

REPORT OF THE COMMITTEE ON ADMINISTRATIVE PRACTICE

I. DEVELOPMENTS IN THE LAW REGARDING FERC SETTLEMENTS

In *Arkla Gathering Services Co.*¹, the Federal Energy Regulatory Commission (FERC or Commission) rejected a unilateral Offer of Settlement filed under rule 602 of the Commission's Rules of Practice and Procedure² by a group of parties. The parties sponsoring the "settlement" acknowledged that they had not provided the other parties to the proceeding an opportunity to participate and have their views considered.

The settlement was filed following a May 27, 1994 Commission order disclaiming jurisdiction over gathering facilities, and determining that the affiliate of an interstate pipeline engaged in gathering was not subject to Commission jurisdiction.³ The parties sponsoring the settlement opposed the jurisdictional holdings in the FERC order, and sought to supersede those holdings with an agreed-upon process for establishment of a "default contract" for gathering services.

The Commission refused to treat the proposal as a settlement. In so holding, the Commission identified several general criteria for consideration of a "settlement" under rule 602: (1) it should be the product of "numerous discussions;" (2) it should reflect "compromises;" and, (3) it should be the product of "extensive negotiations designed to resolve the issues."⁴

The Commission found that the proposed "settlement" failed to meet any of these criteria. Rather than rejecting it altogether, however, the Commission treated the settlement as a "supplement" to the request for rehearing of the May 27, 1994 Order filed by the same parties.⁵

In another proceeding, however, the Commission made at least a tentative determination to consider a "unilateral" settlement as a settlement offer under rule 602. On May 26, 1994, Tennessee Gas Pipeline Company (Tennessee) filed an Offer of Settlement proposing to amend its tariff to implement a variety of service enhancements which, Tennessee contended, were intended to augment its restructured services under Order 636.⁶

Numerous parties challenged the validity of the filing as a settlement. Nonetheless, the Commission did not reject the proposed settlement. Instead, it set the settlement for a technical conference.⁷ Although the

1. *Arkla Gathering Servs. Co.*, 69 F.E.R.C. ¶ 61,280 (1994).

2. 18 C.F.R. § 385.602 (1994).

3. *Arkla Gathering Servs. Co.*, 67 F.E.R.C. ¶ 61,257 (1994).

4. 69 F.E.R.C. ¶ 61,280, at 62,079.

5. *Id.*

6. Notice of Proposed Settlement and Proposed Changes in FERC Gas Tariff, *Tennessee Gas Pipeline Co.*, Docket No. RP94-276-000 (June 7, 1994) (unreported).

7. Notice of Technical Conference, *Tennessee Gas Pipeline Co.*, Docket No. RP94-276-000 (Aug. 25, 1994) (unreported).

Commission assigned the "settlement" a new docket number, it granted automatic party status in the new docket to all parties to Tennessee's restructuring proceeding.

In an order that dealt primarily with interpretation of case-specific language in a comprehensive settlement agreement, the Commission reiterated some of the attributes of what constitutes a "settling party" and the rights and obligations of such a party with respect to subsequent events. In *Transcontinental Gas Pipe Line Corp.*,⁸ KCS Energy (KCS) filed comments supporting a comprehensive settlement filed by Transco to resolve, among other things, take-or-pay cost allocation issues. KCS later argued that it should be exempted from paying certain surcharges because of subsequent proceedings involving a non-party to the settlement.⁹

The Commission concluded, under the particular provisions of the case, that KCS had become a "settling party" by filing supporting comments (although it was not a signatory to the settlement itself), and that the terms of the settlement did not place KCS in a category that qualified for a subsequent exemption from certain surcharges.¹⁰ In explaining why KCS was not entitled to the same exemption granted to a non-settling party under arguably similar circumstances, the Commission reminded KCS that "[p]arties to settlements are bound by the terms to which they agree."¹¹ In contrast to the surcharge-exempted non-settling party, KCS had agreed to be bound by the settlement terms, notwithstanding any subsequent legal developments that might favor non-settling parties.

II. PROPOSED RULE CHANGES TO IMPLEMENT ADMINISTRATIVE DISPUTE RESOLUTION ACT

On November 10, 1994, the FERC issued a Notice of Proposed Rulemaking (NOPR)¹² under the Administrative Dispute Resolution Act the ADRA's requirements into essentially two practical categories: (1) settlement and related rules and practices already the FERC; and, (2) rules to be amended or added as a result of the ADRA and the NOPR. Significant preparation for formalized alternative dispute resolution (ADR) procedures was begun in 1992, when all of the FERC's administrative law judges (ALJs) received formal training in third-party mediation practice, and continued in 1993, when the ALJs received additional training from the American Arbitration Association. This activity is significant because the Commission recognizes that "ALJs are the most likely class of the Commission's staff to be chosen as neutrals to decide disputes."¹³

8. *Transcontinental Gas Pipe Line Corp.*, 68 F.E.R.C. ¶ 61,316 (1994).

9. The subsequent legal development in this case was the decision in *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992), which was remanded to the Commission to provide an adequate justification for assigning take-or-pay costs to certain NGA § 7(c) transportation customers.

10. 68 F.E.R.C. ¶ 61,316, at 62,303.

11. *Id.* at 62,304.

12. Notice of Proposed Rulemaking, *Administrative Dispute Resolution*, IV F.E.R.C. STATS. & REGS. ¶ 32,510 (1994).

13. *Id.* at 32,924.

Even before the issuance of the NOPR, and well before the enactment of the ADRA, the Commission has had an active settlement program. The NOPR reports that seventy to eighty percent of contested electric and gas matters set for hearing were concluded prior to the completion of the administrative litigation process.¹⁴

Key provisions of the NOPR include the following:

(1) The Commission's existing settlement procedures are retained. These include provisions for the designation of an ALJ as a settlement judge, and for the exclusion of a settlement judge from other participation in the proceeding.¹⁵

(2) The Commission proposes to amend rule 601 to interpret the failure of a participant to take part in a conference to consider employing ADR procedures as a waiver by that participant of its right to object to such procedures, except in the case of binding arbitration.¹⁶

(3) The FERC will consider not allowing parties to use an ADR procedure for policy reasons related to precedential value, possible effects on non-parties, and the need to retain continuing jurisdiction.¹⁷

(4) Arbitration will be subject to several requirements distinct from those applicable to other forms of ADR procedures. The arbitrator, who is to be selected by the participants themselves, will have much of the authority currently possessed by the Commission's ALJs. The arbitrator must afford participants many of the same rights they would have in a formal hearing and must apply relevant policies, statutes, regulations, and precedents. The arbitrator's authority will not extend to the issuance of licenses or certificates.¹⁸ Arbitration awards become final thirty days after filed with the Commission by the prevailing party.¹⁹ Unless vacated by the FERC, a decision to vacate is not subject to judicial review.²⁰

(5) The Commission proposes to implement broad confidentiality requirements in ADR proceedings. Participants, as well as the neutral arbitrator presiding over an ADR proceeding, would be generally prohibited from revealing to anyone the contents of a "dispute resolution communication," except in certain explicitly defined contexts. However, the adoption of a high standard of confidentiality would not lead to the automatic protection of all "dispute resolution communications" from discovery in a traditional, formal proceeding.²¹

(6) The Commission is also proposing to modify its procedures for reviewing contested settlements. Current rules would be amended to

14. *Id.* at 32,918.

15. 18 C.F.R. § 385.601-.603 (1994).

16. NOPR, *Administrative Dispute Resolution*, IV F.E.R.C. STATS. & REGS. ¶ 32,510, at 32,939, 59 Fed. Reg. 59,715, at 59,731 (1994) (proposed § 385.605(a)(5)).

17. *See id.* at 32,937 (proposed § 385.604(a)(2)).

18. *See generally id.* at 32,939 (proposed § 385.605); IV F.E.R.C. STATS. & REGS. ¶ 32,510, at 32,925 n.41 (1994).

19. *See* IV F.E.R.C. STATS. & REGS. ¶ 32,510, at 32,939-40 (1994) (proposed § 385.605(e)).

20. *Id.* at 32,940 (proposed § 385.605(f)).

21. *See generally id.* at 32,940-41 (proposed § 385.606).

explicitly state the authority of the chief ALJ to consolidate matters pending before different ALJs for settlement and to clarify the power of the Commission to do the same with matters pending before the Commission and ALJs. The Commission proposes that comments by a party contesting an offer of settlement on the basis of a disputed material fact be accompanied by an affidavit describing the specific facts in dispute, and that reply comments may include responsive affidavits. In addition, it is proposed that the rules be amended to clarify the authority of the Commission or the presiding ALJ, as the case may be, to sever parties as well as issues from the remainder of a proceeding for settlement purposes. Finally, ALJs would be empowered to certify settlements to the Commission where the parties do not unanimously agree to omit an initial decision if the ALJ found omission to nonetheless be appropriate, and ALJs would no longer be required to certify that the parties' rights of cross-examination and evidence presentation are preserved. It would be sufficient to certify only that the record contains substantial evidence upon which the Commission may render a decision.

III. COURT RULES ON ADEQUACY OF PAPER HEARINGS

The United States Court of Appeals for the District of Columbia dealt with the adequacy of the FERC's paper hearing process in two cases. First, in *Cajun Electric Power Co-Operative, Inc. v. FERC*,²² the Court held that the FERC's failure to conduct an evidentiary hearing on three tariff proposals made by Entergy Corporation (Entergy) was "arbitrary and capricious." Entergy's three filings in combination were designed to permit it to engage in the market-based pricing of its electrical power generation and at the same time unbundle sales generation from transmission services. The FERC approved Entergy's tariff filings summarily. In the court's view, the critical issue was whether Entergy could use its market power over transmission services to eliminate or reduce competition in the generation market. The petitioners proffered several facts that in the court's view raised serious doubts concerning the mitigation of Entergy's market power. The court therefore held that there were disputed issues of material fact concerning the impact of Entergy's proposals, which required an evidentiary hearing, and which could not be summarily decided on the basis of a paper hearing.

The court was particularly concerned that Entergy might impose "stranded investment" costs related to its generation facilities on generation competitors who sought only transmission services from Entergy. The Commission sought to avoid this issue by asserting that it was not susceptible to final resolution at that time. The court, however, found that the question of whether Entergy's standard cost recovery precludes mitigation of its market power was critical to a decision in this proceeding. Further, the court found other provisions of Entergy's tariff might lessen the mitigation of Entergy's market power. In summary, the petitioners raised serious

22. *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994).

doubts about Entergy's alleged mitigation of its market power, which the Court found should be explored in an evidentiary hearing.

The paper hearing process, as well as other due process challenges, was also at issue in *CNG Transmission Corp. v. FERC*.²³ The Commission in the underlying orders denied Consolidated Transmission Corporation's (CNG's) request to treat a fifteen year loss of natural gas from its Sabinville, Pennsylvania storage facility as a regulatory asset in Account Number 182.1, pending the FERC's decision whether to allow CNG to recover the loss in its rates during a formal rate case. CNG asserted that the Natural Gas Act (NGA), the FERC's own regulations, and the Fifth Amendment to the Constitution required the FERC to hold an evidentiary hearing before determining whether it was entitled to its requested accounting treatment.

CNG first contended that it was denied adequate notice and opportunity to be heard, as required by section 8(a) of the NGA.²⁴ The court, however, held that the NGA does not require a formal evidentiary hearing in all circumstances, and that a paper hearing may be sufficient to meet the hearing requirements of the NGA where it provides a sufficient record upon which to resolve the issues at hand. Further, the court stated that CNG was given notice and sufficient opportunity to present evidence (1) by the Commission's own regulations establishing Account Number 182.1, which provides that an application should be accompanied by a statement providing a complete explanation of the reasons for the requested accounting treatment; (2) through two separate requests for additional information from the Chief Accountant's Staff; and (3) through the FERC's Chief Accountant's rejection of CNG's submittal, whereupon CNG had the opportunity to adduce additional information to the Commission in support of its proposal. The court, therefore, found that CNG had proper notice and opportunity to be heard.²⁵

CNG also maintained that the FERC violated CNG's Fifth Amendment rights by depriving it of a property interest without due process of law. The court held that assuming *arguendo* CNG had such a cognizable property right to a particular accounting determination, the paper hearing process afforded CNG all the process that it was due for an interim accounting determination.

IV. CHANGES TO FERC FILING REQUIREMENTS

A. *Natural Gas Pipelines*

On December 16, 1994, the FERC issued two NOPRs to revise the Commission's filing and reporting requirements for interstate pipelines to

23. *CNG Transmission Corp. v. FERC*, 40 F.3d 1289 (D.C. Cir. 1994) (*CNG*).

24. "[T]he Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged or credited." 15 U.S.C. § 717(g) (1988).

25. The Court also held that CNG had plainly misread the hearing requirements of sections 158.1 to .9 of the FERC's Regulations. *CNG*, 40 F.3d at 1291-92.

reflect recent regulatory changes, such as the implementation of restructuring under Order 636, and to reflect the realities of the process of a modern rate case.²⁶ The two NOPRs together would completely overhaul the Commission's regulations pertaining to natural gas pipeline rate and tariff filings.

In Docket Number RM95-3-000, the Commission proposes to completely rewrite its reporting regulations. The current part 154 regulations²⁷ would be reorganized, consolidated, and "pruned" to provide more useful information by which to evaluate pipeline operations, costs, and services.²⁸ The Commission states in its NOPR that many of these changes would lessen the reporting burden on pipelines. Many of the changes would also require pipelines to provide more accurate and comprehensive information, and would require pipelines to provide more information earlier in pipeline proceedings.

Issued as a companion rulemaking to Docket Number RM95-3-000, Docket Number RM95-4-000 is designed to streamline the Commission's reporting requirements to reflect the current regulatory environment of unbundled pipeline services and open access transportation of natural gas under Order 636.²⁹ The Commission states that its goal is to reduce the reporting burden on interstate pipeline companies. The Commission is focusing in this rulemaking on changes to the Uniform System of Accounts, which is the accounting system pipelines use to track costs and revenues. The Commission also proposes to amend certain forms that pipelines are required to file periodically with the Commission under part 260 of the Commission's regulations.³⁰

The proposed modifications to the Commission's regulations in both of these NOPRs represent an attempt to conform the Commission's regulations to the current regulatory environment in which natural gas pipeline services are unbundled and pipelines serve primarily as transporters of natural gas. Many of the changes will assist customers of pipelines to evaluate pipeline filings and pipeline operations earlier in pipeline proceedings, which may result in less discovery and more expedient consideration of pipeline rate and tariff proceedings.³¹

26. *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, IV F.E.R.C. STATS. & REGS. ¶ 32,511 (1994) [hereinafter *Filing Requirements*]; *Revisions to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies*, IV F.E.R.C. STATS. & REGS. ¶ 32,512 (1994) [hereinafter *Revisions*].

27. 18 C.F.R. pt. 154 (1994).

28. *Filing Requirements*, *supra* note 26.

29. *Revisions*, *supra* note 26.

30. 18 C.F.R. pt. 260 (1994).

31. *Filing Requirements*, *supra* note 26 (discussing how the filing of a pipeline's Statement P upfront will enable parties to address important issues more quickly and reduce the time-consuming process of discovery).

B. Oil Pipelines

On October 28, 1994, the Commission issued Order 571.³² Order 571 establishes new filing requirements for oil pipelines seeking approval of cost-of-service rates, filing requirements for oil pipelines seeking new or changed depreciation rates, and new and revised pages of FERC Form Number 6 (Annual Report for Oil Pipelines).

The Association of Oil Pipe Lines (AOPL) sought rehearing of Order 571, asserting several challenges to the procedures established by the Commission. It argued that: (1) the Commission went beyond its statutory authority in requiring detailed schedules, when the Interstate Commerce Act merely requires a showing of any proposed changes in an oil pipeline's rates; (2) the new requirements are burdensome; and (3) requiring detailed depreciation rate data could lead to the unwarranted disclosure of confidential shipper information.

The Commission in Order 571-A denied the AOPL's request for rehearing.³³ The Commission stressed that the detailed filing schedules were being required of oil pipelines seeking cost-of-service rates, so that the Commission would be able to effectively evaluate whether the pipeline had met the threshold test of demonstrating a substantial divergence between rates at the indexed ceiling level and the pipeline's cost-of-service. The Commission found that such a showing is a necessary predicate to finding that the pipeline might be entitled to changed cost-of-service rates as an exception to rate changes normally made under the indexing methodology. The Commission clarified its filing procedures relating to the detailed depreciation rate data, to remove the likelihood that confidential shipper information might be inadvertently disclosed.

On October 28, 1994, the FERC issued Order 572,³⁴ in which it adopted procedures to facilitate the use of market-based rates as an alternative or waiver of the generally applicable indexing method of establishing the maximum just and reasonable rates allowable for an oil pipeline. The Order 572 procedures included provisions specifying the required elements of an application for a market power determination by an oil pipeline prior to the submission of a rate filing by an oil pipeline seeking approval of market-based rates.

The AOPL opposed the detailed market power application filing requirements of Order 572 (including the submission of a case-in-chief even where no protest to the application is filed) and challenged the new procedures promulgated by the Commission as being unduly burdensome. The Commission denied the AOPL's challenges and reaffirmed the procedures promulgated in Order 572.

32. *Cost-of-Service Reporting and Filing Requirements for Oil Pipelines*, III F.E.R.C. STATS. & REGS. ¶ 31,006 (1994).

33. *Cost-of-Service Filing and Reporting Requirements for Oil Pipelines*, 69 F.E.R.C. ¶ 61,411 (1994).

34. III F.E.R.C. STATS. & REGS. ¶ 31,007 (1994).

C. *Electric Utilities*

Consistent with the drive toward an increasingly electronic data base of reports and filings by regulatees, on December 29, 1994, the FERC issued Order 574, "Electronic Filing of FERC Form No. 1 and Delegation to Chief Accountant."³⁵ This rule requires the electronic filing of Form 1, (Annual Report of Major Electric Utilities).

In early January of 1995, the FERC was to mail to each Form 1 respondent a PC-based software program that will enable submission of Form 1 via two duplicate diskettes, as well as an original and six paper copies. No substantive changes to Form 1 are made in this rule. The Commission has also delegated to the Chief Accountant the authority to rule on requests for waiver of the electronic filing requirement.

D. *All FERC-Regulated Entities*

On July 28, 1994, the FERC amended parts 35 and 154 of its regulations to require public utilities and interstate natural gas companies to file a marked version of proposed rate schedule and tariff changes that highlights new language and shows deleted language by strikeout.³⁶ The Commission said the change was made to make it easier for interested parties to quickly understand proposed tariff revisions.

The new language in the text can be marked by highlight, background shading, bold text, or underlined text. Deleted language must be indicated by strike-through. The FERC estimates the change will increase the existing reporting burden of affected companies by an average of forty-five minutes per response.

V. STANDING

In *Liquid Carbonic Industries Corp. v. FERC*,³⁷ Liquid Carbonic Industries (Liquid Carbonic) sought review in the United States Court of Appeals for the District of Columbia Circuit of three FERC orders certifying proposed cogeneration facilities as "qualifying cogeneration facilities" within the meaning of section 201(8) of the Public Utility Regulatory Policies Act of 1978 (PURPA).³⁸ In the three orders, the FERC had rejected Liquid Carbonic's arguments that the proposed facilities did not meet the standards for certification. Liquid Carbonic, which is in the business of producing and selling industrial gases including CO₂, was a competitor of

35. Order No. 74, *Electronic Filing of FERC Form No. 1 and Delegation to Chief Accountant*, IV F.E.R.C. STATS. & REGS. ¶ 32,498, 18 C.F.R. pts. 141, 375, 385 (1994).

36. Final Rule, *Filing Requirements for Public Utility and Interstate Natural Gas Company Rate Schedules and Tariffs*, III F.E.R.C. STATS. & REGS. ¶ 30,998, 18 C.F.R. pts. 35, 154 (1994).

37. *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697 (D.C. Cir. 1994).

38. Pub. L. No. 95-617, 92 Stat. 3117, 16 U.S.C. § 768 (1988) (PURPA). PURPA amended certain sections of the Federal Power Act. Review of FERC orders under either act is authorized by 16 U.S.C. § 825i (1988).

the companies using steam from the cogeneration facilities for the production of CO₂.³⁹

Although the Court found that Liquid Carbonic met the Constitution's Article III standing requirements of actual or threatened injury traceable to the defendant's conduct and likely to be redressed, the court held that Liquid Carbonic must also satisfy prudential standing requirements. The court stated that the Federal Power Act contained a statutory restriction that a party seeking review must be aggrieved, and that this requirement imposes a prudential standing barrier that Liquid Carbonic had to surmount to proceed with its appeal.

The court applied a "zone of interests" test, under which it asked whether the challenger to the FERC's action was pursuing an interest arguably within the zone of interests that Congress intended either to regulate or protect in PURPA. Liquid Carbonic's status in this proceeding was as a competitor in the liquid CO₂ market, and not as a competitor for the development of cogeneration facilities or as a consumer of electricity. The court found that Liquid Carbonic's interest as a "second-tier" competitor had nothing to do with goals of PURPA—to encourage cogeneration facilities and energy conservation.⁴⁰ Since Liquid Carbonic's interest was not closely aligned with PURPA's goals, and, in fact, contradicted such goals, Liquid Carbonic was not a suitable challenger of the FERC's actions implementing PURPA. Its petitions were therefore denied.

VI. NOTICE AND COMMENT RULEMAKING

Largely on grounds of its "substantial impact on the regulated industry," the United States Court of Appeals for the Fifth Circuit ruled in *Phillips Petroleum v. Johnson*⁴¹ that the Minerals Management Service (MMS) could not use an unpublished internal "Procedure Paper" to recalculate increased royalties. Until March 1, 1988, the MMS considered several factors (such as posted or regulated prices) in determining the value of federal offshore production for royalty purposes. On December 14, 1984, the MMS developed a new criterion for valuing natural gas liquids. This new criterion—which was not subject to notice and comment rulemaking procedures—relied exclusively on published spot prices.

In September of 1989, the MMS notified several lessees of audit findings that required the lessees to recalculate higher royalties based on the spot pricing methodology of the Procedure Paper. The lessees sued, successfully contending that the Procedure Paper should not have been employed without prior notice and comment procedures applicable to rulemakings under the Administrative Procedure Act (APA).⁴²

39. *Lavair Cogeneration Ltd. Partnership*, 59 F.E.R.C. ¶ 62,266 (1992); *AES WR Ltd. Partnership*, 60 F.E.R.C. ¶ 62,011 (1992); *Polk Power Partners Ltd. Partnership*, 61 F.E.R.C. ¶ 61,030 (1992). Each of the certified facilities generates electricity by burning natural gas and exports steam generated during the process to an adjacent CO₂ manufacturing plant to produce liquid CO₂.

40. 16 U.S.C. §§ 824-824a-3 (1988).

41. *Phillips Petroleum v. Johnson*, 22 F.3d 616 (5th Cir. 1994).

42. 5 U.S.C. § 553 (1988).

The court concluded that the Procedure Paper was not exempt from notice and comment procedures as an "interpretive rule," a "general statement of MMS policy," or a "procedural" rule. The Procedure Paper was not an interpretive rule, reasoned the court, because it effected a change in the valuation method, rather than interpreting an existing rule or statute. It was not a general statement of policy because instead of setting a goal that future proceedings might achieve, it accomplished the change. It was not a procedural rule because it had a substantial impact on those entities the MMS regulated.

Perhaps of greatest concern to the court was the importance of notice and comment procedures to "afford an opportunity for 'the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated.'"⁴³ Here, because the change in valuation technique "dramatically affects the royalty values of all oil and gas leases,"⁴⁴ the lessees who were adversely affected deserved notice and an opportunity to comment on the change.

On a related note, as 1994 drew to a close, the MMS was experimenting with an alternate dispute resolution technique—negotiated rulemakings to change the method it uses to value natural gas royalties on federal leases.⁴⁵ The regulatory negotiation, or "reg-neg," panel of the Federal Gas Valuation Negotiated Rulemaking Committee will make recommendations to the MMS, which will incorporate them in a proposed rulemaking this spring.

The MMS decided in 1993 to use the "reg-neg" process to resolve controversial issues surrounding federal gas royalties. The "reg-neg" panel has met monthly. The report of the Federal Gas Valuation Negotiated Rulemaking Committee was expected to be finished in January 1995 and then sent to the MMS director. The MMS anticipates preparing a Federal Register notice as part of the rulemaking in March.

VII. MISCELLANEOUS PRACTITIONERS' TIPS

A. *Rehearing of Sections 210/211 Proposed Orders*

In transmission access (or mandatory wheeling) cases arising under sections 211 to 213 of the Federal Power Act, the FERC, if it determines that relief should be granted, must first issue a "proposed order" and give the parties a reasonable time period in which to agree voluntarily on the terms and conditions of the transmission service.⁴⁶ As a practical matter, however, the proposed order is usually dispositive of the question of

43. *Phillips Petroleum*, 22 F.3d at 620 (quoting *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969)).

44. *Id.* at 621.

45. *Natural Gas Royalties on Federal Acreage at Issue*, Oil & Gas J., Nov. 28, 1994, at 28.

46. See 16 U.S.C. § 824k(c)(1) (1988) (Section 212(c)(1) of the Federal Power Act). The requirement for issuance of a proposed order also extends to cases in which the Commission is asked to mandate interconnection between utilities under section 210 of the Act. 16 U.S.C. § 824i (1988).

whether the transmitting utility that is the target of the application will be required to perform transmission service.⁴⁷

A number of utilities, having been the subject of proposed orders to perform mandatory wheeling service, filed requests for reconsideration or rehearing of these proposed orders. The Commission has consistently rejected such requests, ruling that such an order is interlocutory in nature and, consequently, is not subject to a request for rehearing or reconsideration.⁴⁸

On October 18, 1994, the Commission in Order 570 amended its procedural rules to authorize its Secretary to reject future requests for reconsideration of proposed orders issued under section 210 or section 211 of the Federal Power Act.⁴⁹

In its preamble to the amendment, the Commission stated that, as a general rule, the Secretary was to exercise her discretion to reject requests for reconsideration or modification of proposed orders, although the rejection in each case was to be "without prejudice." It noted that entities had continued to file requests for reconsideration or modification of proposed mandatory wheeling orders "notwithstanding many previous, specific admonishments that a request for rehearing of a proposed order for transmission services under Section 211 is improper."⁵⁰ The Commission reiterated its conviction that a request for reconsideration or rehearing is premature until the final order in the case is entered, and that, consequently, "preliminary findings in a proposed order [are] not subject to judicial review or requests for rehearing."⁵¹ Rejection of such a premature request, said the Commission, would further "the interests of administrative efficiency."⁵²

In issuing its revised delegation of authority to the Secretary, the Commission stated that legitimate requests for clarification of a proposed order will still be entertained. The Commission went on to rule that a request for clarification would not be considered, however, if it is combined with an improper request for rehearing or modification of a proposed order issued in a proceeding under section 211.

47. The Commission has never reversed a proposed order directing that wheeling be performed.

48. See *El Paso Elec. Co. v. Southwestern Pub. Serv. Co.*, 68 F.E.R.C. ¶ 61,399, at 62,581 (1994); *Minnesota Mun. Power Agency v. Southern Minn. Power Agency*, 67 F.E.R.C. ¶ 61,075, at 61,206-07 (1994); *Minnesota Mun. Power Agency v. Northern States Power Co.*, 66 F.E.R.C. ¶ 61,323, at 62,034 (1994); *Florida Mun. Power Agency v. Florida Power & Light Co.*, 65 F.E.R.C. ¶ 61,125, at 61,613 (1993).

49. Order No. 570, *Authorizing Delegation to the Secretary in Proceedings Under Section 210 or Section 211 of the Federal Power Commission*, III F.E.R.C. STATS. & REGS. ¶ 31,003 (1994). For current version of amended rule, see 18 C.F.R. § 375.302(t)-(u) (1994).

50. III F.E.R.C. STATS. & REGS. ¶ 31,003, at 31,133 (1994).

51. *Id.* Under section 313 of the Federal Power Act, 16 U.S.C. § 825l (1988), judicial review of a FERC order is foreclosed unless the Commission has entertained, and denied, an application for rehearing of the order. Hence, the Commission's view that requests for rehearing of a proposed order are improper, if sustained by the courts, effectively precludes judicial review of such an order.

52. III F.E.R.C. STATS. & REGS. ¶ 31,003, at 31,133 (1994).

B. *Test for Dismissal of Complaint*

In dismissing a complaint filed in *Suncor Inc. v. Pacific Gas Transmission Co.*,⁵³ the FERC briefly addressed the procedural claim of the respondents, Pacific Gas Transmission Company (PGT) and Pacific Gas and Electric Company (PG&E), that the complaint against them was inadequate to state a claim under Commission Rule 206(a).⁵⁴ The complainant sought to persuade the FERC that action of the California Public Utilities Commission (CPUC) was contrary to the exercise of the FERC's authority under the NGA and the NGPA. In response, PGT and PG&E sought dismissal, contending that the complaint did not claim that either company—under the language of rule 206—had violated “any statute, rule or other law administered by the Commission,” or that either was guilty of “any other alleged wrong over which the Commission has jurisdiction.”

Although the Commission dismissed the complaint on other grounds, it indicated that the complaint passed a threshold test under rule 206(a) by “alleg[ing] a sufficient violation or wrong over which the Commission has jurisdiction to constitute a valid complaint.”⁵⁵ The fact that the respondents were not specifically charged with wrongdoing would not, by itself, defeat the complaint. The claims that PGT's adherence to orders of the CPUC would result in service discrimination over which the Commission has jurisdiction were adequate to withstand a rule 206 attack against the complaint.

C. *Denial of Withdrawal of Motion to Intervene*

In an order issued on June 6, 1994, an ALJ denied Exxon Corporation's motion to withdraw as a party from a consolidated proceeding in which Southern Natural Gas Company (Southern) sought to recover gas supply realignment (GSR) costs under Order 636.⁵⁶

Several intervenors objected to Exxon's withdrawal, contending that Exxon possessed documents potentially relevant to the case. Exxon sold gas to Southern under contracts at issue. The principal issue was whether Exxon's withdrawal would present an unreasonable burden to parties attempting to seek discovery from Exxon, when compared with the burden imposed upon Exxon by requiring it to remain a party.

In denying Exxon's motion, the ALJ emphasized that (1) Exxon had sought and accepted party status voluntarily, and could not object to the consequences of party status, including discovery; (2) under the Commission's discovery rules, data requests directed at a party are “a lot simpler and more direct” than seeking a subpoena and the production of docu-

53. 67 F.E.R.C. ¶ 61,352 (1994).

54. “Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.” 18 C.F.R. § 385.206(a) (1994).

55. 67 F.E.R.C. ¶ 61,352, at 62,226.

56. Order Denying Withdrawal of Exxon Corporation, *Southern Natural Gas Co.*, Docket No. RP94-67-000 (June 6, 1994) (unreported).

ments through a motion to compel; and, (3) Exxon was a party to contracts at issue.⁵⁷

The ALJ denied *sub silentio* the parties' alternative proposal, that Exxon's withdrawal be conditioned on responses to discovery without requiring the issuance of subpoenas.

Without ruling specifically on any particular discovery issues, the ALJ advised generally that Exxon should not be subjected "to the same rigorous discovery demands as the parties with a direct financial stake in the outcome."⁵⁸ Exxon was not, the ALJ noted, "the jurisdictional entity seeking cost recovery" or "one of those participants opposing" cost recovery.⁵⁹

D. Filing of Videotapes

On December 2, 1994, the Commission issued Order 573,⁶⁰ amending its Rules of Practice and Procedure by adding a new rule 2013 dealing with the filing of videotapes. Rule 2013 permits any person to file a videotape that portrays the site of, or some physical aspect of, an energy project. Four copies must be filed in VHS format. The filing must be accompanied by a written statement describing the date, place, and time at which the videotape was filmed, who filmed it, what it purports to depict, and the caption and docket number of the proceeding (if any) in which it will be filed. The written statement must also be included on the videotape, either in the form of a voice-over recitation or by including it in the pictures. If the videotape is filed in a formal proceeding, the party making the filing must serve copies on all other parties and include a certificate of service with the filing.

In issuing the new rule, the Commission noted that videotapes are commonly filed in hydroelectric licensing proceedings, where they are often used to depict the flow of water at the project site or proposed site. Videotapes have, however, also been filed in natural gas pipeline certificate cases to portray construction activities, the Commission said.

Participants in hearings before FERC administrative law judges have also successfully proffered videotapes as evidence for the hearing record. In *Trans Alaska Pipeline*,⁶¹ for example, a number of videotapes were introduced into evidence, including some showing the construction of other long-distance oil pipelines, which were proffered for the purpose of proving that the building of TAPS was not a wholly unique construction project. Presumably, the use of videotapes as evidence in hearings continues to be governed by the Procedural Rules pertaining to formal hearings,⁶² although Order 573 does not expressly say so.

57. *Id.* at 1-2.

58. *Id.* at 2.

59. *Id.*

60. 69 F.E.R.C. ¶ 61,282 (1994).

61. Docket No. OR78-1 (unreported).

62. 18 C.F.R. §§ 385.508, .509 (1994).

E. Filing of Post-Hearing Briefs

In an Order issued September 9, 1994,⁶³ an ALJ chastised an attorney representing a party to a case before him for failing to make a timely filing of its initial brief with the Secretary.

The attorney in question had perfected the filing of the client's initial brief on August 29, 1994, three days after the date required under the post-hearing schedule that the ALJ had adopted. The attorney had, however, sent by the due date a single "courtesy copy" of its brief to the Secretary of the Commission and a single copy to the ALJ. The attorney stated that he thought the "standard" filing requirements for Commission pleadings set out in rules 2001 to 2005⁶⁴ did not apply, since section 706⁶⁵ contemplates that posthearing briefs will be filed with the "presiding officer."

While the wording of rule 706 itself could lend itself to such a construction, the ALJ said that counsel's contention was "disingenuous and lacks any credence whatsoever."⁶⁶ The judge stated that, "[t]he truth is that, due to his negligence, inattention to the Rules of Practice, or for some other incomprehensible reason, counsel for [the party] failed to make a timely and proper filing of its initial brief with the Secretary." However, the ALJ did in the end accept the initial brief for filing nonetheless. This ruling stands as a clear reminder to counsel to check *all* applicable filing requirements.

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63. Order Granting Reconsideration and Accepting Initial Brief of Project Orange Associates, L.P., *Tennessee Gas Pipeline Co.*, Docket No. RM94-19-000 (Sept. 9, 1994) (unreported).

64. 18 C.F.R. § 385.2001-2005 (1994).

65. *Id.* § 385.706.

66. Order Granting Reconsideration and Accepting Initial Brief of Project Orange Associates, L.P., *Tennessee Gas Pipeline Co.*, Docket No. RM94-19-000 (Sept. 9, 1994) (unreported).