

REPORT OF THE FERC PRACTICE & ADMINISTRATIVE LAW JUDGES COMMITTEE

This report summarizes certain statistics pertaining to the Federal Energy Regulatory Commission (the FERC or the Commission) and the FERC Administrative Law Judges (ALJs). The report also summarizes select decisions that have issued at the FERC and the United States Courts of Appeals in the area of FERC practice and procedure. The time frame covered by this report is the period between July 1, 2010 and June 30, 2011.*

I.	FERC Budget and ALJ Statistics	659
A.	FERC Budget Statistics.....	659
B.	ALJ Statistics	661
1.	Projections for Fiscal Year 2011 (10/1/10 – 9/30/11).....	661
2.	Comparative Statistics for 1998-2011	661
II.	Select Decisions Relevant to FERC Practice and Procedure	663
A.	FERC Orders.....	663
1.	<i>Mobile-Sierra</i> Doctrine Rulings After <i>Maine Public Utilities Commission v. FERC</i>	663
2.	The FERC’s Use of Policy Statements and Declaratory Order Guidance Documents	666
3.	The Work-Product Privilege for Non-Attorney Witnesses	668
a.	The Work-Product Privilege: A Brief Description.....	668
b.	The Lead-up to Judge Glazer’s April 19 Order.....	669
c.	Judge Glazer’s April 19 Order	670
d.	The Applicability of the Work-Product Privilege as Outlined in FERC Rule 402(b).....	670
e.	Whether the Expert’s Testimony Waived the Work Product Privilege	672
4.	Standards of Ethical Conduct for FERC Employees	673
5.	Tolling of Time During Emergencies	674
6.	E-Tariff Implementation	675
7.	Withdrawal Versus Cancellation of Tariff Filings.....	676
8.	Access to Confidential Information; Protective Order.....	676
9.	Limitation of Late Intervention	677
B.	Appellate Decision.....	678
1.	The FERC’s Delegation Practice	678

I. FERC BUDGET AND ALJ STATISTICS

A. *FERC Budget Statistics*

The FERC submitted its Fiscal Year (FY) 2012 budget request on February 14, 2011.¹ Over the last few years, the FERC’s budget and number of

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1. FISCAL YEAR 2012 CONGRESSIONAL PERFORMANCE BUDGET REQUEST (FERC issued Feb. 4, 2011), available at www.ferc.gov/about/strat-docs/FY12-budg.pdf [hereinafter 2012 REQUEST]. Congress must approve the FERC’s budget, but no net appropriation results because the FERC “recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986.” CONGRESSIONAL

employees have increased, although the FY 2012 request represents a smaller increase than that requested for FY 2011:

FERC Expenses (dollars in thousands) ²	FY 2009 Actual	FY 2010 Actual	FY 2011 Request	FY 2012 Request
Total Budget	\$282,469	\$296,297	\$315,600	\$304,600
Full-Time Equivalent Employees (FTEs)	1,396	1,452	1,539	1,500

For FY 2012, the FERC requested a 2.8% increase over its FY 2010 budget.³ According to the FERC, its budget supports the two primary goals of the agency: (1) to ensure “just, reasonable and not unduly discriminatory” rates, terms, and conditions; and (2) to “[p]romote the development of safe, reliable and efficient energy infrastructure.”⁴ The FY 2012 request reveals that, although a larger portion of its budget is devoted to the first goal, most of the requested budget increase is designed to advance the Commission’s infrastructure goal.⁵ Within that infrastructure goal, the objective of achieving reliability saw the largest requested increase: 16.8% increase in funding, 19.7% increase in FTEs.⁶

In describing its \$304,600,000 request for FY 2012, the Commission explained the changes by major category.⁷ The requested \$15,483,000 net increase in salaries and benefits assumes forty-eight additional FTEs but includes a two-year pay freeze for FYs 2011 and 2012.⁸ Rent is proposed to increase by \$3,053,000 over FY 2010.⁹ Environmental and program contracts are proposed to decrease by a net \$1,286,900 over FY 2010 due to a decrease in “hydro and natural gas environmental services contracts.”¹⁰ Information technology would decrease by \$2,636,000 following a “one-time major [information technology] infrastructure purchase[] in FY 2010.”¹¹

PERFORMANCE BUDGET REQUEST FISCAL YEAR 2011, at 6 (FERC issued Feb. 1, 2010), available at www.ferc.gov/about/strat-docs/FY11-budg.pdf [hereinafter 2011 REQUEST]. “[That] revenue is deposited into the Treasury as a direct offset to its appropriation.” *Id.*

2. 2011 REQUEST, *supra* note 1, at 5; 2012 REQUEST, *supra* note 1, at 3.

3. Because Congress used continuing resolutions and had not passed a budget at the time the Commission issued its FY 2012 budget request, the Commission did not reference the FY 2011 budget in its FY 2012 request.

4. 2012 REQUEST, *supra* note 1, at 1.

5. *Id.* at 4.

6. *Id.*

7. *Id.* at 3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Administrative support would decrease \$6,311,000 due to savings in areas such as travel, training, and professional support services contracts.¹²

Looking at the FY 2012 request by regulated industry, the budget for regulation of the electric industry would increase by 4.2% over FY 2010 while the oil industry would see a decrease of 0.6%. Hydro and natural gas would both increase by 1.5%.¹³

B. ALJ Statistics

On May 4, 2011, Chief Judge Curtis L. Wagner, Jr. presented statistics concerning the workload of ALJs at the FERC.¹⁴ The statistics provided by the Chief Judge included projections for the 2011 fiscal year as well as a comparison of the ALJ workload for the period 1998-2011.

1. Projections for Fiscal Year 2011 (10/1/10 – 9/30/11)

The number of cases in process at the beginning of the FY 2011 on October 1, 2010 was fifty-six, and the projected cases in process for the end of the FY 2011 on September 30, 2011 increased to sixty-four.¹⁵ The total workload for the period is 126, with seventy cases received and sixty-two cases terminated.¹⁶ Fourteen Initial Decisions are projected to be issued during the FY 2011.¹⁷ There are projected to be forty-eight total settlements certified, as well as fifty-four settlement judge or mediator designations.¹⁸ Forty-eight cases are projected to be resolved through alternative dispute resolution (ADR).¹⁹ There will be 1,156 orders issued, with 330 of them issued by the Chief Judge.²⁰

2. Comparative Statistics for 1998-2011

As of April 2011, the projected number of cases received for FY 2011 is seventy.²¹ This is the same number of cases received in FY 2010.²² FY 2009 had four less cases than FY 2010.²³ Seventy-six cases were received in FY 2007, and eighty-four were received in FY 2008.²⁴ Comparatively, more than 100 cases were received each year during the period 2002 through 2006.²⁵ The total workload projected for FY 2011 of 126 cases represents a decrease from the prior's year total of 133; there has been a steady downward trend over the last

12. *Id.*

13. *Id.* at 4.

14. Hon. Curtis L. Wagner, Jr., C.A.L.J., Presentation by Chief Judge Curtis L. Wagner, Jr. to the Foundation of the Energy Law Journal Reception Honoring FERC Judges (May 4, 2011) (on file with author). All of the statistics included in the following summary are from the May 4, 2011 Presentation.

15. *Id.* at 6.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 7.

21. *Id.*

22. *Id.*

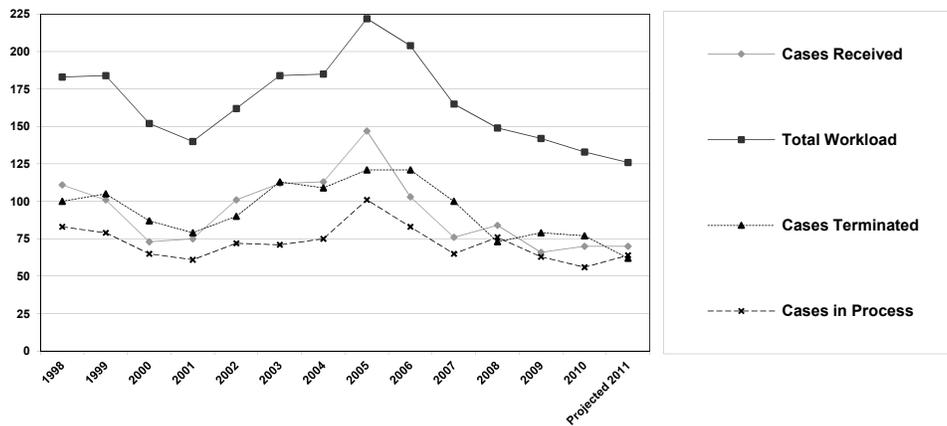
23. *Id.*

24. *Id.*

25. *Id.*

six years in total workload.²⁶ The number of cases projected to be terminated in FY 2011 is the lowest for the 1998-2011 period at sixty-two; this figure is fifteen less than the 2010 number and twenty-five less than the number of cases terminated in FY 2000.²⁷ The number of cases in progress during FY 2011 of sixty-four is in line with the average of sixty-eight cases over the last five years.²⁸ More cases are expected to be in settlement or mediation procedures in the FY 2011 than in the previous four years, but fewer cases are projected to be resolved through ADR in FY 2011.²⁹ More initial decisions are projected to be made in FY 2011 than in the previous four years, but only forty-eight settlements are expected to be certified, which is the lowest of the comparative period.³⁰

The following graph depicts the changes in selected FERC ALJ actual workload statistics during the period 1998-2010, and includes projections for FY 2011.³¹



There are fifteen ALJs, including the Chief Judge, in the FY 2011, which is the same number as the FY 2010.³² The number of ALJs has remained fairly constant over the past thirteen years, with the greatest number of ALJs being nineteen in FY 1998, and the fewest being fourteen in FY 2001, 2007, and 2009.³³

26. *Id.*
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. *Id.*
 31. *Id.*
 32. *Id.*
 33. *Id.*

II. SELECT DECISIONS RELEVANT TO FERC PRACTICE AND PROCEDURE

A. FERC Orders

1. *Mobile-Sierra* Doctrine Rulings After *Maine Public Utilities Commission v. FERC*³⁴

In two recent Orders, the FERC considered – with differing outcomes – settlement agreements that included a *Mobile-Sierra*³⁵ provision that purported to apply the public interest standard to non-settling parties.

In *Devon Power LLC*,³⁶ the FERC addressed the questions remanded to it by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Maine Public Utilities Commission v. FERC*.³⁷ (1) whether “auction results and transition payments arising from a contested settlement . . . constitute contract rates” that may be reviewed only under the “more rigorous” *Mobile-Sierra* “public interest” standard as opposed to the “just and reasonable” standard of review; and (2) if the auction results and transition payments do not constitute contract rates, whether the FERC can nevertheless approve a settlement provision that imposes “the *Mobile-Sierra* ‘public interest’ standard on certain future challenges to the auction results and transition payments.”³⁸

At issue in *Devon Power* was a 2006 contested settlement agreement that established the Forward Capacity Market in the New England Independent System Operator (ISO).³⁹ The settlement agreement included a provision that imposed the *Mobile-Sierra* “public interest” standard on all challenges to the auction results and transition payments in the Forward Capacity Market, regardless of whether the challenge was brought by a settling or non-settling party.⁴⁰ The FERC’s acceptance of this provision, among other decisions, was challenged on appeal to the D.C. Circuit, which “agreed with petitioners that applying the *Mobile-Sierra* ‘public interest’ standard to challenges by non-settling parties ‘unlawfully deprived non-settling parties of their rights under the [Federal Power Act].’”⁴¹ The Supreme Court reversed that determination, holding that the *Mobile-Sierra* standard “is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by

34. *Maine Pub. Utils. Comm’n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010).

35. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*); *See also Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 530 (2008) (*Morgan Stanley*) (“Under the *Mobile-Sierra* doctrine,” as interpreted by the Supreme Court, “the [FERC] must presume that the rate set out in a freely negotiated wholesale-energy contract meets the ‘just and reasonable’ requirement” of the Federal Power Act, 16 U.S.C. § 824d(a)(2005); “[t]he presumption may be overcome only if [the] FERC concludes that the contract seriously harms the public interest.”).

36. *Devon Power LLC*, 134 F.E.R.C. ¶ 61,208 (2011) [hereinafter *Devon Power*].

37. *Maine Pub. Utils. Comm’n*, 625 F.3d at 759-60.

38. *Devon Power*, *supra* note 36, at P 1.

39. *Id.* at P 1 n.1, P 3 (citing *Devon Power, LLC* 115 F.E.R.C. ¶ 61,340, *order on reh’g*, 117 F.E.R.C. ¶ 61,133 (2006), *remanded in part sub nom.*, *Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *order on remand*, 26 F.E.R.C. ¶ 61,027 (2009)).

40. *Devon Power*, *supra* note 36, at P 4.

41. *Id.* at P 5, P 5 n.8 (citing *Maine Pub. Utils. Comm’n*, 520 F.3d at 467).

third parties.”⁴² The Supreme Court, however, did not determine whether the auction results and transition payments constituted contract rates but, instead, remanded the question to the D.C. Circuit, which remanded the question to the FERC.⁴³

On remand, the FERC found that the auction results and transition payments at issue were not contract rates.⁴⁴ The FERC distinguished the auction results and transition payments arising from the contested settlement from contract rates because, unlike a contract, the settlement and the rates created by the auctions established in the settlement were binding upon non-settling parties.⁴⁵ The FERC further explained that “the rates set by the forward capacity auctions represent tariff, not contract, rates.”⁴⁶

While the FERC found that the auction results were not contract rates and thus not automatically subject to the “more rigorous” public interest presumption,⁴⁷ the agency found that “the flexibility inherent in the statutory ‘just and reasonable’ standard” gave it the discretion to “require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances.”⁴⁸ The FERC determined that it “reasonably acted within its discretion to approve” a settlement provision that made it “more difficult to challenge the auction results brought after an initial 45-day review period.”⁴⁹ The FERC determined that approving the *Mobile-Sierra* provision to the settlement was within its discretion because the auctions created by the settlement have “certain market-based features that tend to assure just and reasonable rates.”⁵⁰ The market-based features of the auctions cited by the FERC included the “market-based mechanism to appropriately value capacity resources based on their location,” the provision of “appropriate signals to investors when infrastructure resources are necessary with sufficient lead time to allow that infrastructure to be put into place before reliability is sacrificed,” and the assurance that “the addition of new infrastructure is targeted to where reliability problems are most imminent.”⁵¹ Moreover, the FERC found that applying the more rigorous *Mobile-Sierra* standard to future challenges “promote[d] rate stability.”⁵² Finally, the FERC stated that its acceptance of the inclusion of the *Mobile-Sierra* standard was “grounded solidly in public policy” because “[t]he Settlement [was] the result of extensive negotiations among market participants and it might not have been reached without the inclusion of

42. NRG Power Mktg. v. Maine Pub. Utils. Comm’n, 130 S. Ct. 693, 701 (2010).

43. *Id.*; *Devon Power*, *supra* note 36, at P 8.

44. *Devon Power*, *supra* note 36, at PP 9, 14.

45. *Id.* at PP 12-13.

46. *Id.* at P 13.

47. *Id.* at PP 14, 16.

48. *Id.* at P 16. Citing to the *Morgan Stanley* Court’s interpretation of *Mobile-Sierra*, the FERC noted that there is only one statutory standard of review under the FPA, *i.e.*, the “just and reasonable” standard, and that “the ‘public interest’ presumption is not a different standard; rather ‘the term . . . refers to the differing application of [the statutory] just and reasonable standard.’” *Id.* at P 10, P 10 n.19 (citing *Morgan Stanley*, 554 U.S at 535) (emphasis in original).

49. *Id.* at P 19.

50. *Id.*

51. *Id.* (citations omitted).

52. *Id.* at P 20.

the ‘public interest’ standard.”⁵³ Accordingly, while the auction results and transition payments ensuing from the contested settlement were not contract rates automatically subject to the more rigorous *Mobile-Sierra* review, the FERC determined it nevertheless had the authority to approve a *Mobile-Sierra* provision in the settlement.

Commissioner LaFleur concurred with the Order but wrote “separately to emphasize . . . the narrow and fact-bound basis of [the] decision,” stating that “the question of whether the Commission should apply its discretion to approve a public interest standard of review in other instances that do not strictly involve contract rates must be decided on the facts of each case.”⁵⁴

Commissioner Norris concurred in part and dissented in part. Commissioner Norris concurred that the auction results were not contract rates but dissented with the majority’s conclusion that it “[could] or should exercise its discretion to decide *in advance* that it will employ the more rigorous public interest application of the just and reasonable standard to future challenges to non-contract rates, terms and conditions.”⁵⁵ Commissioner Norris found it “difficult to reconcile the fact that the *Mobile-Sierra* presumption is grounded on the presence of a freely-negotiated contract” with the majority’s decision to apply the *Mobile-Sierra* standard to a non-contract situation.⁵⁶ The Commissioner further expressed concerns that the majority had “open[ed] the door for entities to propose, in non-contract rate filings . . . , that the more stringent public interest form of the just and reasonable standard be applied to *future* challenges.”⁵⁷

One month after the FERC issued its Order in *Devon Power*, the agency returned to the issue of whether a *Mobile-Sierra* provision binding non-settling parties could be included in a settlement agreement. In *High Island Offshore System, LLC*,⁵⁸ the FERC approved an uncontested settlement in a rate proceeding, subject to the *removal* of any provision in the settlement agreement that purported to bind the Commission or non-settling parties to the *Mobile-Sierra* “public interest” standard, which the FERC described as “the more rigorous application of the statutory ‘just and reasonable’ standard of review for future changes to the Settlement.”⁵⁹

In *High Island Offshore System*, High Island Offshore System (HIOS) made a rate filing under the Natural Gas Act.⁶⁰ The FERC “accepted and suspended [the] proposed rates subject to refund and the outcome of an evidentiary hearing.”⁶¹ HIOS then filed an uncontested settlement agreement that resolved the issues set for hearing.⁶² The settlement agreement included a provision that

53. *Id.* at P 23.

54. *Id.* at p. 62,049 (LaFleur, Comm’r, concurring).

55. *Id.* at p. 62,047 (Norris, Comm’r, dissenting in part) (emphasis in original).

56. *Id.*

57. *Id.* at p. 62,048 (emphasis in original).

58. *High Island Offshore Sys., LLC*, 135 F.E.R.C. ¶ 61,105 (2011).

59. *Id.* at P 1.

60. *Id.* at P 2.

61. *Id.*

62. *Id.* at P 3.

imposed “the *Mobile-Sierra* ‘public interest’ standard of review on any future changes to the Settlement, regardless of who proposed the change.”⁶³

Citing *Devon Power*, the FERC found that the settlement agreement was “not a contract to which the *Mobile-Sierra* presumption applies.”⁶⁴ The agency then examined whether it was, nevertheless, “‘fair and reasonable and in the public interest’” to allow HIOS to include the *Mobile-Sierra* standard in its settlement.⁶⁵ The agency stated that the “compelling circumstances” that warranted inclusion of the *Mobile-Sierra* standard in *Devon Power* did not exist in the proposed HIOS settlement.⁶⁶ Specifically, the agency found that “in the *Devon Power* situation, the issue of price certainty was critical to the Forward Capacity Market’s goal of attracting and retaining investors in order to ensure reliability. There are no similar concerns in the instant proceeding.”⁶⁷ Therefore, the FERC did not approve the application of the *Mobile-Sierra* “public interest” standard in the settlement proposed by HIOS.

2. The FERC’s Use of Policy Statements and Declaratory Order Guidance Documents

In three different proceedings during the relevant time period, the FERC commented on its ability to provide guidance, through the issuance of a policy statement or a case-specific determination, in lieu of a notice and comment rulemaking.

In its *Revised Policy Statement on Penalty Guidelines*,⁶⁸ the FERC addressed comments made in response to the Policy Statement on Penalty Guidelines issued in March 2010.⁶⁹ Several commenters noted that the guidelines bear many of the hallmarks of a rulemaking, thus requiring the Commission to comply with both the Administrative Procedure Act’s (APA) notice and comment rulemaking and the Regulatory Flexibility Act (RFA).⁷⁰ The FERC clarified that its policy statement merely explains the Commission’s “processes for assessing civil penalties,” consistent with prior approaches “such as with our 2005 Policy Statement and Revised Policy Statement in 2008.”⁷¹ In confirming that “[t]his is a policy statement,” the FERC made clear that whenever it applies the Penalty Guidelines or departs from them, the Commission “will support and justify that [action] based on the facts and circumstances of the specific case” at hand.⁷² To address concerns about public input, the FERC noted that it had considered the views of the industry in crafting the March 2010 Penalty Guidelines; Enforcement staff had held three workshops

63. *Id.* at P 16.

64. *Id.* at PP 18-19.

65. *Id.* at P 21.

66. *Id.* at P 25.

67. *Id.* at P 24.

68. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 F.E.R.C. ¶ 61,216 (2010) [hereinafter *Revised Policy Statement on Penalty Guidelines*].

69. *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 F.E.R.C. ¶ 61,220 (2010).

70. *Revised Policy Statement on Penalty Guidelines*, *supra* note 68, at P 188.

71. *Id.* at P 210 (referring to *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 F.E.R.C. ¶ 61,068 (2005) (2005 Policy Statement) and *Enforcement of Statutes, Regulations and Orders*, 123 F.E.R.C. ¶ 61,156 (2008) (Revised Policy Statement)).

72. *Id.* at P 211.

to address industry questions; the Commission had considered forty-one sets of comments prior to revision; and it was planning to hold a technical conference in September 2011.⁷³ Regarding the RFA requirement to analyze the impact of any final rule that will substantially affect small businesses, the Commission explained that the RFA does not apply because this policy statement “is not a regulation promulgated by notice and comment rulemaking pursuant to section 553(b) of the [APA];” but the FERC noted that it is “cognizant of the impact of civil penalties on small businesses” and found that “the Penalty Guidelines take such considerations into account.”⁷⁴

In January 2011, the FERC issued another order in which it differentiated a policy statement from a rulemaking. The Commission denied rehearing and clarified a December 17, 2009 order⁷⁵ authorizing the Secretary of the Commission to issue, upon direction from the Director of the Office of Enforcement, a Staff’s Preliminary Notice of Violations stemming from a FERC investigation.⁷⁶ The December 17 Order modified the practice of publicly disclosing investigations by authorizing disclosure at an earlier stage in the proceedings. One of the FERC’s bases for denying rehearing was on procedural grounds: “the Commission’s December 17 Order was an exercise of agency discretion and thus not subject to review” because the order “falls within the exceptions to the [APA’s] notice and comment requirements,” which exceptions the Commission explained, “apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.”⁷⁷ The Commission explained that the December 17 Order was procedural rather than substantive because it did not affect the legal rights of parties:

Issuance of a Notice [of Violation] is entirely separate and unrelated to any findings the Commission may or may not later make with regard to the investigation. Nor does issuance of the Notice foreclose alternative courses of action or, indeed, any actions at all that the subject may choose to take. Therefore, the Commission’s decision to authorize issuance of Notices under certain specified circumstances is not substantive but procedural.⁷⁸

The FERC categorized its December 17 Order as falling within two of the APA’s exempted procedural rule types: (1) a policy statement, and (2) “a pronouncement of agency organization, procedure, or practice.”⁷⁹ The FERC explained that its December 17 Order could be viewed as a policy statement

73. *Id.* at P 210.

74. *Id.* at P 195. The FERC noted that “[s]ection 553(b) [of the APA] does not apply ‘(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice’ Thus, when the Commission issues a policy statement, we need not fulfill the section 553(b) requirement of issuing a proposed rulemaking because it falls into the exception in section 553(b)(3)(A).” *Id.* & P 195 n.291 (citing 5 U.S.C. § 553(b)(3)(A)(2006)).

75. *Enforcement of Statutes, Regulations, and Orders*, 129 F.E.R.C. ¶ 61,247 (2009).

76. *Enforcement of Statutes, Orders, Rules, and Regulations*, 134 F.E.R.C. ¶ 61,054 (2011).

77. *Id.* at P 11, P 11 n.28 (citing 5 U.S.C. § 553(b)(A) (2009)). The FERC noted that these “three exceptions to the notice and comment requirements of the APA are sometimes referred to collectively as procedural rules (as opposed to substantive rules that require notice and comment)” and that “[w]hether actions or procedures announced by an agency are substantive or not turns on whether they have substantive legal effect, thus foreclosing alternate courses of action or conclusively affecting the rights of parties.” *Id.* at P 11 (citations omitted).

78. *Id.* at P 11.

79. *Id.* at P 12.

because “it announced and described the process whereby [it] would exercise its discretion . . . to release certain non-public information pertaining to an investigation.”⁸⁰ Alternatively, the FERC explained, the December 17 Order could be “viewed as a pronouncement of agency organization, procedure, or practice” because it addressed staff authority, the manner and timing of issuances, and clarified practice.⁸¹

The FERC also issued an order in January 2011 clarifying that it was not required to proceed by rulemaking in response to two petitions for declaratory order.⁸² The Commission denied rehearing of two orders that provided guidance on when the California Public Utility Commission’s (CPUC) proposed feed-in tariff, created pursuant to California Assembly Bill 1613, would *not* be preempted by the FPA, the Public Utility Regulatory Policies Act of 1978 (PURPA), and the FERC’s regulations. Noting that its regulations expressly authorize the FERC to provide guidance in response to petitions for declaratory order to “remove uncertainty,” the FERC explained that it had merely provided guidance on the approaches that the CPUC proposed to take.⁸³ The Commission further found that it “was not required to proceed by rulemaking but rather had the discretion to proceed by case-specific adjudication – which both [parties] had requested, and which was within the Commission’s discretion.”⁸⁴

3. The Work-Product Privilege for Non-Attorney Witnesses

Two recent orders authored by FERC ALJ Stephen A. Glazer,⁸⁵ related to an ongoing dispute between the Missouri Public Service Commission (MoPSC) and MoGas Pipeline LLC (MoGas), explored the bounds of the work-product privilege⁸⁶ and the work-product privilege’s coverage of documents relied upon by expert witnesses. This report briefly describes the work-product privilege, lists the events leading up to the two orders, and then offers a summary of the parties’ arguments and Judge Glazer’s findings.

a. The Work-Product Privilege: A Brief Description

The work-product privilege pertains generally to material “prepared in anticipation of litigation.”⁸⁷ Rule 402(b) of the FERC’s Rules of Practice and Procedure⁸⁸ restates the work-product privilege and is modeled after Rule

80. *Id.*

81. *Id.* at P 13. FERC Commissioner Marc Spitzer dissented from the majority’s procedural and substantive findings, noting, among other things, that a “pronouncement crosses the line to require compliance with the APA’s rulemaking requirements when the pronouncement has a binding effect on the public or on the agency itself.” *Id.* at p. 62,223 (Spitzer, Comm’r, dissenting).

82. *California Pub. Utils. Comm’n*, 134 F.E.R.C. ¶ 61,044 (2011).

83. *Id.* at P 28, P 28 n.50 (quoting 18 C.F.R. § 385.207(a)(2) (2010)).

84. *Id.* at P 28, P 28 n.54 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947)).

85. Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal, FERC Docket No. CP06-407-007 (May 12, 2011) (Glazer, J.) [hereinafter May 12 Order]; Order Granting in Part Motion to Compel and Releasing “Enhanced Privilege Log,” FERC Docket No. CP06-407-007 (Apr. 19, 2011) (Glazer, J.) [hereinafter April 19 Order].

86. The work-product privilege is also known as the work-product doctrine, work-product immunity, work-product protection, and work-product rule.

87. *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947); FED. R. CIV. P. 26(b)(3).

88. 18 C.F.R. § 385.402(b) (2011).

26(b)(3) of the Federal Rules of Civil Procedure.⁸⁹ Rule 402(b) prohibits a participant from obtaining “discovery of material prepared in anticipation of litigation by another participant, unless that participant demonstrates a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship.”⁹⁰ If an ALJ orders such discovery, he must “prevent disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.”⁹¹ When the FERC lacks its own controlling precedent concerning the limits of the work-product privilege, it looks to federal court precedent “with due consideration [of its] need to obtain information necessary to discharge its regulatory responsibilities.”⁹² The work-product privilege typically goes hand in hand with the attorney-client privilege but “may extend to the work[-product] of non-attorneys” if an attorney requested the work.⁹³ The burden of proving the work-product privilege’s applicability lies with the party asserting the privilege.⁹⁴

b. The Lead-up to Judge Glazer’s April 19 Order

The catalyst for the dispute between the MoPSC and MoGas was a motion that MoGas filed to compel the discovery of approximately ninety documents that the MoPSC claimed were “Documents Prepared in Anticipation of Litigation” and, thus, privileged.⁹⁵ Approximately sixty-eight of these documents were prepared by, or addressed to, a non-attorney employee of the MoPSC, Janice Fischer.⁹⁶ Ms. Fischer was the MoPSC’s sole witness in the proceeding and possessed characteristics of both an expert and a fact witness.⁹⁷

On March 31, 2011, upon receiving MoGas’s motion and the MoPSC’s March 29, 2011 answer, Judge Glazer instructed the parties to brief an issue that neither party had considered – whether Ms. Fischer’s consideration of the approximately sixty-eight documents as an expert witness waived the work-product privilege’s potential applicability to those documents.⁹⁸ As a result, the parties addressed two main sub-issues: (1) whether the Fischer documents fell within the gambit of the work-product privilege as set out in FERC Rule 402(b); and (2) if so, whether Ms. Fischer’s review of the documents waived the work-product privilege. On April 14, 2011, Judge Glazer ruled from the bench that the sixty-eight Fischer documents were discoverable.⁹⁹

89. May 12 Order, *supra* note 85, at P 9.

90. 18 C.F.R. § 385.402(b).

91. *Id.*

92. 18 C.F.R. § 385.410(d).

93. May 12 Order, *supra* note 85, at P 16 (citing *Panhandle E. Pipe Line Co.*, 48 F.E.R.C. ¶ 63,013, at p. 65,029 (1989) (Harfeld, J.)).

94. *Consolidated Gas Supply Corp.*, 17 F.E.R.C. ¶ 63,048, at p. 65,239 (1981) (Birchman, J.).

95. Motion of MoGas Pipeline LLC to Compel Discovery of Missouri Public Service Commission Documents Without a Valid Claim of Privilege at 6-7, FERC Docket No. CP06-407-007 (Mar. 14, 2011) [hereinafter MoGas Motion to Compel Discovery].

96. May 12 Order, *supra* note 85, at P 7.

97. *Id.*

98. Order Scheduling Discovery Conference and to Show Cause at P 7, FERC Docket No. CP06-407-007 (Mar. 31, 2011) (Glazer, J.).

99. Transcript of Discovery Conference at 56:21-25, 57:1-25, 58:1-13, 60:8-25, FERC Docket No. CP06-407-007 (Apr. 14, 2011) (Glazer, J.).

c. Judge Glazer's April 19 Order

Judge Glazer issued an order on April 19, 2011 granting MoGas's motion to compel discovery, mandating the release of the Fisher documents.¹⁰⁰ Judge Glazer reasoned that the MoPSC had read Rule 402(b) "too broadly," agreeing with the FERC Staff's position that the "scope of discovery rules apply [sic] equally to private parties and government agencies."¹⁰¹ Judge Glazer relied on federal case law pertaining to expert witnesses to find that the Fischer documents were "discoverable to the extent that they 'identif[ied] facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed' or 'identif[ied] assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.'"¹⁰² Judge Glazer also found that irrespective of whether Ms. Fisher testified "as a fact witness or an expert witness, the underlying facts to which she [testified were] not shielded by the work-product [privilege] from disclosure."¹⁰³

d. The Applicability of the Work-Product Privilege as Outlined in FERC Rule 402(b)

In response to Judge Glazer's ruling, the MoPSC filed a motion with Judge Glazer to permit interlocutory appeal on April 29, 2011.¹⁰⁴ The MoPSC relied on the plain language of the rule to buttress its argument.¹⁰⁵ The MoPSC alleged that the Fischer documents were "material prepared in anticipation of litigation" by a "participant" under FERC Rule 402(b).¹⁰⁶ The MoPSC noted that FERC Rule 402(b) refers to a "participant" and not to materials prepared by or at the direction of a participant's attorney.¹⁰⁷ Because the MoPSC was a participant in litigation, the MoPSC stated that the work-product privilege should apply.¹⁰⁸ The MoPSC also reiterated that a contrary interpretation would force state public utilities commissions to involve attorneys in every phase of the preparation of technical analyses of ongoing issues in litigated proceedings.¹⁰⁹

The MoPSC, in addition, averred that because Rule 402(b) does not refer to a specific instance of litigation, it covers material prepared for any litigation.¹¹⁰ The MoPSC noted that the Fischer documents were prepared by the MoPSC's technical staff, an integral part of the MoPSC's legal team,¹¹¹ "in anticipation of, or as part of, specific litigated proceedings."¹¹² The MoPSC made a related argument that Rule 402(b) should be applied broadly to the Fischer documents

100. April 19 Order, *supra* note 85, at P 8.

101. *Id.* at P 5 (citations omitted).

102. *Id.* at P 6.

103. *Id.* at P 7.

104. Motion of the Missouri Public Service Commission to Permit Interlocutory Appeal, FERC Docket No. CP06-407-007 (Apr. 29, 2011) [hereinafter MoPSC Interlocutory Appeal].

105. *Id.* at PP 13-15.

106. *Id.* at PP 13-14 (quoting 18 C.F.R. § 385.402(b) (2011)).

107. *Id.* at P 13.

108. *Id.* at P 14.

109. *Id.* at PP 36-37.

110. *Id.* at P 26 (citing *FTC v. Grolier Inc.*, 462 U.S. 19 (1983)).

111. *Id.* at P 34.

112. *Id.* at P 42.

because of the MoPSC's statutory mandate.¹¹³ The MoPSC noted that "to the extent the applicable standard is whether the materials were 'prepared for counsel,' the MoPSC should be deemed to have met its burden [because] its state statute creates a nexus between materials prepared in anticipation of, or during, litigation by non-attorneys and [how] the MoPSC manages its litigation."¹¹⁴ The MoPSC stated that the statute creates a nexus, because "all litigation in which [the MoPSC] is involved is *at all times* managed by the MoPSC's General Counsel's Office, either directly or in consultation with the MoPSC's outside counsel."¹¹⁵

In its answer, MoGas maintained that the Fischer documents fell outside of the work-product privilege's confines.¹¹⁶ MoGas argued that direct attorney involvement, *i.e.*, an attorney nexus, is essential to the work-product privilege.¹¹⁷ MoGas noted that "every single federal court and [FERC] decision that [the] MoPSC relie[d] upon to state its case [was] premised on *attorney* work product or offers a nexus to specific *attorney* supervision."¹¹⁸ Because there was no attorney supervision, MoGas contended that there was no attorney nexus and that, therefore, the Fischer documents were not shielded from discovery by the work-product privilege.¹¹⁹ MoGas added that "[a] testifying technical expert's thought processes and analyses are exactly the type of information that is open to discovery."¹²⁰ MoGas rebutted the MoPSC's statutory mandate argument, averring that the statute did not create a presumption that counsel requested the creation of the Fischer documents.¹²¹ MoGas noted that Fischer did not work in the General Counsel's office under the organizational structure that the statute created but rather the Utility Service Division, a completely distinct entity.¹²²

On May 12, 2011, Judge Glazer issued an order denying the MoPSC's motion. As to the MoPSC's statutory argument, Judge Glazer found that the statute did not create an attorney nexus.¹²³ He noted that the statute did "not confer blanket authority on [the MoPSC's General Counsel's Office] to manage the day-to-day assignments of employees in other divisions."¹²⁴ Judge Glazer added that the "MoPSC cannot cloak its entire regulatory function with the attorney work-product mantle of 'litigation' in order to shield all material that it prepares in fulfilling its general mission."¹²⁵

113. *Id.* at P 31.

114. *Id.*

115. *Id.* at P 34; *see also* MO. REV. STAT. § 386.071 (2000).

116. Answer of MoGas Pipeline LLC in Opposition to the Missouri Public Service Commission's Motion to Permit Interlocutory Appeal, FERC Docket No. CP06-407-007 (May 6, 2011) [hereinafter MoGas Answer].

117. *Id.* at 6-7.

118. *Id.* at 6 (citations omitted).

119. *Id.* at 6-7, 14.

120. *Id.* at 14.

121. *Id.* at 9.

122. *Id.* at 10.

123. May 12 Order, *supra* note 85, at P 20.

124. *Id.*

125. *Id.* at P 24.

e. Whether the Expert's Testimony Waived the Work-Product Privilege

In its motion to permit interlocutory appeal, the MoPSC challenged that federal courts are split “as to whether, and if so to what extent, [the work-product privilege] is waived when an expert witness files testimony.”¹²⁶ The MoPSC stated that FERC “precedent properly recognizes that the line separating fact witnesses from expert witnesses is not always clear.”¹²⁷ The MoPSC stressed that an ALJ found that the work-product privilege establishes two classes of protection, one for “opinion work-product” and another for “fact work-product.”¹²⁸ According to MoPSC,

opinion work-product . . . "reflect[s] the mental impressions, conclusions, or legal theories of an attorney *or representative of a party* concerning [work-product] which fall within a 'zone of privacy' and are protected from disclosure by Federal Rules of Civil Procedure 26(b)(3), to preserve the important public purpose served by the [work-product privilege].”¹²⁹

Conversely, “fact work-product . . . analyze[s] factual information”¹³⁰ and “is discoverable only with a showing of both substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.”¹³¹ The MoPSC charged that the Fischer documents were within the “zone of privacy” and, thereby, protected from discovery.¹³² To the extent that some of documents constituted “fact work-product,” the MoPSC noted that these documents were still protected from discovery because they were interlaced with mental impressions and manifested the exercise of judgment with respect to their usage of facts.¹³³ Under such circumstances, the MoPSC stated that the FERC has not required disclosure.¹³⁴

In response, MoGas argued that even if the Fischer documents were privileged, “by electing to present Ms. Fisher as a witness, [the MoPSC] granted the parties . . . the right to learn what [she] considered in formulating her testimony and the opinions stated therein.”¹³⁵ Additionally, MoGas stated that no federal court split existed as to whether parties waive the work-product privilege when an expert submits her testimony.¹³⁶ Even if such a debate existed, MoGas maintained that the United States Supreme Court clarified the issue when it adopted amendments to Rule 26 of the Federal Rules of Civil Procedure in December 2010.¹³⁷ MoGas noted that Rule 26(b)(3)(C) now says

126. MoPSC Interlocutory Appeal, *supra* note 104, at P 46.

127. *Id.* at P 45 (citing *Californians for Renewable Energy, Inc. v. Pacific Gas and Elec. Co.*, 134 F.E.R.C. ¶ 61,207 at P 11 (2011)).

128. *Id.* at PP 47-49 (citing *Connecticut Yankee Atomic Power Co.*, 110 F.E.R.C. ¶ 63,005 at P 4 (2005) (Birchman, J.)).

129. *Id.* at P 48 (quoting 110 F.E.R.C. ¶ 63,005 at P 4) (emphasis in original).

130. *Id.* at P 50.

131. *Id.* at P 48 (quoting 110 F.E.R.C. ¶ 63,005 at P 9).

132. *Id.* at P 49.

133. *Id.* at P 50 (citing *McDowell Cnty. Consumers Council, Inc. v. American Elec. Power Co.*, 23 F.E.R.C. ¶ 61,142, at p. 61,321 (1983)).

134. *Id.*

135. MoGas Answer, *supra* note 116, at 7-8.

136. *Id.* at 7.

137. *Id.*

that a testifying witness's "own previous statement about [an] action or its subject matter" are discoverable.¹³⁸ As to the MoPSC's "zone of privacy" argument, MoGas claimed that the MoPSC misread the relevant FERC Order.¹³⁹ In that case, MoGas noted "there was absolutely no dispute that the expert witness materials at issue were prepared at the direction of counsel, and were discussed in consultation with counsel."¹⁴⁰

In his May 12 Order, Judge Glazer determined that calling Ms. Fischer as a witness amounted to waiving the work-product privilege.¹⁴¹ Judge Glazer noted: "Where an attorney offers his own investigator as a witness in a trial, the work-product [privilege] is waived with respect to matters covered in the investigator's testimony."¹⁴² Judge Glazer asserted that a contrary finding would allow parties to use the work-product privilege "as both a shield and a sword to control the disclosure of evidence."¹⁴³ Judge Glazer reasoned that "[t]he majority of federal circuits that have considered the question recognize that trial preparation materials considered by an expert witness in connection with her testimony, regardless of whether the materials were relied upon by the expert or not in formulating her opinions, are not protected as attorney work-product."¹⁴⁴ Moreover, Judge Glazer noted that the new language of Rule 26(b)(3)(C) of the Federal Rules of Civil Procedure recognizes that "the previous written or transcribed oral statements of a testifying witness about the facts underlying a case are fully discoverable."¹⁴⁵ Consequently, he found that the work-product privilege did not shield the core facts of Ms. Fisher's testimony in her role as a fact or expert witness.¹⁴⁶

On May 19, 2011, the MoPSC sought appeal with the FERC of Judge Glazer's May 12 Order.¹⁴⁷ On May 26, 2011, Chairman Jon Wellenhoff, acting as the FERC Motions Commissioner, declined to refer the MoPSC's appeal of the May 12 Order to the full Commission on the basis that the MoPSC had "failed to demonstrate extraordinary circumstances" to warrant "prompt [FERC] review of the contested ruling[s]."¹⁴⁸

4. Standards of Ethical Conduct for FERC Employees

The FERC issued *Order No. 744* on January 4, 2011 to amend the Supplemental Standards of Ethical Conduct for Employees of the FERC (FERC Supplemental Standards).¹⁴⁹ In part, the FERC Supplemental Standards contain

138. *Id.* (citing FED. R. CIV. P. 26(b)(3)(C)(i)-(ii)).

139. *Id.* at 11 (citing 110 F.E.R.C. ¶ 63,005 at P 4).

140. *Id.* at 11.

141. May 12 Order, *supra* note 85, at P 25.

142. *Id.* at P 13 (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975)).

143. *Id.*

144. *Id.* at P 25.

145. *Id.* at P 26.

146. *Id.* at P 14.

147. Missouri Public Service Commission's Appeal of Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal, FERC Docket No. CP06-407-007 (May 19, 2011).

148. Notice of Determination by the Chairman, FERC Docket No. CP06-407-007 (May 26, 2011).

149. Order No. 744, *Supplemental Standards of Ethical Conduct for Employees of the Federal Energy Regulatory Commission*, 134 F.E.R.C. ¶ 61,003 (2011) (to be codified at 5 C.F.R. pt. 3401) [hereinafter *Order No. 744*].

a general prohibition on employees acquiring or holding securities of entities regulated by the Commission.¹⁵⁰ The FERC Supplemental Standards are in addition to the generally applicable ethical standards applicable to agency employees reflected in title 5 of the Code of Federal Regulations.¹⁵¹

In *Order No. 744*, the FERC noted that the general prohibition of the FERC Supplemental Standards did not apply to the ownership of securities in a liquefied natural gas (LNG) terminal as defined by section 3 of the Natural Gas Act, as amended by the Energy Policy Act of 2005 (EPAAct).¹⁵² Nor did they “expressly apply to a ‘transmitting utility’” as defined by the EPAAct.¹⁵³ Therefore, *Order No. 744* amended the general prohibition to encompass the ownership of the securities of an LNG terminal and a transmitting utility by FERC employees and the spouse or minor children of FERC employees.¹⁵⁴

Order No. 744 also codified the current Commission practice of having the Office of General Counsel’s General and Administrative Law Section maintain a list of prohibited securities in which FERC employees may not acquire or hold an interest.¹⁵⁵ The Designated Agency Ethics Official (DAEO) has discretion to add or remove prohibited securities from the list depending upon whether they raise concerns about impartiality.¹⁵⁶

The FERC clarified its “exception to the general prohibition . . . for interests in mutual funds that do not have a stated objective of concentrating their investments in prohibited securities.”¹⁵⁷ Additionally, *Order No. 744* codified requirements that: (1) employees report any prohibited financial interest to the DAEO in writing within thirty days;¹⁵⁸ (2) employees must divest prohibited financial interests within ninety days of the DAEO’s direction, absent written waiver;¹⁵⁹ and (3) employees disqualify themselves pending divestiture from matters that would affect their financial interests.¹⁶⁰ Employees may be able to defer capital gains tax resulting from sales made to comply with the conflict of interest requirements.¹⁶¹

5. Tolling of Time During Emergencies

In *Order No. 738*, the FERC amended its procedures governing filing and other requirements during emergencies that require the FERC to implement its Continuity of Operations Plan (COOP Plan).¹⁶² The COOP Plan addresses emergencies lasting up to thirty days that disrupt communications and/or

150. 5 C.F.R. § 3401.102(a) (2011).

151. 5 C.F.R. pt. 2635.

152. *Order No. 744*, *supra* note 149, at P 3.

153. *Id.* at P 4.

154. *Id.* at P 5.

155. *Id.* at P 7.

156. *Id.*

157. *Id.* at P 8.

158. *Id.* at P 10.

159. *Id.* at P 11.

160. *Id.* at P 12.

161. *Id.* at P 13.

162. *Order No. 738, Supplement to Commission Procedures During Periods of Emergency Operations Requiring Activation of Continuity of Operations Plan*, F.E.R.C. STATS. & REGS. ¶ 31,316, 75 Fed. Reg. 48,553 (2010) (to be codified at C.F.R. pts. 18, 376) [hereinafter *Order No. 738*].

operations at Commission headquarters resulting in inability on the part of the Commission or the public to meet regulatory or statutory requirements.¹⁶³ The COOP Plan temporarily suspends filing requirements and tolls the time periods for certain Commission actions.¹⁶⁴ These timelines “include the 60-day period for acting on requests for Exempt Wholesale Generator or Foreign Utility [Holding] Company status and the 30-day period for acting on requests for rehearing.”¹⁶⁵

Prior to *Order No. 738*, however, the COOP Plan did not address the time period for acting on a request for relief from, or to reinstate, an electric utility’s mandatory QF purchase obligation. Under section 210(m) of the PURPA, added by the Energy Policy Act of 2005, an electric utility may request termination of its “obligation to purchase electric energy from [QFs] if the [FERC] finds that the QF has nondiscriminatory access to one of the three [enumerated] categories of markets.”¹⁶⁶ Applications for reinstatement of the mandatory purchase obligation may also be filed.¹⁶⁷ The FERC issues orders addressing each of these requests within ninety days.¹⁶⁸ In *Order No. 738*, the FERC amended its COOP Plan “to include the tolling of [this] 90-day period” during emergency situations.¹⁶⁹

6. E-Tariff Implementation

In *Columbia Gas Transmission, LLC*,¹⁷⁰ the FERC clarified that individual pipelines have the ability to determine which volume of their tariffs to file non-conforming agreements in.¹⁷¹ The FERC further clarified that the requirement to treat non-conforming agreements as tariff records created no new filing requirements other than the requirement to file non-conforming agreements electronically through the E-Tariff system.¹⁷²

The FERC also reiterated its rules for implementing negotiated rate transactions, explaining that pipelines may file either “a tariff provision that describes the negotiated rate” or “the negotiated rate agreement” itself.¹⁷³ Alternatively, a pipeline may file both a descriptive tariff provision and the agreement itself.¹⁷⁴ However, if the negotiated rate agreement is filed, it must be electronically filed as a tariff record using the E-Tariff system.¹⁷⁵

Lastly, the FERC incorporated by reference the North American Energy Standards Board (NAESB) requirement that pipelines post their tariffs on

163. *Id.* at P 1.

164. 18 C.F.R. § 376.209 (2011).

165. *Order No. 738*, *supra* note 162, at P 2.

166. *Id.* at P 3.

167. 18 C.F.R. §§ 292.311, 313 (2011); *Order No. 738*, *supra* note 153, at P 4.

168. *Order No. 738*, *supra* note 153, at P 4.

169. *Id.* at P 5.

170. *Columbia Gas Transmission, LLC*, 133 F.E.R.C. ¶ 61,092 (2010).

171. *Id.* at P 4.

172. *Id.* at P 5.

173. *Id.* at P 6.

174. *Id.*

175. *Id.*

Internet Web sites.¹⁷⁶ The FERC further noted that under the applicable NAESB standard, pipelines traditionally only post their Volume No. 1 tariffs. The FERC decided to let NAESB have the first opportunity to address what changes, if any, should be made to the posting requirements for pipelines in light of the FERC's *Order No. 714*.¹⁷⁷

7. Withdrawal versus Cancellation of Tariff Filings

On March 23, 2011, Missouri River Energy Services (MRES) and Western Minnesota Municipal Power Agency (Western Minnesota) filed "a motion . . . to withdraw MRES's Attachment O tariff rate formula filing."¹⁷⁸ MRES made its original Attachment O filing on December 20, 2007.¹⁷⁹ "On September 30, 2008, the Commission accepted MRES's . . . Attachment O filing, suspended it for a nominal period, and set [it] for hearing."¹⁸⁰

Subsequent to the Commission's acceptance of MRES' Attachment O, but prior to MRES transferring any facilities to the Midwest ISO's control, MRES decided to "use the *pro forma* version of the Midwest ISO's . . . Attachment O."¹⁸¹ MRES filed a motion to withdraw its MRES Attachment O, stating that it had never become effective.¹⁸²

However, the Commission found that MRES' Attachment O had become effective on October 1, 2008, as previously ordered.¹⁸³ The fact that MRES had not yet transferred facilities to the Midwest ISO's control did not affect the effectiveness of Attachment O.¹⁸⁴ The Commission's regulations do not permit the withdrawal of filed rate schedules that have been acted upon by the Commission.¹⁸⁵ Accordingly, the Commission denied MRES' motion to withdraw its Attachment O.¹⁸⁶ The Commission instead treated the motion to withdraw as a notice of cancellation and waived the timing requirements of section 35.15 of the Commission's regulations¹⁸⁷ to allow the cancellation to become effective on the date requested for withdrawal.¹⁸⁸

8. Access to Confidential Information; Protective Order

In *West Deptford Energy, LLC*,¹⁸⁹ the FERC denied a request by West Deptford Energy (WDE) to limit access to confidential information filed by WDE to only the FERC, PJM Interconnection, LLC (PJM), and PJM's

176. *Id.* at P 8.

177. *Id.*

178. *Missouri River Energy Servs.*, 135 F.E.R.C. ¶ 61,101 at P 1 (2011) [hereinafter *Missouri River*].

179. *Id.* at P 3.

180. *Id.* (citing *Missouri River Energy Servs., Inc.*, 124 F.E.R.C. ¶ 61,309 (2008)).

181. *Missouri River*, *supra* note 178, at PP 3-5.

182. *Id.* at PP 3-4.

183. *Id.* at P 6.

184. *Id.*

185. *Id.*

186. *Id.*

187. 18 C.F.R. § 35.15 (2011).

188. *Missouri River*, *supra* note 178, at P 7.

189. *West Deptford Energy, LLC*, 134 F.E.R.C. ¶ 61,189 (2011) [hereinafter *West Deptford*].

Independent Market Monitor (IMM).¹⁹⁰ WDE sought a determination that the offer to sell capacity it anticipated making in the upcoming PJM Base Residual Auction was “justified by WDE’s unit-specific costs and expected revenues,” even if it was below the benchmarks set by PJM for capacity sales.¹⁹¹ To enable the FERC to determine whether WDE’s offer was justified, WDE submitted what it considered to be “sensitive, confidential bid-related material and supporting documentation.”¹⁹² WDE requested that the intervenors be denied access to this allegedly “highly sensitive” information, thus restricting access of such information to only the FERC, PJM, and PJM’s IMM.¹⁹³ WDE argued this was necessary to avoid “severely and adversely impact[ing] WDE’s competitive position, creat[ing] a risk of market manipulation and collusion, and damag[ing] the competitive markets.”¹⁹⁴

The FERC denied WDE’s request, stating that the FERC “is obligated to balance the interests of a party seeking confidential treatment for information with the interests of parties seeking access to that information.”¹⁹⁵ Following its decision in *Mojave Pipeline Co.*,¹⁹⁶ the FERC stated that materials “could be treated confidentially if ‘the documents will give the party seeking discovery an unfair business advantage.’”¹⁹⁷ However, the FERC clarified that:

Since in most instances a protective order can protect against harmful disclosure, *a party claiming that confidential material should be withheld entirely [is] expected to show that a protective order will not adequately safeguard its interests* and that this concern outweighs the need for the material to develop the record.¹⁹⁸

The FERC found that WDE had not met its burden of demonstrating why “an appropriate protective agreement [would] not adequately safeguard its interests.”¹⁹⁹ The FERC stated that limiting access to the WDE information would hinder an intervenor’s “ability to participate in [the] case in an informed manner,” and therefore, the FERC rejected WDE’s request.²⁰⁰

9. Limitation of Late Intervention

In *PJM Interconnection, L.L.C.*,²⁰¹ the FERC addressed motions to intervene out-of-time that were filed in conjunction with a request for rehearing of a Commission order.²⁰² The parties seeking to intervene out-of-time claimed that they viewed the original filing that initiated the docket as uncontested and

190. *Id.* at P 4.

191. *Id.* at PP 2-3. WDE asserted that because it was not a net short seller, under the PJM tariff, it need not seek the FERC’s permission to offer capacity at a lower-than-benchmark price. *Id.* WDE sought the FERC’s approval, though, because proceedings were pending that raised an “uncertainty” as to whether the benchmark would soon apply to WDE. *Id.*

192. *Id.* at P 4.

193. *Id.*

194. *Id.*

195. *Id.* at P 30.

196. *Mojave Pipeline Co.*, 38 F.E.R.C. ¶ 61,249 (1987).

197. *West Deptford*, *supra* note 189, at P 27 (quoting 38 F.E.R.C. ¶ 61,249, at p. 61,842).

198. *Id.* (quoting 38 F.E.R.C. ¶ 61,239, at 61,842) (emphasis added in *West Deptford*).

199. *Id.* at P 30.

200. *Id.* at P 29.

201. *PJM Interconnection, L.L.C.*, 132 F.E.R.C. ¶ 61,265 (2010).

202. *Id.* at P 8.

thus did not see a reason to become a party to the proceeding at that time.²⁰³ The original filing was protested in a timely manner, and in response to that protest, the Commission issued an order requiring revisions to the original filing.²⁰⁴

The Commission held that the late intervention requests should be denied for failure to show good cause.²⁰⁵ “When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, the movants bear a higher burden to demonstrate good cause for granting such late intervention.”²⁰⁶

The Commission found that the parties requesting late intervention here were “longstanding and sophisticated” entities with significant Commission experience.²⁰⁷ The Commission went on to state that the parties requesting late intervention had waited to do so until the Commission had issued a dispositive order and that the parties sought to intervene solely to request rehearing of that order.²⁰⁸ In addition, the FERC noted that “even if [it] were to grant the late interventions, such a determination would not permit a party to seek rehearing [because] ‘a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.’”²⁰⁹

B. Appellate Decision

1. The FERC’s Delegation Practice

In *Murray Energy Corp. v. FERC*,²¹⁰ the D.C. Circuit addressed the FERC’s delegation practice. The case concerned a review of orders authorizing the construction of a natural gas pipeline over an underground longwall coal mine.²¹¹ In May 2008, the Commission issued a certificate of public convenience and necessity for the pipeline but added a number of conditions.²¹² Months later, the applicant submitted its construction and operations plan to the FERC to address those conditions.²¹³ In March 2009, the Chief of Gas Branch 2 in the Office of Energy Projects (OEP), under delegation authority from the Director of OEP, authorized the construction of the pipeline by letter order.²¹⁴ Murray Energy Corp. (Murray), the coal mine owner, “filed a request for rehearing . . . , arguing that the Chief of Gas Branch 2 lacked authority to issue the [letter] order.”²¹⁵ In July 2009, the Commission affirmed the OEP Director’s delegation of authority to the Chief of Gas Branch 2:

203. *Id.* at PP 8-9.

204. *Id.* at P 19.

205. *Id.* at P 18.

206. *Id.*

207. *Id.* at P 19.

208. *Id.* at P 20.

209. *Id.* at P 21 (quoting 18 C.F.R. 385.214(d)(3)(ii) (2010)).

210. *Murray Energy Corp. v. FERC*, 629 F.3d 231 (D.C. Cir. 2011).

211. *Id.* at 234.

212. *Id.* (citing *Rockies Express Pipeline LLC*, 123 F.E.R.C. ¶ 61,234 (2008)).

213. *Id.* at 235.

214. *Id.* (citing Letter Order, *Rockies Express Pipeline LLC*, FERC Docket No. CP07-208-000 (Mar. 19, 2009)).

215. *Id.*

With respect to clearances for environmental conditions and authorization to begin construction, the branch chief who has direct responsibility for ensuring compliance with the conditions is appropriately situated to evaluate whether those conditions have been met, and therefore is a “comparable official” to a deputy or division head in this situation, as required by section 375.301(b) of the Commission regulations. Accordingly, we again affirm the practice of delegating authority to Commission staff, and we adopt the Director’s action, through his designee, as our own.²¹⁶

Murray argued before the D.C. Circuit that this delegation was improper for three reasons: (1) it violated FERC regulation section 375.308²¹⁷ in that the OEP Director may only delegate “on ‘small bore’ matters such as ‘uncontested applications and . . . reports . . . of a noncontroversial nature;”²¹⁸ (2) it violated FERC regulation section 375.301(b)²¹⁹ because a “designee” is defined as the head of a division or other comparable official, and the Chief of Gas Branch 2 is not comparable; and (3) the 2008 order issuing the certificate only gave authority to the OEP Director.²²⁰

The D.C. Circuit rejected all of Murray’s delegation arguments as irrelevant because the Commission had ratified the OEP Director’s action in the July 2009 order on rehearing.²²¹ “Given that the Commission had authority to issue the [March 2009 Order], the Commission’s subsequent ratification resolved any potential delegation problems.”²²²

216. *Rockies Express Pipeline LLC*, 128 F.E.R.C. ¶ 61,045 at P 23 (2009).

217. 18 C.F.R. § 375.308 (2011).

218. *Murray Energy Corp.*, 629 F.3d at 236.

219. 18 C.F.R. § 375.301(b) (2011).

220. *Murray Energy Corp.*, 629 F.3d at 236.

221. *Id.*

222. *Id.* (citing *Dana Corp. v. ICC*, 703 F.2d 1297, 1301 (D.C. Cir. 1983)).

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