

would be with the applicant or licensee, rather than with the Commission. In some cases, consultation pursuant to Section 106 may be combined with consultation concerning the preparation of an HPMP. As discussed above, the Commission will attempt to be responsive to tribes' requests for direct communication, if this can be accomplished in a manner consistent with the Commission's rules governing off-the-record communications.

127. Some tribes state that they should be consulted on the identity of, or have the right to approve, all persons performing tribal cultural resources analyses pursuant to section 106 of the NHPA. Tribes may also have professional expertise in this area, and some indicate that qualified tribal members should be hired for such studies whenever possible.¹⁶² We agree that it is appropriate for license applicants to consult with tribes concerning the identity and qualifications of persons conducting studies with respect to a tribe's cultural resources. However, license applicants need to have flexibility in the hiring of consultants. We do not believe that applicants should be required to obtain a tribe's approval before engaging a consultant, or to engage a consultant based on tribal membership. It would however appear to be in a license applicant's best interests to consult affected tribes concerning these matters. We note that, in many proceedings, licensees have reached agreements with affected tribes in which the tribes have a voice in the selection of consultants.¹⁶³

4. Environmental Document Preparation

a. Cooperating Agencies Policy

128. The Commission's policy has for a number of years been that an agency that has served as a cooperating agency in a proceeding may not thereafter intervene in that proceeding. The reason for this policy is that staff of a cooperating agency is treated in some respects as though it were Commission staff, including having conversations and exchanging information that may not be put in the record, just as Commission staff shares predecisional analyses and information internally. To allow a cooperating agency to intervene in a proceeding would make it a party privy to decisional information not available to other parties, in violation of

our rule prohibiting *ex parte* communications.¹⁶⁴

129. Other Federal agencies, environmental groups, and some states urge us to revisit this policy.¹⁶⁵ They contend that the policy is inefficient because it discourages other agencies from becoming cooperating agencies, which forces the preparation of multiple NEPA documents. Interior suggests that if the Commission were to issue non-decisional NEPA documents, that is, documents which are purely analytical and make no substantive recommendations, there should be no concern about off-the-record communications regarding the merits of the proceeding.¹⁶⁶

130. EEI and Idaho Power assert however that reversing the policy would violate the Administrative Procedure Act (APA).¹⁶⁷ They state that APA section 557(d)(1) prohibits in an adjudicatory proceeding any "interested person" from outside the agency from making any "*ex parte* communication relevant to the merits of the proceeding," to a decisional employee.¹⁶⁸ This is correct, but the APA defines a "person" as "a public or private organization *other than an agency*."¹⁶⁹ (emphasis added), and defines an agency, with certain exceptions not relevant here, as "each authority of the Government of the United States."¹⁷⁰ Thus, the APA does not prohibit *ex parte* communications between Federal agencies.

¹⁶⁴ See Rainsong Company, 79 FERC ¶ 61,338, at p. 62,457, n.18 (1997); Order No. 596, Regulations for the Licensing of Hydroelectric Projects, FERC Statutes and Regulations ¶ 31,057 at p. 30,644 (1997). When the Commission modified its *ex parte* communication rules in 1999, it noted, but made no change to, this policy. See Order No. 607-A, FERC Statutes and Regulations ¶ 31,112 n. 50 and p. 31,931 n. 41. See also Arizona Public Service Co., 94 FERC ¶ 61,076 (2001) (denying request for late intervention by the Forest Service and rejecting arguments that the new *ex parte* rule does permit a cooperating agency to also be an intervenor).

¹⁶⁵ HRC, SCE, NYSDEC, WDOE, DOI. NRG also supports this proposal, but would put limits on the bases upon which a cooperating agency that subsequently became an intervenor could seek rehearing or judicial review, and would include disclosure requirements with respect to discussions concerning license articles or terms and conditions, and "any communication necessary for the completeness of the record." See Attachment B to September 12, 2002 Notice, p. 10.

¹⁶⁶ This suggestion is inconsistent with our *ex parte* regulations, which define "relevant to the merits" as "capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding," subject to certain narrowly drawn exceptions not applicable here. See 18 CFR 385.2201(b)(c)(5).

¹⁶⁷ 5 U.S.C. 551-559.

¹⁶⁸ 5 U.S.C. 557(d)(1).

¹⁶⁹ 5 U.S.C. 551(2).

¹⁷⁰ 5 U.S.C. 551(1).

131. Our policies concerning *ex parte* communications exceed the requirements of the APA in this regard, because the Commission is concerned that its procedures be fundamentally fair in both appearance and reality. On this score, EEI and Idaho Power cite Order No. 607, where the policy against cooperating agency intervenors articulated above was codified, and *Arizona Public Service*, where it was affirmed. They assert that nothing has changed in this regard, and add that reversing the policy would afford a dissatisfied cooperating agency a "second bite at the apple" by permitting it to seek rehearing and judicial review of Commission orders.¹⁷¹ EEI intimates that permitting cooperating agency relationships would enable other Federal agencies to prevent or hinder the issuance of economically vital gas pipeline certificates and unduly influence the Commission's public interest balancing under FPA section 10(a)(1).¹⁷² Finally, they argue that NRG's proposal would be impractical because it would require all communications to and from a cooperating agency to be placed on the record, which would be administratively unworkable and inimical to the free exchange of ideas essential to the cooperating agency relationship.

132. We conclude that reversal of our policy (and the concomitant revision of our *ex parte* rules) as it applies to Federal agencies would increase the likelihood that Federal agencies with mandatory conditioning authority would be willing to act as cooperating agencies, which would better enable these agencies and the Commission to coordinate the exercise of their separate responsibilities. This should also better enable cooperating Federal agencies with conditioning authority to develop a complete record, reduce duplication of effort among cooperating agencies, and may help to focus discussion of scientific and policy issues. To be weighed against these benefits is the potential for prejudice to other parties that would not have access to some information and decisional communications between the Commission and the cooperating agency.

133. On balance, we are persuaded that the potential benefits are significant and the likelihood of prejudice to other parties is minimal if an appropriate disclosure requirement is established. The Commission and other Federal agencies with mandatory conditioning

¹⁷¹ EEI, Idaho Power.

¹⁷² See EEI, pp. 45-46.

¹⁶² Shoshone, Kalispel.

¹⁶³ Examples include relicense proceedings for the Condit Project No. 2342, Box Canyon Project No. 2040, Lake Chelan Project No. 637, Rocky Reach Project No. 2145, Klamath River Project No. 2082, and Baker River Project No. 2150.