

122 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Grid plc
KeySpan Corporation

Docket No. EC06-125-001

ORDER DENYING REHEARING

(Issued February 4, 2008)

1. On November 16, 2006, Public Citizen, Inc. (Public Citizen) requested rehearing of the Commission's October 20, 2006 Order in this proceeding.¹ In that order, the Commission granted a joint application filed by National Grid plc (National Grid) and KeySpan Corporation (KeySpan) (collectively, Applicants) pursuant to section 203 of the Federal Power Act (FPA),² which requested Commission authorization to merge and for a disposition of jurisdictional facilities. In this order the Commission denies Public Citizen's request for rehearing as discussed below.

I. Background

2. Section 203(a) of the FPA provides the Commission's standard of review for mergers. The Commission must approve a merger if the Commission makes two determinations. First, the Commission must determine that the merger or disposition will be consistent with the public interest.³ The Commission's analysis of whether a merger or disposition will be consistent with the public interest involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on

¹ *National Grid plc*, 117 FERC ¶ 61,080 (2006) (October 20 Order).

² 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAAct 2005).

³ 16 U.S.C. § 824b(a) (2000 & Supp. V 2005).

regulation.⁴ Second, the Commission must determine that the transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”⁵ The Commission’s regulations establish verification and informational requirements for applicants that seek to determine that a merger or disposition will not result in cross-subsidization or pledge or encumbrance of utility assets.⁶

3. The October 20 Order found that the proposed transaction was consistent with the public interest. The Commission found that the combination of generation assets would not adversely affect competition in any relevant market.⁷

4. The Commission also found that the proposed transaction would not adversely affect regulation.⁸

5. Finally, the Commission found that the merger would not adversely affect Commission or state regulation.⁹

6. The Commission also concluded that Applicants had provided sufficient assurance that their merger would not result in cross-subsidization of a non-utility company or in the pledge or encumbrance of utility assets for the benefit of an associate company.

⁴ 18 C.F.R. § 2.26 (2007); *see also Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh’g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001); *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005).

⁵ *See supra* note 3; 18 C.F.R. § 2.26(f) (2007).

⁶ 18 C.F.R. § 33.2 (2007) (as amended).

⁷ October 20 Order, 117 FERC ¶ 61,080 at P 26-28; *see also id.* P 43-45.

⁸ *Id.* P 54.

⁹ *Id.* P 59.

7. With respect to claims that there had been impermissible *ex parte* communications in the form of pre-filing meetings, the Commission reiterated that pre-filing meetings are permissible.¹⁰ The Commission explained that the *ex parte* regulations are triggered only when a filing is made and contested,¹¹ which was not the case at the time of the alleged *ex parte* communications in this proceeding.

II. Request for Rehearing

8. On November 16, 2006, Public Citizen requested rehearing. Public Citizen reiterates that Applicants' company executives had impermissible *ex parte* communications, in the form of a meeting, with Commissioners on April 26, 2006, in violation of the Administrative Procedure Act (APA).¹² Public Citizen points out that the APA forbids *ex parte* communications beginning no later than the moment those involved in the communications "have knowledge" that the matter will be noticed for hearing.¹³ Public Citizen also points out that the APA prohibits *ex parte* communications "relative to the merits of [a] proceeding" between interested outside persons and the agency.¹⁴ It contends that "both FERC and the applicants knew that the application would be filed when they met on April 26."¹⁵ According to Public Citizen, once the

¹⁰ *Id.* P 78; see *Commonwealth Edison Co.*, 115 FERC ¶ 61,133, at P 23-26 (2006); *Exelon Corp.*, 113 FERC ¶ 61,299, at P 92-97 (2005); *Duke Energy Corp.*, 113 FERC ¶ 61,297, at P 14-23 (2005); *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298, at P 13-21 (2005).

¹¹ See 18 C.F.R. §§ 385.2201(a), (b), (c)(1)(i) (2007); *Regulations Governing Off-the-Record Communications*, Order No. 607, FERC Stats. & Regs. ¶ 31,079, at 30,879, 30,890-92 (1999), *order on reh'g and clarification*, Order No. 607-A, FERC Stats. & Regs. ¶ 31,112 (2000).

¹² 5 U.S.C. §§ 551 *et seq.* (2000).

¹³ Request for Rehearing at 4-5, 7 (citing APA § 557(d)(1)(E)).

¹⁴ 5 U.S.C. § 557(d)(1)(A), (B) (2000).

¹⁵ Request for Rehearing at 7.

Commission—or Commissioners—and the Applicants had knowledge the application would be filed, they had knowledge that it would be noticed for hearing.¹⁶ Thus, the prohibition on impermissible *ex parte* communications applied.

9. Public Citizen adds that its due process rights and other rights under the APA have been violated by these communications, because the Commissioners were biased as a result.

III. Discussion

10. We disagree that the pre-filing meetings at issue in this proceeding were in violation of the APA or that the Commission’s regulations, as applied in this case, conflict with federal law.¹⁷ Accordingly, we deny rehearing.

11. Before turning to Public Citizen’s request for rehearing,¹⁸ we note that the Commission’s decision, the reasons for that decision, and the record that formed the basis for that decision, are all public. The October 20 Order is public, and that order contains the Commission’s decision and the reasons for that decision. That order indicates, as well, the record upon which the Commission made its decision. Hence, the Commission has complied with the APA’s directives that “[a]ll decisions ... shall include a statement of ... findings and conclusions, and the reasons or basis therefor.”¹⁹

A. Public Citizen’s Argument Is Untimely

12. Turning to Public Citizen’s request for rehearing, as a preliminary matter, Public Citizen’s request for rehearing amounts to an impermissible collateral attack on the

¹⁶ Public Citizen proffers correspondence and other documents (as Exhibits C and D) in order to show “that the applicants and the agency had knowledge at the time of the April 26 meeting that the application would be noticed for hearing.” Request for Rehearing at 5; *see also id.* at 3-4.

¹⁷ We refer to “meetings” in the plural because more than one Commissioner met with the Applicants’ representatives.

¹⁸ As a preliminary matter, we remind parties to follow the Commission’s regulations on citation in their filings, 18 C.F.R. § 385.2003(d) (2007), so that the filings may be fully and accurately considered.

¹⁹ 5 U.S.C. § 557(c) (2000).

Commission's regulations applicable to off-the-record communications.²⁰ In Order No. 607, in adopting the regulations, the Commission determined that "the prohibitions on off-the-record communications do not apply prior to the initiation of a proceeding at the Commission,"²¹ and explained that "pre-filing communications generally fall outside the scope of the APA's definition of *ex parte*."²² That is so because "they take place prior to the filing of an application, and therefore prior to any 'proceeding' at the Commission."²³ The Commission went on to state that "pre-filing communications [are] harmonious with the APA and ... [the Commission] does not believe that any bar to communications should exist prior to the time a matter is formally contested, let alone prior to the time a matter is filed for its consideration."²⁴ The regulations were adopted in

²⁰ 18 C.F.R. § 385.2201 (2007); *Regulations Governing Off-the-Record Communications*, Order No. 607, FERC Stats. & Regs. ¶ 31,079 (1999), *order on reh'g*, Order No. 607-A, FERC Stats. & Regs. ¶ 31,112 (2000).

²¹ Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,892.

²² *Id.* at 30,890.

²³ *Id.* at 30,879.

²⁴ *Id.* at 30,891. In adopting our current *ex parte* regulations, which we note that we previously have found are consistent with the APA in allowing pre-filing meetings, *see id.* at 30,890-91, we explained that our *ex parte* regulations reflect "fundamental APA principles" and "further[] . . . basic tenets of fairness." *Id.* at 30,878. We did not, however, expressly address the applicability of the *ex parte* prohibition of the APA; rather, to the extent that we considered the matter at all, we simply assumed the applicability of the *ex parte* prohibition of the APA. Likewise, in *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004) (*EPSA*), we again essentially assumed (as did the court) the applicability of the *ex parte* prohibition of the APA. In neither instance did we closely examine the question of whether, in fact, the *ex parte* prohibition of the APA applied. Here, prompted by allegations in this and other recent cases that we have violated the *ex parte* prohibition of the APA by allowing pre-filing meetings, we have closely examined the question (and also engaged a leading expert on administrative law to look into the question), and, as explained below, we have concluded (and that expert likewise concluded) that the *ex parte* prohibition of the APA does not apply to this and similar proceedings and does not bar pre-filing meetings in such proceedings. Indeed, as explained in greater detail below, we chose to adopt (and that expert likewise has noted that we have adopted) *ex parte* regulations that go beyond what is required by the APA.

1999 and reaffirmed on rehearing in 2000; Public Citizen did not take issue with them at that time and it is too late to do so now.²⁵ Fundamental principles settled in final orders cannot be attacked in subsequent proceedings before the Commission.²⁶

B. Pre-Filing Meetings Are Allowed Under the APA

13. Turning to the substance of Public Citizen's claim regarding the APA, we disagree that pre-filing meetings like those at issue here are barred by the APA. Indeed, the *ex parte* prohibition of the APA simply does not apply here and thus does not bar pre-filing meetings like those complained of here.²⁷

14. In its decision-making, the Commission traditionally has employed procedures generally similar to those spelled out in APA section 557. However, the Commission's

²⁵ See *Exelon Corp.*, 113 FERC ¶ 61,299, at P 97 (2005) (finding Public Citizen's arguments are an impermissible collateral attack on the Commission's regulations).

To the extent that Public Citizen now challenges the Commission's *ex parte* regulations, Request for Rehearing at 1, 6, Public Citizen makes a collateral and belated attack on the Commission's regulations. Public Citizen did not file comments in the Commission's rulemaking proceeding proposing its regulations governing off-the-record communications, however, nor did Public Citizen seek rehearing of the Commission's order promulgating the regulations. Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,878 n.14, 30,896-97 (Appendix A); Order No. 607-A, FERC Stats. & Regs. ¶ 31,112 at 31,924. It is therefore too late for Public Citizen to challenge the Commission's regulations.

Moreover, we note that, while in *EPSA* the court had before it the Commission's *ex parte* regulations, the court did not overturn those regulations. In fact, the court addressed a different factual circumstance than that presented here. In *EPSA*, the court noted that it was addressing "Congress' directive banning *ex parte* communications relevant to *pending on-the-record proceedings* between decisional staff and interested persons outside the agency." *EPSA*, 391 F.3d at 1266 (emphasis added). That is not the circumstance presented here.

²⁶ See *Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998) ("The Commission need not revisit the reasoning of a general order every time it applies it to a specific circumstance.").

²⁷ In fact, the natural consequence of Public Citizen's argument if we were to rule in Public Citizen's favor would be to bar precisely the kinds of informal contacts with Commission staff that our regulations allow. See 18 C.F.R. §§ 35.6, 388.104 (2007).

doing so does not mean that the Commission was required to follow the APA. In the present context, where less-than-formal adjudication is implicated,²⁸ the *ex parte* prohibition of the APA does not apply.²⁹ The *ex parte* prohibition of the APA, section 557(d)(1),³⁰ applies only to proceedings that are required by statute to be conducted “on the record,” i.e., in a trial-type hearing; section 557 prohibits *ex parte* communications in formal adjudications subject to section 554 of the APA,³¹ and such adjudications are those “required by statute to be determined *on the record* after opportunity for an agency

²⁸ See generally Richard J. Pierce, Jr. *et al.*, *Administrative Law and Process* 298-307 (3d ed. 1999).

²⁹ See *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 240 (1973) (construing “hearing” mandate in agency’s governing statute as not invoking APA requirements for formal adjudication); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) (statute must require hearing “on the record” to implicate APA’s formal adjudication and *ex parte* provisions); *Dist. No. 1, Pac. Coast Dist., Marine Engineers’ Beneficial Ass’n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000) (in absence of statutory command, agencies may grant additional procedural rights, but reviewing courts may not impose them if agencies have not granted them; APA’s *ex parte* prohibition did not apply to application to transfer of registry of eight vessels); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (APA’s *ex parte* prohibition applied because Endangered Species Act mandated an “on the record” final determination).

Compare *Izaak Walton League v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) (“The APA itself does not use the term ‘informal adjudication.’ Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through ‘on the record’ hearings. The APA fails to specify the procedures that must be followed for agency actions that fall within this category.”), with *PBGC v. LTV Corp.*, 496 U.S. 633, 655-56 (1990) (distinguishing between “formal adjudication . . . pursuant to the trial-type procedures set forth in [APA §§ 554, 556, and 557]” and “informal adjudication, the minimal requirements for which are set forth in § 555 of the APA . . .”), and 5 U.S.C. § 555(b), (e) (2000) (requiring each agency, “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, [to] proceed to conclude a matter presented to it,” and to give “[p]rompt notice . . . of the denial of a written application, petition, or other request of an interested person made in connection with any agency proceeding . . . [with] a brief statement of the grounds for denial”).

³⁰ 5 U.S.C. § 557(d)(1) (2000).

³¹ *Id.* § 554.

hearing.”³² Section 203 of the FPA does not *require* an APA “on the record”—i.e., trial-type—hearing.³³ Hence, the *ex parte* prohibition of the APA does not apply to proceedings under section 203 of the FPA and does not bar pre-filing meetings like those at issue here.

15. The legislative history of APA section 557(d)(1) supports our reading. Adopted as part of the Government in the Sunshine Act,³⁴ the legislative history makes clear that the *ex parte* prohibition is intended for formal, trial-type proceedings.³⁵ The House Judiciary Committee Report describes this language as focused on “formal” proceedings and, in particular, as focused on “formal, trial-type proceedings.”³⁶ That report, as well as the House Government Operations Committee Report and the Senate Government Operations Committee Report, indicates that the *ex parte* prohibition “only applies to formal agency adjudication,” and that “[i]nformal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing

³² *Id.* § 554(a)(1) (emphasis added).

³³ 16 U.S.C. § 824b (2000). While section 203 of the FPA does not *require* APA “on the record,” i.e., trial-type, hearings, we do on occasion opt to hold trial-type hearings. That fact does not change our analysis or our conclusion. Section 203 of the FPA does not *require* that we hold such hearings, and so the *ex parte* prohibition of the APA does not apply to section 203 of the FPA and to actions taken and decisions made under section 203 of the FPA.

Most commonly, as in this instance, decisions under section 203 of the FPA are based on a written, and public, record (what we sometimes refer to as a “paper” record). That record would consist, as it does here, of the application and any amendments or supplements, any interventions, protests and comments, and any answers that we have accepted. Again, the fact that we have developed a record does not change our analysis or our conclusion. Section 203 of the FPA does not *require* that we hold an APA “on the record,” i.e., trial-type, hearing, and so the *ex parte* prohibition of the APA does not apply to section 203 of the FPA and to actions taken and decisions made under section 203 of the FPA.

³⁴ Pub. L. No. 94-409, § 4(a), 90 Stat. 1241, 1246 (1976).

³⁵ This, we note, is consistent with the approach taken in our regulations—discussed elsewhere in this order.

³⁶ H.R. Rep. No. 94-880, pt. 2, at 18 (1976) (House Judiciary Committee Report). Our prior orders take a similar view. *See* Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,891 n.95.

will not be affected by the provision.”³⁷ All three committee reports correspondingly offer the same explanation of what triggers APA section 557(d)(1)(E) in particular, i.e., an agency’s institution of a trial-type hearing. “[T]he prohibitions against *ex parte* communications apply as soon as a proceeding is noticed for a hearing.”³⁸

16. In this regard, we also engaged a leading expert on administrative law to conduct an independent report on whether the *ex parte* prohibition of the APA applies to Commission proceedings.³⁹ The report examined the APA prohibition on *ex parte* communications and concluded that “the *ex parte* provisions of the APA do not apply to FERC proceedings”:

APA §557(d)(1) prohibits *ex parte* communications in any agency proceeding that is subject to APA §557(a). That section applies “when a hearing is required to be conducted in accordance with section 556 of this title.” APA §556 applies “to hearings required by section ... 554 of this

³⁷ House Judiciary Committee Report at 18; H.R. Rep. No. 94-880, pt. 1, at 19 (1976) (House Government Operations Committee Report); S. Rep. No. 94-354, at 35 (1975) (Senate Government Operations Committee Report).

³⁸ House Judiciary Committee Report at 21; *accord* House Government Operations Committee Report at 21 (using substantially identical language); Senate Government Operations Committee Report at 38 (same as House Government Operations Committee Report).

As explained below, the Commission has chosen in its regulations to time the application of the *ex parte* prohibition to the contesting of a proceeding, regardless of whether a trial-type hearing is ultimately ordered. *See* 18 C.F.R. § 385.2201(a), (c) (2007); *see also Dist. No. 1, Pac. Coast Dist., Marine Engineers’ Beneficial Ass’n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000) (in absence of statutory command, agencies may grant additional procedural rights, but reviewing courts may not impose them if agencies have not granted them). The legislative history of APA section 557(d)(1) similarly indicates that the *ex parte* prohibition is focused on contested proceedings: “The purpose of this provision is to notify *the opposing party* and the public” House Government Operations Committee Report at 21 (emphasis added); *accord* House Judiciary Committee Report at 20 (same); Senate Government Operations Committee Report at 37 (same).

³⁹ Richard J. Pierce, Jr., Federal Energy Regulatory Commission Ex Parte Regulations and Practices (Nov. 27, 2006) (FERC Ex Parte Regulations), *available at* <http://www.ferc.gov>.

title to be conducted in accordance with this section.” ...APA §554(a) makes §§556 and 557 applicable “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,....” Thus, the APA prohibition on *ex parte* communications applies only when a statute requires an agency to issue a rule or to resolve an adjudicatory dispute “on the record after opportunity for agency hearing.”

....

No FERC-administered statute contains the language “on the record after opportunity for agency hearing” or any equivalent language that triggers the prohibition on *ex parte* communications in APA §557(d).... Thus, FERC is not required by statute to engage in ... formal adjudication, and therefore the *ex parte* provisions of the APA do not apply to FERC proceedings....^[40]

17. Moreover, even if we were to assume that the APA applies to section 203 proceedings, it would not bar the pre-filing meetings at issue here. APA section 557(d)(1) applies the *ex parte* prohibition only to “agency proceedings”;⁴¹ here, as we explain elsewhere in this order, at the time of the pre-filing meetings at issue, there was no proceeding. Moreover, for the same reason, there were no “parties” to whom “notice” could be given of any such communication.⁴² Therefore, the *ex parte* prohibition in APA section 557(d)(1)(E),⁴³ highlighted by Public Citizen, would not apply to the pre-filing meetings at issue here.

18. Public Citizen seeks to avoid this conclusion by relying on language in section 557(d)(1)(E) of the APA which provides that *ex parte* prohibitions shall “apply no later than the time at which a proceeding is noticed for hearing unless the person responsible

⁴⁰ *Id.* at 2-3 (footnotes omitted); *accord id.* at 4 (“FERC is not required to use formal adjudication to conduct any adjudication. It is free to use informal adjudication, and the APA does not prohibit *ex parte* communications in informal adjudications.”) (footnote omitted).

⁴¹ 5 U.S.C. § 557(d)(1) (2000).

⁴² Compare 5 U.S.C. § 551(14) (2000) with 5 U.S.C. § 551(3) (2000) (defining “party” under APA), 18 C.F.R. 385.102(c) (2007) (defining “party” in Commission proceedings), and 18 C.F.R. 385.214(c) (2007) (discussing granting of party status in Commission proceedings).

⁴³ Request for Rehearing at 4-5, 7 (citing 5 U.S.C. § 557(d)(1)(E) (2000)).

for the communication has knowledge that it will be noticed, in which case the [*ex parte*] prohibitions shall apply beginning at the time of his acquisition of such knowledge.” According to Public Citizen, a pre-filing meeting triggers this clause because the Commissioner attending the meeting “has knowledge” that a proceeding will be “noticed for hearing.”⁴⁴ This is not correct. First, as a threshold matter, section 557(d)(1) does not apply to section 203 proceedings for the reasons explained above. Second, even if section 557(d)(1) were applicable, it would not produce a different result. Under this clause, the *ex parte* prohibition applies no earlier than at the time the “person responsible for the communication”⁴⁵ has “knowledge” that “it” (i.e., the proceeding) will be “noticed for hearing,” not merely knowledge that a proceeding may be instituted (i.e., that there may be a filing).⁴⁶ “Noticed for hearing,” the Commission found in Order No. 607, refers to formally setting a proceeding for hearing.⁴⁷ And knowledge that a “proceeding” will be “noticed for hearing” certainly cannot exist earlier than when a “proceeding” is first instituted by a filing with the Commission. Further, such knowledge that a “proceeding” will be “noticed for hearing,” it likewise follows, can only occur

⁴⁴ *Id.* at 1, 4, 7.

⁴⁵ We note that the person to whom this phrase refers is difficult to determine. Normally, it is the outside party that initiates the communication, so the Commissioners or Commission staff would not be the person “responsible” for the communication. It is not that person but the Commission or Commission staff, however, that ultimately will have knowledge (following receipt of and analysis of all the various filings and pleadings) that a proceeding will be “noticed for hearing.” For the sake of the following discussion, however, we will assume that the Commissioners and Commission staff are the “person responsible for the communication.” Compare 5 U.S.C. § 557(d)(1)(C) (2000) with *id.* § 557(d)(1)(E).

⁴⁶ On the facts of this case, where the meetings pre-dated the filing and thus the proceeding, there was certainly no violation of the Commission’s regulations or the APA. The Commission’s regulations, like the APA, define prohibited off-the-record communications in the context of contested proceedings, *see* 18 C.F.R. § 385.2201(a), (b), (c)(1) (2007); Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,892 (“the proscriptions apply ... from the time of the filing of an intervention disputing any material issue that is the subject of a proceeding”), 30,893 (“prohibitions on off-the-record communications will typically be triggered by the filing of a protest or an intervention that disputes any material issue”), and at the time of the meetings at issue there was no contested proceeding.

⁴⁷ Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,891 & n.95.

when the Commission issues an order⁴⁸ formally setting a “proceeding” for a trial-type hearing and not when a “proceeding” is first instituted. Thus, we reject any claim that the Commissioners or Commission staff in this case had the requisite knowledge to trigger the *ex parte* communication prohibitions, and that the pre-filing meetings were prohibited. To this, we add that knowledge that a proceeding will be instituted and “notice” of the filing will be published in the *Federal Register* for public comments is not the same as “knowledge” that a proceeding will be set for a trial-type hearing as provided in the APA.⁴⁹

C. Commission Rule 2201 Does Not Conflict with the APA

19. Our regulations are, in fact, consistent with the APA. Like the APA, our regulations prohibit off-the-record communications in any “contested” proceedings.⁵⁰ As relevant here, the Commission defines a “contested” proceeding as “any *proceeding* before the Commission to which there is a right to intervene and *in which an intervenor disputes any material issue.*”⁵¹ Just as we explained above with respect to the APA, before a filing has been made at the Commission, there is no proceeding, let alone a proceeding in which an intervenor is disputing a material issue. At the time of the pre-filing meetings at issue here, there had been no filing at the Commission, there was no

⁴⁸ The Commission, a five-member agency (*see* 16 U.S.C. § 792 (2000); 18 C.F.R. § 376.102 (2007)), acts through its written orders (*see, e.g., Indianapolis Power & Light Co.*, 48 FERC ¶ 61,040, at 61,203 & n.29 (“The Commission speaks through its orders.”), *order on reh’g*, 49 FERC ¶ 61,328 (1989)), which are “issued” following a favorable vote of the majority. *Cf. Joseph Martin Keating*, 47 FERC ¶ 61,170, at 61,554 (1989) (Commissioner Trabandt dissenting) (referring to several recent cases “that by majority vote” took certain actions), *remanded on other grounds*, 927 F.2d 616 (D.C. Cir. 1991). Phrased differently, in the absence of such orders, including before it has issued such orders, the Commission cannot be said to have acted.

⁴⁹ *See* 16 U.S.C. § 824b(a) (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (providing for “notice” so that interested persons may seek to intervene and protest). While every FPA section 203 filing—indeed, virtually every FPA filing—is “noticed,” in that a notice of the filing is issued and published in the *Federal Register*, comparatively few filings are set for trial-type hearings.

⁵⁰ 18 C.F.R. § 385.2201(a), (b) (2007).

⁵¹ 18 C.F.R. § 385.2201(c)(1) (2007) (emphasis added); *accord* Order No. 607-A, FERC Stats. & Regs. ¶ 31,112 at 31,925 & n.6.

docketed proceeding at the Commission, and there was no intervenor disputing a material issue in a docketed proceeding at the Commission.⁵² In short, prior to filing, just as the APA would not have applied, Rule 2201's prohibitions on *ex parte* communication did not apply,⁵³ and pre-filing meetings like those at issue here were not prohibited.⁵⁴

⁵² Moreover, just as our regulations did not preclude National Grid and KeySpan from seeking a pre-filing meeting in this instance, so our regulations do not preclude potential intervenors (like Public Citizen) from seeking pre-filing meetings in anticipation of filings under section 203 of the FPA. As with National Grid and KeySpan here, at the time of any such pre-filing meetings, there would be no filing yet, no docketed proceeding yet, and no intervenor disputing a material issue in a docketed proceeding yet.

⁵³ In this regard, the independent report on *ex parte* communications that we commissioned states:

FERC's ban on *ex parte* communications does not apply to pre-filing meetings. FERC therefore allows informal communications to occur prior to the time a filing is made and disputed by an intervenor on a material issue. There is, as indicated, nothing unlawful about this practice.

FERC Ex Parte Regulations at 8.

We add that informal meetings and conversations are used in many contexts and not just in the pre-filing context. They occur in the context of other provisions of the FPA, as well as in the context of holding company-related matters, hydroelectric-related matters, and natural gas-related matters; such informal meetings and conversations involve all of the industries that the Commission regulates. Such informal contacts—which can be and are not only with regulated public utilities but also with customers—are the “‘bread and butter’ of the process of administration” and they are “completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.” *Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (*Louisiana*); *see* 18 C.F.R. §§ 35.6, 388.104 (2007) (providing for informal advice by Commission staff); 18 C.F.R. § 2.1a (2007) (soliciting suggestions, comments, and proposals from the public, including persons regulated by the Commission); Order No. 607, FERC Stats. & Regs. ¶ 31,097 at 30,878, 30,892-93. And here, given the facts of a public decision, rationale, and record, there is no basis on which a claim can be made that judicial review will be frustrated or that serious questions of fairness exist. *Louisiana*, 958 F.2d at 1113.

Moreover, in this regard, since the range of persons and companies that potentially can file is so wide, *see* 18 C.F.R. §§ 385.206(a), .207(a) (2007), if the Commission were

(continued...)

20. It is noteworthy, we add, that the standard which our *ex parte* regulations apply is not only easily administered and practicable, but also initiates the *ex parte* prohibitions earlier than would be required under the APA (if the APA applied) and thus is more stringent than the APA (if the APA applied).⁵⁵ That is, as discussed above, once a filing is contested, the Commission's regulations prohibit off-the-record communications, even if the proceeding ultimately is *not* "noticed for hearing."⁵⁶

21. Finally, it is worth repeating that the Commission based its decision to approve the proposed transaction on the extensive and public record of Applicants' filings and the many responsive pleadings received from intervenors, including Public Citizen. That Commission decision is contained in a public order that details how the public record supports each finding made by the Commission. At no point did the Commission rely on any information received at any pre-filing meetings to make its decision.⁵⁷

to agree with Public Citizen the Commission arguably could be barred from meeting with anyone on anything, which would hurt not only the Commission, but also those who appear before it. *See* 18 C.F.R. §§ 35.6, 388.104 (2007) (providing for informal advice by Commission staff); 18 C.F.R. § 2.1a (2007) (soliciting suggestions, comments, and proposals from the public, including persons regulated by the Commission).

⁵⁴ Further, Public Citizen does not explain when it believes a proceeding would begin for purposes of the APA or Rule 2201, which effectively puts no limit on how early a proceeding begins.

⁵⁵ The independent report on *ex parte* communications that we commissioned notes that the Commission "has adopted restrictions on *ex parte* communications in informal adjudications even though the APA does not require such restrictions." FERC *Ex Parte* Regulations at 4-5; *id.* at 3 (noting that the Commission's restrictions on *ex parte* communications "go beyond what is required by the APA.").

⁵⁶ Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,880-81 (extending *ex parte* prohibition to contested proceedings).

⁵⁷ *See Louisiana*, 958 F.2d at 1113.

The Commission orders:

Public Citizen's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.