reference in 14 CFR 71.1. The Class D airspace designations listed in this document will be published subsequently in the order.

The Rule

This amendment to 14 CFR Part 71 establishes Class D airspace, at Sugar Land, TX, extending upward from the surface to and including 2,600 feet MSL, within a 4.2-mile radius of the Sugar Land Municipal/Hull Field, Sugar Land, TX.

The FAA has determined that this regulation only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. It therefore (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, *Airspace Designations and Reporting Points*, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 5000 Class D airspace areas.

* * * * *

ASW TX D Houston Sugar Land Municipal/ Hull Field, TX [New]

Sugar Land, Sugar Land Municipal/Hull Field, TX
(Lat. 29°37′20″ N., long. 095°39′24″ W.)

That airspace extending upward from the surface to and including 2,600 feet MSL within a 4.2-mile radius of Sugar Land Municipal/Hull Field. This Class D airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Fort Worth, TX, on September 14, 1999.

Robert N. Stevens,

Acting Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99–24653 Filed 9–21–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 153, 157 and 375

[Docket No. RM98–16–000; Order No. 608]

Collaborative Procedures for Energy Facility Applications

Issued September 15, 1999.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission, (Commission) is issuing a final rule to expand its procedural regulations governing the authorization of natural gas facilities and services. The regulations offer prospective applicants seeking to construct, operate or abandon natural gas facilities or services the option, in appropriate circumstances and prior to filing an application, of designing a collaborative process that includes environmental analysis and issue resolution. This pre-filing collaborative process is comparable to the process the Commission adopted two years ago with respect to applications for hydroelectric licenses, amendments and exemptions and, like those regulations, is optional and is designed to be adaptable to the facts and circumstances of the particular case. The regulations do not delete or replace any existing regulations.

EFFECTIVE DATE: This rule is effective October 22, 1999.

FOR FURTHER INFORMATION CONTACT:

Richard Hoffman, Office of Pipeline Regulation, 888 First Street, NE, Washington, DC 20426, (202) 208–0066

Gordon Wagner, Office of the General Counsel, 888 First Street, NE, Washington, DC 20426, (202) 219–0122.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE, Room 2A, Washington, DC 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission from November 14, 1994, to the present. CIPS can be accessed via Internet through FERC's Home page (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon, or by going directly to the following address: http// cips.ferc.fed.us/cips/default.htm. Documents will be available on CIPS in ASCII and WordPerfect 8.0. User assistance is available at 202–208–2474 or by E-mail to cipsmaster@ferc.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Home Page using the RIMS link or the Energy Information Online icon, or by going directly to the following address: http://rimsweb1.ferc.fed.us/rims. User assistance is available at 202–208–2222, or by E-mail to rimsmaster@ferc.fed.us.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, NE, Washington, DC 20426.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is expanding its procedural regulations governing the authorization of natural gas facilities and services to offer prospective applicants seeking to construct, operate or abandon natural gas facilities or services the option, in appropriate circumstances and prior to filing an application, of using a collaborative process to identify and resolve significant issues. In addition, a

significant portion of the environmental review process can be completed as part of the pre-filing collaborative process. This process is comparable to the process the Commission adopted two years ago with respect to preparing applications for hydroelectric licenses, amendments and exemptions and, like those regulations, is optional and voluntary and is designed to be flexible and adaptable to the facts and circumstances of the particular case.

A prospective gas facility applicant may continue to use the standard authorization procedures (which do not require any pre-filing consultation process). After a pre-filing collaboration has begun, an applicant may switch to the standard procedures and file its application if it believes that the pre-filing collaborative process is not productive. The regulations do not delete or replace any existing regulations.

II. Background

On September 30, 1998, the Commission issued a Notice of Proposed Rulemaking (NOPR)[1] to expand its procedural regulations governing the authorization of natural gas facilities and services, and to consider certain revisions in its procedural regulations governing applications for licenses, amendments and exemptions for hydroelectric projects. In response to the comments received[2] and discussions by staff with potential participants in technical workshops,[3] the Commission is adopting a final rule that offers an optional, pre-filing collaborative process to gas facility applicants and is not modifying any of the existing regulations for hydropower applicants.

Regardless of the process path the applicant selects, once the application is filed the Commission will review it for adequacy, publish a notice of it in the **Federal Register**, and invite comments and interventions. The Commission will then either complete or begin the NEPA process depending on the procedures that were employed in the pre-filing stage. In a standard process, the NEPA process will begin only after the filing of the application. In the pre-filing collaborative process promulgated herein, the NEPA process can begin prior to the filing of the application, and the Commission will complete the NEPA process after the application is filed.

III. Discussion

A. Should the Pre-filing Collaborative Process be Authorized for Gas Applicants?

In the NOPR, the Commission proposed a new § 157.22 of the regulations to allow potential applicants for gas facilities under sections 3 and 7 of the Natural Gas Act (NGA)[4] to choose a pre-filing collaborative process in preparing an application for filing with the Commission. As proposed, and as adopted herein, the potential applicant can obtain the assistance of Commission staff in preparing its application and begin the NEPA process in the pre-filing stage. Before undertaking a collaboration, the applicant must show that it has contacted entities interested in its proposal, a consensus exists to support the collaborative process, and a communications protocol among the entities has been negotiated. A successful collaborative process might conclude with the filing of a complete application with the Commission that includes a preliminary draft NEPA document (a preliminary draft EA or EIS). Depending upon the willingness of the participants, including the applicant and resource agencies, the process could also result in the filing of an agreement or an offer of settlement with the Commission that addresses issues raised by the application, and to the extent possible resolves within the pre-filing collaborative process related legal processes mandated by other agencies.

Many commenters representing pipelines supported adoption of the proposed pre-filing collaborative process for the gas industry as long as the final rule incorporates certain provisions to maximize its chances for success. In particular, these commenters believe that use of the collaborative process should be optional and voluntary for the applicant, the process should be limited to environmental issues, and the applicant should be able to terminate the process and file its application at any time.[5] One commenter took the same approach but wanted assurances that the collaborative process would not have as objectives the narrowing of areas of disagreement and the promotion of settlements, on the grounds that such efforts would distract from the NEPA process and lead to unnecessary delays. Another commenter was concerned that adoption of the proposed rule would have an adverse effect on existing and proposed practices aimed at streamlining the processing of gas applications by the Commission and would encumber pipelines in red tape, including restrictions and reporting requirements.[6]

Another commenter requested that the Commission clarify in the final rule that the process will not abridge the legal rights of any party to the subsequent Commission proceeding, and in particular, that all parties retain the right to protest all issues, including those addressed in the pre-filing process.[7] One gas industry commenter was opposed to the proposed rule, suggesting that it would not help to certificate needed pipeline construction under the NGA and is subject to a number of legal infirmities.[8]

State agencies expressed support for extending the opportunity to engage in a pre-filing collaborative process to potential applicants for gas facilities, citing their favorable experience with such procedures used by potential applicants for hydropower facilities.[9] Federal resource agencies that filed comments were generally supportive of pre-filing consultation processes, stating that such efforts have been helpful in addressing resource issues presented by hydropower applications.[10]

Environmental groups favor the proposed rule. One commenter asked the Commission to explain in more detail how it would work for the gas industry and what its benefits would be.[11] Landowners' comments generally favored improving Commission procedures in order to give landowners additional notice of pipeline proposals and the opportunity to express their views about them.[12]

We believe that the final rule adopted herein addresses and responds to the main concerns expressed by the gas industry and others in this rulemaking. As recommended by the commenters and discussed in the following sections, in the final rule we adopt a pre-filing collaborative process for potential applicants for gas facilities that is strictly voluntary, and the applicant may terminate the process at any time. We are neither prohibiting the

[1] FERC Stats. & Regs. (Proposed Regulations 1988–1998) ¶ 32,536 (Sept. 30, 1998), 63 FR 59916 (Nov. 6, 1998).

[2] The commenters (and abbreviations to identify them) are listed in Appendix A.

[3] Staff conducted technical workshops on the NOPR in Washington, D.C., Houston, Texas, and Chicago, Illinois, on November 5, 10 and 18, 1999, respectively.

[4] 15 U.S.C. 717b and 717f(c).

[5] *E.g.*, INGAA at 1–2, Williams at 2–3, Williston at 2–3.

[6] Enron at 2–4.

[7] AGA at 2–8.

[8] Indicated Shippers at 2–3 and 7–15.

[9] *See, e.g.*, Wisconsin DNR at 1–2. State agencies also made recommendations for improvements in the proposed rule, which are discussed in the following sections.

[10] *E.g.*, Commerce at 14, Interior at 1–2, EPA at 1, and Forest Service at 1,3.

[11] Trout Unlimited at 5–6.

[12] Ferguson & Tavares at 1–2, Smith at 4–5, and Southern Landowners at 2–3.

discussion of non-environmental issues in the process, nor requiring that such issues be addressed. It will be up to the applicants and the other participants in the process to decide which issues will be covered in each collaboration. We emphasize the flexibility of the pre-filing process and are open to working cooperatively with potential applicants and participants to design pre-filing processes that are helpful to all concerned and lay the foundation for expeditious proceedings on gas applications and full compliance with the NGA, NEPA and other applicable statutes.

We hope that the positive and open dialogue established by a pre-filing collaborative process may help other state and federal agencies to coordinate the exercise of their regulatory mandates with the Commission's and will foster the resolution of disputed issues and the submission of offers of settlement. But a successful pre-filing collaborative process does not require such results. We stress that adoption of the new, optional pre-filing process will neither prejudice the processing of any applications that are prepared by standard means (*i.e.,* absent pre-filing consultation), nor will use of the process curtail the legal rights of any party to intervene and participate fully in the Commission's post-filing proceedings. If a pre-filing process produces an agreement between the applicant and some or all of the participants, the applicant and participants may elect to treat the agreement as an offer of settlement and submit it in conjunction with an application. The offer of settlement will be treated like any other such offer, and be evaluated under the same legal standards that the Commission customarily applies.[13]

While we recognize that nothing in the NGA or the Natural Gas Policy Act (NGPA)[14] specifically authorizes the adoption of pre-filing collaborative procedures for gas applicants, we perceive no prohibition of such procedures in either act. We also believe that affording this procedural option furthers a number of important legal and policy objectives dedicated to streamlining and coordinating the regulatory process and makes it more flexible and responsive to citizens' concerns, including those expressed by business, consumer, and environmental interests.[15]

Many commenters mentioned that they thought that the time required to complete a pre-filing collaborative process would not shorten the time from initial proposal to Commission action and questioned why an applicant for gas facilities or services would undertake the process. In the technical workshops, the Commission's staff specifically asked about the time frames used by applicants to prepare gas applications. Since only one commenter filed a response to the staff's question,[16] the Commission is not in a position to determine whether the overall application preparation time of an applicant using a pre-filing collaborative process would be less, the same or longer than the preparation time of an applicant using the standard process (which does not require as much pre-filing consultation).[17]

B. Should the Collaborative Process be Mandatory?

Although the regulatory text in the NOPR proposed a pre-filing collaborative process for gas applicants that would be voluntary, the preamble to the NOPR asked whether the process should be made mandatory, not only for gas but also for hydropower applicants. The latter are currently using alternative pre-filing procedures that are similar to the collaborative procedures proposed in the NOPR for gas applicants; hydropower applicants may also use standard pre-filing consultation procedures that do not require the formation of a collaborative group.[18] The Commission invited commenters to describe the advantages and disadvantages of making the pre-filing collaborative process mandatory for all applicants (gas and hydropower) and to describe how the proposal might work, especially if there were no consensus among the participants that such a process would be useful. The Commission also asked whether applicants should at least be required to make a good faith effort to undertake such a collaborative process and what should be done if an applicant could not document that it had made such an effort.

Almost without exception,[19] commenters rejected the suggestion of mandating pre-filing collaboration for applicants for either gas or hydropower facilities. Commenters familiar with the alternative pre-filing process for hydropower applicants who use collaborative procedures stressed that the successful use of the process requires a strong consensus to support it. They contended that the Commission cannot mandate the cooperative attitude among the participants and applicant that is necessary for a productive collaboration; the willingness of participants and applicant to voluntarily support the process is critical.[20] Representatives of the hydropower industry also emphasized how helpful it is, when planning for the licensing of a hydropower project, to have current regulations that afford applicants a range of pre-filing options from which they may choose the process best suited to the preparation of their applications in each case.[21] Gas industry commenters agreed, favoring flexibility in preparing their applications but stressing that timely approval of gas projects is often crucial to their viability. Many were concerned that requiring the use of pre-filing collaborative procedures in all cases might add significantly to the time and expense needed to obtain authorization for a proposal, which could preclude or end some time-sensitive project proposals.[22] Gas commenters further stated that the proposed requirement that all applicants demonstrate at least a good faith attempt to initiate a pre-filing collaborative process would place an additional administrative burden on the applicant and would not serve any useful purpose.[23]

Commenters favoring voluntary collaboration[24] noted that gas certificates and abandonments cover a

[13] *See* 18 CFR 385.602 of the Commission's rules of practice and procedure.

[14] 15 U.S.C. 3301–3432.

[15] *See* 40 U.S.C. 101.

[16] El Paso at 8–9.

[17] INGAA is concerned that the new collaborative process could curtail existing pre-filing procedural rights. We clarify that nothing in the new regulations will displace or replace present pre-filing options. The new regulations provide prospective applicants an additional means to engage in discussion with interested persons prior to filing.

Trout Unlimited observes that not all proposed gas projects make promising candidates for a collaboration and thus requests that the Commission consider other forms of early public involvement. We note the existing procedural rights alluded to above constitute one such alternative; another is contemplated in the NOPR on Landowner Notification, Residential Area Designation, and Environmental Filing Requirements, 64 FR 27717 (May 21, 1999), IV FERC Stats. & Regs. ¶ 32,540 (Apr. 28, 1999).

[18] 18 CFR 4.38 and 16.8.

[19] EDF at 2. EDF advocated requiring all applicants for natural gas facilities and services to demonstrate that they have made a good-faith effort to undertake a pre-filing collaboration.

[20] NHA at 2–6; Northwest at 3–6; EEI at 9–12; CRITFC at 1–2; HRC at 4–6; EPA; Commerce at 2; Interior at 7–8; NY DEC at 2.

[21] SoCal Ed at 3–5; Sacramento at 2–3; California Water at 3–6; PG&E at 9.

[22] AGA at 6–7; ANR at 3; El Paso at 14–17; Great Lakes at 6; Tejas at 5–6; Williams at 7; Williston at 4.

[23] AGA at 4; PG&E at 14–15.

[24] Among those favoring a voluntary process are California Water at 1; Great Lakes at 2–4; INGAA at 2; Nicor at 3–4; PG&E at 7–9, 16; Industrials at 4–8; Sempra at 2; Williams at 6–7; Wisconsin DNR at 1–2; and Williston at 3–4.

broad range of different types of projects, and asserted that pre-filing collaboration will be ineffective for at least some of these projects. Commenters pointed out that prospective project sponsors are in the best position to judge whether a collaborative process is likely to be fruitful and should therefore have the flexibility either to request a pre-filing collaboration or to file an application without using such a process.

In view of the comments, the Commission will not mandate that all project applicants engage in a pre-filing collaboration or explain why efforts to do so were unavailing. The final rule adopts regulations similar to those proposed in the NOPR in order to offer applicants for gas facilities or services the option of undertaking a pre-filing collaboration. Those applicants may continue to use the standard certification procedures (which, for gas applicants, do not require any pre-filing consultation process). After a pre-filing collaboration has begun, the applicant may switch to the standard procedures and file its application if it believes that the pre-filing collaborative process is not productive.

C. Should the Collaborative Process be Extended to Include a Draft EIS or Draft FEIS?

In the preamble to the NOPR, the Commission asked whether it would be appropriate to extend the pre-filing collaborative process beyond the stage of preparing a preliminary draft NEPA document, as provided under current regulations for hydropower applicants and proposed in the NOPR for gas applicants. The Commission asked whether it would be appropriate for Commission staff, in the pre-filing stage, to issue a draft EIS and for participants in a pre-filing collaborative process to review the comments on the draft EIS and prepare either a final EIS or a preliminary draft of a final EIS. The Commission asked whether such a process should be permitted prior to the filing of the application, without first issuing a notice inviting interested persons to intervene as parties to a formal proceeding.

While a few commenters thought that the Commission should consider extending the NEPA process (prior to the filing of an application) beyond the point allowed by current regulations for hydropower applicants (*i.e.*, the preparation of a preliminary draft EA or EIS),[25] most commenters thought that such a proposal was ill-advised and may be illegal.[26] Commenters stated that the proposal would complicate the pre-filing collaborative process and could undercut one of its central purposes, allowing the applicant to craft a proposal in its application that would respond to the resource concerns raised by the participants in the pre-filing process. An attempt to carry NEPA further in the pre-filing stage may entangle the pre-filing collaboration with the Commission's post-filing review and decision-making process, which should not commence until after the application is filed and a legal proceeding begins, with all its attendant protections for parties.

We agree with the majority of commenters on this issue. The rulemaking establishing the alternative pre-filing procedures for hydropower applications carefully balanced the interests of accelerating the NEPA process by beginning it, with staff's assistance, in the pre-filing stage, against the interests of preserving the Commission's responsibilities—under the Federal Power Act (FPA),[27] NEPA, and other applicable statutes—to conduct its own independent review of the application after it has been filed. That balance is best accomplished as the current hydropower regulations provide, by ending the pre-filing process with the preparation of an application and a preliminary draft EA or EIS. Only after the filing of these documents in conjunction with an application will the Commission complete the NEPA process by issuing a draft EA or EIS. Then, in light of the comments received, and any additional analysis and review deemed necessary, the Commission issues the final EA or EIS, followed by a decision on the application.[28] To try to carry the NEPA process further in the pre-filing stage would upset this balance, raise the risks outlined by the commenters, and call into question the integrity of the Commission's review and decision-making processes.

D. Should there be Deadlines on the Collaborative Process?

The proposed rule required the submission of certain reports by the applicant in the course of the pre-filing collaborative process, allowed the participants in the process to set reasonable deadlines for requests for scientific studies or alternative route analyses, and provided that the Commission may set deadlines for preliminary resource agency recommendations, conditions, and comments, to be submitted in final form after the filing of the application with the Commission.[29]

The Commission invited comment on whether any limitations of time should be placed on the pre-filing collaborative process and, if so, what time limits might be appropriate. Comment was sought on how best to ensure that all participants in the process have a full and fair opportunity to participate in a manner that facilitates cooperative progress within a reasonable time frame.

Some commenters wanted the Commission to set deadlines for pre-filing processes and participants in order to avoid delaying the filing of certificate applications.[30] One commenter suggested the potential applicant propose time limits for a collaboration in its initial request to employ the pre-filing process.[31] Another commenter argued that participants and Commission staff should follow through to establish a post-filing schedule for submitting comments, data, and documents.[32]

Other commenters observed that establishing deadlines can be effective in moving hydropower alternative pre-filing processes along, but concluded that given the relatively short period that this process has been in effect for hydropower applicants, it would be premature for the Commission to set time limits on the pre-filing process.[33]

Many commenters wanted to avoid any Commission-imposed deadlines on the pre-filing process, preferring that the collaborative participants concur on deadlines.[34] Concerns were expressed that any fixed time limit applied across the board to the wide variety of possible processes would be arbitrary and burdensome[35] and that such constraints might pressure participants into making unwanted concessions.[36] One commenter observed that any imposition of time limits in the pre-filing process must not conflict with the time frames provided under the regulations of the affected agencies.[37]

In light of the commenters' concerns, we see no reason to establish in the final rule any general deadlines for

[25] *E.g.*, EEI at 12 and Northwest at 7.

[26] *E.g.*, California Water at 7–9, Interior at 5, Commerce at 3–4, PG&E at 10–11, and HRC at 3.

[27] 16 U.S.C. 791a *et seq.*

[28] Although not required by NEPA, the Commission in its hydropower licensing program issues draft EA's for comment.

[29] Proposed 18 CFR 157.22(f)(2), (7) and (8).

[30] Industrials at 8; SoCal Ed at 7–8; NY DEC at 4, citing proposed 18 CFR 157.22(f)(8).

[31] PG&E at 17.

[32] Forest Service at 2.

[33] California Water at 10.

[34] Wisconsin DNR at 2; Interior at 6–7; Forest Service at 2; Commerce at 2–3; and AGA at 8.

[35] PG&E at 11, 17; Forest Service at 2; Interior at 7; AGA at 8.

[36] Wisconsin DNR at 2.

[37] Advisory Council at 2, citing 36 CFR part 800.

completion of stages in the pre-filing collaborative process; this issue is best left to the potential applicant and the participants in each process to decide. A collaborative process must be flexible.

We do not anticipate that any deadlines agreed upon in the pre-filing collaborative process, or any set by the Commission in the proceeding on the filed application, would conflict with those set by other agencies with related authorities. Should such a conflict arise, we believe it can be resolved on a case-by-case basis.

It would not be appropriate to add specific provisions for the Commission to confer with a collaborative group to establish deadlines after an application is filed. Once an application has been filed, existing Commission practices and regulatory deadlines come into effect in the context of an administrative proceeding, and all deadlines will be set in reference to established Commission regulations, practices and procedures applicable to such proceedings. As appropriate, the Commission will consult with parties in setting such deadlines.

E. Should the Collaborative Process be Limited to Environmental Issues?

The NOPR noted that there are sometimes contentious non-environmental issues that may undermine successful collaboration in a pre-filing consultation process and sought comment on whether the process for gas applicants should address only the environmental issues associated with the potential application. While the main focus of the NOPR was to propose regulations that would allow for resolution of environmental issues prior to the filing of applications, the NOPR asked whether the collaborative process should be extended to non-environmental issues such as the need for the project, a comparison with competing projects, capacity allocation, rates, and the effects of abandonments on existing customers.

Some commenters believed that both environmental and non-environmental issues should be considered in the pre-filing process, at least in its initial phases, with the participants ultimately deciding the scope of issues to be addressed.[38] The majority of the commenters, however, stated that the pre-filing process should deal exclusively with environmental issues.[39]

The competitive nature of many NGA applications was most frequently cited as the reason why non-environmental issues should not be made part of the pre-filing process. Some of the commenters expressed concern that certain entities might try to use the pre-filing collaborative process as a means to delay the preparation and filing of applications of competitors, which would be contrary to the Commission's policy of promoting competition in the industry.[40] Several commenters asserted that allowing the pre-filing collaborative process to address non-environmental issues would cause unnecessary delay, emphasizing that the Commission's existing procedures are sufficient to address such topics as the need for a project, rate design, and other market-based issues.[41]

Commenters had varied opinions as to what constitutes environmental issues, with one commenter requesting that the Commission clarify what is an environmental issue.[42] While there was general agreement that issues such as need, capacity allocation and rates should not be included within the review of environmental issues, some commenters considered such issues as alternatives to a certificate proposal, landowner matters, terms of service, and related market and competitive matters to be non-environmental issues.[43] Other commenters expressed the view that it would be difficult, if not impossible, to differentiate between environmental and non-environmental issues.[44] Many commenters stated that the stakeholders involved in a collaborative team should be the ones to decide what issues will be addressed in the pre-filing process.[45]

We agree with the commenters that propose that the potential gas applicant and participants in any pre-filing process should determine the range of issues to be addressed in a collaboration. While the final rule adopted herein sets forth procedures for establishing a pre-filing collaborative process and the preparation of a preliminary draft NEPA document, nothing in it precludes the applicant and the participants from voluntarily deciding to use the process to address non-environmental issues which are not required to be a part of the NEPA process.

F. Procedural Questions

(1) Notice

As proposed in the NOPR, § 157.22(c)(1) of the rule required an applicant contemplating a pre-filing collaboration to make a ''reasonable effort'' to contact all ''resource agencies, Indian tribes, citizens'' groups, landowners, customers, and others affected by the applicant's proposal.'' Proposed § 157.22(c)(3) would require such an applicant to send a copy of its request to use the pre-filing collaborative process to the same entities. Under § 157.22(d)(1), the applicant's request must include provisions to distribute a description of its proposed project (including its intended purpose, location and scope, and the estimated dates of construction) at an initial information meeting (or meetings) open to the public. Pursuant to § 157.22(e), the Commission will publish in the **Federal Register** a notice of the request to initiate a pre-filing collaborative process and invite comments on the request. The Director of the Office of Pipeline Regulation (OPR) will review the comments submitted on the applicant's request and decide whether to approve the proposed process.

If a request to use the process is approved, under § 157.22(f)(1), the Commission will give notice in the **Federal Register**; the applicant will give notice in local newspaper(s) in the county or counties in which the project is proposed to be located, of the initial public meeting(s) and, subsequently, the scoping of environmental issues.[46] Under § 157.22(f)(5), the applicant must maintain a public file of all the relevant documents generated during the process, and the Commission will maintain a public file of the initial description of the proposed project, each scoping document, the periodic reports on the process and the preliminary draft EA or EIS. Under § 157.22(f)(4), the applicant must send copies of all these filings to each participant in the pre-filing collaborative process that requests a copy.

Some commenters contended that these procedures are inadequate to ensure that all interested parties: (1) Receive actual notice of the intent to

[38] Interior at 5; NY DEC at 2; Nicor at 5; NHA at 5.

[39] INGAA at 5; Williston at 5; Great Lakes at 7; Sempra at 2; Williams at 3; Industrials at 7; Duke at 11–12; AGA at 2.

[40] Industrials at 8; AGA at 6; and Great Lakes at 6.

[41] Williston at 5–6; Great Lakes at 6; Sempra at 2; Williams at 5; and Duke at 19.

[42] Duke at 20.

[43] Sempra at 2; Williams at 3; Industrials at 7; Duke at 12.

[44] Interior at 4; Nicor at 5.

[45] NHA at 7; Nicor at 5; Interior at 4; NY DEC at 2.

[46] In the interest of simplifying the process, we have deleted proposed 18 CFR 157.22(f)(2), which would have required the potential applicant to file periodic progress reports with the Commission. We have also deleted proposed 18 CFR 157.22(b), describing the goals of the process, because those goals are adequately described in the preamble herein and do not need to be articulated again in the regulatory text.

initiate a collaboration; (2) are informed that a collaboration has been initiated; and (3) have a meaningful opportunity to participate and be heard in a collaboration.[47]

Some commenters proposed that notice of the request to use the collaborative process be sent by certified mail to all landowners directly impacted by a proposed project.[48] One commenter expressed concern that without confirmed notification trespassing[49] may occur.[50] This commenter also asked: (1) Whether the Commission will verify that the list of contacted landowners is accurate and complete; (2) how participants will be informed of relevant Commission filings; and (3) how participants can obtain information about scientific studies and alternative route analyses and deadlines therefore.[51]

One commenter was concerned that once underway, a pre-filing collaborative process may so change the parameters of a proposed project that it may affect persons whom the applicant did not initially inform. That commenter urged us to adopt some means to inform and bring such persons into an ongoing collaboration.[52]

One commenter requested that the Commission clearly state how the universe of potentially interested entities is to be defined and urged that the Commission require the applicant to include the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) in any pre-filing collaborative process.[53]

One commenter requested that the Commission describe in greater specificity the minimum required contents of the project description included in the applicant's initial notice.[54] To ensure that participants have a full understanding of the collaborative process, that commenter proposed that the Commission publish an explanation with guidelines covering the process and require that the applicant distribute these guidelines to potentially interested entities with its initial notice of its request to undertake a pre-filing collaboration.

We believe that with the changes discussed herein, the notice procedures proposed in the NOPR should be adopted. In the final rule, § 157.22(c)(1) requires an applicant to make a reasonable effort to contact ''all entities affected by the applicant's proposal.'' As revised herein, § 157.22(c)(3) requires the applicant, within five days, to send a copy of the request to use the pre-filing collaborative process on ''all affected resource agencies and Indian tribes and on all entities that have expressed an interest in the collaborative process.'' [55] The Commission will publish notice of the request in the **Federal Register**. If the use of the pre-filing process is approved, the applicant must conduct a public meeting or meetings at which a description of its proposed project will be distributed. The Commission will give notice in the **Federal Register** and the applicant will give notice in local newspapers of the initial public meeting(s) and of the scoping of environmental issues.[56] As the pre-filing process unfolds, the applicant must keep a complete file, open to the public, of the process; essential information about the process must be submitted to the Commission for insertion into its public file, and copies of these filings must be sent to each participant in the process that requests a copy. In addition, the regulations require the negotiation of a communications protocol, governing the flow of information between the participants in the process.

The notice procedures for the pre-filing collaborative process for potential gas applicants are similar to the comparable procedures now in effect for hydropower applicants. We are not aware of any significant noticing problems under the hydropower procedures. We do not think it is useful to try to describe further in the final rule the universe of potentially interested entities. We note the Commission will have the opportunity to review the adequacy of the applicant's notification efforts when deciding whether to permit a potential applicant to use the pre-filing collaborative process. Further, the Commission's staff will work closely with the applicant and participants during the process to ensure appropriate efforts are made to inform interested persons of the proposed project and of any subsequent changes to the initial proposal.[57]

We note that the regulations require that notice of the request be sent to resource agencies and Indian tribes. We believe that this notice, along with the required **Federal Register** notice, is sufficient to alert the SHPO or THPO that a pre-filing collaborative process is being considered. In response to the concerns raised in the comments and to clarify these noticing requirements, we are adding in the final rule, at new § 157.1, definitions of ''Indian tribe'' and ''resource agency.'' These definitions are based on similar definitions in the Commission's hydropower regulations, which apply to potential hydropower applicants using the standard or alternative pre-filing consultation processes.[58]

We believe that the concerns about notification to landowners are adequately addressed by the provisions in the final rule, along with the regulations proposed in Docket No. RM98–17–000,[59] which include prompt notification to landowners by mail once an application for gas facilities is filed with the Commission. We are not persuaded that there is any need in the pre-filing process for the applicant and the Commission to provide landowners' notice by certified mail.

How all types of information, including studies and analyses that are part of the NEPA process, are distributed and made available to the public is an issue we expect that the applicant and participants will take up, resolve, and make part of the communications protocol to be filed with each request for a collaborative process.

We do not believe it is appropriate to specify further in the regulations what description of the proposed project the potential applicant must make in its notices and what procedures may be used for participating in the pre-filing collaborative process. We believe the project description required by the final rule is both broad and particular enough to alert entities to proposals that they may want to monitor or participate in. As far as the procedural steps in a collaborative process and the

[47] Advisory Council at 1–2; Indicated Shippers at 8–12; Trout Unlimited at 3–4.

[48] Ferguson & Tavares at 1; Southern Landowners at 2–3.

[49] Trespass is governed by state law, and is not affected by the final rule because the rule adopts procedures that apply prior to the issuance of a certificate. Specific allegations of trespass may be referred to the Commission's Enforcement Task Force Hotline at (202) 208–1390 or (877) 303–4340 or by E-mail to hotline@ferc.fed.us.

[50] Ferguson & Tavares at 1.

[51] Id.

[52] Indicated Shippers at 12.

[53] Advisory Council at 2.

[54] NY DEC at 3.

[55] The regulatory language adopted herein is based on 18 CFR 4.43(i), which is applicable to hydropower applicants using the alternative pre-filing consultation process.

[56] The timing and sequencing of notices of environmental scoping may vary considerably among different projects and collaborative processes.

[57] The Commission encourages applicants and participants, to the extent practical on a case-by-case basis, to consider making use of the Internet to supplement the notification procedures mandated herein.

[58] See 18 CFR 4.30, 4.34(i), 4.38 and 16.8.

[59] Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements, Notice of Proposed Rulemaking, 64 FR 27717 (May 21, 1999), IV FERC Stats. & Regs. ¶ 32,540 (Apr. 28, 1999).

participants' roles are concerned, we will leave that up to the applicant and the collaborative participants to decide in each case. To assist interested entities in developing an understanding of these types of processes and their role in the Commission's regulation of gas projects, we are incorporating into § 157.22(c)(3) of the final rule a requirement that a potential applicant requesting to use a pre-filing collaborative process must include a copy of the regulations adopted herein when it is sending notice of its request to all affected resource agencies, Indian tribes, and entities that have expressed an interest in the process.[60]

(2) Involvement of Commission Staff

Some commenters asked why Commission approval should be required for an applicant to use a pre-filing collaborative process.[61] It is not necessary for applicants to seek Commission approval for activities which take place without substantial involvement by Commission staff and without the preparation of a draft NEPA document.

One commenter urged the Commission to describe in greater detail the benefits available through use of the process and to clarify the role and purpose of Commission staff involvement.[62] The role of Commission staff is to guide and support the pre-filing process but not to lead or direct it. Participants in the process may choose a ''neutral,'' such as a facilitator or mediator, to coordinate the collaborative group's efforts, and this role may be filled by any person that the group selects.[63]

(3) Consensus

As proposed in the NOPR, and as adopted herein in § 157.22(b)(1), a potential applicant requesting to use a pre-filing collaborative process must contact entities affected by its proposal and demonstrate that a ''consensus exists that the use of the collaborative process is appropriate under the circumstances.'' Under § 157.22(f), a participant that has cooperated in the pre-filing process can petition the Commission for an order to terminate the process if a consensus to support it no longer exists and if continued use of the process would not be productive.[64] In the NOPR, we explained that the requirement for a consensus means that ''the weight of opinions expressed makes it reasonable to conclude that under the circumstances the use of the collaborative process will be productive.'' The applicant's consent to use of this process would be required, but the agreement of everyone interested in the proposal would not be required for the Commission's approval of the process. The term ''consensus'' is also used in § 157.22(f), providing that if a consensus supporting use of the process no longer exists, a participant can petition the Commission for an order directing the applicant to use appropriate procedures to complete its application.

A number of commenters requested clarification regarding the criteria the Commission will use in determining whether to approve or deny an applicant's request to initiate a pre-filing collaborative process.[65] One commenter argued that ''consensus'' should be defined as ''unanimous agreement by the various stakeholders,'' [66] while other commenters urged that the Commission not approve a request to use a pre-filing collaborative process unless ''critical constituencies'' or a majority of the ''customers/shippers'' that may use the proposed facilities endorsed the process.[67]

One commenter was unclear if the Commission, in considering comments in response to a request to initiate a collaboration will, pursuant to proposed § 157.22(e), accept comments only from entities previously notified by the applicant or will also accept comments from entities not so notified. That commenter recommended revising proposed §§ 157.22(c) and (e) [68] to specify whether the Commission may compel an applicant to admit a late-arriving interested entity to an ongoing collaboration.[69]

The Commission addressed similar concerns in the rulemaking adopting the regulations governing the alternative pre-filing process for hydropower applicants. [70] Our subsequent experience with those regulations does not lead us to change the conclusion we reached at that time. For the purposes of determining whether the Commission should grant an applicant's request to use the pre-filing collaborative process and determining whether such a process should be allowed to continue, ''consensus'' means ''general agreement'' or ''collective opinion: The judgment arrived at by most of those concerned.'' While unanimity among the participants in a collaborative process reflects consensus, it is not essential to support a consensual approach. In its request to use the pre-filing collaborative process, the applicant need only show that the weight of opinions expressed by the entities interested in the process makes it reasonable to conclude that under the circumstances use of the process will be productive. No signed agreement or use of a particular voting procedure is required to memorialize the consensus on use of the process. The Commission will apply similar standards in evaluating any petition alleging that the consensus for the process has collapsed and asking for an order to bring it to a conclusion.

As stated in Order No. 596, the Commission expects the potential applicant, prior to filing its request to use the pre-filing collaborative process, to engage in a series of interactions with those who may be interested in its proposal, going beyond an exchange of letters. Such interactions could include teleconferences and meetings involving Commission staff to explore the use of the process. In some cases the applicant's showing in support of its request to use the process may rely on a lack of objections raised in such meetings, in order to allow the applicant and the participants an opportunity to try the process. Where the position of potentially key players in a collaborative process is not clear, the Commission's staff may reach out to solicit their position before reaching any decision on a request to use the process. If entities that appear to be key players oppose the use of a collaborative process, we will carefully weigh whether the process should be allowed to proceed under these circumstances, and staff may hold discussions with those concerned to try to find ways to reconcile different views on the use of the process.

[60] As a means to inform potentially interested persons of procedures generally applicable to pipeline projects, the Commission has made available to the public, in pamphlet form, answers to questions frequently asked concerning gas certificate applications. In the event the need arises for a similar procedural summary or a set of guidelines with respect to the pre-filing collaborative process for gas facilities, the Commission will make it available in the same manner.

[61] Martin at 1, Enron at 3.

[62] Trout Unlimited at 5–6.

[63] In the interest of simplifying the process, we have deleted proposed § 157.22(f)(9), which would have authorized participants to request dispute resolution by the Commission.

[64] The petitioner must also serve a copy of the petition on all participants and recommend specific procedures for completing the pre-filing process.

[65] *E.g.*, NY DEC at 3–4.

[66] Interior at 3.

[67] Industrials at 8–10; EDF at 2.

[68] Because of our deletion of several subsections of the regulations that were proposed in the NOPR, as mentioned above, proposed §§ 157.22(c) and (e), as well as other subsections, have been renumbered in the final rule.

[69] NY DEC at 3.

[70] Order No. 596, 62 FR 59802 (Nov. 5, 1997), III FERC Stats. & Regs. ¶ 31,057 at 30,638–39 (1997).

We are therefore not making any changes in the final rule regarding ''consensus'' as it applies to requests to use or to discontinue the pre-filing collaborative process. Likewise, we do not believe that it would be appropriate to specify criteria that the Commission will use in making decisions on such requests, beyond the general considerations outlined above.

We clarify that in deciding whether to approve an applicant's request to use the pre-filing collaborative process, under § 157.22(d) (as it is numbered in the final rule), all timely submitted comments will be considered, whether in response to actual notice by the applicant or not.

Because the procedures for the pre-filing collaborative process in the final rule provide for abundant notice to potentially interested persons and entities, as discussed above, latecomers may enter as participants provided they do not delay or disrupt the process, *i.e.*, latecomers must deal with the applicant and the collaborative group that has formed and with any ground rules that have already been established. For these reasons we strongly encourage those interested in an applicant's proposal to participate from the outset in any pre-filing collaborative process that is authorized, if not directly then indirectly through others with similar interests. At the very least, we expect interested entities to monitor the progress of a collaboration through the many sources of public information that the rule requires.

(4) *Concluding the Pre-Filing Process*

As noted above, under proposed § 157.22(g)[71] a participant that has cooperated in the pre-filing process can petition the Commission for an order to terminate the process if a consensus to support it no longer exists and if continued use of the process would not be productive. The request must recommend specific procedures that are appropriate to use to complete the process, and the petition must be served on all the other participants in the process.

One commenter requested that proposed § 157.22(g) be modified to state that when a participant submits a petition to the Commission claiming that a consensus no longer exists to support the process, other participants may submit comments in response to that petition.[72] The commenter also asked whether a collaboration might continue without the participation of the applicant and proposed that the Commission describe the circumstances under which it would intervene to end a pre-filing collaborative process.

Several commenters were concerned that proposed § 157.22(g) would impede a prospective applicant's right to file an application with the Commission at any time and, by so filing, end a pre-filing collaborative process at the applicant's discretion.[73] Another commenter suggested that if a pre-filing collaboration stagnates, the Commission might require the applicant to show cause why pre-filing efforts should not end and an application be filed.[74]

When a participant in a pre-filing collaborative process believes that the consensus supporting the use of the process has collapsed and petitions the Commission for an order terminating it, other participants may submit a response to the Commission. Any such response should be served on all other participants and submitted to the Commission as soon as possible. In seeking to determine whether a consensus still exists to support continuation of the process, the Commission will consider both the petition and timely responses to it. With this clarification, we see no need to revise proposed § 157.22(g) in the final rule.

The proposed regulations were not intended to preclude an applicant from withdrawing from and ending an ongoing pre-filing collaborative process by filing an application, which an applicant may do under current practice and procedures. As stated in the preamble to the NOPR: ''Entering into a pre-filing collaboration will not bar an applicant from interrupting pre-filing efforts by exercising its existing option to file an application.'' In response to the concerns expressed in the comments, and in order to ensure that the new regulations in no way intrude on a project sponsor's existing rights, in the final rule we are adding a new § 157.22(h) to clarify that these rights are not affected by the rule.

We are also changing the first sentence of proposed § 157.22(g) to make it clear that any order issued in response to a petition will only end the pre-filing process and will not affect the applicant's existing right to file an application for the proposed facilities.[75]

(5) Offer of Settlement

The NOPR anticipated that one outcome of a pre-filing collaborative process could be a settlement or agreement on issues by the participants. The results could be submitted to the Commission with the application and the preliminary draft NEPA document as an offer of settlement covering all or certain issues raised in the process, as a stipulation of facts, or in conjunction with certain documentation (such as studies that have been conducted pursuant to the process).

Commenters requested that the Commission clarify in the regulations whether an agreement or offer of settlement resulting from a pre-filing process is binding on all the participants in the process and pointed out that in some cases such settlements may not satisfy criteria established in applicable statutes and regulations.[76]

One commenter was concerned that entities opposing a collaboration are left no option but to refuse to participate, risking exclusion from ''a settlement that would effectively moot the formal proceeding before the Commission.'' [77]

The manner in which a settlement is binding on signatories is a matter properly described in the language of the settlement. The terms of a settlement may bar signatories from protesting certain aspects of an application. We note, however, that no provision in the Commission's regulations restricts a collaborative participant or non-participant from intervening, commenting on, and protesting any aspect of an application or settlement. Collaborative participants that are non-signatories to a settlement or agreement are obviously not committed to the terms of that settlement or agreement.[78]

In any proceeding on an application in which an offer of settlement is filed, the Commission will carefully review the offer, including all comments supporting or opposing it, to determine whether the settlement proposed complies with all applicable legal standards and Commission policy. The Commission will not approve any offer unless it is supported by substantial evidence such as documents and studies. When evidence is developed in

[71] Proposed § 157.22(g) appears as § 157.22(f) in the final rule.

[72] NY DEC at 3–4.

[73] El Paso at 19–20; Enron at 3; Great Lakes at 4–5; INGAA at 4; PG&E at 18; Tejas at 14–15; Williston at 6–7.

[74] Commerce at 2–3.

[75] Hydropower applicants using the alternative pre-filing procedures may be subject to different requirements in such a case, as they must fulfil detailed pre-filing consultation requirements under the standard process. *See* 18 CFR 4.38 and 16.8.

[76] NY DEC at 3, Advisory Council at 2.

[77] Indicated Shippers at 10.

[78] *See, e.g.*, Kern River Gas Transmission Company, 87 FERC ¶ 61,128 at 61,506 (1999), in which the Commission found that a party had not been afforded the opportunity to participate in discussions leading to a rate settlement, and ''in the spirit of the effort already expended,'' withheld ruling on the pending settlement while the Director of the Commission's Dispute Resolution Service convened ''a meeting of the parties to arrange a process that will foster negotiation and agreement.''

the course of a pre-filing collaboration, the applicant should include such information in the administrative record in the proceeding on the application.

(6) Post-Filing Changes in Proposed Facilities

The NOPR did not address the impact of an applicant's participation in a pre-filing process on its rights to revise its proposal after filing an application with the Commission.

One commenter stated that, in the past, changed circumstances have compelled it to modify the terms of a requested authorization after the application was initially filed and expressed concern that pre-filing discussions cannot anticipate or address such changes to a proposal that may become necessary after filing.[79] This commenter claimed that the existing certificate process is flexible enough to accommodate such post-filing changes and was concerned that understandings reached in a pre-filing collaboration could inhibit or delay the submission of amendments (incorporating such changes) to an application that has been filed.

The final rule does not restrict an applicant's ability to make changes to the parameters of a proposed project after the application is filed. Depending on the extent of the changes, the application may need to be amended or refiled. An applicant may make a post-filing change in a project that raises issues that go beyond those addressed in the pre-filing process. Such post-filing changes may well reflect the applicant's reasoned response to recommendations received in the pre-filing process or in the post-filing review, including the NEPA process. The new regulations will not in any way inhibit or delay an applicant from making changes to a proposed project.

The pre-filing process is not designed to compel an applicant to bind itself to build or abandon a project as initially proposed. In the context of a collaboration, a project sponsor may, but need not, make commitments that vary in their rigidity and enforceability as a means to firm up support for or satisfy critics of a project. Such efforts are no different from the precedent agreements gas pipelines have secured under existing procedures to show demand for proposed new capacity. Similarly, in order to address concerns raised by landowners or resource agencies, pipelines have often committed to routing a proposed line along a particular right of way prior to filing an application. An applicant may feel bound to honor such commitments made prior to filing, whether as part of a pre-filing collaborative process or not.

Of course parties to a proceeding on an application for gas facilities, including parties that did not participate in the pre-filing process, may oppose the application as initially filed or as revised or amended. The Commission will consider any such opposition prior to issuing a decision on the application.

G. Miscellaneous

(1) Study Requests Made during the Pre-filing Process

The section proposed in the NOPR as § 57.22(f)(7) and adopted herein as § 157.22(e)(6) states in part: ''Additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.''

One commenter noted that an applicant may not conduct all the studies requested by participants in the pre-filing process, and sought assurances that the regulations do not preclude a participant in the process from renewing its request for a study that had been made by the participant and had been rejected by the applicant in the pre-filing stage. Specifically, the commenter requested that the language in proposed § 157.22(f)(7) be changed to substitute ''study requests'' for ''additional requests for studies.'' [80]

We do not believe it is necessary to change the language in § 157.22(f)(7). We confirm that participants (including resource agencies) in a pre-filing process (either gas or hydropower), after an application has been filed, are free to renew requests for studies that were made but rejected by the applicant in the pre-filing process. In such cases, however, we encourage the participants to make every effort to resolve their differences with the applicant as part of the pre-filing process and to consider the filing of a request for dispute resolution with the Commission in the pre-filing stage if such efforts are not successful.

(2) Communications Protocol

Section 157.22(c)(2) as proposed in the NOPR, adopted herein as § 157.22(b)(2), states that an applicant seeking to undertake a pre-filing collaboration must submit with its request ''a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing collaborative process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and recommendations of interested entities.'' The NOPR stated that this protocol would designate how communications in the pre-filing process would be documented and made available to the participants and the public.

One commenter asked the Commission to provide more guidance regarding the required communications protocol, including what such a protocol must include or may exclude, how it may be implemented, and the consequences for violating it.[81] Another commenter was concerned that the applicant may exert undue influence over a group's development of the communications protocol and therefore urged the Commission to impose its own protocol on all collaborative groups.[82]

The communications protocol governs how the applicant, Commission staff, and participants in the pre-filing collaborative process may communicate with each other during the process. The protocol should specify how such communications will be documented and made available to the participants and the public.[83] Because we want to leave the applicant and participants room to tailor the protocol to suit the particular circumstances of each collaborative process, we will not add requirements to the final rule specifying the content or manner of implementation of a protocol. When an applicant files its request to use the pre-filing collaborative process, the Commission will have the opportunity to review the proposed communications protocol and prospective participants' comments regarding it before deciding whether to authorize the requested pre-filing collaboration. We can reject the protocol or require revision of its terms if they are inadequate, inappropriate, or prejudicial in any way.

(3) Record in Certificate Proceedings

Section 157.22(e)(5) as adopted herein (§ 157.22(f)(6) in the NOPR) states: ''An applicant authorized to use the pre-filing collaborative process may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of an environmental report with its application as required by § 380.3 of this chapter and need not supply additional

[79] Tejas at 11–12.

[80] *Id.*

[81] Industrials at 10.

[82] Smith at 3.

[83] The Commission staff can provide examples of communications protocols that have worked on hydropower projects and can assist the applicant and participants in defining the necessary elements.

documentation of the pre-filing collaborative process with its application. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the proceeding.''

One commenter asked the Commission to clarify whether ''additional material'' is to include documentation sufficient to satisfy the identification and evaluation requirements of section 106 of National Historic Preservation Act.[84] Other commenters asked whether any portion of pre-filing discussions would become part of the record after the application is filed with the Commission[85] and, if the post-filing record rests on the pre-filing discussions, whether dissenting points of view would appear in the record.[86]

We expect that the information submitted with the application after a pre-filing process would be equivalent to that normally submitted pursuant to § 380.3, for purposes of evaluating the consistency of the application with the National Historic Preservation Act and other relevant statutes.

We expect that only pertinent parts of the information gathered in the pre-filing process will become part of the record of the proceeding once an application has been filed.[87] At the conclusion of the pre-filing process, the applicant and the collaborative group should decide what information they wish to become part of the administrative record in the proceeding on the application, and that information should be submitted to the Commission with the application.

Any party to the proceeding, regardless of whether it participated in the pre-filing process or whether it supports the application, may seek to enter additional information into the record to support the party's position, and if necessary or appropriate, the Commission may direct such information to be submitted.

(4) Rights of Parties

Currently, once an application is filed, interested persons can intervene, comment, and/or protest. Several commenters emphasized that it would be inappropriate if this existing process were curtailed in any way with respect to applications filed following a collaboration.[88] One commenter sought assurances that participants in a pre-filing process can withdraw from it without prejudicing their right to later intervene after an application has been filed and participate in the proceeding before the Commission.[89] One commenter insisted the Commission must accord the same treatment to all applications, whether filed after a collaboration or without any pre-filing consultation.[90]

All entities, including those that do not participate in or withdraw from a pre-filing process, retain their existing rights to intervene in the proceeding concerning the proposed project once an application is actually filed and to comment on, support or protest the application. The time the Commission needs to reach a decision is in part a function of the complexity of the issues raised, the degree to which issues are contested, and the thoroughness with which the application explores the issues. In particular, when an application is filed in which the environmental impacts of a proposed project have been adequately addressed and the applicant has agreed to take actions to provide appropriate mitigation for such impacts and enhancement, the time required for Commission review may be significantly shorter than for an application that does not discuss such issues.

(5) Relation to Ex Parte Regulations

One commenter[91] questioned the Commission's legal authority to provide for pre-filing collaboration for gas applicants, contending this could be construed to be a form of alternative dispute resolution (ADR) that could run afoul of *ex parte* prohibitions.[92] Commenters sought clarification on how *ex parte* rules will affect the collaborative process.[93] One commenter suggested that, if not the letter, then the spirit of the *ex parte* prohibitions would be compromised were the same Commission staff to participate in pre-filing collaboration and to later serve in an advisory role in the decision-making proceeding on any resulting application that was filed.

The Commission's *ex parte* rules[94] are intended to avoid any prejudice, real or apparent, that might result to a party in a contested, on-the-record proceeding before the Commission, were a party or ''interceder'' to communicate information regarding the merits to decision-making (advisory) staff without the knowledge of other parties. Since the pre-filing collaborative process established by the final rule is not a proceeding before the Commission (which commences only after the filing of an application), the Commission's regulations precluding *ex parte* communications do not apply to communications with staff during the course of such a pre-filing process. The communications protocol, however, typically addresses concerns about private communications with Commission staff during the pre-filing process. Collaborative participants have the flexibility in negotiating the protocol to set the level of scrutiny that they feel is appropriate to apply to exchanges of information among participants and with the Commission staff. Consequently, we do not believe that the involvement of the project sponsor, interested persons, or Commission staff in pre-filing, pre-decisional activities conflicts with the Commission's *ex parte* rules.

We are not persuaded that a staff member's participation in a pre-filing discussion should disqualify that individual from serving in an advisory role in any proceeding on an application that is subsequently filed. We note that staff representations in the pre-filing forum can not in any way bind the Commission, because the Commission alone is responsible for making all final decisions on the application.

IV. Environmental Analysis

Commission regulations describe the circumstances where preparation of an EA or an EIS will be required.[95] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[96] No environmental consideration is necessary for the promulgation of a rule

[84] Advisory Council, attachment at 2–3.

[85] Industrials at 10.

[86] Sempra at 3.

[87] Examples of information gathered in the pre-filing process that would not normally become part of the administrative record of the proceeding on the application would include drafts of studies or reports, routine correspondence, and privileged settlement discussions. Information that would normally be submitted to the Commission for inclusion in the record would include the results of relevant scientific studies or other investigations of resource concerns conducted during the pre-filing process.

[88] AGA at 7–8; Industrials at 9; Sempra at 3.

[89] EDF at 2.

[90] INGAA at 3–4.

[91] Indicated Shippers at 4 and 14.

[92] *See* 5 USC 551–557 and 18 CFR 385.604 and 385.2201.

[93] Advisory Council, attachment at 3; Martin at 2.

[94] *See* 5 U.S.C. 557; 18 CFR 385.2201; *see also* Regulations Governing Off-the-Record Communications, Notice of Proposed Rulemaking, 63 FR 51312 (Sept. 25, 1998), FERC Stats. & Regs. (Regulations Preambles 1988–1998) ¶ 32,534 (Sept. 16, 1998).

[95] Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), codified at 18 CFR part 380.

[96] 18 CFR 380.4(a)(2)(ii).

that is clarifying, corrective, or procedural, or that does not substantially change the effect of legislation or regulations being amended.[97]

The final rule adopted herein is procedural in nature. It implements an optional pre-filing collaborative process that a prospective applicant for a natural gas authorization may wish to use. Thus, no environmental assessment or environmental impact statement is necessary for the requirements adopted in the rule.

V. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (RFA)[98] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the final rule adopted herein will not have a significant economic impact on a substantial number of small entities.

The procedural regulations adopted in this final rule are purely voluntary in nature, and are designed to reduce burdens on small entities (as well as large entities) rather than to increase them. The pre-filing collaborative process adopted herein is optional, will not alter or replace the procedures currently prescribed in our regulations, and will not be available unless it is the consensus of the persons interested in the proposed project to use that process. Under this approach, each small entity will be able to evaluate for itself whether the pre-filing process would be beneficial or burdensome, and could decline to participate in the proposed process if it appeared to be more burdensome than beneficial. Under these circumstances, the economic impact of the final rule will be either neutral or beneficial to the small entities affected by it.

VI. Information Collection Statement

The regulations adopted in this final rule will impose reporting burdens only on those applicants that voluntarily choose to use the pre-filing collaborative process, and will only require minor additional filing requirements, as most of the reporting burdens associated with preparing and filing an application for natural gas facilities or services are imposed by existing regulations. The other additional burdens of the process do not involve filings with the Commission, but consist of various outreach efforts of the potential applicant and related interactions with entities interested in its proposal. An applicant would presumably only incur such additional burdens if it believed that, in the long run, it would reduce the time required to obtain Commission authorization or save on litigation and other costs incurred to pursue its application using only the standard procedures.

The Commission has made approximate estimates of the additional time that may be required of an applicant to comply with the pre-filing collaborative process. It is difficult to be precise about such estimates, because the time required for one applicant could vary considerably from the time required for other applicants, depending upon the circumstances involved, including the complexity of the issues raised, the total number of participants in the pre-filing process, and how cooperatively those participants worked together. If the pre-filing collaborative process were successful and resulted, for example, in the filing of an agreement or an offer of settlement with the Commission, the applicant might be able to save substantially more time by avoiding rehearing and litigation than was invested in the use of that process. If an applicant requested and was allowed to use the pre-filing collaborative process for an average project requiring a significant EA or an EIS, the main additional burden areas, with the estimated hours to comply with each, are:

Process	Burden (hours of effort)
(1) contact interested entities;	80
(2) prepare and submit request, including communications protocol;	80
(3) prepare and distribute scoping and hold related meetings;	32
(4) develop agenda and other documents, including minutes, for all meetings and prepare and distribute them (only additional time as compared to presently required meetings;	802
(5) prepare and publish public notices;	88
(6) prepare and submit required Commission filings;	64
(7) maintain a complete record of the pre-filing consultation proceedings that would be open to the public.	208
Total	1,354

We estimate that to prepare and distribute the preliminary draft environmental review document would not take any more time than to prepare an environmental report under the standard process. Therefore, the estimated additional burden of the tasks required of an applicant if it voluntarily undertakes the alternative process totals 1,354 hours.

SoCal Ed expects that an effective collaboration will involve frequent meetings with multiple participants and on this basis believes the Commission underestimates the hours such meetings will require.[99] We clarify that the specified number of additional hours reflects our judgment of the additional time needed to conclude an average pre-filing collaboration. As previously explained, the time devoted to a collaboration will vary considerably depending on the complexity and contentiousness of the proposed project. A potential applicant may expend less than 1,354 hours to complete a collaboration for relatively minor modifications to existing facilities, whereas a collaboration for a large and controversial project can be expected to take longer. Given the inevitable variability in types of applicant proposals, we have endeavored to strike a balance and gauge the additional time needed to undertake a collaboration for a moderately scaled project. For such a project, we affirm our estimate that an additional 1,354 hours will be needed.

Office of Management and Budget (OMB)[100] approval is required for certain information collection requirements imposed by agency rules. Accordingly, pursuant to OMB regulations, the Commission is providing notice of its information collections to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995.[101] The Commission identifies the information provided under parts 153 and 157 of its regulations as FERC–539 and FERC–537, respectively.

Title: FERC–537, Gas Pipeline Certificates: Construction, Acquisition, and Abandonment, and, FERC–539, Gas Pipeline Certificate: Import/Export.

Action: Proposed Data Collection.

OMB Control No.: 1902–0060 and 1902–0062.

An applicant shall not be penalized for failure to respond to this collection of information unless the collection of information displays a valid OMB control number.

Respondents: Businesses or other for profit, including small businesses.

Frequency of Responses: On occasion.

Necessity of Information: The rule will revise the Commission's regulations contained in 18 CFR parts 153 and 157.

[97] 18 CFR 380.4.

[98] 5 U.S.C. 601–612.

[99] SoCal Ed at 5–6.

[100] 5 CFR 1320.11.

[101] 44 U.S.C. 3507(d).

Implementation of the rule will offer prospective applicants seeking to construct, operate, or abandon natural gas facilities or services the option, in appropriate circumstances and prior to filing an application, of using a collaborative process.

Internal Review: The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements. The Commission's Office of Pipeline Regulation (OPR) will use the data included in applications to determine whether proposed facilities, services, or abandonments are in the public interest as well as for general industry oversight. This determination involves, among other things, an examination of adequacy of design, costs, reliability, redundancy, safety, and environmental acceptability of the proposal. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the natural gas industry.

Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426 (Attention: Michael Miller, Office of the Chief Information Officer, Phone: (202) 208–1415, fax: (202) 273–0873, E-mail: michael.miller@ferc.fed.us).

For submitting comments concerning the collection of information and the associated burden estimates, please send comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs (Attention: Desk Officer for Federal Energy Regulatory Commission).

VII. Effective Date

These regulations become effective October 22, 1999. The Commission has concluded, with the concurrence of the Administrator of the Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects

18 CFR Part 153

Exports, Imports, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

By the Commission. Commissioner Bailey concurred with a separate statement attached.

David P. Boergers,

Secretary.

Appendix A—List of Commenters

Advisory Council on Historic Preservation (Advisory Council)
Alabama Historical Commission (Alabama)
Alabama Power Company (Alabama Power)
American Gas Association (AGA)
ANR Pipeline Company (ANR)
California Department of Water Resources (California Water)
Columbia River Inter-Tribal Fish Commission (CRITFC)
Duke Energy Companies (Duke)
Edison Electric Institute (EEI)
El Paso Energy Interstate Pipelines (El Paso)
Enron Interstate Pipelines (Enron)
Environmental Defense Fund (EDF)
FPL Energy Inc. (FPL)
Frederick W. Martin (Martin)
Great Lakes Gas Transmission Limited Partnership (Great Lakes)
Hydropower Reform Coalition (HRC)
Idaho Power Company (Idaho Power)
Interstate Natural Gas Association of America (INGAA)
Indicated Shippers
J. Ferguson & J. Tavares (Ferguson & Tavares)
Laurie G. Smith (Smith)
National Hydropower Association (NHA)
New York State Department of Environmental Conservation (NY DEC)
Nicor Gas (Nicor)
Northwest Hydroelectric Association (Northwest)
Oregon Departments of Fish and Wildlife and Environmental Quality (Oregon)
PG&E Corporation (PG&E)
Process Gas Consumers Group, The American Iron and Steel Institute, and
The Georgia Industrial Group (Industrials)
Sacramento Municipal Utility District (Sacramento)
Sempra Energy Companies (Sempra)
Southern California Edison Company (SoCal Ed)
Southern Tier Landowners Association (Southern Landowners)
Tejas Offshore Pipeline, LLC (Tejas)
Travis K. Bynum
Tri-Dam Project of the South San Joaquin and Oakdale Irrigation Districts (Tri-Dam)
Trout Unlimited
U.S. Department of Agriculture, Forest Service (Forest Service)
U.S. Department of Commerce, National Marine Fisheries Service (Commerce)
U.S. Department of the Interior (Interior)
U.S. Environmental Protection Agency (EPA)
Williams Gas Pipeline Company (Williams)
Williston Basin Interstate Pipeline Company (Williston)
Wisconsin Department of Natural Resources (Wisconsin DNR)

(Issued September 15, 1999)

BAILEY, Commissioner, *concurring.*

I support the *voluntary* use of the collaborative process adopted in this document. I write separately only to question the need for engrafting a voluntary process into the Code of Federal Regulations as a rule. Putting aside a semantic discussion about whether a rule is a rule or just an option, my concern derives from the simultaneous issuance today of a certificate policy statement that has as a goal the filing of complete applications that can be processed expeditiously by minimizing adverse effects and working out contentious issues in advance. I am concerned that these two documents not be read in tandem so as to suggest the collaborative process is anything other than voluntary. I want to make it perfectly clear that from my perspective, this is the case.

Vicky A. Bailey,

Commissioner.

In consideration of the foregoing, the Commission amends Parts 153, 157 and 375 of Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 153—APPLICATIONS FOR AUTHORIZATION TO CONSTRUCT, OPERATE OR MODIFY FACILITIES USED FOR THE EXPORT OR IMPORT OF NATURAL GAS

1. The authority citation for part 153 continues to read as follows:

Authority: 15 U.S.C. 717b, 717o; E.O. 10485, 3 CFR, 1949–1953 Comp., p. 970, as amended by E.O. 12038, 3 CFR, 1978 Comp., p. 136, DOE Delegation Order No. 0204–112, 49 FR 6684 (February 22, 1984).

2. Section 153.12 is added, to read as follows:

§ 153.12 Collaborative procedures for applications for authorization to site, construct, maintain, connect, or modify facilities to be used for the export or import of natural gas.

The definitions and pre-filing collaborative procedures for certificate applications in §§ 157.1 and 157.22 of this chapter are applicable to applications under section 3 of the Natural Gas Act filed pursuant to subpart B of this part.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

3. The authority citation for part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717w; 3301–3432; 42 U.S.C. 7101–7352.

4. Section 157.1 is added, to read as follows:

§ 157.1 Definitions

For the purposes of this part—

Indian tribe means, in reference to a proposal or application for a certificate or abandonment, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the **Federal Register** in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the proposed construction, operation or abandonment of facilities or services (as where the construction or operation of the proposed facilities could interfere with the tribe's hunting or fishing rights or where the proposed facilities would be located within the tribe's reservation).

Resource agency means a Federal, state, or interstate agency exercising administration over the areas of recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which the facilities or services for which a certificate or abandonment is proposed are or will be located.

5. Section 157.22 is added, to read as follows:

§ 157.22 Collaborative procedures for applications for certificates of public convenience and necessity and for orders permitting and approving abandonment.

(a) A potential applicant may submit to the Commission a request to approve the use of collaborative procedures for pre-filing consultation and the filing and processing of an application for certificate or abandonment authorization that is subject to part 157 of this chapter.

(b) A potential applicant requesting to use the pre-filing collaborative procedures must provide a list of potentially interested entities invited to participate in a pre-filing collaborative process and:

(1) Demonstrate that a reasonable effort has been made to contact all entities affected by the applicant's proposal, such as resource agencies, local governments, Indian tribes, citizens' groups, landowners, customers, and others, and that a consensus exists that the use of the collaborative process is appropriate under the circumstances;

(2) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing collaborative process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and recommendations of interested entities; and

(3) Submit a request to use the pre-filing collaborative process and, within five days, send a copy of the request, along with the docket number of the request, instructions on how to submit comments to the Commission, and a copy of §§ 157.1 and 157.22, to all affected resource agencies and Indian tribes, and all entities contacted by the applicant that have expressed an interest in the pre-filing collaborative process.

(c) As appropriate under the circumstances of the case, the request to use the pre-filing collaborative procedures must include provisions for:

(1) Distribution of a description of the proposed project (including its intended purpose, location and scope, and the estimated dates of its construction), and scheduling of an initial information meeting (or meetings, if more than one such meeting is appropriate) open to the public;

(2) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(3) The preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application.

(d) The Commission will give public notice in the **Federal Register** and the prospective applicant will inform potentially interested entities of a request to use the pre-filing collaborative procedures and will invite comments on the request within 30 days. The Commission will consider the submitted comments in determining whether to grant or deny the applicant's request to use the pre-filing collaborative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(e) If the Commission accepts the use of a pre-filing collaborative process, the following provisions will apply:

(1) To the extent feasible under the circumstances of the process, the Commission will give notice in the **Federal Register**, and the applicant will give notice in a local newspaper of general circulation in the county or counties in which the facility is proposed to be located, of the initial information meeting or meetings and the scoping of environmental issues. The applicant shall also send notice of these events to a mailing list approved by the Commission. To the extent feasible under the circumstances of the process, the mailing list should contain the names and addresses of landowners affected by the project.

(2) The applicant must also file with the Commission a copy of the initial description of its proposed project, each scoping document, and the preliminary draft environmental review document.

(3) All filings submitted to the Commission under this section shall consist of an original and seven copies. The applicant shall send a copy of each filing to each participant that requests a copy.

(4) At a suitable location (or at more than one location if appropriate), the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing collaborative process. The Commission will maintain a public file of the applicant's initial description of its proposed project, scoping documents, periodic reports on the pre-filing collaborative process, and the preliminary draft environmental review document.

(5) An applicant authorized to use the pre-filing collaborative process may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of an environmental report with its application as required by § 380.3 of this chapter and need not supply additional documentation of the pre-filing collaborative process with its application. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the proceeding.

(6) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens' groups, and interested entities to submit to the applicant requests for scientific studies or alternative route analyses during the pre-filing collaborative process. Additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

(7) During the pre-filing collaborative process the Commission may require deadlines for the filing of preliminary resource agency recommendations, conditions, and comments, to be submitted in final form after the filing of the application.

(f) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the pre-filing collaborative process can show that it has cooperated in the process but that a consensus supporting the use of the pre-filing collaborative process no longer exists and that continued use of that process would not

be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its pre-filing process. No such request will be accepted for filing unless the participant submitting it certifies that the request has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(g) The Commission staff may participate in the pre-filing collaborative process (and in discussions contemplating initiating a collaboration) and assist in the integration of this process and the environmental review process in any case. Commission staff positions are not binding on the Commission.

(h) A potential applicant for gas facilities is not precluded by these regulations from filing an application with the Commission at any time, even if the pre-filing collaborative process for the proposed facilities has not been completed.

PART 375—THE COMMISSION

6. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

7. In § 375.307, a new paragraph (h) is added, to read as follows:

§ 375.307 Delegations to the Director of the Office of Pipeline Regulation.

* * * * *

(h) Approve, on a case-specific basis, and make such decisions as may be necessary in connection with the use of pre-filing collaborative procedures, for the development of an application for certificate or abandonment authorization under section 7 of the Natural Gas Act, or the development of an application for facilities under section 3 of the Natural Gas Act, and assist in the pre-filing collaborative and related processes.

[FR Doc. 99–24615 Filed 9–21–99; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM98–1–000; Order No. 607]

Regulations Governing Off-the-Record Communications

Issued September 15, 1999.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its rules concerning communications between persons outside the Commission and the Commission and its employees. The revised regulations are designed to clarify ambiguities in the existing *ex parte* rules and to provide better guidance on what communications to and from the Commission are permissible and what communications are prohibited.

EFFECTIVE DATE: This rule is effective on October 22, 1999.

FOR FURTHER INFORMATION CONTACT: David R. Dickey, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, (202) 208–2140.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE, Room 2A, Washington, DC 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission from November 14, 1994, to the present. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. Documents will be available on CIPS in ASCII and WordPerfect 8.0. User assistance is available at (202) 208–2474 or by E-Mail to CipsMaster@FERC.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Home Page using the RIMS link or the Energy Information Online icon. User assistance is available at (202) 208–2222, or by E-Mail to *RimsMaster@FERC.fed.us.*

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, NE, Washington, DC 20426.

I. Introduction

The Federal Energy Regulatory Commission is revising its regulations governing communications between the Commission's decisional employees and persons outside the Commission. The revisions clarify the ground rules for communication, consistent with the Commission's outreach goals. The final rule is intended to permit fully informed decision making while at the same time ensuring the continued integrity of the Commission's decisionmaking process.

II. Background

The amendments added to the Administrative Procedure Act (APA) in 1976 by the Government in the Sunshine Act provided a general statement as to the limitations and procedures governing *ex parte* communications in matters that statutorily require an on the record hearing.[1] Except as otherwise authorized by law, the APA prohibits *ex parte* communications relevant to the merits of a proceeding between employees involved in the decisional process of a proceeding and interested persons outside the agency.[2] The 1976

[1] 5 U.S.C. 551–557. Section 557 applies ''according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.'' Section 556 applies to hearings required by sections 553 and 554.

[2] 5 U.S.C. 557(d) provides that:

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) 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 decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) No 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 decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;