

discriminatory service.¹⁵ The sellers eligible for such service expressly include QFs.¹⁶

In addition, as stated above, the ADFAC NOPR acknowledged the difficulty of administratively setting avoided cost rates, and particularly recognized that competitive bidding was a viable alternative to determining avoided cost. Since 1988, in fact, substantial experience has been gained by state commissions, electric utilities and QFs themselves regarding competitive bidding. While few states allowed competitive bidding at the time of the ADFAC NOPR, well over half the states now use competitive bidding to one degree or another in setting avoided cost rates.¹⁷ Indeed, in a number of cases, the Commission itself has considered rates resulting from competitive bidding and negotiation in which QFs were active participants.¹⁸ Accordingly, the industry itself appears to have made substantial progress regarding the determination of avoided cost and the setting of avoided cost rates.

Given these facts, as well as the continuing development of competitive power markets generally,¹⁹ the Commission does not believe it appropriate to adopt revisions proposed a decade ago.

Additionally, we note that certain of the issues addressed in the ADFAC NOPR were the subject of other proceedings: for example, allowing QFs to construct and own transmission lines and interconnection equipment.²⁰

¹⁵ *E.g.*, Order No. 888, FERC Stats. & Regs. at 31,635-36.

¹⁶ *E.g.*, *id.* at 31,688.

¹⁷ 64 FERC at 63,491; *accord*, Order No. 888, FERC Stats. & Regs. at 31,651; National Independent Energy Producers, *Competing for Power: A Survey on Competitive Procurement Systems and Blueprint for the Future* 5-6 (July 1991).

¹⁸ *E.g.*, PSNH, 83 FERC at 62,000-01 ("parties to QF purchases are free to negotiate purchase rates" and a "more competitive environment is expected to foster such outcomes"); *accord*, *id.* at 61,995-96, 62,001 n.20 (noting the use of competitive bidding by the applicant to establish an avoided cost rate); Enron Power Enterprise Corporation, 52 FERC ¶ 61,193 (1990) (involving multi-source, including QF, competitive bidding); Doswell Limited Partnership, 50 FERC ¶ 61,251 (1990) (involving QF competitive bidding); *see also* Southern California Edison Company, 70 FERC ¶ 61,215 at 61,675-76, 61,677, *order on reconsid.* 71 FERC ¶ 61,269 at 62,078-80 (1995); *cf.* Jersey Central Power & Light Company, 73 FERC ¶ 61,092 at 61,297 & n.5, *reh'g denied*, 73 FERC ¶ 61,333 (1995); Metropolitan Edison Company, 72 FERC ¶ 61,015 at 61,049 & n.6, *reh'g denied*, 72 FERC ¶ 61,269 at 62,184 (1995).

¹⁹ *See* Order No. 888, FERC Stats. & Regs. at 31,639-52; *accord*, Order No. 888-A, FERC Stats. & Regs. at 30,183-85; *see also* 70 FERC at 61,675-76.

²⁰ *See* Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, Notice of Proposed Rulemaking, 57 FR 55176 (1992), FERC Stats. & Regs. ¶ 32,489 at 32,643-44,

Likewise, the issue of whether states can require that rates for QF sales at wholesale be set above avoided cost, which was added to the ADFAC NOPR proceeding after the ADFAC NOPR was originally issued,²¹ has since been addressed in another proceeding.²²

Accordingly, because the revisions to the Commission's regulations proposed in the ADFAC NOPR have been overtaken by subsequent events, the Commission will exercise its discretion to terminate this proceeding.²³

Administrative Findings and Effective Date

The Administrative Procedure Act (APA)²⁴ requires a notice of proposed rulemaking to be published in the **Federal Register**. The APA also mandates that an opportunity for comments be provided when an agency proposes to promulgate regulations. The Commission finds that notice and comment are unnecessary when terminating a proceeding. The express language of the APA requires such notice and comment only when promulgating new regulations and not when the agency is, as in this case, terminating a proceeding that proposed amending pre-existing regulations.²⁵ Moreover, notice and comment are not required under the APA when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.²⁶ As explained above, this order merely removes from consideration proposed regulations that were never adopted and have since been overtaken by events, and thus are no longer necessary.

The Commission will make the termination of this proceeding effective on September 25, 1998.

32,647 (1992), *regulation adopted*, Order No. 575, 60 FR 4831 (1995), FERC Stats. & Regs. ¶ 30,014 at 31,279-81 (1995), *order on reh'g*, 71 FERC ¶ 61,121 (1995).

²¹ *See* Administrative Determination of Full Avoided Costs, 53 FR 24099 (1988), FERC Stats. & Regs. ¶ 32,462 (1988); *cf.* Orange and Rockland Utilities, Inc., 70 FERC ¶ 61,014, *reconsideration denied*, 71 FERC ¶ 61,034 (1995).

²² *See* Connecticut Light & Power Company, 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995).

²³ *See, e.g.*, Professional Drivers Council v. Bureau of Motor Safety, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983) (discussing agency's decision not to promulgate new rules in an area already subject to agency regulation).

²⁴ 5 U.S.C. 553(b), (c).

²⁵ *See, e.g.*, *Kennecott Utah Copper Corporation v. United States Department of Interior*, 88 F.3d 1191, 1207-09 (D.C. Cir. 1996) (discussing challenges to withdrawal of draft final regulations without notice and comment); *accord*, ICORE, Inc. v. FCC, 985 F.2d 1075, 1082 (D.C. Cir. 1993) (not modifying a rule is not same as rulemaking).

²⁶ 5 U.S.C. 553(b).

List of Subjects in 18 CFR Part 292

Electric power plants, electric utilities, natural gas, reporting and recordkeeping requirements.

The Commission Orders

Docket No. RM88-6-000 is hereby terminated.

By the Commission.

David P. Boergers,

Secretary.

[FR Doc. 98-25676 Filed 9-24-98; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM98-1-000]

Regulations Governing Off-the-Record Communications

September 16, 1998.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to revise its rules concerning communications between persons outside the Commission and the Commission and its employees. The proposed 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.

DATES: Written comments are due on or before December 24, 1998.

ADDRESSES: File comments with the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: David R. Dickey, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., 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 -1a -copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, DC 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the

Commission. 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. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397, if dialing locally, or 1-800-856-3920, if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. 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 Homepage 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 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, N.E., Washington D.C. 20426.

I. Introduction

The Federal Energy Regulatory Commission (Commission or FERC) proposes to revise its rules governing communications with Commissioners and Commission employees. The proposed revisions are designed to permit fully informed decision making while at the same time ensuring the integrity of the Commission's decision making process. The proposed revisions are intended specifically to provide clearer direction both to the Commission and its staff and persons outside the Commission on the ground rules for communication. In keeping with the Commission's outreach goals, specific changes are proposed to enhance the ability of the Commission to interact with other regulatory agencies and the public.

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 prohibitions on *ex parte* communications have two primary underlying premises: (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;³ and (2) reliance on "secret" evidence may foreclose meaningful judicial review.⁴ The 1976 Act instructed agencies to issue regulations necessary to implement the APA's requirements.⁵ Shortly thereafter, the Federal Power Commission implemented *ex parte* regulations based on the APA's guidance.⁶ This rule, Rule 2201, applies to all covered proceedings before the Commission except those involving oil pipelines.⁷ The Commission has a second *ex parte* rule, Rule 1415, which was originally developed by the Interstate Commerce Commission (ICC) and which applies only to oil pipeline proceedings.⁸ 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.

III. Discussion

The problems with the existing regulations were recognized by the participants in the Commission's 1992 Public Conference on *ex parte* issues, where a general consensus developed 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.⁹ In sum, the current regulations have been viewed as needlessly complex and confusing, and therefore provide inadequate guidance to Commission officials and the public. For example, as noted above, the Commission currently has two *ex parte* rules while it clearly has need for only one. Accordingly, the proposed rule would eliminate Rule 1415 in its entirety and provide that revised Rule 2201 will apply to oil pipeline cases in addition to other proceedings.

Moreover, the current regulations fail to reflect adequately the APA *ex parte* prohibitions. For example, current Rule 2201 covers communications from someone outside the Commission to a Commissioner, Administrative Law Judge, or advisory staff, while the APA prohibitions cover communications in both directions.

Finally, the Commission staff recently undertook an initiative, known as "FERC First," to study the Commission's current and anticipated future missions and functions, identify the internal and external obstacles to carrying out those missions and functions efficiently and effectively, and, to the extent practicable, design processes enhancing the effectiveness of the Commission's operations. The FERC First team recognized the need to strengthen the Commission's relationships with Congress, federal and state agencies and other interested persons. Discussions undertaken as part of Commission staff's reengineering effort, indicated that many people feel that changes to the current *ex parte* rule could enhance the Commission's operations.

For all of the above reasons, we believe that the existing *ex parte* rule should be revised to help achieve our goals of improving communications while at the same time ensuring the integrity of the Commission's decision making.

The significant proposed revisions are discussed below. The proposed text for Rule 2201 is set out in full at the end of this notice.

⁹ 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); 58 FERC ¶ 61,320 (Mar. 20, 1992).

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 See 5 U.S.C. 557(d)(1).

³ *WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir.), cert. denied, 360 U.S. 841 (1961).

⁴ *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).

⁵ 5 USC 559.

⁶ FPC Order No. 562, 42 FR 14701, (March 16, 1977).

⁷ Proposed 18 CFR 385.2201.

⁸ 18 CFR 385.1415.

A. Prohibitions on Communications Relevant to the Merits of a Contested Proceeding.

Under the proposed regulations, the prohibitions would apply to "proceedings involving a party or parties",¹⁰ defined as all docketed¹¹ Commission matters except investigations under Part 1b of the Commission's regulations. Non-covered proceedings would include informal (i.e., notice and comment) rulemaking proceedings, and any other proceeding not having a party or parties, and public technical, policy, and other conferences intended to inform the public or solicit their comments on issues of interest to the Commission and the industry.

The proposed regulations would continue to prohibit "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 provisions and its definition is drawn in substantial part from the legislative history of those provisions.¹² The proposed regulations would define "relevant to the merits" to mean capable of affecting the outcome of a proceeding, or of influencing, or providing an opportunity to influence, a decision on any substantive issue. Purely procedural inquiries or status requests generally will not have an effect on the outcome of a case or on the decision on any substantive issue. Under the proposed rule, communications would not be characterized as status requests, however, where the request states or implies a preference for a particular party or position, advocates expedited action or action by a certain date, or "is otherwise intended, directly or

indirectly, to address the merits or influence the outcome of a proceeding."¹³

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. However, even some communications that appear to be procedural, in that they relate to how a proceeding is conducted, also may be capable of influencing the result on the substantive issues. These include communications about whether to hold a hearing and, if so, what type of hearing, and communications regarding the admissibility of evidence or the timing of a decision, since when the Commission acts can be highly relevant to the merits of the proceeding.¹⁴ Requests and advocacy of positions concerning such matters, especially by parties in a proceeding, should be presented on the record and in compliance with the Commission's procedural rules governing the format and service of pleadings.

The proposed regulations are intended to apply to communications between decisional employees and persons outside the Commission without regard to who initiated the communication. Thus, for example, if a decisional Commission employee initiates a covered communication with a person outside the Commission, the employee may thereby be providing that person the opportunity to influence a decision on any substantive issue. The prohibitions apply both to oral and to written communications. The term "written communications" as used in the proposed rule extends to electronic communications (e.g., e-mail).

Additionally, the APA *ex parte* prohibitions apply essentially to adjudications and similar cases required by statute to be decided on the record after an opportunity for hearing. 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.¹⁵ The Commission's existing Rule 2201, and the proposed rule, extends the prohibitions to "contested on-the-record" proceedings required to be decided on the record of a Commission hearing, regardless of whether the hearing is required by statute, the Constitution, a Commission regulation, or an order in a particular case. Rule 1415 (applicable to oil pipeline cases) specifies that the rule covers both oral hearings and the "taking of evidence by modified procedure," a reference to a "paper hearing" procedure, and this clarification is made in the proposed revisions to Rule 2201.¹⁶

The existing rule further defines a proceeding as contested if a petition or notice to intervene in opposition has been filed. 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. Accordingly, as discussed below, the proposed rule retains the triggering date of the existing rule, and off-the-record communications will not be prohibited until such time as a protest or intervention in opposition to an application has been filed.

B. When Communications Are Prohibited

The proposed regulations would provide a clear-cut time frame for beginning and ending the prohibitions. The restrictions on communications would be inapplicable to off-the-record communications before the commencement of a proceeding. When there is no pending proceeding, there can be no barred communications pertaining to a proceeding. Accordingly, the prohibitions would take effect at the time of the filing with the Commission of a complaint, or a protest or intervention in opposition to a proceeding initiated by a person outside the Commission. (The prohibitions on off-the-record communications would not be triggered by a premature filing.)

We note that the Commission often receives filings that do not specify whether a filed intervention is actually protesting or opposing a requested Commission action, or was filed merely to support the applicant or to allow the filer to be placed on a service list. The

¹⁰ The definition of "party" may be found at 18 CFR 385.102.

¹¹ "Docketed" matters include those bearing a "docket" number and those bearing a "project" number.

¹² See H.R. Rep. No. 880 (Part I), 94th Cong., 2d Sess. at 20, reprinted in 1976 U.S.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.

¹³ See Proposed 18 CFR 2201(c)(6).

¹⁴ *But c.f., Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588, 611 (3rd Cir. 1977) cert. denied, 434 U.S. 1062 (1978) (where Congressional communications are directed not at the agency's decision on the merits but at accelerating the disposition and enforcement of pertinent regulations, such legislative conduct does not affect the fairness of the agency's proceedings).

¹⁵ *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).

¹⁶ See proposed Rule 18 CFR 385.2201(c)(4).

Commission will consider interventions as opposing an application, and triggering the proposed rule's prohibitions, when they are expressly styled as such. Additionally, based on arguments or issues raised in the document, the Commission may consider a filing not styled as an intervention in opposition as nonetheless opposing the application, thus triggering the prohibitions contained in this proposed rule. However, the Commission will not treat as opposing an application those interventions that appear to have been filed solely to request that the filer be placed on the service list, or to preserve the opportunity to present oral argument should the Commission order a hearing to be held.

The prohibitions would remain in force until final disposition of the proceeding by the Commission, or until the opposition, complaint or protest is withdrawn. Final disposition refers to the final Commission decision and the rehearing of that decision, where applicable. This means the prohibitions would continue until the Commission has acted on petitions for rehearing, rehearing has been denied by operation of law, the time for petitions for rehearing has passed and none has been filed, an application is withdrawn, or, in matters where there is no right to rehearing (e.g., DOE remedial order cases), when the Commission issues its final decision. Where an administrative law judge's initial decision becomes final by operation of law because no party has filed exceptions, and the Commission has taken no action to stay the effectiveness of an initial decision under section 375.712 of our regulations,¹⁷ final disposition of the case will be assumed to have occurred at that point. If a rehearing petition is filed, notwithstanding a party's failure to file exceptions, the prohibitions would apply to the rehearing process.¹⁸

After final Commission disposition, the constraints on communication would cease to apply even if judicial review of the case has been sought. If a court remands the proceeding to the Commission following judicial review, the prohibitions would attach once more at the time the Court issues its mandate.

¹⁷ 18 CFR 375.712.

¹⁸ See 18 CFR 385.709(d). Where a document initiating a proceeding is filed but subsequently rejected (see 18 CFR 4.32 and 385.2001), the document is deemed not to have been filed with the Commission. Accordingly, until the document has been resubmitted, no proceeding is pending before the Commission and the proposed Rule 2201 prohibitions would not apply.

C. Who Is Covered

The proposed regulations would prohibit off-the-record communications between a person outside the Commission and a "decisional employee." The definition of "person" as presently defined in Rule 102(d) arguably includes Commission staff.¹⁹ Accordingly, for the purposes of this proposed Rule 2201, "person" would be defined as any person, other than an employee of the Commission. "Decisional employee" would be defined, as under existing Rule 2201, to mean a Commissioner, a member of his or her personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of a particular Commission proceeding. The revised definition is intended to clarify that the term does not include: (1) members of the Commission's trial staff, (2) a settlement judge appointed under existing Rule 603 (who is not also the presiding judge in the proceeding)²⁰, (3) a neutral (other than an arbitrator) in an alternative dispute resolution proceeding, and (4) an employee designated as non-decisional for a particular case. The revised definition, however, has been expanded to clarify that the term includes contractors involved in the Commission's decisional process.²¹

Members of the trial staff (or their supervisors in the conduct of the trial) are not decisional employees because they are barred by the separation of functions requirements from serving as advisors to the Commission in the same proceeding.²² For the same reason, any employee designated by the Commission to be non-decisional for a particular case is subject to similar separation of functions requirements and would not be involved in the Commission's decisional process. The prohibitions also would be inapplicable to communications with a settlement judge because settlement judges are not decisional employees and communications relating solely to settlement are not viewed as relating to the merits for purposes of restrictions on off-the-record communications.²³

¹⁹ 18 CFR 385.102(d).

²⁰ 18 CFR 385.603.

²¹ For purposes of the proposed rule, "contractor" means a direct Commission contractor or a third-party contractor subject to Commission supervision and control.

²² See 18 CFR 385.2202.

²³ *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (In a settlement or in a purely procedural proceeding there are no issues to be decided upon an open record and, therefore, in communicating

D. Non-Covered Proceedings

1. Enforcement Investigations Not Covered

Under the terms of part 1b of the Commission's regulations, enforcement investigations do not adjudicate any person's rights and have no parties.²⁴ Moreover, section 385.101(b)(1) of the Commission's regulations provides that the Commission's Rules of Practice and Procedure, including existing Rule 2201, do not apply to part 1b investigations. The proposed regulations would clarify that the prohibitions will continue to be inapplicable to such investigations.²⁵ The Commission recently proposed amendments to part 1b and to its Rule 206 complaints procedures²⁶ that added provisions allowing, *inter alia*, non-public, anonymous communications between the Commission's Enforcement Hotline Staff. We note that these communications are permitted because there are no parties to such investigations. However, once a matter being investigated is set for hearing, the prohibitions against off-the-record communications would apply to that proceeding.

2. Rulemaking Proceedings Not Covered

Similarly, neither the APA *ex parte* prohibitions nor the Commission's existing *ex parte* regulations apply to informal, notice and comment, rulemaking proceedings. Communications with outside sources of information are proper and often necessary to the full development of a rulemaking.²⁷

E. Exempt Communications

The proposed rule sets out ten exemptions from the general prohibitions against off-the-record communications. These exemptions are intended to be independent of one another. Accordingly, if any individual exemption applies to the circumstances of a particular proceeding, off-the-record communications will be permitted subject to any disclosure requirements. For example, under proposed exemption 18 CFR 385.2201(d)(8), a Federal agency with concurrent jurisdiction that is a party to a

with a settlement judge, the parties do not engage in "surreptitious efforts" to influence an official charged with the duty of deciding contested issues).

²⁴ 18 CFR Part 385.101(b)(1).

²⁵ 18 CFR Part 1(b).

²⁶ See Complaint Procedures, 63 FR 41,982 (Aug. 6, 1998), (Notice of Proposed Rulemaking).

²⁷ We note, however, that the information available to support a final rule upon judicial review is generally limited to that found in the final rule itself and material that has been placed in the associated rulemaking record.

proceeding may not participate in off-the-record communications relating to that proceeding. Yet, that party agency may freely participate in the development of an environmental assessment or environmental impact statement in accordance with proposed exemption 18 CFR 385.2201(d)(9).

We note that while the proposed rule seeks to establish clear boundaries between prohibited and permitted communications, the Commission and Commission staff would, of course, retain the discretion not to engage in permitted discussions if in their judgment such communications would create the appearance of an impropriety or otherwise seem inconsistent with the best interests of the Commission.²⁸

1. Communications Expressly Permitted by Rule or Order

As a general principle the APA recognizes that its prohibitions against off-the-record communications do not include those "required for the disposition of ex parte matters as authorized by law."²⁹ Existing 18 CFR 385.2201(b)(1) also allows the Commission, by rule or order, to modify any of the provisions of Rule 2201, or Rule 1415, as they apply to all or part of a proceeding, to the extent permitted by law. The proposed rule contains a similar provision without the reference to Rule 1415.

The proposed regulations track the legislative history in permitting general background or broad policy discussions about an industry or a segment of an industry where these discussions do not relate to the specific merits of a particular pending case. General discussions about industry conditions or broad policies provide useful information important to effective regulation. Restrictions on off-the-record communications were not intended to cut an agency off from the general information it needs to carry out its regulatory responsibilities.³⁰ Such general discussions are permitted even where they may touch on an issue that also happens to be before the Commission in the specific factual context of an individual case.

However, where the discussion is carried on in the context of a particular case, the prohibitions extend to policy and legal issues as well as to issues of

fact. Moreover, where a general discussion relates to the specific merits of a pending case (where, for example, the discussion turns on the specific facts of the case), the prohibitions would apply even if the case is not mentioned by name during the discussion.

2. Communications Related to Emergencies

Subject to a disclosure requirement, the proposed rule would allow the Commission to engage in off-the-record communications with regard to emergencies. This provision would allow the Commission to respond to emergencies such as earthquakes, floods, severe weather conditions, fires, or explosions that damage or threaten to damage FERC-regulated facilities, or significant market anomalies that undermine the ability of FERC-regulated entities to deliver energy. Written communications, or summaries of oral communications, taking place during an emergency would be delivered to the Secretary to be noticed and placed in the public file of the proceeding(s) most readily identifiable with facilities affected by the emergency. The Commission invites comments on this proposal. The Commission is particularly interested in comments on whether, for example, a significant but temporary economic impact on regional markets may properly constitute an emergency that, subject to the disclosure requirements described above, would appropriately permit the Commission to conduct off-the-record communications to address those issues expeditiously.

3. Communications Concerning Published or Widely Disseminated Public Information Permitted

The Commission is free to take official notice of its own decisions as well as the published decisions of judicial and other administrative tribunals. In addition, since the basic concern of the prohibitions is with private communications and "secret" evidence, Commissioners and Commission staff may freely consult legal, economic, engineering and other technical or scholarly journals. Material appearing in the trade press, the general news media, and on publicly available Internet sites is also not subject to the prohibitions.³¹ Similarly, speeches and statements made to a large audience at a public

forum will rarely raise the types of concerns that the proposed rule is intended to address.

Communications relating to such published or other widely disseminated public information would be permitted to the extent that they do not seek to determine how precedent might apply to fact-specific issues in a pending proceeding. Thus, the Commission and the staff would be permitted to explain events such as actions that courts or the Commission have already taken, and to describe objectively issues before the Commission or the positions of the parties regarding those issues.

4. Pre-filing Consultations Permitted

Pre-filing consultations would be permitted under the proposed rule. Pre-filing consultations are often useful in educating applicants as to the appropriate format, content, and form that an application or other filing should take. Such consultations can therefore improve the chances that filings, once made, will be ready for evaluation on the merits. The value of pre-filing consultations is explicitly recognized in Commission regulations, which permit such informal consultations in connection with pipeline certificate applications³² as well as public utility and natural gas rate schedules and tariff filings.³³ Other specific examples of permitted pre-filing communications would include consultations under sections 4.34(i), 4.38, and 16.8 of our regulations taking place before the filing with the Commission of an application for certain hydropower licenses, exemptions or license amendments.³⁴

Our alternative hydropower licensing procedures permit establishing pre-filing communications protocols.³⁵ Under these procedures, an applicant must demonstrate that it has made an effort to contact all resource agencies, citizens groups and others that may be affected by the project, and that a consensus exists for the participants to communicate off-the-record under a communications protocol. The alternative procedures may be used only upon Commission approval and must include a disclosure requirement providing that information specified in the protocol will be placed in the public record. The Commission invites comments on whether off-the-record communications, occurring under

²⁸ Proposed Rule 18 CFR 385.2201(i)(2).

²⁹ 5 U.S.C. 557(d)(1). The legislative history of this section indicates that it was envisioned as allowing ex parte requests for subpoenas and other matters that might be resolved by the decisional authority on an *ex parte* basis. See 1977 U.S.C.A.N. at 2201.

³⁰ H.R. Rep. No. 880 (Part 1), 94th Cong., 2d Sess. at 20, reprinted in 1976 U.S.C.A.N. at 2202.

³¹ While materials in scholarly journals, the news media, and on the Internet are not communications prohibited by the proposed rule, this does not necessarily mean that they are accurate, valid or persuasive in all circumstances. Under Commission regulations, even officially noticeable facts are subject to rebuttal at the request of any participant. 18 CFR 385.508(d).

³² 18 CFR 157.14(a).

³³ 18 CFR 35.6 and 154.25.

³⁴ See 18 CFR 4.34, 4.38 and 16.8.

³⁵ See Docket No. RM95-16, Order No. 596, Regulations for the Licensing of Hydroelectric Projects, 62 FR 59802 (Nov. 5, 1997), 81 FERC ¶ 61,103 (October 29, 1997).

protocols entered into under the alternative procedures during the pre-filing stages, should be permitted to continue after the application is formally filed with the Secretary. Is there a need to renew the consensus in order for the communications protocol to survive? Should the protocol remain in effect following an application absent formal opposition by a party (whether an existing or new participant)?

5. Communications Agreed to by the Parties Permitted

Proposed 18 CFR 385.2201(b)(5) would retain the existing provision in 18 CFR 385.2201(b)(6) permitting communications which all the parties agree may be made without regard to communications constraints. The proposed regulations would retain the current policy of imposing no prohibition on communications during a meeting or conference noticed and open to all parties in a proceeding. The fundamental concern posed by off-the-record communications is with private or secret communications. The right to a fair hearing is denied when one party or interest has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut.³⁶ This concern is not present in meetings which all parties have an opportunity to attend.

6. Written Communications with Non-party Elected Officials Permitted

Proposed 18 CFR 385.2201(d)(6) would permit written communications from non-party elected officials acting in their official representative capacities. The Commission receives numerous letters from Federal and state elected officials requesting expedition or forwarding correspondence from constituents.³⁷ This proposal would treat such letters as permitted communications, subject to a disclosure requirement under which the communications would be placed in the public record and noticed, providing an opportunity for review and comment, thus mitigating any potential due process concerns.

7. Certain Staff Communications Concerning Compliance Matters Permitted

We are concerned with the fact that Commission staff frequently is restrained from being able to communicate with regulated entities and others regarding compliance with the requirements of Commission orders pending on rehearing. Such situations can lead to regulatory delay in compliance.

Most post-licensing compliance takes place after all the underlying issues have been resolved. Therefore, the proposed restrictions would not apply to conversations or exchanges of information during Commission staff safety inspections, post-licensing or post-certification environmental monitoring or compliance, or routine staff audits of company books or records when the inspections, monitoring, or audits are not undertaken in connection with an ongoing licensing or certificate case or other specific pending proceeding. Proposed 18 CFR 385.2201(d)(7) would make clear that limited off-the-record communications also would be permitted where, for example, a licensee is undertaking a good faith compliance effort, while pursuing rehearing on the underlying order. Only discussions concerning the mechanics of compliance, as opposed to the merits of the underlying order, would be permitted.

For example, in a hydropower licensing context, we do not believe that post-licensing communications on compliance with dam safety matters should be encumbered by the fact that a party has sought rehearing on the underlying licensing order.

8. Communications with Other Federal, State and Local Agencies

Existing 18 CFR 385.2201(b)(1) does not prohibit 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. Because many of the outside agencies with which the Commission works do have an official interest in the proceeding to which interagency communications relate, the proposed rule would permit some communications with Federal, state, or local agencies that are not parties in the relevant Commission proceeding. This exemption would apply to 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.

The partial exemption recognizes that, except where 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.³⁸ To ensure that such communications do not compromise the procedural rights of the parties or the integrity of the Commission's decisional record, proposed 18 CFR 385.2201(g)(1)(ii) would require that actual 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.

9. Communications Relating to Environmental Documentation

The Commission is interested in establishing rules that will permit more effective cooperation with other agencies, applicants, and the public in developing documentation, consistent with the National Environmental Policy Act of 1969 (NEPA),³⁹ that supports decisions made by the Commission. Accordingly, the Commission proposes to exclude from the coverage of the rule all off-the-record communications required to comply with the NEPA and implementing regulations issued by the Council on Environmental Quality (CEQ)⁴⁰ and the Commission.⁴¹

The CEQ's regulations describe an open and public NEPA process leading up to the issuance of an environmental document that includes opportunity for public comment and participation, and record development akin to the procedures used in informal rulemaking. For example, in cases necessitating the preparation of an Environmental Impact Statement (EIS), CEQ rules describe a public scoping requirement that may include noticed,

³⁶ *WKAT, Inc. v. FCC*, 296 F.2d at 383.

³⁷ 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. 880 (Part 1), 94th Cong., 2d Sess at 21-22, reprinted in 1976 U.S.C.C.A.N. at 2203.

³⁸ Similar exclusions appear in the Federal Communications Commission's *ex parte* regulations. See 47 CFR 1.1204(b)(5), (7) and (8).

³⁹ National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*

⁴⁰ 40 CFR 1500-1508.

⁴¹ 18 CFR Part 380.

public, on-the-record meetings,⁴² and requirements that all substantive comments (whether written or oral) received on the draft statement (or summaries thereof where the response has been especially voluminous) should be addressed in the final statement whether or not they are relied upon by the agency.⁴³ Comments or communications received after issuance of the final EIS should be made on-the-record or else they will be considered as prohibited communications, unless they are exempt under another provision of this rule.

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 environmental assessment (EA).⁴⁴ However, the CEQ's regulations for preparation of an EA do not require the same procedures to further public participation as those related solely to EIS preparation.

Based on our experience, a substantial majority of applications requiring preparation of an EA are uncontested. Because the rule does not apply to uncontested proceedings, communications undertaken in the environmental review process for these proceedings may take place off-the-record. However, this rule must address how off-the-record communications should be handled in those cases where an application requiring preparation of an EA is contested.

Accordingly, the Commission proposes, in cases that are contested, to exempt from the coverage of the proposed rule those communications relating to the preparation of an EA in cases where the Commission has determined to solicit and address public comment. In this manner, we believe that the Commission will have access to the information it needs to make an informed decision, and the public will have the requisite opportunity to participate in the process leading up to issuance of an environmental assessment. We note that the "final" environmental assessment may in fact be incorporated in the Commission's final order on the underlying action.

CEQ regulations require, to the fullest extent possible, that Federal agencies

⁴² Scoping meetings convened by the Commission are frequently transcribed by a court reporter. In the absence of a stenographic report, the substance of significant communications taking place in such meetings is memorialized, in writing, by Commission staff. These documents are made available to the parties and placed in the public record of the proceeding.

⁴³ 40 CFR 1503.4(b).

⁴⁴ 40 CFR 1501.4.

integrate related surveys, required by other relevant environmental review laws, into an EIS. Therefore, communications necessary to assure compliance with all relevant statutes protecting environmental, cultural and historic preservation concerns⁴⁵ also would be considered as excluded from the rule, if they occur prior to the issuance of a completed EA or EIS. Thus, to the extent that an applicant's compliance with these statutes is addressed in a final EA or EIS associated with a particular proceeding, the integrity of decisions arising under these statutes is protected by the EIS process. Any communications taking place after the Commission's issuance of the final environmental document would have to take place on-the-record.⁴⁶

The Commission is mindful that other Federal and state resource agencies with which we share jurisdiction may choose to intervene in the same Commission proceeding in which they have been serving as a cooperating agency⁴⁷ in the preparation of NEPA documentation, and thus may have been made privy to non-public predecisional information. The Commission invites comments on whether cooperating agencies who are also parties should have access to materials to which other parties lack access.

10. Communications With Individual, Non-Party Landowners Permitted

Communications involving individual, non-party landowners, whose property may be directly affected by a pending proceeding, would be permitted, subject to a disclosure requirement. This exemption would apply even after the issuance of a completed NEPA document. Consistent with fundamental fairness, such individual landowners should be permitted to comment without the need to incur the expense of formally intervening in a proceeding. Any

⁴⁵ 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 of the Clean Water Act, 33 U.S.C. 1341.

⁴⁶ The Commission believes that it is not required to disclose the specific details of communications with some cultural, historical, and environmental protection agencies. Rather, in order to protect the location or specific nature of an endangered resource, a general description of the problem encountered and proposed mitigative action, should be sufficient disclosure. This rationale would apply whether the communication is addressed in an environmental document, or as a separate part of the decisional record.

⁴⁷ The term "cooperating agency" is defined in the CEQ regulations as an agency invited by the lead agency to participate in the preparation of an environmental document. See 40 CFR 1501.6.

possible bias to the parties would be mitigated by a requirement that communications with affected landowners be placed in the record of the proceeding. This exception would not apply, however, in the case of communications with a landowner organization, or if an individual landowner is a party to the proceeding.

F. Handling of Off-the-Record Communications

1. Prohibited Off-the-Record Communications

The proposed regulations differentiate between two types of off-the-record communications: those prohibited by the regulations and those permitted by the regulations. Commission decisional employees who make or receive a prohibited communication would remain 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 the public record associated with, but separated from, the decisional record in the proceeding. The Secretary will acknowledge receipt of the prohibited communication by periodically issuing a public notice that the agency has received a prohibited communication. Such notice will list the author of the communication, date of receipt by the Commission, and the docket number to which the communication relates. Parties may seek an opportunity to respond on the record to any facts or contentions made in a communication placed in the non-decisional associated file. The Commission will grant such requests only where it determines that the dictates of fairness so require. When the request is granted, a copy of the off-the-record communication and the permitted response will be made a part of the decisional record.

The proposed regulations depart from existing Rule 2201 (but not the APA) in dropping the requirement that submissions in the public file revealing barred communications must also be routinely served on the parties to the relevant proceeding. The substitution of "public" notice is modeled on the approach used in the FCC's *ex parte* rule with regard to permitted off-the-record communications.⁴⁸ Given that these prohibited communications are not part of the Commission's decisional record, we believe there is no justification for imposing on the Commission a burdensome requirement of service on the parties. We note that the FCC's requirement is that its

⁴⁸ 47 CFR 1.1206(b).

Secretary publicly notice receipt of the off-the-record contact. Such notice apparently is accomplished by a regular posting on the public bulletin board, without resort to more formal **Federal Register** notice. Considering that the communications in question are prohibited, we believe the FCC's approach is valid and therefore propose that the Commission adopt it.

The Commission specifically invites comments on the use of public notice in lieu of service.⁴⁹ We also invite comments on whether the Secretary should retain the prohibited communication and response thereto in a file separate from the decisional file (*i.e.*, the associated file) or whether the incoming communication should be immediately placed in the decisional file and noticed (in the **Federal Register**) by the Secretary for public comment, and whether the latter approach would provide adequate incentive to comply with the *ex parte* rules.

The proposed regulations also would drop the requirement that appears in existing Rule 2201, but not in Rule 1415 or the APA, for "sworn" statements summarizing oral communications. While sworn statements may be appropriate in certain specific circumstances, the proposed regulations follow the practice of most Federal agencies in not imposing a general requirement of sworn statements.

2. Permitted Off-the-Record Communications

The due process principles underlying *ex parte* relate to preserving the actual and apparent integrity of administrative processes and creation of an agency decision-making record capable of judicial review. Consistent with these principles, the Commission proposes to permit certain off-the-record communications, but require that documentation of such communications be placed in the decisional record with public notice that the communication has been placed in the record. This disclosure requirement may, however, create some incremental burden on FERC staff relating to drafting memoranda or notes on oral communications, and may chill communications that outside parties would prefer not to disclose. The Commission invites comments on whether the proposed rule attains an appropriate balance of these interests.^{50/}

The proposed rule would require the Secretary periodically to notice receipt of these permitted communications, thereby notifying the parties, in lieu of direct service, that the communications are in the decisional record (or environmental record), and that they have the right to file a response.

We propose that notice be accomplished through publicly posting receipt of these communications. In addition, the notice might be accessible through the Commission's Internet homepage. We request comments on the sufficiency of this type of notice for publicizing permitted off-the-record communications.

G. Sanctions

The proposed regulations expand the sanctions provision in existing Rule 2201 in one respect. Added as a possible sanction for violations of the proposed regulations is disqualification or suspension from practice or appearance before the Commission. This sanction is already available under Rule 2102 to deal with misconduct by those appearing before the Commission.^{51/} It is included in the proposed regulations to clarify that persons who engage in barred communications are among those who may be subject to disqualification or suspension in the appropriate circumstances. One purpose of the proposed rule is to assure that the Commission's decisions are based only on information available to all parties. Accordingly, this sanctions portion of the rule would apply notwithstanding that the prohibited off-the-record communication would be made publicly available under proposed 18 CFR 385.2201(f). As under existing Commission regulations, the proposed

five exceptions—relating to emergencies, communications by non-party public officials, agency communications, the NEPA process, and landowner interests—might otherwise be viewed as violative of the *ex parte* principles designed to ensure the integrity of the Commission's proceedings if they were not accompanied by alternative procedural assurances that the Commission's records will be complete and that others will have a fair opportunity to respond. Thus, we propose to require that communications under these five areas be placed in the public record.

In total, the Commission proposes to exempt ten categories of communications from coverage under the proposed rule. The other proposed exemptions relate to communications that may be viewed as falling outside the penumbra of *ex parte* communications recognized by the APA. Therefore, we do not require notice and a record of their occurrences. These include communications permitted by law, pre-filing communications, communications that all parties agree may take place off the record, procedural inquiries, communications taking place in public fora, and communications relating to compliance with Commission orders.

⁵¹ 18 CFR 385.2102.

sanctions provision would apply only to persons outside the Commission. Commission employees who violate the proposed Rule 2201 prohibitions would be subject to administrative disciplinary measures applicable to Federal employees.

IV. Regulatory Flexibility Certification Statement

The Regulatory Flexibility Act^{52/} 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.^{53/}

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 proposed rule will not have a significant economic impact on small entities.

V. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.^{54/} 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 clarifying, corrective, or procedural, or that do not substantively change the effect of the regulations being amended.^{55/} The proposed 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.^{56/} However, this proposed rule contains no information collection requirements and therefore is not subject to OMB approval.

VII. Public Comment Procedures.

The Commission invites interested persons to submit written comments on

⁵² 5 U.S.C. 601–612.

⁵³ 5 U.S.C. 605(b).

⁵⁴ Order No. 486, Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1997), FERC Stats. & Regs., Regulations Preambles 1986–90 ¶ 30,783 (1997).

⁵⁵ 18 CFR 380.4(a)(2)ii).

⁵⁶ 5 CFR Part 1320.

⁴⁹ The Commission may also notice prohibited communications on its Homepage (<http://www.ferc.fed.us>) and/or its official bulletin board.

⁵⁰ For communications under five exceptions we propose a disclosure and notice requirement. These

this Notice of Proposed Rulemaking. An original and 14 copies of the comments must be filed with the Commission no later than December 24, 1998.

Comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 1st Street, N.E., Washington, DC 20426 and should refer to Docket No. RM98-1-000.

All written comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Room at 888 1st Street, N.E., Washington, DC 20426, during regular business hours.

List of Subjects in 18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, and Reporting and recordkeeping requirements.

By direction of the Commission.

Linwood A. Watson, Jr.,
Acting Secretary.

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

PART 385—RULES OF PRACTICE AND PROCEDURE

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

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

2. Section 385.101(b)(4) is revised to read as follows:

§ 385.101 Applicability (Rule 101).

* * * * *

(4) With respect to any oil pipeline filing or proceeding, the modified procedures set forth in Rules 1404 and 1414 will apply.

* * * * *

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 Subpart V heading and § 385.2201 are revised to read as follows:

Subpart V—Prohibited Communications and Other Communications Requiring Disclosure; Separation of Functions

§ 385.2201 Prohibited communications and other communications requiring disclosure (Rule 2201).

(a) *Purpose and scope.* The purpose of this section is to govern 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 shall 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) *Prohibited off-the-record communications in proceedings involving a party or parties.* (1) Except as permitted in paragraph (d) of this section, no person shall make or knowingly cause to be made to any decisional employee an off-the-record communication relevant to the merits of a contested on-the-record proceeding involving a party or parties; and

(2) Except as permitted in paragraph (d) of this section, no decisional employee shall make or knowingly cause to be made to any person an off-the-record communication relevant to the merits of a contested on-the-record proceeding involving a party or parties.

(c) *Definitions.* For purposes of this section:

(1) *Off-the-record communication* means a communication which, if written, is not served on the parties to the proceeding, and if oral, is made without reasonable prior notice to the parties to a proceeding.

Note: Written communications includes a communication transmitted by electronic means such as "e-mail."

(2) *Contested on-the-record proceeding* means any complaint, action initiated by the Commission, or other

proceeding involving a party or parties in which an intervenor opposes a proposed action.

Note: The Commission will consider an intervention as contesting the proposed action, and triggering the prohibitions on off-the-record communications, when the intervenor expressly styles its petition as being in opposition. Additionally, the Commission will consider an intervention as being in opposition, even when not so styled, if the arguments contained therein reasonably establish the filer's opposition to the application. However, the Commission will not treat an intervention as being in opposition to the applicant when it appears to have been made solely for the purpose of being placed on the service list or to seek permission to participate in a hearing, should the Commission order that a hearing be held.

(3) *Decisional employee* means 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 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, 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).

Note: For purposes of this paragraph, "contractor" means a direct Commission contractor or a third-party contractor subject to Commission supervision and control.

(4) *Person* means any person outside the Commission.

(5) *Proceeding involving a party or parties* means any docketed Commission proceeding other than an investigation under part 1b of this chapter, an informal rulemaking under the procedures of 5 U.S.C. 553 or exempted from those procedures under 5 U.S.C. 553(a)(1) and (a)(2), or any other proceeding not having a party or parties.

Note: An on-the-record proceeding includes both proceedings set for oral hearings and those hearings disposed of on evidence taken by modified procedures, that is a "paper hearing."

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

(i) A request for information relating solely to the status of a proceeding, unless the request states or implies a preference for a particular party or position, advocates expedited action or action by a certain date or time, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding; or

(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.

Note: Although the Administrative Procedure Act 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.

(d) *Exempt communications.* The general prohibitions in paragraph (b) of this section do not apply to the following:

(1) A communication specifically authorized by law, or permitted by Commission rule or order in a particular proceeding;

(2) Subject to the disclosure requirements of paragraph (g) of this section, a communication related to an emergency;

(3) Communications of published or broadly disseminated public information;

Note: Communications taking place in public fora, and material appearing in the public domain, are not subject to the general prohibitions on off-the-record communications.

(4) Pre-filing communications, including communications under §§ 4.34(i), 4.38, and 16.8 of this chapter, to take place before the filing with the Commission of an application for an original, new, nonpower, or subsequent hydropower license or exemption or a license amendment;

Note: Application of this section is not limited to the above listed hydropower regulations. Other examples of permitted pre-filing communications would include, but are not limited to, submitting draft rate schedules for the purpose of receiving staff suggestions under § 35.6 of this chapter, and certain informal pipeline certificate consultations pursuant to § 157.14(a) of this chapter.

(5) A communication that all parties to a proceeding agree may be made without regard to the prohibitions in paragraph (b) of this section;

Note: Absent formal opposition by a party, this exemption allows pre-filing communications protocols to remain in effect after an application is filed with the Commission.

(6) Subject to the disclosure requirements of paragraph (g) of this section, a written communication from a non-party elected official;

Note: This exemption covers written communications requesting expedition or forwarding constituent correspondence; oral communications would be subject to the prohibitions of this subpart.

(7) Where an order is pending rehearing, communications on issues relating to compliance with order conditions;

Note: Communications related to the basis for, or seeking changes in, the underlying order for which rehearing is being sought would not be permitted.

(8) Subject to the requirements of paragraph (g) of this section, a communication to or from another Federal, state or local agency that is not a party in the Commission proceeding where the communication involves:

(i) A verbal or written request for information made by the Commission or Commission staff; or

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

(9) Subject to the disclosure requirements of paragraph (g) of this section, and without regard to party status, any communication that relates to:

(i) The preparation of an environmental impact statement, if such communications occur prior to the issuance of the final environmental document; or

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

Note: This exemption applies to discussions with Federal, state, or local agencies, applicants, landowners, and non-governmental entities engaged in preparation of an environmental document. Once the final environmental document is issued, further communications with parties would be subject to the general prohibitions described in this section unless another exemption applies.

(10) Subject to the disclosure requirements of paragraph (g) of this

section, any communications involving individual, non-party landowners whose property may be affected by a pending proceeding.

Note: This exemption applies even after the National Environmental Policy Act process has been completed, but is inapplicable to landowner organizations and individual landowners who are parties to the underlying proceeding.

(e) *When the prohibitions apply.* (1) The prohibitions in paragraph (b) of this section will apply:

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

(ii) For proceedings returned to the Commission on judicial remand—from the date the Court issues its mandate;

(iii) For complaints initiated pursuant to Rule 206 (complaints)—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

(iv) For all other matters—from the time of the filing, in accordance with § 385.2001(a)(2), of any protest or intervention in opposition to an application, petition, tariff or rate filing, or other matter that is, or will be, the subject of the proceeding, including a petition for rehearing of an administrative law judge's decision that becomes a final decision under Rule 708(d).

Note: Prematurely filed interventions would not trigger the prohibitions on off-the-record communications.

(2) The prohibitions will remain in force until final disposition of the proceeding by the Commission, including a decision on rehearing where applicable. The prohibitions will also remain in effect until the time period for seeking rehearing has expired. In the case of an initial decision by an administrative law judge, the prohibitions will remain in force until it becomes final pursuant to Rule 708(d).

(f) *Handling of prohibited off-the-record communications.* A prohibited communication in violation of paragraph (b) of this section 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.

(1) *Disclosure requirement.* Any decisional employee who makes or receives a communication prohibited by paragraph (b) of this section will submit to the Secretary the communication, if written, or a summary of the substance of any oral communication. The Secretary will place the communication or summary in the public file associated

with, but not part of, the decisional record of the proceeding.

(2) *Public notice requirement.* The Secretary shall periodically issue a public notice listing any prohibited off-the-record communications or summaries thereof received by his or her office relating to a proceeding. Such notice shall identify the author of the communication, the date the communication was received, and the docket number to which it relates.

(3) *Responses to prohibited off-the-record communications.* Any party may file a response to a communication placed in the non-decisional public record under paragraph (f)(1) of this section. A party may also file a written request for an opportunity to respond, on-the-record, to any facts or contentions made in an off-the-record communication placed in the non-decisional public file. The Commission will grant such request only where it determines that the dictates of fairness so require. When the request is granted, a copy of both the off-the-record communication, and the permitted response, will be made a part of the decisional record.

(g) *Handling of permitted off-the-record communications.*—(1) *Disclosure requirement.* (i) Any written information, and a summary of the substance of any significant oral information, not already in the record, obtained through a permitted communication in response to an emergency covered by paragraph (d)(2) of this section, will be submitted to the Secretary and placed in the decisional record of the underlying Commission proceeding.

(ii) Any permitted written information obtained through a permitted communication with a non-party elected public official under paragraph (d)(6) of this section will be submitted to the Secretary and placed in the decisional record of the proceeding.

(iii) Except for information of which official notice may be taken, any written information, and a summary of the substance of any significant oral information, not already in the record, obtained through a permitted communication with a Federal, state, or local agency under paragraph (d)(8) of this section, will be submitted to the Secretary and placed in the decisional record of the Commission proceeding.

(iv) Any written information, and a summary of the substance of any significant oral information, not already in the environmental documentation of a proceeding, obtained through a permitted communication to or from any person under paragraph (d)(9) of this section, will be submitted to the

Secretary, placed in the public record of the proceeding, and addressed in the final environmental document issued by the Commission.

(v) Any written information, and a summary of the substance of any significant oral information, not already in the record, obtained through a permitted communication involving an individual non-party landowner under paragraph (d)(10) of this section will be submitted to the Secretary, and placed in the decisional record of the Commission proceeding.

(2) *Public notice requirement and response.* For each communication required to be disclosed under paragraph (g)(1) of this section, the Secretary shall periodically issue a public notice listing any permitted off-the-record communications or summaries thereof received by his or her office relating to a proceeding. Any party may file a response on the record.

(h) *Sanctions.* (1) If a person knowingly makes or causes to be made a communication in violation of paragraph (b) of this section, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2101 (appearances); and

(2) If a party or its agent or representative knowingly makes or causes to be made a communication in violation of paragraph (b) of this section, 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.

(i) *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 communication, or where not required by the rule, to make a public disclosure of a permitted off-the-record communication, in circumstances where the employee determines that such action is appropriate.

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

§ 385.2202 Separation of functions (Rule 2202).

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 2

[Docket No. 98N-0417]

General Administrative Rulings and Decisions; Amendment to the Examination and Investigation Sample Requirements; Companion Document to Direct Final Rule

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its regulations regarding the collection of twice the quantity of food, drug, or cosmetic estimated to be sufficient for analysis. This action increases the dollar amount that FDA will consider to determine whether to routinely collect a reserve sample of a food, drug, or cosmetic product in addition to the quantity sufficient for analysis. Experience has demonstrated that the current dollar amount does not adequately cover the cost of most quantities sufficient for analysis plus reserve samples. This proposed rule is a companion to the direct final rule published elsewhere in this issue of the **Federal Register**. This action is part of FDA's continuing effort to achieve the objectives of the President's "Reinventing Government" initiative, and it is intended to reduce the burden of unnecessary regulations on food, drugs, and cosmetics without diminishing the protection of the public health.

DATES: Comments must be received on or before December 9, 1998.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Sharon M. Sheehan, Office of Regulatory Affairs (HFC-230), Food and Drug Administration, 12720 Twinbrook Pkwy., Rockville, MD 20855, 301-827-0412.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule is a companion to the direct final rule published in the final rules section of this issue of the **Federal Register**. This companion proposed rule will provide the procedural framework to finalize the rule in the event that the direct final