

Report of The Committee On Judicial Review

Since the last report of the Committee on Judicial Review,¹ the Supreme Court and the United States courts of appeals have reaffirmed several accepted principles of judicial review of Commission² orders. These include (i) whether a party has satisfied the jurisdictional prerequisites to judicial review; (ii) when rehearing and judicial review should be sought; (iii) whether a person is a party to a Commission proceeding; (iv) how to determine which court of appeals has jurisdiction to review a Commission order when several petitions for review are filed simultaneously in two or more circuits; and (v) whether suspension orders are subject to judicial review, and, if so, the extent of such review.

This report focuses mainly on the jurisdictional prerequisites, including rehearing, to obtaining judicial review under the Federal Power Act,³ Natural Gas Act,⁴ and Natural Gas Policy Act of 1978 ("NGPA"),⁵ because most of the cases decided in 1984 address those matters. The Commission, however, also acts under other statutes, including the Interstate Commerce Act,⁶ which do not require an application for rehearing as a jurisdictional prerequisite to judicial review.⁷

One purpose of this report is to integrate the past cases and recent decisions. A second purpose is to advise members of this association and other practitioners before the Commission and the courts of appeals of the implications of the principles set out in these cases.

JURISDICTIONAL PREREQUISITES TO JUDICIAL REVIEW

A. *Rehearing.*

Section 313(a) of the Federal Power Act,⁸ Section 19(a) of the Natural Gas Act,⁹ and Section 506(a)(2) of the NGPA,¹⁰ require a party seeking judicial review to have filed an application for rehearing of the Commission's order. The application for rehearing is a jurisdictional prerequisite to judicial review.¹¹

In 1955, the Supreme Court held that a party may not decline to seek review of an order which may aggrieve that party and then challenge that order in subsequent

¹Energy L. J. 445 (1983).

²Herein, the term "Commission" means the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

³16 U.S.C. § 791, *et seq.*

⁴15 U.S.C. § 717, *et seq.*

⁵15 U.S.C. § 3301, *et seq.*

⁶49 U.S.C. § 1, *et seq.* In 1978, the Interstate Commerce Act was recodified as 49 U.S.C. § 10101, *et seq.* As recodified, this act does not apply to oil pipelines. 49 U.S.C. § 10501(a)(1)(C). Oil pipelines are covered by this act as it existed before the recodification. See Section 4(c) of the Recodification Act of 1978, Pub. L. 95-473, 92 Stat. 1466 (1978).

⁷Judicial review of Commission orders issued under the Interstate Commerce Act is governed by 28 U.S.C. §§ 2321-2323, 2341-2356.

⁸16 U.S.C. § 825¹(a)(1980).

⁹15 U.S.C. § 717r(a)(1980).

¹⁰15 U.S.C. § 3301(a)(2)(1980).

¹¹FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 497-499, 501 (1955); Interstate Natural Gas Association of America v. FERC, 716 F.2d 1, 15 (D.C. Cir. 1983); *cert. denied*, 104 S. Ct. 1615 (1984); ECEE, Inc. v. FERC, 611 F.2d 554, 555, 563, 566 (5th Cir. 1980).

proceedings.¹² In that case, the Commission had approved the merger of Canadian River Gas Company into Colorado Interstate on the condition that any losses from certain gas processing operations would not be considered in determining Colorado Interstate's cost of service.¹³ In a subsequent rate proceeding, Colorado Interstate objected to the cost allocation method, but did not challenge the merger condition.¹⁴ On judicial review, the Tenth Circuit, *sua sponte*, held that the loss must be included in the cost of service in spite of the merger condition.¹⁵ The Supreme Court reversed, holding that (i) the courts of appeals may not consider, *sua sponte*, issues not raised in the petitioner's application for rehearing to the Commission,¹⁶ and (ii) the courts of appeals may not determine the validity of orders which were never the subject of judicial review and thus are final.¹⁷ On this latter point, the Supreme Court held that a party receiving the benefits of an order may not challenge provisions of that order in a subsequent, separate proceeding.¹⁸

In spite of the Supreme Court's holding in *Colorado Interstate*, some parties to Commission proceedings do not seek rehearing and judicial review of an order for various reasons and later seek to challenge a subsequent order which implements the provisions of the first order. In 1984, two courts of appeals dismissed petitions for review because the petitioners had failed to seek rehearing and judicial review of the Commission's original orders.

The District of Columbia Circuit dismissed a petition for review of an order requiring a company to credit revenues to its purchased gas adjustment clause accounts because the company had accepted a certificate containing the crediting condition, without applying for rehearing and seeking judicial review of the certificate order.¹⁹ Midwestern had accepted a blanket certificate containing a condition requiring Midwestern to credit certain transportation revenues to Account No. 191.²⁰ Later, Midwestern filed a PGA adjustment without crediting the transportation revenues claiming that the condition was unlawful.²¹ The Commission rejected these claims and Midwestern sought judicial review.²² The D.C. Circuit held that Midwestern's objections could not be considered because of a procedural infirmity.²³ The Court described Midwestern's failure to seek rehearing and judicial review of the certificate order as a "jurisdictional bar" to Midwestern's later challenge to the rate order.²⁴ The court then held "that when Midwestern

¹²FPC v. Colorado Interstate Gas Co., *supra*, 348 U.S. at 493-494, 501-502.

¹³*Id.* at 494-495.

¹⁴*Id.* at 496.

¹⁵*Id.*

¹⁶*Id.* at 497-499, 501.

¹⁷*Id.* at 501-502.

¹⁸*Id.* at 502.

¹⁹Midwestern Gas Transmission Co. v. FERC, 734 F.2d 828 (D.C. Cir. 1984).

²⁰Account 191 contains unrecovered purchased gas costs. Balances in this account increase the pipelines' rates. The crediting of transportation revenues reduces such balances and resulting rate increases. *Id.* at 829-830.

²¹*Id.* at 830.

²²*Id.*

²³*Id.* at 831.

²⁴*Id.* at 832.

accepted without challenge its certificate containing the revenue-crediting condition, it waived its opportunity to challenge the condition later.”²⁵

The Eighth Circuit also dismissed a petition for review because Montana-Dakota Utilities Company had failed to seek rehearing and judicial review of a certificate order.²⁶ The Commission had issued a certificate authorizing Montana-Dakota to sell gas to Colorado Interstate Gas Company. In that order, the Commission stated expressly that the contract and certificate had no minimum take requirement.²⁷ Later, when Colorado Interstate reduced its takes, Montana-Dakota filed a complaint with the Commission. The Commission dismissed the complaint, holding that Montana-Dakota was aggrieved, if at all, by the original order, and, having failed to seek rehearing and judicial review of the certificate order, could not use a complaint to challenge that order.²⁸ The Eighth Circuit dismissed Montana-Dakota’s petition for review, holding that Montana-Dakota’s failure to seek rehearing of the original certificate order barred it from challenging provisions of that order in subsequent proceedings.²⁹

The District of Columbia Circuit recently emphasized the need for parties objecting to an order to seek rehearing.³⁰ Several parties that objected to the grant of an exemption from licensing intervened in proceedings in which International Paper sought review of the revocation of its exemption. These parties, however, had not presented their objections to the Commission in an application for rehearing of the exemption.³¹ The Court held that “[b]ecause neither intervenor sought rehearing from the Commission, their arguments going to the merits of petitioner’s exemptions are not properly before us.”³²

The D.C. Circuit’s decision is important in terms of the timing of judicial review. If the intervenors had applied for rehearing of the automatic grant of the exemption, the Commission would have been compelled to address that grant then rather than later in the revocation order. If the Commission had affirmed the automatic grant of the exemption, the intervenors could have sought judicial review of the grant of the exemption and presented their objections to a court of appeals.

By not seeking rehearing and judicial review of the automatic grant of exemption, the intervenors deprived themselves of the right to present their objections to that grant of the exemption. The court of appeals was limited to considering the reasons given by the Commission in its order.³³ As a result, the intervenors lost the opportunity to present their objections to International Paper’s exempt status to a court of appeals.

The D.C. Circuit also issued a decision holding that interpretative rules may not be reviewable until applied to a company.³⁴ In 1983, the Commission issued a

²⁵*Id.*

²⁶*Montana-Dakota Utilities Co. v. FERC*, 739 F.2d 376 (8th Cir. 1984).

²⁷*Id.* at 379-380.

²⁸*Id.*

²⁹*Id.* at 380-381.

³⁰*International Paper Co. v. FERC*, 737 F.2d 1159 (D.C. Cir. 1984).

³¹*Id.* at 1162 & n. 5.

³²*Id.* at 1162 n. 5.

³³*FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (“an agency’s order must be upheld, if at all, ‘on the same basis articulated in the order by the agency itself’”).

³⁴*Tennessee Gas Pipeline Co. v. FERC*, 736 F.2d 747 (D.C. Cir. 1984).

decision under the Federal Power Act, holding that it has authority to suspend initial rates filed under that Act.³⁵ The Commission also issued new interpretative rules under the Federal Power Act and Natural Gas Act, stating that it has authority to suspend initial rates.³⁶ The Court dismissed Tennessee's petition for review of the interpretative rule issued under the Natural Gas Act "for want of a question ripe for review."³⁷ The Court concluded that the Commission's interpretation was an issue fit for judicial review,³⁸ but that immediate review was not appropriate because Tennessee had not shown any current hardship resulting from the Commission's interpretation.³⁹ A major factor underlying the court's finding of no current hardship was its conclusion that Tennessee can seek immediate judicial review of any order suspending an initial rate.⁴⁰

The D.C. Circuit's decision makes little sense because of the pendency of a companion case under the Federal Power Act, and the Court's subsequent decision in that case. In that decision, the Court reversed the Commission's decision and the interpretative rule under the Federal Power Act.⁴¹

B. Party To A Proceeding.

Over twenty years ago, the District of Columbia Circuit held that a person denied intervention in a proceeding is a party to that proceeding for the limited purpose of seeking review of the denial of intervention.⁴² The Court held that "applicants for intervention have a right to judicial review of such denials [of intervention]."⁴³ Such a person must seek rehearing of the denial of intervention and then judicial review if rehearing is denied;⁴⁴ the result of a failure to seek rehearing and judicial review is the dismissal of any petition for review of subsequent orders in that proceeding.⁴⁵ Furthermore, the Court held that if the Commission erred in denying intervention at the opening stages of a proceeding, then the proceeding will have to be reopened and the excluded person permitted to participate as a full party.⁴⁶

The D.C. Circuit reaffirmed that a person denied intervention is a party to the proceeding for purposes of seeking judicial review of the denial of intervention.⁴⁷ NCWCD claimed that it had not received actual notice of an application for a preliminary permit as required by statute and moved to intervene and to reopen the proceeding.⁴⁸ The D.C. Circuit dismissed the Commission's contention that NCWCD's petition for review should be dismissed because NCWCD was not a party

³⁵*Id.* at 748.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.* at 749.

³⁹*Id.* at 749-750.

⁴⁰*Id.* at 751.

⁴¹*Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984).

⁴²*Public Service Commission v. FPC*, 284 F.2d 200, 203-204 (D.C. Cir. 1960).

⁴³*Id.* at 206.

⁴⁴*Id.* at 204, 205-206.

⁴⁵*Id.* at 204-205.

⁴⁶*Id.* at 206.

⁴⁷*Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984).

⁴⁸*Id.* at 1511, 1514.

to the proceeding. The Court held that “a petitioner must obviously be considered a party for the limited purpose of reviewing the agency’s basis for denying party status.”⁴⁹ The Court also stated that “it would be unfair to declare the denial of an untimely effort to reopen a proceeding to be unreviewable, when the basis of the effort is the contention that, because a required notice was not given, a timely objection was infeasible.”⁵⁰

The D.C. Circuit then addressed NCWCD’s arguments on the merits.⁵¹ After concluding that NCWCD was entitled to statutory notice,⁵² the Court reversed the Commission’s rejection of NCWCD’s petition to reopen as untimely and remanded for further proceedings to determine if the petition was untimely.⁵³

Public Service Commission and *NCWCD* illustrate the dangers inherent in a Commission denial of intervention. A final order issuing a certificate or a license or approving rates may be negated because a person was denied intervention early in the proceeding. In some cases, a person obtaining a reversal of a denial of intervention may be entitled to a new hearing, however lengthy.

The greatest protection against such results is the Commission’s policy of granting most requests to intervene. Even though it has adopted more restrictive policies regarding requests to intervene late,⁵⁴ and requires persons seeking to intervene late to justify their belated requests,⁵⁵ the Commission still grants many such requests. Furthermore, very few denials of intervention are taken to the courts of appeals.

C. *Limitation On The Issues Which May Be Raised On Review.*

Section 313(b) of the Federal Power Act,⁵⁶ Section 19(b) of the Natural Gas Act,⁵⁷ and Section 506(a)(4) of the NGPA,⁵⁸ provide that “[n]o objection to [the Commission’s order] shall be considered by the court if such objection was not argued before the Commission in the application for rehearing” In 1955, the Supreme Court held that a court of appeals may not consider, *sua sponte*, an objection not urged in the application for rehearing.⁵⁹

In 1984, the Supreme Court refused to consider an issue because it had not been raised on rehearing before the Commission.⁶⁰ The Supreme Court refused to consider petitioners’ arguments that a proceeding was a relicensing proceeding subject to Section 15(a) of the Federal Power Act,⁶¹ not an original licensing

⁴⁹*Id.* at 1515.

⁵⁰*Id.*

⁵¹*Id.* at 1515-1524.

⁵²*Id.* at 1515-1516, 1521.

⁵³*Id.* at 1524.

⁵⁴18 C.F.R. § 385.214.

⁵⁵*E.g.*, Valero Interstate Transmission Co., 28 F.E.R.C. ¶ 61,026 (1984).

⁵⁶16 U.S.C. § 825¹(b).

⁵⁷15 U.S.C. § 717r(b).

⁵⁸15 U.S.C. § 3416(a)(4).

⁵⁹FPC v. Colorado Interstate Gas Co., 348 U.S. at 498-499.

⁶⁰Escondido Mutual Water Co. v. La Jolla, Bands of Mission Indians, 80 L. Ed. 2d 753, 755-766 n. 23 (1984).

⁶¹16 U.S.C. § 797(e).

proceeding subject to Section 4(e),⁶² because that objection had not been raised in the application for rehearing.⁶³ According to the Supreme Court, because petitioners had not objected to the Commission's treatment of the proceeding as a Section 4(e) proceeding for an original license, "they may not challenge it now"⁶⁴

Furthermore, merely mentioning an objection in an application for rehearing may not satisfy the requirement that an objection be raised in the application for rehearing.⁶⁵ The Sixth Circuit noted that petitioner's application for rehearing "mentioned the provision only twice and neither time was there any explicit argument."⁶⁶ Because it disposed of the case on other grounds, the Sixth Circuit did "not decide whether the issue was sufficiently raised or whether the failure to more explicitly raise it was excusable."⁶⁷

Several cases in recent years have held that applications for rehearing must raise explicitly the petitioner's objections to the Commission's order.⁶⁸ The Sixth Circuit's observation, albeit a dictum, probably should be read as requiring at least some brief argument supporting a specification or error as well as a listing of the errors.⁶⁹

D. *Exclusivity Of Judicial Review Procedures.*

In 1983, the United States District Court for the District of Oregon rejected claims that it had authority to review Commission decisions.⁷⁰ In *Steamboaters*, the Steamboaters, which had petitioned to intervene in a proceeding in which the applicant sought an exemption from the hydroelectric licensing provisions of Part I of the Federal Power Act, and had its grant of intervention rescinded,⁷¹ sought review of the order issuing the exemption⁷² in the District Court.⁷³ Thus, the District Court had to decide if a person not then a party to a Commission proceeding may obtain review of an order issued in that proceeding in a District Court.⁷⁴ The District Court ruled that it lacked jurisdiction to review the Commission's orders because the Federal Power Act vests the courts of appeals with exclusive jurisdiction to review Commission orders.⁷⁵ Although the Steamboaters were not then a party to the

⁶²16 U.S.C. § 808(a).

⁶³80 L. Ed. 2d at 766 n. 23.

⁶⁴*Id.*

⁶⁵*Cincinnati Gas & Electric Co. v. FERC*, 724 F.2d 550 (6th Cir. 1984).

⁶⁶*Id.* at 553-554.

⁶⁷*Id.* at 554.

⁶⁸*E.g.*, *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 958-959 (4th Cir. 1979); *Phillips Petroleum Co. v. FPC*, 556 F.2d 466, 471 (10th Cir. 1977).

⁶⁹Rule 713 of the Commission's Rules of Practice and Procedures requires a person seeking rehearing to "[s]tate concise the alleged error[s]" and "to [s]et forth the matters" support the request for rehearing. 18 C.F.R. §§ 385.713(c)(1), (3)(1984).

⁷⁰*Steamboaters v. FERC*, 572 F. Supp. 329 (D. Ore. 1983).

⁷¹*Id.*, 23 F.E.R.C. ¶ 61097 (1983).

⁷²572 F. Supp. at 329 & n. 1, 330-331.

⁷³*Id.* at 330-331.

⁷⁴*Id.* at 329, 330-331.

Commission proceedings,⁷⁶ the District Court held that it did not have jurisdiction to hear the case.⁷⁷

Congress did not intend to create a "system of bifurcated jurisdiction" with parties filing in the courts of appeals and non-parties filing in the district courts, only to have the district court decisions appealed to the courts of appeals.⁷⁸

VENUE FOR JUDICIAL REVIEW RACES TO THE COURTHOUSE

In recent years, a number of Commission orders have been the subject of "races to the courthouse" as parties attempt to file petitions, and obtain venue, in a court of appeals which they believe will be more favorable to their positions than other courts of appeals.⁷⁹ These races led the Fifth Circuit to amend its rules to require the Commission to conduct factual hearings in any case pending in that Court in which any party raises a question of venue.⁸⁰ Recently, the Commission changed its policies regarding the time when its orders are deemed issued. Whether this new policy will alleviate or eliminate past problems, and/or create new ones, remains to be seen.

The source of the venue disputes is the statutory provisions governing judicial review of Commission orders issued under the Federal Power Act, the Natural Gas Act, the NGPA, and the Interstate Commerce Act. Section 313(b) of the Federal Power Act, Section 19(b) of the Natural Gas Act, Section 506(a)(4) of the NGPA, and 28 U.S.C. § 2343 which governs review of orders issued under the Interstate Commerce Act, provide that review may be had in the court of appeals for the circuit in which the regulated company is located (incorporated) or has its principal place of business, or in the District of Columbia Circuit.⁸¹ Section 2112(a)⁸² then provides that venue for review purposes is in the circuit in which the first petition is filed. This provision is applied literally. Review is had in the circuit in which the first petition is filed even if that petition is filed only seconds before a second petition is filed in another circuit.⁸³ Thus, the statutes reward the party which can file a petition for review within seconds after the Commission issues its order and seconds before another party files in another circuit.

The Commission's former practice of specifying the time when its orders were deemed issued as the exact time that the order was time-stamped in the Office of

⁷⁶For purposes of obtaining judicial review of the rescission of intervenor status, Steamboaters were a party to the proceedings. *See, e.g.*, Northern Colorado Water Conservancy District v. FERC, 730 F.2d 1509, 1515 (D.C. Cir. 1984).

⁷⁷572 F. Supp. at 330.

⁷⁸*Id.* at 331.

⁷⁹*E.g.*, Associated Gas Producers v. FERC, 738 F.2d 1388 (D.C. Cir. 1984); Public Service Company of New Mexico v. FERC, 716 F.2d 778 (10th Cir. 1983); City of Gallup v. FERC, 702 F.2d 1116 (D.C. Cir. 1983), *on reh.*, 726 F.2d 772 (D.C. Cir. 1984); Pennzoil Co. v. FERC, 645 F.2d 360, 371 & n. 21 (5th Cir. 1981) *cert. den.* 454 US 1142 (1982); American Public Gas Association v. FPC, 555 F.2d 852, 856-857 (D.C. Cir. 1976); Shell Oil v. FPC, 509 F.2d 176, 179 & n. 5 (5th Cir. 1975).

⁸⁰Fifth Circuit Rule 15.3.5.

⁸¹Section 506(a)(4) of the NGPA and 28 U.S.C. § 2343 substitute party to the proceeding for the regulated entity, thereby enlarging the number of circuits in which review may be sought.

⁸²28 U.S.C. § 2112(a).

⁸³*See, e.g.*, Associated Gas Distributors v. FERC, 738 F.2d at 1391.

Public Information placed a premium on split-second timing.⁸⁴ Parties engaging in a race to the courthouse would await this moment and then pass signals along to persons waiting in the clerks' offices to file.⁸⁵ Thereafter, the Commission and the courts attempted to determine which petition was filed first.⁸⁶

Recently the Commission changed its practice of deeming orders to be issued at the exact time that they are posted. Now, the Commission deems its orders to be issued at exactly 10:00 a.m. or 3:00 p.m. when the orders are posted within a few minutes of one of those times. The Commission however, has not explained how to determine the time of issuance when an order is posted at another time, for example, 4:30 p.m.

Two courts of appeals have accepted the Commission's practice of deeming its orders issued at 10:00 a.m. and 3:00 p.m. The Tenth Circuit was the first circuit to address and approve the Commission's new practice.⁸⁷ Now, the District of Columbia Circuit has approved the practice.⁸⁸ Quoting from the Tenth Circuit's opinion, the D.C. Circuit explained that "'10:00 a.m. and 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.'"⁸⁹ The D.C. Circuit then concluded that the Tenth Circuit's "decision to rely on FERC's 'long-standing' posting hours is equally applicable to orders posted shortly *after* the scheduled posting time."⁹⁰ The D.C. Circuit explained the reasons for relying on the scheduled, rather than the actual, posting time:

We agree with the Tenth Circuit that the scheduled posting time should control the validity of petitions for review, as long as the actual posting time is within a few minutes of the scheduled time. To hold otherwise would require the courts to ascertain the precise moment that a particular order was posted and would permit the race to the courthouse to run with an advantage to those able to send a body with a split-second clock and walkie-talkie to FERC. We do not believe this result is either necessary or desirable.⁹¹

The difficulty with using 10:00 a.m. and 3:00 p.m. as the time of issuance is that it creates the possibility of a tie. Because they know the time of issuance in advance, parties can simply wait at the chosen courthouse and file petitions for review at exactly 10:00 a.m. and 3:00 p.m. each day until the order is issued. If two or more petitions are filed at exactly the same time as the order is issued, Section 2112(a) cannot be applied because there is no petition which was filed first.⁹² In such a case, the courts of appeals have to rely on other criteria such as "convenience of the parties" to determine venue. In one such case, the D.C. Circuit determined that it had venue because the Commission and some of the attorneys for some of the

⁸⁴*E.g.*, Shell Oil Co. v. FPC.

⁸⁵*E.g.*, Tenneco Oil Co., 6 F.E.R.C. ¶ 63015 at 65123-65124 (1979).

⁸⁶*Id.* at 65124-65125 (reenactment of the original race).

⁸⁷Public Service Company of New Mexico v. FERC, 716 F.2d 778 (10th Cir. 1983).

⁸⁸Associated Gas Distributors v. FERC, 738 F.2d 1388 (D.C. Cir. 1984).

⁸⁹738 F.2d at 1391.

⁹⁰*Id.* (emphasis in original).

⁹¹*Id.* at 1392.

⁹²American Public Gas Association v. FPC, 555 F.2d at 857.

petitioners are located in the District of Columbia.⁹³ This problem may arise more frequently in the future.

In its opinion on rehearing in *City of Gallup*, the D.C. Circuit addressed a problem created by its earlier opinion in that case and the Tenth Circuit's *Public Service Company* opinion. Gallup had filed a petition for review when the Commission's order was posted shortly before the 3:00 p.m. posting time and a second one several days later.⁹⁴ The D.C. Circuit had transferred that first petition to the Tenth Circuit for a determination of venue, and dismissed the second as duplicative.⁹⁵ Then in *Public Service Company*, the Tenth Circuit held that all petitions for review filed before the 3:00 p.m. posting time, including Gallup's were premature. Gallup then requested the D.C. Circuit to reverse the dismissal of its second petition so that it could seek review of the Commission's orders. The D.C. Circuit agreed that the Tenth Circuit's dismissal of Gallup's petition was unanticipated and that Gallup's second petition should be reinstated in order to preserve Gallup's rights to seek review of the Commission's orders.⁹⁶

REVIEWABILITY OF SUSPENSION ORDERS

The District of Columbia Circuit reaffirmed that orders suspending proposed rate increases are subject only to "a very narrow standard of review[.]"⁹⁷ The Court held that as long as the Commission gives non-frivolous reasons for its decision to suspend and does not overstep the bounds of its authority, the courts of appeals will not review the act of suspension.⁹⁸ As long as the Commission gives reasons for the suspension and the length of the suspension, a court will not inquire further.⁹⁹

This decision reconciles two prior decisions concerning the reviewability of the length of a suspension.¹⁰⁰ *Connecticut Light & Power* held "that the agency must give 'reasons for the length of the suspension that fit the fact situation of the relevant case.c2'"¹⁰¹ *Delmarva*, on the other hand, held that a maximum length suspension, accompanied by reasons, was not reviewable.¹⁰² Concluding that *Connecticut Light* "authorized a more probing review of the merits of a suspension decision than is appropriate" and that *Delmarva* went too far in holding suspension decisions to be wholly unreviewable[.]"¹⁰³ the Court held that courts should review a suspension decision to determine if the reasons given for the length of the suspension are related to the Commission's statutory inquiries and that the Commission had not imposed different lengths of suspension in indistinguishable cases without offering

⁹³*Id.* at 857-858.

⁹⁴726 F.2d at 772-773.

⁹⁵*Id.* at 773.

⁹⁶*Id.* at 773-774.

⁹⁷*Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1468 (D.C. Cir. 1984).

⁹⁸*Id.* at 1473.

⁹⁹*Id.* at 1473, 1474.

¹⁰⁰*Connecticut Light & Power Co. v. FERC*, 627 F.2d 467 (D.C. Cir. 1980); *Delmarva Power & Light Co. v. FERC*, 671 F.2d 587 (D.C. Cir. 1982).

¹⁰¹*Exxon Pipeline*, 725 F.2d at 1471.

¹⁰²*Id.* at 1472-1473.

¹⁰³*Id.* at 1473.

even summary reasons for the difference or the action was "foreclosed by existing rules or past precedent."¹⁰⁴ In sum, *Exxon Pipeline* narrows the scope of review of suspension orders thought to be provided by *Connecticut Light*.

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¹⁰⁴*Id.* at 1474.