

ENERGY LAW JOURNAL

Volume 16, No. 2

1995

A SALUTE: 75 YEARS FOR THE FPC AND FERC¹

1995 marks the diamond anniversary of the Federal Energy Regulatory Commission (FERC) and its predecessor, the Federal Power Commission (FPC). On this 75th year, the *Journal* salutes the Commission and reviews how the Commission has met the challenges of the electric, hydroelectric, natural gas and oil pipeline industries.

Beginnings were on June 10, 1920, when Congress passed the Federal Water Power Act (FWPA)² in an attempt to correct conditions that had nearly stymied hydroelectric development. Prior to that time, licenses were issued by separate acts of Congress. The first FPC consisted of the Secretaries of War, Interior and Agriculture, *ex officio*. The Secretary of War, Newton D. Baker, was designated Chairman by President Woodrow Wilson.

The Executive Secretary, Mr. O.C. Merrill, was the first and only employee of the Commission. All other personnel, who assisted the Commission through the divisions of engineering, accounting, legal and operation, were on loan from other agencies of the government, principally from the three Cabinet Offices that constituted the Commission. The FPC's first staff, which consisted of 9 engineers, 2 draftsmen, 3 attorneys, 2 accountants, 13 clerks and stenographers and 2 messengers, occupied quarters in the Interior Department Building.³ The appropriation for the Commission's first fiscal year was \$100,000, of which nearly \$3,000 went unspent.

In its First Annual Report to Congress, the Commission noted:

What is seriously needed in the interest of adequate administration of the act is a small organization of trained and experienced men capable of meeting intelligently the important and perplexing engineering and economic problems which are constantly arising and upon the correct solution of which will depend the value of the legislation and, in no small degree, the future of

1. This Salute is a result of the efforts of Chair Elizabeth Moler, David Ward, Robert C. Platt, Sherman Poland and David Benkin.

2. Pub. L. No. 66-245, 41 Stat. 1063 (renumbered Pub. L. No. 95-617, 92 Stat. 3148 (1978)) (codified at 16 U.S.C. §§ 791a-825r).

3. In the mid 1940s, the Commission occupied rented space in the Hurley Wright Building at 1800 Pennsylvania Ave. In the early 1950s, the FPC moved to the General Accounting Office Building at 441 G Street N.W., before moving to 825 North Capitol Street in May 1973. In late 1995, the FERC moved to new headquarters at 888 1st Street N.E.

the electric power industry. It is, therefore, earnestly recommended that immediate steps be taken to amend the act, at least to the extent necessary to permit the Commission to employ its own personnel.⁴

In response, on July 1, 1928, the civilian employees, 29 in number, who had previously been assigned to the Commission from various bureaus of the offices of the Departments of War, Interior and Agriculture, were transferred permanently to the Commission.

Thereafter, The Act of June 23, 1930,⁵ created the five member independent Federal Power Commission. President Hoover appointed George Otis Smith as the first Chairman. The Secretary was F.E. Bonner, the first of only eight Secretaries, including the incumbent, to serve the independent Commission. The Commission's total costs in the 1930-31 fiscal year was \$1,976,074.16. There were 45 employees, in addition to the Commissioners. As of June 30, 1931, the Commission had issued 223 preliminary permits and 571 licenses. Of the 507 licenses then outstanding, 109 were for major projects and 398 for minor projects or for minor parts of complete projects. According to the Commission's Sixteenth Annual Report to Congress of June 30, 1936, (which was sold for 10 cents) the Commission Staff was reorganized to handle new duties. Regional offices were established in New York City, Atlanta, San Francisco, Denver and Chicago. The first National Power Survey was well under way. During the late 1930s, various other powers were conferred upon the Commission by the Tennessee Valley Authority Act,⁶ the Fort Peck Project,⁷ and the Flood Control Act of 1938.⁸

Then, in 1935, the Federal Power Act (FPA) became law as Part II of the Public Utility Act (the FWPA became Part I).⁹ The FPA gave the FPC rate and accounting jurisdiction over wholesale sales and transmission of electric in interstate commerce. The Commission's jurisdiction expanded significantly in 1938, when the Natural Gas Act (NGA)¹⁰ was passed, giving the FPC jurisdiction over natural gas companies similar to its jurisdiction over electric public utilities. In 1942, the NGA,¹¹ to provide for the issuance of a certificate of public convenience and necessity prior to construction of any jurisdictional pipeline facilities and prior to undertaking sales of natural gas in interstate commerce for resale. During fiscal years 1941 and 1942 employment at the FPC averaged 774 but decreased during World War II to approximately 664 in 1945.

In 1946, Congress adopted the Administrative Procedure Act (APA),¹² which brought the Commission under a common set of proce-

4. H.R. Doc. No. 242, 67th Cong., 2d Sess. (1922).

5. Pub. L. No. 71-412, 46 Stat. 797 (1930) (codified at 16 U.S.C. §§ 792, 793, 797).

6. Pub. L. No. 73-16, 48 Stat. 58 (codified at 16 U.S.C. § 831-831dd).

7. Pub. L. No. 75-529, 52 Stat. 403 (1938) (codified at 16 U.S.C. § 833-833q).

8. Pub. L. No. 75-761, 52 Stat. 1215, 1216, 1220, 1223, 1225, 1226 (codified in scattered sections of 33 U.S.C.).

9. 16 U.S.C. §§ 791a-828c.

10. Pub. L. No. 75-688, 52 Stat. 821 (codified at 15 U.S.C. § 717-717z).

11. Pub. L. No. 77-444, 56 Stat. 83 (codified at 15 U.S.C. § 717(c)-717(g)).

12. Pub. L. No. 89-554, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-559).

dural standards with all other federal regulatory agencies. The APA, among other things, codified the role of Hearing Examiners.¹³ The idea of employees performing a “judicial” role without life tenure was controversial. For example, the second Hoover Commission recommended in 1955 that an Administrative Court take over the adjudication functions of the FTC, ICC, FCC, CAB, FRB and FPC. However, over the years, the debate has subsided, and Administrative Law Judges (ALJs) are now a well established part of the Commission’s process.

The Commission’s corps of ALJs steadily grew, and benefited from the leadership of Chief Hearing Examiners with long tenures: Edward B. March, Joseph Zwerdling and incumbent, Curtis Wagner, Jr. One of the more interesting crises in the ALJ corps occurred in 1974, when Congress inadvertently created an incentive for ALJs to retire by amending the Civil Service Pay law.¹⁴ As a result, six out of the FPC’s 18 ALJs retired while the Commission faced a large backlog of gas pipeline curtailment adjudications. Another turning point occurred in the early 1980s, when the ALJ corps voted 19 to 1 to require the wearing of robes while presiding at hearings. The ALJs were required to purchase the robes at their own expense.

In the early days of the agency, all cases set for hearing were assigned to an ALJ. For example, even uncontested, routine applications for certificates of public convenience and necessity were heard by an ALJ. To expedite these cases, a special “Frannie” hearing procedure was created,¹⁵ so that at the start of the day, the ALJ would receive the uncontested applications into evidence and forward a draft order prepared by the Commission staff to the full Commission. As the procedure evolved, the Commission merely approved certificates with a paragraph reciting that a hearing was held, instead of requiring an ALJ to conduct a “live” hearing.

On June 7, 1954, the United States Supreme Court issued *Phillip’s Petroleum*,¹⁶ which held that all wellhead sales in interstate commerce of natural gas were subject to the FPC’s certificate and rate jurisdiction. Thus, overnight the FPC, which had been regulating a modest number of hydroelectric licensees, electric utilities and natural gas companies, was faced with the additional task of regulating sales of gas by hundreds of producers. By June 1955, the Commission had received 10,978 rate filings and 6,047 applications for certificates from producers. Meanwhile the Commission’s appropriation for fiscal year 1955 had decreased to \$4,250,000. By 1960, the Commission noted that there were 3,372 independent producers with rates on file and 570 producers involved in 3,278 rate increase filings awaiting hearings and decisions. The Commission dramatized its then-existing problems as follows:

13. Congress did not amend the APA to call these officials “Administrative Law Judges” until 1978. Pub. L. No. 95-251, 92 Stat. 183 (codified at 5 U.S.C. § 554(a)(2)).

14. Pub. L. No. 89-554, 80 Stat. 557 (codified at 5 U.S.C. §§ 8301-8351) (amended by Pub. L. No. 93-350, 88 Stat. 355, affecting §§ 8331(20),(21), 8335(g), 8336c, 8339d).

15. Named for the Frannie Gas Company, *see*, 4 F.P.C. 1118 (1945).

16. 347 U.S. 672 (1954).

"[I]f our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D. - eighty-two and one half years from now."¹⁷

Soon thereafter, the Commission instituted Area Rate Regulation of producers. This new method of regulation was approved in the *Permian Basin Area Rate Cases*.¹⁸ Later, the Commission regulated producers on a national basis. The FERC came into existence in 1977 with the enactment of the Department of Energy Organization Act.¹⁹ Under that statute, the FERC was to be an "independent regulatory commission within the Department of Energy."²⁰ Most of the FPC's duties were delegated to the new FERC. In addition, jurisdiction over oil pipelines was transferred from the Interstate Commerce Commission to the FERC. President Carter designated Charles Curtis as the first Chairman of the FERC. Mr. Curtis had been serving as Chairman of the FPC.

In 1978, after struggling for twenty four years with producer wellhead regulation, the Natural Gas Policy Act (NGPA)²¹ "simplified" the Commission's task (it only had to set prices for some 27 categories of gas) and started the march toward total wellhead deregulation that culminated with the Natural Gas Decontrol Act of 1989.²² In addition to the NGPA, the National Energy Act of 1978 also included the Public Utility Regulatory Policies Act (PURPA),²³ which was designed to encourage the construction and operation of cogeneration and small power production facilities. In the meantime, the Electric Consumers Protection Act of 1986,²⁴ substantially amended Part I of the FPA, giving federal and state resource agencies greater input into the hydro-power licensing process.

Finally, the Energy Policy Act of 1992 (EPAAct)²⁵ established, *inter alia*, a new class of electricity wholesalers, Exempt Wholesale Generators, to be regulated by the FERC in a light handed manner. The EPAAct also gave the FERC authority to order a transmitting utility to "wheel" power for any electric utility, thus starting the electric industry down the road to a more competitive environment.

In response to the EPAAct, as well as the evolution of the electric industry, the FERC recently proposed a rulemaking to address the "restructuring" of the industry along more competitive lines. Tariffs providing "open-access" transmission service by all public utilities are expected to be in place by mid-1996. The FERC's approach toward the electric industry was influenced by its experience in transforming the natural gas industry with

17. *Phillips Petroleum Co.*, 24 F.P.C. 537 (1960).

18. 390 U.S. 747 (1968).

19. Pub. L. No. 95-91, 91 Stat. 567 (codified at 42 U.S.C. §§ 7101-7382f).

20. 42 U.S.C. § 7171.

21. Pub. L. No. 95-621, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432).

22. Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C.).

23. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 2610-2645).

24. Pub. L. No. 99-495, 100 Stat. 1250 (codified in scattered sections of 16 U.S.C.).

25. Pub. L. No. 102-486, 106 Stat. 2782 (codified at 42 U.S.C. §§ 13,201-13,556 (Supp. 1993)).

greater competition. Under Order No. 636,²⁶ interstate pipelines generally left the merchant business of buying and selling gas, and now merely transport gas for third party shippers on a non-discriminatory basis.

The Commission has always been on the leading edge of the move toward computerization and the "information superhighway." The Commission took the initiative to become one of the early agencies to have the full text of FERC reports retrievable through LEXIS. In 1987, the Commission launched the CIPS electronic bulletin board system so that Commission issuances could be disseminated electronically. Later initiatives permitted the electronic distribution of tariffs, annual reports, and informational filings. The Commission has also facilitated the shift of its regulated pipelines and public utilities toward electronic commerce. Subsequently, FERC has encouraged the development of gas industry standards for electronic communication. More recently, as a part of its electric industry restructuring, the FERC has sought to establish industry standards for Real Time Information Networks to facilitate the bulk power market.

Although a number of the FERC's sister agencies, such as the Civil Aeronautic Board and the Interstate Commerce Commission are no longer, the FERC remains to serve an important and viable role in promoting competition and fairness in key sectors of the nation's energy economy. For this, the *Journal* on behalf of its readers and all the members of FEBA join in this Salute!

26. Order 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. STATS. & REGS. ¶ 30,939, 57 Fed. Reg. 13,267 (1992).