FEDERAL ENERGY REGULATORY COMMISSION EX PARTE REGULATIONS AND PRACTICES

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The Federal Energy Regulatory Commission (FERC) asked me to review its rules and practices with respect to ex parte communications in various types of proceedings to determine whether its rules and practices are consistent with the law. FERC's request was prompted, in part, by allegations in recent cases that pre-filing meetings between applicants and FERC Commissioners may violate the rules regarding ex parte communications contained in the Administrative Procedure Act (APA). To assist FERC in evaluating the lawfulness of its procedures, I reviewed the statutes administered by FERC, applicable FERC regulations, and the case law respecting ex parte communications in administrative proceedings. I conclude that FERC's practices respecting ex parte communications are fully consistent with the law. I also conclude that FERC's ex parte rules are more stringent than those required by the APA.

In offering these conclusions, I wish to emphasize that I am not addressing these issues for the first time in this report. Rather, I first addressed the issues I discuss in this report long before FERC or any other client asked my opinion about them. I have discussed the law governing ex parte communications in the proceedings of regulatory agencies in several scholarly works,[1] including most recently an article that is forthcoming in a Symposium issue of George Washington University Law Review that is devoted to discussion of administrative law issues.[2]

I. THE LAW GOVERNING EX PARTE COMMUNICATIONS

Agency decision-making procedures are governed by three sources of authority – agency rules, statutes, and the Constitution. Some judges once believed that the common law was also a legitimate source on which a court could draw to require an agency to adopt a decision-making procedure preferred by a court, but the Supreme Court held unanimously in 1978 that a court can not require an agency to use a procedure that the court considers necessary or appropriate.[3] Since agency procedural rules must themselves comply with statutes and the Constitution, I will begin with a discussion of statutes as a potential source of limits on ex parte communications in FERC proceedings.

A. STATUTORY RESTRICTIONS ON EX PARTE COMMUNICATIONS

The APA applies to FERC because FERC is an "agency" within the meaning of APA §551(1).[4] APA §551(14) defines an ex parte communication as:

> An oral or written communication not on the public record with respect to which reasonable prior notice to

[1] E.g,, I Richard J. Pierce, Jr., Administrative Law Treatise §8.4.

[2] Richard J. Pierce, Jr., Waiting for Vermont Yankee III, IV, and V: A Response to Lawson & Beerman, forthcoming in George Washington Law Review (2007).

[3] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 546-48 (1978).

[4] 5 U.S.C. §551(1).

> all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.[5]

The APA definition of ex parte communications is consistent with the general understanding of the term in the Anglo-American legal system.[6] The United States has long prohibited ex parte communications in disputes adjudicated by courts for good reason.[7] It is fundamentally unfair for a prosecutor, for instance, to engage in ex parte communications with a judge in an effort to persuade the judge to convict a criminal defendant, or for one of the parties to a civil dispute arising from an auto accident to engage in ex parte communications with the judge in an effort to convince him that the accident was the fault of the other party. Without notice and an opportunity to participate in the conversation, the other party has no way of responding effectively to the arguments made in the ex parte communications.

The drafters of the APA recognized that ex parte communications are fundamentally unfair in contexts analogous to a judicial adjudication of a dispute involving the competing rights of two individuals. They prohibited ex parte communications in such circumstances. The drafters of the APA also recognized, however, that many types of agency proceeding are not analogous to a judicial trial and that a ban on ex parte communications would make no sense in the context of those types of agency proceedings. Thus, the APA prohibits ex parte communications in only two types of proceedings – formal adjudications and formal rulemakings.[8] As I explain further below, "formal" adjudications and "formal" rulemakings are proceedings that Congress, by statute, has required to be conducted in formal, trial-type proceedings. Congress deemed these trial-type proceedings sufficiently analogous to judicial proceedings to merit a ban on ex parte communications. The APA does not, however, extend that ban to informal adjudications or informal rulemakings, which, as described below, are the types of proceedings conducted by FERC.

The applicability of the APA's prohibition on ex parte communications is revealed through the interactions of several of its provisions. APA §557(d)(1) prohibits ex parte communications in any agency proceeding that is subject to APA §557(a).[9] That section applies "when a hearing is required to be conducted in accordance with section 556 of this title."[10] APA §556 applies "to hearings required by section 553 or 554 of this title to be conducted in accordance with this section."[11] APA §553(c) makes §§556 and 557 applicable to a rulemaking proceeding "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, . . ."[12] APA §554(a) makes §§556 and 557 applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . .

[5] 5 U.S.C. §551(14).
[6] See I Pierce, supra. note 1, at §8.4.
[7] E.g., Canon 3A(4), Code of Conduct for United States Judges.
[8] For descriptions of formal adjudications and formal rulemakings, see I Pierce, supra. note 1, at §§7.2, 8.2.
[9] 5 U.S.C. §557(d)(1).
[10] 5 U.S.C. §557(a).
[11] 5 U.S.C. §556(a).
[12] 5 U.S.C. §553(c).

."[13] Thus, the APA prohibition on ex parte communications applies only when a statute requires an agency to issue a rule or to resolve an adjudicatory dispute "on the record after opportunity for agency hearing."[14] Those two classes of agency proceedings are often referred to as formal rulemaking and formal adjudication.[15]

No FERC-administered statute contains the language "on the record after opportunity for agency hearing" or any equivalent language that triggers the prohibition on ex parte communications in APA §557(d). FERC-administered statutes contain many provisions that require FERC to act after a "hearing," but the Supreme Court held in 1972 that the statutory term "hearing" does not require an agency to engage in formal rulemaking,[16] and the circuit courts have subsequently held that the statutory term "hearing" does not require an agency to engage in formal adjudication.[17] Thus, FERC is not required by statute to engage in formal rulemaking or formal adjudication, and therefore the ex parte provisions of the APA do not apply to FERC proceedings.[18] Despite this, FERC has, as discussed in Section C of my report, adopted restrictions on ex parte communications even in informal adjudications. FERC therefore has adopted restrictions on ex parte communications that go beyond what is required by the APA.

I will now turn to a discussion of the APA's requirements for informal rulemakings and informal adjudications, neither of which include a ban on ex parte communications. APA §553 governs informal rulemakings and authorizes an agency to use a three-step process to issue a rule – issuance of a notice of proposed rulemaking, receipt and consideration of comments on the agency's proposed rule, and issuance of the final rule, incorporating a concise general statement of its basis and purpose.[19] There is, however, no statutory prohibition on ex parte communications that applies to informal rulemaking proceedings. That is for good reason. Informal rulemakings bear no relationship to judicial trials to resolve adjudicatory disputes. Informal

[13] 5 U.S.C. §554(a).

[14] The legislative history of the Sunshine Act, which was the source of the APA prohibition, is clear on this point as well. "The [ex parte] prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for agency hearing *will not be affected by the provision*." House Judiciary Committee Report at 18; House Government Operations Committee Report at 19; Senate Government Operations Committee Report at 35 (emphasis added).

[15] See, e.g., I Pierce, supra. note 1, at §§7.2, 8.2.

[16] U.S. v. Allegheny-Ludlum Steel Corp, 406 U.S. 742,756-757 (1972). See also U.S. v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

[17] E.g., Dominion Energy Brayton Point v. Johnson, 443 F. 3d 12,15-19 (1st Cir. 2006); Chemical Waste Management v. EPA, 873 F. 3d 1477, 1480-82 (D.C. Cir. 1989).

[18] The courts have explicitly recognized that ex parte communications are not statutorily prohibited in informal adjudications. E.g., District No. 1 v. Maritime Admin., 215 F. 3d 37,42-43 (D.C. Cir. 2000). In Electric Power Supply Ass'n. v. FERC, 391 F. 3d 1255 (D.C. Cir. 2004), the court held that a FERC rule violated the APA restrictions on ex parte communications. The court based its holding on its apparent (but erroneous) belief that the APA restrictions on ex parte communications apply to FERC proceedings. The court was not, however, asked to decide that question because FERC did not argue the point. Because FERC did not argue the point, the court could not consider it. The Supreme Court has long held that a court can uphold an agency action only on a basis stated by the agency. Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196-97 (1947).

[19] 5 U.S.C. §553.

rulemakings are analogous instead to the process through which a legislative body chooses rules that apply generally to the conduct of large classes of people. It would be no more appropriate to ban agency decision-makers from engaging in ex parte communications in informal rulemakings than to ban members of Congress from engaging in off-the-record conversations with constituents who are interested in a legislative proposal pending before Congress. Moreover, as the Court of Appeals for the District of Columbia Circuit has recognized, the President and members of Congress often engage in ex parte communications with agency decision-makers about the merits of then-pending informal rulemakings, and communications of that type are indispensable in a democracy in which the people expect their elected representatives to express their views to unelected agency decision-makers.[20] Former D.C. Circuit Chief Judge Patricia Wald put the point well in a 1981 opinion:

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these political pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context.[21]

There is also no prohibition on ex parte communications in the APA applicable to informal adjudications. As I explained above, since no provision of any FERC-implemented statute requires FERC to conduct an adjudication "on the record after opportunity for agency hearing," APA §§554, 556, and 557 do not apply to any FERC adjudication. In 1990, the Supreme Court held that only APA §555[22] applies to an agency adjudication in the absence of a provision requiring the agency to conduct adjudications "on the record."[23] Thus, FERC is not required to use formal adjudication to conduct any adjudication. It is free to use informal adjudication, and the APA does not prohibit ex parte communications in informal adjudications.[24] As discussed in section C of this report, however, FERC has adopted restrictions on ex parte communications in informal

[20] Sierra Club v. Costle, 657 F. 2d 298,400-10 (D.C. Cir. 1981).

[21] Id. at 400-01.

[22] APA §555 authorizes a person who is compelled to appear before an agency to retain a lawyer to accompany him, limits an agency's ability to require a report or other investigative act to circumstances in which the requirement is authorized by law, authorizes a person who provides a statement, data, or report to an agency to obtain a copy of the statement, data, or report, limits the issuance of subpoenas to circumstances in which there has been a showing of general relevance and reasonable scope, and requires an agency to provide a prompt notice of denial of any written request, accompanied by a brief explanation of the grounds for denial. 5 U.S.C. §555.

[23] Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 653-56 (1990).

[24] District No. 1 v. Maritime Administration, 215 F. 3d 37, 42-43 (D.C. Cir. 2000).

adjudications even though the APA does not require such restrictions.

Moreover, as the D.C. Circuit has recognized, even in the context of adjudications, FERC must have the discretion to engage in ex parte discussions of issues of legislative fact. In dismissing a claim that the FERC Commissioners had engaged in illegal ex parte communications in a pipeline certification proceeding in 1992, the court said:

> In short, while there were meetings between agency officials and Iroquois and other industry officials, the record supports the Commission's conclusion that there was nothing improper about those meetings. Agency officials may meet with members of the industry both to facilitate settlement and to maintain the agency's knowledge of the industry it regulates. As this court has noted before, "such informal contacts between agencies are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[25]

B. Constitutional Restrictions on Ex Parte Communications

I will also, for completeness, review whether there are constitutional restrictions on ex parte communications applicable to FERC proceedings. In some narrow classes of cases, the Due Process Clause of the Constitution can be a source of limits on ex parte communications in agency proceedings. The first step in determining whether Due Process can be the source of such a limit is to determine whether the Due Process Clause applies at all to the class of disputes at issue. Due Process applies only when the government seeks to "deprive" a "person" of "life, liberty, or property."[26] In 1915, the Supreme Court held that Due Process does not apply to a proceeding in which an agency issues "a rule of conduct [that] applies to more than a few people."[27] The vast majority of agency rulemaking proceedings fall within the scope of that holding.[28] Thus, there is rarely any arguable basis to apply the Due Process Clause to an agency rulemaking. It is even more rare for an agency rulemaking to involve a pattern of facts that could conceivably support a limit on ex parte communications.

I am aware of only one case in which a court relied on Due Process to support a holding that an agency engaged in illegal ex parte communications in an informal rulemaking. In the 1950s, the FCC used informal rulemaking to decide which of two competing applicants for a broadcast license should receive the license. In 1959, the U.S. Court of Appeals for the D.C. Circuit held that the FCC violated the law when the Commissioners met with the winning applicant in private and accepted Christmas turkeys from the winning applicant during the pendency of the proceeding.[29] The court made it clear that its restriction on ex parte communications applied only when two individuals are "competing for the same valuable privilege."[30] The D.C. Circuit

[25] Louisiana Ass'n. of Indep. Producers v. FERC, 958 F. 2d 1101, 1113 (D.C. Cir. 1992).

[26] U.S. Constitution, Amend. V.

[27] Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 446 (1915).

[28] See II Pierce, supra. note 1, at §9.2.

[29] Sangamon Valley Television Corp. v. U.S., 269 F. 2d 221,224 (D.C. Cir. 1959).

[30] Id. at 224.

has reaffirmed the narrow scope of its restriction on ex parte communications in subsequent cases in which it has explicitly recognized the importance of allowing ex parte communications in most informal rulemakings.[31] Thus, with the narrow and rare exception of a case in which an agency uses informal rulemaking to decide which of two individuals will receive a valuable privilege, the Due Process Clause cannot provide the basis for a restriction on ex parte communications in an informal rulemaking.

The Due Process Clause does apply to some classes of agency adjudications. To determine whether Due Process applies to a class of agency adjudications requires a determination of whether the types of adjudications at issue have the potential to "deprive" a "person" of "life, liberty, or property."[32] The law governing that determination is complicated. To implicate the Due Process Clause the agency proceeding must have the potential to deprive a particular individual of an interest in "life," "liberty," or "property."[33] Since FERC proceedings do not implicate "life," only the Due Process Clause's protection of "property" or "liberty" interests could be relevant to FERC proceedings. The Supreme Court has defined "property" for Due Process purposes to include: (1) something like a house or a car that qualifies as property under state common law, (2) some benefit like social security payments that the individual has been receiving from the government in the past pursuant to a statute that arguably entitles the person to continue to receive the benefit; and, (3) a government job if a statute or contract limits the government's ability to terminate the individual who holds the job. Some FERC adjudicatory proceedings may involve property interests that fall in the first or second category. The Supreme Court has defined "liberty" to include: (1) freedom from incarceration, (2) freedom from government punishment as a result of exercise of a constitutional right; and, (3) freedom from official stigmatization if that stigmatization is contemporaneous with deprivation of some tangible interest. It is conceivable that a FERC adjudicatory proceeding might involve a liberty interest of the third type.

If the Due Process Clause applies to an agency proceeding, it does not necessarily follow that the agency is prohibited from engaging in ex parte communications in the proceeding. The procedures required by Due Process depend on judicial application of a three-part balancing test that the Supreme Court announced in 1976.[34] That test can yield a wide variety of results.[35] It rarely produces a prohibition or limitation on ex parte communications. In fact, I have found only one regulatory proceeding (the FCC case discussed supra) in which a court invalidated an agency action based on the court's conclusion that the agency had engaged in ex parte communications that violated the Due Process Clause.[36] That case involved two entities "competing for the same valuable privilege" and the ex parte communications were accompanied by

[31] Sierra Club v. Costle, 657 F. 2d 298, 400-410 (D.C. Cir. 1981)
[32] U.S. Constitution, Amend. V.
[33] For detailed discussion of the definitions of liberty and property for due process purposes, see II Pierce, supra. note 1, at §9.4.
[34] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[35] II Pierce, supra. note 1, at §9.5.
[36] Sangamon Valley Television v. U.S., 269 F. 2d 221(D.C. Cir. 1959).

secret gifts to the agency decision-makers.[37] Finally, even in the rare instance in which the Due Process Cause might apply to a FERC proceeding, I am unaware of any case that would suggest that FERC's own regulations would not satisfy the Due Process Clause.

C. Regulatory Restrictions on Ex Parte Communications

In the prior two sections, I considered whether the APA or the U.S. Constitution places limits on ex parte communications in FERC proceedings. I concluded that the APA's provision restricting ex parte communications does not apply and that a constitutional limit could arise only in rare cases. Despite this, FERC has adopted regulations regarding ex parte communications that go beyond what is required by the APA or the Constitution. I will now turn to a discussion of those regulations. When FERC conducts its proceedings, it must, of course, abide by its own regulations if they confer important rights on parties even if the rules are not required by statute or by the Constitution.[38]

FERC Rule 2201 governs off-the record communications.[39] That rule prohibits ex parte communications in "all contested on-the-record proceedings."[40] It defines a contested on-the-record proceeding as "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing."[41] The prohibition on ex parte communications does not apply to "notice-and-comment rulemakings under 5 U.S.C. §553, investigations under part 1b of this chapter, or any proceeding in which no party disputes any material issue."[42] The prohibition also does not apply to "procedural inquiries" or to "a general background or broad policy discussion involving a substantial segment of an industry, where the discussion occurs outside of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding."[43]

The rule also specifies the point at which a proceeding begins for purposes of the applicability of the prohibition on ex parte communications. If the Commission initiates the proceeding, it begins when the Commission issues the order in which it initiates the proceeding.[44] If the proceeding takes place after a remand from a court, it begins when the court issues its mandate.[45] If the proceeding is initiated as a result of the filing of a complaint, it begins at the time of the filing of the complaint or at the time the Commission initiates an investigation on its own motion.[46] In any other proceeding to which the prohibition applies, the proceeding begins when an intervention is filed in which the intervenor disputes a material issue.[47]

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[37] Id. at 224.
[38] United States v. Nixon, 418 U.S. 683, 694-96 (1974); American Farm Lines v. Black Ball Freight Service, 397 U. S. 532 (1970); U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See generally I Pierce, supra. note 1, at §6.6.
[39] 18 C.F.R. §385.2201.
[40] Id. at §385.2201(a).
[41] Id. at §385.2201(c)(1)(i).
[42] Id. at §385.2201(c)(1)(ii).
[43] Id. at §385.2201(c)(5).
[44] Id. at §385.2201(d)(i).
[45] Id. at §385.2201(d)(ii).
[46] Id. at §385.2201(d)(iii).
[47] Id. at §385.2201(d)(iv).

As these regulations indicate, FERC's ban on ex parte communications does not apply to pre-filing meetings. FERC therefore allows informal communications to occur prior to the time a filing is made and disputed by an intervenor on a material issue. There is, as indicated, nothing unlawful about this practice. Congress did not require that FERC proceedings resemble judicial trials. The fact that FERC has gone beyond what is required by the APA or the Constitution, and adopted ex parte rules that apply once an informal proceeding is initiated does not invalidate its limited exception for pre-filing meetings. There is nothing in the APA, the Constitution, or FERC's own regulations that preclude such meetings. In sum, I conclude that FERC's practices respecting ex parte communications, including pre-filing meetings, are fully consistent with the law, provided that FERC follows its own regulations when it conducts proceedings.

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