

123 FERC ¶ 61,158  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 385

Docket No. RM08-8-000

Ex Parte Contacts and Separation of Functions

(Issued May 15, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission is proposing to revise its regulations to clarify its rules governing ex parte contacts and separation of functions as they apply to proceedings arising out of investigations initiated under Part 1b of the Commission's regulations. This proposal is intended to provide clearer guidance to both Commission litigation staff and persons outside the Commission in determining whether they may properly contact decisional employees once the Commission has established further proceedings on matters that had been investigated under Part 1b. The Commission also is proposing to clarify its regulations governing intervention to specify that intervention is not permitted as a matter of right in proceedings arising from Part 1b investigations.

DATES: Comments are due [**60 days after publication in the FEDERAL**

**REGISTER]**

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- Agency Web Site: <http://ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail/Hand Delivery: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, D.C. 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

123 FERC ¶ 61,158  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Ex Parte Contacts and Separation of Functions

Docket No. RM08-8-000

NOTICE OF PROPOSED RULEMAKING

(Issued May 15, 2008)

**I. Background**

1. The Commission is seeking comment on a proposal to revise its regulations to clarify the application of its rules governing off-the-record (or ex parte) communications and separation of functions as they apply to proceedings arising out of investigations under 18 CFR Part 1b. The Commission has become aware of some uncertainty regarding the situations in which persons outside the Commission and Commission litigation staff may contact decisional employees of the Commission once it establishes a proceeding governed by 18 CFR Part 385 in a matter that has been under investigation pursuant to Part 1b. These proposed revisions are intended to clarify the applicable rules, place respondents and litigation staff on similar footing, and continue to ensure the integrity of Commission proceedings. Finally, the Commission is proposing to clarify its regulations governing interventions to specify that intervention is not permitted as a matter of right in proceedings arising from investigations under Part 1b.

## II. Discussion

### A. Separation of Functions and Off-the-Record Communications

2. The Commission's regulations governing off-the-record communications (Rule 2201),<sup>1</sup> or ex parte contacts, and separation of functions (Rule 2202)<sup>2</sup> serve related purposes. Both seek to protect due process rights and ensure the integrity of litigated proceedings by limiting off-the-record contacts between persons involved in litigating a matter and decisional employees of the Commission.<sup>3</sup> Decisional employees are defined to include Commissioners and their staffs, Administrative Law Judges (ALJs), and other Commission employees and contractors who may reasonably be expected to be involved in the decisional process of a proceeding.<sup>4</sup> Rule 2201 prohibits off-the-record communications by persons outside the Commission, made in connection with specified

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<sup>1</sup> Rule 2201 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2201 (2008).

<sup>2</sup> Rule 2202 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2202 (2008).

<sup>3</sup> The Commission examined the purposes and operation of Rules 2201 and 2202 in detail in Statement of Administrative Policy on Separations of Functions, 101 FERC ¶ 61,340 (2002) (Policy Statement).

<sup>4</sup> Rule 2201(c)(3). Litigation staff, settlement judges, neutrals and employees designated as non-decisional are excluded.

proceedings, with decisional employees. Rule 2202 prohibits litigation staff from advising on or participating in the findings, conclusions or decisions of adjudications.<sup>5</sup>

3. Rules 2201 and 2202 have important implications for investigations conducted under Part 1b. Generally speaking, Part 1b investigations are carried out by staff from the Office of Enforcement and are non-public. By regulation, information obtained by staff during the course of a Part 1b investigation is considered non-public until such time as the Commission determines disclosure is appropriate, or until disclosure occurs during an adjudicatory proceeding or pursuant to the Freedom of Information Act.<sup>6</sup> Part 1b investigations therefore differ from other types of investigations carried out by the Commission, such as investigations into the justness and reasonableness of the rates in a particular market. Investigations that are not carried out under Part 1b generally are announced publicly, and include public comment and the maintenance of a public record in the same manner as adjudicatory proceedings.<sup>7</sup>

4. During an investigation under Part 1b, the assigned employees gather information and examine the actions of regulated companies and market participants. The matters raised may not necessarily result in a proceeding governed by Part 385. For example,

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<sup>5</sup> Although the coverage of Rules 2201 and 2202 is not identical—off-the-record communications compared to advising on decisions—in practice the coverage normally overlaps.

<sup>6</sup> 18 CFR 1b.9 (2008); see 5 U.S.C. 552 (Freedom of Information Act).

<sup>7</sup> E.g., Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 97 FERC ¶ 61,220 (2001).

staff may close an investigation after concluding that no violation occurred, or the investigation may be closed for other reasons without sanctions being imposed. In other cases, the investigation may result in a settlement including payment of a civil penalty. There are no parties and no right to intervene in a Part 1b investigation and, as explained below, the ex parte and separation of functions rules do not apply. In some cases, staff may recommend that the Commission initiate further proceedings. If the Commission initiates a proceeding governed by Part 385, such as an order to show cause, an investigator may be assigned to litigate the matter, which brings Rules 2201 and 2202 into play.<sup>8</sup>

### **1. Separation of Functions**

5. Rule 2202 prohibits litigation staff from advising in the outcome of “any proceeding in which a Commission adjudication is made after hearing.” The Commission discussed the scope of this prohibition at length in the Policy Statement, specifically addressing its application in the context of investigations. The Commission noted that it has generally interpreted Rule 2202 as applying where a matter has been “set for a trial-type evidentiary hearing.”<sup>9</sup> It did not at that time address the application of Rule 2202 to other types of proceedings, such as “paper hearings” in which the Commission determines matters based on written submissions.

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<sup>8</sup> Policy Statement, at P 24-26.

<sup>9</sup> Id., at P 12.

6. The Commission addressed the application of Rule 2202 to investigations in Energy Transfer Partners, L.P., 121 FERC ¶ 61,282 (2007) (ETP).<sup>10</sup> In ETP, the Commission stated:

To provide additional due process in all future civil penalty cases under the FPA, NGPA, and NGA, at the time the Office of Enforcement investigative staff completes its investigation, it will transmit to the Commission a report with recommended findings and conclusions of fact and law and the Commission will attach the report to a show cause order to respond to the recommended findings. The Commission will not make any findings, preliminary or otherwise, at least until it has considered the response. In addition, at the point Office of Enforcement investigative staff submits a report to the Commission, designated Office of Enforcement investigative staff will become non-decisional employees for purposes of participating in the remainder of that enforcement proceeding, including any hearing or other procedures used by the Commission to resolve the proceeding.<sup>11</sup>

The Commission thus expressed its intention to provide greater due process in investigations than is currently required by Rule 2202 by invoking the separation of functions prohibitions sooner than would otherwise be the case.<sup>12</sup> Otherwise, Rule 2202 could be interpreted as applying only when and if the Commission ordered a trial-type evidentiary hearing.

7. In this proceeding, we propose to revise Rule 2202 to bring it in line with the procedures adopted in ETP, with one alteration. Rule 2202 would specifically state that separation of functions restrictions begin to apply once the Commission issues a show

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<sup>10</sup> See also Amaranth Advisors L.L.C., 122 FERC ¶ 61,087 (2008).

<sup>11</sup> ETP, 121 FERC ¶ 61,282, at P 89 (2007) (footnote omitted).

<sup>12</sup> The Commission explained that it was exercising its discretion to extend procedural protections beyond the requirements of the regulations. Id. at P 88.

cause order in an investigation under Part 1b of the Commission's regulations. The ETP order refers to the submission of staff's report, rather than a subsequent show cause order, as the "start time" for application of the separation of functions. Upon further consideration, however, we believe that the initiation of a proceeding under Part 385 would be a more practical triggering event. In the context of a Part 1b investigation, it is the issuance of a show cause order or the initiation of a civil action that commences a proceeding, making it the most logical and clearly delineated event to begin application of the rules limiting contacts with Commissioners and decisional staff. This approach is similar to that employed by other agencies.<sup>13</sup> It also provides a clear demarcation point, which should be helpful to both Commission staff and outside parties as they endeavor to remain in compliance with the rules.

8. Once a proceeding governed by Part 385 or a civil action is initiated, the Commission will designate which of the employees within the Office of Enforcement will be considered decisional for purposes of the relevant proceeding. All other Office of Enforcement employees will be non-decisional. If employees from other Commission offices are participating as part of the investigative staff after the proceeding governed by Part 385 is initiated, those employees will be designated as non-decisional at this time.

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<sup>13</sup> For example, the Securities and Exchange Commission's rules on contacts between litigants and decisional staff begin to apply at the time a proceeding is commenced. Depending on the type of proceeding, initiation of the proceeding generally occurs through various types of filings or through issuance of an order commencing proceedings. 17 CFR 200.111(c) (2008). The Federal Trade Commission follows the same approach, 16 CFR 4.7(e) (2008), and specifically excludes investigations that have not reached the adjudicative stage, 16 CFR 4.7(f).



The restrictions will continue to apply regardless of whether the Commission sets the matter for trial-type evidentiary hearing or some other procedure, such as a paper hearing.

The Commission invites comment on this proposal.

## 2. **Off-the-Record Communications**

9. The Commission's rule governing off-the-record, or ex parte, communications, Rule 2201,<sup>14</sup> is similar in purpose, scope and operation to Rule 2202. Rule 2201 regulates contacts between persons outside the Commission and the Commission's decisional employees, while Rule 2202 regulates contacts between decisional and non-decisional employees.<sup>15</sup> With respect to scope, Rule 2201 applies to

any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issues, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing.<sup>16</sup>

The rule explicitly excludes rulemakings, investigations under Part 1b, proceedings without a party and proceedings in which no party disputes a material issue.<sup>17</sup> As a result, the restrictions on ex parte contacts do not apply while a Part 1b investigation is underway. They come into play only when the Commission initiates a proceeding.

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<sup>14</sup> Rule 2201 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2201 (2008).

<sup>15</sup> See Policy Statement, 101 FERC ¶ 61,340, at P 7.

<sup>16</sup> Rule 2201(c)(1)(i), 18 CFR 385.2201(c)(1)(i).

<sup>17</sup> Rule 2201(c)(1)(ii), 18 CFR 385.2201(c)(1)(ii).

10. The Commission understands that the application of Rule 2201 to investigations has been the source of some uncertainty within the regulated community. For example, in connection with a Conference on Enforcement Policy held on November 16, 2007, the National Rural Electric Cooperative Association (NRECA) asked the Commission to clarify several points:

- That a Part 1b investigation is not a “proceeding” to which the ex parte rules apply unless and until it is set for hearing.
- That communications between persons outside the Commission and Commissioners or decisional staff during investigations are not limited to situations covered in 18 CFR § 1b.19, which allows investigative personnel to invite the subject of a Part 1b investigation to make a submission to the Commission in response to an expected recommendation that the Commission initiate civil action.
- That the subject of a Part 1b investigation would not be acting inappropriately by contacting a Commissioner where the subject thought it was being treated unfairly or had a question that only the Commission could address.

11. As noted above, a Part 1b investigation is expressly excluded from the coverage of Rule 2201. Consequently, the subject of such an investigation could, without acting contrary to Rule 2201, contact a Commissioner while an investigation was pending but before the Commission initiated a proceeding based on the investigative staff’s report. Concurrently with the issuance of this notice of proposed rulemaking, however, we are

announcing<sup>18</sup> a policy to govern contacts by persons outside the Commission with Commissioners and their staffs. In the Revised Policy Statement on Enforcement, we institute a policy under which the subject of a Part 1b investigation may not communicate with Commissioners or their personal staffs about the investigation in person or by telephone. Instead, such communications must be written.<sup>19</sup> The subject may still speak to decisional staff other than Commissioners and their personal staffs about an investigation, and may speak to Commissioners and their personal staffs about subjects other than the investigation as otherwise permitted by the Commission's regulations. If and when the Commission issues a show cause order instituting enforcement proceedings, off-the-record communications of any sort would be prohibited by Rule 2201. To summarize, we are not proposing to revise Rule 2201 to prohibit off-the-record communications concerning Part 1b investigations between persons outside the Commission and Commissioners or decisional employees. We are, however, establishing a policy under which Commissioners and their personal staffs will accept only written communications during the pendency of such investigations.

12. With respect to NRECA's remaining question on contacting the Commission, section 1b.19<sup>20</sup> is not the sole avenue open to the subject of an investigation.

Furthermore, the answer to this question remains the same in light of the final rule we are

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<sup>18</sup> Revised Policy on Enforcement, Docket No. PL08-3-000.

<sup>19</sup> See 18 CFR 1b.18 (2008).

<sup>20</sup> 18 CFR 1b.19 (2008).

issuing today to clarify section 1b.19.<sup>21</sup> Under both current practice and the revised section 1b.19 that we announce today, Office of Enforcement staff will notify the subject of an investigation, except in extraordinary cases,<sup>22</sup> of its intention to recommend that the Commission initiate enforcement proceedings. The revised section 1b.19 provides that, where staff gives such notification, the subject may submit a response within 30 days. Nothing in the former or revised version of this provision prohibits other contacts between the subject of an investigation and the Commissioners or decisional employees, nor does it act to override the explicit exclusion of Part 1b investigations from Rule 2201. Communications during a Part 1b investigation would, however, be subject to the policy we are announcing today, as explained above and set forth in the Revised Policy on Enforcement.

13. In view of the revision that this proposed rule would make to the separation of functions provision, there would be an inconsistency between Rules 2201 and 2202 in the context of a Part 1b investigation. The proposed change to Rule 2202 would provide that the separation of functions restrictions apply when the Commission initiates a proceeding under Part 385 through an order to show cause. This proposed rulemaking would include a parallel change to Rule 2201 to ensure similar treatment of investigative staff and

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<sup>21</sup> Submissions to the Commission upon Staff Intention to Seek and Order to Show Cause, Docket No. RM08-10-000.

<sup>22</sup> An example of such an extraordinary circumstance would be the need to seek an injunction to prevent immediate and irreparable harm.

respondents to a proceeding. The Commission seeks comment on this proposed revision to Rule 2201.

**B. Intervention**

14. The Commission in ETP also addressed the question of intervention in enforcement proceedings arising from Part 1b investigations. Without categorically stating that intervention in an enforcement proceeding is impermissible, the Commission stated that, “[a]s a general proposition,” intervention should not be allowed. An enforcement proceeding necessarily focuses on the conduct and culpability of the subject party and does not directly implicate the rights of third parties in the same manner as, for example, a rate proceeding. Intervention by third parties thus could delay or complicate an enforcement proceeding and sidetrack it from its purpose. The Commission did note, however, that intervention might be appropriate once the enforcement proceeding had reached the stage of determining a sanction. This might, for instance, allow third parties to participate in determinations that might directly affect them, such as the allocation of disgorged profits.<sup>23</sup>

15. The Commission’s rules currently provide that intervention is not appropriate in Part 1b investigations. Part 1b specifically states, “There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may

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<sup>23</sup> ETP, 121 FERC ¶ 61,282, at P 19 & n.28; see Williams Gas Pipelines Central, Inc., 94 FERC ¶ 61,285 (2001) (allowing intervention in enforcement proceeding where state public service commission sought to clarify impact of settlement on state interests).

intervene or participate as a matter of right in any investigation under this part.”<sup>24</sup> This provision, however, does not specifically refer to enforcement proceedings arising out of a Part 1b investigation and does not distinguish between such proceedings and the investigations themselves. Because Rule 214,<sup>25</sup> which governs interventions, makes no specific reference to proceedings arising from Part 1b investigations, the current rules may be read to allow intervention in such proceedings on the same basis as any other Commission adjudication. The more sensible view is that, once an enforcement proceeding is established, intervention should not be available except under limited circumstances.

16. The Commission proposes to revise Rule 214 to state specifically that intervention is not permitted as a matter of right in enforcement proceedings arising from Part 1b investigations. This would leave open the possibility that intervention in an enforcement proceeding might be appropriate in some circumstances, such as where a third party wished to determine the impact of a sanction or other resolution upon its own interests. The Commission seeks comment on this proposal.

17. It should be noted that different considerations may govern intervention issues in proceedings arising from Part 1b investigations. The Commission has, for example, been

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<sup>24</sup> 18 CFR 1b.11 (2008).

<sup>25</sup> Rule 214 of the Commission’s Rules of Practice and Procedure, 18 CFR 385.214 (2008).

less reluctant to permit intervention in proceedings involving reliability penalties.<sup>26</sup>

Another situation that differs from the “classic” Part 1b investigation can arise where an entity files a complaint. The Commission may conduct a complaint proceeding while at the same time ordering a Part 1b investigation. In such situations, the Commission has allowed intervention more readily in the complaint proceeding, although intervention would not be proper in the Part 1b investigation.<sup>27</sup> This proposed revision is not intended to restrict the Commission’s ability to determine the appropriateness of intervention in individual cases.

### **III. Information Collection Statement**

18. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>28</sup> This proposed rulemaking does not contain any information collection requirements and compliance with the OMB regulations is thus not required.

### **IV. Environmental Analysis**

19. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect

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<sup>26</sup> See, e.g., Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 509, order on reh’g, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>27</sup> E.g., New York Independent System Operator, Inc., 120 FERC ¶ 61,024 (2007).

<sup>28</sup> 5 CFR 1320.12 (2008).

on the human environment.<sup>29</sup> Issuance of the revisions proposed in this Notice of Proposed Rulemaking will not represent a major federal action having a significant adverse effect on the quality of the human environment under the Commission's regulations implementing the National Environmental Policy Act of 1969. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Analysis or an Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.<sup>30</sup> This proposed rulemaking is exempt under that provision.

**V. Regulatory Flexibility Act Certification**

20. The Regulatory Flexibility Act of 1980 (RFA)<sup>31</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This proposed rulemaking concerns procedural matters and is primarily intended to clarify existing regulations. The Commission certifies that it will not have a significant economic impact upon participants in Commission proceedings. An analysis under the RFA is not required.

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<sup>29</sup> Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

<sup>30</sup> 18 CFR 380.4(1) and (5) (2008).

<sup>31</sup> 5 U.S.C. 601-612.



**VI. Comment Procedures**

21. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [**60** days from publication in the FEDERAL REGISTER]. Comments must refer to Docket No. RM08-8-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

22. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

23. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street N.E., Washington, DC, 20426.

24. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

**VII. Document Availability**

25. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page

(<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

26. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

27. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

List of subjects in 18 CFR Part 385

18 CFR Part 385

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

By direction of the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

In consideration of the foregoing, the Commission proposes to amend 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. §§ 717–717z, 3301–3432; 16 U.S.C. §§ 791a–825v, 2601–2645; 28 U.S.C. § 2461; 31 U.S.C. §§ 3701, 9701; 42 U.S.C. §§ 7101–7352, 16441, 16451-16463; 49 U.S.C. § 60502; 49 App. U.S.C. §§ 1–85 (1988).

2. Amend section 385.214 by adding new paragraph (a)(4) to read as follows:

**§ 385.214 Intervention (Rule 214).**

(a) \* \* \*

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

3. Amend section 385.2201 by revising paragraph (c)(1) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) Contested on-the-record proceeding means

(i) Except as provided in paragraph (c)(1)(ii), any proceeding before the

Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint

with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter.

(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.

\* \* \* \* \*

4. Amend section 385.2202 by revising it to read as follows:

**§ 385.2202 Separation of functions (Rule 2202).**

In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.