

97 FERC ¶ 61, 356
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 385

(Docket No. RM02-5-000; Order No. 623)

Amendment to Rules Governing
Off-the-Record Communications

FINAL RULE

(December 21, 2001)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its regulations governing off-the-record communications. The revisions ensure that the regulations do not impede the Commission's ability to quickly address issues relating to national security which may arise within the context of pending proceedings and its ability to maintain the confidentiality of sensitive security-related information.

EFFECTIVE DATE: This final rule is effective [insert the date of publication in the FEDERAL REGISTER].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Amendment to Rules
Governing Off-the-Record
Communications

Docket No. RM02-5-000

ORDER NO. 623

FINAL RULE

(December 21, 2001)

I. BACKGROUND

The September 11, 2001 terrorist attacks have prompted the Commission to reexamine its rules governing prohibited off-the-record communications at 18 C.F.R. § 385.2201 (Rule 2201). Specifically, the Commission has determined that in the interest of national security, Rule 2201 should be amended so as not to impede the Commission from immediately addressing issues related to national security where that would require discussions, in particular with other government entities, off-the-record. The need to change Rule 2201 recently became apparent when the Commission was called upon to assess the national security implications of certificating an expansion to and reactivating the operations of the Cove Point LNG facilities in Calvert County, Maryland. *See Cove Point LNG Limited Partnership*, 97 FERC ¶ 61,181 (2001). In that situation, the rule frustrated the Commission's ability to talk to persons, including parties in the case, as

quickly as desired, without violating the existing prohibition on off-the-record communications. As a result, the Commission convened a technical conference to which it invited all parties and non-party state and Federal agencies that share jurisdiction or regulatory responsibilities over security matters that could be implicated by the Commission's actions in the proceeding. *See* 97 FERC ¶ 61,834-35. Subsequently, a transcript of the conference was placed in the non-public decisional file in the case. Access to that transcript was limited to the parties, on the condition that they sign a non-disclosure agreement. *See* "Notice to Parties," in Docket No. CP01-76, *et al.*, issued November 21, 2001.

II. DISCUSSION

The communications dilemma which the Commission faced in the *Cove Point* proceeding was due in large part to the current structure of Rule 2201, which prohibits any off-the-record communication between a Commission decisional employee and any person outside the Commission on the merits of any issue in a contested on-the-record proceeding. *See* 18 C.F.R. § 385.2201(b). Rule 2201 exempts certain off-the-record communications from this prohibition, subject to disclosure and notice.¹ As relevant

¹The notice and disclosure 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 the Office of the Secretary (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 record (if a prohibited communication) or in the decisional record (if

(continued...)

here, Rule 2201 exempts an off-the-record communication from anyone related to any emergency. *See* 18 C.F.R. § 385.2201(e)(1)(ii). The emergency exemption, however, was intended to cover events like earthquakes, floods, severe weather conditions, fires, or explosions that damage or threaten to damage FERC-regulated facilities, *i.e.* emergencies affecting a regulated entity's ability to deliver energy. *See* Regulations Governing Off-the-Record Communications, Order No. 607, FERC Stats. & Regs. ¶ 31,079 at 30,885 (Sept.15, 1999). At that time, neither the Commission nor anyone commenting on the proposed rule contemplated the vulnerability of the nation's energy infrastructure to terrorist attacks as part of the concept of "emergency" in Rule 2201. Indeed, Order No. 607's requirement of prompt notice and disclosure of such off-the-record communications indicates that the Commission did not consider that some of the information could be sensitive. As a separate matter, Rule 2201 also exempts, subject to disclosure and notice, written communications from non-party members of Congress (*see* 18 C.F.R. § 385.2201(e)(1)(iv)) and any communications from a non-party Federal, state, local or Tribal agency over a matter which the Commission and the other agency shares jurisdiction (*see* 18 C.F.R. § 385.2201(e)(1)(v)).

¹(...continued)

an exempt communication). Every 14 days OSEC publishes a notice in the Federal Register identifying both types of communications, to which parties then have an opportunity to respond. *See* 18 C.F.R. § 385.2201 (f) - (h).

Thus, as currently structured and as relevant here, Rule 2201 prohibits all off-the-record communications relating to emergencies with national security implications, oral off-the-record communications with non-party members of Congress, all off-the-record communications with State and Federal agencies with shared responsibilities and members of Congress who are parties in a proceeding, and all other persons, including licensees and certificate holders and their security personnel.

The Commission finds that the current scope of Rule 2201 is inadequate to enable it to carry out its licensing and other responsibilities under its organic statutes, to address possible breaches of national security through critical infrastructure vulnerabilities. In particular, we find that to the extent such circumstances require us to communicate with other government employees or anyone with whom we deem communication appropriate, we need to be able to do so without the restriction of the prohibition against off-the-record communications in Rule 2201. Therefore, we determine that Rule 2201 needs to be amended to treat all communications involving critical energy infrastructure matters as exempt communications, subject to a limited form of disclosure and notice. As explained below, while the communications may be with anyone, its disclosure will be limited to parties in a proceeding who sign non-disclosure statements. In our view, this amendment to Rule 2201 strikes the proper balance between maintaining the fairness of our proceedings and enabling us to protect sensitive information.

III. ANALYSES OF THE AMENDMENTS TO RULE 2201

As explained above, in the interests of national security, we will amend Rule 2201 in two respects. First, we will expand the exemptions to prohibited off-the-record communications by adding a new paragraph (viii) to 18 C.F.R. § 385.2201(e)(1), to permit any person to discuss off-the-record with the Commission and its decisional staff their concerns about any national security-related issue in a proceeding regarding a facility regulated by the Commission or a facility that provides Commission-regulated services. This exemption recognizes that the public interest favors a free flow of information involving the security of our nation, especially among Federal employees with a shared responsibility to protect our nation.

Second, we will amend the disclosure requirements under 18 CFR § 385.2201(g) by adding a new paragraph (3), which will treat national security-related communications as confidential, unless the Commission determines that such protection is unnecessary. Accordingly, this new paragraph requires that any such document, or the summary of the substance of any oral communication, be submitted to the Secretary and placed in the relevant non-public decisional file and made available only to parties to the proceeding in which the communications were made, subject to the parties' signing a non-disclosure agreement. Any responses to such off-the-record communications will also be placed in the non-public decisional file and held confidential. Should the Commission determine that the information is not sensitive national security information, it will place the

information, if written, or a summary of it, if oral, in the public record. This amendment to the disclosure requirements protects sensitive security-related communications so that they do not compromise public safety. At the same time, the amendment ensures that such communications do not undermine the procedural rights of the parties or the integrity of the Commission's decisional record by allowing the parties to rebut the information and to discern the basis of the Commission's decision by viewing actual information obtained through off-the-record communications with any person and relied upon by the Commission in reaching its decision.

IV. REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act² requires rulemakings either to contain a description and analysis of the impact the rules will have on small entities or a certification that the rule will not have a substantial economic impact on a substantial number of small entities. The Commission certifies promulgating this rule does not represent a major Federal action having a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

V. NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

The Commission concludes that promulgating this Final Rule does not represent a major Federal action having a significant adverse effect on the human environment under the Commission's regulations implementing the National Environment Policy Act (*see* 18

²5 U.S.C. 601-12 (1994).

C.F.R. Part 380). This rule is procedural in nature and therefore falls within the categorical exemptions provided in the Commission's regulations. Consequently, neither an environmental impact statement nor an environmental assessment is required. *See* 18 C.F.R. § 380.4(a)(1).

VI. PAPERWORK REDUCTION ACT STATEMENT

The Paperwork Reduction Act of 1995 (Pub. L. No. 104-13, 109 Stat. 163 (1995)) and the Office of Management and Budget's (OMB's) regulations (5 C.F.R. Part 1320) require that OMB approve certain information collection requirements imposed by agency rule. However, this rule contains no information collection requirements and therefore is not subject to OMB approval.

VII. ADMINISTRATIVE PROCEDURE ACT

Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, requires rulemakings to be published in the Federal Register. The APA generally mandates that an opportunity for comment be provided when an agency promulgates regulations. Notice and comment are not required, however, where a rule relates to (1) agency personnel or agency organization, procedure or practice or (2) when the "agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. § 553 (b)(A) and (B). The Commission finds that notice and comment are unnecessary for this rulemaking because the rule relates to Commission's rules of practice and procedure. Furthermore, the September 11

terrorist attacks and concerns raised regarding the Cove Point LNG facilities indicate that it would be contrary to the public interest to delay implementing regulations which would protect the country's critical infrastructure to give notice and seek comment.

VIII. EFFECTIVE DATE AND CONGRESSIONAL NOTIFICATION

The APA generally mandates that publication or service of a substantive rule not be made less than 30 days before its effective date. This waiting period is not required, however, for interpretative rules and statements of policy or as otherwise provided by the agency for good cause found. For the same reasons stated above, the Commission, therefore, finds good cause in accordance with 5 U.S.C. § 553(d)(3) to make these rules effective upon less than 30 days' notice. This Final Rule, therefore, will be made effective upon publication in the Federal Register.

The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to report to Congress on the promulgation of certain final rules prior to their effective dates. *See* 5 U.S.C. § 801. That reporting requirement does not apply to this Final Rule because it does not substantially affect the rights or obligations of non-agency parties, and therefore falls within a statutory exception for rules relating to agency procedures or practices that do not substantially affect the rights or obligations of non-agency parties.³

³5 U.S.C. 804(3)(C).

IX. AVAILABILITY OF DOCUMENTS

In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.fed.us>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, DC 20426.

From FERC's Home Page on the Internet, this information is available in both the Commission Issuance Posting System (CIPS) and the Records and Information Management System (RIMS).

- - CIPS provides access to the texts of formal documents issued by the Commission since November 14, 1994.
- - CIPS can be accessed using the CIPS link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 8.0 format for viewing, printing, and or/downloading.
- - RIMS contains images of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed from FERC's Home Page using the RIMS link or the Energy Information Online icon. Descriptions of documents back to November 18, 1981,

are also available from RIMS-on-the-Web; requests for copies of these and other older documents should be submitted to the Public Reference Room.

Users assistance is available for RIMS, CIPS, and the Website during normal business hours from our Help Line at (202)208-2222 (E-mail to WebMaster@ferc.fed.us) or the Public Reference at (202)208-1371 (E-Mail to public.referenceroom@ferc.fed.us).

During normal business hours, documents can also be viewed and/or printed in FERC's Public Reference Room, where RIMS, CIPS, and the FERC Website are available. User assistance is also available.

List of Subjects in 18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, and Reporting and record keeping requirements.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

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

TITLE 18 – [AMENDED]

PART 385 – RULES OF PRACTICE AND PROCEDURE

- 1. The authority citation continues to read as follows:

Authority: 5 U.S.C. 551-557; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 791a - 825r, 2601 - 2645; 31 U.S.C. 9701; 42 U.S.C. 7101 - 7352; 49 U.S.C. 60502; 49 App. U.S.C. 1 - 85 (1988).

- 2. Section 385.2201 Rules governing off-the-record communications. (Rule 2201).

* * * * *

In § 385.2201 paragraphs (e)(1)(viii) and (g)(3) are added to read as follows:

- (e) Exempt off-the-record communications.

- (1) * * *

(viii) An off-the-record communication from any person related to any national security-related issue concerning a facility regulated by the Commission or a facility that provides Commission-regulated services.

* * * * *

- (g) Disclosure of exempt off-the-record communications. * * *
- (3) Any document, or a summary of the substance of any oral communications, obtained through an exempt off-the-record communication under paragraphs (e)(1)(viii) of this section, will be submitted promptly to the Secretary and placed in a non-public decisional file of the relevant Commission proceeding and made available to parties to the proceeding, subject to their signing a non-disclosure agreement. Responses will also be placed in the non-public decisional file and held confidential. If the Commission determines that the communication does not contain sensitive national security-related information, it will be placed in the decisional file.

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