

access to more information than others, and thus would violate the APA's prohibition against *ex parte* communications.²⁷³ In support of their contentions, these commenters cite the Commission's statement when it amended its *ex parte* rule that "a hearing is not fair when one party has private access to the decision maker and can present evidence or argument that other parties have no opportunity to rebut,"²⁷⁴ as well as case law. *See e.g., Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1997) (*HBO*); *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (*Audubon*); *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982) (*PATCO*).²⁷⁵

300. We continue to believe strongly that maximizing cooperation between the Commission and the federal resource agencies will lead to optimal results in the licensing process. However, we conclude that precedent indicates that allowing federal agencies to serve both as cooperators and intervenors in the same case would violate the APA. Our proposal to change the existing policy rested on a plain meaning reading of the APA provisions which the courts have not adopted. Rather, the courts have interpreted the APA more broadly on this point in order to ensure that the purposes of the statute are fulfilled. We therefore will not change the policy precluding cooperating agencies from also being intervenors.

2. NEPA Document Contents

301. California and PFBC state that the filing requirements for license applications include information on the costs of the applicant's proposed PM&E measures, but not information on the economic benefits of those measures. They assert that the NEPA document

should contain a much expanded discussion of the latter. Our policy concerning this matter was discussed above.²⁷⁶

302. NOAA Fisheries recommends that the regulations include a standard methodology "to calculate project economics."²⁷⁷ Economic evaluations in the context of our public interest analysis cannot be reduced to a formula. For example, one component is a comparison of the current cost of project power under each reasonable alternative to the current cost of the most likely alternative source of power. The comparison helps to support an informed decision concerning what is in the public interest.²⁷⁸ The estimated current cost of project power under each alternative is of course the sum of many other estimates, principally of the costs of PM&E measures proposed by applicants, agencies, Indian tribes, and NGOs. PM&E measures are moreover not standardized in any way, but are made on a site-specific basis, and often require, in addition to capital cost estimates, annualized estimates of long-term operation and maintenance expenses. Such estimates rest on myriad debatable assumptions upon which reasonable people often disagree.

303. The means of determining the current cost of the most likely alternative source of power also cannot be reduced to a formula. It is based on the project-specific operating regime (e.g., run-of-river or peaking) and is made in the context of regional power markets. For instance, the most likely alternative to baseload hydroelectric capacity in some regions is baseload power from a coal-fired plant. The most likely alternative to hydroelectric energy is typically a combined cycle gas-fired combustion turbine. The value of such power varies from region-to-region and time-to-time. Each NEPA document fully explains the determination of the most likely alternative source of power and the basis for its valuation.

304. The NOPR proposed to accompany draft NEPA documents and environmental assessments with draft special license articles (*i.e.*, articles specific to a project).²⁷⁹ NHA supports this, but states that standard form license articles should also be included in order to enable the U.S. Forest Service to address concerns it purportedly has about the Commission's administration of projects on National

Forest lands. The U.S. Forest Service did not raise this issue. In any event, the standard form license articles are a matter of public record²⁸⁰ and anyone may request the Commission to modify them.

305. The NOPR proposed to revise our practice in preparing NEPA documents to more clearly separate resource impact analysis from decisional analysis.²⁸¹ California reiterates its prior assertion that we should issue NEPA documents containing only resource impact analysis on the ground that it would eliminate any *ex parte* problem associated with state agencies acting as cooperating agencies. We rejected this argument in the NOPR²⁸² and above.²⁸³

306. NHA, SCE, HRC and others support our proposal to better separate the environmental impact analysis from decisional analysis; that is, decisional analysis will appear only in the comprehensive development section of the NEPA document. NHA and SCE ask that we make clear that discussion of alternatives and potential mitigation measures in the NEPA document is part of the resource impact analysis under NEPA. We are not entirely clear what these commenters are requesting. We think it is self-evident that the environmental impact analysis under NEPA will cover alternatives and potential mitigation measures. These things are however also likely to be considered, or at the least referred to, in the decisional analysis.

307. HRC requests that a NEPA document prepared in cooperation with another agency include in the environmental analysis the views of each agency where there is a disagreement in the agencies' conclusions concerning impacts to resources. We think the cooperating agencies should decide how best to present the resource impact analysis in such a case.

308. RAW continues to assert that the baseline for environmental analysis on relicensing should be pre-project conditions. We rejected such assertions in the NOPR,²⁸⁴ and RAW offers no new arguments that would cause us to change our well-established and judicially-approved policy in this regard.

309. Finally, VANR opposes our practice of issuing a single

²⁷³ See 5 U.S.C. 557(d)(1)(A) & (B).

²⁷⁴ Order No. 607, Regulations Governing Off-the-Record Communications, 64 FR 51222 (Sept. 22, 1999); FERC Stats. & Regs. ¶ 31,079 at 30,878 (Sept. 15, 1999).

²⁷⁵ APA Section 557(d)(1) bans *ex parte* communications to or from "interested persons" outside the agency. The *PATCO* court held that the ban is not intended to have limited application and that "[t]he term 'interested person' is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have." 685 F.2d at 562. *Audubon*, which holds that the President and White House staff are not exempt from Section 557(d)(1), similarly notes that the legislative history of the provision confirms the ban is to be broadly construed in order to achieve the appearance and reality of open decision-making. 984 F.2d at 1543-44. *HBO* holds that all relevant information must be disclosed in order to ensure the efficacy of judicial review. 567 F.2d at 54.

²⁷⁶ See Section III.L.1.

²⁷⁷ NOAA Fisheries, p. 8.

²⁷⁸ See Mead Corporation, Publishing Paper Division, 72 FERC ¶ 61,027 at pp. 61,068-069 (1995).

²⁷⁹ 68 FR at pp. 14004-005; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,722.

²⁸⁰ The current standard form articles are published at 54 FPC 1799-1928 (1975).

²⁸¹ 68 FR at p. 14004; IV FERC Stats. & Regs. ¶ 32,568 at pp. 34,721-722.

²⁸² 68 FR p. 14004; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,721.

²⁸³ Section III.O.1.

²⁸⁴ 68 FR at p. 13995; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,706.