
SUBMITTED COMMITTEE REPORTS

As a general policy, the Energy Bar Association does not take positions in published Committee Reports on substantive issues that are the subject of pending litigation.

REPORT OF THE ADMINISTRATIVE PRACTICE AND ADMINISTRATIVE LAW JUDGES COMMITTEE

The report of the Energy Bar Association's Administrative Practice and Administrative Law Judges Committee (Committee) will analyze significant developments within the areas of administrative practice and procedure at the Federal Energy Regulatory Commission (Commission) that occurred during 1999. The objective of this Committee is to acquire and maintain a proficient basic administrative practice and procedural regulations of the Commission and also act as the bar association's liaison with the Commission's Office of Administrative Law Judges. The 1999 report examines several major areas of administrative law: (1) the implementation of new collaborative procedures for processing energy facility applications; (2) final modifications of existing regulations governing Off-the-Record Communication; (3) the final amendments to the Commission's Complaint Procedures; (4) provisions for the electronic service of documents; and (5) new requirements for the designation of individuals to receive service. In addition, the report will briefly review certain recent developments and precedent in other procedural and practice areas.

I. COLLABORATIVE PROCEDURES FOR ENERGY FACILITY APPLICATIONS

On September 15, 1999, the Commission adopted its Order No. 608 Final Rule, thereby implementing a pre-filing collaborative process for applications to construct or abandon jurisdictional natural gas facilities.¹ Modeled after collaborative procedures for hydropower licensing applications,² the new procedures are intended to foster pre-filing consultation and to improve coordination among the applicant, resource agencies, and other interested parties participating in the environmental review process under the National Environmental Policy Act of 1969 (NEPA).³

The newly-adopted collaborative procedures are available to applicants for certificates to construct natural gas facilities under section 3 and section 7(c) of the Natural Gas Act (NGA)⁴ and applicants for authority to abandon certified facilities pursuant to section 7(b) of the NGA.⁵ Ordinarily, such actions trigger the environmental review process under the NEPA only when an application is filed. With the approval of the Commission, a potential applicant now may begin the environmental review process and complete the preliminary NEPA documentation (a draft Environmental Assessment or a draft Environmental Impact Statement) before filing an application.

To secure the Commission's approval to invoke the collaborative process, the applicant must submit a request to the Commission that shows how the applicant will implement the process.⁶ The applicant must make a reasonable effort to contact all potentially interested parties and demonstrate that "a consensus

1. *Collaborative Procedures for Energy Facility Applications*, III F.E.R.C. STATS. & REGS. ¶ 31,080, *reh'g granted* (1999). In response to requested rehearings, the Commission granted rehearing for further consideration to preclude denial of the request, which would occur automatically pursuant to 18 C.F.R. § 385.713.

2. 18 C.F.R. §§ 4.38, 16.8 (1999).

3. *Collaborative Procedures for Energy Facility Applications*, IV F.E.R.C. STATS. & REGS. ¶ 32,536, at 33,578 (1998); 42 U.S.C. §§ 4321-47 (1999).

4. 15 U.S.C. §§ 717b, 717f(c) (1999).

5. 15 U.S.C. § 717f(b) (1999).

6. 18 C.F.R. §§ 157.22(a), 157.22(b)(3) (1999).

exists that the use of the collaborative process is appropriate under the circumstances."⁷ The applicant also must describe how the parties will communicate through a "communications protocol" that is supported by the interested parties.⁸ The request must describe the process for distributing a description of the project, schedule an initial informational meeting, and provide for cooperative scoping of environmental issues, and the preparation of preliminary documentation under the NEPA.⁹ The Commission and the potential applicant are required to provide notice of the request to interested parties and others.¹⁰

Approval of the request to invoke a pre-filing collaborative process triggers a second round of notice requirements.¹¹ The applicant then must file the initial description of its proposed project, the scoping documents, and the preliminary draft environmental review documentation.¹² Participants in the collaborative process must set reasonable deadlines for interested parties to request studies and to analyze alternatives. For good cause shown, the Commission may also require additional studies and analysis and impose deadlines for input by resource agencies.¹³

Any participant may petition the Commission to terminate the pre-filing collaborative process, if it can show that "a consensus supporting the use of the pre-filing collaborative process no longer exists. . ."¹⁴ and that pursuing the process would no longer be productive. The petitioner must propose an alternative procedure for completing the pre-filing process.¹⁵ The applicant may file its application at any time, regardless of whether it has completed the pre-filing collaborative process.¹⁶ If the parties are able to reach an agreement in the pre-filing process, they may submit that agreement as an offer of settlement.¹⁷ The Commission then would review the agreement pursuant to its standard procedures governing offers of settlement.¹⁸

In adopting the new procedures, the Commission emphasized the flexibility of the pre-filing collaborative process. Participation in the collaborative process is voluntary, and the applicant can terminate the process at any time. Participants may, but need not, consider non-environmental issues.¹⁹ The Commission declined to establish deadlines for completion of the collaborative process, electing instead to permit the participants to determine a timeline for the process.²⁰ The collaborative process does not displace or replace other pre-filing op-

7. 18 C.F.R. § 157.22(b)(1) (1999).

8. 18 C.F.R. § 157.22(b)(2) (1999).

9. 18 C.F.R. § 157.22(c) (1999).

10. 18 C.F.R. § 157.22(d) (1999).

11. 18 C.F.R. § 157.22(e)(1) (1999).

12. 18 C.F.R. § 157.22(e)(2) (1999).

13. 18 C.F.R. §§ 157.22(e)(6), (7) (1999).

14. 18 C.F.R. § 157.22(f) (1999).

15. *Id.*

16. 18 C.F.R. § 157.22(h) (1999).

17. III F.E.R.C. STATS. & REGS. ¶ 31,080, at 30,900-01.

18. 18 C.F.R. § 385.602 (1999).

19. III F.E.R.C. STATS. & REGS. ¶ 31,080, at 30,900, 30,905.

20. *Id.* at 30,904.

tions available to the applicant.²¹

While the need for increased coordination among applicants, interested parties, and federal resource agencies seems clear,²² it is not clear whether the new rules will improve the process. Even the Commission acknowledged that there is no indication that the new procedures will expedite the environmental review process.²³ However, the Commission views the pre-filing collaborative process for hydropower licensing process as a success.²⁴ The Commission insists that the new procedures serve only to increase the flexibility of the process. Thus, the availability of the new procedure may be a benefit to potential applicants for jurisdictional natural gas facilities.

II. FINAL RULE ON OFF-THE-RECORD COMMUNICATIONS

On September 15, 1999, the Commission in Order No. 607, issued a Final Rule on communications between persons outside the Commission and the Commission or its employees.²⁵ The Commission substantially adopted its 1998 Notice of Proposed Rulemaking (NPR) on off-the-record communications, otherwise referred to as *ex parte* rules.²⁶ All off-the-record communications, whether written or oral, relevant to the merits of a Commission on-the-record proceeding between a party or parties and the Commission's decisional employees are prohibited, subject to certain limited exemptions. The Final Rule prescribes when off-the-record communications may take place between the Commission staff and persons outside the Commission, and alternatively when such communications must be made on-the-record. The new regulations also provide directions on how prohibited and exempted off-the-record communications will be handled by the Secretary of the Commission including procedures for the public notice of such comments.

The original NPR on this matter had proposed ten exemptions to the general prohibition against off-the-record communications in contested, on-the-record proceedings. In Order No. 607, the Commission adopts seven of these ten exemptions. Specifically, the Final Rule eliminated the proposed exemption for communications taking place prior to the filing of an application for Commission action. The Commission stated that pre-filing communications were outside the Rule because they would take place prior to the filing of an applica-

21. *Id.* at 30,901 n.17.

22. See also INGAA Foundation, *Coordinating Federal Agency Review During the Environmental Approval Process*, 5-7 (1999). This report, prepared for the research arm of the Interstate Natural Gas Association, compiles findings of a survey addressing problem areas in the environmental review of pipeline certificate applications. The report recommends that agencies identify a few "critical points" on the review path that would permit agencies to coordinate the key steps in their process of reviewing a proposal. *Id.* at 6. The report also recommends that agencies execute Interagency Agreements that would clarify their authority and integrate the review processes of the agencies involved. *Id.* at 7.

23. *Collaborative Procedures for Energy Facility Applications*, III F.E.R.C. STATS. & REGS. ¶ 31,080, at 30,901.

24. IV F.E.R.C. STATS. & REGS. ¶ 32,536, at 33,579 (1998).

25. *Regulations Governing Off-The Record Communications*, No. RM98-1-000, III F.E.R.C. STATS. & REGS. ¶ 31,079 (1999).

26. *Notice of Proposed Rulemaking, Regulations Governing Off-The-Record Communications*, No. RM98-1-000, IV F.E.R.C. STATS. & REGS. ¶ 32,534, 63 Fed. Reg. 51,312 (1998).

tion.²⁷ The Final Rule also eliminated the NOPR's proposed exemption for published or broadly disseminated public information. The Commission concluded that when its staff obtains such information of its own volition, an exemption is not necessary.²⁸ Independent research of this type does not constitute an *ex parte* communication.²⁹ Finally, when compliance was not the subject of a pending proceeding, the Commission did not include its originally proposed exemption for communications related to compliance matters. The Commission stated that Order No. 607 already addressed this by defining communications of this type as not relevant to the merits of a proceeding.³⁰

The Commission also modified in part certain definitions of the NOPR. The definition of off-the-record communications was modified to address the context of an oral communication with prior notice. Off-the-record communications are now defined to as

any communication relevant to the merits of a contested on-the-record proceeding which, if written, is not filed with the Secretary and not served on the parties to the proceeding pursuant to Rule 2010 [of the Commission's Rules of Practice and Procedure], and, if oral, is made without reasonable prior notice to the parties . . . to be present when the communications are made.³¹

The Commission also amended its definition of a contested on-the-record proceeding to apply to "any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, or any proceeding initiated by the Commission on its own motion or in response to a filing."³² Any material issue may include a dispute of fact, law, or policy.

The Commission adopted as final the concept of noticing in prohibited and exempted off-the-record communications in the Federal Register. The Secretary will periodically, but not less than every fourteen days, publish a list of prohibited and exempted off-the-record communications in the Federal Register.³³ Additionally, public notice of prohibited off-the-record communications will appear on the Commission's web page.

III. FINAL RULE ON COMPLIANT PROCEDURES

During 1999 the Commission finalized its proposed revisions to its Compliant Procedures. Specifically in its Order No. 602, issued March 31, 1999, in Docket No. RM98-13-000, the Commission revised Rule 206 of its Rules of Practice and Procedure,³⁴ to require that complaints must contain certain information providing for answers to be filed within a twenty day time frame and establishing various paths for the resolution of complaints.³⁵ The Commission also

27. III F.E.R.C. STATS. & REGS. ¶ 31,079, at 30,879, 30,890-91.

28. *Id.* at 30,879.

29. III F.E.R.C. STATS. & REGS. ¶ 31,079, at 30,891.

30. *Id.* at 30,879, 30,891-92.

31. III F.E.R.C. STATS. & REGS. ¶ 31,079, at 30,880.

32. *Id.* at 30,880-81.

33. III F.E.R.C. STATS. & REGS. ¶ 31,079, at 30,894-95.

34. 18 C.F.R. § 385.206

35. *Complaint Procedures*, No. RM98-13-000, III F.E.R.C. STATS. & REGS. ¶ 30,071 (1999).

adopted certain simplified procedures for complaints where the amount in controversy is less than \$100,000 and the impact on other entities is *de minimis*.³⁶ These rules will apply to complaints filed with the Commission under the Federal Power Act, Natural Gas Act, Public Utility Regulatory Policies Act of 1978, the Interstate Commerce Act, and the Outer Continental Shelf Lands Act. The revised procedures are designed to encourage and support the consensual resolution of complaints and to organize complaint procedures so that all complaints are handled in a timely and equitable manner.³⁷ In Part 1b, Rules Relating to Investigations, Order No. 602 also codified the Commission's current Enforcement Hotline procedures and revised its alternative dispute resolution regulations to conform to the changes made by the Administrative Dispute Resolution Act of 1996.

Thereafter, within addressing requests for rehearing of its Order No. 602, the Commission issued Order No. 602-A on July 28, 1999, and continued the general framework of its complaint revisions. The Commission modified certain procedures concerning the treatment of privileged information in complaints and answers, modified the requirement concerning simultaneous service of complaints, and reduced the scope of documentation required in an answer.³⁸ The Commission further clarified, in Order No. 602-A, the types of relief that it could provide under the complaint rule. The Commission stated that it would only act on complaints where it has authority under the various statutes administered by the Commission.³⁹ The Commission eliminated from its complaint rule all references to preliminary relief, other than stays or extensions of time. However, the Commission indicated that there may be cases in which it could issue what could be categorized as an "interim" or "preliminary" order in a complaint proceeding pursuant to existing authorities.⁴⁰ The Commission also agreed to delete the standards for relief that were based on *Virginia Petroleum Jobber Ass'n v. FPC*.⁴¹ The Commission opined that these changes should eliminate certain parties' concerns that it was establishing procedures for the granting of injunctive-type relief.

Subsequent to the issuance of Order No. 602-A, certain additional rehearing requests were filed out of concern that the removal of references to "preliminary" and "interim" relief would preclude a complainant from seeking immediate or early Commission action. In its Order No. 602-B, the Commission denied rehearing on this issue on September 29, 1999, in Docket No. RM98-13-002. However, the Commission clarified that under the complaint regulations a potential complainant may request immediate action on the merits of its claims and that any complaint in which time is of the essence could be filed under the Fast Track procedures provided in section 385.206(h) of the Commission's Rules of

36. *Id.* at 30,756.

37. III F.E.R.C. STATS. & REGS. ¶ 30,071, at 30,756.

38. *Order On Rehearing and Clarification*, No. RM98-13-001, III F.E.R.C. STATS. & REGS. ¶ 30,076 (1999).

39. *Id.* at 30,863.

40. III F.E.R.C. STATS. & REGS. ¶ 30,076, at 30,864.

41. 259 F.2d 921 (D.C. 1958).

Practice and Procedure.⁴²

IV. ELECTRONIC SERVICE OF DOCUMENTS

On May 26, 1999, the Commission issued Order No. 604, the Final Rule in its Docket No. RM99-6-000 rulemaking, investigating the possibility for the electronic service of documents within its administrative regulatory practice.⁴³ The Final Rule in Order No. 604 represents the completion of the Commission's efforts initiated in its May 13, 1999, Request for Comments and Notice of Technical Conference concerning the expansion of its existing administrative practice regulations to include the ability for parties to serve written documents through various electronic means.⁴⁴ Order No. 604 reflects the Commission's continued belief that the electronic service of documents among participants in administrative proceedings should be encouraged by the modification of existing administrative service regulations, thus allowing the voluntary use of electronic service methods.⁴⁵ Specifically, the Commission is amending Rule 2101(f) of its Rules of Practice and Procedure by adding the option of service of documents by electronic means among parties that voluntarily agree to employ such electronic service in administrative proceedings.⁴⁶ The Commission envisions that the application of its voluntary electronic service provisions will be an issue for parties to discuss with a presiding ALJ at a pre-hearing conference convened for a public hearing. The specific parameters and guidelines for the electronic service of documents in administrative proceedings would be designed on a case-specific basis subject to the consent of the ALJ and all active parties. In its Order No. 604, the Commission emphasizes that the specific terms and conditions for the service of documents by electronic means within an administrative proceeding is voluntary in nature for all parties. The implementation of optional electronic service in Order No. 604 is intended only to address the service of documents among various parties in a proceeding and does not change existing rules for the filing of pleadings and documents with the Commission.⁴⁷ The amendments to Rule 2101(f) allowing voluntary electronic service of documents within an administrative docket set for hearing became effective on July 12, 1999.

V. THE DESIGNATION OF SPECIFIC INDIVIDUALS TO RECEIVE SERVICE

On November 10, 1999, the Commission issued Order No. 610 Final Rule within its rulemaking proceeding related to implementing a uniform permanent delegation by regulated entities of a specific individual to receive service of pleadings and documents within the administrative process of the Commission.⁴⁸

42. *Order on Rehearing*, No. RM98-13-002, III F.E.R.C. STATS. & REGS. ¶ 30,083 (1999).

43. *Electronic Service of Documents*, No. RM99-6-000, 87 F.E.R.C. ¶ 61,205 (1999), III F.E.R.C. STATS. & REGS. ¶ 31,074 (1999).

44. 63 Fed. Reg. 27,532 (1998).

45. III F.E.R.C. STATS. & REGS. ¶ 31,074, at 30,834.

46. *Id.* at 30,835.

47. III F.E.R.C. STATS. & REGS. ¶ 31,074, at 30,834.

48. *Designation of Corporate Officials or Other Persons to Receive Service*, No. RM99-0-000, III F.E.R.C. STATS. & REGS. ¶ 31,085 (1999).

The action of the Commission reflected in Order No. 610 is a culmination of the investigation commenced by its July 28, 1999, Notice of Proposed Rulemaking into the appropriateness for all entities regulated by the Commission to designate and maintain a permanent corporate official, or other individual, responsible for the receipt of pleadings or other service relating to activities within the Commission's jurisdiction.⁴⁹ In commencing its Docket No. RM99-9-000 rulemaking, the Commission stated that it had determined that its administrative practice would benefit by maintaining a permanent directory of individuals appointed by each regulated entity to be responsible for the receipt of service. The Commission's Final Rule in Order No. 610 requires each entity regulated under the Commission's natural gas and oil, electric, hydroelectric, or other jurisdiction to file with the Commission the following information regarding an individual designated for the permanent receipt of service: (1) the name of the corporate official or other person to receive service; (2) the title of that corporate officer or person; (3) the address of the designated official or person including applicable department, room number, or mail routing code; (4) the telephone number of the designated corporate official or person; (5) the facsimile number of the designated corporate official or person; and (6) the electronic mail address of the designated corporate official or person.⁵⁰

The Commission will require its Office of Secretary to maintain a master list of officials designated to receive service for all regulated entities and make such information available to the public.⁵¹ In order to implement this requirement for the mandatory designation of individuals responsible for the receipt of service, the Commission is amending Rule No. 2010 of its Rule of Practice and Procedure requiring all regulated entities to file with the Secretary of the Commission the identification of the initial designated corporate official or person formally authorized to receive general service.⁵² Thereafter, each regulated entity will be responsible for supplying the Secretary of the Commission with updated information concerning any change in the designated individual, address, or other information necessary for the service of documents.⁵³ Finally, the Commission's November 10, 1999, Order No. 610 clarifies that the designated individual for service is to be used only for Commission proceedings where another person has not been otherwise designated to receive service.⁵⁴ In docketed administrative proceedings where an official service list has been formed, service of documents should be made to the individuals reflected on the Commission's official specific service list rather than the corporate official or other person designated to receive service under Order No. 610.⁵⁵ The requirement for regulated entities to designate a specific corporate official or other person to receive service under Order No. 610 was effective on December 17, 1999.

49. *Designation of Corporate Officials or Other Persons to Receive Service*, Notice of Proposed Rulemaking, No. RM99-9-000, IV F.E.R.C. STATS. & REGS. ¶ 32,543 (1999).

50. III F.E.R.C. STATS. & REGS. ¶ 31,085, at 30,976.

51. *Id.*

52. 18 C.F.R. § 385.2101(i)(1) (1999).

53. 18 C.F.R. § 385.2101(i)(2) (1999).

54. III F.E.R.C. STATS. & REGS. ¶ 31,085, at 30,976.

55. *Id.* at 30,978.

VI. PRACTICE TIPS

A. Settlement Procedures

During 1999, significant procedural activity occurred concerning the handling of negotiated settlements in contested administrative proceedings set forth in Rule 602 of the Commission's Rules of Practice and Procedure especially relating to processing contested settlements.⁵⁶ The Commission accepted the certification of an uncontested settlement by the Chief Administrative Law Judge (ALJ) in a *Williams Gas Pipeline Central, Inc.*, proceeding over the opposition of an intervening party.⁵⁷ Specifically, while the intervenor had filed "limited objections", the party had not explicitly elected to become a "contesting party" to the settlement.⁵⁸ This action of the Commission reaffirmed an earlier acceptance of a contested settlement, inclusive of procedural objections submitted by "non-customer" state agency parties, that also elected not to be characterized as opposing parties to the settlement.⁵⁹ In later action within this rate proceeding, the Commission further emphasized that state regulatory agency parties that file opposition comments without specifically electing to become formal contesting parties to a settlement will not prevent the processing and approval of a settlement for contesting parties.⁶⁰ However, if a state agency party chooses to become a contesting party to the settlement, both the state agency and any local distribution company (LDC) parties under the state agency's jurisdiction would be severed from this settlement and provided the opportunity to fully litigate contested issues.⁶¹ In a contested settlement filed in an electric rate case, the presiding ALJ determined that it was appropriate to certify the contested settlement for all but one contesting party and severed the single contesting intervenor for litigation on the basis that a decision on the merits for the contesting "non-transmission customer" intervenor will not substantially affect the settlement position of all other consenting parties.⁶² A pipeline rate proceeding was certified by an ALJ as uncontested over the opposition of a single intervenor where the ALJ determined that the opposing comments of the single contesting party did not raise a general issue of material fact or present a reasonable basis for the Commission to sever the party to conduct further proceeding.⁶³ Also during 1999, the Commission clarified the general standards to be applied in approving a contested settlement over the objections of contesting parties originally established the 1998 *Trailblazer Pipeline Company* decision.⁶⁴ In an Order on Re-

56. 18 C.F.R. § 385.602 (1999).

57. *Williams Gas Pipelines Cent., Inc.*, 88 F.E.R.C. ¶ 61,198 (1999).

58. *Id.* at 61,678.

59. *Columbia Gas Transmission Corp.*, 87 F.E.R.C. ¶ 63,006, 65,032 (1999) (Grossman S.) (Presiding Judge's Certification of Uncontested Offer of Settlement).

60. *Columbia Gas Transmission Corp.*, 88 F.E.R.C. ¶ 61,161 (1999).

61. *Id.* at 61,544.

62. *New England Power Pool*, 87 F.E.R.C. ¶ 63,004, 65,028 (1999) (Brenner J.) (Certification of Contested Offer of Settlement).

63. *Trunkline Gas Co.*, 89 F.E.R.C. ¶ 63,004, 65,004 (1999) (Zimmet R.) (Certification of Contested Offer of Settlement with Recommendation that No Additional Procedure be Provided to Lone Opponent).

64. *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345 (1998).

hearing in the *Trailblazer* Docket Nos. RP97-408-006 and 007 proceeding, the Commission reaffirmed that it may approve a settlement over the objections of a contesting party when the overall results of the settlement are just and reasonable without a specific determination that each element of the settlement package is individually just and reasonable.⁶⁵ The Commission again acknowledged the appropriateness of use of the following four approaches for processing contested settlements: (1) the Commission renders a binding merits decision on each of the contested issues; (2) approval of the contested settlement is based upon a finding that the overall settlement as a package provides a just and reasonable result; (3) the Commission determines whether the benefits of the settlement outbalance the nature of the objections in light of limited interest of a contesting party; and (4) the Commission proves the settlement as uncontested for consenting parties and severs contesting parties to litigate their issues.⁶⁶

In October 1999, the Commission, applying these *Trailblazer* standards to an *Iroquois Gas Transmission System, L.P.*, section 4 rate proceeding, rejected a contested partial settlement when it determined that the settlement could not be approved for all parties under its first three *Trailblazer* approaches and was not possible to sever contesting parties for separate litigation and preserve the settlement for consenting parties.⁶⁷ Finally, the Chief ALJ issued Notice to the Public on December 8, 1999, requiring that all settlements submitted to the Commission are required to include a Draft Commission Letter approving the settlement in both hard copy and electronic diskette format.⁶⁸ Also, as of December 21, 1999, all uncontested settlements certified to the Commission by ALJs must include a draft letter order approving the settlement in addition to detailed information concerning the procedural history of the case, the specific provisions of the proposed settlement and a description of settlement comments.⁶⁹

B. Discovery Process

In 1999, the Commission and its ALJ staff were provided opportunities to address and clarify the application of the Commission's administrative discovery rules.⁷⁰ First, in a 1999 litigated electric proceeding, the presiding ALJ denied a proposed modification to an existing protective order that would create a special "highly sensitive protected material" category of information with access restricted solely to outside counsel and expert witnesses.⁷¹ The ALJ determined that the creation of this unique category of confidential information unfairly and unduly restricted in-house counsel in representing their parties and created additional and unnecessary expenses interfering with certain intervening parties' due

65. *Trailblazer Pipeline Co.*, 87 F.E.R.C. ¶ 61,110 (1999).

66. *Id.* at 61,439.

67. *Iroquois Gas Transmission Sys., L.P.*, 89 F.E.R.C. ¶ 61,005 (1999).

68. *Proposed Settlement Agreements* (Dec. 8, 1999) (Wagner C.) (unreported).

69. *New Procedures for Certifications of Uncontested Settlements to the Commission* (Dec. 21, 1999) (Wagner C.) (unreported).

70. 18 C.F.R. § 385.401-410 (1999).

71. Docket No. EC98-40-000, *et al.* (Feb. 10, 1998) (Nacy J.) (unreported).

process.⁷² The ALJ also concluded that such an extra protected class of information was contrary to the Commission's public policy of encouraging rather than limiting active participation in the Commission proceedings.⁷³ The Commission, in response to the requests by twelve power companies for confidential treatment of their F.E.R.C. Form No. 1 data, denied rehearing on the basis that petitioners had not demonstrated that the degree of potential competitive disadvantages from the release of information outweighed longstanding benefits of public access to such critical cost and operational information.⁷⁴ The Commission also denied requests for confidential status of a pipeline's cost information contained in a reconciliation report for its Gas Supply Realignment (GSR) cost recovery program after the pipeline admitted that the data was equivalent to certain other information previously disclosed in the proceeding.⁷⁵ The Commission required an LDC to provide to competitors, pursuant to a protective order, information concerning interstate pipeline capacity released by the LDC to its own marketing affiliate because such formation was posted on upstream pipelines' electronic bulletin boards and thereby already available to the public through other sources.⁷⁶ In December 1999, the Chief ALJ issued a notice to the public establishing specific discovery time standards applicable to the Commission's regulatory discovery process for contested administrative public hearings.⁷⁷ As of December 8, 1999, the following time schedules are applicable to the Commission's discovery process: (1) discovery may commence immediately with respondents required to provide best efforts to complete responses ten days after receipt of discovery requests; (2) notice and explanation of inability to respond in ten days must be provided within five business days of receipt of a discovery request; (3) objections to discovery requests must be made within five business days after receipt of the discovery request; (4) motions to compel discovery must be filed within five business days from the receipt of objections to discovery; (5) oral arguments will be scheduled within seven days of the receipt of motions to compel, answers to motions are due five business days after receipt of motions or two business days prior to oral argument; and (6) all discovery shall be completed five days prior to the commencement of public hearings.⁷⁸

C. Complaint Procedures

The Commission in 1999 was presented with several case-specific opportunities to rule on issues relating to its Rule 206 complaint process.⁷⁹ An existing transportation customer was granted relief by the Commission in the Docket No. RP99-477-000 complaint proceeding on the grounds that a pipeline had not provided the shipper with an opportunity to exercise its right of first refusal to renew its transportation capacity upon the expiration of its service agreement by

72. *Id.*

73. *Id.*

74. *PECO Energy Co.*, 88 F.E.R.C. ¶ 61,330 (1999).

75. *Natural Gas Pipeline Co. of Am.*, 87 F.E.R.C. ¶ 61,355 (1999).

76. *Atlanta Gas Light Co.*, 88 F.E.R.C. ¶ 61,331 (1999).

77. *Time Standards for Discovery* (Dec. 8, 1999) (Wagner C.) (unreported).

78. *Id.*

79. 18 C.F.R. § 385.206 (1999).

first not posting the expired long-term pipeline capacity for at least thirty days, and thereafter awarding the capacity to a new shipper after receiving notice from the complainant of its intent to exercise its right of first refusal.⁸⁰ The Commission determined the appropriate remedy was to require the pipeline to reinstitute and continue to provide firm transportation service to the complainant consistent with its service agreement and right of first refusal.⁸¹ In a complaint proceeding involving the open-access transmission of electricity, the Commission denied the complaint when it determined that the underlying premises of the complainant's allegations had ceased to exist after the Commission had issued an order finding that the respondent could not exercise market power.⁸² In response to a complaint concerning an alleged sharing of "market information" between a utility and its own marketing affiliate filed by another non-affiliate entity, the Commission issued an industry-wide declaratory order ruling that a public utility's notification to its own affiliate to monitor the utility's electronic bulletin board for forthcoming postings itself constitutes a prohibited sharing of "market information" by the utility and its affiliate.⁸³

D. Rehearing Process

The administrative rehearing process codified in Rule 713 of the Commission's Rules of Practice and Procedure was the subject of considerable precedent during 1999.⁸⁴ The Commission held that the failure of a participant in a contested public hearing to file a brief on exceptions opposing an ALJ's initial decision acts as a bar to the party's subsequent right to seek rehearing of the Commission's final order in the proceeding sustaining the ALJ's position on that issue.⁸⁵ The Commission dismissed the subsequently filed petition for rehearing on the grounds that the party's failure to take exception to the ALJ's position prior to the Commission's final action on the initial decision acts as a waiver of the parties' right to thereafter seek rehearing of the Commission's final order affirming the ALJ's initial decision on that issue.⁸⁶ The Commission also affirmed that rehearing requests may only be submitted by formal parties to a proceeding when it denied the requests for rehearing by a state agency that had not obtained intervenor status in the underlying dockets.⁸⁷ Also in 1999, the Commission enforced its procedural time period for the submission of rehearing requests in denying a late-filed rehearing request based upon an allegation of a failure to receive actual notice of the Commission's substantive decision even though the order had been served upon counsel for the petitioner.⁸⁸ In a similar fashion, the

80. *North Am. Energy Conservation, Inc. v. CNG Transmission Corp.*, 88 F.E.R.C. ¶ 61,255 (1999).

81. *Id.* at 61,810.

82. *Old Dominion Elec. Coop. & PJM Interconnection L.L.C.*, 89 F.E.R.C. ¶ 61,008 (1999).

83. *Communication of Market Information Between Affiliates*, No. IN99-2-000, 87 F.E.R.C. ¶ 61,012 (1999).

84. 18 C.F.R. § 385.713 (1999).

85. *Southern Co. Servs., Inc.*, 87 F.E.R.C. ¶ 61,097 (1999).

86. *Id.* at 61,416.

87. *Township of Van Buren, Mich. & STS Hydropower Ltd., Project No. 9951-051*, 86 F.E.R.C. ¶ 61,156 (1999) and *Indiana-Michigan Power Co., Project No. 10661-040*, 87 F.E.R.C. ¶ 61,278 (1999).

88. *City of Summerville, W. Va., Project No. 10813-041*, 86 F.E.R.C. ¶ 61,148 (1999).

Commission rejected a request for rehearing that was received more than thirty days after the final date for the submission of rehearing requests.⁸⁹ The Commission also rejected the request for rehearing from a party to an electric open-access transmission tariff proceeding on the grounds that the petitioner failed to allege or identify any specific error in the underlying Commission order subject of the rehearing petition.⁹⁰ The Commission denied, as a late-filed rehearing request, a pleading that was captioned a declaratory order submitted under Rule 207 of the Commission's Rules of Practice and Procedure.⁹¹ In responding to a request by the El Paso Natural Gas Company (El Paso) to answer a rehearing request, the Commission set forth the objective of ensuring the establishment of a complete record in the proceeding as the basis for allowing an answer to the rehearing and a subsequent answer by the petitioner to El Paso's answer to its rehearing request.⁹²

E. Intervention

The general procedure regarding intervention in regulatory proceedings is set forth in Rule 214 in the Commission's Rules of Practice and Procedure.⁹³ Generally, all timely motions to intervene demonstrating an interest as a consumer, customer, competitor, security holder, or other public interests are granted routinely.⁹⁴ Requests to intervene received after the prescribed intervention date require a demonstration of good cause for failing to file a timely motion, the absence of undue delay or disruption of the proceeding, and a lack of burden to other parties.⁹⁵ Certain late-filed petitions to intervene out of time were denied due to a disruption or delay of the proceeding resulting in a burden upon existing parties.⁹⁶ In certain circumstances when late interventions were granted, the late-filing parties' subsequent participation in the proceeding was strictly limited to the issues and concerns identified in their out-of-time motions to intervene.⁹⁷ An intervention request filed over one year after the initial intervention date was denied based upon a failure of the petitioners to demonstrate good cause sufficient to warrant a late intervention.⁹⁸ The Commission similarly

89. *Annual Charges Under the Omnibus Budget Reconciliation Act of 1986 (Sonat Power Marketing L.P. and Sonat Power Marketing, Inc.)*, No. RM87-3-040 (Nov. 26, 1999) (Secretary David P. Boergers) (unreported).

90. *PrairieLand Energy, Inc.*, 87 F.E.R.C. ¶ 61,096 (1999).

91. *Crown-Vantage-New Hampshire Elec., Inc., Project No. 2311-029*, 88 F.E.R.C. ¶ 61,018 (1999).

92. *Phelps Dodge Corp. v. El Paso Natural Gas Co.*, 87 F.E.R.C. ¶ 61,297 (1999).

93. 18 C.F.R. 385 § 214 (1999).

94. 18 C.F.R. 385 § 214(b)(2) (1999).

95. 18 C.F.R. 385 § 214(d)(1) (1999).

96. *Public Serv. Co. of N.M.*, Nos. ER98-2862-000 and ER98-3376-000 (Apr. 6, 1999) (Albrecht J.) (unreported); *Southern Natural Gas Co.*, No. 99-496-000 (Nov. 23, 1999) (McCartney B.) (unreported); *TriState Pipeline, L.L.C.*, 88 F.E.R.C. ¶ 61,090 (1999); and *PJM Interconnection, L.L.C.*, 88 F.E.R.C. ¶ 61,274 (1999).

97. *Williams Gas Pipelines Cent., Inc.*, Nos. RP99-257-000, et al. (Apr. 20, 1999) (Wagner C.) (unreported); *Wyoming Interstate Co., Ltd.*, No. RP99-391-000 (Aug. 18, 1999) (Harfeld D.) (unreported); and *Northern Border Pipeline Co.*, Nos. RP99-322-000 and RP96-45-000 (Oct. 18, 1999) (Harfeld D.) (unreported).

98. *First Energy Operating Cos.*, 86 F.E.R.C. ¶ 61,152 (1999).

denied late interventions in a hydro project licensing proceedings and emphasized that late interventions will only be granted, after the issuance of a hydro project license, when the license order included material changes to the original terms of the project that adversely affected the property rights of the late intervenor.⁹⁹ Also, within a Texas Eastern Transmission Corporation rate proceeding, the Commission denied numerous out-of-time requests to intervene on the basis that the late intervenor's interests had already been adequately represented by existing parties to the proceeding.¹⁰⁰ However, the Commission did accept into the record of the proceeding, the parties' intervention pleadings "in the nature of amicus curiae briefs."¹⁰¹ An out-of-time motion to intervene in a Transok, L.L.C. proceeding was denied on the grounds that granting the late intervention, in the final state of the proceeding, after settlement negotiations had commenced, imposed unwarranted burdens on the other parties.¹⁰² Finally, on December 21, 1999, the Commission issued new directions in its Docket No. RM00-2-000 rulemaking establishing certain procedural time frames applicable to electric filings under section 205 of the Federal Power Act.¹⁰³ Specifically, the Commission adopted a twenty-one-day time period for submitting petitions to intervene and protest in order to provide interested parties sufficient time to review a filing and submit initial pleadings.¹⁰⁴

F. Administrative Hearings, Testimony, and Evidence

Throughout 1999, the Commission and its ALJ staff undertook numerous opportunities to clarify various aspects of its general administrative hearing process and issues relating to the receipt of evidence and testimony. The Burden of Proof applicable to interstate pipelines rate filings was addressed by an ALJ that determined that this Burden of Proof means the burden of persuasion is not merely a burden of coming forward with evidence and is equivalent to a duty of affirmatively proving facts by a requisite degree of evidence necessary to sustain all elements of the case.¹⁰⁵ The Commission issued a clarification of the standard to be applied concerning requests for waiver of an ALJ's initial decision under Rule 710 of the Rules of Practice and Procedure by denying a request to wave an initial decision when such a waiver would not, in and of itself, result in a more prompt final opinion and order.¹⁰⁶ The Commission concluded that without the benefit of the detailed analysis set forth in the initial decision, the Commission itself would need additional time to review the administrative record in order to re-analyze the credibility and weight of the evidentiary record.¹⁰⁷ Also,

99. *Bangor Hydro-Elec. Co., Project Nos. 2403-11, et al.*, 87 F.E.R.C. ¶ 61,035 (1999).

100. *Texas E. Transmission Corp.*, 88 F.E.R.C. ¶ 61,167 (1999).

101. *Id.* at 61,559.

102. *Transok, L.L.C.*, 89 F.E.R.C. ¶ 61,055, 61,186 (1999).

103. Order No. 612, *Time Frame for Intervening In And Protesting Federal Power Act Section 205 Filings*, 89 F.E.R.C. ¶ 61,307 (1999).

104. *Id.*

105. *Williston Basin Interstate Pipeline Co.*, No. RP95-364-005 (Aug. 18, 1999) (Albrecht W.) (unreported).

106. *American Elec. Power Co. & Cent. & S.W. Corp.*, 88 F.E.R.C. ¶ 61,121 (1999).

107. *Id.* at 61,317.

numerous orders and rulings concerning the use of testimony and evidence were issued during 1999, including a Wyoming Interstate Company gas rate proceeding ruling, where the presiding ALJ allowed a severed party to adopt the pre-filed testimony of a Commission Staff witness, even though the Staff was not participating in the severed litigation.¹⁰⁸ The same ALJ denied to receive into evidence certain testimony in an affidavit form on the basis that the use of affidavits at hearings is generally not allowed, especially when the witness is available for direct testimony.¹⁰⁹ Also, the applicant pipeline was allowed to substitute a new witness, adopting the pre-filed testimony of another individual, upon the establishment of a proper foundation.¹¹⁰ In addressing a request to withdraw pre-filed testimony, under Rule 216(b) a presiding ALJ determined there was no need to withdraw the testimony as it had not been formally offered into evidence, and therefore, had not become an official part of the evidentiary record of the hearing.¹¹¹ In the same electric merger proceeding, a motion to strike testimony on a claim that the testimony addressed issues not set for hearing, was denied as the ALJ ruled that the testimony did not relate to the intervenor's recognized interest in the proceeding.¹¹² In an electric rate proceeding, a motion to strike testimony and supporting exhibits was denied as premature prior to the ability of the ALJ to determine that the evidence was not relevant to the issues to be addressed in the proceedings.¹¹³ Participants in administrative proceedings are entitled to initiate an involuntary withdraw of any pleading that has been previously submitted by filing a formal notice of withdraw pursuant to Rule 216 of the Commission's Rules of Practice and Procedure.¹¹⁴ The withdrawal of a pleading will be automatically effective fifteen days after the notice of the request to withdraw if no opposition to the withdrawal is filed and the Commission does not issue an order denying the proposed withdrawal.¹¹⁵

G. Stay of Proceeding

Generally, the Commission is willing to stay its own orders, upon a sufficient demonstration of irreparable harm for only so long as is necessary, and it will lift a stay of a hydro license after receiving evidence that the pending judicial review basis for the original stay order has been withdrawn or dismissed.¹¹⁶

108. *Wyoming Interstate Co., Order Granting Motion to Permit Interlocutory Appeal*, No. RP97-375-007 (Sept. 16, 1999) (Albrecht W.) (unreported).

109. *Wyoming Interstate Co., Order Denying Use of Affidavits*, No. RP97-375-007 (Sept. 28, 1999) (Albrecht W.) (unreported).

110. *Wyoming Interstate Co., Order Granting Substitution of Witnesses*, No. RP97-375-007 (Sept. 28, 1999) (Albrecht W.) (unreported).

111. *Western Resources & Kansas City Power & Light Co., Order on Withdrawal*, Nos. EC97-56-000 and ER97-4669-000 (Oct. 26, 1999) (Harfeld D.) (unreported).

112. *Western Resources & Kansas City Power & Light Co., Order on Motion to Strike*, Nos. EC97-56-000 and ER97-4669-000 (Sept. 30, 1999) (Harfeld D.) (unreported).

113. *Montana Power Co., Order Denying Motion*, No. ER98-2382-000 (Feb. 10, 1999) (Cowan J.) (unreported).

114. 18 C.F.R. § 385.216 (1999).

115. *Williams Gas Pipelines Cent., Inc.* 88 F.E.R.C. ¶ 61,289 (1999), and *Indeck N. Am. Power Fund L.P.*, 86 F.E.R.C. ¶ 61,123 (1999).

116. *Cogeneration Inc., Project No. 4797-050*, 89 F.E.R.C. ¶ 61,193 (1999).

Traditionally, the Commission, in determining the appropriateness of and granting a stay of the effectiveness of its orders, has applied the standards set forth in the Federal Administrative Procedure Act (APA) when "justice so requires," in order to prevent irreparable harm to a party.¹¹⁷ In discussing the necessity to issue an order staying the grant of an interstate pipeline in Docket No. CP98-49-0004, the Commission reaffirmed the use of the APA standard and indicated that it would consider the following factors: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether the issuance of a stay of an order is in the public interest.¹¹⁸ The Commission will first determine whether or not the requesting party has sufficiently demonstrated that it will suffer harm without the stay and, after the demonstration of irreparable harm, will examine the other two factors. In the *Wattenberg* decision, the Commission determined that this request for a stay, being only based upon a need to investigate the jurisdictional status of the certificated facilities, would not cause the respondent to incur such irreparable harm.¹¹⁹ A great number of requests for a stay of Commission orders were submitted in regards to the issuance of hydropower project licenses. A stay of the Commission's order re-licensing an existing hydro project, inclusive of certain new license operating requirements, was partially stayed pending judicial review based upon a demonstration of irreparable harm.¹²⁰ The Commission considered as an adequate demonstration of "irreparable harm," the fact that the licensee would be required to incur the costs for substantial modifications to its project, that could be rendered unnecessary if the project was substantially modified as a result of the pending judicial review.¹²¹ The Commission also issued stays of new hydro-license compliance requirement orders to the Eugene Water and Electric Board pending judicial review of the underlying license order.¹²² Alternatively, the administrative procedural concept that the "irreparable harm" standard for issuance of a stay of a hydro project license order, is generally not established solely by the existence of economic harm in the form of increased costs to complete the project was reaffirmed in the denial of the request to stay the licenses issued to N.E.W. Hydro, Inc.¹²³ The Commission also denied a request to stay its order designating the date for the commencement of construction on a hydro project, upon receiving evidence that the required redesign of the project would not significantly delay the original construction time estimate.¹²⁴ Even after a demonstration of irreparable harm, the Commission is hesitant to stay the portion of hydropower license order requirements relating to compliance with its own safety regulations.¹²⁵

117. 5 U.S.C. § 705 (1994).

118. *KN Wattenberg Transmission L.L.C.*, 89 F.E.R.C. ¶ 61,174 (1999).

119. *Id.* at 61,528.

120. *City of Tacoma, Wash., Project Nos. 460-015, 020 and 021*, 87 F.E.R.C. ¶ 61,197 (1999).

121. *Id.* at 61,738.

122. *Eugene Water & Elec. Bd., Project No. 2496-039*, 87 F.E.R.C. ¶ 61,139 (1999), 88 F.E.R.C. ¶ 61,064 (1999).

123. *N.E.W. Hydro, Inc., Project No. 2523-017*, 88 F.E.R.C. ¶ 61,259 (1999).

124. *Southeastern Hydro-Power Inc., Project No. 6879-021*, 88 F.E.R.C. ¶ 61,065 (1999).

125. *Great N. Paper, Inc., Project No. 2034-009*, 88 F.E.R.C. ¶ 61,258 (1999).

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