Report of The Committee On Practice and Procedure

I. Introduction

The major development in the FERC administrative practice in 1984 was the Commission's issuance of its proposed discovery rules on July 26, 1984. Other developments include a number of major opinions by the United States Court of Appeals for the District of Columbia Circuit and Commission orders concerning treatment of contested offers of settlement (see part IV, *supra*) and Commission orders and opinions and judicial opinions relating to the necessity for on-the-record hearing in contested proceedings (see part III,A, *supra*).

II. Discovery

A. FERC Proposed Rules

On July 26, 1984, the Commission issued a notice of proposed rulemaking in "Rules of Discovery for Trial-Type Proceedings," 28 FERC ¶ 61,172 (1984). The Commission announced its intentions to codify discovery practice before the Commission by issuing new rules for discovery in trial-type proceedings which track the Federal Rules of Civil Procedure (FRCP) for many provisions.

After review, revision, and approval by the FEBA Committee, comments drafted by the FEBA Committee on Practice and Procedure were filed on behalf of the Association on November 1, 1984. In sum, the FEBA comments: (1) supported the Commission's decisions to codify discovery practice and to use the FRCP as a model; (2) recommended that the Commission depart from the FRCP model if specific rules are found unsuitable for multi-party administrative proceedings, but also urged the Commission to make clear when such departure from the FRCP was intentional and to express its reasons for such departure; (3) expressed concern over certain special procedures in proposed Rule 413(d)(3) for the Commission's trial staff permitting automatic interlocutory appeals to the Commission when an ALJ rules against assertions by the Commission's trial staff of "Commission privilege"; (4) noted but took no position on the controversial proposal in proposed Rule 408(a) permitting Commission trial staff, with prior approval of a presiding officer, to submit to a "jurisdictional entity" that is a party to a proceeding requests for performance of "special studies"; and (5) submitted a section-by-section analysis of the proposed rules, including numerous recommended changes and specific language to implement the changes suggested in the section-by-section analysis.

The recommended changes addressed both substance and clarity of the proposed rules. These included suggested revisions of: proposed Rule 401(a) to clarify applicability to specific proceedings; proposed Rule 403 as to scope of discovery; proposed Rule 404(c) as to the effect of signature on discovery submissions; proposed Rule 404(d) as to the obligation to supplement submissions; proposed Rule 405 to require prior approval by the presiding officer for taking depositions and other proposals as to depositions; proposed Rule 408 as to the time for responses to data requests and as to inspection of documents; and other proposed Rules governing inspections, admissions, issuance of subpoenas, production of documents, service, objections, protective orders, and sanctions. The

FEBA comments also recommended the convening of a drafting conference in which commenters and the Staff could discuss drafting and substantive modifications proposed in comments. To date, no such conference has been scheduled by the Commission.

B. Discovery of FERC Staff

In *Stowers Oil and Gas Company,* 28 FERC ¶ 61,138 (1984), the Commission permitted limited deposition of the Director of Producer Audits and Pricing of OPPR in a proceeding initiated by the Office of Enforcement. After review of the "Commission privilege" asserted for intra-agency communications, the Commission permitted written interrogatories upon "matters of fact" as to which the deponent might have first-hand knowledge. However, the Commission directed that the deponent could not be required to answer questions requiring expression of opinions or conclusions, including questions as to hypothetical situations.

In *MGPC, Inc.,* 27 FERC ¶ 62,336 (1984), the Commission vacated an order granting discovery as to Commission documents and Staff personnel. The Commission concluded that preambles in orders promulgating certain regulations constituted the official contemporaneous agency statements on the questions raised by the discovery requests. Further discovery as to the "decision-making" process, implicating internal agency memoranda and examination of agency personnel, is prohibited unless the regulations are overly vague. The Commission found that exception inapplicable and that the existence of the contemporaneous official statements further showed that no purpose could be served by the discovery sought.

C. Deposition of Non-witness

In *Northwest Pipeline Corp.,* 29 FERC ¶ 63,014 (1984), the presiding judge denied Northwest Pipeline's application to take the deposition of an official from intervenor Southwest Gas Corp. The denial came, in part, because the official was not a witness for the customer group of which Southwest was a member. The ALJ noted that "Commission Rule 1906(a) is limited to deposition of the testimony of a *witness*" in contrast to Federal Rule of Civil Procedure 30(a), "which permits oral deposition of *any person.*" Two additional reasons for the denial were given by the ALJ: (1) failure of Northwest Pipeline to justify its delay in seeking the information from the proposed deponent, and (2) the ability of Northwest Pipeline to get the information from one of the witnesses and to explore related issues during cross-examination of that witness at hearing. 29 FERC at 65,021.

The presiding judge in *Trunkline Gas Co.,* 29 FERC ¶ 63,031 (1984), rejected Trunkline's objection, based on the assertion that Rule 1906(a) states a flat prohibition against deposing a non-witness, to a staff deposition request. The ALJ said that, because the judge in *Northwest* gave other reasons for disallowing deposition of a nonwitness, Rule 1906 alone could not be relied upon to prevent such depositions. 29 FERC at 65,062. Further on the issue, the ALJ said "[t]he fact that the Commission seems to use the words 'witness' and 'person" interchangeably in Rule 1906 is an adequate reason to conclude that it did not intend to limit the taking of depositions to only those who are scheduled to be witnesses." *Id.*

D. Site Access

In *Long Lake Energy Corporation,* Project Nos. 4114-001, *mimeo,* (August 6, 1984), one party asserted that an order authorizing site access was essential to preparation of data requests, and the opponent countered that information first should be sought by conventional requests and depositions. The ALJ agreed with the opponent, concluding that should these "traditional" methods prove inadequate, the party seeking site access could reapply in a renewed motion containing more specific grounds and a showing as to why access was a "necessary element" to proceeding with further discovery.

E. Sanctions

ALJs continued to rely upon Commission policy on sanctions expressed in *Pennsylvania Power Co.,* 21 FERC ¶ 61,313 (1982), where the Commission concluded that it has authority to impose sanctions for refusal to comply with a discovery order, but stated such "extraordinary" action will be taken only in the clearest of cases and not simply on the basis of assertions of "foot-dragging" or "indifference" to discovery orders.

In *McDowell County Consumers* v. *American Electric Power Co.,* 25 FERC ¶ 63,038 (1983), the ALJ denied a motion for sanctions filed after trial staff terminated a deposition because of questions involving a document referred to in pre-filed testimony. The movement sought an order barring introduction of evidence concerning the document and reimbursement by Staff of certain costs. The ALJ concluded that Staff's action was not within the Commission's *Pennsylvania Power Co.* standard, because it apparently was the product of "inexperience" and not of an effort to gain advantage, that the company involved likely would pass on the costs, and that there was no policy ground to impose such costs on "taxpayers." The aspects of this case dealing with substitution of witnesses is discussed *infra.*

F. Protective Orders

A number of orders were issued by ALJs concerning specific factual circumstances involving assertions of confidentiality, privilege, and protective orders (*see, e.g., Trunkline Gas Company,* 28 FERC ¶ 63,035 (1984). These appear to have followed generally applicable policy and precedent and are omitted from this report because of length constraints.

III. Hearings

A. Requirement for Hearing

1. Commission Authority Not to Grant Hearing

In *Cities of Carlisle and Neola, Iowa v. FERC,* 741 F.2d 429 (D.C. Cir. 1984), the Court left the FERC with broad discretion to decide matters on the basis of a "paper hearing" while the Court gently chastised the FERC regarding the adequacy of the

Commission's letter orders, it found supported by substantial evidence the Commission's conclusions that, if the Commission had accepted the "worst case" calculations prepared by the intervenor in this case involving a filed rate increase of less than $200,000, the requested rates still would lie within the zone of reasonableness.

The opinion has important dicta in a footnote regarding the Court's authority to review a FERC decision *not* to suspend a proposed rate. The Court, having decided the case on the merits of the rates themselves, took great care to preserve the question for future consideration. The Court suggested that the Commission consider routine suspension of all filings at least for a minimal period.

A Commission decision not to suspend but to allow proposed increases in transmission rates to be placed in effect without hearing was upheld in a proceeding involving a disputed contract between two power companies. *Ohio Power Company v. FERC,* 744 F.2d 162 (D.C. Cir. 1984). The question was one of the contract authority of one contracting party to unilaterally file for an increase in rates under the *Sierra-Mobile* doctrine. While declining to accord conclusive validity to contractual interpretations by the Commission, the court found: that a hearing was not necessary for the FERC to reach a reasoned decision on the questions of law involved in its interpretation of a contract entered into by two parties of equal bargaining power; and, further, that the FERC's interpretation of the contract's provisions without reviewing matters extrinsic to the contract was reasonable.

Citing *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, (1978), the U.S. Court of Appeals for the Ninth Circuit found that nothing in the Federal Power Act or the Administrative Procedure Act required the FERC to conduct, in considering an application for a hydroelectric license, a *trial-type* hearing, i.e., one with witnesses under oath, cross-examination and compulsory process. *Sierra Association for Environment v. FERC,* 744 F.2d 661 (9th Cir. 1984). The FERC had conducted a two-day *public* hearing open to all parties and had ". . . carefully considered [Appellant's] submissions and responded to each of its comments. . . ." *Sierra* at 663. The Court stated that SAFE had failed to meet its burden of tendering evidence suggesting the need for an adjudicatory hearing on particular, material questions of fact. Had SAFE tendered such evidence either before the Commission or to the court when given by the court a post-oral argument opportunity to do so, the court indicated it well might have decided this case otherwise.

2. *Summary Disposition*

In *Jersey Cent. Power & Light Co. v. FERC,* 730 F.2d 816 (D.C. Cir. 1984), the court upheld a FERC order that summarily dismissed a power company's effort to recover its costs of an abandoned generating plant and directed the filing of rates excluding those costs. The court said that an agency may dispose of a matter on the pleadings where there are no disputed evidentiary questions but only questions of law or administrative policy. The court quoted from *Municipal Light Boards v. FPC,* 450 F.2d 1341 (D.C. Cir. 1971), *cert denied,* 405 U.S. 989 (1972), in analogizing such disposition to a Rule 56 motion for summary judgment.

In *Pacific Gas and Electric Co. v. FERC,* 746 F.2d 1383 (9th Cir. 1984), the court found that neither the Administrative Procedure Act nor the FERC's own

precedents required a trial-type hearing, or even an opportunity to engage in discovery, where there had been no showing of disputed material facts. The FERC must only demonstrate it has considered all the relevant factors and rationally exercised its discretion in deciding matters of law in which the FERC has special competence. The Court therefore upheld a FERC order that interpreted a contract and summarily disposed of a proceeding without evidentiary hearing.

3. *Comparative Hearing*

The FERC determined it was not necessary to a proper exercise of its statutory obligations to conduct a comparative hearing on two pipeline certificate applications where the two applications, while designed to serve some of the same gas producing fields, were neither comparable to nor mutually exclusive with each other. Transcontinental Gas Pipe Line Corporation (Transco) sought to construct a 26.7 mile lateral line (estimated cost of $20.2 million) connecting limited blocks of the Matagordo Island (MAT) offshore fields with Transco's own gathering system, and asserted a need to do so in order to meet demand in the winter '84-'85 heating season. The Mantaray Pipeline Company and Texas Eastern Transmission Corporation moved to consolidate with Transco's application their own joint application to construct and operate in the same area an offshore pipeline (estimated cost of $186 million) to be operated as a contract carrier in interstate commerce affording more pipelines access to the MAT Blocks. Emphasizing the relative magnitude of the two proposals, the FERC found no policy reason to suspend action on a request for an incremental expansion of an existing system, where the public interest requires timely construction, pending determination of other broader proposals even though they would serve the same area. *Transcontinental Gas Pipe Line Corporation,* 28 FERC ¶ 61,069 (1984).

The U.S. Court of Appeals for the Fourth Circuit upheld a FERC decision not to hold a comparative hearing on two substantially identical competing applications for preliminary permits for development of hydroelectric power. The FERC, in reliance on its first-to-file regulations, 18 C.F.R. § 4.33(g)(2), had determined that any alleged differences in the applications were necessarily, because of the speculative nature of permit proposals, unsubstantiated and best explored at the time of any license application when both the permit holder/applicant and any competing applicants would be given an opportunity to demonstrate the superiority of their respective applications. *Appamattox River Water Authority v. FERC,* 736 F.2d 1000 (4th Cir. 1984).

B. Interim Relief

A FERC administrative law judge found the Commission and, by proper delegation, the Commission ALJ's to have equitable authority grounded in the Natural Gas Act and Natural Gas Policy Act to require, under certain circumstances, the establishment of escrow accounts to secure disputed funds. The prerequisites to such establishment would be the same as for securing preliminary injunctions. *Colorado Interstate Gas Co. and CIG Exploration, Inc.,* 27 FERC ¶ 63,084 (1984), *affirmed,* 27 FERC ¶ 63,085 (1984) (the decision will be subject to appeal to the Commission after an initial decision is issued).

III. HEARINGS

C. *Evidence and Witnesses*

1. *Testimony of Former Staff Member*

An administrative law judge issued an order striking the direct testimony and exhibit of a former Commission trial attorney in *Northern Natural Gas Co.*, 27 FERC ¶ 63,018 (1984). One party claimed that area rate language was incorporated into gas purchase contracts because it was part of a settlement agreement reached some twenty years ago. It offered the testimony of the former Commission staff attorney — who was involved in the settlement — to show the intent of the parties at settlement. The ALJ disallowed the testimony, drawing an analogy to the rule that former Commissioners may not testify as to the meaning of an opinion or decision of the Commission. No appeal to the Commission was taken.

The issue of testimony of a former staff witness was also raised in Montana Power Company's competitive Kerr relicensing hearing. *The Montana Power Co.*, 27 FERC ¶ 63,079 (1984). MPC moved to strike certain testimony of a witness concerning the proper method for determining annual charges for MPC's use of the Kerr hydroelectric project because the same witness had appeared in 1978 as a staff witness in a Commission proceeding involving readjustment of the annual charges applicable to Kerr. The ALJ rejected MPC's motion to strike, which was based on Commission Rule 2103(a) and 18 U.S.C. § 207 — rules that preclude the appearance and testimony of former Commission employees at Commission proceedings on the same matter.

The ALJ held that Rule 2103(a) did not apply because the witness had left the Commission's employ before the rule was adopted and while former section 207(a) was in effect. The ALJ also held that the annual charge issue in the relicensing context was not the same "matter," within the meaning of former section 207(a), as the adjustment of annual charges that was before the Commission in 1978. The particular facts and circumstances that determine the charge, rather than the methodology, were found to be controlling on the issue of whether the same "matter" was involved in the two proceedings. Finally, the ALJ referred to the rule's objectives and determined that the appearance of this witness did not unduly influence the staff, nor did the witness use confidential information in presenting his testimony. 27 FERC at 65,307. Thus the concerns underlying the rule were not present in this case. Because this contested relicensing has been settled, there may be no Commission action on the ALJ's determination of this issue.

Similar issues have been presented in discovery. *See* part II,B, *supra.*

2. *Use of Depositions at Hearing*

In *Gas Producing Enterprises Inc.*, 26 FERC ¶ 61,352 at 61,773 (1984), the Commission held that the ALJ properly exercised his discretion, under 18 C.F.R. § 385.509, to exclude from evidence certain depositions where a party attempts to enter depositions but fails to call the deposed witnesses to testify at hearing and fails to explain the absence of those witnesses. 26 FERC at 61,773. The Commission

denied an application for rehearing and motion to reopen and consolidate proceedings, 28 FERC ¶ 61,008 (1984), but the evidentiary point was not an issue on rehearing.

3. *Witness Substitution*

A Commission decision on interlocutory appeal established its policy regarding substitution of expert witnesses. *McDowell County Consumers Council, Inc. v. American Electric Power Co.*, 26 FERC ¶ 61,042 (1984). The Commission looked to the Federal Rules of Civil Procedure and case law thereunder for guidance in determining whether expert testimony should be excluded or allowed; and it identified four factors that, combined, would provide a test for questions of witness substitution: (1) prejudice or surprise in facts, (2) ability to cure such prejudice, (3) disruption of the trial process, and (4) bad faith or willfulness.

During the deposition of an expert whose testimony Staff had filed, it became apparent that the expert was unable to respond to questions concerning certain documents cited in his testimony. Staff terminated the deposition to give the witness an opportunity to familiarize himself with the documents. Before the deposition was to reconvene two weeks later, Staff informed all parties that the witness was withdrawn and sought to substitute another expert who would adopt the original witness' testimony and exhibits. AEP deposed the substitute witness, but filed a motion for sanctions regarding the original witness' deposition. The presiding ALJ denied the sanctions but required Staff to use its original witness, or alternatively, before it could use a substitute witness, to stipulate that the reason for withdrawal of the original witness was lack of competence. The ALJ also refused to certify the ruling to the Commission, and staff filed an interlocutory appeal.

Based on the four factors derived from the Federal Rules of Civil Procedure, the Commission stated that no substitution will be allowed if the substitution will cause undue prejudice to other parties or undue disruption of the Commission hearing process. The Commission found that Staff substitution of one expert for another should be permitted. Staff notified all parties of this substitution months in advance of hearing, so surprise was not a factor. In addition, the complaining party deposed the substitute witness and had an opportunity to file rebuttal testimony and to cross-examine the witness. Because the substitute witness adopted *in toto* the testimony and exhibits of his predecessor and because there was more than ample time to adjust to the new witness, the Commission found no prejudice to the parties and no disruption to the hearing procedure. Finally, the Commission said that Staff had exhibited no bad faith.

Commissioner Sousa dissented from the Commission decision in *McDowell* because, in his view, "[t]he instant appeal does not constitute an extraordinary circumstance which would justify an intrusion into a presiding officer's management of his proceedings." *Id.* at 61,140. He also objected to the Commission's use of this interlocutory order as a vehicle to establish a new policy regarding substitution of expert witnesses.

D. Burden of Proof

In *City of Winnfield, Louisiana v. FERC*, 744 F.2d 871 (D.C. Cir. 1984), the Court analyzed the burden of proof requirement for increased rates filed under section

205 of the Federal Power Act. The City's position was that the burden was not sustained because the utility introduced evidence relating only to the incremental cost rate structure. (The Commission Staff alone introduced evidence supporting the new rates under an average system fuel cost methodology.) The court, however, said that the section 205 burden was a burden of persuasion rather than one of production: "If evidence is introduced in the proceeding supporting a rate increase, the increase can lawfully be imposed, reagardless of the source from which that evidence comes. In this case, the evidence introduced by the Commission staff satisfied the requirement of § 205." 744 F.2d at 877. Winnfield's petition for review of the Commission's order was denied.

IV. SETTLEMENT

In *United Municipal Distributors Group v. FERC,* 732 F.2d 202 (D.C. Cir. 1984), a group of distributors of natural gas in Alabama and Florida ("UMDG") sought review of two orders of the FERC. The orders approved a general rate case settlement and rejected UMDG's contention that approval of the settlement should have been conditioned upon the inclusion of a reservation clause which would have deferred resolution of a certain federal income tax issue pending judicial review of FERC's policy regarding this tax issue in another proceeding. In so doing, FERC approved the settlement as among all parties except UMDG and remanded the case for a full administrative hearing on the rates that United Gas Pipe Line Company ("United") would charge UMDG.

On appeal, the court rejected UMDG's argument that the Commission's action was contrary to its rules and judicial precedent. The court noted the Commission could approve a contested settlement as a decision on the merits if it were supported by substantial evidence or approve a contested settlement if no genuine issue of material fact existed as to contested issues. 18 C.F.R. § 385.602(h)(l)(i) (1982). If neither of the above were appropriate, the Commission could sever and approve uncontested portions of a settlement and set the contested portions for hearing or "[t]ake other action which the Commission deems appropriate." *Id.* at § 385.602(h)(l)(ii)(B). Relying on the plain language of the rule allowing the Commission to take other appropriate action and its obligation to defer to an agency's construction of its own rules, the court rejected UMDG's argument that FERC's actions were contrary to its procedural rules on the approval of contested settlements. UMDG's contention that *Mobil Oil Corp. v. FPC,* 417 U.S. 283 (1974), required FERC to approve a contested settlement based on substantial evidence was also rejected. In *Mobil,* the Supreme Court stated that a settlement "may be adopted as a resolution on the merits" even if all parties did not agree to it. *Id.* at 314. The court distinguished *Mobil* since approval of the settlement had bound all parties in that case and here UMDG would have had an opportunity to have a hearing on its rates. Finally, the court noted that FERC's actions promoted the policy that settlement of rate cases should be encouraged.

UMDG next argued that FERC's orders violated Commission precedent, relying on recent cases where the Commission had approved the contested portions of a settlement and severed the contested portions. The court found, however, "at least one Commission precedent support[ing] the procedure followed" and no

precedent "severing the contested issue and yet holding in abeyance the hearing on the reserved issue." 732 F.2d at 211. UMDG's final argument was that as a result of FERC's approval of the settlement, United would charge UMDG's members different rates than those charged other United customers receiving the same service. UMDG contended that this violated the antidiscrimination provision of Section 4(b) of the NGA. 15 U.S.C. § 717c(b) (1982). The court rejected this argument, concluding "that a settlement agreement reached in good faith and not involving improper conduct, and which does not unduly burden a customer group, may justify a rate disparity, since settlements would be severely discouraged if rate disparities arising out of settlements were considered unlawfully discriminatory." 732 F.2d at 212.

In *Panhandle Eastern Pipe Line Company,* 26 FERC ¶ 61,342 (1984), the Presiding Administrative Law Judge certified a contested settlement to the Commission which resolved all issues in Panhandle's general rate case except certain cost allocation, cost classification, rate design, and minimum bill issues. These issues were reserved for hearing and an interim cost classification, cost allocation and rate design methodology was established in the settlement pending the outcome of the hearing. All parties supported or did not oppose the settlement; however, one party, East Ohio Gas Company ("East Ohio") raised certain objections to the interim rate design methodology in its comments on the settlement to the Commission. FERC characterized the question before it not as "whether the interim rate design is reasonable, but rather whether the settlement provides the requisite procedures, taking into account the due process rights of the protesting parties for establishing a just and reasonable interim rate design." *Id.* at 61,751. Noting that East Ohio's objections were directed only to the rate design issues, the Commission approved the interim rate design for all parties except East Ohio, and gave East Ohio the right to litigate the interim rate design issues. Pending the outcome of this hearing, however, East Ohio's rates would be those originally moved into effect by Panhandle.

In *Southern Natural Gas Company,* 27 FERC ¶ 61,477 (1984), FERC was asked to approve a contested partial settlement agreement of a general rate case which provided for jurisdictional rate reductions of approximately $72 million per year over the then current base rates for Southern Natural Gas Company ("Southern"). Two parties objected to the interim settlement agreement because it limited the relief for the rate design issues that they had raised by making the relief prospective only. The Commission acknowledged that approval of the settlement agreement would resolve questions of fact, at least on a temporary basis, and admitted that it did not have a record before it to resolve the fact issues. However, the Commission approved the settlement (*Id.* at 61,921.):

> The proposed settlement, overall, produces a reasonable compromise of the issues in this case. Although it would be possible to sever the contested issues and approve the settlement only as to the other issues, such action would likely nullify the agreement which was negotiated as a package by Southern and the majority of its customers. Moreover, there is no need to sever the issues which, pursuant to the settlement, are already set for hearing in RP83-58.

In *North Carolina v. FERC,* 730 F.2d 790 (D.C. Cir. 1984), the State of North Carolina and the North Carolina Public Utilities Commission ("North Carolina")

objected to a Commission decision approving the settlement of certain cases involving the curtailment plans of Transcontinental Gas Pipe Line Company in three different time periods. The settlement provided compensation only for those consumers who were curtailed in one of the three time periods. North Carolina asked the court to approve that portion of the Commission's decision which provided compensation and to reverse the remainder of the Commission's decision. The court stated that whether FERC's decision was severable and could be affirmed in part and reversed in part depended on the Commission's intent in approving it. Since FERC had approved the settlement because it was "a comprehensive settlement which as a package, appears reasonable," the court held it could not grant the requested relief. 730 F.2d at 796.

In *Southern Natural Gas Company,* 27 FERC ¶ 61,322 (1984), the Commission rejected a settlement agreement proferred by Southern and certain of its customers resolving a minimum bill dispute concerning Southern's purchases of liquified natural gas ("LNG") and ordered Southern to refund to its customers certain minimum bill amounts that Southern had paid to the operator of the LNG facility. In ordering refunds, however, FERC distinguished between those parties that had agreed to the settlement and those which had not. Customers that had not approved the settlement received total refunds; those that did approve the settlement received total refunds; those that did approve the settlement did not because the Commission reasoned that the approving customers should share in the apportionment of risk between shareholders and customers. However, on January 28, 1985, FERC reviewed its earlier decision and reduced refunds paid to all customers. *Southern Natural Gas Company,* 30 FERC ¶ 61,080 (1985).

In *National Fuel Gas Supply Corporation,* 27 FERC ¶ 61,111 (1984), the Commission refused to modify a settlement agreement to permit National Fuel to reprice its pipeline production from a cost-of-service basis to an NGPA basis. In reaching its decision, the Commission looked not only to private law, but also the public interest encouraging and preserving settlement agreements. The Commission noted that "[i]f parties to a settlement could simply opt out of it whenever circumstances changed in their favor, the whole purpose of encouraging settlements may be frustrated." *Id.* at 61,211-12.

Thus, if an overall settlement appears reasonable to the Commission, it will likely approve it for all parties if it considers the objections to be *de minimis.* Meritorious objections, however, could well result in the opposing party being removed from the offending provisions of the settlement or being excluded from the entire settlement, rather than in disapproval of the entire settlement.

V. Judicial Review

A. *Finality, Ripeness, Aggrieved Party*

In *The Great Western Sugar Co. v. FERC,* No. 83-1135 (D.C. Cir., April 16, 1984), the court was faced with the issue of whether a Commission order initiating a full evidentiary hearing in a proceeding is final and subject to judicial review. The court held that while such an order is a prerequisite to arriving at a definitive agency decision, it did not constitute a "definitive statement" of the Commission's position

subject to the review of the appellate court. The court stated that the Commission's order was merely a procedural order, that the Commission had not taken a position on substantive issues raised in the declaratory proceeding, and that judicial review at this stage would likely "interfere with the proper functioning of the agency. . . ." for the foregoing reasons, the Court found that the Commission's order was not a final order subject to judicial review and dismissed the Petition for Review.

In *Tennessee Gas Pipeline Company v. FERC,* 736 F.2d 747 (D.C. Cir. 1984), Tennessee Gas Pipeline Company (Tennessee) filed a petition for review of a Commission's Natural Gas Act interpretative rule. The court held that while the Commission's interpretation was fit for judicial review, *i.e.* it involved the agency's attempt to determine congressional intent, Tennessee did not show "current 'hardship' of its operations" as a result of the Commission's newly-made interpretation. Therefore, according to the precedent set forth in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), and *Arkansas Power & Light Co. v. ICC,* 725 F.2d 716 (D.C. Cir. 1984), the court dismissed Tennessee's petition for want of "a question ripe for review."

In *Transwestern Pipeline Company,* 747 F.2d 781 (D.C. Cir. 1984), the court was presented the question of whether or not Transwestern was an "aggrieved party" within the context of Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and therefore could seek review of a Commission order. Transwestern filed a petition for review requesting the court to interpret an order of the Commission, which, if given the meaning Transwestern advanced, would cause injury to Transwestern. The court found that the interpretation advocated by Transwestern was not appropriate, and concluded that the proper interpretation of the Commission's order would not cause "injury" to Transwestern. Therefore, the court found that Transwestern was not an aggrieved party within the meaning of Section 19(b) and dismissed the petition for review.

In *Pennzoil Co. v. FERC,* 742 F.2d 242 (5th Cir. 1984), Pennzoil Company sought judicial review of the Commission's denial of its request for summary judgment in an on-going proceeding. The court dismissed the petition for review, stating that the Commission had not yet had the opportunity to make a a final determination of the underlying issues; therefore, the issues were not ripe for judicial review. The court characterized the Commission's order as interlocutory and having no direct and immediate impact on Pennzoil that can not be altered by subsequent Commission action. Further, the court did not find the case ripe for judicial review because the Commission's order did not present Pennzoil with the threat of irreparable harm.

B. FERC Action Set Aside

Commission orders have been set aside due to procedural errors in several recent cases involving permit proceedings for hydroelectric projects. In one such case, *International Paper Company v. FERC,* 737 F.2d 1159 (D.C. Cir., 1984), the Court followed its earlier ruling in *Hirschey v. FERC,* 701 F.2d 215 (D.C. Cir. 1983), holding that the Commission must strictly comply with its own rules regarding exemptions from hydro-licensing requirements. Under its regulations, the Commission has 120 days to act on an application for an exemption or it is deemed to be granted. In *International Paper Company,* the Commission did not act within the 120 days but

subsequently vacated the exemption on the ground that it had inadvertently failed to suspend the 120 days and that this inadvertence constituted "ministerial error". The court, in rejecting the Commission's argument, narrowly construed the "ministerial error doctrine" and ruled that the Commission had no authority to vacate the exemptions after the 120 days.

In *Northern Colorado Water Conservation District v. FERC,* 730 F.2d 1509 (D.C. Cir. 1984), NCWCD appealed the Commission's denial, on lateness grounds, of a petition to reopen the permit proceeding because NCWCD had not received the statutorily required notice of the permit application. Even though Section 4(f) of the Federal Power Act sets forth the method of notice to be provided to "interested municipalities", the Commission argued that it had made a contemporary news agency interpretation of the statute that written notification was not required in this situation. The court held that the Commission could not rely on such an interpretation because (1) the interpretation was contrary to the clear language of the act and (2) it was not a contemporaneously articulated and consistently followed agency interpretation.

In *New York State Energy Research and Developmental Authority v. FERC,* 746 F.2d 64 (D.C. Cir. 1984), the Commission promulgated a new filing rule with respect to license requests after NYSERDA filed its notice of intent to file an application but before the application was filed. NYSERDA's application, while meeting the requirements of the old rule, did not meet the requirements of the new one. The court reversed the Commission's rejection of the application, holding that the totality of the circumstances indicated that NYSERDA acted in good faith and should not be penalized.

In *City of Gillette, Wyoming v. FERC,* 737 F.2d 883 (10th Cir. 1984), the City filed a permit application after the time that a Commission's regulation permitted an applicant to either file the application or give notice of intent to file. However, the applicant later stated that it had filed its notice of intent before the deadline, but apparently the Commission did not receive the pleading. After the applicant's pleading was rejected as untimely, the applicant filed a petition for waiver with the Commission for leave to file an application for preliminary permit. The commission denied the applicant's request for waiver by merely stating that it had not demonstrated sufficient cause not to deviate from its policy to strictly enforce filing deadlines in preliminary permit proceedings. The Court of Appeals overturned the decision holding that the Commission failed to adequately state its reasons for rejecting the applicant's petition for waiver.

There were also two major electric rate cases in which the D.C. Court of Appeals overturned the Commission's orders. In *Middle South Energy, Inc. v. FERC,* 747 F.2d 763 (D.C. Cir. 1984), the electric company appealed the Commission's order suspending its initial rate schedule for sale of electricity and the orders announcing that the Commission, for the first time, interpreted its suspension authority to include authority to suspend initial rates. The Commission's new policy was based on *Trans-Alaska Pipeline Rate Case,* 436 U.S. 631 (1978), which held that a parallel rate provision in the Interstate Commerce Act (ICA) authorized the Interstate Commerce Commission to suspend rates and require refunds of initial rates filed by oil pipelines. The Court of Appeals, in overruling the Commission, distinguished the language, legislative history, and contemporaneous construction

of the two acts. However, the court remanded the matter to the Commission for the determination of whether the filing constituted "initial" rates or a "change" in existing rates.

In *Burroughs of Ellwood City v. FERC,* 731 F.2d 959 (D.C. Cir. 1984), the Burroughs challenged Commission approval of a wholesale electric rate. The court vacated the Commission's refusal to remedy an unlawful discrimination between wholesale and retail customers (price squeeze) and remanded the case, stating that although extraordinary circumstances might excuse a price squeeze, (1) numerous "inconsistencies and inaccuracies" existed in the Commission's explanation of the circumstances specific to the instant case and (2) the Commission's explanation of those circumstances was irreconcilable with United States Supreme Court precedents.

C. *Rehearing*

In *Montana-Dakota Utilities Co. v. FERC,* 739 F.2d 376 (8th Cir. 1984), the Court considered the statutory prerequisite to judicial review of a petition for rehearing. The Commission had entered an order granting certificates of public convenience and necessity to Montana-Dakota Utilities Co. (MDU) and Colorado Interstate Gas Co. (CIG) for the construction of various facilities and the sale of natural gas by MDU to CIG. The Commission's order was specifically based on its interpretation of an agreement between MDU and CIG, dated August 12, 1981, for the sale and purchase of natural gas, and found that the agreement did not contain a minimum take provision. MDU did not file for rehearing of the order, but instead filed a complaint against CIG with the Commission alleging that CIG was in violation of a provision of the August 12, 1981, agreement relating to mimimum take obligations.

Because MDU did not file for rehearing of the Commission's rigid order which was explicit regarding the lack of a minimum take provision in the August 12, 1981 agreement, the Court held that the jurisdictional prerequisite for review of a Commission order, established by Section 19(b) of the Natural Gas Act was not met.

In *Cooperative Power Ass'n v. FERC,* 733 F.2d 577, *reh'g denied,* 739 F.2d 390 (8th Cir. 1984), the Cooperative Power Association (CPA) petitioned the court to review orders of the Commission accepting rates filed by Minnesota Power & Light Company (MP&L), without suspension, and ordering an evidentiary hearing pursuant to Section 206 of the Federal Power Act, 16 U.S.C. § 824 (1982). The Commission held that pursuant to its regulations it did not have the power to suspend a rate schedule after its effective date, even upon the granting of a rehearing, as in the instant case, and that whether to proceed with an evidentiary hearing under § 205 or § 206 of the Federal Power Act, is within the discretion of the Commission. The Court upheld the Commission and affirmed the agency's orders in the instant case. On rehearing, the Court held that assuming *arguendo* that the Commission did not have the power to suspend a rate schedule after its effective date the Court would not reverse the Commission's decision to not suspend unless an abuse of discretion on the part of the Commission could be established. The Court found no abuse of discretion in the instant case; therefore, it denied CPA's petition for rehearing.

D. Race to the Courthouse

In two decisions this year, the District of Columbia Circuit injected a modicum of common sense into the perennial "race to the courthouse" problems that have plagued parties who seek judicial review of Commission decisions. In the first decision, *City of Gallup v. FERC,* 726 F.2d 772 (D.C. Cir. 1984), eight petitions for review were filed. Three were filed by Gallup with the D.C. Circuit a few days before the Commission issued its final order. On the day the final Commission order was issued, two petitions were filed with the Tenth Circuit by the Public Service Company of New Mexico; one was filed by Gallup in the D.C. Circuit, but all three of these were filed between 2:59 and 3:00 p.m. The last two petitions were filed a few days later, one by Public Service Company in the Tenth Circuit, the other by Gallup in the D.C. Circuit.

The D.C. Circuit dismissed the petitions of Gallup that were filed before and after the day the Commission's order issued. The sole remaining petition by Gallup was transferred to the Tenth Circuit, since Public Service Company had filed first in that circuit. *See* 28 U.S.C. § 2112(a) (1976). However, the Tenth Circuit dismissed as premature all of the petitions filed on the date the Commission's order issued. *Public Service Co. v. FERC,* 716 F.2d 778 (10th Cir. 1983). That court established 10:00 a.m. and 3:00 p.m., when the Commission officially issues its orders, as critical to the timely filing of petitions for review. All three of the petitions filed on the date the Commission's order issued were stamped prior to 3:00 p.m. The court accepted the petition of Public Service Company that had been filed several days after the order issued.

Gallup requested rehearing by the D.C. Circuit, since all of its petitions for review had now been dismissed and the time period for filing a new petition had expired. The D.C. Circuit, on grounds of fairness, reinstated the last petition for review that Gallup had filed. The court then transferred that petition to the Tenth Circuit where the remainder of the litigation was pending.

In the next case, *Associated Gas Distributors v. FERC,* 738 F.2d 1388 (D.C. Cir. 1984), the D.C. Circuit followed the lead of the Tenth Circuit. Relying on long-standing Commission custom, the court held that "[t]he Secretary of the FERC has determined that 10:00 a.m. and 3:00 p.m. are the critical moments in regard to FERC orders, we therefore hold that in FERC matters such as this, 10:00 a.m. or 3:00 p.m., or for future cases whatever time the Secretary determines as critical, is the first moment at which a petition for review of an order can be timely filed even if the order is physically posted somewhat before that time." *Id.* at 1391. The court rejected as controlling the Commission's regulation to the effect that an order is deemed issued when *posted,* mailed, or copies made public. 18 C.F.R. § 385.2007(b) (1982). The court felt that the regulations merely reflect that some orders are posted, rather than mailed.

E. ANGTA

In *Iowa State Commerce Commission v. Office of the Federal Inspector of the Alaska Natural Gas Transportation System,* 730 F.2d 1566 (D.C. Cir. 1984), the Court considered two primary issues: what standard of review is appropriate for the

challenged action of the Office of Federal Inspector (OFI); and whether, under the proper level of review, the Iowa State Commerce Commission's (ISCC) rights had been violated by OFI action approving certain rate base inclusions for the Alaska Natural Gas Transportation System (ANGTS).

On the first issue, the Court noted that its review would be severely restricted if the OFI's action were reviewable under section 10 of the Alaska Natural Gas Transportation Act of 1976 (ANGTA). The Court held that the rate base determination made by the OFI was an action to enforce a condition of the pipeline's certificate of public convenience and necessity and thus action under section 9 of ANGTA, and also an action to enforce ANGTA under a Presidential Reorganization Order. Thus, the Court concluded the OFI action was only reviewable under section 10 of ANGTA.

On the second issue, the Court found section 10 of ANGTA to preclude review of the OFI action for reasonableness or substantial evidentiary support. Rather, the action would be reviewable only for denial of a constitutional or statutory right, or for an action in excess of statutory authority or limitation. The Court held (1) that the ISCC's right to a hearing had not been denied, since the opportunity to comment meaningfully on the OFI proposed action was sufficient, (2) that there had not been impermissible *ex parte* contacts, (3) that the lack of opportunity for discovery did not violate a statutorily granted right, and (4) that the OFI written decision addressed all pertinent issues raised by the ISCC and comported with the requirement of essential findings and conclusions.