

# THE FERC'S NEW RULES OF DISCOVERY: A WELCOMED APPROACH

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Responding to criticism about the absence of formal discovery rules in its adjudicatory proceedings,<sup>1</sup> in 1984 the Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking that would establish discovery rules applicable to such proceedings.<sup>2</sup> The proposed rules, which were modeled in large part upon the Federal Rules of Civil Procedure (F.R.C.P.), dealt with, *inter alia*, the scope of discovery,<sup>3</sup> and the assertion of privilege.<sup>4</sup> Also, they specified the types of discovery devices available and codified existing procedures,<sup>5</sup> including procedures for data requests.<sup>6</sup>

Six years have passed since Messrs. Kissel and Roscher made their cogent plea for codification of the Commission's discovery procedures and nearly three more since the Commission issued its proposed rules of discovery. The need for formal discovery rules, while it has remained strong, is, if anything, even stronger today. During the last several years, the Commission has been expediting all manner of hearings. These include not only rate cases, which are given priority by statute,<sup>7</sup> but abandonment proceedings under section 7 of the Natural Gas Act,<sup>8</sup> cases involving the allocation of preference power<sup>9</sup> and even cases in which the proposals have been rejected, but nonetheless set for hearing.<sup>10</sup> Because so many cases have been expedited, the expedited case appears to be the norm, rather than the exception.

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1. Kissel & Roscher, *Availability and Use of Discovery At the Federal Energy Regulatory Commission: The Need for Modernization*, 2 ENERGY L.J. 79 (1981).

2. FERC No. RM83-41-000, FERC Stats. & Reg., Proposed Regulations, § 32,380 49 Fed. Reg. 30,519 (1984). For an extended treatment of the proposed rules, see Benkin, *More Ado about Prehearing Discovery at FERC*, 6 ENERGY L.J. 1 (1985).

3. Proposed Rule 401, FERC Stats & Regs. at 32,976.

4. Proposed Rule 413(d), F.E.R.C. Stats & Regs. at 32,984.

5. Although the proposed rules were intended to serve, for the most part, to codify existing practice, there were some distinct changes, including principally express provisions for sanctions, Proposed Rule 414, FERC Stat. & Reg. at 32,985, provisions mandating reliance on Federal Rules decisions on questions such as privilege, relevance, confidentiality and burden, Rule 413, FERC Stats. & Regs. at 32,984, and the special status accorded the FERC staff. *See, e.g.*, Rules 408 (Special Studies); Proposed Rule 413 (Privilege), FERC Stats. & Regs. at 32,982-85. The final rules drop the "special studies" provision, but otherwise adhere quite closely to the proposed rules.

6. Proposed Rule 408, F.E.R.C. Stats. & Regs. at 32,982-83.

7. 16 U.S.C. § 824d(e); 15 U.S.C. § 717c(e).

8. Cities Serv. Oil and Gas Corp., 33 F.E.R.C. ¶ 61,258 (1985).

9. Municipal Elec. Util. Ass'n. v. Power Auth., 36 F.E.R.C. ¶ 61,333 (1986).

10. Tennessee Gas Pipeline Co., 36 F.E.R.C. ¶ 61,032 (1986); Transwestern Pipeline Co., 36 F.E.R.C. ¶ 61,048 (1986); Transcontinental Gas Pipe Line Corp., 37 F.E.R.C. ¶ 61,089 (1986).

Whatever its merits, however, the expedited hearing is a fact of life for practitioners and administrative law judges. It imposes substantial burdens on litigants, particularly in the area of discovery. It also creates increased opportunities for abuse of the process by those with an incentive for delay. To minimize this possibility, litigants must be well-versed in their discovery rights and administrative law judges must be prepared to assert their prerogatives aggressively.

On March 2, 1987 the Commission issued Order No. 466,<sup>11</sup> adopting rules of discovery for trial-type proceedings. The Commission's long-awaited final action on its proposed discovery rules is a giant and timely step forward that should be of considerable assistance to litigants in both conventional and expedited proceedings.

Order No. 466 defines the scope of discovery available to participants in adjudicative proceedings before the Commission, outlines the types of discovery available, sets forth the procedures for obtaining and limiting discovery, and, for the first time, specifies sanctions for non-compliance with discovery orders. More specifically, it codifies the "data request", containing express provisions for interrogatories, depositions, subpoenas, requests for production of documents or things, entry onto lands, motions to quash or to compel, protective orders, admissions, etc.<sup>12</sup>

The Commission notes in its order that its objectives in adopting the rules are (1) to develop full and complete records in adjudicative proceedings and (2) to promote the timely resolutions of such proceedings. In this latter respect, the Commission observes that many discovery disputes have arisen in the past precisely because of the absence of a set of comprehensive discovery rules. It reasons, sensibly, in this author's belief, that codification of the discovery process will eliminate at least some disputes, thereby expediting the process.<sup>13</sup> The Commission's new rules are modeled largely along the line of federal rules of discovery, with some exceptions.<sup>14</sup> In this regard the new rules are essentially a codification of existing discovery practice at the Commission, although the rules vary in some limited respects from historical practice.

Notwithstanding the prior lack of a comprehensive set of discovery rules, a body of case law has evolved, primarily through decisions of the Commission's administrative law judges, that provides guidance as to the likely nature and scope of discovery in Commission adjudicative proceedings under its new rules. This article discusses the basic principles of discovery practice with which parties must be familiar, describes how they have been applied in Commission practice and explains how the new rules differ in some respects from historical practice. It concludes with some observations concerning the exigencies of discovery practice in expedited proceedings.

## I. PREPARATION OF ONE'S CASE

The principal purpose of discovery in administrative litigation before the

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11. Order No. 466, 52 Fed. Reg. 6957 (1987).

12. See generally 18 C.F.R. §§ 385.401-410 (1987).

13. See Order No. 466, *supra* note 11, at 6958.

14. *Id.*

Federal Energy Regulatory Commission is to develop one's case—to strengthen one's affirmative presentation and to probe for weaknesses in the positions of other parties. Because most proceedings before FERC are multi-party and multi-issue in nature, discovery may be valuable if for no other reason than to define who one's most significant opponents are and which issues are most important to them. This is particularly important in natural gas proceedings, where many parties to a case will be interested in only one issue or a very few of the issues.

## II. CROSS-EXAMINATION OF OPPONENT'S WITNESSES

Prehearing discovery of an opponent's witnesses can often be vital to the development of effective cross-examination of those witnesses. In typical court proceedings, discovery will often take the form of depositions, since, in the absence of depositions, a party will have only limited or general knowledge of the testimony that will be presented. In contrast to the typical judicial proceeding, what an opponent's witness will say in the direct case in an administrative hearing before FERC is rarely a surprise, even with no advance discovery. This is so because the practice at the Commission, as with many regulatory agencies, requires that the direct testimony of each expert witness be reduced to writing and filed in advance of the hearing.<sup>15</sup> This is done on the theory that such testimony by expert witnesses is usually highly technical in nature and that advance disclosure will speed the proceedings.<sup>16</sup> Nonetheless, depositions of an opponent's witnesses are occasionally requested and authorized in these types of proceedings.<sup>17</sup> More common, however, are discovery requests made after the "prepared" testimony has been filed, usually in the form of requests for workpapers and other supporting data,<sup>18</sup> since most of the witnesses are experts, and the disputed issues often turn on the soundness of an expert's methodology and assumptions.

## III. TYPES OF DISCOVERY GENERALLY

The forms of discovery available to litigants in federal district court under the Federal Rules of Civil Procedure have all been utilized in proceedings before the Commission, and now are expressly authorized. These include: (1) requests for inspection of documents,<sup>19</sup> (2) interrogatories,<sup>20</sup> (3) requests for

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15. 18 C.F.R. § 385.597 (1986).

16. DAVIS, 2 ADMINISTRATIVE LAW § 14.16 (1st ed. 1958); Benkin, *The Inconstant Lady: Discovery in Administrative Adjudications and the Evidentiary Use of Its Fruits*, 4 ENERGY L.J. 201, 103 (1983) [hereinafter *The Inconstant Lady*].

17. See, e.g., *Attorney General v. New England Power Co.* 33 F.E.R.C. ¶ 63,042 at 65,232 (1985); *McDowell County Consumers' Council v. American Elec. Power Co.*, 26 F.E.R.C. ¶ 61,042 (1984); MEZINES, STEIN & GRUFF, ADMINISTRATIVE LAW § 23.03[2] (1982).

18. At the FERC, it is not unusual for judges to require that a witness' workpapers be served on other parties together with the prepared testimony as a means of expediting the discovery process.

19. See Rule 407, 18 C.F.R. § 385.407 (1987). Rule 407 also permits entry onto lands. 18 C.F.R. § 385.407(a)(3) (1987).

20. See Rule 406, 18 C.F.R. § 385.406 (1987). This rule incorporates data requests, interrogatories and requests for production of documents or things.

admissions,<sup>21</sup> (4) subpoenas duces tecum,<sup>22</sup> and (5) depositions.<sup>23</sup> Each form of discovery is described briefly below.

### A. Requests for Documents

Under the Federal Rules of Civil Procedure, a party may compel another party (or a non-party) within the jurisdiction of the court to produce for inspection and copying documents in its possession relevant to the subject matter of the litigation.<sup>24</sup>

The request for documents need not necessarily request relevant evidence, but must be calculated to lead to the production of relevant evidence. Litigants before FERC may similarly obtain documents either by invoking the compulsory process of the agency or by seeking voluntary production. More often than not, the informal "data request" (discussed *infra*) has been utilized and is the principal means of discovery.

### B. Interrogatories

As with requests for production of documents, the interrogatory is a form of discovery permitted under the federal rules of discovery<sup>25</sup> and has also been

21. See Rule 409, 18 C.F.R. § 385.409.

22. See Rules 404 and 405, 18 C.F.R. § 385.409; 18 C.F.R. § 385.405.

23. *Id.*

24. See FED. R. CIV. P. 34:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

25. See FED. R. CIV. P. 33, Interrogatories to Parties, which provides in relevant part:

(a) *Availability: Procedures for Use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

FED. R. CIV. P. 31, Depositions Upon Written Questions similarly provide an relevant part as follows:

(a) *Serving Questions; Notice.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name of descriptive title and address of

used in Commission proceedings. The interrogatory allows a party to identify opposing witnesses, custodians of documents, the contentions of other parties, etc. Although not often identified separately as such in the past, the interrogatory has often been part of a "data request" in FERC proceedings, and has usually been posed to secure a narrative response as an alternative to the cumbersome process of producing raw data.<sup>26</sup>

### C. Requests for Admissions

Requests for admissions are specifically contemplated under the federal rules,<sup>27</sup> as well as under the former and current rules of FERC and other regulatory agencies.<sup>28</sup> Admissions can be made only by a party.<sup>29</sup> Admissions are used as a means of narrowing the issues in contention and serve essentially the same purpose as a stipulation, however, in that the process is compulsory and failure to comply with requests for admissions can result in sanctions against the refusing party, such as (1) payment of costs incurred by the other party to prove the non-admitted facts, (2) a negative inference that the admission would have been adverse, or (3) the striking of a defense or claim.<sup>30</sup>

### D. Subpoenas Duces Tecum

Subpoenas duces tecum can be directed at both parties and non-parties within the jurisdiction of the court or agency. Under the federal rules, subpoenas duces tecum are issued by the party seeking the documents and are self-enforcing, subject only to motions to quash that may be filed by the subpoenaed person or entity.<sup>31</sup> Subpoenas in the administrative context, by contrast, must be issued by the agency or an administrative law judge or other presiding officer and usually require a showing of good cause.<sup>32</sup> Despite the breadth of use

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the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

26. As discussed in more detail, *infra* notes 122-24 and accompanying text, one often posed objection to interrogatory-type data requests is that they do not call for narrative responses within the knowledge of the responding party but for the compilation of new analyses or studies.

27. See FED. R. CIV. P. 36.

28. The Federal Energy Regulatory Commission's procedural rules, for example, previously contained an express provision for admissions. See 18 C.F.R. § 385.604 (1986). This has been supplanted under Order No. 466 by a new provision on admissions, Rule 408, 18 C.F.R. § 385.408 (1987). Similar provisions are found in the discovery rules for the Economic Regulatory Administration, 10 C.F.R. § 205.198 (1986) and the Nuclear Regulatory Commission, 10 C.F.R. § 2.740 (1986).

29. FED. R. CIV. P. 36(a).

30. See, e.g., FED. R. CIV. P. 37(b), (c); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *International Union (UAW), v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

31. FED. R. CIV. P. 45.

32. See, e.g., *P.R. Mallory & Co. v. NLRB*, 400 F.2d 956 (7th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); *NLRB v. APW Products Co.*, 316 F.2d 899 (2nd Cir. 1963); *International Union (UAW) v. NLRB*,

and flexibility of the data request in FERC proceedings, it cannot be utilized to compel production from non-parties. Instead, discovery of non-parties requires the use of subpoenas for documents or to secure testimony (subpoenas ad testificandum).<sup>33</sup>

### E. Depositions

Under the Federal Rules of Civil Procedure, depositions are used (1) to preserve testimony where the witness would otherwise be unavailable at trial,<sup>34</sup> such as in the case of impending death, an illness or other circumstances that would preclude in-person testimony, and (2) to discover the case of one's opponent.<sup>35</sup> They serve similar purposes in regulatory proceedings.

459 F.2d 1329 (D.C. Cir. 1972).

33. The use of subpoenas in FERC proceedings is discussed in greater detail, *infra* notes 65-69 and accompanying text.

34. FED. R. CIV. P. 27, 32(a)(3). Rule 27 provides in relevant part:  
Depositions Before Action or Pending Appeal.

(a) *Before Action.*

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony. . . .

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

FED. R. CIV. P. 32(a)(3) provides:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

35. FED. R. CIV. P. 30 provides in relevant part:

(a) *When Depositions May be Taken.* After commencement of the action, any party may take the

The standards for permission to utilize depositions to preserve testimony are somewhat less stringent in the administrative context than they are under the F.R.C.P. Concerns about opportunity to observe the demeanor of the witness, which underlie F.R.C.P. limits on the use of depositions to preserve testimony, are less weighty in administrative proceedings where so much of what is relied upon by the agency is prepared written testimony anyway.<sup>36</sup>

#### IV. RESOLUTION OF DISCOVERY DISPUTES GENERALLY

Because of the liberal intent of the discovery process, most discovery disputes are resolved informally. A system of discovery rules, to be effective, however, must depend upon compulsory process that also affords protection for privileged communications. If litigants in court refuse to abide by orders directly compliance with discovery, the court can enforce its own orders by its powers of contempt. By contrast, if a discovery dispute arises in the administrative setting, the agency has no such powers. Its orders, in the event of non-compliance, must be enforced by a court before they can be given effect.<sup>37</sup> This is not to suggest that an agency such as the FERC is without tools to govern and facilitate the discovery process. These are discussed below.

##### A. *Orders to Compel Production*

Where the process of voluntary discovery breaks down, parties may have to resort to agency processes to compel production. Subpoenas are one form of process, but an agency, under its authority to conduct hearings, may simply direct production via oral or written order, usually in response to a motion to compel.

##### B. *Sanctions for Non-Compliance*

Because the administrative agency has no direct authority to enforce its own orders, but must instead invoke the jurisdiction of the courts,<sup>38</sup> and because the process of seeking court enforcement may extend beyond the length of the proceedings involved, an agency may find it necessary to adopt alternative pro-

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testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in sought discovery, or (2) if special notice is given as provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. See generally R. SUGARMAN & S. NORTH, *DEPOSITION STRATEGY, LAWS AND FORMS* (1981)

36. Davis, *supra* note 7 at § 14.16. The Commission's new rules, for example, expressly adopt a more liberal standard. They provide that depositions may be used for any purpose, if otherwise admissible, where (1) they are used against a deponent who is a participant or is employed by a participant to the proceeding or (2) where the deponent is a witness in the proceeding. See Rule 405(a)(1), (2), 18 C.F.R. § 385.405(a)(1), (2) (1987).

37. See *International Union (UAW) v. NLRB*, 459 F.2d at 1340-42.

38. *Id.*

cedures to ensure timely compliance. Agency-imposed sanctions for non-compliance with discovery orders have been recognized as an appropriate alternative to court enforcement.<sup>39</sup> Sanctions may take the form, for example, of a dismissal of a claim, the striking of a defense, the striking of testimony,<sup>40</sup> or other evidence or denial of the right to cross-examine.<sup>41</sup> The legal justification for such sanctions is the common law principle of the adverse inference—*i.e.*, the agency may infer that the documents, data, etc. which a party has refused to produce are adverse to its interests on the theory that if the information would have done the non-complying party any good it would have been produced voluntarily.<sup>42</sup> One of the most important features of the Commission's newly adopted discovery rules is the provision for sanctions for non-compliance with discovery orders. The usefulness of the device in connection with expedited proceedings is discussed *infra*.

### C. Attorney-Client Privilege

Documents that may be responsive to discovery requests may also be subject to common law privileges such as the attorney-client privilege. This privilege has previously been recognized at the FERC<sup>43</sup> and is now given express protection under its discovery rules.<sup>44</sup> The privilege extends not to the attorney, but to the client or would be-client, and applies to communications made in confidence by the client to an attorney acting in that capacity<sup>45</sup> for the purpose

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39. *Id.*

40. *Id.* at 1338-39. *See also* NLRB v. American Art. Indus., Inc., 415 F.2d 938 (5th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); Hedison Manufacturing Co. v. NLRB, 643 F.2d 32 (1st Cir. 1981). The types of sanctions referred to above, for example, are expressly authorized in the rules of practice adopted by the Federal Trade Commission 16 C.F.R. § 3.38 (1986) and in the FERC's new rules, 18 C.F.R. § 385.411 (1987).

41. *See, e.g.*, NLRB v. C.H. Sprague & Son Co. 428 F.2d 938 (1st Cir. 1970).

42. *International Union v. NLRB*, 459 F.2d at 1338-39. As the D.C. Circuit Court there explained:

[T]he adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored. It is, of course, always possible for the opposing party to seek enforcement of the subpoena in court. But enforcement against a really intransigent party can be costly and time consuming, particularly in administrative proceedings where the enforcement process is of necessity collateral to the main case. The adverse inference rule allows a tribunal to attach weight to a party's intransigence without resorting to the awkward enforcement process . . . . At the same time, the rule does not deprive the suppressing party of his constitutional right to an enforcement hearing on the subpoena, since he is not required to produce the evidence in question. Rather, the tribunal simply utilizes the common-sense inference that if the evidence would do the suppressing party any good, he would readily produce it. [Citation omitted].

459 F.2d at 1338-39. *But see*, NLRB v. International Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) (holding that sanctions beyond negative inference are outside agency's authority). The Commission, in adopting sanctions as part of Order No. 466, has rejected the Ninth Circuit's ruling. Order No. 466, *supra* note 11, at 37.

43. *See, e.g.*, McDowell County Consumers Council v. American Elec. Power. Co. 23 F.E.R.C. ¶ 61,142 (1983). *See also* McCORMICK, THE LAW OF EVIDENCE, PRIVILEGE IN ADMINISTRATIVE PROCEEDINGS, 2nd ed 1972 ("Privileges under state law are generally governed by statutes sufficiently broad in terms to apply to administrative proceedings.").

44. *See* Rule 402(a), 18 C.F.R. § 385.402(a) (1987); Rule 410(d), 18 C.F.R. § 385.410(d) (1987).

45. The presence of non-attorneys (such as consultants) during disclosure of privileged communications by the client, to the extent their presence is necessary, does not abrogate the privilege. *See, e.g.*, Mountain Fuel Supply Co., 23 F.E.R.C. ¶ 63,057 (1983).



of obtaining legal advice or assistance—not for the purpose of committing a crime—and when the privilege has been claimed and not waived by the client.<sup>46</sup>

#### D. *Privilege Against Self-Incrimination*

The privilege against self-incrimination is a constitutional right and is applicable in administrative proceedings.<sup>47</sup> Only rarely is it likely to arise in FERC proceedings, however, because the parties involved are usually corporations or other artificial entities and are therefore not protected by the privilege.<sup>48</sup>

#### E. *Attorney Work Product Privilege*

In the leading case of *Hickman v. Taylor*,<sup>49</sup> the Supreme Court set forth the principles now codified in the Federal Rules of Civil Procedure<sup>50</sup> governing the privilege attached to the work product of the attorney. This is a qualified, not an absolute, privilege<sup>51</sup> relating to the materials that comprise the attorney's trial or hearing preparation, including notes, memoranda, interviews, correspondence and mental impressions.<sup>52</sup> This privilege has also been applied to work product prepared in anticipation of FERC proceedings.<sup>53</sup>

#### F. *Agency Deliberative Privilege*

Predecisional documents or communications prepared internally by an agency or its staff as part of the agency's deliberative process are protected by the deliberative privilege on the theory that the confidentiality of these communications is essential to promote a "frank discussion of legal and policy matters,"<sup>54</sup> "to encourage the free exchange of ideas among government policy makers,"<sup>55</sup> and to prevent probing of the "mental processes" of the decisionmakers.<sup>56</sup>

46. See *El Paso Natural Gas Company*, 20 F.E.R.C. ¶ 63,021 (1982); *Independent Oil and Gas Ass'n*, 21 F.E.R.C. § 63,019 (1982).

47. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

48. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968); *United States v. White*, 322 U.S. 694 (1944).

49. 329 U.S. 495 (1947).

50. FED. R. CIV. P. 26(b)(3).

51. For example, the privilege would not protect "relevant and non-privileged facts" from disclosure that are "essential to the preparation of one's case." FED. R. CIV. P. 26.

52. FED. R. CIV. P. 26. See also, *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

53. See, e.g., *McDowell County Consumers Council* 23 F.E.R.C. at 61,417. See new Rule 402(b), 18 C.F.R. § 385.402(b) (1987).

54. *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973).

55. *Id.*

56. *Ginsburg v. Federal Energy Admin.*, 591 F.2d 717 (D.C. Cir. 1978); See also *McDowell County Consumers' Council*, 23 F.E.R.C. ¶ 61,142.

## V. DISCOVERY PRACTICE BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

### A. *The Availability of Discovery*

Discovery is generally available to litigants before FERC only in adjudicative proceedings, *i.e.*, in proceedings set for formal evidentiary hearings.<sup>57</sup> It is not available in rulemaking proceedings, nor does it apply, by its terms, to investigations conducted by the agency's enforcement staff.<sup>58</sup>

### B. *Applying the FERC's New Discovery Rules*

#### 1. The Informal Data Request

With the limited exception of rules pertaining to depositions,<sup>59</sup> subpoenas,<sup>60</sup> and admissions,<sup>61</sup> the FERC historically had no formal rules of discovery. Rather, discovery was conducted under the general authority of the presiding officer to "[C]ause Discovery to be Conducted" and to "[i]ssue subpoenas under Rule 1905."<sup>62</sup> The most common form of discovery employed at the FERC was the informal "data request," a catch-all device that was used in place of requests for admissions, requests for production of documents and interrogatories that are sanctioned under the Federal Rules of Civil Procedure.<sup>63</sup>

57. See 18 C.F.R. §§ 385.501-510 (1986) (rules relating to adjudicatory proceedings). These rules relate to hearings commenced under the Federal Power Act, the Public Utility Regulatory Policy Act, the Natural Gas Act, the Natural Gas Policy Act, the Interstate Commerce Act, the Outer Continental Shelf Lands Act, the Niagara Redevelopment Act and other statutes administered by the Commission under which formal hearings before the Commission are permitted. They do not cover hearings held on review of orders of the Department of Energy's Office of Hearing Appeals. These proceedings are governed by separate rules found at 18 C.F.R. §§ 385.901-917 (1986).

58. See, Benkin, *More Ado about Prehearing Discovery at FERC*, 6 ENERGY L.J. 1, 2 (1985) [hereinafter *More Ado*]. Although there is no express provision in the rules relating to investigations precluding the sort of discovery contemplated in the adjudicative setting, it is safe to assume that such discovery would not be permitted. Indeed, it would run contrary to the nature and purpose of an enforcement investigation. Agency investigations are *ex parte*, not adjudicative in nature, and are not governed by the same procedural standards as would apply in a adjudicative setting. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-3 (1950); Rules Relating to Investigations, Notice of Proposed Rulemaking, FERC Proposed Regulations, § 32,013 at 32,159 (1979); *United States v. McGovern*, 87 F.R.D. 582, 583 (M.D. Pa. 1980) (discovery by private parties relating to agency investigative proceedings not permitted where agency investigation is for lawful purpose and information sought by the agency is relevant to its investigation).

59. Rule 1906, 18 C.F.R. § 385.1906 (1986). This rule has now been replaced by Rule 404, 18 C.F.R. § 385.404 (depositions during proceedings), and Rule 405, 18 C.F.R. § 385.405 (use of depositions).

60. Rule 1905, 18 C.F.R. § 385.1905 (1986). This rule has now been replaced by Rule 409, 18 C.F.R. § 385.409.

61. Rule 604, 18 C.F.R. § 385.604 (1986). This rule has now been replaced by Rule 408, 18 C.F.R. § 385.408.

62. 18 C.F.R. § 385.504(b)(4), (5) (1986). The authority for discovery derives from the Administrative Procedure Act, 5 U.S.C. § 551-559 (1982), the Federal Power Act, § 307(b), 16 U.S.C. 825f(b) (1985), the Natural Gas Act, § 14(c), 15 U.S.C. § 717m(c) (1982), and the Interstate Commerce Act as it relates to the regulation of oil pipelines, 49 U.S.C. § 15 (1982). The Commission has ICA authority only with respect to oil pipelines. Other carriers subject to the ICA are regulated by the I.C.C.)

63. The data request has been described as a "flexible and efficient instrument of discovery" that "enables a participant to go even further than he could under the Federal Rules." For example, a party may request reproduction of documents—not merely the right to inspect and copy them. Also, to a limited extent parties may be compelled to compile or "create" information and furnish it to others, "something that simply

There was no specific provision in the FERC rules for the use of data requests, however. Rather, it "evolved from felt necessity"<sup>64</sup> and was part of what has been referred to as a "rich tradition of prehearing discovery" that is familiar to practitioners before the FERC.<sup>65</sup> The data request survives as a discovery device under the Commission's new rules as a specific method of discovery codified under Rules 403 and 406.<sup>66</sup>

## 2. Reliance on Federal Rules of Discovery

In the absence of express rules of discovery, the Commission and its presiding officers have utilized the federal rules and cases, interpreting them as guidelines in ruling on discovery disputes, a reality the Commission acknowledged when it initially proposed the discovery rules it has now adopted.<sup>67</sup> There is relatively scant Commission precedent on specific discovery issues, although it has addressed such issues as the scope of discovery,<sup>68</sup> deliberative privilege,<sup>69</sup> sanctions for non-compliance with discovery orders,<sup>70</sup> work product,<sup>71</sup> trade secrets and commercially sensitive information,<sup>72</sup> privilege as to settlement negotiations,<sup>73</sup> and protective orders.<sup>74</sup> For the most part however, precedent, such as exists, is to be found in the orders of the Commission's administrative law judges. Except where the new rules depart from the federal rules, practitioners can reasonably anticipate that court interpretations of the

cannot be done under the Federal Rules." Note, *A Colloquy on the Trial of a Case Before the FERC: The Administrative Law Judge's Perspective*, 3 ENERGY L.J., 317, 318 (1982).

64. *Id.*

65. Benkin, *More Ado*, *supra* note 58, at 1.

66. 18 C.F.R. § 406 (1987). Rule 406 identifies data requests, interrogatories and requests for production of documents or other things all as forms of "written request to supply information." The new rules differ from prior practice in that they obligate the responding party (1) to supplement its responses when a response is discovered to be incorrect or no response. Order No. 466, *supra* note 11. These requirements, in the past, have not been uniformly applied, but have typically been implemented only pursuant to specific instructions to that effect set forth in the data request.

67. See *Boston Edison Co.*, 1 F.E.R.C. ¶ 61,300 (1977); FERC No. RM83-41, FERC Proposed Regulations § 32,380 (1984), 49 Fed. Reg. 30519 (1984) (to be codified at 7 C.F.R. § 385).

68. See, e.g., *Columbia Gas Transmission Corp.*, 34 F.E.R.C. ¶ 61,049 (1986) (order requiring Columbia to produce requested documents).

69. *McDowell County*, 23 F.E.R.C. at 61,417 (order denying request for rehearing of Commission order denying request for production of Commission documents); *McDowell County Consumers' Council*, 23 F.E.R.C. at 61,142 (order withholding intra-agency documents from disclosure); *Stowers Oil & Gas Co.*, 28 F.E.R.C. ¶ 61,138 (1984) (Commission refused to allow deposition of high level Commission advisor).

70. *Pennsylvania Power Co.*, 21 F.E.R.C. ¶ 61,313 (1982), *modified* 731 F.2d 959 (1984) (requests for monetary sanctions for non-compliance with discovery request denied); *Tennessee Natural Gas Pipeline Co.*, 22 F.E.R.C. ¶ 61,067 (1983) (order requiring parties to respond to data request to be deemed to have waived position on issue).

71. *Northwest Cent. Pipeline Corp.*, 29 F.E.R.C. ¶ 61,333 (1984) (order withholding names of advisors of Commission Staff).

72. *Michigan-Wisconsin Pipe Line Co.*, 15 F.E.R.C. ¶ 61,316 (1981) (protective order issued preserving confidentiality of pipeline's contracts).

73. *Columbia Gas Transmission Corp.*, 28 F.E.R.C. ¶ 61,185 (1984) (*in camera* review ordered of documents relating to contract renegotiations).

74. *Michigan-Wisconsin Pipe Line Co.*, 15 F.E.R.C. ¶ 61,316 (1981) (protective order issued preserving confidentiality of pipeline's contracts).

parallel federal rules will continue to "provide useful guidance"<sup>75</sup> since the Commission's new discovery rules are intended to "reflect the spirit of the federal rules."<sup>76</sup> In the case of qualified privileges: such as work product, the attorney-client privilege, trade secrets, etc.—the Commission expresses this intention directly, noting that "[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities."<sup>77</sup>

### C. *Scope of Discovery*

Under the Federal Rules of Civil Procedure, parties are entitled to discovery on

any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>78</sup>

The Commission and its predecessor, the Federal Power Commission, have several times reiterated this same standard, making it clear that the criterion for discovery is not admissibility,<sup>79</sup> but rather whether compliance with the request "would lead to the discovery of admissible material."<sup>80</sup> The new rules codify this practice by adopting Rule 402 on the scope of discovery, a nearly verbatim version of the federal rule.<sup>81</sup>

### D. *Resolution of Specific Discovery Disputes Before FERC*

#### 1. *Motions to Compel*

In the past, where parties have been unable informally to resolve disputes as to data requests, the requesting party was obliged to file a motion to compel production, because a data request was not self-enforcing.<sup>82</sup> Motions to compel

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75. Order No. 466, *supra* note 11, at 6958.

76. *Id.*

77. 18 C.F.R. § 385.410(d)(1) (1987).

78. FED. R. CIV. P. 26(b).

79. *See, e.g.,* Columbia Gas Transmission Corp., 34 F.E.R.C. § 61,049 at 61,073 (1986); TransAlaska Pipeline System, 9 F.E.R.C. ¶ 61,133 (1979); Cities Serv. Gas Co., 32 F.P.C. 1258, 1261 (1964); Atlantic Seaboard Corp., 36 F.P.C. 320, 321 (1966).

80. *Columbia Gas Transmission Corp.*, 34 F.E.R.C. at 61,073.

81. 18 C.F.R. § 385.402(a) (1987). Under this rule, the Commission intends "no departure from the approach of the Federal rules." Order No.466, *supra* note 11, at 6959.

82. To expedite resolution of disputes, the presiding officer often has established deadlines for the filing of objections to data requests as part of the procedural schedule in a case. The practical effect of such a requirement was to require the party against whom a data request was directed to respond to all data requests not objected to, although a refusal to respond in such circumstances would still necessitate a motion to compel. This procedure is likely to continue, albeit in slightly modified form. The new rules obligate the requesting party to specify a date for responding to requests, 18 C.F.R. § 406(b). Respondents are likewise required to state their objections within a reasonable time in advance of the date on which a response or other

were treated as any motion under the Commission's rules; they were required to set forth the "specific relief or ruling requested" and a statement of the "facts and law which support the motion."<sup>83</sup> In the case of the motion to compel, this generally required a recitation of the information requested, its relevance, the objections posed to production, if known, and the reasons why the objections are unfounded. Answers to motions to compel, like other answers to motions, had to be made within fifteen days, unless another period was specified by the presiding officer.<sup>84</sup> An answer could raise a number of defenses, such as burden, relevance, confidential business information, deliberative privilege, attorney-client privilege, attorney work product, etc.<sup>85</sup> The burden in discovery disputes before the FERC, as in federal cases, was on the party resisting discovery.<sup>86</sup>

The new rules do not materially alter this process but are somewhat more rigorous in defining the steps. For example, Rule 410(b) outlines six separate grounds for motions to compel: (1) the failure to respond fully, completely or accurately to an interrogatory; (2) the failure of a deponent to appear for a deposition; (3) the failure of a party named in a notice of intent to take a deposition to designate one or more persons to testify on its behalf; (4) the failure of a deponent to answer fully, completely and accurately questions propounded during the deposition; (5) the failure of a party to respond to a request for admissions; (6) the refusal of a participant upon whom an order to produce or to permit inspection or entry is served to comply with such an order.<sup>87</sup>

Also, under the new rules, prior to the time that a party files a motion to compel, the responding party will already have been obliged to have notified the requesting party of its objections to the discovery at issue.<sup>88</sup> If the discovery request calls for the production of documents or other such items, except where the objection is on grounds of undue burden, the objecting participant must itemize the items withheld by character and subject matter and must specify the objection asserted for each item.<sup>89</sup> Claims of undue burden must also be specifically supported by a "description of the approximate number of documents that would have to be produced and a summary of the information contained in such documents."<sup>90</sup> Other grounds for objection must also be clearly stated by the objecting participant.<sup>91</sup> Finally, objections to the compilation or processing of information must also be set forth by the objecting participant. This issue is discussed in more detail *infra*, in connection with the production of "studies."

Ideally the more specific procedures for objections to discovery requests

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action in conformance with the discovery request is due." 18 C.F.R. § 385.410(a) (1) (1987). Rule 403(b) empowers the presiding judge to establish timetables for requests, objections, etc., and it is likely that these matters will be resolved much as they usually are: under ground rules worked out by the parties and approved or modified by the judge.

83. 18 C.F.R. § 385.212(c) (1986).

84. 18 C.F.R. § 385.213 (1986).

85. The various objections to discovery requests are discussed *infra* text accompanying notes 88-91.

86. *Boston Edison Co.*, 1 F.E.R.C. ¶ 61,300 (1977).

87. 18 C.F.R. § 385.410(b) (1987).

88. 18 C.F.R. § 385.410(a) (1987).

89. 18 C.F.R. § 385.410(c)(2)(i) (1987).

90. 18 C.F.R. § 385.410(c)(2)(B)(ii) (1987).

91. 18 C.F.R. § 385.410(a)(3) (1987).

should expedite the resolution of those cases in which a participant files a motion to compel. That is because the underlying validity of the discovery request itself should have already been resolved at an earlier stage.

## 2. Subpoenas

Given the availability of data requests, subpoenas in FERC proceedings have only occasionally been employed against parties, notwithstanding the provisions in the rules for their issuance.<sup>92</sup>

Subpoenas have more frequently been directed against non-parties who otherwise are under no compulsion to respond to discovery.<sup>93</sup> Under Rule 1905, the Commission exercised nationwide subpoena power. Subpoenas were issued *ex parte*, subject to motions by the subpoenaed party to quash.<sup>94</sup> Subpoenas could be issued only on the basis of what amounts to a showing of good cause. Specifically, a subpoena application, which could be oral or written, was required to set forth "the general relevance, materiality and scope" of the testimonial or documentary evidence sought.<sup>95</sup> As to documents, there was the further requirement of a showing, to the extent possible, of the specific documents sought, and an explanation of the relevance of the facts sought to be proven by the documents.<sup>96</sup>

The new rules eliminate the existing provision for subpoenas, but retain their scope and, for the most part, codify prior practice. For example, while the motion to quash was a device previously recognized in Commission proceedings, there was no express provision for its use. Under Rule 409, a subpoena may be issued upon application, subject to a notice of objection or motion to quash under Rule 410.<sup>97</sup> Similarly, the new rules clarify that depositions of non-participants must be secured by subpoena.<sup>98</sup> At the same time, the new rules streamline subpoena practice by making express provision for service by certified or registered mail<sup>99</sup> and by allowing for the issuance of subpoenas "on request."<sup>100</sup>

## 3. Depositions

Former Rule 1906<sup>101</sup> authorized the taking of depositions and specified that discovery depositions could, upon proper showing, be admitted into evidence.<sup>102</sup> As with subpoenas, depositions could be taken only upon application to the presiding officer,<sup>103</sup> unlike the case under the F.R.C.P.<sup>104</sup> And, as with

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92. See 18 C.F.R. § 385.1905 (1986).

93. See, e.g., *Tennasco Corp.*, 36 F.E.R.C. § 61,279 (1986).

94. See, e.g., *Southern Cal. Edison Co.*, 19 F.E.R.C. § 63,038 (1982).

95. 18 C.F.R. § 385.1905 (1986).

96. *Id.*

97. 18 C.F.R. § 385.409(d) (1987).

98. Rule 404, 18 C.F.R. § 385.404(a)(2) (1987).

99. Rule 409, 18 C.F.R. § 385.409(b) (1987). These alternate forms of service are likely to be as effective and less costly than traditional personal service.

100. *Id.*

101. 18 C.F.R. § 385.1906 (1986).

102. See *supra* notes 34-35.

103. *Id.*

subpoenas, depositions could be authorized nationwide.<sup>106</sup> Depositions specifically intended to preserve the testimony of witnesses "have been authorized in FERC proceedings under the general supervisory powers of administrative law judges."<sup>106</sup>

Although there was no express requirement for good cause, such a requirement was implicit in the former rule, which required the applicant to specify (1) the name and address of the person to be deposed, (2) the time and place of the deposition, (3) the name and address of the officer, (4) the subject matter of the deposition and (5) the reasons for the deposition.<sup>107</sup> The justification for a deposition has been held to be the same as for the discovery of evidence generally, *i.e.*, whether it involves "any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>108</sup>

Depositions authorized by the Commission or its officers under prior practice were taken before a court reporter and in the absence of the presiding judge.<sup>109</sup> Deponents at the depositions, as under the Federal Rules of Civil Procedure, have been held to be required to answer the questions, even if objections are posed.<sup>110</sup> Failure to answer, it has also been held, could subject the witness or the party with whom the witness is employed to sanctions.<sup>111</sup>

There is little change that should be anticipated under the new rules, except that obtaining the prior approval of the Judge before a deposition can be taken is not required under the new rule. As the Commission has explained, "[i]n most cases, participants should be able to agree on the time, place and manner of the deposition. Requiring prior approval by the presiding officer in those situations is time consuming and burdens the presiding judge and the participants by adding an unnecessary set of pleadings."<sup>112</sup>

#### 4. Interrogatories

Interrogatories to parties—written questions to be answered in narrative form by the party or its representative and a similar discovery device, depositions on written questions,<sup>113</sup> are rarely utilized in FERC proceedings because the data request can be fashioned to elicit similar types of responses.<sup>114</sup> None-

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104. FED. R. CIV. P. 30(a) ("leave of court" for a deposition is only required "if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant.").

105. Benkin, *The Inconstant Lady*, *supra* note 16, at 206.

106. Benkin, *The Inconstant Lady*, *supra* note 16, at 206 (citing 18 C.F.R. § 385.504(b)(8), (9)).

107. 18 C.F.R. § 385.1906(b) (1986).

108. *Public Serv. Co. v. Colorado Interstate Gas Co.*, 26 F.E.R.C. § 63,051 (1984) (citing FED. R. CIV. P. 26(b)).

109. Benkin, *More Ado*, *supra* note 58, at 3.

110. *Kansas-Nebraska Natural Gas Co.*, 24 F.E.R.C. § 63,007 (1983).

111. Under the Federal Rules a party may seek to suspend a deposition on grounds of oppression, or that answers would disclose privileged information. FED. R. CIV. P. 26. First however, a motion for protective order must be made to the Judge. It can reasonably be expected that similar requirements will apply in FERC depositions. *See, e.g.*, *McDowell County Consumers' Council v. American Electric Power Co.*, 26 F.E.R.C. § 61,042 (1984).

112. Order No. 466, *supra* note 11, at 6960.

113. *See supra* note 25.

114. Instructions accompanying a data request may, for example, specify that answers be submitted

theless, interrogatories have been authorized to, *inter alia*, determine the contentions of opposing parties,<sup>115</sup> and the names of witnesses expected to be called.<sup>116</sup> They have also been authorized as an alternative to oral deposition in order to limit the possibility of disclosure of privileged intra-agency communications.<sup>117</sup> The new rules make express provision for the use of these discovery devices.<sup>118</sup>

### 5. Requests for Admissions

Under the Federal Rules, requests for admissions, if not responded to within 30 days, are deemed admitted.<sup>119</sup> Former Rule 604 of the FERC's Rules of Practices and Procedure<sup>120</sup> did not set forth any specific procedure for the request for admissions, such as time for response or written or oral format, but simply provided that if a party "refuses to admit or stipulate to the genuineness of a document or of the truth of a matter of fact," and "if the party requesting the admission or stipulation proves" what it sought to have admitted or stipulated, the requesting party could apply to the judge for recovery of the costs incurred in establishing its proof.<sup>121</sup> Absent good cause for a refusal to stipulate or admit, it specified that "the presiding officer will order payment of expenses."<sup>122</sup> The refusing party then was entitled, as a matter of right, to an interlocutory appeal of the ruling to the Commission.<sup>123</sup> If the appeal was denied, and the appealing party still refused to pay costs, the rule provided that "the Commission may strike all or any part of that party's pleadings or omit or deny further participation by the party."<sup>124</sup> Proposed admissions or stipulations not agreed to, however, were nonetheless not admissible in evidence against parties objecting to their admission.<sup>125</sup>

The Commission's former rule on admissions, as noted above, was far narrower than the request for admissions sanctioned under the Federal Rules. In particular, there were no procedures to deem admissions made as a result of a failure to respond to requests for admissions. Presiding officers however, in

under oath.

115. *Amoco Prod. Co.*, 24 F.E.R.C. ¶ 63,032 (1983).

116. *Id.*

117. *Stowers Oil & Gas Co.*, 28 F.E.R.C. ¶ 61,138 (1984). For a discussion of the privilege attached to certain intra-agency communications generally, see *supra* notes 54-56; *infra* notes 142-148 and accompanying text.

118. 18 C.F.R. § 385.406 (1987). The rules also make a new provision for orders directing entry onto lands. 18 C.F.R. § 385.407. This provision codifies existing practice under which the Commission has authorized on-site inspections by participants. See *City of Tacoma*, 3 F.E.R.C. ¶ 61,033 (1979) and other cases cited in Order No. 466, *supra* note 6, at 6961 n.38.

119. Fed. R. Civ. P. 36(a).

120. 18 C.F.R. § 385.604 (1986).

121. 18 C.F.R. § 385.604(a) (1986).

122. 18 C.F.R. § 385.604(b) (1986).

123. 18 C.F.R. § 385.604(c) (1986).

124. 18 C.F.R. § 385.604(d) (1986).

125. 18 C.F.R. § 385.604(e) (1986). Taken literally, this requirement would lead to incongruous results where the refusal to stipulate or admit was unreasonable. In fact however, refusals to admit have on at least one occasion been deemed as admissions by the Commission unless written denials were submitted within 30 days of the request. *Stowers Oil & Gas Co.* 28 F.E.R.C. § 61,138 (1984). The new rules render the problem moot by adopting the Federal rules approach taken in *Stowers*.



addition to their enumerated powers, had general authority to "[t]ake any other action necessary or appropriate to the discharge of" their duties.<sup>126</sup> Implicitly, this included the power to establish procedures governing requests for admissions. Parties could file motions under Rule 212,<sup>127</sup> including motions for admissions, and presiding officers had the inherent power to rule on such motions. Documented instances in which procedures for requests for admissions were established however, have been rare; no doubt because of the lack of an express Commission rule.<sup>128</sup>

The new rule on admissions, Rule 408,<sup>129</sup> is a tremendous advancement over the *ad hoc* use of admissions under prior practice. Requests for admissions may be made to any participant as to the genuineness of a document or the truth of a matter of fact.<sup>130</sup> Requests for admissions must be responded to within 20 days, unless the presiding judge provides for different period for response.<sup>131</sup>

Although the new rule on admissions omits the prior provision for monetary sanctions, it is, on its face, an infinitely more useful device than the prior rule. Imposition of monetary sanctions, as the Commission noted in its final rule, never actually occurred.<sup>132</sup> By the same token, under the new rule a failure to respond to a request for admission is subject to a far more useful sanction to the requesting party: the admission requested will be deemed to have been made.

## 6. Attorney-Client Privilege

The attorney-client privilege is applicable in FERC proceedings. The Commission itself has not expressly defined the privilege<sup>133</sup> although it has been successfully invoked before the administrative law judges at the Commission.<sup>134</sup> The judges have applied the privilege as it has been interpreted by the federal courts.<sup>135</sup> Thus, to sustain the privilege, parties invoking it have been

126. 18 C.F.R. § 385.504(b) (20) (1986).

127. 18 C.F.R. § 385.212 (1986).

128. The only reported instance which the author could find in which the failure to admit was deemed an admission was the *Stowers* case. See *supra* notes 69 and 125.

129. 18 C.F.R. § 385.408 (1987).

130. *Id.* In this respect the new rule carries forward the limitation existing in the prior rule on admissions, *i.e.*, the rule does not permit requests for admissions as to questions of law, as are permitted under the federal rules. The Commission appears to have been persuaded by commentators who argued that the broader federal rules as applied to Commission proceedings could result in abuses—for example, using the "threat of sanctions for a failure to make admissions to prevent a party from pursuing legitimate differences of opinion." See *supra* note 11, at 6962.

131. *Id.*

132. *Id.* at 6957.

133. Although it had not defined it, the Commission expressly recognized the applicability of the privilege to proceedings before it. *McDowell County Consumers' Council*, 23 F.E.R.C. ¶ 61,142 (1983).

134. See, *e.g.*, *Consolidated Gas Supply Corp.*, 17 F.E.R.C. ¶ 63,048 (1981); *Mountain Fuel Supply Co.*, 23 F.E.R.C. § 63,057 (1983); *Kansas-Nebraska Natural Gas Co., Inc.*, 23 F.E.R.C. ¶ 63,080 (1983).

135. *Kansas-Nebraska Natural Gas*, 23 F.E.R.C. ¶ 63,080 (1983). There is a split of authority in the courts concerning applicability of the "narrow" and "broad" view of the privilege. Under the narrow view, only if the lawyer's communications to the client would disclose confidential information from the client are the communications privileged. The broader view would encompass even unsolicited communications from the attorney to the client. Like the courts, judges at F.E.R.C. are split. See *United Gas Pipe Line Co.*, 17

required to submit descriptions or indices of the documents by date, author and subject matter,<sup>136</sup> to submit affidavits detailing the basis for the privilege claim,<sup>137</sup> and to submit the documents for *in camera* inspection.<sup>138</sup>

Also, in accordance with court rulings, presiding officers have acknowledged the applicability of the privilege to the confidential communications between the client's attorney and a non-attorney whose expertise is necessary or helpful to the attorney in developing a legal opinion for the client,<sup>139</sup> but have also recognized that voluntary disclosure of privileged information may result in a waiver of the privilege with respect to related communications and documents.<sup>140</sup> The new rules codify this practice.<sup>141</sup>

## 7. Deliberative Privilege

The deliberative privilege as it applies to internal FERC documents has been actively guarded by the Commission.<sup>142</sup> Because it is the Commission's privilege and not that of its staff, the staff has no authority to waive the privilege.<sup>143</sup> Moreover, the privilege is not waived solely by the fact that internal predecisional documents had been viewed by the trial staff; trial staff also functions from time-to-time in an advisory capacity and its access to deliberative materials in one case does not thereby waive the privilege as to those materials in other cases.<sup>144</sup> This privilege has been upheld many times by presiding officers.<sup>145</sup> It also has been held to apply to discovery against other government agencies, where the information sought is contained in the intra-agency pre-

F.E.R.C. ¶ 63,009 (1981); Northern Natural Gas Co., 24 FERC ¶ 63,016 (1983) (broad view); Mountain Fuel Supply Co., 23 F.E.R.C. ¶ 63,057 (1983).

136. Kansas-Nebraska Natural Gas Co., 23 F.E.R.C. ¶ 63,104 (1983); Pacific Gas Transmission Co., 26 FERC ¶ 63,053 (1984).

137. Independent Oil and Gas Ass'n, 20 F.E.R.C. ¶ 63,094 (1982); Kansas-Nebraska Natural Gas Co., 23 F.E.R.C. ¶ 63,080 (1983).

138. Stowers Oil & Gas Co., 27 FERC ¶ 63,027 (1984); Independent Oil and Gas Ass'n, 20 F.E.R.C. ¶ 63,094 (1982). On occasion, the *in camera* inspection has been conducted by a special judge appointed to rule on the privilege claims in order to avoid prejudicing the presiding officer. See Independent Oil and Gas Ass'n, 20 F.E.R.C. § 63,074; Kansas-Nebraska Natural Gas Co., 23 F.E.R.C. ¶ 63,078 (1983).

139. Mountain Fuel Supply Co., 23 F.E.R.C. ¶ 63,057 (1983); El Paso Natural Gas Co., 23 F.E.R.C. ¶ 63,040 (1983).

140. *El Paso Natural Gas Co.*, 23 F.E.R.C. ¶ 63,040. (transmittal of document to independent contractor may result in waiver); Northern Natural Gas Co., 24 F.E.R.C. ¶ 63,016 (1983) (testimony by attorney does not *per se* result in waiver of privilege); KN Energy, Inc., 27 F.E.R.C. ¶ 63,091 (1984) (voluntary disclosure of privileged document in prior case results in waiver as to all related communications). What constitutes related is a fact-specific determination. Also, waiver "results" only from *voluntary* disclosure. Inadvertent disclosure under the pressure of an expedited discovery schedule, for example, has been held by at least one court not to constitute a waiver. *Transamerica Computer Co. v. IBM Corp.*, 573 F.2d 646 (9th Cir. 1978). Commission hearings are now frequently scheduled on an expedited basis, and this issue may arise in such cases.

141. 18 C.F.R. § 385.410(d) (1987).

142. See, e.g., *McDowell County Consumers' Council*, 23 F.E.R.C. § 61,142. Exxon Co., U.S.A., 25 F.E.R.C. § 61,412 (1983).

143. See *Rules of Discovery for Trial-Type Proceedings*, F.E.R.C. Proposed Regulations, § 32,380 at 32,975 (1984).

144. *McDowell County Consumers' Council*, 23 F.E.R.C. ¶ 61,142.

145. El Paso Natural Gas Co., 23 F.E.R.C. ¶ 63,039 (1983); Stowers Oil & Gas Co. United Gas Pipe Line Co., 29 F.E.R.C. ¶ 63,072 (1984).

decisional<sup>146</sup> communications or documents of such agencies.<sup>147</sup> The privilege however, is not absolute and, at least in theory, can be overridden if the party seeking the information can demonstrate that its need for the data outweighs the value of upholding the policy underlying the privilege.<sup>148</sup> Rule 410 places particular emphasis on the deliberative privilege as it applies to the Commission's internal deliberations. In order to assure that the Commission's privilege is not waived, the presiding officer is required to certify any staff claim of deliberative privilege to the Commission even where the presiding officer has ruled it inapplicable.<sup>149</sup>

### 8. Attorney-Work Product

The qualified privilege attached to the work product of attorneys, as discussed *supra*, had been adopted by the Commission<sup>150</sup> prior to Order No. 466 and has been applied by its presiding officers.<sup>151</sup> The Commission has recognized the importance of the privilege in protecting the attorney's ability to prepare for litigation,<sup>152</sup> and has held that the privilege extends also to documents prepared by experts at the request of the attorney in anticipation of litigation or settlement discussions,<sup>153</sup> a principle that has also been applied in individual cases by presiding officers.<sup>154</sup> New Rule 402 codifies the work product privilege, adopting Rule 26(b)(3) of the Federal rules.<sup>155</sup>

Claims of work product privilege have generally been upheld in the absence of a waiver, consistent with the rule that although not absolute, the privilege should not be waived except in cases of "substantial need and hardship" on the part of the requesting party in obtaining sufficient information to establish

146. Predecisional means that the communications must relate to opinions, deliberations and recommendations that are part of the decisionmaking process of the agency. *United Gas Pipe Line Co.*, 29 F.E.R.C. § 63,070 (1984). An analogous limitation on the disclosure of agency records is contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (1982). The Supreme Court has held that if a document is exempt from disclosure in the civil discovery process it cannot be obtained under FOIA. *United States v. Weber Aircraft Corp.*, 104 S.Ct. 1488, 1494 (1984). However, the converse does not necessarily hold true. Because the issues in agency proceedings and the issues in the context of an FOIA action differ, a document that may be exempt from an FOIA demand may nonetheless be subject to production pursuant to a discovery request, which involves the "particularized needs" of . . . a private litigant." *EPA v. Mink*, 410 U.S. 73, 86 (1973); *Weber*, 104 S. Ct. at 1494 n.20. Thus, as one ALJ has ruled, cases applying to FOIA exemptions for deliberative documents are only "roughly analogous," *Consolidated Gas Supply Corp.*, 17 F.E.R.C. ¶ 63,048 at 65,237 (1981).

147. *United States Dept. of Energy, Bonneville Power Admin*, 31 F.E.R.C. § 61,089 (1985). A closely related privilege, the executive privilege, has been held applicable to communications between an executive branch state agency in Vermont and the offices of the Governor and Attorney General of Vermont. *See, Municipal Elec. Util. Ass'n v. Power Auth.*, Docket No. EL86-24-000 (September 26, 1986).

148. *V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.) *cert. denied*, 389 U.S. 952 (1967).

149. 18 C.F.R. § 385.410(d)(2)(ii) (1986).

150. *McDowell County Consumers' Council*, 23 F.E.R.C. ¶ 61,142.

151. *See, e.g., Carolina Power and Light Co.*, 31 F.E.R.C. ¶ 63,027 (1985); *KN Energy, Inc.*, 27 F.E.R.C. ¶ 63,091 (1984); *Stowers Oil & Gas Co.*, 28 F.E.R.C. ¶ 61,138 (1984); *KN Energy, Inc.*, 26 F.E.R.C. ¶ 63,068 (1984); *Kansas-Nebraska Natural Gas Co.*, 24 F.E.R.C. ¶ 63,059 (1983); *TransAlaska Pipeline System*; 24 F.E.R.C. ¶ 63,125 (1983).

152. *McDowell County Consumers' Council*, 23 F.E.R.C. ¶ 61,142.

153. *Id.*

154. *Stowers Oil & Gas Co.*, 28 F.E.R.C. ¶ 61,138; *KN Energy, Inc.*, 26 F.E.R.C. ¶ 63,068 (1984).

155. Order No. 466, 52 Fed. Reg. 6957 (1987).

its claim or defense.<sup>156</sup> In such cases, one judge has stated that the privilege may be subject to a protective order or waived where justice so requires.<sup>157</sup> The privilege is not applicable to business advice,<sup>158</sup> but where the advice is intertwined with bona fide work product, the privilege will apply.<sup>159</sup> The privilege may be waived if the work product is disclosed by the attorney to a witness who relied upon it in preparation of his testimony,<sup>160</sup> where the party claiming the privilege testifies,<sup>161</sup> or where similar documents are disclosed,<sup>162</sup> but compelled disclosure in another proceeding will not necessarily result in a waiver.<sup>163</sup>

## 9. Production of Studies

As a general rule, most presiding officers in the past have not required parties to prepare a study in response to a data request.<sup>164</sup> As one commentator has noted, this is not universally the case, as many studies were ordered to be performed by natural gas pipelines in proceedings involving gas curtailment plans.<sup>165</sup> Moreover, the compilation of data in a useable format—for example, the conversion of magnetic tape to hard printed copy or the compilation of data by category where that form of data retrieval can readily be accomplished by the producing party—has been required.<sup>166</sup>

The new rules recognize the frequent need for compilations of data in forms different from that maintained by a participant and emphasize that studies *can* be required; the Commission states simply that requests for studies are not “to impose an open-ended obligation on jurisdictional entities to perform expensive new studies as part of the discovery process”<sup>167</sup> and that the cost of compliance is but one factor to be considered in weighing the burdensomeness of the request.<sup>168</sup>

156. See *Independent Oil & Gas Ass'n*, 21 F.E.R.C. ¶ 63,019 (citing Fed. R. Civ. P. 26(b)(3)).

157. *KN Energy, Inc.* 27 F.E.R.C. ¶ 63,091.

158. *Mountain Fuel Supply Co.*, 23 F.E.R.C. ¶ 63,057.

159. *Id.*

160. *El Paso Natural Gas Co.*, 23 F.E.R.C. ¶ 63,040. *But see TransAlaska Pipeline System*, 24 F.E.R.C. ¶ 63,125.

161. *KN Energy, Inc.* 27 F.E.R.C. ¶ 63,091. (waiver by filing of prepared testimony); *Transcontinental Gas Pipe Line Corp.* 18 F.E.R.C. ¶ 63,043 (1982).

162. *Boundary Gas Co., Inc.*, 23 F.E.R.C. ¶ 63,107 (1983).

163. *Public Serv. Co. v. Colorado Interstate Gas Co.*, 26 F.E.R.C. ¶ 63,051 (1984).

164. See, e.g., *Kansas Gas and Elec. Co.*, 20 F.E.R.C. ¶ 63,044 (1982). Under the proposed discovery rules an exception to this practice was to be made in the case of studies requested of jurisdictional entities by the staff. See, FERC Proposed Regulations, § 32,380 at 32,977, Proposed Rule 408(a). The final rule dropped this aspect of its proposal. But, the Commission noted, its final rule was not intended to limit the discovery of other parties. It described the “special studies” rule as “misunderstood” and explained that any party could obtain “special studies” in the sense that computer uses of “alternative assumptions” and “print-out of . . . automated data might be required of regulated entities in the public interest.” Order No. 466, 52 Fed. Reg. 6957 (1987).

165. Benkin, *More Ado*, *supra* note 58, at 22-23 n. 136 (citing *United Gas Pipe Line Co.*, 89 F.P.C. 2226, 2227 (1977)).

166. Benkin, *More Ado*, *supra* note 58, at 22.

167. Order No. 466, 52 Fed. Reg. 6957 (1987).

168. *Id.*

## 10. Undue Burden

Under the Federal Rules of Civil Procedure, bare claims of undue burden are not usually sustained.<sup>169</sup> The expense of production or the time consumed are arguments given scant weight.<sup>170</sup> By contrast, while a general claim of burdensomeness is insufficient,<sup>171</sup> presiding officers at FERC have shown far greater sympathy to such claims,<sup>172</sup> weighing the effort of production against possible relevance,<sup>173</sup> the expense of production,<sup>174</sup> or the burden on Commission staff of compilation of matters in public files.<sup>175</sup> As one Commission administrative law judge has noted, the question whether an undue burden is involved is typically a "factual matter" rather than one of "legal theory."<sup>176</sup> The new rules mirror this historical practice.<sup>177</sup>

## 11. Confidentiality and Protective Orders

As a general proposition, the burden of persuasion in the case of confidentiality issues is on the party claiming confidentiality.<sup>178</sup> The claim must be made with specificity as to the precise disclosure that would cause harm and the nature of the harm.<sup>179</sup> Because the confidentiality attached to commercially sensitive information is only a qualified privilege,<sup>180</sup> production will often be required even where the material requested qualifies as confidential, subject to protective orders that may limit the conditions under which the material may be used or disseminated.<sup>181</sup> Applications for such protective orders are fre-

169. *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980).

170. *Laufman v. Oakley Bldg. & Loan Co.*, 72 F.R.D. 116, 121 (S.D. Ohio 1976).

171. *See, e.g., Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980). For example, while it is fairly well settled under the Federal Rules that a request for "all documents" relating to a particular subject is not in itself unduly burdensome, *see, e.g., Sheny v. Hotel Waldorf-Astoria Corp.*, 77 F.R.D. 468 (D.C.N.Y. 1978), at least one administrative law judge at FERC has deemed an "all document" request *per se* unduly burdensome. *See, e.g., U.S. Dept. of Energy, Bonneville Power Admin.*, 26 F.E.R.C. ¶ 63,040 (1984).

172. *Tennessee Gas Pipeline Co.*, 21 F.E.R.C. ¶ 63,103 (1982); *Pennsylvania Power Co.*, 26 F.E.R.C. ¶ 63,115 (1984).

173. *Mississippi Power & Light Co.*, 28 F.E.R.C. ¶ 63,031 (1984); *Pacific Gas Transmission Co.*, 26 F.E.R.C. ¶ 63,117 (1984); *Transcontinental Gas Pipe Line Corp.*, 26 F.E.R.C. ¶ 63,050 (1984).

174. *Kansas Gas and Elec. Co.*, 20 F.E.R.C. ¶ 63,044 (1982).

175. *El Paso Natural Gas Co.*, 23 F.E.R.C. ¶ 63,040.

176. Benkin, *More Ado, supra* note 58, at 17.

177. 18 C.F.R. § 385.410 (1986).

178. *Tenneco Oil Co.*, 27 F.E.R.C. ¶ 61,489 at 61,954-56 (1984). There the Commission established five criteria for assertion of a business confidentiality claim: (1) that the information is customarily confidential; (2) that public disclosure will cause specific injury and how injury will be caused; (3) the nature and extent of harm expected to result from disclosure; (4) the length of time for which non-disclosure is sought and the reasons underlying the request; and (5) how the injury resulting from disclosure outweighs the public benefit of full disclosure.

179. *Tenneco Oil Co.*, 27 F.E.R.C. at 61,954-56.

180. *Truncks Mfg. Co. v. Paramount Bag. Mfg.*, 35 F.R.D. 540 (D.C.N.Y. 1969).

181. *Columbia Gas Transmission Co.*, 28 F.E.R.C. ¶ 61,185 (1984). To the extent that documents produced to the Staff under protective order come into the Commission's "custody", they are not thereby likely to become subject to FOIA demands that would circumvent the protective order. The purpose of the FOIA is not "to benefit private litigants by serving as a supplement to the rules of civil discovery." *Parton v. U.S. Dept. of Justice*, 727 F.2d 774, 777 (8th Cir. 1984). More specifically, the FOIA only covers "agency

quently filed at the FERC<sup>182</sup> and, as has aptly been observed, protective orders have often been employed as an expediting device to advance discovery proceedings and avoid disputes—notwithstanding the absence of any prior showing of confidentiality.<sup>183</sup> The downside, as has also been noted, is that procedures necessary to comply with protective orders are cumbersome, expensive and often unnecessary because most of the protected materials are not entitled to the privilege.<sup>184</sup>

Some of the material filed by regulated companies as part of their applications is submitted under a request for confidentiality. The Commission's long-standing practice, recently codified in Order No. 462,<sup>185</sup> is to place such material in a non-public file. No prior determination is made by the Commission as to the validity of the confidentiality claim. Rather, the initial classification of such material as non-public affords the Commission an initial opportunity to review the documents before they are disclosed in discovery or pursuant to any relevant statutes. Such a procedure, it has been reasoned, facilitates Commission access to the Commission while providing the filing party some protection against improper disclosure.<sup>186</sup>

The new rules give added importance to the protective order. Confidentiality, under these rules, will not be accepted "as a general ground for refusing to produce information sought through discovery."<sup>187</sup> Instead, the Commission has explained, "[p]rotective orders can ordinarily be fashioned so as to preserve confidential material and also permit the production of confidential matters."<sup>188</sup>

### *E. Discovery of Expert Witnesses*

Pretrial discovery of expert witnesses in FERC proceedings is of less urgency than in federal district court proceedings because the testimony is prepared in written form and is usually available in advance of the hearing. Depositions of expert witnesses, although atypical, are not unprecedented.<sup>189</sup> Most pretrial discovery of expert witnesses however, consists of data requests for workpapers or specific questions directed to the filed testimony.

Pretrial discovery of experts retained by a party, but not expected to be called as witnesses, has been treated much as it is under the federal rules, which bar discovery of facts known or opinions held by such experts absent a showing of exceptional circumstances making it impractical for the party seek-

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records." Written data that is either generated, owned or possessed by private parties do not become agency records as a result of their temporary location in agency files. See *e.g.*, *Forsham v. Harris*, 445 U.S. 169 (1980).

182. See *e.g.*, *El Paso Natural Gas Co.*, 23 F.E.R.C. ¶ 63,040.

183. Benkin, *More Ado*, *supra* note 58, at 27.

184. *Id.* at 29-30.

185. *Confidential Treatment of Records and Documents Filed with the Commission*. F.E.R.C. Stats & Regs. ¶ 30,723 (1987).

186. *Id.*

187. Order No.466, 52 Fed. Reg. 6957 (1987).

188. *Id.*

189. See, *e.g.*, *Southland Oil Co. UGS Corp.*, 20 F.E.R.C. ¶ 62,606 (1982); *Kansas-Nebraska Natural Gas Co.*, 24 F.E.R.C. ¶ 63,002 (1983).

ing discovery to obtain expert opinion on the same matter.<sup>190</sup> The Commission has reasoned, like the courts, that parties should not be permitted to use discovery as a device for obtaining free expert opinions.<sup>191</sup> Rule 402(c) codifies this principle by precluding discovery of experts that are retained by a participant, but not used by that participant as a witness nor relied upon by any other expert that is used as a witness by the participant.<sup>192</sup> In a decision that can only be explained by the unique status historically accorded the FERC staff, the Commission has extended the rationale for this limit on discovery to preclude inquiry into either (1) the identity of other staff experts (who are not witnesses in the proceeding) consulted by a staff witness in preparing his testimony or (2) the nature of the matter consulted upon. If the staff witness maintains that he has not "relied on" such consultation in forming his opinion, unless "exceptional circumstances" so require, the Commission will not order discovery.<sup>193</sup>

### 1. Fees

Rule 1906(i) established a requirement that the individuals deposed and that court officers (usually a court reporter) recording the deposition be paid by the parties seeking the deposition. This requirement has been eliminated under the new rules.<sup>194</sup> Subpoenaed witnesses however, are entitled to the same fees as witnesses subpoenaed to testify in federal district courts, including, when travel is involved, the federal per diem for lodging and meals.<sup>195</sup> This is a carryover from the existing rules.

### 2. A Word About Discovery in Expedited Proceedings

As noted at the outset of this article, the need for familiarity with the tools of discovery is particularly critical in the expedited proceedings that are now so

190. FED. R. CIV. P. 26(b)(4)(B).

191. See *Northwest Cent. Pipeline Corp.*, 29 F.E.R.C. ¶ 61,333 at 61,693 (1984); Benkin, *More Ado*, *supra* note 58, at 13. Indeed, under the Federal Rules, even where the expert is expected to be called as a witness by the opposing party, the party taking the deposition of the expert must pay the expert a fee for his time comparable to the expert's hourly rates. FED. R. CIV. P. 26(b).

192. 18 C.F.R. § 385.402(c) (1987).

193. *Northwest Cent. Pipeline Co.*, 29 F.E.R.C. ¶ 61,333 (1984). That the witness may not have relied upon the other expert does not make such consultation irrelevant. Indeed, if the witness rejected the views of another expert, his reasons therefor might bear on the soundness of his own opinions. As one frequent commentator on Commission discovery practice has observed, "the Commission's ruling appears to have turned this 'common law' body of discovery rules on its head": With the *Northwest Central* order, the exceptional circumstances test can never be met where the very issue is the source of information *only* within the staff's possession. See Benkin, *More Ado*, *supra* note 58, at 14.

194. Deponents of their principals must bear their own costs, under the new rules "in all but exceptional circumstances." Order No. 466, 52 Fed. Reg. 6957 (1987). However, the cost to the deponent and the willingness of the requesting party to share in the expense are factors relevant to the question of undue burden. *Id.*

195. Compare 18 C.F.R. § 385.1906(i) (1986), 18 C.F.R. § 385.409(c) (1986). See 28 U.S.C. § 1821 (1982), setting forth payments due subpoenaed witnesses. Although expert witnesses are entitled to fees comparable to their hourly charges, an individual subpoenaed to testify solely as to facts within his knowledge, and not his capacity as an expert, may not be entitled to expert witness fees. See, e.g., *Congrove v. St. Louis S.F.R. Co.*, 77 F.R.D. 503 (D.C. Mo. 1978).

commonplace at the FERC. There are several discovery approaches that merit attention in this regard.

Requests for admissions are an underutilized discovery device. Parties frequently know what they want to prove and expect that documentary evidence will support their claims. Requests for admissions place the onus on the responding parties to admit or to be prepared to come forward with contrary information. Since the request for admissions as a device itself was not expressly provided for in the rules, its use in the past has depended upon the willingness of the Commission's administrative law judges not only to permit its use, but to encourage it. The new rules should greatly enhance the usefulness of the request for admissions as a discovery device.

### 3. Depositions in Lieu of Testimony

Under Commission practice prior to the issuance of Order No. 466, there were no guidelines for use of depositions in lieu of testimony. The use of depositions of adverse witnesses as evidence ought to be treated liberally, especially in expedited proceedings. The deposition is a means of obtaining information directly and to follow-up immediately through further questioning. Since the expedited hearing may have to be concluded within a specified period,<sup>196</sup> receipt of the depositions in evidence will save valuable hearing time.

The usual reasons for limitations on the use of depositions in lieu of testimony at hearing, the need to preserve the right of other parties to cross-examine and the value to the trier of fact of being able to observe the demeanor of the witness first hand, do not readily apply in the case of an adverse witness. If the deponent is a participant (or an employee of a participant) limiting the deposition to use solely for impeachment purposes places the party seeking the deposition in an unnecessary quandary. If the party does not subpoena the deponent to appear at hearing, that deponent (1) may not wind up as a witness at hearing or (2) may submit direct testimony of limited scope unrelated to the subject matter of the deposition. In either case, the deposition cannot be used affirmatively. There would seem little purpose and needless expense in requiring the deposing party to subpoena the deponent, whose testimony could be logically treated as an admission, and who is likely to repeat what he said under oath at the deposition. Similar considerations apply to the deposition of an adverse witness; other participants are entitled to notice of the deposition and may attend it. Moreover, since the deponent will be a witness, he can be cross-examined at hearing where his demeanor can be observed and his credibility tested.

The Commission's rules wisely incorporate these considerations by allowing participants to use as affirmative evidence the depositions of other participants and witnesses.

### 4. Sanctions

Outright refusals to respond to discovery requests and, to a lesser but still substantial degree, dilatory tactics, can cripple the presentations of parties on

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196. See *infra* discussion of "record closing dates" in text accompanying notes 197-99.



the receiving or, more accurately, non-receiving end, where time is at a premium. Nowhere is the problem more glaring than in the expedited hearing.

In many of the expedited hearings now being ordered by the Commission, the parties and the administrative law judge are obliged to abide by a "record closing date."<sup>197</sup> In such cases, hearings must not merely be expedited, but must be concluded within a specified period of time, typically five months from the hearing order.<sup>198</sup> While the Chief Administrative Law Judge (but not the presiding judge) is authorized to grant extensions of the record closing date, it is apparent that the Chief Judge often has little discretion<sup>199</sup> and extensions have been granted only sparingly. As a result, parties must make do, if they can,<sup>200</sup> with the time they are accorded. Sanctions in such circumstances may provide the only realistic substitutes for the data being sought.

Sanctions, as noted earlier, can take a number of forms. One recent motion filed by a group of shippers complaining of dilatory and incomplete responses to their requests, sought an order from the administrative law judge requesting adverse findings of fact and other sanctions.<sup>201</sup> Instances in which sanctions may have been ordered by presiding judges are, judging by the absence of reported rulings, a rarity. Whether this has been the result of the absence of express provisions for sanctions or simply a general reluctance to impose them except in the clearest of cases is difficult to say. But the absence of precedent tends to rob the threat of sanctions of any real weight. Parties must be prepared to move for sanctions, where needed, and administrative law judges must ex-

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197. See, e.g., *Tennessee Gas Pipeline Co.*, 36 F.E.R.C. ¶ 61,032 (1986); *Transwestern Pipeline Co.*, 36 F.E.R.C. ¶ 61,048 (1986); *Transcontinental Gas Pipe Line Corp.*, 37 F.E.R.C. ¶ 61,089 (1986).

198. 37 F.E.R.C. ¶ 61,089 (1986).

199. In one recent instance, several parties who had been denied documents by the pipeline applicant pending resolution of a protective order issued by the Commission sought a suspension of the record closing date from the Chief Judge on the ground that they could not proceed without the information. The Chief Judge, citing the Commission's intention to complete that and similar "take-or-pay buy-out," cases by the end of 1987, concluded that the motion was without merit. *Transcontinental Gas Pipe Line Corp.*, FERC No. RP87-7-000 (Feb. 9, 1987). The Chief Judge seemed to have no real discretion in this regard. Because the case must be decided by the end of 1987, the Chief Judge reasoned that any request for a significant extension of the record closing date must "logically" be lacking in merit because it would prevent conclusion of the case. That the case may lack evidence upon which to base a decision, by the Commission's directive, becomes irrelevant. See also *ANR Pipeline Co.*, FERC No. RP86-105-000 (Feb. 10, 1987) (request for 45 day extension denied in light of Commission's intent to issue final order in all take-or-pay buy-out cases by end of 1987). But see *Southern Natural Gas Co.*, 37 F.E.R.C. ¶ 63,033 at 65,221 (1986) ("due process required a modest extension of time" to allow full presentation by staff and intervenors on important take-or-pay issues).

200. Where the presiding judge has ruled that a party is entitled to discovery, but it is effectively denied because the hearing must be concluded before the data is produced the Commission's procedures raise serious due process concerns. "The right to a hearing" embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan v. United States*, 304 U.S. 1, 18 (1938), *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973). The Brooklyn Union Gas Company has recently sought interlocutory appeal of a ruling by the Chief Judge denying extension of the record-closing date on the grounds, *inter alia*, that the Chief Judge's ruling denied it "due process rights to a meaningful opportunity to participate in discovery of relevant facts." Appeal of the Brooklyn Union Gas company of Chief Judge's Denial of Motion for Extension of Record Closing Date, *Transcontinental Gas Pipe Line Corp.*, FERC No. RP87-7-000 (filed Feb. 12, 1987).

201. Motion of Indicated Shippers to Compel Discovery, and For Other Relief, *Transcontinental Gas*, FERC No. RP87-7-000 (filed Feb. 4, 1987).

hibit a willingness to wield the express authority they have now been given under the new rules.

#### VI. CONCLUSION

The author hopes that the foregoing is of some immediate value to practitioners who must continue to wind their way through the discovery process. The Commission's adoption of formal discovery rules is an action for which it is to be commended highly. No one can pretend to claim that any set of rules, however well-devised, will eliminate all discovery disputes. What the Commission has done, however, is all that could be hoped for: it has given participants a fair set of ground rules under which to operate.