

101 FERC ¶ 61, 340  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Separation of Functions

Docket No. PL02-5-000

STATEMENT OF ADMINISTRATIVE POLICY  
ON SEPARATIONS OF FUNCTIONS

(Issued December 20, 2002)

1. The Commission adopts this statement of administrative policy on the separation of its staff's functions. The Commission believes generally that functions may be combined, that is, the same person may perform more than one function or perform a function that he typically does not otherwise perform, provided (1) such combination enhances the Commission's understanding of energy markets and related issues and (2) parties in individual proceedings appear to and actually receive a fair and impartial adjudication of their claims. Nothing in this statement of administrative policy should be construed as modifying the Commission's existing regulation on separation of functions at 18 C.F.R. 385.2202 (Rule 2202) or on prohibited off-the-record communications at 18 C.F.R. 385.2201 (Rule 2201). In brief, this statement of administrative policy addresses those situations where a Commission staff member may perform multiple functions without running afoul of the Administrative Procedure Act (APA), 5 U.S.C. 554(d)(2) and 557(d). Simply put, it examines "who may talk to whom when."

## I. BACKGROUND

2. The APA recognizes that Congress has generally vested Federal administrative agencies with both the power to initiate actions to enforce compliance with their statutes and the responsibility of ultimately determining the merits in those cases.<sup>1</sup> "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process."<sup>2</sup> Nevertheless, APA § 554(d)(2) directs Federal agencies to separate functions to prevent contamination of judging by the performance of inconsistent functions. A bedrock of Anglo-American jurisprudence, the principle briefly stated is that "no person can be a judge in his own cause."<sup>3</sup> The Commission has applied this direction and principle in Rule 2202, which, generally speaking, prohibits communications between its advisory and trial staffs in the same proceeding. This statement of administrative policy is not intended to modify Rule 2202, but rather to elaborate on it. As the Commission gains experience in implementing the policy articulated here, it may consider amending Rule 2202 to codify further its guidance on separation of functions.

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<sup>1</sup> See *FTC, et al. v. Cinderella Career and Finishing Sch., Inc., et al.* 404 F.2d 1308, 1315 (D.C. Cir. 1968).

<sup>2</sup> *Id.* (internal quotation marks and citations omitted).

<sup>3</sup> Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8 (4th ed. 2002) (citing *Bonham's Case*, S Co. 14a, 118a (1610)(translated from Latin)).

3. The Commission's staff performs many functions to enable the Commission to fulfill its responsibilities under its enabling statutes, *inter alia*, to ensure that public utilities and natural gas and oil pipelines charge just and reasonable rates and provide nondiscriminatory service, and to protect the public and the environment in the construction and operation of hydropower and natural gas pipeline projects. These many functions are frequently complex, and include: (1) the review of rate and other tariff filings; (2) the litigation of rate filings and other matters; (3) the auditing of companies' accounts; (4) the preparation of environmental documents; (5) the economic and engineering analysis of project applications; (6) the promulgation of rules and issuance of policy statements; (7) the resolution of disputes; (8) the monitoring of markets; (9) the enforcement of regulations and law; and (10) the communication with the public on Commission rules and policy.

4. At all times, the Commissioners function as the ultimate decisionmakers.<sup>4</sup> Commission staff's functions, however, are varied. Sometimes, as noted, they perform functions simply referred to as either advisory or trial – a bright-line characterization of the separation of functions principle reflected in Rule 2202. That rule states (with emphasis added):

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<sup>4</sup> See *Withrow, et al. v. Larken*, 421 U.S. 35, 50 (1975) (pointing out that 5 U.S.C. 554(d) expressly exempts "the agency or a member or members of the body comprising the agency").

In any proceeding in which a Commission adjudication is made *after* hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

The Commission has generally viewed "hearing" in this context to mean a trial-type evidentiary hearing before an Administrative Law Judge (ALJ), and accordingly has applied Rule 2202 in that context.<sup>5</sup> In addition, the Commission has found that separation of functions is not required in rulemakings.<sup>6</sup>

5. Generally, the Commission's advisory staff literally "advises" the Commission by preparing memoranda and draft orders, opinions, and rules for its consideration in specific docketed proceedings, and the Commission's trial staff literally "tries" cases in

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<sup>5</sup> See, e.g., *Panhandle Eastern Pipe Line Co.*, 41 FERC ¶ 61,202 at 61,525 (1987) ("Since the case was never set for an adjudicatory hearing, the Commission's rules pertaining to separation of functions do not apply. . . ."); *Seagull Shoreline System*, 41 FERC ¶ 61,325 at 61,860 n.6 (1987) (finding staff panel proceeding to determine whether rates are fair and reasonable under NGPA is an advisory proceeding, not an adjudication, and therefore separation of functions does not apply); *Mustang Fuel Corp.*, 31 FERC ¶ 61,265 at 61,535 (1985) (finding that separation of functions rule does not apply to non-evidentiary proceedings such as staff panel proceedings, but separation of functions was maintained as a matter of administrative discretion); *Tenneco Oil Co.*, et al. 27 FERC ¶ 61,489 at 61,956-57 (1984) (finding that special marketing program proceedings not set for hearing are not adjudicatory and receipt of staff advice was proper); *Tenneco Inc.*, et al. 14 FERC ¶ 61,097 at 61,182 (1981) (finding that declaratory order proceeding is not an adjudication subject to separation of functions).

<sup>6</sup> See *Mustang Fuel Corp.*, 31 FERC ¶ 61,265 at 61,537 n.50 (1985). See also U.S. Department of Justice Attorney General's Manual on the Administrative Procedure Act 50 (1947) ("Rule making, of course, is not subject to [5 U.S.C. 554]").

such proceedings before the Commission's ALJs. But the Commission has many staff members who are not trial staff but who also are not the traditional advisory staff. These include staff members who monitor the energy markets, investigate and enforce alleged violations of the law, audit companies' books, work with other Federal and state agencies on environmental matters, facilitate resolution of disputes, and communicate agency policy and action to the Congress, state officials, and the public.

6. Separating the Commission's functions has become more challenging recently because of fundamental changes in the industries regulated by the Commission, as well as the imperative for the Commission to oversee markets and reach out to members of the industry, state commissions, and citizen groups in pursuing its market-oriented goals. The Commission wants to be able to be open and responsive to those outside the Commission, and at the same time have access to advisors with the required expertise to aid the decision making process. Thus, as the Commission's resources are limited, a combination of certain functions may be necessary to take advantage of that expertise while ensuring the integrity of the decision making process in pursuit of the important public interest objective of resolving critical matters correctly and on a timely basis.

7. Separating the Commission's functions is also complicated by the important and necessary prohibition of off-the-record communications in Rule 2201. Promulgated to protect the due process rights of those participating in Commission proceedings, Rule 2201 (also known as the *ex parte* rule) prohibits off-the-record communications between

Commission "decisional" staff and persons outside the Commission on the merits of any issue in a contested on-the-record proceeding.<sup>7</sup> A "decisional employee" is defined as a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee or contractor of the Commission, who is or may reasonably be expected to be involved in the decisional process of a proceeding. *See* 18 C.F.R. 385.2201(c)(3). A "non-decisional employee" is a member of the Commission's trial staff in a proceeding, a settlement judge, a neutral (other than an arbitrator) in an alternative dispute resolution proceeding, or an employee designated as non-decisional in a case. *Id.* Both definitions presuppose an on-going on-the-record proceeding in which persons have filed a complaint or have intervened and protested a filing or proposal, and the issues are being litigated or have been litigated before an ALJ or are being adjudicated in on-the-record "paper" hearings that will be decided by the Commission.<sup>8</sup>

8. The separation of functions and *ex parte* rules address two distinct types of situations: one involving communications within the Commission and the other

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<sup>7</sup> Such proceedings do not include notice-and-comment rulemakings under 5 U.S.C. 553, investigations under 18 C.F.R. Part 1b, or proceedings without parties. *See* 18 C.F.R. 385.2201(c)(1)(ii).

<sup>8</sup> A "paper hearing" refers to the Commission's adjudicating or processing a filing, complaint, or other claim by using procedures such as technical conferences and data requests, and by analyzing the issues through the review of the various pleadings submitted by the parties. *See generally Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (holding that FERC may resolve factual issues on a written record where no material disputes exist); *Louisiana Ass'n of Independant Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (same).

involving communications between Commission personnel and persons outside the Commission, respectively. As described in the House Committee Report on the Government in the Sunshine Act, which amended the APA in 1976, the *ex parte* "rule forbids . . . communications between interested persons outside the agency and agency decision makers. . . . Communications solely between agency employees are excluded from the section's prohibitions."<sup>9</sup> Nevertheless, the two rules can collide where a Commission non-decisional employee engages in a permissible *ex parte* communication but is confronted with the opportunity to discuss the matter with Commission decisional employees. In that situation, as discussed below, the non-decisional employee must separate his function and refrain from conveying the communication to the decisional employee.

9. The two rules can also interact, or at least raise concerns, where an employee's function falls somewhere between the traditional litigation and advisory roles, that is, where the employee is not typically a member of the Commission's litigation staff, but also is not involved in the day-to-day processing of filings and advising the Commission on particular contested cases. In that situation, as also discussed below, the employee is considered decisional for the purposes of Rule 2201. Thus, while he may discuss with the Commission information he has obtained from the industry and the public, he may

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<sup>9</sup> 1976 U.S.C.C.A.N. 2183, 2202.

not receive or convey any information on issues in on-going contested on-the-record proceedings.

## II. LEGAL CONSIDERATIONS

10. Against this backdrop, the Commission's objective here is to craft a policy on separation of functions that will balance the imperative to be kept fully informed by the agency's expert staff, who necessarily need to talk to the public and members of the industry, and the requirement to protect the due process rights of persons participating in Commission proceedings. The law on separation of functions is murky at best, in large part because of the incredible variety of functions performed by the many Federal agencies.<sup>10</sup> Consequently, as "one size does not fit all," the Commission must examine these issues specifically in the context of its own functions and needs, informed as much as possible by APA case law involving other agencies.

11. To this end, the Commission believes that the place to start is the "separation of function" rule in the APA, which provides:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply (A) in

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<sup>10</sup> See generally Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759 (1981)("Asimow"). See also *Withrow, et al. v. Larken*, 421 U.S. at 52 ("The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.").

determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers; or (C) to the agency or a member or members of the body comprising the agency.

5 U.S.C. 554(d)(2). Subject to many interpretations and nuances, this rule has generally been viewed as foreclosing staff adversaries from advising the agency's decision making personnel.<sup>11</sup> While a subordinate purpose is to safeguard the record from off-the-record communications, the rule's "primary purpose is to exclude staff members whose "will to win" makes them unsuitable to participate in decision making."<sup>12</sup>

12. As a practical matter, the Commission has implemented APA § 554's mandate in Rule 2202 by separating its staff into advisory and trial staff once a filing, complaint, or investigation has been set for a trial-type evidentiary hearing before an ALJ. That has been the case even though APA § 554 explicitly excludes from its coverage the Commission's two major functions – licensing and ratemaking.<sup>13</sup> Thus, for example, the Commission has applied Rule 2202 to electric and gas rate filings and hydropower and gas pipeline licensing applications that were set for trial-type evidentiary hearing; conversely, the Commission has not applied Rule 2202 to such filings and applications –

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<sup>11</sup> See generally Asimow at 147-52.

<sup>12</sup> *Id.* at 154 (emphasis added).

<sup>13</sup> In *American Tel. and Tel. Co., et al. v. FCC*, 449 F.2d 439 (2d Cir. 1971), the court also observed that "adjudications" under the APA exclude "rulemaking," and found that Federal Communications Commission orders setting prospective rates have the effect of a rule.

regardless of their complexity or record size – that were processed by its advisory staff through "paper hearings."<sup>14</sup>

13. As a consequence, for example, the Commission's ALJs currently serve as true trial judges, generally not consulting advisory staff, and ensuring that the trials are a separate and distinct aspect of the decision making process. On the other hand, the Commission's advisory staff conduct technical conferences where they discuss issues with the parties, and subsequently advise the Commission on the appropriate course of action. The Commission has not separated these latter functions – nor does it intend to do so now – even though staff's participation in the technical conferences may have on occasion appeared to have been adversarial. Furthermore, under APA § 554, the Commission would not necessarily have to separate any functions in the licensing and ratemaking areas.<sup>15</sup> Nevertheless, when the Commission has chosen to set certain cases,

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<sup>14</sup> Compare *Transcontinental Gas Pipe Line Corporation*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998)(major gas pipeline rate case set for hearing); and *Union Electric Co. and Central Illinois Public Service Co.*, Opinion No. 417-B, 82 FERC ¶ 61,093 (1998)(major public utility merger application set for hearing) with *Tennessee Gas Pipeline Co.*, 68 FERC ¶ 61,001 (1994)(major gas pipeline restructuring proceeding not set for hearing); and *City of Tacoma, Washington*, 84 FERC ¶ 61,107 (1998)(major hydropower relicensing case not set for hearing).

<sup>15</sup> Indeed, in the hearings before a Senate Subcommittee to amend the APA in 1965, then Federal Power Commission Chairman Joseph Swidler testified that "[t]he activities of the [Commission], both in the ratemaking areas and in its licensing and certificate work as well, are essentially legislative, with the problems being the application to the complex but normally undisputed facts of record of the policy judgments of the Commissioners . . . ." *Administrative Procedure Act: Hearing on Bills S. 1160, S. 1336, S. 1758 and S. 1879 Before the Senate Subcommittee on*

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in particular rate cases, for hearing, it has separated, or not combined, the trial and advisory functions in factually-related proceedings regardless of the subject matter.<sup>16</sup>

14. In sum, especially with respect to regulatory agencies like the Commission, the APA does not require that there be a rigid line drawn between functions. Rather, the APA strikes a balance between "fairness and pragmatism."<sup>17</sup> Thus, the protection of fair decisions can be balanced against the efficient use of staff resources so that the Commission may have access to the expertise that it needs to make sound decisions in highly technical, complex, or novel situations. At bottom, due process requires that there

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<sup>15</sup>(...continued)

Administrative Practice and Procedure of the Committee on the Judiciary, 89th Cong. 464 (1965).

<sup>16</sup> There appears to be no clear definition of a "factually-related" case. In *Marshall v. Cuomo*, 192 F.3d 473 (4th Cir. 1999), for example, the court found that the Department of Housing and Urban Development (HUD) did not violate the APA separation of functions rule where two HUD employees involved in investigating and prosecuting a Washington case acted as supervisors to the hearing official in a Chicago case related to an affiliated entity, because the matters involved separate subsidized housing and separate agreements about rental assistance payments. Likewise, in *Au Yi Lau, et al. v. INS*, 555 F.2d 1036, 1043 (D.C. Cir. 1977), the court found no APA violation on the basis of the affidavit of the Chairman of the Immigration Appeals Board, whose previous employment was under challenge, who swore he had no knowledge of the case or any other case arising out of the same transaction prior to his joining the Board.

<sup>17</sup> See *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1305 (D.C. Cir. 1975).

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be an impartial decision maker to ensure that decisions are reasoned and unbiased and that all affected parties can play a meaningful role in the decision making process.<sup>18</sup>

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<sup>18</sup> See generally Asimow at 161-70.

### III. POLICY ON SEPARATING FUNCTIONS

15. The Commission now adopts the following statement of administrative policy for separating its staff's functions. This statement lays out the function by policy, which for the most part corresponds to the Commission's program and legal offices, and, where relevant, explains the relationship between the function and the *ex parte* rule. It mainly explores "who may talk to whom when," and focuses understandably on who may talk to the decision makers and their advisors, as the concern of the APA is the integrity of the decision making process. As noted, the Commission generally believes that functions may be combined provided (1) such combination enhances the Commission's understanding of energy markets and related issues and (2) parties in individual proceedings receive a fair and impartial adjudication of their claims. Nothing in this policy should be construed as modifying either Rule 2202 (separation of functions rule) or Rule 2201 (*ex parte* rule).

16. For purposes of applying this statement of administrative policy, one may assume that if a staff member who typically performs one function is assigned to perform another function in a specific case, he is bound by the rules applicable to the function for that case. In other words, the policy follows the function.<sup>19</sup> As a separate matter, for purposes

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<sup>19</sup> For example, if a market overseer is assigned to work with a litigation team, he would be subject to the rules applicable to a litigator with respect to that litigation.

of applying this statement of administrative policy, "factually-related" refers to cases triggered by the same filing or arising out of the same set of facts.<sup>20</sup> The Commission recognizes that this is a relatively narrow definition of "factually-related," but a broader definition could impede the Commission in carrying out its responsibilities, given the tremendous overlap between companies and between issues in Commission cases.

## **A. Litigation**

### **1. Relevant Offices**

17. The litigation function is staffed primarily by the Office of Administrative Litigation (OAL). OAL, which is composed of technical and legal staff members, participates in trial-type evidentiary hearings and settlement judge proceedings, representing the public interest in proceedings related to all areas of the Commission's jurisdiction.<sup>21</sup> (As discussed below in III. B., investigators in Office of Market Oversight

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<sup>20</sup> For example, factually-related cases include: the compliance phase of a proceeding and the original proceeding; and a litigated case on issues carved out of a settlement and the settlement part of the proceeding. Cases that would not be factually-related include: an original licensing proceeding and a relicensing proceeding involving the same hydroelectric project; and a rate case for a locked-in period and a rate case for the same company for a later period.

<sup>21</sup> In addition, the Commission has appellate litigators in its Solicitor's Office. As most cases handled by that office must (or should) be final to be reviewed by the courts, *see* 16 U.S.C. 824l (Federal Power Act) and 15 U.S.C. 717r (Natural Gas Act), there are generally no *ex parte* or separation of function issues for the Commission's appellate litigators. Likewise, the appellate litigators are not constrained by either rule where they are called upon to defend the Commission against stay requests or motions to enjoin the agency, or in the rare situation where they file a complaint on behalf of the Commission.

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and Investigations at times also serve as litigators. Also, as described in Paragraph 45, the Commission may designate an advisor as non-decisional to function as a litigator.)

## **2. Functions**

18. The litigation function begins when the Commission by order sets a matter for trial-type evidentiary hearing before an ALJ or institutes a settlement judge proceeding. *See generally* 18 C.F.R. Part 385, Subparts D-H. It may also be triggered where the Commission remands a case for further examination at trial. In these situations, litigators take an adversarial role, conducting discovery, negotiating settlements, filing testimony, appearing as witnesses, cross-examining witnesses, and drafting motions, answers, and initial and reply briefs. The litigation ends when the parties settle or the record closes after the ALJ issues an initial decision and the parties, including the Commission's litigators, have filed briefs on and opposing exceptions. The litigation function, however, for purposes of separation of functions, continues throughout the time that the Commission is considering the case, including the period when any rehearing requests are pending.

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<sup>21</sup>(...continued)

In these cases, the appellate litigators must be able to talk to persons inside FERC to understand the issues and to persons outside FERC to facilitate resolving the issues before the court.

### 3. Who May Talk To Whom When

19. Rule 2202 in particular governs discussions between a litigator and other members of the Commission's staff. As provided there, the litigator must separate his function from other functions once a matter is set for trial-type evidentiary hearing. Accordingly, until that time, a staff member who may ultimately be a litigator in a case may discuss the matter with anyone at the Commission, including the decision makers and their advisors. In effect, until that time, the "litigator," *i.e.*, typically a staff member in OAL, would not be serving a litigation function. Accordingly, he may analyze tariff filings, review and help draft hearing orders, and participate in technical conferences. At this early stage in a proceeding, a would-be litigator would not have the "will to win" underlying the separation of functions rule so the protection of the process would be fairly balanced by the experience the litigator can contribute. He may also review and help draft other orders, including rehearing orders, provided the case was not set for hearing and did not involve a matter factually related to a case set for trial-type evidentiary hearing.<sup>22</sup>

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<sup>22</sup> While theoretically an OAL staff member could also review and draft final orders in cases set for hearing if he did not participate in the hearing, as a practical matter, such involvement in the order drafting process may be administratively difficult to carry off without running afoul of Rule 2202. An OAL supervisor, however, may discuss a case in litigation with decision makers and their advisors until he participates in the case. See *Au Yi Lau v. INS*, 555 F.2d at 1043 (permitting uninvolved supervisor of trial division to be appointed as decision maker); *R.A. Holman & Co., Inc., v. SEC*, 366 F.2d 446, 451-54 (2d Cir. 1966)(allowing former prosecutor supervisor to serve as decision maker provided he had not been personally involved in prosecution). See also Asimow at 157 n. 80.

Further, he may participate informally in the Commission's rulemakings (that is, he may review and help draft rules, and discuss the issues with the advisors and would not need to file formal comments), and otherwise contribute to generic policy discussions. In addition, he may perform other functions normally associated with staff who reach out and provide information to the public about Commission action.

20. Once a case is set for trial-type evidentiary hearing, a litigator may no longer serve an advisory function or give advice on the merits in that proceeding or in a factually-related proceeding, even after the record closes before the ALJ. That, of course, is what Rule 2202 requires. The reasons are twofold. Primarily, the litigator is assumed to have the "will to win" that could skew the impartiality of the proceeding if he were to speak to the Commission or its advisors. To do so would mean that he was acting as both prosecutor and judge in the same proceeding. Indeed, while the APA contains an exception for "the agency or a member or members of the body comprising the agency," *see* 5 U.S.C. 554(d)(2)(c), that exception is generally believed to preclude the agency's members from receiving advice from staff adversaries.<sup>23</sup> Also, as a practical matter, the litigator cannot function efficiently without speaking off-the-record to parties in the proceeding. Accordingly, he would taint the proceedings if he communicates case-

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<sup>23</sup> See Michael Asimow, *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 Tulsa L.J. 297, 316 n. 120 (1996). ("[T]he statute permits only non-adversaries to give advice.").

specific information gleaned from otherwise permissible communications with persons outside the agency to the decision makers and their advisors. See also *infra* note 42 and paragraph 27.

21. Additionally, a litigator may not, without the prior agreement of all parties, explain to decision makers and their advisors, off-the-record, a contested settlement agreement.<sup>24</sup> The reason is obvious – the proceeding is still adversarial. The same policy is unnecessary, however, for truly uncontested settlements because there no longer exists any controversy.<sup>25</sup> Thus, for example, litigators may explain the uncontested settlement to the advisors. Such communication would not impair the Commission's independent obligation to ensure that even uncontested settlements are in the public interest, because, notwithstanding any discussion between these staff members, the Commission always has the "last word."

22. On the other hand, as noted, the litigator may talk to others at the agency on matters of general policy, as the separation of functions rule does not prohibit such communications as long as they are not a subterfuge for prohibited *ex parte* communications.<sup>26</sup> He may also receive a briefing from advisors on the policy

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<sup>24</sup> Axiomatically, the parties in any proceeding may waive or otherwise qualify their protections under Rule 2201 or Rule 2202.

<sup>25</sup> Uncontested settlement means just that – no conditional objection or reservation from even one party or from the litigators.

<sup>26</sup> See *McDowell County Consumers Council, Inc. v. American Electric Power*  
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implications of a case, as long as that communication is from the advisors and not to them. That is, any information flow may be down from the advisors, but *never* up to them from the litigator. In addition, the litigator may communicate with advisors about strictly-speaking procedural matters, *e.g.*, to inquire about the status of a related proceeding or to convey parts of the record for consideration by the Commission. At all times in these procedural exchanges, the litigator must avoid discussing anything substantive or opining in any way about the issues or the record.<sup>27</sup>

## **B. Investigation and Enforcement**

### **1. Relevant Offices**

23. The Commission's investigation and enforcement function is primarily staffed by the Office of Market Oversight and Investigations (OMOI), which, *inter alia*, manages the Enforcement Hotline; investigates alleged violations of orders, rules and regulations; informally facilitates resolution of disputes; and advises the Commission on, and at times litigates, formal enforcement cases. In addition, the Office of the Executive

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<sup>26</sup>(...continued)

Co., *et al.*, 23 FERC ¶ 61,142 at 61,320 (1983) (finding no unfairness in trial staff's having greater access than persons outside the Commission to policy views and discussions at the Commission).

<sup>27</sup> See *Greenburg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 167 (2d Cir.1992) (finding that law clerk who formerly prosecuted case did not violate the APA separation of functions by performing only a ministerial role in adjudicating case).

Director/Division of Regulatory Audits (OED/DRA) performs a type of investigative function by conducting financial and performance audits of regulated companies.

## 2. Functions

24. Investigators conduct preliminary and formal investigations, which may be either public or private. *See generally* 18 C.F.R. Part 1b.<sup>28</sup> They accomplish their mission by gathering information, sometimes obtained initially through the Enforcement Hotline, auditing compliance with Commission rules and reporting requirements, and investigating actions of market participants. Investigators frequently resolve disputes, and reach settlements on violations by market participants, through informal procedures. If such matters cannot be resolved informally, investigators may advise the Commission on how to proceed, *e.g.*, by recommending that the Commission issue a show cause order, set the matter for hearing, direct staff to pursue further a particular matter, or terminate the investigation.<sup>29</sup> As relevant here, there are no parties and no person may

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<sup>28</sup> For purposes of this statement of administrative policy, unless indicated otherwise, "investigation" refers to 18 C.F.R. Part 1b investigations and "investigators" refer to the staff members who conduct such investigations. This is to be distinguished from the "investigations" that the Commission establishes under the Federal Power Act, the Natural Gas Act, and the Interstate Commerce Act to examine the rates and terms and conditions of service of public utilities, natural gas pipelines, and oil pipelines, respectively. This latter type of "investigations" is initiated by companies' filing rate changes or in response to a formal complaint, and are traditionally pursued through either trial-type evidentiary hearings, conducted by the Commission's ALJs and litigation staff, or "paper hearings," processed by the Commission's advisory staff.

<sup>29</sup> See, *e.g.*, Order Directing Staff Investigation of Electric Bulk Power Markets, 92 FERC ¶ 61,160 (2000); Order Directing Staff Investigation of Potential Manipulation (continued...)

participate as a matter of right in an investigation.<sup>30</sup> Sometimes, the Commission also directs its investigators to pursue formal complaints filed with the Commission.<sup>31</sup>

25. For their part, OED/DRA auditors perform financial audits by reviewing the accounting records and financial statements of jurisdictional companies to determine if they comply with requirements of the Uniform Systems of Accounts and related Commission regulations. They perform reviews of management operations through performance audits, which are objective and systematic examinations of performance of a program, activity, or function in order to provide information to improve public accountability and facilitate decision-making by parties with responsibility to oversee or initiate corrective action.

### **3. Who May Talk To Whom When**

26. Unless an investigator is assigned to serve as a litigator, she may freely speak to persons inside the Commission about an investigation, and outside the Commission subject to 18 C.F.R. 1b. 9, which requires, *inter alia*, Commission staff to treat as non-public the existence of an investigation and any information received during it, unless the

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<sup>29</sup>(...continued)  
of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002).

<sup>30</sup> See 18 C.F.R. 1b.11; see also *Columbia Gas Transmission Corporation*, 85 FERC ¶ 61,437 at 62,641 n. 12 (1998), *aff'd*, *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001).

<sup>31</sup> See, e.g., *Chesapeake Panhandle Limited Partnership v. Natural Gas Pipeline Co. of America, et al.*, 92 FERC ¶ 61,082 (2000).

Commission orders otherwise.<sup>32</sup> (If she serves as a litigator, then she must separate her functions as discussed below in III. A.) Technically, this is the case because there are no parties in an investigation, *see Baltimore Gas & Electric v. FERC*, 252 F.3d at 461, and nothing has been set for a trial-type evidentiary hearing. Therefore, the investigation triggers neither Rule 2201, which assumes a proceeding with parties, nor Rule 2202, which assumes a trial-type evidentiary hearing. Accordingly, the investigator may speak to decision makers and their advisors throughout her investigation (up to the point where she may be assigned to be a litigator), providing them with details of the investigation, seeking their input on how to proceed, and discussing settlement with them. Proceeding in this way does not compromise the Commission's decision making process, because the "mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [Commissioners] at a later adversary hearing."<sup>33</sup>

27. The freedom that an investigator has to discuss matters with anyone in the Commission derives from the meaning of "adjudication" in the APA, *viz.*, an "agency

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<sup>32</sup> The investigator also must comply with Rule 2201 when she is staffing the Enforcement Hotline, and avoid receiving and conveying to the Commission communications pertaining to issues in on-going contested on-the-record proceeding. On the other hand, because Rule 2201 does not apply to rulemakings, she may discuss issues in those proceedings with decision makers and advisors.

<sup>33</sup> See *Withrow, et al. v. Larkin*, 421 U.S. at 55. See also *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assn.*, 426 U.S. 482, 494 (1976)(upholding the combination of investigating and judging); *Richardson v. Perales*, 402 U.S. 389, 410 (1971)(same).

process for formulation of an order." *See* 5 U.S.C. 551(7). Accordingly, "[i]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication."<sup>34</sup> Indeed, the Commission has found that a staff investigation does "not affect or determine rights, but merely develops facts."<sup>35</sup> Therefore, as noted, an investigator may discuss issues with and otherwise advise or seek guidance from decision makers and their advisors while the investigation is on-going up to and through the issuance of a show cause order or order instituting a formal investigation, and even thereafter through the issuance of a final Commission order disposing of the investigation, for example, by accepting a settlement of the matter or taking appropriate remedial action. Again, assuming that the matter had not been set for trial-type evidentiary hearing and that the investigator has not served as a litigator, the combination of the investigative and advisory functions under these circumstances would be appropriate.<sup>36</sup>

28. Of course, if the Commission sets a matter that was previously the subject of an investigation for trial-type evidentiary hearing, an investigator who now serves as a

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<sup>34</sup> *ITT v. Electrical Workers, et al.* 419 U.S. 428, 443 (1975), quoting Attorney General's Manual on the Administrative Procedure Act 40 (1947).

<sup>35</sup> *See Amoco Production Company, et al.* 21 FERC ¶ 61,256 at 61,564 (1982).

<sup>36</sup> *See Withrow, et al. v. Larkin*, 421 U.S. at 51-52 ("The case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . .") (internal citation omitted).

litigator or who now works with the litigators during the hearing is foreclosed from discussing the case with the decision makers and their advisors, just as litigators are, because at that point Rule 2202 expressly comes into play.<sup>37</sup> While the Commission's setting a matter for hearing will probably close out the investigator's role under the aegis of OMOI, her experience with the record may prove invaluable to the litigators, who may want to seek her counsel throughout the trial.<sup>38</sup> That too would foreclose her advising the Commission later. On the other hand, if all the investigator does is to turn over information collected during the course of her investigation to the litigators at the beginning of the litigation, she would be allowed to advise the Commission subsequently when the Commission considers the matter after hearing.<sup>39</sup>

29. In the event the investigator continues an aspect of an investigation while other aspects of the investigation are being tried before an ALJ, the investigator may

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<sup>37</sup> See Stephen Melton, *Separation of Functions at FERC: does the reorganization of the Office of General Counsel mean what it says?*, 5 Energy L.J. 349, 353 (1984) ("FERC has flexibility on the separation of functions issue as long as it has discretion not to hold a 'hearing.' But once the FERC sets a case for hearing, separation of functions, in accord with its regulations, is required because an agency must comply with its own Regulations.").

<sup>38</sup> See *Trans Alaska Pipeline System*, 9 FERC ¶ 61,205 at 61,372 (1979)(ruling that investigative and trial staffs may share information and assist each other).

<sup>39</sup> See, e.g., *Order on Request for Clarification and Amending Policy Statement Concerning Disclosure of Documents and Information Obtained in Staff Audits*, FERC Stats. & Regs. [Regulations Preambles Jan. 1991-June 1996] ¶ 30,972 at 30,848 (1993) (recognizing that all relevant information acquired by investigators, including relevant workpapers pursuant to an investigation, may be used in proceedings set for formal hearing under the Federal Power Act and Natural Gas Act).

communicate the results of such additional investigation to the litigator, and may answer the litigator's questions about the additional information. The investigator and the litigator may not, however, discuss the issues in or the progress of the litigation. In other words, any communication between them on the litigation must be strictly procedural. If the investigator receives inadvertently an *ex parte* communication as a result of communication with litigation staff, he is, of course, bound by Rule 2201, and must disclose the communication for publication in the Federal Register. Conversely, the investigator may receive from litigation staff non-case-specific information on possible statutory or other legal violations that came to the litigators' attention during the course of litigation.

## **C. Dispute Resolution**

### **1. Relevant Offices**

30. The dispute resolution function is primarily staffed by the Commission's Dispute Resolution Service (DRS), the Office of the Administrative Law Judges (OALJ), and OAL, although other offices are frequently involved in resolving disputes, as the vast majority of Commission cases are processed outside an adversarial setting. As an independent and neutral office, DRS is not involved in the Commission's decisional processes, does not advocate positions in Commission proceedings (in trial-type evidentiary hearings or elsewhere), and does not conduct investigations. DRS is functionally separate from the rest of the Commission, because the nature of the work

requires *ex parte* contacts. *See* 18 C.F.R. 385.604. For its part, OALJ provides settlement judges, where appropriate or ordered, to resolve disputes. In this regard, the Commission may direct the appointment of a settlement judge or a judge to act as a mediator in any proceeding, or the parties or the presiding judge may request the appointment of a settlement judge or a judge to act as a mediator to assist in settlement negotiations. *See* 18 C.F.R. 385.603. OAL also negotiates settlements, and assists parties in proceedings in a non-adversarial, facilitative role. In addition, other offices supply neutrals and facilitators, with relevant technical or legal expertise, to assist in resolving disputes.

## **2. Functions**

31. A dispute resolver convenes meetings and otherwise works with parties in a proceeding to facilitate or mediate a resolution of disputes without litigation. His goal is to promote frankness and cooperation among the parties, so anything that a party tells a dispute resolver is protected as confidential. Parties must feel free to be completely forthcoming without fear that their statements may later be used against them if settlement is not achieved. His unique status allows him to assist parties at any time before or after a filing is made at the Commission, or whenever a dispute arises between or among entities that appear before the Commission. If the parties choose to proceed with Alternative Dispute Resolution (ADR), they select a third party neutral (who may be a DRS staff member, an ALJ acting as a mediator, another FERC employee, or an

outside person) and define that person's role with the help of DRS. *See* 18

C.F.R. 385.604. A settlement judge performs in a similar fashion except, as noted, he does not work independent of the Commission action inasmuch as his involvement is ordered either by the Commission *ab initio* or by parties in cases already set for trial-type evidentiary hearing, and replaces or suspends any otherwise pertinent procedures. If negotiations with the settlement judge do not result in a settlement, the matter is returned to the Commission or presiding judge, as appropriate, for further proceedings. *See* 18 C.F.R. 385.603.

### **3. Who May Talk To Whom When**

32. A dispute resolver must be separated from the rest of staff so that he may facilitate resolution of disputes through *ex parte* contacts, even though participation in settlement discussions is not the equivalent of participation in a trial-type evidentiary hearing for the purpose of Rule 2202.<sup>40</sup> This separation of functions is reflected in the definition of "non-decisional" in Rule 2201, which expressly includes neutrals and settlement judges (as well as trial staff). This separation of functions is also qualified in three ways. First, before he begins his job, the dispute resolver may talk to advisors and other staff

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<sup>40</sup> See generally *Edwards Mfg. Co., et al*, 76 FERC ¶ 61,027(1996). This is in contrast to advisors' efforts to resolve informally disputes in contested on-the-record proceedings at technical conferences. As these conferences are noticed and open to all the parties, they do not trigger Rule 2201. Likewise, this is in contrast to investigators' efforts to resolve informally Hotline complaints. As investigations do not involve parties, they too do not trigger Rule 2201.

members to obtain background information. Second, with the permission of all other parties, he may communicate with decision makers and their advisors about substantive matters. Finally, he may report to decision makers and their advisors on the status of the ADR proceeding at any time, *see* 18 C.F.R. 385.604(f), provided such discussions do not include any characterizations of the negotiations, including the positions being taken by the parties.

33. Other staff may be brought into the dispute resolution process if their subject matter expertise is needed to assist with resolution of a dispute, although these staff members may not later participate in or advise decision makers in any factually-related proceeding without the permission of the parties. For like reasons, a settlement judge may report to the Commission only the procedural status of the settlement negotiations. *See* 18 C.F.R. 385.603(g)(2). In order to encourage a free flow of information in the settlement process, the settlement judge is prohibited from discussing the case with the presiding judge and is never the presiding judge. He likewise may not discuss the merits with decision makers or advisors, because he would have been privy to *ex parte* communications, although he may talk to litigators just as he may talk to all parties in the case off-the-record.

**D. Market Oversight****1. Relevant Office**

34. The market oversight function is staffed primarily by OMOI, which, among other things, produces reports describing the state of energy markets, reviews and analyzes market occurrences and trends, provides early warning of vulnerable market conditions, and makes recommendations to the Commission on the functioning and governance of energy markets. The Office of Markets, Tariffs and Rates also performs a market oversight function as associated with its review and processing of rate filings from the regulated companies.

**2. Functions**

35. Market overseers assess market performance through analyzing market structures and proposing policies for improvement; acquire and analyze public and proprietary information data bases; conduct market research and develop market models and simulations; analyze effects of current and proposed regulation, market rules and policy options; and advise the Commission on the market effects of current and proposed policies. For instance, market overseers review bidding anomalies, price spikes, inappropriate use of certain financial instruments, fluctuations in available capacity on electric transmission lines as well as on natural gas pipelines, and market affiliate transactions.

### 3. Who May Talk To Whom When

36. Market oversight by definition does not involve trial-type evidentiary hearings or other contested on-the-record proceedings. Therefore, as an initial matter, neither Rule 2202 nor Rule 2201 would foreclose a market overseer from talking to any other Commission employee, including decision makers and their advisors, on any matter about which the market overseer has gained insight and information in the course of performing his market oversight function, including talking to people outside the agency. Along the same lines, the market overseer may share written materials that he may obtain in that process with other employees. This is the case even if the information conveyed by the market overseer to other employees ultimately forms the basis for Commission action, for example, the institution of an investigation or the issuance of a show cause order on an anomaly discovered in the operation of the energy markets. At that time, the market overseer would have properly combined his oversight function with an advisory function. Afterwards, he may also assist the investigators without running afoul of either Rule 2202 or Rule 2201. See *supra* III.B (discussion on investigators).

37. Notwithstanding the freedom the market overseer has to communicate inside FERC in performing his function, he is nevertheless bound, as are all employees, by the prohibitions in Rule 2201 on *ex parte* communications. That is true because, while he does not normally perform a traditional advisory function, such as drafting orders, opinions, and rules, the market overseer is considered a decisional employee for the

purpose of that rule. Accordingly, he may at times find himself in a difficult position, because his function will necessarily bring him into contact with members of the industry and public, some of whom may want to talk about specific issues in contested on-the-record proceedings. As a consequence, he must be diligent to avoid discussing issues in such proceedings with persons outside the Commission so as not to jeopardize the integrity of the Commission's decision making process.<sup>41</sup> Of course, as is also true for all employees, the market overseer may freely discuss generic issues, especially as they arise in rulemaking proceedings, with both outsiders and other Commission staff, as Rule 2201 does not apply to such proceedings.<sup>42</sup> Accordingly, he may combine his oversight function with an advisory function, and even assist in drafting rules and policy statements.

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<sup>41</sup> The Commission recognizes that market overseers must have the ability to communicate freely with independent market monitors and market monitoring units so that both staff and those individuals and companies may effectively perform their functions. Accordingly, the Commission plans to modify in the near future the application of Rule 2201 (the *ex parte* rule) to such communications.

<sup>42</sup> While a market overseer will probably have few occasions to communicate with the Commission's litigation staff, he may do so, for example, to provide information that may be pertinent to issues in a trial-type evidentiary hearing. The market overseer may not, however, discuss case-specific issues or facts with litigation staff. If he receives inadvertently an *ex parte* communication as a result of communication with litigation staff, he is, of course, bound by Rule 2201, and must disclose the communication for publication in the Federal Register. Conversely, the market overseer may receive from litigation staff non-case-specific policy suggestions that the litigators have gleaned from their participation in litigation.

## **E. Environmental Coordination**

### **1. Relevant Office**

38. The Commission has a special environmental expert called the Federal Preservation Officer (FPO), who coordinates with various offices regarding the Commission's compliance with the National Historic Preservation Act and related statutes.

### **2. Functions**

39. The FPO is the Commission's technical expert on historic preservation matters, and also ensures that Indian tribes have meaningful and timely input in the Commission's processes that may affect them. The FPO coordinates with (1) the General Counsel on preservation matters requiring legal opinions, (2) the Director of the Office of External Affairs on inter-agency preservation matters, and (3) the Office of Energy Projects on technical responses, guidance, and project-specific matters that are high profile, precedent-setting, or in dispute. The FPO also engages in outreach activities in regard to the National Historic Preservation Act and related statutes.

### **3. Who May Talk to Whom When**

40. The FPO is an advisor and generally may have discussions on the merits of even contested on-the-record proceedings with decision makers and other advisors, even though she may have engaged in off-the-record communications with other Federal agencies. The reason is that, assuming the other agencies have not intervened in the

proceeding, those conversations would be exempt from the *ex parte* prohibitions, albeit subject to disclosure and notice, and placed in the decisional record. See 18 C.F.R.385.2201(e)(1)(v). Accordingly, she may discuss anything in the record as would be the case for another advisor. In other words, the function of the FPO and other staff members who regularly coordinate with other agencies to ensure FERC compliance with environmental statutes is not separated from other functions, but rather combined with an advisory function that is simply subject to the procedures for exempt communications in Rule 2201, the *ex parte* rule.<sup>43</sup>

## **F. Advisors**

### **1. Relevant Offices**

41. The advisory function is staffed primarily by the Office of Market, Tariffs, and Rates (OMTR), the Office of Energy Projects (OEP), the Office of the Executive Director/Division of Regulatory Accounting Policy (OED/DRAP), and the Office of General Counsel (OGC).<sup>44</sup> OMTR is responsible for providing technical advice to the

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<sup>43</sup> The significance between exempt and prohibited off-the-record communications is that, while both are subject to disclosure and notice to the public in the Federal Register, exempt communications are placed in the decisional record in that proceeding, and therefore the Commission may base its decision on that communication, whereas prohibited communications are placed in the non-decisional record and, unless it orders otherwise, the Commission will not rely on the communication in the ultimate decision in the case. See 18 C.F.R. 385.2201(e)-(h).

<sup>44</sup> Each Commissioner also has a personal staff of technical and legal advisors. In addition, as described above in III. D., OMOI market overseers *advise* the Commission, although they do not typically perform an *advisory function* as explained in III. F. 2.

Commission in matters involving electric, natural gas, and oil pipeline rates and services. OEP provides technical guidance related to the certification, construction, acquisition, operation and abandonment of natural gas pipeline facilities and services; the import and export of natural gas; the licensing and related regulation of hydroelectric projects; and hydroelectric safety. OED/DRAP advises the Commission and other offices on the accounting aspects of mergers, acquisitions and dispositions of facilities, rate filings, and gas pipeline certificate applications; develops accounting policy; and responds to requests for accounting approvals and interpretive rulings. OGC is responsible for providing legal advice to the Commission in conjunction with the technical advice and for representing the Commission before the Federal courts in regard to the agency's enabling statutes.

## **2. Functions**

42. Advisors perform both legislative and adjudicative functions. For example, they draft rules and policy statements for the Commission's consideration, and help organize meetings to gather comments from the public. Along the same lines, they prepare interpretive rulings and render advisory opinions in accordance with 18 C.F.R. 388.104. Advisors also process "paper hearings," which constitute the bulk of Commission action. In this regard, among other things, they prepare initial and rehearing orders, including orders and opinions on ALJ initial decisions, and conduct technical conferences to facilitate resolution of disputes among the parties.

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### **3. Who May Talk To Whom When**

43. An advisor may speak to anyone else in the agency on policy matters and on matters not related to the merits of a contested on-the-record proceeding, as the first does not implicate trial-type evidentiary hearings and the second does not implicate prohibited off-the-record communications. In the highly complex technical field of energy regulation, information sharing is essential and administratively efficient. The advisor may also speak to another staff member on procedural matters, even where the other staff member may have permissibly received information from someone outside the agency because, for example, he was litigating the case before an ALJ. An advisor, of course, must take great care to avoid discussions on the merits in such cases, as such discussions are specifically barred by Rule 2202, and otherwise to avoid any appearance of impropriety. Moreover, as a practical matter, it is very difficult to discuss the facts of a case without getting into the merits of the issues. Frequently, the facts or, more precisely, the relevance of certain facts plays a major role in the ultimate decision by the Commission. Therefore, the advisor should not discuss the facts of a case with the litigator who is trying or has tried the case.

44. An advisor's rendering an interpretive ruling or an advisory opinion will not, as a general matter, trigger either Rule 2201 or Rule 2202. Section 388.104 of the Commission's regulations, which provides that staff may informally advise and assist the general public and applicants, points out that the views expressed by staff do not

represent the official views of the Commission. Also, the informal advice that may be sought from staff under this regulation is intended for the sole use of the person requesting the opinion, and is limited to the facts presented in the request. More to the point, with one exception, requesting an opinion does not initiate a proceeding with parties or trigger a trial-type evidentiary hearing, thereby falling outside the scope of both Rule 2201 and Rule 2202 and allowing for discussions between Commission staff and persons outside FERC and discussions between individual Commission staff members. The exception involves interpretive rulings by the Chief Accountant in OED/DRAP. Even though they respond to individual company requests, the rulings are publicly available and subject to rehearing. If a rehearing application is filed, the matter becomes a contested proceeding, subject to Rule 2201 (the *ex parte* rule). It is still not a matter in litigation, however, and Rule 2202 (separation of functions rule) is not applicable. Staff members may thus freely talk among themselves about the issues.

45. At times, the Commission designates an advisor as non-decisional for the purpose or Rule 2201, for example, to serve as an expert witness in a trial-type evidentiary hearing or to serve as a facilitator in a contested on-the-record "paper hearing" proceeding.<sup>45</sup> During the time he serves in that capacity *and* afterwards, the designated

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<sup>45</sup> In some quarters of the agency, these employees are also referred to as "separated staff." Frequently, "separated staff" are found in the hydropower area where they assist the parties in the settlement process and do not advise the Commission on the merits of the proceeding.

non-decisional employee may not advise the Commission on the matter (or a factually-related one). In other words, as is true for the litigator, the road is one-way. Once the advisor becomes a litigator or non-decisional employee, he may not return to advising the Commission on the matter, or a factually-related one, because in addition to the obvious fairness concerns identified above with respect to a litigator's becoming an advisor, he would likely have permissibly engaged in off-the-record communications necessary to litigate a case or he would have probably worked with outside parties off-the-record to resolve issues. Both scenarios implicate possible *ex parte* concerns.

## **G. Outreach**

### **1. Relevant Offices**

46. The Office of External Affairs (OEA) is the primary source of information regarding Commission matters for the general public; Federal, state, and local governments; news media; and public and private interest groups. The program offices also perform an outreach function as that pertains to the areas of the Commission's jurisdiction or responsibilities for which they are charged to handle, and OGC provides any legal support necessary to ensure that the outreach programs comply with any applicable law.

### **2. Functions**

47. The main function of the out-reacher is to convey the Commission's message to those outside the agency. The out-reacher performs that function in a variety of ways,

including issuing news releases and otherwise working with the press; providing instructive materials; fielding calls from the public; responding to correspondence, including inquiries from members of Congress; and organizing meetings, conferences, and workshops to examine issues that range from the Nation's energy infrastructure to the condition of energy markets.<sup>46</sup> While the out-reacher does not usually participate in the decision making process, he is nonetheless a decisional employee, or at least he is not a non-decisional employee, as defined in Rule 2201. The reason is that he frequently must interact with the Commission and its advisory staff, and he may necessarily be involved in discussions of contested cases in order to be able to explain them to the public.

### **3. Who May Talk To Whom When**

48. An out-reacher's role at the Commission rarely if ever triggers Rule 2202 on separation of functions, as he is never involved in trial-type evidentiary hearings. Of course, as he may be privy to discussions of the merits of pending cases that may have been litigated, he must avoid talking to the litigators about the merits of the issues in those cases or factually-related cases, as required by Rule 2202. By contrast, the out-reacher's job understandably implicates Rule 2201 on *ex parte* contacts, because that job *is* to talk to outsiders. The type of communication in which he normally is involved, however, is not on the merits of issues in contested proceedings. Rather, as noted, the

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<sup>46</sup> There are other employees who also serve the outreach function of representing the Commission at meetings of inter-agency organizations, such as the Interagency Hydropower Committee and the Interstate Oil and Gas Compact Commission.

out-reacher is primarily charged with conveying information to the public on the Commission's decisions and other agency events, and he should not be receiving information intended to influence the Commission's decision making in contested on-the-record proceedings. Nevertheless, he must be very careful to avoid receiving and then relaying to the Commission such communications received off-the-record.

49. That said, because he understandably will have access to information outside the Commission, the out-reacher may generally speak to anyone in the Commission, even decision makers and their advisors, about issues in contested on-the-record proceedings *if* that discussion simply reflects, and does not characterize or analyze, what was said at public meetings, which he or others have arranged.<sup>47</sup> These meetings are noticed and frequently transcribed for the record. Even if they are not transcribed, however, their public nature would permit discussion among all staff members, including out-reachers. Again, however, an out-reacher may not be a conduit for prohibited off-the-record communications to the decision makers and advisory staff. He may, on the other hand,

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<sup>47</sup> This would include, for example, the state-federal regional panels. While not open to the public, the discussions there are exempt off-the-record communications and transcribed for the record. See Order Announcing the Establishment of State-Federal Regional Panels to Address RTO Issues, 97 FERC ¶ 61,182 (2001), *reh'g denied*, 98 FERC ¶ 61,309 (2002), *appeal dismissed sub nom. Exelon Corp., et al. v. FERC*, No. 02-1154 (D.C. Cir. Sept. 20, 2002).

discuss with anyone at the agency general policy matters and issues in rulemaking proceedings as both are outside the scope of Rule 2201.<sup>48</sup>

## **H. Conclusion**

50. As is now apparent, while the APA distinguishes between separation of functions and the prohibition against off-the-record communications, as a practical matter at the Commission, the two principles are intertwined because of the interplay between Rule 2202 (separation of functions) and Rule 2201 (*ex parte* rule). Rule 2202 allows a combination of staff functions in matters or proceedings that do not involve trial-type evidentiary hearings, and contemplates open discussions between the Commission and all staff members about generic matters, market conditions, rulemakings, Part 1b investigations, and non-contested proceedings. Conversely, Rule 2202 clearly requires a separation of functions, and forbids any staff member involved in a trial-type evidentiary hearing from discussing the issues in the case or a factually-related one with the Commission or decisional staff members. Rule 2201 also requires a form of separation of functions, and forbids any non-decisional staff member, defined as a litigator, a settlement judge, a neutral in an ADR process, or an employee designated as non-decisional for a specific proceeding, from discussing the issues in the particular contested

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<sup>48</sup> A decisional employee who represents the Commission at inter-agency meetings similarly may similarly convey the discussions at those meetings to others at the Commission, because such discussions would entail policy and not case-specific matters.

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proceeding in which the staff member is involved with the Commission or decisional staff members.

51. As described herein, the Commission adopts this statement of administrative policy on separation of functions.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.  
Deputy Secretary