

UNITED STATES OF AMERICA 97 FERC ¶ 61,182
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

State-Federal Regional RTO Panels	Docket No. RT02-2-000
RTO Informational Filings, <u>et al.</u>	Docket No. RT01-1-000
Allegheny Electric Coop., Inc.	Docket No. RT01-2-000
Allegheny Power	Docket No. RT01-10-000
Duquesne Light Co.	Docket No. RT01-13-000
Avista Corp. <u>et al.</u>	Docket No. RT01-15-000
Southwest Power Pool, Inc.	Docket No. RT01-34-000
Avista Corp. <u>et al.</u>	Docket No. RT01-35-000
Arizona Public Service Co. <u>et al.</u>	Docket No. RT01-44-000
GridFlorida LLC, <u>et al.</u>	Docket No. RT01-67-000
GridSouth Transco L.L.C.	Docket No. RT01-74-000
Entergy Services, Inc., <u>et al.</u>	Docket No. RT01-75-000
Southern Company Services, Inc.	Docket No. RT01-77-000
San Diego Gas & Electric Co.	Docket No. RT01-82-000
Pacific Gas & Electric Co.	Docket No. RT01-83-000
California ISO Corp.	Docket No. RT01-85-000
New England Transmission Owners	Docket No. RT01-86-000

Docket No. RT01-2-000, et al.

-2-

Midwest ISO

Docket No. RT01-87-000

Ameren (Alliance Companies)

Docket No. RT01-88-000

Citizens Communications Co.

Docket No. RT01-89-000

Concord Electric Co.

Docket No. RT01-90-000

Southern California Edison Co.

Docket No. RT01-92-000

California Power Exchange Corp.

Docket No. RT01-93-000

NSTAR Services Co.

Docket No. RT01-94-000

New York Independent System Operator, Inc.

Docket No. RT01-95-000

Alliant Energy Corporate Services, Inc. et al.

Docket No. RT01-96-000

PJM Interconnection, L.L.C.

Docket No. RT01-98-000

Regional Transmission Organizations

Docket No. RM99-2-000

Open Access Same Time Information System Phase II Docket No. RM00-10-000

Alliance Companies

Docket No. ER99-3144-000

American Electric Power Service Co.

Docket No. EC99-80

Regional Transmission Organizations

Docket No. RT01-99-000

Regional Transmission Organizations

Docket No. RT01-100-000

Arizona Public Service Co. et al.

Docket No. RT02-1-000

National Grid USA

Docket No. EL01-80-000

Dayton Power and Light Company

Docket Nos. RT01-37-000

Illinois Power Company

Docket Nos. RT01-84-000

Docket No. RT01-2-000, *et al.*

-3-

Northern Indiana Public Service Company
Illinois Power Company

Docket Nos. RT01-26-000
Docket Nos. ER01-123-000

American Electric Power Company

Docket No. ER01-2995-000

Virginia Electric and Power Company

Docket No. ER01-2993-000

Illinois Power Company

Docket No. ER01-2999-000

Dayton Power and Light Company

Docket No. ER01-2997-000

Commonwealth Edison Company

Docket No. ER01-2992-000

International Transmission Company
and DTE Energy Company

Docket Nos. ER01-3000-000,
RT01-101-000, EC01-146-000

International Transmission Company

Docket No. ER00-3295-000

DTE Energy Company and
International Transmission Company

Docket No. EC01-137-000

Montana-Dakota Utilities Company

Docket No. EL01-116-000

Midwest Independent System
Operator, Inc.

Docket No. ER02-108-000

Regulations Governing Off-the-Record
Communications

Docket No. RM98-1-002

(Not Consolidated)

ORDER ANNOUNCING THE ESTABLISHMENT OF STATE-FEDERAL
REGIONAL PANELS TO ADDRESS RTO ISSUES,
MODIFYING THE APPLICATION OF RULE 2201 IN THE
CAPTIONED DOCKETS, AND CLARIFYING ORDER NO. 607

(Issued November 9, 2001)

The Commission believes an additional, more structured approach for communicating with state commissions on a variety of issues, including for the purposes of this order,

discussions on the formation of Regional Transmission Organizations (RTOs), will advance the public interest. Accordingly, the Commission announces the formation of State-Federal regional panels to address RTO issues, modifies the application of Rule 2201 (the Commission's *ex parte* regulations) to the RTO proceedings listed in the caption of this order, and clarifies Order No. 607,¹ the final rule promulgating the Commission's current *ex parte* regulations.

Establishment of State-Federal Regional Panels

From the time that Congress passed the Federal Power Act (FPA), the Commission has recognized the importance of state commissions' views on matters that come before the agency. Indeed, the FPA, as well as the Natural Gas Act, is replete with references to state-federal cooperation. *See, e.g.*, FPA § 209(b), 16 U.S.C. § 824h(b). At this time, the Commission wants to strengthen that cooperation by establishing State-Federal regional panels to address issues of mutual concern on a generic basis as well as in specific cases. The Commission believes that such panels will further the goal of receiving input from the states, help reduce the transaction costs for states engaged in Commission issues, and enhance the flexibility of the Commission's problem solving.

For the purposes of addressing key issues facing the Commission in the near-term, most of which are related to the development of RTOs and seams issues, the Commission plans to organize State-Federal regional panels to reflect the state interests affected by RTO developments since the issuance of Order No. 2000. The Commission will lay out the structure of specific panels, including all relevant docket numbers, in future notices.

Modification of the Application of Rule 2201 to the Captioned RTO Dockets

In Order No. 607, the Commission promulgated its current regulations governing off-the-record communications, and codified them at 18 C.F.R. § 385.2201 (Rule 2201). Among other things, the Commission provided that Rule 2201 would apply to all contested

¹Order No. 607, Regulations Governing Off-the-Record Communications, [Regs. Preambles July 1996 - Dec. 2000] FERC Stats. & Regs. ¶ 31,079 (1999); Order No. 607-A, Order on Rehearing and Clarification, [Regs. Preambles July 1996 - Dec. 2000] FERC Stats. & Regs. ¶ 31,112 (2000).

on-the-record proceedings, but that the Commission could, by rule or order, modify any provision of Rule 2201, as it applies to all or part of a proceeding, to the extent permitted by law. In addition, in Rule 2201, the Commission exempted certain types of communications from the coverage of the *ex parte* rules, although for some of these communications, it required that they be disclosed to the public through a notice published in the Federal Register.² As relevant here, the Commission distinguished between two types of communications with state agencies. Those communications with state agencies which are parties to a contested proceeding are prohibited; those communications with state agencies which are not parties to the proceeding are exempt. *See* 18 C.F.R. § 385.2201(e)(v).

The Commission believes that to facilitate the resolution of the many issues in the captioned RTO proceedings a modification of the application of Rule 2201 to those proceedings is appropriate. Therefore, the Commission modifies that application by declaring that it will treat, as exempt, communications between the Commission or its staff and state agencies which are parties in the captioned proceedings. Accordingly, and in recognition of the prohibition in the Administrative Procedure Act, 5 U.S.C. § 557(d), against *ex parte* communications relevant to the merits of a proceeding between an agency's decisional staff and interested persons outside the agency, the Commission reiterates that communications received by Commission decisional staff in the course of participating in the State-Federal panels will be placed in the decisional file of the pertinent proceeding. Also, in light of the level of controversy the RTO proceedings have generated to date, the Commission will further modify the application of Rule 2201 by requiring that the meetings of the panels be transcribed to ease the documentation of the panel discussions and to ensure fundamental fairness to other parties in the proceedings.³

²The disclosure and notice procedure works as follows. Any decisional employee who makes or receives a prohibited or an exempt off-the-record communication is obligated promptly to deliver to OSEC a copy of the communication, if written, or a summary of the substance of any oral communication. Next, OSEC places the written communication or summary of an oral communication in the non-decisional file (if a prohibited communication) or in the decisional record (if an exempt communication). Every 14 days OSEC publishes a notice in the Federal Register identifying exempt and prohibited communications. Parties then have an opportunity to respond to such communications. *See* 18 C.F.R. § 385.2201(f).

³The Commission emphasizes that the above modification to Rule 2201 applies to communications pertaining to the captioned proceedings, and any proceedings that may be listed in the notices to be issued in the future laying out the State-Federal regional

(continued...)

Clarification of Order No. 607

With respect to exempt off-the-record communications with *non-party* state agencies, the Commission takes this opportunity to clarify that it views the exempt status of such communication, and by analogy to the communications covered by the modification ordered herein, as permission to engage in such communications. In other words, by exempting them from the coverage of the *ex parte* rules, albeit subject to notice and disclosure, the Commission recognizes the importance of such communications to understanding better issues critical to the Federal and state governments.

The Commission orders:

- (A) The Commission staff will promptly organize State-Federal regional panels to address issues in the captioned proceedings along the lines discussed in this order.
- (B) The application of 18 C.F.R. § 385.2201 is modified to treat communications between state agencies that are parties to a Commission proceeding and the Commission or its staff as exempt rather than prohibited communications in the captioned proceedings for the purpose of the State-Federal regional panels announced in this order. The application of 18 C.F.R. § 385.2201 is further modified to require a transcript of the discussions of the State-Federal regional panels announced herein be made and placed in the relevant decisional records.

³(...continued)

RTO panels and only to discussions with state agencies that are *parties* to the proceedings. The normal application of Rule 2201 continues to apply to communications with *non-party* state agencies, *i.e.*, the disclosure and notice procedures described above.

- (C) Order No. 607 is clarified to the extent there is any doubt that the Commission considers the exempt status of communications with non-party state agencies as permitted.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.