

## *Report of the Committee on Judicial Review*

Since the publication of the last Report of the Committee on Judicial Review, several significant cases have been decided concerning questions which arise regularly in the appeals process. These questions include (1) whether an order is final and therefore appealable; (2) whether a party has fulfilled the jurisdictional prerequisites of taking an appeal; and (3) which court of appeals should hear the appeal. The Federal Energy Bar should take note of these cases and the developments which they foretell.

### I. FINALITY OF ORDERS

Both the Federal Energy Regulatory Commission<sup>1</sup> and the U.S. Courts of Appeals have reinforced and expanded the principle of *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission*<sup>2</sup> that an order accepting a rate filing is unreviewable. Thus, in *Boroughs of Ellwood City v. Federal Energy Regulatory Commission*,<sup>3</sup> the Third Circuit held that the Commission's order fixing the length of the suspension period of a filed rate schedule was not a final order and consequently was not subject to judicial review. The court reasoned that were it to hold the suspension order a reviewable final order, "the courts would soon find themselves in a position of having to ascertain whether the challenged rates are just and reasonable even before the Commission has discharged that function."<sup>4</sup> The court further noted that "[p]reliminary decisions are designed to give the FERC an opportunity to investigate before it reaches the ultimate determination on the justifiability of the rates in a way that minimizes the unfairness to the parties."<sup>5</sup>

Similarly, in *Cities of Carlisle and Neola, Iowa v. Federal Energy Regulatory Commission*,<sup>6</sup> the D.C. Circuit held that a FERC order accepting and not suspending a filed rate schedule was unreviewable.<sup>7</sup> The court recognized that this order meant that FERC would proceed under § 206 rather than § 205 of the Federal Power Act to determine the lawfulness of the rates, and that the appellant customers would therefore bear the burden of proof and might lose their right to a refund. Nevertheless, the court refused to find the irrevocable harm necessary to render the order reviewable under the exception carved out in *Papago*.<sup>8</sup> The court expressed a concern shared by the Third Circuit's *Ellwood Cities* decisions that judicial review would impinge on the

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<sup>1</sup>The Federal Energy Regulatory Commission, except in case titles, will hereinafter be referred to as "FERC" or "the Commission."

<sup>2</sup>628 F.2d 235 (D.C. Cir.), cert. denied, 449 U.S. 1061 (1980).

<sup>3</sup>701 F.2d 266 (3d Cir. 1983) (hereinafter sometimes referred to as "*Ellwood City*").

<sup>4</sup>*Ellwood City*, 701 F.2d at 270.

<sup>5</sup>*Id.* at 271. The court noted that although the Federal Power Act's refund provision assures customers recovery of excessive charges collected under an unsuspended but ultimately invalidated rate schedule, no complementary provision allows a public utility recovery of amounts not collected under a suspended but ultimately vindicated rate schedule. This suggests that a suspension order challenged by a public utility rather than a customer remains appealable under 16 U.S.C. § 824d(e), which requires the Commission to provide to the affected utility the reasons for the suspension. *Id.* at 269-70 (citing *Connecticut Light & Power Co. v. Federal Energy Regulatory Comm'n.*, 627 F.2d 467 (D.C. Cir. 1980)).

<sup>6</sup>Util. L. Rep. (CCH) ¶ 12,694 (D.C. Cir. April 5, 1983).

<sup>7</sup>The court relied in large part on three cases: *Delmarva Power & Light Co. v. Federal Energy Regulatory Commission*, 671 F.2d 587 (D.C. Cir. 1982) (FERC order accepting and suspending rate schedule non-reviewable); *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission*, *supra*, (order accepting rate filing non-reviewable); *Municipal Light Boards v. Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972) (order suspending rate schedule and fixing length of suspension non-reviewable).

<sup>8</sup>*Id.* at 17,056.

Commission's original jurisdiction over the lawfulness of rates:

The decisions how to utilize its limited resources and what procedures to follow with regard to timing, burden of proof and remedy are uniquely within the competence of the Commission in the first instance. These decisions not only involve a comparative consideration of the agency's entire docket and the other filings before it — information not before the court — but also call upon agency expertise in evaluating the complex economic and technical factors underlying a rate filing, expertise which the courts cannot match.<sup>9</sup>

In *Cities of Anaheim and Riverside, California v. Federal Energy Regulatory Commission*,<sup>10</sup> a case arising under Part I of the Power Act, the D.C. Circuit found that orders effectively transforming a contested preliminary permit proceeding into a license proceeding were not final and were unreviewable, because they were "merely procedural." The court reached this conclusion even though this action potentially caused the municipal appellant to lose its priority for a license.<sup>11</sup>

Finally, the FERC has held that an order of the Division of Hydropower Licensing accepting for filing a competing license application was interlocutory and not appealable to the Commission under Section 1.7(d) of the FERC's regulations.<sup>12</sup> That provision stated that "[a]ny staff action, other than a decision or ruling of a presiding administrative law judge, taken pursuant to authority delegated to the staff by the Commission that would be final . . . may be appealed to the Commission . . ." <sup>13</sup> Reading section 1.7(d) with *Papago*, the Commission concluded that only if a staff order meets the specifications of the regulation is it appealable.<sup>14</sup> The FERC has thus incorporated by reference into its internal procedures the courts of appeals' standard of appealability and final order rule.

The theme running through these cases is that effective delegation in the ratemaking and licensing area, on whatever level, requires that all substantial steps in the decision-making process, save the ultimate step, be free from review. The courts and the FERC have arrived at this conclusion by focusing on the overall efficiency of the administrative process. One other recent case reaches a similar result simply by applying the doctrine of standing.

In *Tenneco, Inc. v. Federal Energy Regulatory Commission*,<sup>15</sup> the Fifth Circuit held that Tenneco was not aggrieved by the FERC's order terminating an adjudicatory proceeding commenced pursuant to Tenneco's petition for a declaratory order when the FERC had instead undertaken an investigation of the matters with which Tenneco was concerned. The Court reasoned that a party does not gain a right to an adjudication just because the FERC had commenced an adjudication, and that Tenneco therefore lacked standing to appeal the order.<sup>16</sup> Furthermore, the court

<sup>9</sup>*Id.* at 17,056-17,057.

<sup>10</sup>692 F.2d 773 (D.C. Cir. 1982).

<sup>11</sup>The municipality had initially applied for a preliminary permit in response to Southern California Edison Company's ("SCE's") application therefor to study the development of hydroelectric power at a particular site. FERC is statutorily bound to give municipalities a preference in issuing preliminary permits, 16 U.S.C. § 800(a) (1980), and the holder of a preliminary permit in turn attains priority of application for a license, 16 U.S.C. § 798 (1980). The FERC subsequently permitted SCE to recast its application as one for an amendment to its existing license, which, as a license application, would be preferred over the municipality's permit application. *Id.* at 774-78.

<sup>12</sup>*J. R. Ferguson & Associates*, 20 FERC (CCH) ¶ 61,132 (August 2, 1982).

<sup>13</sup>18 C.F.R. § 1.7(d) (1982). Section 1.7(d) has been replaced by Rule 1902 of the Commission's revised Rules of Practice and Procedure, 18 C.F.R. § 385.1902, 47 Fed. Reg. 19014 (May 3, 1982); the operative terms are unchanged.

<sup>14</sup>20 FERC (CCH) at ¶ 61,291.

<sup>15</sup>688 F.2d 1018 (5th Cir. 1982).

<sup>16</sup>688 F.2d at 1022. *Cf. Cerro Wire & Cable Co. v. Federal Energy Regulatory Comm'n.*, 677 F.2d 124 (D.C. Cir. 1982) (when no material issue of fact in dispute, FERC decision to hold informal conference instead of formal hearing not arbitrary and capricious).

said, given the pendency of the investigation, the order terminating the adjudication was not dispositive of Tenneco's substantive rights; thus, Tenneco was not injured and lacked standing.<sup>17</sup>

## II. PREREQUISITES TO JUDICIAL REVIEW: JURISDICTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under section 19(a) of the Natural Gas Act<sup>18</sup> and section 313(a) of the Federal Power Act,<sup>19</sup> a party seeking judicial review of a Commission order must first apply to the Commission for rehearing. The petition for rehearing is a jurisdictional prerequisite to judicial review.<sup>20</sup> With respect to delegated staff action, the rehearing requirement applies even if such actin has first been appealed to the full Commission.<sup>21</sup> Thus, in *Southern Union Gathering Company v. Federal Energy Regulatory Commission*,<sup>22</sup> the Fifth Circuit confirmed that an appeal of an order of the Director of the Office of Pipeline and Producer Regulations did not constitute a petition for rehearing for judicial review purposes — that a petition for rehearing of the appeal was required prior to judicial review.

The court also held that an appeal of delegated staff action to the full Commission, as specified in Section 1.7(d) of the FERC's regulations, was "mandatory to the exhaustion of administrative remedies."<sup>23</sup> While the exhaustion-of-remedies doctrine is applied at a court's discretion, the court's use of the word "mandatory" suggests that it viewed the appeal requirement as jurisdictional. In any event, as a practical matter the appeal is mandatory, insofar as the petition for rehearing is mandatory, because rehearing cannot be brought unless the full Commission has made an initial disposition.

## III. THE RACE TO THE COURTHOUSE

Section 19(b) of the Natural Gas Act<sup>24</sup> and section 313(a) of the Federal Power Act,<sup>25</sup> allow a licensee or public utility aggrieved by a FERC final order to seek review in the circuit in which it is located or has its principal place of business, or in the D.C. Circuit. Section 2112(a) of title 28<sup>26</sup> provides that when more than one petition for review is filed in different courts of appeal, the FERC must file the record in the court in which the petition was filed first. Once it does so, that court has exclusive jurisdiction to review the order.<sup>27</sup>

The mechanical "first-in-time, first-in-right" rule of section 2112(a) was intended to prevent the FERC from controlling the choice of forum simply by filing the record wherever it wished.<sup>28</sup> Section 2112(a) has, however, resulted in an acute forum-shopping problem between appellants from Commission decisions.

In *City of Gallup v. Federal Energy Regulatory Commission*,<sup>29</sup> the D.C. Circuit faced

<sup>17</sup>See 688 F.2d at 1023.

<sup>18</sup>15 U.S.C. § 717r(a) (1980).

<sup>19</sup>16 U.S.C. § 8251(a) (1980).

<sup>20</sup>E.g., *Placid Oil Co. v. Federal Energy Regulatory Comm'n*, 666 F.2d 976, 9809 (5th Cir. 1982).

<sup>21</sup>See 18 C.F.R. § 385.1902, 47 Fed. Reg. 19014 (May 3, 1982), which replaces 18 C.F.R. § 1.7(d) (1982).

<sup>22</sup>687 F.2d 87 (5th Cir. 1982).

<sup>23</sup>*Id.* at 92.

<sup>24</sup>15 U.S.C. § 717r(b) (1980).

<sup>25</sup>16 U.S.C. § 8251(a) (1980).

<sup>26</sup>28 U.S.C. § 2112(a) (1980).

<sup>27</sup>15 U.S.C. § 717r(b) (1980); 16 U.S.C. § 8251(b) (1980).

<sup>28</sup>See, e.g., *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 592 F.2d 693, 696 (3d Cir. 1979).

<sup>29</sup>Nos. 82-1069, 82-1075, 82-1099, 82-1115, slip op. (D.C. Cir. March 11, 1983) (per curiam).

the question whether an appeal of a rate increase order filed there by the City of Gallup was "first-in-time" when it was the first appeal filed after the posting of the FERC's order but the second filed after the release of that order for posting. Public Service Company of New Mexico<sup>30</sup> had filed its appeal in the Tenth Circuit the moment the order reached the Commission clerk's in-box. Twenty-five seconds later, when the clerk had posted the order on the FERC's bulletin board, the City of Gallup and PNM filed simultaneously in the D.C. and Tenth Circuits, respectively. The parties were able to achieve this split-second timing by deploying representatives equipped with walkie-talkies at the FERC and at the courts of appeals.

The City of Gallup contended that an order is publicly issued and appealable under 16 U.S.C. § 8251(b) only when it has been posted. The D.C. Circuit held, however, that whether PNM's first petition was valid was for the court of first filing to decide. The court accordingly transferred the City of Gallup's petition for review to the Tenth Circuit pending the latter court's decision as to the validity of PNM's first-filed petition and corresponding order to the FERC directing filing of the record in the appropriate court of appeals.<sup>31</sup> The D.C. Circuit, of course, was fully aware that the choice of forum would be clear only if the Tenth Circuit found PNM's first petition valid, since the other two petitions were filed simultaneously. The court expressed the expectation that, were the Tenth Circuit to find PNM's first petition invalid, "that court would contact this court informally to designate one of the courts to make the choice of forum."<sup>32</sup> Assuming this choice were made on the basis of "convenience of the parties in the interest of justice,"<sup>33</sup> this is indeed the best solution.

It remains, however, that when "zealous representatives employing modern technology"<sup>34</sup> exploit that technology with the utmost precision, simultaneous filings will become more frequent. This will defeat the purpose of the first-filing rule of section 2112(a) — to allow the parties to choose the forum, at least in the first instance. Legislators may well question whether, in that event, the first-filing rule is necessary or desirable.<sup>35</sup>

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<sup>30</sup> Hereafter referred to as "PNM."

<sup>31</sup> *Id.* at 17-18.

<sup>32</sup> *Id.* at 17.

<sup>33</sup> This is the ultimate standard for choice of venue under 28 U.S.C. § 2112(a) (1980), the choice effected by first filing to stand only if it also meets this standard.

<sup>34</sup> *City of Gallup*, slip op. at 18.

<sup>35</sup> Legislation introduced in the 97th Congress appears to have done just that by providing for random selection of an appellate court when simultaneous appeals have been filed. See *City of Gallup*, slip op. at 18 n.5.