ORAL ARGUMENT IS SCHEDULED FOR SEPTEMBER 28, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1182

ELECTRIC POWER SUPPLY ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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APRIL 9, 2004

FINAL BRIEF: MAY 14, 2004

Electric Power Supply Association v. FERC
FERC Docket No. RT03-1
D.C. Cir. No. 03-1182

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 7,999 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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May 14, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

A. Parties and Amici

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief. There are no *amici*.

B. Rulings Under Review

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *Communications With Commission-Approved Market Monitors*, "Order Modifying the Application of Rule 2201 to Communications With Commission-Approved Market Monitors," 102 FERC ¶ 61,041 (2003), R. 1, J.A. 5.

2. *Communications With Commission-Approved Market Monitors*, "Order Denying Rehearing," 103 FERC ¶ 61,151 (2003), R. 10, J.A. 9.

C. Related Cases

On September 20, 2002, this Court dismissed, as unripe, an appeal (*Exelon Corp., et al. v. FERC*, D.C. Cir. No. 02-1154) of an earlier exemption to the Commission's *ex parte* regulations.

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Robert H. Solomon
Deputy Solicitor

May 14, 2004

GLOSSARY

APA	Administrative Procedure Act
Commission or FERC	Respondent Federal Energy Regulatory Commission
EPSA	Petitioner Electric Power Supply Association
ex parte regulations	Commissions regulations, found at 18 C.F.R. § 385.2201 (Rule 2201), which govern circumstances in which the Commission can engage in off-the-record communications with persons outside the agency
FPA	Federal Power Act
Initial Order	*Communications With Commission-Approved Market Monitors*, "Order Modifying the Application of Rule 2201 to Communications With Commission-Approved Market Monitors," 102 FERC ¶ 61,041 (2003), R. 1, J.A. 5.
ISO	Independent System Operator
J.A.	joint appendix page
Pet. Br.	Petitioner's opening brief
R.	record item
Rehearing Order	*Communications With Commission-Approved Market Monitors*, "Order Denying Rehearing," 103 FERC ¶ 61,151 (2003), R. 10, J.A. 9.
RTO	Regional Transmission Organization

Simon Aff.	Affidavit of Julie Simon, attached to Petitioner's opening brief

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ON PETITION FOR REVIEW OF ORDERS OF THE
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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the adoption of a particular exemption to the Federal Energy Regulatory Commission's ("Commission's") *ex parte* regulations, when Petitioner has not demonstrated any concrete harm caused by the exemption, which improves the Commission's ability to monitor regulated markets, and when Petitioner can raise any concerns about implementation of the exemption in individual case-specific proceedings.

2. Assuming jurisdiction, whether the Commission adopted by order an exemption from its *ex parte* regulations that is narrowly tailored to provide the Commission with the information it needs to monitor the operation of regulated markets, while maintaining the fairness and openness of its proceedings.

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act ("FPA"), the Administrative Procedure Act ("APA"), and the Commission's implementing regulations are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

Contrary to the argument of Petitioner (*see* Pet. Br. 1-2, 8-13), this Court lacks jurisdiction to consider its appeal. Petitioner fails to allege a concrete injury resulting from the Commission's adoption of an *ex parte* exemption that will serve to promote the type of competitive markets that Petitioner favors. Moreover, Petitioner's appeal is not ripe for immediate review, as judicial review would benefit from the issuance of case-specific orders addressing any actual injury Petitioner might suffer in a concrete setting.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Commission regulations implementing section 557 of the APA, 5 U.S.C. §

557(d), govern the circumstances in which the Commission can engage in off-the-record communications – also referred to as *ex parte* communications – with persons outside the agency. *See* 18 C.F.R. § 385.2201 (2003). The Commission's *ex parte* regulations provide, in relevant part, for a number of exemptions. *See id*. § 385.2201(e). Some exempted communications require subsequent notice and disclosure, while others do not. *See id.* § 385.2201(g). The Commission's *ex parte* regulations also allow for future modification, as appropriate, by either rulemaking or order. *See id*. § 385.2201(a), (j).

This appeal challenges the Commission's adoption of another exemption, by order, to its *ex parte* regulations. *Communications With Commission-Approved Market Monitors*, 102 FERC ¶ 61,041 (2003), R. 1, J.A. 5 (Initial Order), *reh'g denied*, 103 FERC ¶ 61,151 (2003), R. 10, J.A. 9 (Rehearing Order). The challenged orders permit Commission-approved market monitors, which monitor the operation of regional markets to assure they are open and competitive, to provide the Commission and its staff with information on the current state of markets. The availability of this market status information in a timely manner, from an independent, objective source, helps the Commission's monitoring of regulated markets to assure that they remain competitive, and that market practices are just, reasonable, and not unduly discriminatory or preferential. In response to concerns of Petitioner and others that

the receipt of market information might upset the integrity and fairness of contested, on-the-record proceedings, the Commission announced various limitations to protect their due process rights.

II. STATEMENT OF FACTS

A. Development of Independent Market Monitors

In fulfilling its statutory mission under the FPA to ensure that utility rates and practices are just and reasonable, and not unduly discriminatory or preferential, 16 U.S.C. §§ 824d-824e, the Commission is obligated to monitor the competitive nature of, and to address any anti-competitive practices in, regulated markets. *See, e.g., Gulf States Utilities v. FPC*, 411 U.S. 747, 758-59 (1973). In recent years, Commission initiatives in the electricity industry have promoted open access to broader markets, *see, e.g., New York v. FERC*, 535 U.S. 1, 5-14 (2002) (explaining developments), and greater reliance on competitive energy markets to protect consumers. *See, e.g., Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998) (upholding grant of authority to charge market-based rates where markets are competitive and non-discriminatory).

To assist the development of competitive energy markets, the Commission, in Order No. 2000, directed all transmission owning utilities either to participate in a regional transmission organization ("RTO") or explain efforts to participate in a RTO.

1 *See Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (dismissing appeals of Order 2000 and describing evolution of regional markets). An RTO provides for independent, non-discriminatory operation of the transmission facilities under its control. 2 In Order 2000, the Commission directed all RTOs, among other functions and characteristics, to perform a market monitoring function. The Commission explained that "[m]arket monitoring is an important tool to ensuring that markets within the region covered by an RTO do

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1 *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *dismissed sub nom. Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

2 Earlier, in Order No. 888, to further the development of competitive markets, the Commission encouraged, but did not direct, the development of Independent System Operators ("ISOs") of regional, multi-system grids. *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). While independent market monitoring was not explicitly one of the principles for ISO formation identified in Order 888, *see* FERC Stats. & Regs., Regs. Preambles at 31,730-32, market monitoring proposals were included in later approved ISO plans. *See, e.g., Central Hudson Gas & Electric Corp., et al*., 86 FERC ¶ 61,062 at 61,237-39 (1999) (requiring independent monitoring program for New York ISO).

not result in wholesale transactions or operations that are unduly discriminatory or preferential or provide opportunity for the exercise of market power." Order 2000, FERC Stats. & Regs., Regs. Preambles at 31,155. Market monitoring also "will provide information regarding opportunities for efficiency improvements." *Id*. To carry out these responsibilities, market monitors must report to the Commission objective information about RTO markets, evaluate the behavior of market participants, and recommend how markets can operate more competitively and efficiently. *Id*. at 31,155-56.

While the Commission insisted that the RTO provide a market monitoring function and fulfill basic reporting obligations, it left the details of how that responsibility would be carried out to the individual RTO. RTOS operating in different regions need not assume exactly the same form; they can perform the market monitoring function themselves or leave this function for an independent outside monitor. *Id*. In response to the concerns of commenters that the Commission was affording market monitors too much flexibility and discretion, however, the Commission clarified that it was not delegating any of its enforcement authority under the FPA to market monitors: "[B]ecause market monitoring plans will be required to be filed with and approved by the Commission as part of an RTO proposal, we will retain the ability to determine what, how and by whom activities will be performed in

the first instance." *Id*. at 31,157. *See also* Order 2000-A, FERC Stats. & Regs., Regs. Preambles at 31,380 (explaining that RTOs, while "help[ing] us understand and identify market problems, . . . will be permitted to take actions only within specified parameters that are contained in a Commission-approved tariff").

To date, the Commission has approved market monitors for five regions where a RTO or an ISO operates the regional transmission grid: New York, New England, portions of the Mid-Atlantic states, portions of the Midwest, and California. *See* Initial Order, 102 FERC (R. 1) at P1, n.1, J.A. 5 (citing orders). *See also, e.g.*, *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 966 (D.C. Cir. 2003) (explaining monitoring of New York markets for exercise of market power). [3]

B. The Commission's *Ex Parte* Regulations

The Commission's regulations, found at 18 C.F.R. § 385.2201 ("Rule 2201"), implement its responsibilities under the APA, 5 U.S.C. § 557(d)(1), to limit communications with "interested person[s] outside the agency" that are "relevant to the merits of the proceeding." The most recent version of the Commission's *ex parte* regulations was adopted in 1999, to "clarify the ground rules" for communications

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3 Indeed, in light of the value of independent, objective market monitoring in assisting the Commission to assure competitive, non-discriminatory markets, the Commission has on occasion insisted on the creation of an independent market monitor even in the absence of an approved RTO or ISO. *See Wabash Valley Power Ass'n v. FERC*, 268 F.3d 1105, 1111 (D.C. Cir. 2001) (requiring

between the Commission's decisional employees and persons outside the agency, and with the intent of balancing the need for "fully informed decision making while at the same time ensuring the continued integrity of the Commission's decisionmaking process." Order No. 607, FERC Stats. & Regs., Regs. Preambles ¶ 31,079 at 30,876 (1999), *order on reh'g*, Order No. 607-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,112 (2000).

With certain exceptions, the Commission's *ex parte* regulations prohibit "persons outside the Commission" from exchanging "off-the-record communications" with FERC "decisional employees" in any "contested on-the-record proceeding." 18 C.F.R. § 385.2201(b). The definitions for these phrases enumerate various categories of persons, participating in various types of proceedings, that are constrained in their ability to communicate information. In relevant part, a prohibited "off-the-record communication" is one that is "relevant to the merits" of a contested proceeding. The definitions do not, however, prohibit communications that are incapable of affecting or influencing the outcome of a proceeding, such as procedural and compliance inquiries. *Id*. § 385.2201(c)(5). Similarly, a communication is not prohibited when it is merely 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

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independent market monitoring as a condition to merger approval).

any particular proceeding involving a party or parties and does not address the specific merits of the proceeding." *Id*. § 385.2201(c)(5)(ii).

In addition, there are eight exemptions from the general prohibition against off-the-record communications. *Id*. § 385.2201(e). Five of the exemptions require subsequent public disclosure of the communication and placement of the transcript or a summary in the decisional record of the relevant proceeding. [4] Three exemptions (for communications (1) permitted by law and authorized by the Commission; (2) contemplated in a written, approved agreement among the parties; and (3) related to national security issues) do not require subsequent disclosure or an opportunity for responses. *Id*. § 385.2201(e)(1)(i), (iii), (viii). [5] Off-the-record communications within the exemptions are only permitted, not required; the Commission explained in Order 607 that "the Commission and Commission staff retain the discretion not to engage in permitted communications if, in their judgment, such communications would create the appearance of an impropriety or otherwise seem inconsistent with the best interests of the Commission." FERC Stats. & Regs. at 30,884.

Finally, the *ex parte* regulations explicitly allow for modification "by rule or

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4 In contrast, prohibited off-the-record communications, while also subject to public disclosure, and any responses are not made part of the decisional record. *Id*. § 385.2201(f).

5 EPSA states erroneously (at 4-5) that notice and disclosure requirements

order . . . to the extent permitted by law." *Id*. § 385.2201(a), (j). Since the regulations have been in effect, the Commission has added two additional exemptions "by order," rather than by rule. The first added exemption permits state and federal officials to meet to discuss RTO formation efforts, without the general public's participation, subject to the condition that transcripts of those meetings be placed in the record of relevant RTO proceedings. *See Order Announcing the Establishment of State-Federal Regional Panels to Address RTO Issues*, 97 FERC ¶ 61,182 (2001), *reh'g denied*, 98 FERC ¶ 61,309 (2002), *appeal dismissed as unripe*, *Exelon Corp., et al. v. FERC*, No. 02-1154 (D.C. Cir. Sept. 20, 2002).

C. The Challenged Orders, Providing Another Exemption

The second of the added exemptions is the subject of the instant appeal. In an order issued January 16, 2003, the Commission exempted from the *ex parte* rules communications between Commission-approved market monitors and the Commission or its staff. *Communications With Commission-Approved Market Monitors*, "Order Modifying the Application of Rule 2201 to Communications With Commission-Approved Market Monitors," 102 FERC ¶ 61,041 (2003), R. 1 (Initial Order), J.A. 5.

In support of the new exemption, the Commission explained that "its

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are applicable to all exempt *ex parte* communications.

surveillance of the operation of the energy markets requires open communications" with market monitors for RTOs and ISOs. 102 FERC (R. 1) at P1, J.A. 5. Because Commission-approved market monitors "stand apart from the interests of any market participant and even the RTO or ISO," and because they are charged with collecting data and reporting any problems and recommendations back to the Commission, they "serve an important practical and unique function as the Commission's 'eyes and ears' in the marketplace." 102 FERC (R. 1) at P9-10, J.A. 7-8. Limiting the ability of market monitors to report back to the Commission important market information in a timely manner would frustrate the Commission's ability to "ensur[e] the proper and efficient operation of the wholesale energy markets." 102 FERC (R. 1) at P9, J.A. 7. Accordingly, because the Commission views market monitors, "in practice, as extensions of its own staff," exempt communications with Commission-approved market monitors are not subject to disclosure conditions. 102 FERC (R. 1) at P12, J.A. 8. [6]

While improving its ability to obtain vital information about markets it regulates, the Commission also took steps to maintain "the integrity of the decisionmaking process." 102 FERC (R. 1) at P11, J.A. 8. Specifically, the

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6 The Commission anticipated that external market monitors would communicate primarily with the Commission's internal market monitors in its Office of Market Oversight and Investigations. 102 FERC (R. 1) at P9, n.23, J.A.

Commission limited the exemption by not applying it to communications with market monitors that are parties or appear on behalf of parties in contested on-the-record proceedings. *Id*. The Commission also clarified that market monitors cannot employ the exemption as a conduit for presenting comments or arguments from or to others outside the agency. 102 FERC (R. 1) at P13, J.A. 8.

Petitioner Electric Power Supply Association ("EPSA") and others sought rehearing of the Commission's market monitor exemption. Those rehearings were denied in an order issued May 8, 2003. *Communications With Commission-Approved Market Monitors*, "Order Denying Rehearing," 103 FERC ¶ 61,151 (2003), R. 10 (Rehearing Order), J.A. 9.

In denying rehearing, the Commission rejected the argument that off-the-record communications with market monitors would undermine the fairness of contested proceedings or the due process rights of participants to those proceedings. As market monitors serve as "data collectors and 'watchdogs' over the energy market," they will simply provide the Commission with "background information on the current state of the markets." 103 FERC (R. 10) at P12, J.A. 12. If EPSA or others are concerned about the independence or motivations of any particular market monitor, those concerns should be articulated in specific proceedings involving that monitor. 103

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FERC (R. 10) at P10, J.A. 11. Moreover, the Commission cannot rely on information reported in an exempted communication from a market monitor as part of its decision unless the substance of that communication is reflected in the record. 103 FERC (R. 10) at P19, J.A. 13.

In addition, the Commission rejected the argument that the APA disables the Commission from modifying its *ex parte* rules by order. The Commission responded that it adopted the market monitor exemption using exactly the process reserved in Order No. 607 – explicitly allowing modifications by rulemaking or order. 103 FERC (R. 10) at P4, J.A. 10. Further, the Commission explained that its *ex parte* rules and exemptions constitute rules of internal agency practice and procedure that, under the APA, *see* 5 U.S.C. § 553, do not require notice and comment rulemaking. 103 FERC (R. 10) at P5-6, J.A. 10.

EPSA subsequently filed a petition for review. The Commission responded with a motion to dismiss the petition for lack of aggrievement or ripeness. J.A. 42. By Order of this Court dated November 25, 2003, that motion was referred to the merits panel and the parties were directed to address the issue of jurisdiction in their briefs.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction, in the absence of aggrievement or ripeness, to

review a challenge to the Commission's adoption of another exemption to its *ex parte* regulations. The challenged exemption, improving the Commission's ability to monitor the competitiveness of the markets it regulates, does not have an immediate, substantive impact on EPSA's members and, in any event, serves to promote the type of open, competitive markets they favor. Any concerns they might have as to how the exemption will work in practice should be articulated in other proceedings where a factual record may be developed in a concrete setting. There is no basis upon which to distinguish this case from an earlier case in which the Court dismissed an appeal of the Commission's adoption of another *ex parte* exemption.

Assuming jurisdiction, the Commission reasonably balanced the need for enhanced monitoring of markets with the need to respect the fairness and openness of its proceedings. EPSA disregards entirely the Commission's stated need for timely reporting of market information. Moreover, EPSA overstates the potential for procedural harm, as the Commission's ability to communicate with market monitors as to market conditions is limited in a number of important respects. Nor does the exemption allow the Commission to rely on secret evidence, as the basis for any Commission decision must be reflected in the decisional record.

Finally, the Commission was justified in adopting the market monitoring exemption by order rather than by rulemaking. The Commission followed the process

established in its regulations for modifying its *ex parte* requirements and the same process used in adopting an earlier *ex parte* exemption. Moreover, notice and comment rulemaking is not required where, as here, the Commission adopts a policy of agency practice and procedure that imposes no immediate substantive obligation.

ARGUMENT

I. PETITIONER FAILS TO ALLEGE AN INJURY THAT ESTABLISHES STANDING OR IS RIPE FOR IMMEDIATE REVIEW

A. EPSA Is Not Aggrieved by the Market Monitoring Exemption

Section 313(b) of the FPA, 16 U.S.C. 825*l*(b), allows only "aggrieved" parties to seek judicial review of Commission orders. *E.g., Public Util. Dist. No. 1*, 272 F.3d at 613. A party is aggrieved only if it can establish both the constitutional and prudential requirements for standing. *Id*. "Common to . . . these thresholds is the requirement that petitioners establish, at a minimum, 'injury in fact' to a protected interest." *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 45 (D.C. Cir. 2002), quoting *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995). **7** "Injury in fact" requires harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

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7 *Interstate Natural* was decided under the Natural Gas Act, but the judicial review provisions of the FPA are virtually identical, and precedent under the two provisions is routinely treated as interchangeable. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002).

559-61(1992). Moreover, there must be "a causal connection between the injury and the conduct complained of the injury must be fairly traceable to the challenged action of the defendant." *Id*. at 560-61; *see also, e.g.*, *North Carolina Util. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981) (to show aggrievement, a petitioner must allege facts sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature).

Here, Petitioner cannot demonstrate concrete and particularized harm to show it is currently aggrieved by the challenged orders. The orders improve the Commission's ability to communicate with market monitors; they do not mandate specific conduct. *See* 102 FERC (R. 1) at P13 (new exemption "allows, but does not require, market monitors and the Commission and its staff to have less fettered communications than otherwise permitted under Rule 2201"), J.A. 8. The market monitor exemption was not designed to have a substantive or immediate effect on the rights and interests of parties, such as EPSA's members, that may appear before the Commission. Rather, the market monitor exemption represents a rule of agency "practice and procedure" that "may affect parties' ability to contest the presentation of viewpoints to the agency," but "does not in and of itself alter parties' substantive rights." 103 FERC (R. 10) at P6, J.A. 10; *see also id*. at P12 (noting that exempt "communications will not negatively impact the fairness of the Commission's

decision-making as they will simply provide background information on the current state of the markets"), J.A. 12.

EPSA responds that the market monitoring exemption creates two types of injury. First, it claims that its "economic" and "financial" interests are threatened, Pet. Br. 2, 9, but makes no effort to identify those interests or explain how they are threatened by the exemption. Indeed, as EPSA states that its mission is to promote "a favorable market environment for the competitive electric industry" and the "development and implementation of a competitive market for electricity," Simon Aff. at 2 (quoting EPSA bylaws), the challenged exemption, intended to enhance the competitiveness and efficiency of regulated markets, is consistent with EPSA's pro-competitive interests. EPSA members, which own generating facilities and market electricity in markets administered by RTOs and ISOs, *id*. at 5, are beneficiaries of FERC efforts, including the new exemption, designed to promote restructured, increasingly competitive regional markets. [8]

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8 EPSA touted the competitive benefits of information gathering and dissemination in its comments in the Order No. 2000 rulemaking proceeding. Specifically, EPSA "suggest[ed] that the information and market data, if collected by an independent and unbiased RTO, could be relied upon by market participants in formulating business strategies, and by regulators for purposes of reviewing and approving modifications to regulated aspects of RTO structures and operations." FERC Stats. & Regs., Regs. Preambles at 31,149. By adopting the marketing monitoring exemption, the Commission has further enhanced EPSA's ability to develop business strategies in markets that the Commission, using the exempt

Second, EPSA claims, Pet. Br. 2, 9, that its procedural due process rights are threatened by the monitoring exemption. It recognizes, however, that to establish standing any deprivation of a procedural right must impair a separate concrete interest. *Id*. at 10, citing *Moreau v. FERC*, 982 F.2d 556, 566-67 (D.C. Cir. 1993). EPSA identifies the separate concrete interest as the financial interests of its members, *id*., but, as explained above, those interests are enhanced, not harmed, by operation of the market monitoring exemption. Moreover, EPSA has not claimed similar harm resulting from earlier Commission exemptions from its *ex parte* rules, even though some of them, like the monitoring exemption, do not provide for subsequent notice and disclosure. No explanation for these disparate positions is offered.

Because it has failed to demonstrate the requisite injury, either economic or procedural, EPSA lacks standing to pursue its objections to the market monitoring exemption. *See Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 284-85 (D.C. Cir. 1993) (dismissing, for lack of standing, objections to alleged *ex parte* communications during licensing proceeding when petitioners did not have viable, competing license applications pending before the agency).

B. Orders Adopting the Market Monitoring Exemption Are Not Ripe for Immediate Review

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information, can keep competitive and efficient.

Even assuming aggrievement, a dispute must be ripe for judicial review by being presented in a concrete setting with actual consequences. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) (review denied where impact not felt "immediately" in "day-to-day affairs" and "no irremediable adverse consequences" from delay); *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995) (same). Ripeness principles require that a court postpone review of administrative decisions where (1) delay would permit better review of the issues while (2) imposing no significant hardship to the parties. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *see also, e.g., National Park Hospitality Ass'n v. Dept. of the Interior*, 123 S. Ct. 2026, 2030-32 (2003) (declining to review regulation which has no immediate or direct impact on parties, and where judicial review of legal issue would benefit from "further factual development").

Here, there is no benefit to proceeding immediately to abstract review of Commission orders adopting the market monitoring exemption. As the Commission explained, objections concerning the independence or motivations of Commission-approved market monitors should be raised in the context of "a specific proceeding involving that market monitor," 103 FERC (R. 10) at P10, J.A. 11, rather than presented as vague speculation as to what might happen. In this regard, it should be noted that market monitors, while independent and objective, are not free to take

whatever remedial action they deem appropriate. Rather, as the Commission explained in Order No. 2000, it must approve in advance "what, how, and by whom" market monitoring activities will be carried out. *See supra* pages 6-7. EPSA and others have the ability to participate in those proceedings establishing the specific parameters of monitoring behavior.

Likewise, if the Commission were to rely on a particular communication from a market monitor in a particular proceeding, "the Commission would be required to ensure the information was indeed part of the decisional record," and would "still have to base its decisions on substantial evidence in the record." 103 FERC (R. 10) at P19, J.A. 13. In other words, the contents of an exempted communication must be made public and open to challenge before it can be given decisional weight. Thus, any claim that a party has been deprived of substantive or due process rights through exempt communications with a market monitor can be reviewed in the context of a specific record in a specific proceeding resulting in a particular action. *See*, *e.g.*, *Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 472-74 (D.C. Cir. 2002) (dismissing petition on standing and ripeness grounds, where "no one can say now" what the "precise effect" of Commission order will be, and where "[t]he injury has not yet materialized nor has the factual record related to that injury been established").

For these reasons, the Court dismissed as unripe an appeal of the Commission's earlier *ex parte* exemption by order, *see supra* page 10, designed to allow joint State-Federal RTO regional panels to meet without public participation. *See Exelon Corp., et al. v. FERC*, No. 02-1154 (Sept. 20, 2002) (dismissing appeal because "[t]he issues presented are not yet ripe for review" and because Petitioners could challenge the exemption "in an appropriate circumstance in the future"), citing *Mississippi Valley*, 68 F.3d at 509.

EPSA seeks (at 13) to distinguish the dismissal of the earlier exemption appeal by the fact that the regional panel exemption provides for subsequent notice and disclosure, while the monitoring exemption only does when the Commission seeks to rely on the exempt communication. This distinction does not matter, however, for ripeness purposes, as in either event the consequence of any communication is not known until the Commission makes a specific determination based on a specific record, which triggers opportunity for agency rehearing and judicial review. [9] Moreover, as explained above, the market monitoring exemption offers additional

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9 An exemption subject to notice and disclosure does not create a separate proceeding to examine and adjudicate the communication and any responses. Rather, as explained in the Commission's regulations, *see* 18 C.F.R. § 385.2201(g), and the Commission's orders, *see* 102 FERC (R. 1) at P8, n.21, J.A. 7, the exempt communication (or a summary), and any responses, are placed in the decisional file of the on-the-record proceeding.

opportunities to participate and to minimize the possible adverse impact of any exempt communication, in proceedings to establish the ground rules for market monitoring and to determine the independence of the RTO and its market monitor, that are not available to parties challenging the regional panel exemption. 10

II. ASSUMING JURISDICTION, THE COMMISSION REASONABLY BALANCED THE NEED FOR ENHANCED MONITORING OF MARKETS WITH THE NEED TO MAINTAIN THE FAIRNESS AND OPENNESS OF ITS PROCEEDINGS

A. Standard of Review

Judicial review of Commission decisions falls under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). The relevant inquiry for the reviewing court under that standard is whether the agency has "examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The findings of the Commission as to facts, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see, e.g., Consolidated*

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10 EPSA offers another distinction, Pet. Br. 13, that there was a pending rehearing in the *Exelon* proceeding in No. 02-1154. In fact, there was no pending rehearing of the orders adopting the regional panel exemption, which is why the Commission did not argue for, and why the Court did not base, dismissal on finality grounds. Rather, rehearing was pending in a separate proceeding in which the Petitioners had submitted an application to form a RTO.

Hydro, Inc. v. FERC, 968 F.2d 1258, 1261 (D.C. Cir. 1992).

Moreover, while the Commission may not be entitled to special deference in its construction of the APA, it is entitled to deference in construing its regulations implementing the APA and in thus determining the inadequacies of, and the need for modifications to, those regulations to enhance its regulation under the FPA. *See, e.g., Central Vermont Public Service Corp. v. FERC,* 214 F.3d 1366, 1369 (D.C. Cir. 2000).

As explained below, the Commission was amply justified in concluding that its *ex parte* regulations were inadequate to the extent they did not allow the timely exchange of information with market monitors necessary to maintain and to enhance the competitiveness of regulated markets, and in adopting another exemption that was narrowly tailored to obtain needed information while respecting the procedural rights of parties to Commission proceedings.

B. The Commission Reasonably Found a Need to Enhance Its Monitoring of Competitive Markets

The Commission's *ex parte* rules and exemptions reflect a balance between the need for information and the need for procedural fairness. The *ex parte* regulations commence with the statement that their purpose is to "permit[] fully informed decisionmaking by the Commission while ensuring the integrity and fairness of the Commission's decisionmaking process." 18 C.F.R. § 385.2201(a). *See also* Order

607-A, FERC Stats. & Regs. at 31,924 (noting purpose of revisions to *ex parte* regulations is to "enhance [the Commission's] access to information from federal and state agencies and other interested persons to the extent consistent with law and fair process"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (task is "[r]econciliation of these considerations in a manner that will reduce procedural uncertainty").

As for the first half of this balance, the challenged orders adopting the market monitoring exemption explain the need for enhancing the Commission's surveillance of energy markets. *See* Initial Order, 102 FERC (R. 1) at PP2-7, J.A. 5-7 (explaining reasons for requiring market surveillance by independent RTO monitors in Order No. 2000 and in subsequent initiatives). External market monitors assist the Commission in "ensuring the proper and efficient operation of the wholesale energy markets" by "being in the market[s] and collecting and analyzing relevant data and reporting data analyses, conclusions, and recommendations back to the Commission." *Id*. at P9, J.A. 7; *see also* Rehearing Order, 103 FERC (R. 10) at P10 (explaining that, "on balance communications now between the Commission and the specified market monitors, within the noted limitations, are imperative to assist the Commission in its oversight of the energy markets"), J.A. 11. [11]

11 Information collected from market monitors and through other means has

Given the immediacy in which many market transactions take place (e.g., in day-ahead and real-time markets), the Commission's *ex parte* rules, as codified in 18 C.F.R. § 385.2201, could act to undermine "[t]imely receipt of those reports" that are "critical to the Commission's ability to respond." 102 FERC (R. 1) at P9, J.A. 7. This is because "market monitors may encounter situations or matters that are also at issue in ongoing contested on-the-record proceedings at the Commission." *Id*. Strict adherence to the *ex parte* rules, without an exemption for market monitoring, would be "counterproductive" when market monitors need to bring market information to the Commission's attention, and would "imped[e] its goal to receive as much timely information as possible from market monitors on the operation of energy markets." *Id*. *See also* Rehearing Order, 103 FERC (R. 10) at P8 ("off-the-record communications with market monitors are needed to enable the Commission to adequately oversee energy markets"), J.A. 11; *id*. at P9 (communications from market monitors "play an important role in assisting the Commission in monitoring the everyday activities in certain power markets"), J.A. 11.

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assisted the Commission in detecting market power abuses and taking appropriate investigative and remedial actions, including actions against certain of EPSA's members. *See, e.g., Reliant Energy Services, Inc., et al.*, 105 FERC ¶ 61,008 (2003), *reh'g dismissed*, 105 FERC ¶ 61,253 (2003) (approving settlement and terminating investigation), *appeals pending*, 9th Cir. Nos. 03-72874, *et al*.; *American Electric Power Service Corp., et al*., 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (initiating investigative proceedings against

EPSA overlooks the first half – i.e., need for timely information -- of the Commission's balance. It argues (at 14) that the Commission's "motives" are irrelevant, and that, indeed, the Commission "wrongly" considered the pro-competitive benefits of improving its ability to communicate with market monitors.

EPSA's limited perspective is inconsistent with APA cases considering the ability of agencies to engage in informed decisionmaking. As this Court recognized in *Home Box Office*, "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." 567 F.2d at 57. Citing to *Home Box Office*, this Court explained in *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101 (D.C. Cir. 1992), that "[a]gency officials may meet with members of the industry . . . to maintain the agency's knowledge of the industry it regulates." *Id*. at 1113 (holding that, under the circumstances, meetings between Commission staff and pipeline officials, while the Commission was considering a pipeline certificate application, did not undermine the integrity of the decisionmaking process). [12]

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numerous energy suppliers), *appeals pending*, D.C. Cir. Nos. 04-1034, *et al*.

12 *See also Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001) (noting that "[g]enerally, *ex parte* contact is not shunned in the administrative agency arena" and that, "[i]n fact, agency action often demands it"); *Ass'n of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1169 (D.C. Cir. 1979)

EPSA questions (at 10-11) whether another *ex parte* exemption truly is necessary to satisfy the Commission's articulated need for "background information on the current state of energy markets." Rehearing Order, 103 FERC (R. 10) at P12, J.A. 12. [13] EPSA asserts that "background" conversations are not *ex parte* communications requiring a new exemption because, it claims, they "do not go to the merits of contested proceedings." Pet. Br. at 10-11 (questioning the Commission's "intent"). [14] This argument fails to understand, however, that some background

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(noting that "[i]f an agency official is to be effective he must engage in debate and discussion about the policy matters before him"); Rehearing Order, 103 FERC (R. 10) at P8, n.27 (quoting APA legislative history that "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"), J.A. 11.

13 The express limitation to "background information" comes directly from the challenged orders, Rehearing Order, 103 FERC (R. 10) at P12, J.A. 12, not simply, as EPSA argues (at 10-11), from the representations of agency counsel. Thus, there is no merit to EPSA's argument (at 11) that the "background information" limitation is "contrary to the plain reading of the Commission's new rule, which is not so limited."

14 The Commission's *ex parte* regulations do not, as EPSA presumes (at 11 n.13), state categorically that a general background or broad policy discussion involving an industry or substantial segment of an industry is not relevant to the merits. Rather, the regulations offer a less certain standard; such a "general background or broad policy discussion" is not relevant to the merits only if it: (1) "occurs outside the context of any particular proceeding involving a party or parties;" and (2) "does not address the specific merits of the proceedings." 18 C.F.R. § 385.2201(c)(5)(ii). Because the new market monitoring exemption provides greater certainty, market monitors and Commission market monitoring staff no longer need to speculate whether market status information falls into

discussions as to market conditions may relate to the merits of particular matters. For example, such discussions may be relevant to the Commission's consideration of whether market conditions may allow particular suppliers possessing market-based sales authority (or attempting to obtain such authority) to exercise market power. Similarly, they may be relevant to the Commission's consideration of whether markets are sufficiently competitive to allow proposed mergers to proceed. By acting to free market monitors from the uncertain task of understanding whether the market conditions they wish to communicate to the Commission relate, or do not relate, to the merits of particular proceedings, the Commission has increased the flow and timeliness of market information – precisely its motivation in adopting the market monitoring exemption.

C. The Commission Reasonably Tailored the Market Monitoring Exemption to Ensure the Fairness of Its Proceedings

As for the second half of the balance, the Commission acted to ensure that the new exemption would not undermine the fairness of its proceedings or operate to frustrate effective judicial review.

1. Exemption Does Not Jeopardize Fairness of Proceedings

In adopting the market monitoring exemption, the Commission was "sensitive to situations where these off-the-record communications could undermine the integrity

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permitted or prohibited categories.

of the decision making process." Rehearing Order, 103 FERC (R. 10) at P20, J.A. 13. The exemption does not, as EPSA asserts (at 20, 33), allow for "unfettered" or "unchecked" communications with market monitors. The Commission recognized that "a contested on-the-record proceeding could be prejudiced by a market monitor's talking freely to the Commission and its staff." Initial Order, 102 FERC (R. 1) at P11, J.A. 8. To eliminate, or at least minimize, the possibility of such prejudice, the Commission adopted a number of limitations on market monitor communications:

> 1. The "sole duty" of market monitors "is to report back to the Commission concerning what is going on in the markets." Rehearing Order, 103 FERC (R. 10) at P12, J.A. 12. The Commission explained that "[t]hese communications will not negatively impact the fairness of the Commission's decision-making process as they will simply provide background information on the current state of the markets." *Id*. In other words, the exemption does not empower the monitors to talk freely with the Commission on any subject, or use their information to impose unilaterally corrective or remedial action not approved in advance by the Commission.
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> 2. Market monitors must "stand apart from the interests of any market participant . . . and must objectively monitor those participants. . . ." Initial Order, 102 FERC (R. 1) at P10, J.A. 8. They must function not as adversarial parties, but as "advisors to the Commission," serving in the field as the "functional equivalent" of the Commission's own market monitoring employees. Rehearing Order, 103 FERC (R. 10) at PP 8-9, J.A. 11.
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> 3. The exemption does not apply when the market monitor is a party or appears on behalf of a party in a proceeding. Without such a limitation, one party could have "an advantage over another party," thereby "undermin[ing] the integrity of the decisionmaking process." Initial Order, 102 FERC (R. 1) at P11, J.A. 8.

> 4. Market monitors cannot employ the exemption as a "conduit for prohibited off-the-record communications from others outside the agency." Initial Order, 102 FERC (R. 1) at P13, J.A. 8. In other words, "market monitors may not convey to the Commission's decisional staff comments and arguments of others outside the agency regarding the issues in contested on-the-record proceedings, and likewise may not divulge to others outside the agency the discussions about such issues they have had with Commission staff." *Id*.

EPSA offers a number of criticisms, none of which is persuasive. First, it contends that these limitations are inadequate to guarantee the fairness of proceedings in which its members participate. It claims (at 13, 19-20, 23) that the Commission still will be influenced by the perspectives and special insights it receives from market monitors.

But there is nothing inherently improper in such influences. *See Louisiana Ass'n*, 958 F.2d at 1112 (finding no procedural impropriety in "at best subtle and indirect attempts to influence Commission officials"). Nor should monitors be presumed to be seeking to influence a particular outcome or action, given their role as an objective, unbiased source of market information. *See* Rehearing Order, 103 FERC (R. 10) at PP8-9 (finding that market monitors, fulfilling a defined reporting role and acting in an advisory, rather than adversarial, role, are not "interested persons" within the meaning of the APA, 5 U.S.C. § 557(d)), J.A. 11. [15] To the extent that EPSA is

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15 While EPSA (Pet. Br. 17-18) cites cases from other circuits for the proposition that the scope of "interested persons" under the APA should be

concerned that a particular market monitor might have a particular interest or bias, or that a market monitor might be inclined to act unilaterally on that interest, such concerns properly should be addressed (and factual support developed) in specific proceedings establishing the independence of RTOs and their market monitors and the ground rules for market monitoring. *See* Rehearing Order, 103 FERC (R. 10) at P10 (independence issues addressed elsewhere), J.A. 11.

Second, EPSA complains that, despite the limitations, it will remain "uncertain" as to precisely what market information is being transmitted to Commission decision makers. Pet. Br. 10-12. The problem with this complaint is that it disregards the balance, as explained above, the Commission has adopted. Absolute certainty is not required; rather, as explained in *Home Box Office*, the goal is to "reduce" procedural unfairness while providing for informed decisionmaking. 567 F.2d at 57. *See also Louisiana Ass'n*, 958 F.2d at 1113 (relevant inquiry is whether "serious" questions of fairness have been presented).

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extremely wide, and encompass "even independent and impartial" persons, this Court has recognized some latitude in the balance between information and process. *See Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563-64 (D.C. Cir. 1982) (noting that "Congress did not intend to erect meaningless procedural barriers to effective agency action"); *see also City of Ukiah, California v. FERC*, 729 F.2d 793, 800 (D.C. Cir. 1984) (finding that *ex parte* restrictions did not apply to communications with the Army Corps of Engineers, which had "no official interest" in whether hydroelectric study permit should be issued). While maintaining that market monitors "ha[ve] their own institutional imperatives,"

In any event, the Commission, by adopting the above limitations on exempted disclosures, has acted to clarify the instances in which market information can be transmitted and has thus acted to lessen uncertainty. EPSA and others now know the precise, limited categories of market information the Commission may receive and consider in contested, on-the-record proceedings. All other types of market information received by the Commission will be treated as prohibited communications that are subject to disclosure and publicly noticed for comment. *See* Initial Order, 102 FERC (R. 1) at P8, n.21 (explaining disclosure and notice procedures for exempted and prohibited communications under 18 C.F.R. § 385.2201(e)-(h)), J.A. 7. [16] Moreover, by enhancing its ability to monitor markets, the Commission has provided market participants, including EPSA's members, with greater certainty that their behavior will be watched and that discriminatory or anti-competitive behavior will be identified and addressed in a timely manner.

EPSA nevertheless does not ascribe "ill motives" to them. Pet. Br. 19.

16 The three scenarios presented in the Simon Affidavit (at 7-10) overstate the possibility of procedural unfairness. The market monitors in all three cases would not have carte blanche to discuss whatever they want – they would be limited only to background information on the state of the markets (assuming they have not participated as parties or appeared on behalf of parties). Moreover, market monitors in the second and third cases, involving California markets, would not satisfy the independence requirement necessary to activate the exemption, as the Commission has found that the California ISO, which employs the monitors, is not independent of other market participants. *See Mirant Delta v. California Independent System Operator*, 100 FERC ¶ 61,059 (2002), *order on reh'g*, 100

Third, EPSA complains that exempt market monitor communications are not themselves subject to disclosure and notice. Pet. Br. 13, 22-24. EPSA suggests that all off-the-record communications must be disclosed; yet, it has not challenged any of the earlier exemptions that also do not require disclosure. *See supra* page 9 (describing exemptions that require disclosure and those that do not). Nor does it challenge the validity of the reason – the imperative for timely information -- underlying the Commission's decision to include market monitor communications in the category of permissible off-the-record communications that do not require disclosure. As the Commission explained, uniformly requiring disclosure, or deciding whether to allow for disclosure on a case-by-case basis, would "frustrate" the timely gathering, reporting, and receipt of important market information. Rehearing Order, 103 FERC (R. 10) at PP 15-17, J.A. 12.

The Commission is not obligated to adopt disclosure requirements for all exemptions simply because it believes that such requirements are appropriate for some exemptions. The Commission has declined to impose additional procedures where, as in the case of the market monitoring exemption, it has concluded that disclosure would undermine the value and timeliness of the information it has obtained. *See id*. at P17, J.A. 12-13. This type of judgment is well within the Commission's discretion.

FERC ¶ 61,271 (2002), *appeal pending*, D.C. Cir. Nos. 02-1287, *et al*.

See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) (in the absence of a statutory directive, "agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them"); *Texas Office of Public Utility Counsel*, 265 F.3d at 326 (noting that "while interested parties should be able to participate meaningfully . . . the public need not have an opportunity to comment on every bit of information influencing an agency's decision") (internal quotes and citation omitted).

2. Exemption Does Not Frustrate Judicial Review

EPSA also argues that it and other parties will be "placed in an inherently unfair position" by the market monitoring exemption, because the Commission "may reach decisions based on *ex parte* communications on which litigants have no knowledge." Pet. Br. 7-8. In EPSA's opinion, reviewing courts will lack an adequate record on which to assess the reasonableness of the Commission's actions, *id*. at 12-13, and will simply have to accept "the Commission's word." *Id*. at 25.

EPSA's concern is unfounded. The Commission may not rely upon communications that are not reflected in the record. Rather, as explained in the challenged orders, the Commission must "base its decisions on substantial evidence in the record." Rehearing Order, 103 FERC (R. 10) at P19 (citing cases), J.A. 13.

Market monitor communications that advise the Commission "are merely part of the way a decision maker gathers information." *Id*. (citing cases). If, however, the Commission "were to rely on any particular communication, the Commission would be required to ensure the information was indeed part of the decisional record, or risk having its decision overturned in court." *Id*. *See also* Initial Order, 102 FERC (R. 1) at P12, n.25 (noting that the Commission is "acutely aware of the requirement under [the APA] that it may only rely on evidence in the record in reaching its ultimate decision in a proceeding"), J.A. 8.

Accordingly, there is no basis for EPSA's concern that the Commission will make decisions based on secret evidence. Communications on which reliance will be placed must be reflected in the record, and thus made open to scrutiny and comment. *See Home Box Office*, 567 F.2d at 57 ("if the information contained in such a communication forms the basis for agency action, then, under well established principles, that information must be disclosed to the public in some form"). *Accord Town of Norwood, Massachusetts v. FERC*, 53 F.3d 377, 384-85 (D.C. Cir. 1995) (*ex parte* communications are not improper when the Commission's decision "is fully supported on its own record and is fully amenable to judicial review on that record"); *Office of Consumers' Counsel of Ohio v. FERC*, 783 F.2d 206, 232 (D.C. Cir. 1986)

(finding that Commission violated fundamental principles of due process when it "relied heavily" on *ex parte* material that was not captured in the record).

If a party to a proceeding believes that a particular decision is not based on the record, it is, of course, free to challenge the sufficiency of the record evidence supporting that decision. EPSA has not demonstrated, however, that the exemption itself will necessarily lead to unsupported decisions, and thus is subject to a facial challenge. Nor has it demonstrated why this particular exemption, for market monitoring communications, is more likely to lead to unsupported decisions than other exemptions that similarly do not provide for routine disclosure, *see supra* page 9, that it does not challenge.

III. THE COMMISSION REASONABLY CONCLUDED THAT IT COULD, CONSISTENT WITH THE APA, ADOPT ITS MARKET MONITORING EXEMPTION BY ORDER RATHER THAN RULEMAKING

EPSA also submits (at 26) that the Commission could issue the market monitoring exemption only as a rulemaking employing APA notice and comment procedures. The Commission explained that it did not engage in rulemaking within the meaning of APA section 553, and thus was not required to employ notice and comment procedures, because it was acting in a manner explicitly contemplated in its *ex parte* regulations. Rehearing Order, 103 FERC (R. 10) at P4, J.A. 10. Specifically, those regulations provide 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." 18 C.F.R. § 385.2201(a), (j).

EPSA responds (at 27-30) that the Commission, under the terms of this provision, can depart from its *ex parte* rules by order only in an identified "proceeding" and cannot exempt an entire category of communications. The Commission rejected such a cramped interpretation of its regulations, finding that they are not so limited by either their words or their purpose. *See* Rehearing Order, 103 FERC (R. 10) at PP15-16, J.A. 12. *See also supra* page 23 (explaining deference to the Commission's interpretation of its own regulations). If the Commission could exempt only specific proceedings, on a case-by-case basis, from application of the *ex parte* rules, then "the purpose behind liberalizing communications between the Commission and Commission-approved market monitors – to ensure timely receipt of important market information – would be impeded. . . ." 103 FERC (R. 10) at P15, J.A. 12. As the Commission explained further,

> The [Initial] Order sets forth a policy of administrative practice. Requiring the Commission to repeat the policy for every relevant proceeding would be an administrative burden and a waste of resources. It could also thwart the market monitors' mission to gather and report information in a timely and efficient manner.

Id.

Moreover, the Commission explained that it followed the same procedure when it adopted by order the exemption for non-public meetings between state and federal panels to discuss RTO developments. *See* 103 FERC (R. 10) at P14, J.A. 12; *see also supra* page 10 (discussing state-federal RTO panel exemption). EPSA argues that the Commission's manner of adopting the earlier (RTO panel) exemption should have no bearing on the adoption of the later (market monitoring) exemption because, it states (at 29-30), the earlier exemption applied only to a specific set of captioned proceedings. That statement, however, is incorrect. The order adopting the earlier exemption "was not limited to a specific proceeding or proceedings," but rather "applied to all existing RTO proceedings as well as any proceedings that would be opened." 103 FERC (R. 10) at P15, J.A. 12. *See, e.g., Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997) (deferring to the Commission's reasonable interpretation of its own orders).

Moreover, while the precise disclosure requirements of the two exemptions are different, the two exemptions were designed with the same goal in mind – providing the Commission with useful, timely information. 103 FERC (R. 10) at P15, J.A. 12. While EPSA argues (at 30) that the Commission's construction of its *ex parte* regulations renders them "meaningless," it is EPSA that is attempting to render the market monitoring exemption meaningless by imposing additional procedural

restrictions in contravention of its purpose. *See* 103 FERC (R. 10) at P5, J.A. 10 (noting that, under 5 U.S.C. § 553(b), notice and comment procedures are not necessary when they would be impracticable, unnecessary, or contrary to the public interest).

Finally, the Commission explained that while it adopted its *ex parte* regulations through APA notice and comment procedures, it was not obligated to do so under APA section 553 because they do not alter substantive rights. *See* 103 FERC (R. 10) at P5 (noting that *ex parte* rules are rules of agency "practice and procedure" that are exempt from notice and comment procedures under APA section 553), J.A. 10. For the same reason, it was not obligated to adopt its market monitoring exemption through notice and comment procedures, as the exemption "does not in and of itself alter parties' substantive rights." 103 FERC (R. 10) at P6, J.A. 10.

EPSA responds (at 31) that the "procedural exception" to notice and comment rulemaking cited by the Commission, *id*. (citing cases), is limited merely to "internal procedural matter[s]." But the relevant cases are not so limited. *See, e.g., James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (explaining that "critical feature" of a rule satisfying the APA "procedural exception" is that it "covers agency actions that do not themselves alter the rights or interests of parties,

although it may alter the manner in which the parties present themselves or their viewpoints to the agency") (quoting cases).

EPSA also seeks to add substantive content to the market monitoring exemption by arguing (at 32-33) that it will "impose new burdens" by allowing the Commission to engage in "undisclosed, unchecked communications" with persons "given license to whisper in the Commission's ear." But, as explained above, *see supra* page 30, EPSA's fears are unfounded, as the Commission has adopted limitations on exempted communications that ensure the fairness and integrity of its proceedings. *See James V. Hurson*, 229 F.3d at 281 (concluding that "an otherwise procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it impose a burden on regulated parties").

CONCLUSION

For the foregoing reasons stated, the Commission submits that the petition for review should be dismissed for lack of aggrievement or ripeness. If the Court decides that it has jurisdiction, the challenged orders should be upheld as reasonable in all respects.

Respectfully submitted,

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