 2–4.

[69] California Oversight at 2.

[70] Interior at 11–12.

[71] *See, e.g.,* 47 CFR 1.1204(a)(5).

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

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 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 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 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 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.

[73] *E.g.* INGAA at 4–5, NHA at 3–4, SMUD at 8.

[74] INGAA at 4–5.

[75] Interior at 12, NMFS at 4–5, ACHP at 1–2, BPA at 4–10, CEQ at 1.

[76] 33 U.S.C. 1251, *et seq.*

[77] 16 U.S.C. 1632, *et seq.*

[78] 16 U.S.C. 470, *et seq.*

[79] Such 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.

[80] Williston at 6.

[81] SoCalEd at 2.

[82] 40 CFR 1503.4(b).

[83] 40 CFR 1501.4.

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

[85] Interior at 12.

[86] *See, e.g.*, 40 CFR 1501.2.

[87] SMUD at 8.

(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 proposal[90] 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 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 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 § 341.12, ''Informal Submissions,'' to allow for this. In addition, the NOPR anticipated additional initiatives permitting pre-filing collaborative 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

[88] *E.g.,* HRC at 7, NGSA at 11.

[89] Joint Commenters at 12, BPA at 7.

[90] *See* ''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).

[91] Williston at 5.

[92] 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs. (Regulations Preambles 1991–1996) ¶ 30,985 (Oct. 22, 1993).

[93] *E.g.,* SCSI 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).

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

[95] *See,* 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.

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.

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 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.

(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 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 complaints initiated pursuant to Rule 206 [103]—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,

[96] Even 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.

[97] ACHP at 3.

[98] NGSA at 9.

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

[100] NMFS 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.

[101] Indicated Shippers at 10.

[102] In 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.

[103] 18 CFR 385.206.

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 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.

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 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.

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

[104] Indicated Shippers at 7, WPPI at 3.

[105] Interior at 15.

[106] Indicated Shippers at 7–9.

[107] *Id.*

[108] 18 CFR 385.2201.

[109] 47 CFR 1.1206(b).

[110] *E.g.*, NHA at 4–5, Interior at 16–17, EEI, 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.

[111] *See, e.g.*, INGAA at 9, BPA at 7, Williams at 2–3, Williston at 6–10.

[112] 18 CFR 385.2201(h).

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.

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 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]

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 conduct [125] and administrative directives [126] 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.

IV. Regulatory Flexibility Certification Statement

The Regulatory Flexibility Act [127] 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

[113] HRC at 8–9.

[114] *Id.*

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

[116] 18 CFR 385.2201(f).

[117] 5 U.S.C. 557(d)(1)(D).

[118] 18 CFR 385.2102

[119] *See, e.g.*, NGSA at 12.

[120] Indicated Shippers at 14–15.

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

[122] NGSA at 12.

[123] 18 CFR 385.2102.

[124] INGAA at 11.

[125] 18 CFR 385.3c

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

[127] 5 U.S.C. 601–612.

[128] 5 U.S.C. 605(b).

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.

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 October 22, 1999.

List of Subjects in 18 CFR Part 385

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

By the Commission.

David P. Boergers,

Secretary.

In consideration of the foregoing, the Commission amends part 385, chapter I, Title 18, Code of Federal Regulations, as follows:

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.

§ 385.101 [Amended]

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 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).

§ 385.1415 [Removed]

5. Section 385.1415 is removed.

6. The heading of Subpart V is revised 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)(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,

[129] 18 CFR part 380.

[130] 18 CFR 380.4(a)(2)(ii).

[131] 5 CFR part 1320.

[132] 5 U.S.C. 804(3)(C).

(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 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.

(ii) 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.

8. The heading of § 385.2202 is revised to read as follows:

§ 385.2202 Separation of Functions (Rule 2202).

Note: This Appendix will not appear in the Code of Federal Regulations

Appendix A—List of Commenters

Adirondack Mountain Club
Advisory Council on Historic Preservation (ACHP)
American Gas Association (AGA)
ANR Pipeline Company/Colorado Interstate Gas Company (ANR/CIG)
Bonneville Power Administration (BPA)
California Electric Oversight Board (Cal Board)
Chevron Pipe Line Company (Chevron)
Edison Electric Institute (EEI)
Electric Power Supply Association (EPSA)
Environmental Protection Agency (EPA)
Executive Office of the President/Council on Environmental Quality (CEQ)
Hydropower Reform Coalition (HRC)
Indicated Shippers
Interstate Natural Gas Association of America (INGAA)
Louisiana Department of Wildlife And Fisheries (La W&F)
National Association of Regulatory Utility Commissioners (NARUC)
National Marine Fisheries Services (NMFS)
National Hydropower Association (NHA)
National Rural Electric Cooperative Association/American
Public Power Supply Association (Joint Commenters)
Natural Gas Supply Association (NGSA)
Public Service Commission of New York (PSCNY)
Public Utilities Commission of State of California (PUCCAL)
Public Utilities Commission of State of California/Independent (Cal–ISO) System Operator
Process Gas Consumers Group (Process Gas)
Sacramento Municipal Utilities District (SMUD)
Sempra Energy Companies (Sempra)
Southern California Edison Company (SoCalEd)
Southern Companies Services, Inc. (SCSI)
Southern Natural Gas Company (SoNat)
United States Department of the Interior (Interior)
Williams Companies (Williams)
Williston Basin Interstate Pipeline Company (Williston)
Wisconsin Public Power, Inc. (WPPI)

[FR Doc. 99–24616 Filed 9–21–99; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 990521142–9252–02]

RIN 0625–AA54

Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (the ''Department'' or ''DOC'') is amending its regulation, which governs the revocation of antidumping and countervailing duty orders, in whole or in part, and the termination of suspended antidumping and countervailing duty investigations, based upon an absence of dumping or subsidization, respectively. The amended regulation conforms the existing regulation to the United States' obligations under Article 11 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (''Antidumping Agreement'') and Article 21 of the Agreement on Subsidies and Countervailing Measures (''SCM Agreement''). The amended paragraph relating to revocation or termination based on absence of dumping provides that the Secretary, upon considering whether producers or exporters have sold subject merchandise at not less than normal value for at least three consecutive years, and whether the continued application of the antidumping duty order is otherwise necessary to offset dumping, will revoke an antidumping duty order if warranted. The amended paragraph relating to revocation or termination based on absence of countervailable subsidy provides that the Secretary, upon considering whether the government of the affected country has eliminated all countervailable subsidy programs covering the subject merchandise for at least three consecutive years, or exporters or producers have not applied for or received countervailable subsidies for at least five consecutive years, and whether the continued application of the countervailing duty order is otherwise necessary to offset subsidization, will revoke a countervailing duty order if warranted.

EFFECTIVE DATE: November 1, 1999.

FOR FURTHER INFORMATION CONTACT: Melissa G. Skinner, Office of Policy, Import Administration, U.S. Department of Commerce, at (202) 482–1560, or Myles S. Getlan, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, at (202) 482–5052.

SUPPLEMENTARY INFORMATION:

Background

On June 3, 1999, the Department published a Notice of Proposed Rulemaking which proposed to amend 19 CFR 351.222(b).[1] See 64 FR 29818 (the ''Proposed Rule''). The Department explained that the process of amending this regulation arose from the findings of a dispute settlement panel convened under the auspices of the World Trade Organization (''WTO'') that considered various aspects of the Department's final results of administrative review in Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea (62 FR 39809, July 24, 1997) (''DRAMs From Korea'').

On January 29, 1999, the Panel determined that the Department's standard for revoking an antidumping duty order contained in 19 CFR 353.25(a)(2) (the precursor to 19 CFR 351.222(b)) was inconsistent with the United States' obligations under Article 11.2 of the WTO Antidumping Agreement. See United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea, WT/DS99/R (''Panel Report''). Specifically, the Panel determined that requiring the Secretary

[1] This amendment does not affect the Department's regulations at 19 CFR 351.218, which implements the statutory provision at 19 U.S.C. 1675(c) and governs the Department's five-year sunset reviews, in which the Department determines whether revocation of an order ''would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.''