98 FERC ¶ 61,309

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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| State-Federal Regional RTO Panels | Docket No. RT02-2-001 |
| RTO Informational Filings, et *al.* | Docket No. RT01-1-001 |
| Allegheny Electric Cooperative, Inc. | Docket No. RT01-2-003 |
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| Midwest ISO | Docket No. RT01-87-004 |
| Ameren (Alliance Companies) | Docket No. RT01-88-013 |
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| Dayton Power and Light Company | Docket No. RT01-37-002 |
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| Northern Indiana Public Service Company | Docket No. RT01-26-002 |
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| Regulations Governing Off-the-Record Communications | Docket No. RM98-1-003 |
| | (Not Consolidated) |

ORDER DENYING REQUEST FOR REHEARING

(Issued March 18, 2002)

In this order, the Commission denies the Alliance Companies' request for rehearing of the November 9, 2001 Order Announcing the Establishment of State-Federal Regional

Panels to Address RTO Issues, Modifying the Application of Rule 2201[1] in the Captioned Dockets, and Clarifying Order No. 607[2] (November 9 Order).[3] The Commission finds that Alliance Companies have established no legal or policy basis to alter the course adopted in that order.

**I. BACKGROUND**

In the November 9 Order, the Commission hoped to strengthen its cooperation with state commissions by establishing State-Federal regional panels to address issues of mutual concern on a generic basis as well as in the captioned proceedings, particularly regarding key issues facing the Commission in the near term. The Commission believed that such panels would 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. In the near term, the Commission intended the State-Federal regional panels to address the state interests affected by RTO developments since

[1] 18 C.F.R. § 385.2201 (2001)(the Commission's *ex parte* rule).

[2] Regulations Governing Off-the-Record Communications, Order No. 607, FERC Stats. & Regs., Regulations Preambles ¶ 31,079 (1999); *order on reh'g*, Order No. 607-A, FERC Stats. & Regs., Regulations Preambles ¶ 31,112 (2000).

[3] *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*, 97 FERC ¶ 61,182 (2001).

the issuance of Order No. 2000.[4] The structure of specific panels was to be laid out in future notices.

The November 9 Order also modified the application of Rule 2201 to various contested on-the-record proceedings by declaring that it would (1) treat, as exempt, certain communications between the Commission or its staff and state agencies which are parties to certain on-the-record proceedings; (2) place in the decisional file of the pertinent proceeding communications received by Commission decisional staff in the course of participating in the State-Federal regional panels; and (3) require that the meetings of the panels be transcribed to document the panel discussions and to ensure fundamental fairness to other parties in the proceedings. In addition, the Commission clarified Order No. 607 in that it viewed the exempt status of off-the record communications with non-party state agencies as analogous to the communications covered by the modification in the November 9 Order as permission to engage in such communications.

[4]Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs., Regulations Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs, Regulation Preambles ¶ 31,092 (2000), *petitions for review dismissed,* Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

On November 27, 2001, the first regional State-Federal panel discussion, to discuss RTO matters in the Midwest region, was held.[5] Subsequently, on December 20, 2001, the Commission issued an order addressing many of those matters.[6]

In their December 10, 2001 request for rehearing, the Alliance Companies argue that the action taken in the November 9 Order and the subsequent regional panel discussion of November 27 are not permitted by the Commission's regulations governing off-the-record communications, are not permitted by the Administrative Procedures Act (APA),[7] and prejudice the due process rights of the Alliance Companies. They request that the Commission reverse the November 9 Order.

On December 21, 2002, a Motion for Leave to Answer and Answer to the Alliance Companies request for rehearing was filed jointly by the State of Michigan and the Michigan Public Service Commission, Ohio Public Utilities Commission, Arkansas Public Service Commission, Indiana Utility Regulatory Commission, Iowa Utilities Board, Kentucky Public Service Commission and the New Mexico Public Regulation Commission (collectively, State Commissions). Alternatively, State Commissions

[5]On January 9 and February 15, 2002, the Northeast and Southeast regional panel discussions were held, respectively.

[6]*Alliance Companies, et al.*, 97 FERC ¶ 61,327(2001)(December 20 Order).

[7]5 U.S.C. § 557(d).

request, pursuant to Rule 713(d)(2),[8] leave to brief the *ex parte* issue addressed in the Commission's November 9 Order modifying Rule 2201.

## II. DISCUSSION

### Procedural Matters

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure provides that answers to requests for rehearing are not normally permitted.[9] The Commission finds good cause here, however, to admit the State Commissions' answer given the nature of the issues raised and because of the particular stake that they and their consumers have in this matter.

### Waiver of the Commission's Regulations

The Alliance Companies first contend that the Commission's regulations governing off-the-record communications do not allow communications with state regulatory commissions that are parties to a contested proceeding, including the contested proceedings involving the Alliance Companies' proposal to form the Alliance RTO. They argue that, in Order No. 607-A, the Commission specifically denied the United States Department of the Interior's request to expand the exemption for off-the-record communications to include agencies that are parties to contested proceedings. They assert

[8] 18 C.F.R. § 385.713(d)(2) (2001).

[9] 18 C.F.R. §385.213(a)(2) (2001).

that the Commission cannot modify the application of regulations to permit an action which is not permitted by those very regulations without a formal rulemaking.

The State Commissions disagree, arguing that Rule 2201 expressly provides for its own modification. They also argue that the rulemaking process would be impractical here, since by the time the rulemaking process had run its course the proceeding to which the modified *ex parte* procedures would apply would be over.

The State Commissions are correct. Rule 2201 provides that the "rule will apply to all contested proceedings, except that the Commission may, by rule *or order*, modify any provision of this subpart, as it applies to all or part of a proceeding, to the extent permitted by law."[10] That is exactly what the Commission did here – by order, the Commission modified the application of Rule 2201 to the RTO proceedings, by treating what would otherwise be prohibited off-the-record communications with state commission parties as exempt off-the-record communications subject to disclosure and notice to the public. Moreover, the Commission may waive its own regulations, as long as it provides an adequate explanation.[11] The November 9 Order clearly did that too, pointing to the importance of improving communications with state commissions in critical areas of mutual regulatory concern. Indeed, the Commission knew when it promulgated Rule 2201 that there might be occasions when the rule must be modified to

[10] 18 C.F.R. § 385.2201(a) (2001)(emphasis added).

[11] *See Georgia Industrial Group v. FERC,* 137 F.3d 1358, 1364 (D.C. Cir. 1998).

ensure fully informed decision making. The circumstances involved in the instant proceedings are exactly the type that warranted a modified application or waiver of the general rule prohibiting off-the-record communications.

Alliance Companies correctly note that, in Order No. 607-A, the Commission specifically denied Interior's request to expand the exemptions to include agencies that are parties to contested proceedings. Denying Interior's request there is not, however, inconsistent with treating as exempt here communications with state commission parties in RTO proceedings. Rather, as explained, that treatment is simply an exercise of invoking the exception in 18 C.F.R. § 385.2201(a). Likewise, Alliance Companies incorrectly suggest that a rulemaking was necessary to treat the communications here as exempt, because the Commission did not change but just applied Rule 2201. In all other proceedings, not otherwise modified, off-the-record communications with a state agency which is a party to a contested proceeding, are prohibited. Lastly, Alliance Companies wrongly contend that the Commission's regulations, which prohibit modifications not permitted by law, prohibit the waiver provided in the November 9 Order. As now explained, the APA is no bar to the invocation of the exception in Rule 2201.

**The Administrative Procedures Act**

The Alliance Companies' next claim that Rule 2201 allows modification of the rule "to the extent permitted by law" and that the APA does not permit the modification the Commission made. They contend that the APA's prohibition of *ex parte* communications

relevant to the merits of a proceeding between decisional employees and interested persons is broad and prohibits any *ex parte* communications relevant to the merits. They also contend that the Alliance Companies' contested proceedings are adjudications, determined on-the-record, and subject to an opportunity for hearing under the Federal Power Act. They argue that the Commission's November 9 Order is contrary to the essential purpose of the APA's ban on *ex parte* communications, which they say is to "require that all communications that might improperly influence an agency be encompassed within the *ex parte* contacts prohibition or else the public and the parties will be denied indirectly their guaranteed right to a meaningful participation in agency decisional processes."[12] They claim that the State-Federal panel communications cannot be addressed and rebutted through the adversarial discussion among the parties, and are thus not permitted by the letter or spirit of the APA.

The State Commissions counter that Alliance Companies' argument is based on the contention that the prohibition on *ex parte* communication contained in 5 U.S.C. § 557(d) applies to the relevant contested proceedings. The State Commissions contend that the Commission and the courts have held that section 557 is not applicable here, because it does not apply to rulemaking and ratemaking proceedings. They state that section 557(a) applies "when a hearing is required to be conducted in accordance with section 556, but

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[12]Rehearing Request at p. 9, citing *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534,1544 (9th Cir. 1993).

that section 556 applies to hearings required by section 553 or 554. They contend that the proceedings that are subject to the Alliance Companies' rehearing are informal rulemakings and ratemaking proceedings and do not involve "hearings required by sections 553 or 554. They argue that the Commission's limited exemption is supported by the APA, noting that the D.C. Circuit has stated that APA sections 555(a) and 555(b) "can reasonably be read as sanctioning *ex parte* contacts, subject of course to an agency's determination that they are consistent with the orderly conduct of public business."[13] Furthermore, they state that the terms of the November 9 Order are narrowly defined and are subject to significant conditions.[14]

Notwithstanding the State Commissions' parsing of the APA, the Commission based Rule 2201 on the inherently sound provisions for fair and impartial adjudications in 5 U.S.C. § 557(d)(1)(A), which provides, *inter alia*, that "no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the proceeding, an *ex parte* communication relevant to the

[13]State Commissions' Answer at p. 3, citing *Action for Children's Television v. FCC*, 564 F.2d 458, 474-75 n. 28 (D.C.Cir. 1977).

[14]They note that the contacts are permitted only by public agencies who, if they chose not to intervene, would, pursuant to Rule 2201 (e)(5), be permitted unlimited contact with FERC. And they note that the November 9 Order requires that the existence and substance of any communications permitted by the rule be disclosed to all parties. Moreover, they point to the FCC rules, which permit a broad range of *ex parte* communications between FCC decisionmaking personnel and any party. *See* 47 C.F.R. § 1.1206 (2001).

merits of the proceeding."[15] Accordingly, the November 9 Order recognizes that the APA applies here. That said, Alliance Companies are wrong that the APA prohibits all *ex parte* communications, and that the APA does not permit invocation of the exception in 18 C.F.R. § 385.2201(a). In this regard, "Congress did not intend to erect meaningless procedural barriers to effective agency action."[16] Indeed, as the Alliance Companies note without objection, *ex parte* communications with non-party state agencies are exempt, subject to notice and disclosure, under Rule 2201. Rather, "Congress sought to establish common-sense guidelines to govern *ex parte* contacts in administrative hearings, rather than rigidly defined and woodenly applied rules."[17] The APA was intended to "ensure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome."[18]

Against this backdrop, the notice and disclosure procedures set out in the November 9 Order were carefully crafted to ensure that the decisionmaking in the RTO

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[15]Order No. 607, FERC Stats. & Regs., Regulations Preambles ¶ 31,079 at 30,877 n. 2.

[16]*Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547, 563 (D.C. Cir.1982).

[17]*Id.* at 563-64.

[18]*Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534, 1539 (9th Cir. 1993)(*quoting Raz Inland Navigation Co. v. I.C.C.*, 625 F.2d 258, 260 (9th Cir. 1980).

proceedings would not be influenced by private communications. To that end, the November 9 Order stated:

> in recognition of the prohibition in the Administrative Procedures 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 the other parties in the proceedings.

In addition, the November 9 Order described the standard notice and disclosure procedures which were to be followed:

> The 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.[[19]] Parties then have an opportunity to respond to such communications. *See* 18 C.F.R. § 385.2201(f).

97 FERC at p. 61,837 n. 2. *See also* 18 C.F.R. § 385.2201(g)(2001). As is clear, the November 9 Order alerted Alliance Companies and other parties that they were entitled to respond to the communications, and ensured that they would have an opportunity for

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[19]The Commission is currently issuing this notice weekly.

meaningful participation. The adversarial discussion that Alliance Companies seek would be akin to a trial-type proceeding, which is only necessary when a witness' motive, intent, or credibility needs to be considered or where the issue involves a dispute over a past occurrence. That is not the case with the regional discussion panels. Thus, the November 9 Order is consistent with the requirements of the APA, which in turn does not bar the invocation of the exception in Rule 2201.

**Due Process**

As a final matter, the Alliance Companies contend that by the November 9 Order and the subsequent November 27 State-Federal Midwest Panel discussion, the Commission has prejudiced their due process rights. They allege that the Commission has called into question the basic fairness of the proceedings by permitting state commissions private access to decision makers where they may present arguments that the Alliance Companies have no opportunity to rebut. In addition, they argue that the Commission's November 9 Order contradicts its denial of the U.S. Department of Agriculture's (Agriculture) motion for late intervention in a relicensing proceeding on the grounds that it would be fundamentally unfair to allow Agriculture to intervene as a party after having had such private access to the decisional process of the Commission staff.[20] The Alliance Companies argue that, like Agriculture, the state commissions have had

[20]Rehearing Request at p. 10, referring to *Arizona Public Service Company*, *order denying reh'g*, 94 FERC ¶ 61,076 at 61,351 n.10 (2001).

party status in the Alliance proceedings for the past three years and to give them private access to the decisional process of the Commission at the end of that process is fundamentally unfair.

Additionally, Alliance Companies allege that the November 20, 2001 notice of the November 27 regional panel discussion was deficient in that it (1) did not provide other parties an opportunity to respond to any statements made during the course of the discussions; (2) did not reasonably inform Alliance Companies that the merits of their RTO application would be debated at the panel discussion; and (3) did not clarify that the panel discussion would provide a forum in which the state commissions would be given an opportunity to dissuade the Commission from approving Alliance Companies' application without affording Alliance Companies an opportunity to respond.[21]

The State Commissions dispute Alliance Companies' characterization of the communications as improper. They argue that informal contacts are "appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[22] They contend that the key to fairness is whether the decision is based on what is in the record.[23]

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[21]Alliance Companies note that, as of the date of their filing herein, the transcript of the panel discussion had not been placed in the public record.

[22]State Commissions' Answer at p. 9, citing *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 57 (D.C. Cir. 1977).

[23]State Commissions' Answer at p. 9, citing *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) and *Courtlands v. Dixon*, 294 F.2d 899, 904 (D.C. Cir. 1961)(fairness preserved by fact that agency did not decide on the basis of secret

(continued...)

They also state that the requirements for disclosure fully protect Alliance Companies interests, since nothing in the November 9 Order precludes another party from requesting permission to respond.

As discussed above, the November 9 Order provides that the panel discussions will be transcribed and placed in the decisional record, subject to the notice and disclosure procedures set out in 18 C.F.R. § 385.2201(g)(1). Accordingly, any person, including Alliance Companies here, may respond to that communication.[24] By placing the transcripts of the panel discussions in the record, the Commission "apprised the petitioners of any argument that had been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused in this case."[25] In these circumstances, the November 9 Order does not deny Alliance Companies, or any party, due process.

Contrary to Alliance Companies' contention, *Arizona Public Service Company* is inapposite here. In *Arizona Public Service Company*, Agriculture sought to intervene as a party in a case in which it had previously participated as a cooperating agency for purposes of preparing an environmental analysis under the National Environmental Policy

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[23](...continued)
evidence).

[24]*See* 18 C.F.R. § 385.2201(g)(2)(2001); *see also* November 9 Order, 97 FERC at 61,837 n.2.

[25]Louisiana Ass'n of Independent Producers v. FERC, 958 F.2d 1101, 1112 (D.C.Cir. 1992).

Act. In denying the request on rehearing, the Commission explained that the staff of the cooperating agency is treated in some respects as though it were Commission staff, including having conversations and exchanging information that may not be put in the record. The Commission reasoned that "to allow such a cooperating agency to intervene in a proceeding would put that agency in the position of having information that was not available to other parties, in violation of our rule prohibiting *ex parte* communications."[26] In other words, the communications made prior to Agriculture's attempt to become a party in the proceeding were clearly off-the-record, a situation which could not be cured years after the fact. Conversely, the communications exempted here are to be transcribed and placed in the decisional record.

Regarding Alliance Companies' allegations that the November 20 notice of the Midwest regional panel discussion was deficient, they point to no requirement, because there is none, that the notice be as explicit as Alliance Companies would like. The November 9 Order put Alliance Companies on notice that discussions would be held, described the likely nature of those discussions, informed the parties that discussions would be transcribed, and reiterated the opportunity provided by Rule 2201 that they could respond to any statements made. All that was missing from the November 9 Order were the dates of the discussions, which is what the November 20 notice provided with

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[26] *Arizona Public Service Company*, 94 FERC ¶ 61,076 at 61,350 (2001).

respect to the first panel discussion to be held.[27] Accordingly, Alliance Companies' allegations that the November 9 Order and the November 20 notice deprived them of due process are without merit.

The Commission orders:

Alliance Companies' request that the Commission reverse the modification of the application of its regulations in the November 9 Order is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.

[27] Alliance Companies correctly note that, at the time they filed their rehearing request on December 10, 2001, the transcript had not been placed in the public record. The Midwest discussion took place on November 27, 2001. The transcript was placed in the record in Docket No. RT02-2-000 on December 13, 2001. Through oversight, it was not placed in the record of other applicable proceedings until February 6, 2002. It was, however, available. It was placed on the Commission's web site for public viewing and was available for purchase from ACE-Federal Reporters, Inc. As Alliance Companies note, the press was able to get access to it. *See* Rehearing Request at p. 6. More to the point, Alliance Companies themselves apparently had a copy in time to respond to the December 20 Order, as they refer to it repeatedly in their Rehearing Request of that order. Accordingly, they cannot be heard to complain that they did not have timely access to the transcript, under the maxim of "no harm, no foul."