

125 FERC ¶ 61,063  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 385

[Docket No. RM08-8-000; Order No. 718]

Ex Parte Contacts and Separation of Functions

(Issued October 16, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Commission is revising 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. The revisions specify when Commission litigation staff and persons outside the Commission may contact decisional employees once the Commission has established proceedings on matters that had been investigated under Part 1b. The Commission also is revising its regulations governing intervention to clarify that intervention is not permitted as a matter of right in proceedings arising from Part 1b investigations.

EFFECTIVE DATE: This rule will become effective [**30 days after publication in the**

**FEDERAL REGISTER]**

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Ex Parte Contacts and Separation of Functions

Docket No. RM08-8-000

FINAL RULE

ORDER NO. 718

(Issued October 16, 2008)

1. On May 15, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR)<sup>1</sup> proposing to revise its regulations governing ex parte contacts and interventions in the context of investigations under Part 1b of its regulations.<sup>2</sup> Specifically, the NOPR proposed to revise the Commission's regulations governing ex parte contacts and separation of functions to clarify the circumstances in which Commission litigation staff and outside persons may contact Commissioners and decisional staff while an investigation is pending. The NOPR further proposed to clarify the Commission's regulations governing intervention to provide that intervention is not available as of right in a proceeding arising from an investigation under Part 1b.

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<sup>1</sup> Ex Parte Contacts and Separation of Functions, 73 FR 29451 (May 21, 2008), FERC Stats. & Regs. ¶ 32,634 (2008).

<sup>2</sup> 18 CFR Part 1b.

**I. Background**

2. In the NOPR, the Commission noted that, while its regulation governing interventions provided that there is no intervention in a Part 1b investigation, the regulation did not address the subject of intervention in a proceeding arising from a Part 1b investigation.<sup>3</sup> The NOPR explained that the Commission's precedents have recognized that, because a proceeding arising from an investigation is focused on the alleged conduct of a specific entity, intervention ordinarily is inappropriate and may delay or sidetrack the proceeding.<sup>4</sup> The NOPR therefore proposed to revise the regulation to provide that intervention is not available as of right in a proceeding arising from a Part 1b investigation. The Commission noted that, under this revision, it would retain the ability to permit intervention in cases where it might be appropriate, as the Commission had in fact done on past occasions.

3. With respect to off-the-record communications, the NOPR explained that the current Commission rules created a potential inconsistency between the ability of Commission litigation staff and persons outside the Commission to contact Commissioners and decisional staff in situations where, as the result of a Part 1b investigation, the Commission initiates proceedings other than trial-type proceedings. The NOPR further noted some uncertainty within the regulated community about the

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<sup>3</sup> Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214.

<sup>4</sup> See Energy Transfer Partners, L.P., 121 FERC ¶ 61,282, at P 19 & n.28 (2007) (ETP).

application of the ex parte rules in the context of Part 1b investigations. The NOPR proposed to revise the Commission's ex parte<sup>5</sup> and separation of functions<sup>6</sup> regulations to provide that neither outside persons nor litigation staff may engage in off-the-record communications with Commissioners and decisional staff once the Commission has initiated a proceeding in connection with a Part 1b investigation, regardless of the type of proceeding.

4. The NOPR also made reference to the Revised Policy Statement on Enforcement,<sup>7</sup> which was issued at the same time as the NOPR. In the Revised Policy Statement on Enforcement, the Commission announced that, as a matter of policy, Commissioners and their personal staffs will no longer accept oral communications about pending investigations from the subjects of those investigations. Such communications will have to be in writing. This measure is a policy and not a part of the Commission's regulations.

5. In total, the Commission received 14 comments regarding the NOPR. Multiple State Utilities Commissions joined the comments of the National Association of Regulatory Utility Commissioners (NARUC).<sup>8</sup> In addition, the Industry Associations'

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<sup>5</sup> Rule 2201 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2201 (2008).

<sup>6</sup> Rule 2202 of the Commission's Rules of Practice and Procedure, 18 CFR 385.2202 (2008).

<sup>7</sup> Enforcement of Statutes, Regulations, and Orders, 123 FERC ¶ 61,156 (2008).

<sup>8</sup> The Public Utilities Commissions of California, Indiana, Nevada, Ohio, and South Dakota, as well as the Public Service Commissions of New York, Maryland, and  
(continued)

(IA) comments represented the views of several entities.<sup>9</sup> In general, the commenters expressed appreciation of the Commission's attempt to refine its enforcement practices, but expressed concern with both the proposal prohibiting intervention as a matter of right in enforcement proceedings, as well as the proposal regarding *ex parte* contacts with decisional staff prior to the issuance of an order to show cause.<sup>10</sup>

## II. Discussion

### A. Intervention

6. The bulk of the comments expressed concern about the NOPR's proposal to revise the Commission's intervention rules to provide that there is no intervention as a matter of right in proceedings arising from Part 1b investigations. For the most part, the commenters were concerned with specific situations that may arise from time to time in

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West Virginia, and the Illinois Commerce Commission, supported the comments of NARUC.

<sup>9</sup> The Industry Association consists of the American Gas Association, the Edison Electric Institute, the Electric Power Supply Association, the Independent Petroleum Association of America, the Interstate Natural Gas Association of America, the Natural Gas Supply Association, and the Process Gas Consumers Group.

<sup>10</sup> Several commenters filed interventions or requested to intervene out of time, or requested to file late comments. These included the Indiana Utility Regulatory Commission, the Public Service Commission of West Virginia, the Illinois Commerce Commission, the Maryland Public Service Commission, the Public Utilities Commission of the State of California, the Public Service Commission of the State of New York, and the Public Utilities Commission of Ohio. The Commission will treat all such submissions as comments on the NOPR and has considered them regardless of when they were filed.

which they believe intervention would be warranted. A few comments reflected broader concerns about possible restrictions on intervention.

### 1. **Broader Issues**

7. With respect to broader concerns, the National Rural Electric Cooperative Association and American Public Power Association (NRECA/APPa), and Ergon Energy Partners, LP (Ergon), assert that the Commission should not adopt the proposed rule abolishing intervention as a matter of right in enforcement proceedings. NRECA/APPa state that the proposed rule is “likely unlawful to the extent it purports to eliminate statutory intervention rights” and is unnecessary in light of the standards contained in Rule 214.<sup>11</sup> They assert that it would be more consistent with the Administrative Procedure Act (APA) if the Commission followed the standards contained in the existing rule.<sup>12</sup> They further suggest that, as an alternative to the automatic grant of a timely, unopposed intervention, the Commission could adopt procedures employed by other agencies that provide for public notice and comment periods on consent decrees.<sup>13</sup> Ergon, while agreeing that intervention in an investigation may be inappropriate, suggests that the Commission modify the rule to allow third parties the opportunity for meaningful

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<sup>11</sup> NRECA/APPa Comments at 2, 5.

<sup>12</sup> Id. at 6-9 (citing 5 U.S.C. 554(c)(1)).

<sup>13</sup> Id. at 6, 11. NRECA/APPa cite Federal Trade Commission and Department of Justice Regulations. Id. at 11.

participation in proceedings that directly affect their interests, and to allow intervention once the Commission finds culpable conduct.<sup>14</sup>

8. We do not agree that the proposed revisions will contravene any statutory right to intervene. The APA requires agencies to give interested parties an opportunity for “the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.”<sup>15</sup>

The concerns underlying the NOPR’s proposal are directly related to these considerations. In an adjudicative proceeding before the Commission, third parties typically provide facts to assist us in developing a case. However, the purpose of investigations and enforcement proceedings is to examine instances of potential wrongdoing and take remedial action where needed. Only in unusual circumstances, as discussed below, would third parties have additional information that is necessary for the Commission’s investigation. As we have stated previously:

As a general proposition, when a Part 1b investigation becomes an enforcement action, we find that it would be inappropriate to allow entities to intervene as parties to the proceeding. We find that allowing parties to intervene during an enforcement action potentially would be contrary to the public interest and would interfere with the Commission considering issues in a timely and judicious manner. This is because in such an enforcement proceeding, the Commission is considering closely the particular actions/inactions, rights, obligations and, potentially violations and penalties of the subject party -- here, ETP. Such a proceeding is different from a rate filing, rulemaking, or other proceeding where the rights of third

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<sup>14</sup> Ergon Comments at 2.

<sup>15</sup> 5 U.S.C. 554(c)(1) (emphasis added).



parties are clearly affected. Allowing third parties to intervene in enforcement proceedings in pursuit of their own objectives could delay or sidetrack a proceeding extending or even creating additional uncertainty for the subject party.<sup>16</sup>

Furthermore, the presence of intervenors could damage the ability of the Commission to conduct investigations, impair our ability to enter into settlements, and be contrary to the public interest. If our ability to enter into settlements is impaired, the result could be litigation of matters that could otherwise be settled, draining Commission enforcement resources. Since litigation could be prolonged, the benefits of settlements could be delayed, perhaps for years. Another result from the strain on the Commission's investigative resources could be fewer investigations, with fewer remedies being imposed and fewer signals being sent to the industry regarding which sorts of behaviors might expose an entity to an enforcement action, along with greater costs and prolonged uncertainty imposed on the subjects of investigation.

9. We consider our views in line with judicial precedent on the subject of an agency's considerable discretion in making enforcement decisions.<sup>17</sup> This discretion extends, among other things, to the decision whether to initiate an enforcement

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<sup>16</sup> ETP, 121 FERC ¶ 61,282, at P 19.

<sup>17</sup> See Heckler v. Chaney, 470 U.S. 821, 831 (1985) (agency decisions regarding conduct of enforcement actions are presumptively unreviewable by the courts).

proceeding<sup>18</sup> as well as the conduct of the proceeding and any settlement efforts.<sup>19</sup>

Inclusion of third parties as a matter of right would necessarily cede a portion of the Commission's discretion to those parties. Furthermore, the proposal made by NRECA/APPA that the Commission rely on the standards currently contained in Rule 214 would limit or eliminate the Commission's ability to take into account parameters such as time and the nature of the proceeding, even though those parameters are specifically set out in the APA. The current rule focuses on the nature of the prospective intervenor's interest, not on the unique considerations that pertain to an enforcement proceeding.<sup>20</sup> We therefore find that NRECA/APPA's proposal is not appropriate to the enforcement context.

10. In our view, the NOPR's proposal addresses Ergon's concerns that third parties be able to participate in proceedings that directly implicate their interests, where those interests can be addressed in a manner that does not unduly hamper the Commission's enforcement efforts. As noted in the NOPR, the Commission has recognized that, on occasion, special circumstances might justify intervention in an enforcement proceeding. One such situation was an intervention in an enforcement proceeding where a state public

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<sup>18</sup> Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456, 459 (D.C. Cir. 2001) (BG&E) ("agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion").

<sup>19</sup> Id. at 458 (decision to settle is committed to FERC's nonreviewable discretion).

<sup>20</sup> Rule 214(b) of the Commission's Rules of Practice and Procedure, 18 CFR 385.214(b).

service commission sought to clarify the impact of a settlement on state interests.<sup>21</sup> The Commission also has noted that intervention might be appropriate to allow parties to participate in the allocation of disgorged profits.<sup>22</sup> The proposed revisions to Rule 214 do not categorically bar interventions in proceedings arising from Part 1b investigations. Situations in which intervention would be appropriate are, however, necessarily limited in keeping with the nature of the enforcement function and the significant discretion accorded the Commission in that area.

## 2. Specific Situations

11. NARUC and the state regulatory bodies argue that state entities should be able to intervene given their unique position as regulators charged with serving the public interest.<sup>23</sup> The state regulators argue that they have a direct interest in enforcement proceedings due to the impact on their ratepayers<sup>24</sup> and that their collaboration will enhance enforcement efforts by avoiding duplicative efforts and inconsistent outcomes.<sup>25</sup> They further maintain that the NOPR's proposal is inconsistent with section 308 of the

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<sup>21</sup> Williams Gas Pipelines Central, Inc., 94 FERC ¶ 61,285 (2001).

<sup>22</sup> ETP, 121 FERC ¶ 61,282 at P 19 & n.28.

<sup>23</sup> NARUC Comments at 5.

<sup>24</sup> Id. at 5-6.

<sup>25</sup> Id. at 6.

Federal Power Act (FPA),<sup>26</sup> which authorizes the Commission to admit interested state and local entities as parties to its proceedings.<sup>27</sup> According to NARUC, the FPA contains “no qualifiers regarding the type of FERC proceedings” to which a state may be granted party status.<sup>28</sup> NARUC proposes to allow states to intervene as a matter of right, and institute a process requiring “specific notification of parties that could have an interest in these determinations, including affected State commissions.”<sup>29</sup> NARUC also states that the Commission should clarify that the resolution of a Part 1b proceeding will not affect the rights of states to pursue their own remedies for the wrongdoing that was the subject of the FERC investigation.<sup>30</sup> The Public Service Commission of Maryland additionally asserts that state commissions must be able to intervene as of right to request rehearing in enforcement proceedings.<sup>31</sup> Finally, the Indiana Utility Regulatory Commission proposes

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<sup>26</sup> 16 U.S.C. 825g(a).

<sup>27</sup> NARUC Comments at 3; see New York Pub. Serv. Comm’n Comments at 4 (Commission should preserve carefully crafted balance by continuing to recognize state interests); Pub. Serv. Comm’n of Maryland Comments at 3 (it would be counterproductive not to include state regulatory authority in enforcement proceedings).

<sup>28</sup> NARUC Comments at 3.

<sup>29</sup> Id. at 8.

<sup>30</sup> Id.

<sup>31</sup> Pub. Serv. Comm’n of Maryland Comments at 4.

that market monitors be allowed to intervene and be informed of the status of ongoing investigations.<sup>32</sup>

12. One other specific circumstance drawing concern was North American Electric Reliability Corp. (NERC) Reliability Standards investigations, particularly so-called “root cause” investigations to determine which entity is at fault for alleged violations of NERC reliability standards.<sup>33</sup> Public Service Electric and Gas Company (PSEG), while agreeing with the Commission generally about intervention in Part 1b investigations, states that, “because in the RTO/ISO construct responsibility for complying with NERC Reliability Standards does not in every case align with responsibilities between PJM and its members,” NERC Reliability Standards investigations are substantially different from other Part 1b investigations and participants deserve more latitude in joining other parties. PSEG asserts that, in the interest of due process, it may be necessary in enforcement proceedings arising from reliability standards investigations to “widen the scope of permitted interventions,”<sup>34</sup> and that an entity accused of a NERC violation must be allowed to argue that another entity is responsible for the violation, and join them as a

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<sup>32</sup> Indiana Utility Regulatory Commission Comments at 3-4.

<sup>33</sup> There may be many situations where several entities could be investigated for violations for facts arising out of the same event and in such a case we would expect each entity would be afforded the full rights allowed to a subject of an enforcement action. Moreover, the conduct of any entity that might mitigate the severity of the violation or penalty as to the subject of an investigation can always be evaluated in an enforcement action regardless of whether such other entity is an intervenor.

<sup>34</sup> PSEG Comments at 3.

party to the proceeding prior to the penalty phase in order to ensure that there is an accurate finding of the “root cause” entity.<sup>35</sup>

13. As we note above, nothing in the proposed revisions to Rule 214 precludes intervention in enforcement proceedings. While clarifying that there is no right to intervene in proceedings arising from Part 1b investigations, the Commission nevertheless retains the discretion to take into account specific circumstances that might favor intervention, although such circumstances would be uncommon and the participation by intervenors may be limited to specific matters.

14. We disagree with PSEG that there is any fundamental difference concerning interventions in investigations carried out by the Regional Entities and the Electric Reliability Organization (ERO) with respect to possible violations of Reliability Standards approved by the Commission and in Part 1b investigations conducted by the Commission staff into the same kinds of violations. The Commission found in Order No. 672 that, in general, there should be no right to intervene in investigations carried out by Regional Entities or the ERO, for the same reasons that interventions are not permitted in our staff’s Part 1b investigations.<sup>36</sup> We note that in its investigation, a Regional Entity

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<sup>35</sup> Id. at 5.

<sup>36</sup> Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 at P 510, order on reh’g, Order No. 672-A, 71 FR 19814 (April 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

or the ERO has authority to inquire into all facts relevant to whether a violation of a Reliability Standard occurred, and to identify all entities, whether listed on the ERO's compliance registry or not, whose actions related to the possible violation of a Reliability Standard.<sup>37</sup>

15. We also stated in Order No. 672 that if a Regional Entity or the ERO concluded that interventions would be appropriate in a particular proceeding it would conduct arising from an investigation into possible violations of Reliability Standards, it must receive advance authorization to do so from the Commission.<sup>38</sup> The Commission, therefore, will be in a position to evaluate on a case-by-case basis whether allowing interventions in a particular Regional Entity or ERO proceeding would be appropriate.<sup>39</sup> We anticipate that the Commission could consider the issues PSEG mentions when making this determination in particular cases.

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<sup>37</sup> See Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators, 122 FERC ¶ 61,247, at P 19 (2008) (NERC and Regional Entities will conduct thorough investigations that will examine the "root cause" of violations, and would extend such investigations to entities not listed on NERC's compliance registry if necessary).

<sup>38</sup> Order No. 672 at P 511.

<sup>39</sup> See, e.g., North American Electric Reliability Council; North American Electric Reliability Corporation, 119 FERC ¶ 61,060, at P 150, order on reh'g, 120 FERC ¶ 61,260 (2007) (recognizing exceptions to the general rule that no interventions should be permitted in Regional Entity and NERC enforcement proceedings, but stating that exceptions to this rule exist, which the Commission would evaluate in advance upon request on a case-by-case basis).

16. We do not agree with the expansive view of state participation in enforcement proceedings taken by NARUC and some of the state regulatory bodies. The proposed revisions are in no way inconsistent with the FPA. Section 308 of the FPA states as follows:

In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.<sup>40</sup>

Although this provision recognizes the role of state authorities, it does not draw a fundamental distinction between them and other interested persons. Furthermore, the FPA leaves the Commission with discretion to prescribe appropriate rules and to admit parties when it is “in the public interest.” By using ‘may’ instead of ‘shall,’ it is clear that section 308 establishes no right of intervention. The section merely authorizes the Commission to admit state commissions into FERC proceedings. Nothing in the provision prevents the Commission from recognizing the differing public interests that may be at stake in different types of proceedings. The provision likewise places no limitations on the considerations that the Commission may take into account in determining the public interest.

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<sup>40</sup> 16 U.S.C. 825g(a). Section 15(a) of the Natural Gas Act, 15 U.S.C. 717n(a), includes a nearly identical provision.



17. In our view, as a general matter the availability of intervention in enforcement proceedings would be inconsistent with the discretion in pursuing enforcement measures that Congress has afforded the Commission. The D.C. Circuit, for instance, has determined that the Natural Gas Act (NGA)<sup>41</sup> places no limitations on the Commission's exercise of its enforcement powers. The court has stated, "At every turn the NGA confirms that FERC's decision how, or whether, to enforce that statute is entirely discretionary."<sup>42</sup> Congress evinced no intention to "cabin FERC's enforcement discretion," because if it had, it would have used "obligatory terms such as 'must,' 'shall,' and 'will,' not the wholly precatory language employed in the act."<sup>43</sup>

18. We also see no reason why the revisions to Rule 214 would have any impact upon the ability of states to pursue remedies for wrongdoing that was the subject of a Part 1b investigation. The revisions address only the availability of intervention in proceedings arising from Part 1b investigations. As the above discussion shows, the Commission's enforcement powers lie within its own discretion and the revisions therefore do not deprive any person or entity of any remedies that it previously possessed.

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<sup>41</sup> 15 U.S.C. 717, *et seq.* There is no meaningful difference between the relevant provisions of the NGA and those of the FPA. Compare 15 U.S.C. 717s(a) with 16 U.S.C. 825m, and 15 U.S.C. 717m with 16 U.S.C. 825f. Analogous provisions of the NGA and FPA are to be read in pari materia. See, e.g., Arkansas-Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).

<sup>42</sup> BG&E, 252 F.3d at 460.

<sup>43</sup> Id. at 461.

19. Although we fully recognize the significant role played in oversight and enforcement by state regulatory commissions, the Commission has the sole authority to enforce its own jurisdictional statutes. As the courts have recognized, enforcement authority is generally considered discretionary with the agencies to which it is granted. In our view, the effective exercise of that discretion requires that enforcement proceedings remain focused on the primary issue, which is the alleged misconduct of the respondent. The revisions to Rule 214 nevertheless will leave the Commission with the ability in appropriate cases to permit the participation of third parties, but that participation will be tailored to appropriate situations based on factors that are unique to the particular enforcement context.

20. For similar reasons, we are not persuaded by the various suggestions that we solicit participation in investigations and enforcement proceedings. Given that we expect intervention to be permitted only in unusual situations, measures designed to invite such participation will in most cases result in delay and distraction from the central issues. Consequently, we find it appropriate to adopt the revisions to Rule 214 contained in the NOPR.

**B. Off-the-Record Communications**

21. The Commission received comments on the NOPR's proposed revisions to its ex parte and separation of functions rules from IA representing the views of several entities. The IA states that it supports the Commission's goal of equal treatment of investigative staff and subjects of an investigation subsequent to a show cause order, and argues that

the Commission should extend the proposal to include the early stages of the investigation.<sup>44</sup> In its view, allowing Commission investigative staff unrestricted access to decisional employees, while allowing the subject of an investigation only written communication, puts the subject of an investigation at a disadvantage in making its case to the Commission. The IA specifically requests that the Commission “allow oral communications with Commissioners and other decision-making employees by both [i]nvestigative [s]taff and the [s]ubject.”<sup>45</sup>

22. The IA also makes specific procedural suggestions. It maintains that the subject of an investigation should be allowed to respond to the investigator’s report and should be provided with “the full set of material facts and legal conclusions appearing in the investigator’s report, at the same time the report or draft is submitted to any decisional employee.”<sup>46</sup> It further requests clarification of Order No. 711.<sup>47</sup> That Order states that a “notice of intent to seek a show cause order ‘shall provide sufficient information and facts’ to enable the Subject to prepare a response.”<sup>48</sup> The IA requests that “sufficient

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<sup>44</sup> IA Comments at 2.

<sup>45</sup> Id. at 8-9.

<sup>46</sup> Id. at 3.

<sup>47</sup> Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause, Order No. 711, 73 FR 29431 (May 21, 2008), FERC Stats. & Regs. ¶ 31,270 (2008).

<sup>48</sup> Id. at 9.

information and facts” be clarified to mean “all of the material facts and legal conclusions being relied on in the investigator’s report.”<sup>49</sup> It further requests that a subject be allowed to respond to an investigator’s report if it is revised after a response is filed.<sup>50</sup>

23. The IAs’ comments are outside the scope of this rulemaking. Although the NOPR made reference to the Revised Policy on Enforcement, which was issued on the same date, it was the latter that announced the policy whereby neither Commissioners nor their personal staffs will receive oral communications, in person or by telephone, about pending investigations from the subjects of those investigations. That policy does not appear in any regulation proposed here. The NOPR proposed only to revise the rules on separation of functions and off-the-record communications to clarify that both outside persons and Commission investigative staff will be able to communicate with decisional staff during the same time periods, specifically while an investigation is pending until the point at which the Commission initiates an enforcement proceeding. The NOPR did not in any way address the procedures for staff to submit, and the subject of an investigation to respond to, a request for a show cause order. Those procedures therefore cannot be addressed properly here. The Commission therefore will adopt the proposed revisions to its rules governing off-the-record communications and separation of functions.

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<sup>49</sup> Id.

<sup>50</sup> Id. at 10.

**III. Information Collection Statement**

24. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>51</sup> This Final Rule does not contain any information collection requirements and compliance with the OMB regulations is thus not required.

**IV. Environmental Analysis**

25. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.<sup>52</sup> Issuance of this Final Rule does 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 Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.<sup>53</sup> This rulemaking is exempt under that provision.

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<sup>51</sup> 5 CFR 1320.12.

<sup>52</sup> Regulations Implementing the National Environmental Policy Act of 1969, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

<sup>53</sup> 18 CFR 380.4(1) and (5).

**V. Regulatory Flexibility Act**

26. The Regulatory Flexibility Act of 1980 (RFA)<sup>54</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This Final Rule concerns solely procedural matters. 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.

**VI. Document Availability**

27. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

28. From the Commission'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.

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<sup>54</sup> 5 U.S.C. 601-12.

29. User assistance is available for eLibrary and the Commission'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).

**VII. Effective Date and Congressional Notification**

30. These regulations are effective [**insert date 30 days after publication in the FEDERAL REGISTER**]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

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 the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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

**PART 385—RULES OF PRACTICE AND PROCEDURE**

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

**Authority:** 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 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 a matter 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.