

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation  
Cinergy Corporation

Docket No. EC05-103-001

ORDER DENYING REHEARING

(Issued February 5, 2007)

1. On January 19, 2006, Public Citizen’s Energy Program, Citizens Action Coalition of Indiana, Ohio Partners for Affordable Energy, and the Southern Alliance for Clean Energy (Public Citizen) requested rehearing of the Commission’s Merger Order in this proceeding.<sup>1</sup> In that order, the Commission granted an application filed by Duke Energy Corporation (Duke) and Cinergy Corp. (Cinergy) (collectively, Applicants) under section 203 of the Federal Power Act (FPA).<sup>2</sup> We reviewed the transaction under the Merger Policy Statement,<sup>3</sup> and found that the merger was consistent with the public interest. In

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<sup>1</sup> *Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005) (Merger Order).

<sup>2</sup> 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). We note that Applicants filed their application for the proposed merger before the date on which the Public Utility Holding Company Act of 2005 (PUHCA 2005), EPAAct 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005), was enacted, August 8, 2005, and thus the prior section 203 standards apply to the proposed merger. Section 1289 of EPAAct 2005 states that “[t]he amendments made by this section shall not apply to any application under section 203 of the [FPA] that was filed on or before the date of enactment of [PUHCA 2005].” EPAAct 2005 § 1289(c).

<sup>3</sup> *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A (1997) (Merger Policy Statement); *see also*

(continued)

this order the Commission denies Public Citizen's request for rehearing, as discussed below.

## **I. Background**

2. The background of this case is described in detail in the Merger Order. Briefly, the merger of Duke and Cinergy created an entity with retail electric and gas customers in Ohio, Kentucky, Indiana, North Carolina, South Carolina, and Canada that owns over 45,000 megawatts (MW) of electric generation and 17,500 miles of natural gas transmission pipeline.

3. Duke formed Duke Energy Holding Corp., which, after the consummation of the transaction, was renamed Duke Energy Corporation and was a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA 1935).<sup>4</sup> The former Duke (*i.e.*, Duke Energy Corporation) was renamed Duke Power Company, LLC.

4. There will also be a number of restructurings and transfers inside the new holding company. Among these steps, Duke Energy North American's (DENA) generation facilities in the Midwest (the DENA Midwest Assets), which are owned and operated by DENA subsidiaries, will be transferred to Cincinnati Gas & Electric Company's (CG&E) and operated together with CG&E generation fleet. (DENA is a separate business unit of Duke that manages power plants outside of Duke's franchised service territory and markets electric power and natural gas.)

5. In the Merger Order, the Commission considered the proposed merger's effect on competition, effect on rates, and effect on regulation, and found that the merger would be consistent with the public interest. The Commission addressed issues that included the use of a single consulting firm, Duke's control of natural gas pipeline capacity, the

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*Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

<sup>4</sup> 16 U.S.C. §§ 79a *et seq.* (2000). We note that EAct 2005 repealed PUHCA 1935, effective February 8, 2006, and enacted PUHCA 2005. EAct 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (amending 16 U.S.C. § 824b).

transfer of “unregulated” generation assets,<sup>5</sup> alleged rate increases, opportunities for cross-subsidization, and *ex parte* issues raised by pre-filing meetings.<sup>6</sup>

6. On August 17, 2006, Public Citizen moved to supplement the record, attaching correspondence between Public Citizen and the Commission concerning Public Citizen’s Freedom of Information Act request for documents relating to pre-filing meetings between Applicants and this Commission’s commissioners.<sup>7</sup> On August 23, 2006, Applicants filed an answer.<sup>8</sup>

## II. Discussion

### A. Ex Parte Communications

7. Public Citizen on rehearing reiterates its protest that Applicants’ representatives held multiple private meetings with some or all of the Commissioners before the July 12, 2005 filing at the Commission and after they had filed details of the proposed transaction with the Securities and Exchange Commission (SEC).

8. Public Citizen states that the Administrative Procedure Act (APA)<sup>9</sup> limits the ability of federal agencies to conduct “off-the-record” private meetings. Public Citizen contends that the APA forbids Commissioners from meeting with parties in private when they have knowledge that a proceeding “will be noticed” for hearing. Public Citizen imputes knowledge by the Commissioners that the proposed transaction filing would be “noticed for hearing” because the “May 9, 2005 filing by the companies with the U.S.

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<sup>5</sup> “Unregulated” refers to generators that are authorized to make sales at market-based rates.

<sup>6</sup> Merger Order, 113 FERC ¶ 61,297 at P 71, 101, 114, 122, 131, 136-41.

<sup>7</sup> While Public Citizen indicates that these documents provide evidence of improper communications, we disagree. Although Public Citizen demonstrates that pre-filing meetings did occur (which we have never denied), it does not demonstrate that those meetings were improper. As explained below, we conclude that those meetings were proper.

<sup>8</sup> Applicants maintain that Public Citizen’s filing is late and that Public Citizen makes no attempt to explain why it could not have included these materials with its protest.

<sup>9</sup> 5 U.S.C. §§ 551 *et seq.* (2000).

Securities and Exchange Commission provided public notice that the merger would be filed for approval under the Federal Power Act [FPA].”<sup>10</sup>

9. Public Citizen argues that, since FPA section 203(a) mandates that the Commission must provide “notice and opportunity for hearing” prior to approval of any merger application, and since the Commission defines such “hearing” as the filing of comments, the “notice” of the merger application filing that calls for such comments is the only “notice for hearing” provided in this case. Public Citizen goes on to reason that, because such notice must be provided for all merger applications—by statutory mandate under section 203(a)—the Commission had knowledge that this merger would be “noticed for hearing” from at least the time that the merger applicants publicly told the SEC that they would seek the Commission’s approval for the merger. The APA is clear, according to Public Citizen: the APA’s *ex parte* prohibitions “shall apply” from the time of such knowledge.

10. Public Citizen contends that the Commission’s interpretation of the APA’s *ex parte* prohibitions as requiring a proceeding in order to be implicated would negate Congressional intent,<sup>11</sup> as evidenced by the “unless” clause in section 557(d)(1)(E), which reads:

the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing *unless* the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.[<sup>12</sup>]

11. Public Citizen states that the Commission mischaracterized Public Citizen’s citation of *Electric Power Supply Association v. FERC*,<sup>13</sup> which, according to Public Citizen, was cited “to remind FERC that the APA trumps whatever rules FERC has on *ex parte* communications.”

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<sup>10</sup> Request for Rehearing at 1, 3.

<sup>11</sup> *Id.* at 4 (citing Merger Order, 113 FERC ¶ 61,297 at P 128).

<sup>12</sup> 5 U.S.C. § 557(d)(1)(E) (2000) (emphasis added).

<sup>13</sup> 391 F.3d 1255 (D.C. Cir. 2004) (*EPSA*).

12. Public Citizen asserts that such meetings “may have served as a de facto negotiation, where Commissioners may have made comments or commitments or suggestions that compromise their objectivity or bias during the public hearing.”<sup>14</sup> Moreover, Public Citizen raises the issue of whether, regardless of any violation of the Sunshine Act (i.e., the APA’s *ex parte* prohibitions), Public Citizen’s right to due process was violated.<sup>15</sup>

### **1. Introduction**

13. 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. Accordingly, we deny rehearing of this issue.

14. Before turning to Public Citizen’s request for rehearing on this issue, 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 Merger 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.”<sup>16</sup>

### **2. Public Citizen’s Argument is Untimely**

15. 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 Commission’s regulations applicable to off-the-record communications.<sup>17</sup> In Order No.

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<sup>14</sup> Request for Rehearing at 4-5.

<sup>15</sup> Public Citizen does not explain how, aside from a claimed violation of *ex parte* prohibitions, its due process rights were violated. To the contrary, Public Citizen was given notice of Applicants’ filing, was accorded party status, and its arguments were fully considered and addressed. And Public Citizen’s request for rehearing is considered and addressed in this order. We thus do not see any colorable basis for its claim that it has been denied due process.

<sup>16</sup> 5 U.S.C. § 557(c) (2000).

<sup>17</sup> 18 C.F.R. § 385.2201 (2006); *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).

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,”<sup>18</sup> and explained that “pre-filing communications generally fall outside the scope of the APA’s definition of *ex parte*.”<sup>19</sup> That is so because “they take place prior to the filing of an application, and therefore prior to any ‘proceeding’ at the Commission.”<sup>20</sup> 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.”<sup>21</sup> The regulations were adopted in 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. Fundamental principles settled in final orders cannot be attacked in subsequent proceedings before the Commission.<sup>22</sup>

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<sup>18</sup> Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,892.

<sup>19</sup> *Id.* at 30,890.

<sup>20</sup> *Id.* at 30,879.

<sup>21</sup> *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.

<sup>22</sup> *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.”).

### 3. Pre-Filing Meetings Are Allowed Under the APA

16. 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.

17. In its decision-making, the Commission traditionally has employed procedures generally similar to those spelled out in APA section 557. However, the Commission's 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,<sup>23</sup> the *ex parte* prohibition of the APA does not apply.<sup>24</sup> The *ex parte* prohibition of the APA, section

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<sup>23</sup> See generally Richard J. Pierce, Jr. *et al.*, *Administrative Law and Process* 298-307 (3d ed. 1999).

<sup>24</sup> 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

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557(d)(1),<sup>25</sup> 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,<sup>26</sup> and such adjudications are those “*required* by statute to be determined *on the record* after opportunity for an agency hearing.”<sup>27</sup> Section 203 of the FPA does not *require* an APA “on the record,” *i.e.*, trial-type, hearing.<sup>28</sup> 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.

18. The legislative history of APA section 557(d)(1) supports our reading. Adopted as part of the Government in the Sunshine Act,<sup>29</sup> the legislative history makes clear that the *ex parte* prohibition is intended for formal, trial-type evidentiary proceedings.<sup>30</sup> The

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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”).

<sup>25</sup> 5 U.S.C. § 557(d)(1) (2000).

<sup>26</sup> *Id.* § 554.

<sup>27</sup> *Id.* § 554(a)(1) (emphasis added).

<sup>28</sup> 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.

<sup>29</sup> Pub. L. No. 94-409, § 4(a), 90 Stat. 1241, 1246 (1976).

<sup>30</sup> This, we note, is consistent with the approach taken in our regulations—discussed elsewhere in this order.

House Judiciary Committee Report describes this language as focused on “formal” proceedings, and in particular as focused on “formal, trial-type proceedings.”<sup>31</sup> 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 will not be affected by the provision.”<sup>32</sup> 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.”<sup>33</sup>

19. In this regard, we also recently engaged a leading expert on administrative law to conduct an independent report on whether the *ex parte* prohibition of the APA applies to

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<sup>31</sup> 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.

<sup>32</sup> 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).

<sup>33</sup> 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) (2006); *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).

Commission proceedings.<sup>34</sup> 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 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.”

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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....<sup>[35]</sup>

20. 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”;<sup>36</sup> 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”

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<sup>34</sup> 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>.

<sup>35</sup> *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).

<sup>36</sup> 5 U.S.C. § 557(d)(1) (2000).

could be given of any such communication.<sup>37</sup> Therefore, the *ex parte* prohibition highlighted by Public Citizen, APA section 557(d)(1)(E),<sup>38</sup> would not apply to the pre-filing meetings at issue here.

21. 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 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.” 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”<sup>39</sup> 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).<sup>40</sup> “Noticed for hearing,” the Commission found in Order No. 607, refers

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<sup>37</sup> 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) (2006) (defining “party” in Commission proceedings), and 18 C.F.R. § 385.214(c) (2006) (discussing granting of party status in Commission proceedings).

<sup>38</sup> 5 U.S.C. § 557(d)(1)(E) (2000).

<sup>39</sup> 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, 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).

<sup>40</sup> 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) (2006); 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

to formally setting a proceeding for hearing.<sup>41</sup> 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 when the Commission issues an order<sup>42</sup> 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 that “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.<sup>43</sup>

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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.

<sup>41</sup> Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,891 & n.95.

<sup>42</sup> The Commission, a five-member agency (*see* 16 U.S.C. § 792 (2000); 18 C.F.R. § 376.102 (2006)), 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.

<sup>43</sup> *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 notice of the filing is issued and published in the *Federal Register*, comparatively few filings are set for trial-type hearings.

#### 4. Commission Rule 2201 Does Not Conflict with the APA

22. Our regulations are, in fact, consistent with the APA. Like the APA, our regulations prohibit off-the-record communications in any “contested” proceedings.<sup>44</sup> 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.*”<sup>45</sup> 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 docketed proceeding at the Commission, and there was no intervenor disputing a material issue in a docketed proceeding at the Commission.<sup>46</sup> In short, prior to filing, just as the APA would not have applied, Rule 2201’s prohibitions on *ex parte* communication did not apply,<sup>47</sup> and pre-filing meetings like those at issue here were not prohibited.<sup>48</sup>

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<sup>44</sup> 18 C.F.R. § 385.2201(a), (b) (2006).

<sup>45</sup> 18 C.F.R. § 385.2201(c)(1) (2006) (emphasis added); *accord* Order No. 607-A, FERC Stats. & Regs. ¶ 31,112 at 31,925 & n.6.

<sup>46</sup> Moreover, just as our regulations did not preclude Duke/Cinergy 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 Duke/Cinergy 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.

<sup>47</sup> 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 —

(continued)

23. 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).<sup>49</sup> 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."<sup>50</sup>

24. 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

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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 (2006) (providing for informal advice by Commission staff); 18 C.F.R. § 2.1a (2006) (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) (2006), if the Commission were 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 (2006) (providing for informal advice by Commission staff); 18 C.F.R. § 2.1a (2006) (soliciting suggestions, comments, and proposals from the public, including persons regulated by the Commission).

<sup>48</sup> 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.

<sup>49</sup> 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.").

<sup>50</sup> Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,880-81 (extending *ex parte* prohibition to contested proceedings).

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.<sup>51</sup>

**B. Use of One Consulting Firm**

25. Public Citizen alleges that the Merger Order does not adequately explain why consumers are not harmed by having one consulting firm, paid for by the applicants, provide analyses that are unchallenged by evidentiary hearings. Public Citizen asserts that a merger of this magnitude should not be decided based on analysis supplied by the merging companies. It requests an evidentiary hearing to determine whether the hired consultant “is prejudiced in favor of the companies that pay his fees.”

26. Public Citizen argues that evidentiary hearings are needed to provide intervenors with the opportunity to challenge the Commission’s merger review analysis in this and every other major merger filed in 2005. It further states that the Commission’s reliance on prejudiced analyses is in contrast to the independent analyses used by other federal anti-trust agencies, such as the Department of Justice and the Federal Trade Commission

27. We deny Public Citizen’s request that we hold a formal evidentiary hearing before an administrative law judge on this matter. As we explained in the Merger Order, the Commission does not determine the individual or the consulting firm that applicants use to perform merger analyses. We recognized that expert witnesses are paid by one party or another and noted that we are alert to the possibility of bias in their analyses; we stated that we do not find anything inherently wrong with a particular firm or individual performing analyses in a number of cases. The Commission thoroughly examined Applicants’ witness’s analysis, including the inputs and assumptions used in the model used to perform the Competitive Analysis Screen; the results of the analysis; and the interpretation of those results. We explained in the Merger Order that, even under the least favorable assumptions in the analysis, the merger would not harm competition because it did not result in the elimination of a competitor in any relevant market.<sup>52</sup> Moreover, the testimony of Applicants’ economic witness, and all of his work papers, were available for review to all intervenors. Public Citizen had ample opportunity to challenge his analysis and to present its own. In fact, another protester, Santee Cooper, hired an expert economic witness to review the analysis of Applicants’ witness and to

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<sup>51</sup> See *Louisiana*, 958 F.2d at 1113.

<sup>52</sup> Merger Order, 113 FERC ¶ 61,297 at P 83.

perform his own analysis. Santee Cooper challenged and changed some of the key assumptions in the model used to perform the Appendix A analysis and the interpretation of the results of the Competitive Analysis Screen. Public Citizen has not shown that its opportunity to challenge the Applicants' witness's analysis was insufficient or that a formal hearing was necessary.

**C. Adequacy of Analysis of Market**

28. Public Citizen argues that the Commission erred in allowing Applicants' power marketing activities to be excluded from their market concentration analysis. Public Citizen states that despite the Commission's claim that "the Appendix A analysis does consider power marketing activity," the effect of power marketing can be temporary in nature, with contracts entered into for short-term purposes and sellers exploiting needs at peak hours. It says that this under-represents the companies' ability to exercise market power. Public Citizen states that this problem can be corrected by holding an evidentiary hearing.

29. We deny Public Citizen's request for rehearing on this point. As we stated in the Merger Order,

[t]he Commission's Appendix A analysis focused on capacity *controlled* by all potential sellers in the relevant market. Without control of capacity, whether through ownership of physical assets or through power purchase agreements, sellers cannot harm competition in wholesale energy markets. If Applicants (or any other potential suppliers) gain control of generation capacity through power marketing activities, the Appendix A analysis does consider power marketing activity, but the mere presence of a large power marketing operation, *per se*, does not, in itself, confer any additional market power on the merged firm, or on any other seller in the relevant market.<sup>53</sup>

Our analysis focused on control of capacity that can be sold into the relevant market, whether that control is through ownership or contract. The short-term contracts that Public Citizen refers to also would be available to other market participants, whether to serve their own load or to market the power to others. Public Citizen has not offered any evidence of actual control of capacity through short-term contracts; it has merely asserted that because the merged company would be a large power marketer, it conceivably could exploit the needs of customers at peak hours. We recognize that competitive conditions can vary across season and load levels; accordingly, our analysis looks at market

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<sup>53</sup> *Id.* P 73.

conditions in peak and off-peak periods in all seasons. Applicants performed an Appendix A analysis, analyzing the effect of the merger at peak and super-peak hours during the Summer, Winter, and Shoulder periods, and showed that the merger would not harm competition during those periods.

#### **D. Effect on Rates from Transfer**

30. Next, Public Citizen remarks that transferring power plants to Cinergy could cause rate increases. Further, Public Citizen maintains that this transfer of assets from Duke to Cinergy violates the Commission's rules regarding the transfer of assets between affiliates. In support, Public Citizen cites a filing by the Office of the Ohio Consumers' Counsel in an Ohio state proceeding.<sup>54</sup>

31. We deny Public Citizen's request for rehearing. As we found in the Merger Order, we agree with Applicants' assertion that no ratepayer will pay for the costs of the DENA plants because, under the PUC-Ohio order regarding CG&E's market-based default rates, only costs associated with existing generation – not newly-acquired generation – can be recovered.<sup>55</sup> In addition, Applicants' hold harmless commitment will shield ratepayers from adverse rate impacts related to the transfer of the DENA plants.

#### **E. Duke's Track Record**

32. Public Citizen further argues that the Commission failed to address the concerns that it raised about Duke's alleged track record of cheating consumers. It lists a number of settlements and fines issued by the Commission, the Commodities Futures Trading Commission and the California Independent System Operator Corp. relating to Duke. It argues that Applicants have not shown that Duke has made sufficient management changes to convince consumers that the company can be trusted. Public Citizen rejects Applicants' claim that the merger "will build on the reputations of both Duke and Cinergy as responsible corporate citizens."<sup>56</sup> It renews its demand that Duke provide a

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<sup>54</sup> Request for Rehearing at 8 (citing *Initial Comments on Staff Recommendations by the Office of the Ohio Consumer's Counsel*, Case No. 05-732-EL-MER (Dec. 1, 2005), available at <http://www.puco.ohio.gov> (stating that "it is not clear that the current RSP or Commission rules would prevent CG&E from passing through to customers the uneconomic power from these assets....")).

<sup>55</sup> Merger Order, 113 FERC ¶ 61,297 at P 122.

<sup>56</sup> Request for Rehearing at 9.

detailed description of what management changes have occurred that will convince consumers that the company can be trusted.

33. We deny Public Citizen's request for rehearing on this issue. In finding that the merger would not harm competition, we did not rely on Applicants' assertion that the merger would "build on the reputations of both Duke and Cinergy as responsible corporate citizens." Rather, we relied on an analysis of the merger's effect on the concentration of the relevant geographic and product markets. In addition, since the enactment of EPAct 2005, the Commission now has significant authority and resources to deter and punish companies engaging in the types of market manipulation described by Public Citizen.

#### **F. Environmental Risks**

34. Public Citizen states that the Commission failed to address its contention that the merger presents risks to the environment. Public Citizen states that Applicants' merger application claimed that their "commitment ... to proactively shape the climate change debate forms the basis for a substantial contribution to the development of a long-term carbon reduction strategy that will benefit both shareholders and the larger public interest."<sup>57</sup> In light of that stated commitment, Public Citizen requests that we require, as a condition of the merger's approval, that Applicants adopt a strategy to assess the cost that emissions will involve when evaluating the company's resource options.

35. We deny Public Citizen's rehearing request. Section 203 of the FPA, which governs our review of dispositions of jurisdictional facilities, does not contemplate that we consider the potential environmental effects of proposed transactions.<sup>58</sup> Further, we

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<sup>57</sup> Request for Rehearing at 10 (citing Merger Application at 17).

<sup>58</sup> Under 18 C.F.R. § 380.4(a)(16) (2006), approval of actions under FPA section 203 are categorically exempted from NEPA analysis. *See Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,128 ("The Commission has recognized that a particular merger can have environmental effects and has been willing to study the issue in an individual case where it is justified. We do not see the need to change our regulation, which explicitly addresses the possibility that an EA or EIS may, on rare occasions, be needed. However, both our categorical exclusion rule and the absence of environmental concerns from the list of three factors in this Policy Statement reflect the simple fact that most mergers do not present environmental concerns.") (footnote omitted); *see also Cal. Indep. Sys. Operator, Corp.*, 93 FERC ¶ 61,001, at 61,003 (2000) (Commission typically does not consider environmental impacts in section 203 and 205

did not rely on Applicants' above-noted statements regarding environmental matters in approving the merger, and we find that Public Citizen has not provided adequate justification in support of its desired additional merger condition.

### **G. Settlement Violation**

36. Public Citizen states that an informational filing made by Duke with the SEC five days after the Commission's approval of the merger disclosed new information revealing that the merger violates a Commission-approved settlement agreement that Cinergy entered into in 1994. According to Public Citizen, one of the main components of this global settlement was a detailed system for cooperative, coordinated post-merger regulation of Cinergy by state and federal regulators.<sup>59</sup> Public Citizen requests a hearing on whether the proposed merger would impair the effectiveness of Indiana state regulation with respect to PSI Energy, Inc., a Cinergy subsidiary, and its affiliates.

37. We deny Public Citizen's request for rehearing on the merger's effect on Indiana regulation. In this proceeding, the Indiana Utility Regulatory Commission (Indiana Commission) raised the concern that the merger would create a multi-state holding company covering some states in which rates are set by competitive forces and other states in which they are set by cost-based regulation. The Indiana Commission requested that we place the proceeding on a settlement track and condition our approval of the merger on state regulators retaining their authority regarding mergers that affect rates paid by retail ratepayers. In the Merger Order, we denied the Indiana Commission's requests, since the Indiana Commission's jurisdiction will be undisturbed. We also stated that PUHCA 2005 was not intended to prevent any state commission from exercising its jurisdiction under otherwise applicable law to protect utility customers and that the Indiana Commission would retain jurisdiction over the affiliate transactions with which it is concerned.<sup>60</sup> Here, Public Citizen raises the same concern, but does not present any evidence that the Indiana Commission would lose jurisdiction over affiliate transactions involving Cinergy and PSI Energy, Inc. We note that the Indiana Commission did not seek rehearing or clarification on this issue.

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proceedings because such actions are categorically excluded from NEPA analysis); *cf.* *Town of Norwood v. FERC*, 202 F.3d 392, 406-07 (1st Cir. 2000) (same).

<sup>59</sup> Request for Rehearing at 11, 12-13.

<sup>60</sup> Merger Order, 113 FERC ¶ 61,297 at P 131-32 (noting that the transfer is expected to occur after February 8, 2006, the date on which PUHCA 2005 would replace PUHCA 1935).

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 )

Magalie R. Salas,  
Secretary.