

INNOVATIONS IN FERC HEARING PROCEDURES

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Synopsis: The existing litigation process at the Federal Energy Regulatory Commission (FERC) is complex, can take years, and can be extremely expensive. But not every dispute requires the full regulatory process that is available at FERC today. Moreover, parties to disputes may be willing to concede some of the full procedural protections that the extant FERC process entails in order to be heard and to obtain certainty with respect to the dispute in a timelier manner. Assuming parties are so willing, however, FERC's procedural rules should be improved with additional structure to support an accelerated and more focused procedure to resolve disputes. This paper describes both a focused quasi-litigation mechanism, the Simplified Track I procedure, and a settlement tool, the Harmonic Auction, which could be implemented by parties to resolve their disputes.

The Simplified Track I procedure could be applied to small disputes, for these purposes, defined as disputes valued at less than \$1 million. This Simplified Track I procedure would limit discovery and testimony. Therefore, the dispute must be able to be resolved with limited witnesses, preferably just one witness, and limited discovery. The issue must also be non-precedential. Finally, consistent with the goal of providing an accelerated timely resolution of the dispute, the parties must agree that the decision of the appointed judge will be final with no appeal to FERC or to an appellate court.

Other cases may be settled without a quasi-litigation process. In many cases, discussions reduce down to a dispute between two numbers, for example, the value of an item, damages, a stated rate, or the just and reasonable return on equity. In appropriate cases, where parties have conducted full discovery of the other side's position, each side may have identified respective settlement numbers the gap between which has, despite the best efforts of a mediator, ceased to close. When each party recognizes that the other party's settlement position is a lawful possible outcome in litigation, the full expense and delay of litigation may be less desirable than a settlement result somewhere between the two positions. In such cases, the Harmonic Auction is a novel settlement tool that can be used to bridge the gap between the respective positions. The Harmonic Auction offers a turn-based opportunity for each side to accept a bid. By starting at the midpoint between Terminal Positions, the harmonic nature of the auction renders

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each rejected bid more consequential to encourage a party to accept a smaller, but certain, gain over a greater loss.

The Simplified Track I procedure and the Harmonic Auction are not replacements for the existing FERC processes. These are two possible additional tools that can promote more timely resolution of disputes, while still providing the opportunity to be heard without the expense and delay inherent in the existing FERC processes.

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I. INTRODUCTION

Practitioners who frequently appear before FERC are familiar with the length of time necessary to resolve important and complicated matters that are regulated by the agency. To illustrate the point, consider the ongoing litigation to establish the return on equity (ROE) used in the rates of transmission owners in ISO New England.¹ The first ROE complaint case, in FERC Docket No. EL11-66, was filed on September 30, 2011.² Nearly nine years later, following a full administrative hearing, multiple substantive Commission orders, an appeal and remand by the U.S. Court of Appeals for the DC Circuit, and further briefing by participants, there is no final resolution of this docket.³ As a result, an issue that is at the core of nearly, if not all, Commission rate proceedings is unre-

1. *Coakley Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, 165 F.E.R.C. ¶ 61,030 at P 1 (2018).

2. *Id.* at P 2.

3. *Id.* at PP 1-5, 9-14 (summarizing the proceedings in Docket No. EL11-66).

solved. Of course, there can be no argument that litigation of such fundamental issues should be careful, thorough, and deliberate.

But not all matters that come before FERC have the importance and the far-reaching impact such as a decision on ROE. However, even a simple case, using the most expedited Track I litigation process currently available under FERC's Rules, is likely to take over a year from the date of filing through a FERC decision.⁴ Following FERC's decision on the Administrative Law Judge's (ALJ) Initial Decision, if an aggrieved party exercises her right to seek rehearing and then, after an unfavorable order on rehearing, takes an appeal, the process will take far longer.⁵

FERC's Rules should be updated and revised to provide alternative paths that will provide litigants with a more efficient means of resolving disputes. This paper describes a new Simplified Track I procedure and includes proposed changes to FERC's regulations to implement it.⁶ While the Simplified Track I procedure requires formal adoption of regulations, a second novel, alternative mechanism described below, the Harmonic Auction, could be used by participants now to resolve disputes in appropriate cases.

II. EXISTING FERC LITIGATION METHODS ARE EXCESSIVELY TIME- AND MONEY-CONSUMING FOR SMALL CASES AND MAY BE A BARRIER TO JUSTICE

The administrative litigation process does not lend itself to quick decisions. Under section 205 of the Federal Power Act (FPA), unless it otherwise orders, FERC must act on a utility rate filing in 60 days.⁷ FERC must process a natural gas company filing under section 4 of the Natural Gas Act (NGA) in 30 days.⁸ In contrast, complaints under both the FPA and NGA can take substantially longer than 60 days before FERC issues its first order on the complaint because neither the FPA nor the NGA require a FERC action on a complaint by a fixed deadline.⁹ While section 206 of the FPA does mandate that FERC "act as speedily as possible"¹⁰ in complaint cases—no such mandate is in NGA section 5—in the absence of a statutory deadline by which FERC must issue a decision, it will inevitably take longer for the Commission to issue an order on a complaint. Moreover, parties seek leave to file multiple rounds of answers to prior pleadings, regardless of the fact that FERC's Rules prohibit answers to answers,¹¹ contributing to the delay. Not unreasonably, even if FERC decides to reject impermissible answers, FERC appears to wait for parties to finish ventilating their

4. See *infra* Part II.

5. See generally 18 C.F.R. §§ 385.708-13 (1995) (discussing the Initial Decision, rehearing, and appeals processes).

6. See *infra* Appendix.

7. 16 U.S.C. § 824d(d) (2018).

8. 15 U.S.C. § 717c(d) (2005).

9. 16 U.S.C. § 824d(d); 15 U.S.C. § 717c(d).

10. 16 U.S.C. § 824e(b) (2005).

11. 18 C.F.R. § 385.213(a)(2) (2012).

positions before issuing an order. Once FERC does issue an order on the initial complaint, FERC frequently sets the matter for settlement, hearing, or both.¹²

The simplest litigation mechanism currently in place at FERC is the Track I process, a 29.5-week process from the date of the order establishing a hearing.¹³ That means, participants in a Track I case frequently will not have an Initial Decision until a minimum of 38 weeks after an FPA case was initiated, or 34 weeks after an NGA case was initiated.¹⁴ Of course, the 38 weeks to Initial Decision is likely to be a low estimate because parties will frequently engage in settlement discussions after FERC's initial order on the pleadings. But assuming the litigants proceed straight to hearing and receive an Initial Decision 38 or 34 weeks from the filing date, the litigation effort is not complete. Following the Initial Decision, participants have 30 days (about 7 weeks) to file briefs on exceptions¹⁵ and an additional 20 days (about 3 weeks) to file a brief opposing exceptions.¹⁶ Thus, standard practice for even the simplest cases requires, from the date of the initial filing, 48 weeks (44 weeks under the NGA) before FERC has a complete record on which to decide.¹⁷ FERC will likely need more than 4 weeks to issue a decision on that record. Even 8 weeks for an NGA case poses a challenge. In other words, existing procedures render it very unlikely that a litigant will obtain an order from FERC, following a hearing, in less than a year.

The expense of a year's worth of litigation will be substantial. While a Track I proceeding may have fewer rounds of pre-filed written testimony, substantial attorney, consultant, and witness time will go into the preparation of that testimony. In addition, more attorney, consultant, and witness time will be required to prepare, respond to, and analyze discovery requests during the 19.5-week period from the order establishing hearing until the hearing. Pre- and post-hearing briefs, as well as other required filings, will require still more time. All of this professional time inevitably translates into substantial bills for services. Meanwhile, as the participants spend these quantifiable dollars, substantial unquantifiable dollars are lost due to uncertainty about the outcome of the case and from lost opportunities because time, attention, and dollars were devoted to litigation.

The substantial time and expense required to litigate a case at FERC may be a barrier to justice. That is, a potential litigant may simply tolerate a circumstance that, if litigated, would be found to be unjust, unreasonable, or unduly discriminatory, *i.e.*, illegal,¹⁸ because the cost is too high.

12. *See generally* 18 C.F.R. §§ 385.502, 385.601 (discussing FERC's ability to set a matter for hearing or settlement).

13. FED. ENERGY REG. COMM'N, FERC: SUMMARY OF PROCEDURAL TIME STANDARDS FOR HEARING CASES (2017), <https://www.ferc.gov/legal/admin-lit/time-sum.asp>.

14. *Id.*

15. 18 C.F.R. § 385.711(a)(1)(i) (1995).

16. *Id.* § 385.711(a)(1)(ii).

17. *Id.*

18. 16 U.S.C. § 824d(a)-(b).

The allocation of the burden of proof to the complainant under the FPA and the NGA also raises the cost of a complaint and increases the risk that an illegal rate may continue in effect.¹⁹ Whereas a utility seeking to change its own rate must simply prove that the new rate is just and reasonable,²⁰ a complainant must show that the existing rate is unjust and unreasonable.²¹ Moreover, while a utility proposing a rate or tariff change has full knowledge of the facts, the complainant must make her case based upon the information she is able to obtain from the utility in discovery or other public documents. Thus, the FPA and NGA place the complainant at a significant informational disadvantage. On top of the procedural burdens, an FPA complainant is limited to 15 months of refunds if the Commission takes longer than 15 months from the refund effective date, generally the date the complaint was filed,²² to issue its determination. Complainants under the NGA are in a still worse position because, under the NGA section 5, there is no refund effective date.²³ That is, rates are not lowered until FERC issues an order granting the complaint and establishing new rates.²⁴ Simply put, for some complainants, the cure is worse than the disease.

FERC has recognized that a high cost of litigation poses a significant concern. In Order No. 602,²⁵ FERC stated that “[a] lack of financial resources should not be an impediment to injured parties seeking relief before this Commission.”²⁶ Nonetheless, litigation at FERC remains a daunting and expensive process.

III. EXISTING ALTERNATIVES THAT COULD ACCELERATE DISPUTE RESOLUTION AND MINIMIZE COSTS

A potential litigant is not completely without tools to pursue a case in a more expeditious and less expensive manner than full litigation. FERC’s Rules provide several mechanisms to abbreviate the litigation process or facilitate settlement.²⁷ As explained below, however, the mechanisms require updating and expansion.

19. 16 U.S.C. § 824d(e); 15 U.S.C. § 717c(e).

20. *Id.*

21. 16 U.S.C. § 824e(b); 15 U.S.C. § 717d(a); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 640 (D.C. Cir. 2010) (“A finding that the existing tariff provisions are unjust or unreasonable is a prerequisite for exercising authority under § 5 of the NGA.”); *Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017).

22. 16 U.S.C. § 824e(b).

23. AM. PUB. GAS ASS’N, MODERNIZING THE NATURAL GAS ACT TO ENSURE IT WORKS FOR EVERYONE, TESTIMONY BEFORE THE ENERGY SUBCOMMITTEE OF THE HOUSE ENERGY AND COMMERCE COMMITTEE (Feb. 5, 2020), <https://docs.house.gov/meetings/IF/IF03/20200205/110468/HHRG-116-IF03-Wstate-WorsingerR-20200205.pdf>.

24. *Id.*

25. *Complaint Procedures*, 86 F.E.R.C. ¶ 61,324 (1999).

26. *Id.*

27. *See generally* 18 C.F.R. §§ 385.217-18, 385.604-05, 385.710.

A. *Rule 217—Summary Disposition*

Assuming a litigant has determined to bring an action notwithstanding the potential commitment of time and money, the litigant may seek summary disposition under Commission Rule 217.²⁸ Summary disposition is available from FERC²⁹ or the appropriate ALJ³⁰ if FERC has set the matter for hearing.³¹ Even if FERC has set the matter for hearing, however, the ALJ's decision on summary disposition is not the end of the matter; rather, the ALJ's decision is an initial decision under FERC's Rules.³² Thus, participants will still need to file briefs on exceptions with FERC, and a reply to exceptions. And participants will need to wait for FERC to issue its decision. Thus, procedurally, summary disposition will not necessarily yield a quick decision that will actually alter rates or tariff provisions.

There are substantive barriers as well. Summary disposition is only available when "there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding."³³ There are certainly occasions when parties to a dispute agree on the facts and the disputed issue is purely an issue of law or policy. From the author's experience, such occasions are the exception, not the rule. When the legal standard is whether a rate is just, or reasonable, or unduly discriminatory, facts are critical to the determination.

As a practical matter, a litigant should consider whether FERC or an ALJ can be deemed to be in error for denying summary disposition. As just noted, the questions FERC must address are generally dependent upon the facts. How can it be error for the decisional authority to require further development of the record when at least one party contends there is a dispute as to the facts? Consider also the incongruity of an ALJ granting summary disposition and finding that there are no issues of material fact when, most probably, FERC, the ultimate decisional authority, has already found that there were issues of material fact that required resolution in a hearing. Conceivably, the ALJ would have the benefit of additional briefing as well as prefiled testimony that was unavailable to FERC when it issued its order establishing a hearing. Nonetheless, an ALJ's grant of summary disposition, in a sense, second guesses a published finding of the Commission. Recognizing these concerns with granting a motion for summary disposition, a now-retired ALJ told the author that he virtually never granted summary disposition because that decision is very unlikely to be reversed.³⁴

28. 18 C.F.R. § 385.217.

29. *Id.* § 385.217(a)(1).

30. If the Chief Judge has appointed a presiding ALJ for the hearing, the appropriate ALJ is the presiding ALJ. If FERC has established a hearing and the Chief Judge has not appointed a presiding ALJ, the appropriate ALJ is the Chief Judge.

31. 18 C.F.R. § 385.217(a)(2).

32. *Id.* § 385.217(d).

33. *Id.* § 385.217(b).

34. A litigant could take an interlocutory appeal of the denial of summary judgment to the Motions Commissioner. 18 C.F.R. § 385.715. But when FERC has ordered the development of a record because of disputes over material facts, such an appeal would have little chance of success given the limited further development of the record. Then, once an Initial Decision is issued on the merits, it seems highly unlikely that a liti-

Moreover, if he granted summary disposition, and that decision was subsequently reversed, more time would elapse, potentially prejudicing litigants, and, especially if the summary disposition did not address all issues in the case, the orderly processing of the case could be seriously disrupted.

The bottom line is that summary disposition offers the potential for an expedited resolution in a very narrow set of cases. For most disputes, however, summary disposition is not an option.

B. Rule 218 - Simplified Procedure for Complaints Involving Small Controversies

FERC has an expedited procedure built into its rules for “small controversies”: Rule 218.³⁵ Rule 218 provides that “if the amount in controversy is less than \$100,000 and the impact on other entities is *de minimis*,”³⁶ then a complaint may be brought using the expedited procedures in the rule. Rule 218 requires that answers be made in 10 days, or 20 days if information in the complaint is privileged.³⁷ Thus, there is an expedited pleading process. However, there is no deadline for FERC to act on the expedited complaint.³⁸ Moreover, FERC’s response may be a hearing order.³⁹ As a result, the litigants’ effort to expedite the resolution of the dispute may be for naught.

Rule 218 has several obvious problems. First, the \$100,000 amount in controversy limitation has not been updated since 1999 when FERC promulgated Order No. 602.⁴⁰ Because rates can be in place for years, few disputes over FERC-regulated rates will have less than \$100,000 at issue. Thus, Rule 218 excludes all but the smallest disputes.

Rule 218 is also flawed because there is no deadline for a FERC decision.⁴¹ Nor is there any certainty that FERC will not determine that a full hearing is necessary.⁴² Thus, only the initial pleading process may be simplified. A hearing process, where the bulk of litigation dollars are spent, may still lie ahead.

Finally, the pleading process in Rule 218 is not very streamlined. Comparing the required pleading elements in a standard complaint under Rule 206(b)⁴³ to Rule 218(b), the only elements Rule 218(b) omits are Rule 206(b)(8)-(11), which are documents supporting the party’s position, a statement about alternative dispute resolution, form of notice, and, for “Fast Track” processing, an ex-

gant would waste further time and money urging FERC to find that the Presiding Judge wrongly denied summary judgment.

35. 18 C.F.R. § 385.218.

36. *Id.* § 385.218(a).

37. *Id.* § 385.218(e)(2).

38. *See generally* 18 C.F.R. § 385.218.

39. 18 C.F.R. § 385.206(g)(3).

40. *See generally* 86 F.E.R.C. ¶ 61,324.

41. *See generally* 18 C.F.R. § 385.218.

42. *Id.*

43. 18 C.F.R. § 385.206(b).

planation as to why standard processing is insufficient.⁴⁴ Perversely, the omission of supporting documents could create uncertainty as to facts and result in FERC ordering a hearing.

In light of the narrow set of disputes eligible for resolution under Rule 218 and the drawbacks of using Rule 218, it is hardly surprising that a review of FERC's eLibrary system⁴⁵ does not show any instance in which Rule 218 has been used.

C. Rule 710 – Waiver of the Initial Decision

In the event a hearing is necessary, litigants can still take steps to accelerate the process without sacrificing the opportunity to conduct discovery or cross-examination at hearing. That is, Rule 710⁴⁶ enables the participants to waive the Initial Decision. However, few litigants have actually sought to waive an Initial Decision. In a search of eLibrary issuances and submissions, the author identified only two dockets in electric and natural gas proceedings in which a participant sought a waiver of the Initial Decision or establishment of a process that the Commission treated similarly to the waiver of an Initial Decision.⁴⁷ In its recent proceedings in Docket No. ER18-1639, FERC did invoke Rule 710 to establish an accelerated hearing procedure without the issuance of an Initial Decision.⁴⁸ In this proceeding, just over seven months after the filing of the agreement, the Commission did issue a (mostly) dispositive order.⁴⁹ Of course, FERC required a compliance filing and did not decide the ROE issue.⁵⁰ As to the ROE issue, FERC ordered a further briefing process slated to take an additional seven months.⁵¹ More than a year after FERC's order on the accelerated hearing, and closing on the second anniversary of the original filing, there has been no dispositive action on either the compliance filing or on the ROE issue. The experience in this proceeding illustrates that Rule 710 is not a guarantee of either an easy or smooth path to a final decision.

That litigants seldom seek to waive an Initial Decision is not surprising. Having structured testimony and cross-examination at hearing to inform an ALJ, it is generally to a litigant's advantage to have the ALJ provide the first assessment of the record. While a request for waiver of an Initial Decision need not be uncontested—although an uncontested motion will be deemed granted unless FERC specifically denies it⁵²—if even one litigating party desires an Initial De-

44. 18 C.F.R. § 385.218(b).

45. FED. ENERGY REG. COMM'N, ONLINE ELIBRARY, <https://elibrary.ferc.gov/IDMWS/search/fercgensearch.asp>.

46. 18 C.F.R. § 385.710.

47. See *Southwest Power Pool, Inc.*, 155 F.E.R.C. ¶ 61,316 at P 6 & n.12 (2016); *Alliance Pipeline L.P.*, 156 F.E.R.C. ¶ 63,038 (2016).

48. *Constellation Mystic Power, L.L.C.*, 164 F.E.R.C. ¶ 61,022 at P 12 & n.16 (2018).

49. *Constellation Mystic Power, L.L.C.*, 165 F.E.R.C. ¶ 61,267 (2018).

50. *Id.*

51. *Id.* at P 2.

52. 18 C.F.R. § 385.710(a).

cision, the safe choice is to require an Initial Decision because the administrative process is intended to build a record.⁵³ Finally, waiving an Initial Decision does not necessarily eliminate briefing.⁵⁴ The extensive, and still pending briefing process in ER18-1699, as just discussed, bears out the potential need for briefing. Nor does a waiver place a timeline on FERC's decision.⁵⁵ In fact, without the benefit of an ALJ's effort to sift through the material in an Initial Decision, it may take longer for FERC to issue its decision. As a result, any opportunity that Rule 710 provides to accelerate the process and limit litigant costs appears to be illusory.

D. Settlement process

The Commission's rules create at least two settlement paths that proceed outside the context of FERC litigation. Rather than file a case which can be set for a hearing that is held in abeyance to permit settlement discussions under the auspices of an ALJ, litigants may invoke Rule 604-Alternative Means of Dispute Resolution (ADR)⁵⁶ and Rule 605-Arbitration.⁵⁷ As discussed below, each process provides an opportunity to avoid costs and accelerate a decision. But each process has flaws that could be addressed through the Simplified Track I procedure.

1. Rule 604 – Alternative Means of Dispute Resolution

Rule 604 provides a broad framework for resolving disputes that are fact specific and involve few parties;⁵⁸ these are the kinds of disputes that may be good candidates for disposition under the Simplified Track I procedure. ADR can be successful when parties to a dispute need limited assistance to resolve the dispute.⁵⁹ But when parties dispute facts, the application of law, or both, the open structure of Rule 604 ADR may no longer be advantageous and flexibility may actually become a hindrance. Oftentimes in these circumstances, parties engage in arguments about “the shape of the table” rather than resolution of the dispute. For example, will there be discovery? If so, how much? How or who will resolve disputes over facts or over law? Will there be briefs or oral presentations? Witness testimony? Cross-examination? In sum, mediation can lead to settlement in some cases, but other disputes may require a more formal structure that provides a process similar to the traditional opportunity to be heard.

53. See *supra* Part III.A (discussing the limited use of summary disposition).

54. 18 C.F.R. § 385.710(b)(4).

55. See generally 18 C.F.R. § 385.710.

56. 18 C.F.R. § 385.604(a)(1).

57. *Id.*

58. 18 C.F.R. § 385.604(a)(2).

59. Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why it Doesn't Work and Why it Does*, HARV. BUS. REV. (1994), <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>.

2. Rule 605 – Arbitration

If litigating parties seek more structure than Rule 604 ADR, Rule 605 Arbitration may enable the parties to resolve the dispute.⁶⁰ But while ADR may have too little structure, Rule 605 Arbitration may have too much structure that may result in costs nearly as great as a FERC litigation without the procedural protections of a FERC litigation.

After reaching agreement to use arbitration, subject to approval by the decisional authority,⁶¹ and after selecting the arbitrator, Rule 605 requires many of the same formalities of a FERC hearing and provides the option to observe other formalities.⁶² For example, discovery can be compelled; the arbitrator has the same authority as FERC.⁶³ That means, discovery can be broad and detailed. The only limits on discovery are the same limits available at a FERC hearing,⁶⁴ *e.g.*, the discovery request seeks materials that are not relevant or likely to lead to the discovery of admissible evidence, that are privileged, that are unduly burdensome to provide, *etc.* Similar to a hearing, there is an *entitlement* to be heard, present evidence, and cross-examine witnesses.⁶⁵ While not required, the parties may choose to have the arbitration proceeding be on the record.⁶⁶ Thus, an arbitration may have many of the hallmarks of a FERC hearing, along with the associated expense. There may also be more process than what is needed or desired for a smaller case.

Arbitrations are unlike FERC hearings in a critical respect: the arbitrator's award is binding,⁶⁷ unlike the Initial Decision of an ALJ.⁶⁸ While the arbitrator's award is filed with FERC,⁶⁹ the rules contain no provision for FERC to rule on the award. Rather the arbitrator's award is final 30 days after it is served on all participants.⁷⁰ Thus, there is no opportunity to request a rehearing or for an aggrieved party to appeal under the FPA or NGA. This lack of review may be undesirable in complex matters for many litigants. Even for simpler matters, however, after having invested in a substantial arbitration process, the absence of judicial review may similarly be more “bug” than “feature.”

60. 18 C.F.R. § 385.605.

61. *Id.* § 385.605(a).

62. *See generally* 18 C.F.R. § 385.605.

63. *Id.* § 385.605(c)(3).

64. *Id.*

65. *Id.* § 385.605(d)(3).

66. *Id.* § 385.605(d)(2).

67. *Id.* § 385.605(e)(3).

68. *See generally* 18 C.F.R. § 385.712 (discussing FERC's ability to review Initial Decisions made by an ALJ).

69. 18 C.F.R. § 385.605(e)(1)(ii).

70. *Id.* § 385.605(e)(2).

IV. THE SIMPLIFIED TRACK I PROCEDURE

Part III summarizes existing FERC mechanisms that accelerate the resolution of cases and reduce the cost of litigation.⁷¹ It also identifies several of the deficiencies in those mechanisms that need to be addressed under FERC's Rules in order to provide another option for simplified litigation, which would occur through approval of the Simplified Track I procedure.⁷² Attached to the end of this Article is an appendix containing draft revisions to Rule 604 to implement the Simplified Track I procedure and which will be referenced hereafter as the Proposed Regulations.⁷³

The Simplified Track I procedure is best viewed as a “mini-trial,” and the Proposed Regulations refer to it as such. However, the Simplified Track I procedure is clearly not a full FERC hearing procedure because it omits such procedural protections as a FERC decision, a request for rehearing, and judicial review.⁷⁴ Litigants that desire or require those procedural protections should proceed with a full FERC hearing. Assuming litigants are comfortable with the waiver of such procedural protections, the Simplified Track I procedure provides a litigation-type structure more formal than Rule 604 but that is more limited than the quasi-hearing structure of a Rule 605 Arbitration. Of course, because the limitations of a Simplified Track I procedure are real, agreement to use the procedure must be consensual among all parties. Moreover, the outcome of the decision must not prejudice other litigants at FERC. Accordingly, the proposed Simplified Track I regulations best fit under Rule 604 ADR with the protections identified at Rule 604(a)(1)-(3).⁷⁵

One of the most significant burdens on parties in litigation is discovery. Perhaps the biggest flaw in the use of Rule 605 Arbitration in small cases is that there is no limitation on discovery.⁷⁶ Recognizing the importance of discovery, but balancing the potential for abuse of discovery in a limited case, the Simplified Track I regulations propose to limit discovery to 25 questions per side.⁷⁷ Further, that cap is a “soft cap” that has the flexibility to be modified by the judge in appropriate circumstances which recognizes that any cap on discovery is arbitrary and subject to potential abuse.⁷⁸ That is, upon a sufficient showing, additional discovery could be allowed.⁷⁹ Consistent with the spirit of a limited proceeding, however, the proposed rule prohibits depositions.⁸⁰

71. See *supra* Part III; see also 18 C.F.R. § 385.604.

72. *Id.*

73. See *infra* Appendix. The draft revisions were first presented in the materials for the 2019 EBA Annual Meeting & Conference presentation, “Innovation in the FERC Hearing Process.”

74. See *infra* Appendix.

75. 18 C.F.R. § 385.604(a)(1)-(3).

76. See generally 18 C.F.R. § 385.605.

77. See *infra* Appendix, at Part (g)(2).

78. *Id.* at Part (g)(3).

79. *Id.*

80. *Id.* at Part (g)(2).

Appropriate to cases with limited dispute as to facts or law, proposed Rule 604(g)(1) imposes a limit on witnesses and their testimony.⁸¹ But a key reason for the Simplified Track I procedure is the “opportunity to be heard” that is fundamental to the American system of jurisprudence.⁸² Balancing these interests, the rule allows 50 pages each for one round of testimony from the proponent, the respondent, and trial staff.⁸³ In addition, the proposed rule permits the proponent an additional 25 pages for rebuttal.⁸⁴ Disputes in which presentation of the facts and the law requires more than 50 pages are, thus, by definition, too complicated for the Simplified Track I procedure.⁸⁵ But if the parties agree, or if the presiding judge determines that the foregoing limits should be adjusted, as with discovery, the Rule authorizes adjustments to be made.⁸⁶

In recognition that the issues to be resolved in a Simplified Track I proceeding are less complex, proposed Rule 604(g)(4) eliminates the hearing unless a hearing is requested by the parties.⁸⁷ The presumption of the rule is that the issues to be resolved using the Simplified Track I procedure are sufficiently clear that live testimony and cross-examination will not substantially add to the presiding judge’s understanding of the issues. However, if the parties desire a hearing, the proposed rule does not preclude it.⁸⁸

To further streamline the procedure for a Simplified Track I proceeding, proposed Rule 604(g)(5) limits briefs to a single round of simultaneously filed briefs limited to 25 pages.⁸⁹ Again, should the parties agree, or should the presiding judge determine otherwise, the presiding judge may alter this limit.⁹⁰

In order to engage in a Simplified Track I procedure, the parties must be in agreement that the presiding judge’s determination will be final.⁹¹ The presiding judge’s determination is not an Initial Decision.⁹² There will be no future order from FERC, no opportunity to seek rehearing, and no opportunity for judicial review.⁹³ The assumption of this provision is that litigants are better off when the decisional authority that has had the most direct contact with the parties and the issues has the final word. Especially in a limited, fact-specific case that does not involve or is not setting major policy issues, the presiding judge will likely be much more focused on the case as compared to FERC, which must focus on larger national issues. Similarly, with respect to judicial review, in contrast to an arbitration proceeding in which parties will have invested substantial time, effort,

81. *Id.* at Part (g)(1).

82. *See infra* Appendix.

83. *Id.* at Part (g)(1).

84. *Id.*

85. *Id.*

86. *Id.* at Part (g)(6).

87. *See infra* Appendix, at Part (g)(4).

88. *Id.*

89. *Id.* at Part (g)(5).

90. *Id.*

91. *Id.* at Part (g)(9).

92. *See infra* Appendix, at Part (g)(9).

93. *Id.*

and dollars in the process and there will have been multiple opportunities for an alleged error to have been made, the streamlined process of a Simplified Track I proceeding is less likely to benefit from judicial review.

V. HALLMARKS OF CASES SUITABLE FOR SIMPLIFIED TRACK I

The Simplified Track I procedure is not appropriate for all cases any more than summary disposition, small controversies, waiver of initial decision, ADR, or arbitration is appropriate for all cases. The Simplified Track I procedure is simply another tool in the toolbox. Litigants should carefully consider whether the procedures in Simplified Track I are sufficient for their circumstances and whether the litigants can accept an outcome with no right to appeal.

The key factor in a Simplified Track I proceeding is that the parties are focused on the resolution of a narrow issue that affects only the parties to the case (or effects on other parties are limited).⁹⁴ This limitation is critical partly because Rule 604 precludes the use of ADR if there are significant policy questions.⁹⁵ Similarly, Rule 604 precludes the use of ADR if the case could be precedential such that a full and public record is necessary.⁹⁶ The Simplified Track I procedures are limited on the assumption that the issues are narrow. The procedures preclude broader discussions of policy or the development of a record that could provide meaningful precedent.

The limited discovery available in the Simplified Track I procedure also presumes that the parties are familiar with the other side's position. A party that knows nothing of the other side's position could not be satisfied with a limitation to 25 discovery questions.⁹⁷ Accordingly, before parties begin a Simplified Track I proceeding, the parties should have had substantial settlement discussions. Those discussions would need to have included sufficient exchange of information to inform both sides of the other's position. What is "sufficient" will be subjective and need to be mutually agreed upon by the parties. In addition, both sides must be convinced that the other side has clear and reasonable goals. Toward that end, prior to the commencement of a Simplified Track I mini-trial, an exchange of multiple offers and counteroffers would be extremely helpful.

Finally, the case should be appropriately "small." As discussed above, the \$100,000 cap of Rule 218⁹⁸ is too small. The author proposes here that an appropriate cap for a Simplified Track I proceeding may be \$1 million. Of course, as with other limitations in the proposed procedure, the cap should be a "soft cap" that allows flexibility, upon mutual agreement, on a case-by-case basis. Especially when the issue involves a rate that is charged year-after-year until changed or until a contract expires, additional flexibility is required. One way for litigants to approximate the dollar value of a rate would be to consider the net present value over five years. If that result is less than \$1 million, the dispute

94. *See infra* Appendix.

95. 18 C.F.R. § 385.604(a)(2)(ii)-(iii).

96. *Id.* § 385.604(a)(2)(v).

97. *See infra* Appendix, at Part (g)(2).

98. 18 C.F.R. § 385.218(a).

may be suitable for resolution by the Simplified Track I procedure. Recognizing the difficulty of establishing a cap and recognizing that a cap can become obsolete when not updated as is the case with Rule 218,⁹⁹ the proposed modifications to Rule 604 do not include a cap.¹⁰⁰

VI. EXAMPLES OF CASES WHICH COULD BENEFIT FROM THE SIMPLIFIED TRACK I PROCEDURE

There are a wide variety of cases that could be resolved using the Simplified Track I procedure. One such category of cases arises from transmission formula rate annual updates. In 1998, FERC accepted a formula rate to be used by transmission owners participating in (what was then known as) the Midwest Independent Transmission System Operator (and which is now known as the Midcontinent Independent System Operator, or MISO).¹⁰¹ Thereafter, transmission owners throughout the U.S. have filed formula rates to replace the stated transmission rates and stated transmission revenue requirements, updated in periodic rate cases, that historically had been in effect.¹⁰² At this time, most transmission rates under FERC's jurisdiction are set by a formula, updated with FERC Form 1 cost data every year.¹⁰³ Protocols that describe and proscribe the implementation of the rate formula, as well as provide interested parties a means to review the implementation of the rate formula are a fundamental part of formula rates approved by FERC.¹⁰⁴ FERC has observed that “[m]odern formula rate protocols also typically provide procedures by which stakeholders can challenge the transmission owner's implementation of the formula rate.”¹⁰⁵ Typically these procedures provide an initial informal information exchange process, followed by informal dispute resolution, and, if necessary, a “formal” challenge filed with FERC.¹⁰⁶ The Simplified Track I procedure could provide an efficient means of resolving disputes that rise to a formal challenge.

The theory behind adoption of transmission formula rates was that by making a significant upfront investment in a robust formula that heavily relied on cost data from the FERC Form 1, utility cost recovery would remain current, rates would be transparent, and utilities and customers would be spared frequent rate cases.¹⁰⁷ Over the course of many annual update processes with several transmission owners, this practitioner has concluded that the theory has faltered when applied to the complexities of utility accounting and ratemaking. In many cases, utilities and their customers have engaged in a process that can last a year

99. *Id.*

100. *See infra* Appendix.

101. *Midwest Independent Transmission System Operator, Inc.*, 84 F.E.R.C. ¶ 61,231, at p. 6 (1998).

102. *Id.* at p. 60-61.

103. *Midwest Independent Transmission System Operator, Inc.*, 143 F.E.R.C. ¶ 61,149 at P 39 (2012).

104. *Id.* at PP 39, 42.

105. *Id.* at P 16.

106. *Id.* at P 18.

107. *Id.* at PP 16-17.

or longer and included extensive discovery throughout the entire process.¹⁰⁸ This process is prolonged, notwithstanding deadlines in the protocols, because the alternative is a formal challenge at FERC which could involve a much longer process and even more discovery.¹⁰⁹ Worse, in many cases, issues are not resolved when they are raised in an annual update. While settlements are reached allowing the parties to move forward, there is no final resolution of the issue.¹¹⁰ Instead, in the next annual update, and in subsequent annual updates, the same issue is challenged again and again because such limited aspects of formula rates are too small to seek a resolution at FERC.¹¹¹ This process is frustrating and expensive for both transmission owners and their wholesale customers.

The Simplified Track I procedure could provide a mechanism for a transmission owner and its customers to resolve their disputes. As an initial matter, the parties would be focused on resolving the dispute. Because the rate is only in effect for a single year,¹¹² a lengthy litigation makes no sense. While different companies' formula rates do have many similarities, each formula is unique, limiting the impact of a decision on a particular formula rate. In addition, while utilities' accounting methodologies are similar and follow the same Generally Accepted Accounting Principles,¹¹³ there are many nuances that render each utility's accounting different. Thus, the application of one utility's accounting to that utility's specific formula rate is unlikely to establish broad precedent or affect other entities not party to the dispute. Because the formula rate protocols provide a substantial informal information exchange and dispute resolution process, the parties will also be very familiar with the respective positions. Limited discovery, limited testimony, and an abbreviated hearing process before an experienced ALJ familiar with FERC ratemaking policies could¹¹⁴ thus provide parties the opportunity to avoid the same disputes year after year after year.

Similar to transmission formula rate disputes, utilities face instances in which the economic benefit of a proposed change filed under FPA section 205 or NGA section 4 is small and outweighed by the potential litigation cost.¹¹⁵ Under current practice, following the utility's filing, if FERC concludes that there are issues of material fact or that the proposed change has not been shown to be just and reasonable, FERC will set the matter for hearing, frequently holding that hearing in abeyance to permit settlement discussions under the direction of an ALJ to occur.¹¹⁶ Regardless of the economic impact of the proposed change, the

108. 143 F.E.R.C. ¶ 61,149 at P 18.

109. *Id.*

110. *Id.* at P 122.

111. *Id.* at P 53.

112. *Id.* at PP 28-29.

113. 143 F.E.R.C. ¶ 61,149 at P 89.

114. *Id.* at PP 96-97 (A principle of Simplified Track I proceedings is that the resolution is not precedential. Thus, having used such procedures to resolve an issue in an annual update, that outcome would not necessarily control in the next annual update. But having had their "day in court," the author presumes the parties would be reluctant to litigate the issue again in a subsequent annual update).

115. *Id.* at P 18.

116. *Id.* at P 122.

settlement and hearing process may include extensive discovery requests, negotiations, testimony, hearings, and briefings. There is no certainty as to when the process will end. Moreover, the longer the process extends, because the utility is collecting its rate, the utility has unknown and growing refund exposure with interest rate risk. Conceivably, a utility may not pursue a rate change because the transaction costs are too high. And even if the utility is totally vindicated and FERC approves the rate change as filed, the utility will likely have poisoned its relationship with customers and state regulators. While the Simplified Track I process cannot prevent all such damage, by minimizing the costs and shortening the fight, there is a better chance for relationships to be preserved.

In the electric industry, there are likely going to be many FPA section 205 filings with limited dollars at stake. Reactive power cases are a good example of such filings: in 2014, for instance, FERC ordered PJM to make several tariff changes to ensure that its Schedule 2 rate for reactive power accurately reflected the costs of the units providing reactive power.¹¹⁷ As a result of that order, FERC all but eliminated fleet-based, black box rates, many of which had been in place from the start of the open access era.¹¹⁸ In addition, FERC all but required that new reactive power rates be unit-specific to ensure that the costs of a transferred or retired unit can be excluded.¹¹⁹ Additionally, in conjunction with NERC requirements for testing the capability of generators and verifying their capability, FERC now requires that applicants submit test data to support a filing for a reactive revenue requirement.¹²⁰ In other words, FERC has set the stage for fact-specific inquiries as to the just and reasonable rate for every single generating unit providing reactive power.

In the wake of the PJM order, as well as other similar orders, a number of utilities have filed with FERC to lower their respective reactive revenue requirement.¹²¹ However, FERC has been clear that such action is no safe harbor if the filing utility has been recovering costs for units found to be incapable of providing service.¹²² For example, Constellation Power Source Generation filed with FERC in 2016 to lower its revenue requirement by a total of \$220,000. FERC set the matter for hearing, initiated an FPA section 206 investigation and referred Constellation to the Office of Enforcement to determine if Constellation recovered costs for units not capable of providing reactive power.¹²³ Similarly, Dayton Power & Light filed in 2016 to lower its revenue requirement by about \$1 million. As with Constellation, FERC set Dayton's filing for hearing, established an FPA section 206 investigation, and referred Dayton to the Office of En-

117. *PJM Interconnection, LLC*, 149 F.E.R.C. ¶ 61,132 (2014) (initiating an investigation of PJM's Schedule 2 rate for reactive power and noting that the PJM tariff did not clearly provide for the reduction of revenue requirements when generating units retired or were transferred).

118. *Id.* at PP 6-9.

119. *Id.*

120. *Wabash Valley Power Association, Inc.*, 154 F.E.R.C. ¶ 61,246 at P 28 (2016).

121. *See Constellation Power Source Generation, LLC*, 155 F.E.R.C. ¶ 61,181 (2016).

122. *Id.*

123. *Id.* at PP 5-6.

forcement.¹²⁴ While the Constellation and Dayton proceedings illustrate that reactive power revenue requirements are not *de minimis*, they obviously exceed the Rule 218 \$100,000 threshold.¹²⁵ On the other hand, FERC regularly addresses cases with economic values that are multiple orders of magnitude larger than these two cases.¹²⁶ Moreover, the litigation expense could easily outweigh revenue to be gained from a single unit providing reactive power. In sum, with respect to reactive power generation, as a generator ages and becomes less capable, a utility faces the triple whammy of lower revenues, substantial litigation expense, and substantial penalty exposure if it does not act quickly enough. By reducing litigation expense and streamlining the process, the Simplified Track I procedure reduces disincentive to file a reactive power rate update and would provide an efficient means for utilities to maintain accurate rates while providing FERC and customers a forum to examine those rates.

Another potential source of extensive litigation at FERC relates to the establishment of interconnections with, and the provision of wholesale distribution service to, distributed resources and storage providers. In Order No. 841, FERC ordered, among other reforms, that operators of organized markets ensure tariff mechanisms exist to enable storage resources to buy power, and get paid for power returned to the grid, at the applicable locational marginal price (LMP).¹²⁷ In so ruling, FERC was clear that it intended to facilitate the interconnection of storage resources to distribution systems as well as the transmission system.¹²⁸ Given the limited power transfer capability of distribution systems relative to transmission systems, such storage resources would necessarily be small. But FERC was clear that such small resources should participate in markets.¹²⁹ Order No. 841 could ultimately be expanded when FERC addresses the issue of aggregation of storage resources, an issue Order No. 841 expressly reserved for future consideration.¹³⁰ One possible consequence of Order No. 841, together with technological improvements and economic efficiencies of batteries, is that a utility could be faced with hundreds, if not thousands of small-scale interconnections to its distribution system. Moreover, each interconnecting resource may seek its own wholesale distribution service rate based on the specific facts of the customer's service. While a utility may propose a one-size-fits-all rate, *e.g.*, a formula rate,¹³¹ it is not clear that such a rate would be just and reasonable. Rather, for each of the potentially thousands of interconnections, a utility could face a

124. *Dayton Power and Light Co.*, 157 F.E.R.C. ¶ 61,231 (2016).

125. *Id.*; 155 F.E.R.C. ¶ 61,181 at PP 5-6.

126. *See e.g., Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 F.E.R.C. ¶ 61,239 (2019) (Glick, Comm'r, dissenting at P 3) (Commissioner Glick quantified the impact of the Commission's order as "amount[ing] to a multi-billion-dollar-per-year rate hike for PJM customers, which will grow with each passing year.") *reh'g pending*.

127. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 at P 289 (2018).

128. *Id.* at P 29.

129. *Id.* at P 35.

130. *Id.* at P 5.

131. *Id.* at P 41.

unique case at FERC. If even a fraction of such cases were to be litigated in hearings at FERC, the litigation log jam would take years to clear. A Simplified Track I procedure that would enable litigants to address their specific concerns could ease the burden.

In contrast to the FPA, the NGA has structural limitations that could prevent a broad use of the Simplified Track I procedure.¹³² NGA section 5 has no refund effective date provision.¹³³ Due to the expense of litigation, while a natural gas company may choose not to litigate with its customers for years, the structure of the statute incents such delay. The longer it takes for FERC to issue a substantive order in a section 5 case, the longer the natural gas company keeps its existing rate. Thus, it seems unlikely that a natural gas company would agree to a streamlined resolution of a dispute with customers in a section 5 context. But certain NGA section 4 cases could benefit from a Simplified Track 1. For example, as with electric utilities, natural gas companies have disputes over interconnections.¹³⁴ Such cases are fact specific and can be sufficiently small that a Simplified Track I procedure could provide an effective means to resolve the dispute. Other NGA section 4 filings by natural gas companies are unlikely to be suitable for resolution by the Simplified Track I procedure because either the dollars at issue are too high or the tariff terms and conditions will involve important FERC policy considerations.

VII. HARMONIC AUCTION AS A SETTLEMENT TOOL

While litigation is necessary to distill facts and law into a resolution, many disputes boil down to a single number. Frequently, the parties find a way to meet at some middle ground. However, on occasion, despite intensive negotiation and good faith efforts on both sides, movement towards the center stops. In those instances in which each party's position has been reduced to a number and the numbers are close—"close" is, of course, case-specific and subjective—and all that remains is to bridge the gap, the parties should settle. The Harmonic Auction is a novel¹³⁵ tool that can be used to bridge that gap.

The Harmonic Auction requires two sides and is limited to those two sides.¹³⁶ Of course, each side may be composed of multiple parties so long as the parties act as one.¹³⁷ For example, one side might be an electric or natural gas

132. Natural Gas Act, 15 U.S.C. §717 (1977).

133. *Id.*

134. 15 U.S.C. § 717f(a) (authorizing FERC to order a pipeline to interconnect to a local distribution utility); *see, e.g.*, NAT. GAS INTELLIGENCE, FERC RESOLVES DISPUTE BETWEEN TENNESSEE, COLUMBIA GULF OVER INTERCONNECT (Aug. 1, 2005), <https://www.naturalgasintel.com/articles/13270-ferc-resolves-dispute-between-tennessee-columbia-gulf-over-interconnect>.

135. *Innovation in the FERC Hearing Process*, ENERGY BAR ASS'N, (May 7, 2019, 11:00 AM), <https://docplayer.net/164490061-Session-a-innovation-in-the-ferc-hearing-process.html>. The term "Harmonic Auction," as well as the concept, originated with the May 7, 2019 panel presentation at the annual meeting of the Energy Bar Association. The author is unaware of any other academic literature discussing or applying this tool.

136. *Id.*

137. *Id.*

utility, while the other side might be comprised of customers and the FERC Office of Administrative Litigation Staff. Therein lies the first challenge to a successful Harmonic Auction: the more parties with more diverse interests, the harder it will be to integrate those parties into the two sides.

Another precondition to a successful Harmonic Auction is that the dispute must be mature; the Harmonic Auction is not the first step.¹³⁸ Before engaging in the Harmonic Auction, each side must have a fully developed position.¹³⁹ In addition, each side must have a full understanding of the other side's position.¹⁴⁰ The position espoused by each side must be intellectually, economically and legally supportable by all participants to the proceeding as well as the appointed Settlement Judge.¹⁴¹ If one side's position does not meet that test, it will be impossible for the Settlement Judge to certify the settlement result and for FERC to accept the settlement as fair and reasonable. But assuming that the two sides' respective positions are fully supportable, those positions define a range of reasonable settlement outcomes, any of which could be approved by FERC. Then, for a successful Harmonic Auction, both sides must be willing to accept any result within that range of settlement outcomes.¹⁴²

Prior to beginning the Harmonic Auction, each side's Terminal Position must be established.¹⁴³ Each side's respective Terminal Position is the outcome that the side considers optimal.¹⁴⁴ Of course, as noted above, that Terminal Position must be intellectually, economically and legally supportable by all participants and the Settlement Judge to yield a valid outcome.¹⁴⁵ In addition, the participants to the Harmonic Auction must determine an Interval Amount.¹⁴⁶ With each round of the Harmonic Auction, the bid moves one Interval Amount towards a Terminal Position.¹⁴⁷ The Interval Amount must be small enough to allow the loser of the coin toss ("Bidder 2") that starts the Harmonic Auction not to feel cheated or abused if the coin-toss winner ("Bidder 1") accepts the first bid iteration.¹⁴⁸ But the Interval Amount must be large enough for the Auction to progress at a reasonable rate.¹⁴⁹ Too small of an Interval Amount will burden the sides with endless iterations of the Harmonic Auction process.

The Harmonic Auction begins at the midpoint of the two Terminal Positions.¹⁵⁰ On the assumption that the parties have rejected the "split the difference compromise," Bidder 1 has the first opportunity to accept a bid that is one Inter-

138. *Id.*

139. *Innovation in the FERC Hearing Process*, *supra* note 135, at 8.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 4.

144. *Innovation in the FERC Hearing Process*, *supra* note 135, at 8.

145. *Id.* at 5.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Innovation in the FERC Hearing Process*, *supra* note 135, at 5.

150. *Id.*

val Amount closer to Bidder 1's Terminal Position from the midpoint.¹⁵¹ Only Bidder 1 can accept that bid.¹⁵² If Bidder 1, does not accept, Bidder 2 has the opportunity to accept a bid that is one Interval Amount closer to Bidder 2's Terminal Position from the midpoint.¹⁵³ Only Bidder 2 can accept that bid.¹⁵⁴ If Bidder 2, does not accept, Bidder 1 has the opportunity to accept a bid that is two Interval Amounts closer to Bidder 1's Terminal Position from the midpoint.¹⁵⁵ And so the auction continues until a bid is accepted.¹⁵⁶

As an example, consider a case in which the Terminal Position of Bidder 1 is payment to it of \$1.2M and the Terminal Position of Bidder 2 is payment to Bidder 1 of \$800,000. The midpoint of these two Terminal Positions is \$1M. In this case, the parties determine the Interval Amount should be \$40,000. Bidder 1 gets the first opportunity with a chance to accept a settlement number of \$1,040,000, the midpoint plus one Interval Amount. Assuming Bidder 1 rejects that number, Bidder 2 gets the opportunity to accept \$960,000, the midpoint minus one Interval Amount. If Bidder 2 rejects that, Bidder 1 may accept \$1,080,000, the midpoint plus two times the Interval Amount. If Bidder 1 rejects that, Bidder 2 may accept \$920,000, the midpoint minus two times the Interval Amount. The next round is the midpoint plus, and then minus, three times the interval amount. And the auction continues, with the settlement number progressively moving further from the midpoint until either bidder accepts the number or a Terminal Position is reached.

The Harmonic Auction could also be applied in the context of an ROE negotiation. Suppose Bidder 1's Terminal Position is 9.5%, Bidder 2's Terminal Position is 10.5%, the midpoint is 10.0%, and the agreed upon Interval Amount is 0.05%. In this auction, Bidder 1 could accept 9.95%. In this case, because Bidder 1's Terminal Position is less than the midpoint, the first bid is a subtraction of one Interval Amount from the midpoint. If Bidder 1 does not accept, the next offer goes to Bidder 2 at 10.05%. Then Bidder 1 gets a chance at 9.9%, Bidder 2 at 10.1%, Bidder 1 at 9.85%, Bidder 2 at 10.15%, Bidder 1 at 9.8%, Bidder 2 at 10.2%, and so forth until an offer is accepted or the Bidder 1 Terminal Position is reached.

While it may appear that the coin toss winner always wins, even if the Interval Amount has been properly set, that should not be the case. To illustrate that the coin toss winner will not always win, consider a situation in which Bidder 1 believes she has a very strong case. Bidder 1 may be tempted to reject all bids until her Terminal Position is reached. But Bidder 1's strategy could backfire. Bidder 2 may agree that Bidder 1 has a very strong case. Bidder 2 may accurately perceive that Bidder 1 will hold out to obtain a result as close as possible to her Terminal Position. Thus, Bidder 2 may accept a bid several Interval

151. *Id.*

152. *Id.*

153. *Id.* at 8.

154. *Innovation in the FERC Hearing Process*, supra note 135, at 8.

155. *Id.* at 3.

156. See discussion *supra* Part II; see, e.g., 16 U.S.C. § 824e; 15 U.S.C. § 717d.

Amounts before her Terminal Position, preventing Bidder 1 from approaching her Terminal Position. In other words, in this hypothetical, Bidder 2's decision to accept a bid is not only driven by her belief in her case and desire to reach her Terminal Position, but also her assessment of Bidder 1's case and Bidder 1's desire to reach her Terminal Position. Thus, while it is true that Bidder 2, as the coin toss loser, cannot achieve her Terminal Position, she can still "win" the Harmonic Auction through accurately assessing Bidder 1's position and strategy and accepting a bid on her side of the midpoint.

Recall the ROE Harmonic Auction illustration above. It would be very shortsighted of Bidder 1 to think she would achieve her Terminal Position. Working backward in the Harmonic Auction process, would Bidder 2—recall Bidder 2 seeks the highest possible ROE—reject 10.45% knowing that rejection of 10.45% would allow Bidder 1 to accept 9.5%? Of course not. Similarly, would Bidder 1—recall Bidder 1 seeks the lowest possible ROE—reject 9.55% knowing that rejection would result in the all but certain acceptance by Bidder 2 of 10.45%? That is similarly improbable. This example reveals that a key factor in deciding to accept an offer is a participant's perception of when the other side is most likely to accept the next bid. Thus, a participant wins by accepting the offer just before the other side, if given the opportunity, would accept.

It is clear that a bidder's actions in the Harmonic Auction are dependent upon an understanding of the other side's case and goal. Thus, full information exchange is critical. To run a Harmonic Auction requires the settlement discussions to be mature.¹⁵⁷ In addition, it should be clear that the Terminal Positions cannot be extreme positions.¹⁵⁸ Rather, the Terminal Positions must represent two positions in the range of fair and reasonable settlement outcomes.¹⁵⁹ Then, by means of the Harmonic Auction, two sides that were otherwise unable to close the gap in their positions, may successfully reach settlement.¹⁶⁰

VIII. CONCLUSION

Under FERC Rules, there are a variety of options to expedite resolution of cases and minimize the expense to litigants. For a variety of reasons, chiefly the absence of a deadline for final FERC decision,¹⁶¹ those options do not expedite cases in fact. In addition, the current FERC Rules do not offer a streamlined, but still structured, process that provides an opportunity to be heard when the issues to be resolved are narrow and the dollars at issue are limited.¹⁶² Because of the time and expense of litigation, important issues may not be litigated. Simply put, for some cases, the FERC process is a worse option than the status quo. Similarly, when facing a litigant with larger litigation resources, a party may be compelled to accept an unfavorable settlement to avoid a worse litigation result.

157. See discussion *supra* Part II.

158. See discussion *supra* Part VI.

159. *Innovation in the FERC Hearing Process*, *supra* note 135, at 1.

160. *Id.* at 8.

161. *Id.*

162. *Id.* at 3.

Additional procedures should be added to FERC's Rules in order to provide a simplified mini-trial mechanism to resolve small, that is, less than about \$1 million, cases. A Simplified Track I mechanism as has been proposed here offers limited discovery, limited testimony, and the option of limited hearing procedures before an informed neutral party. The Simplified Track I procedure also provides the opportunity to achieve a final binding result much quicker than could be obtained in standard litigation.¹⁶³ The net result is certainty achieved at much lower cost while providing litigants an opportunity to be heard.

As an alternative to litigation, when a dispute can be reduced to two sides, each with a single Terminal Position, the Harmonic Auction provides a novel tool to bridge the gap between Terminal Positions.¹⁶⁴ However, a successful Harmonic Auction requires substantial effort by the two sides, both to understand their own case and the other side's case.¹⁶⁵ The Harmonic Auction requires that the two Terminal Positions each be fully supportable settlement end points making clear that the Terminal Positions define a range of fair and reasonable settlement outcomes.¹⁶⁶ Then, the Harmonic Auction can be used to produce a settlement when parties have closed the gap between their positions but have been unable to reach a settlement.¹⁶⁷

IX. APPENDIX

Draft Proposed Revisions to Rule 604, 18 C.F.R. § 385.604

1. Revise section 385.604(d)(3) to read as follows:

For all other matters:

(i) a proposal to use alternative means of dispute resolution may be filed with the Secretary for consideration by the appropriate decisional authority; or

(ii) a request for a minitrial may be filed with the chief judge as described in (g) below.

2. In section 385.604, paragraph (g) is added to read as follows:

(g) The minitrial will follow then-current FERC discovery and hearing rules, except for as follows:

(1) The complainant's Direct Testimony, respondent's Answering Testimony, and FERC Trial Staff Answering Testimony will be

163. *See infra* Appendix.

164. *See generally* *Innovation in the FERC Hearing Process*, *supra* note 135.

165. *Id.*

166. *Id.*

167. *Id.*

limited to 50 pages (not including exhibits). Complainant's Rebuttal Testimony will be limited to 25 pages (not including exhibits).

(2) Absent approval from the ALJ, a party may direct no more than a total of a combination of 25 data requests and interrogatories to the other party; no depositions will be permitted.

(3) The ALJ may allow for additional data requests and interrogatories only upon a motion showing that such additional discovery is necessary. The party making the motion will include with the request the proposed additional discovery.

(4) There will be no trial-type hearing unless one party requests it, in which case a brief hearing (*e.g.*, one witness per side) will be held.

(5) Simultaneous Initial Briefs will be limited to 25 pages each and simultaneous Reply Briefs will be limited to 10 pages each. These page limits may be increased upon agreement of the parties.

(6) Upon mutual written agreement of the parties, any of the limits described above may be adjusted. Also, for good cause shown, at the request of either party the ALJ presiding over the minitrial may agree to alter any of these limits for either or both parties.

(7) Exhibits will be presumptively admitted upon their filing with the ALJ. Parties may, however, move to strike evidence that is irrelevant, immaterial, unfairly prejudicial, or unduly repetitious.

(8) In the course of a minitrial, the parties agree to abide by the Commission's then-current rules and procedures for electronic submission of documentary evidence.

(9) The decision of the ALJ presiding over the minitrial will be binding, final and not subject to rehearing, appeal or further legal review.