

Report of the General Counsel:

THE NEW TRIAL PROGRAM AT
THE FEDERAL ENERGY REGULATORY COMMISSION

*Charles A. Moore**

In the summer of 1981 — shortly after I was named General Counsel of the Federal Energy Regulatory Commission — I initiated extensive discussions with the staff of the Office of the General Counsel (OGC). At that time, it was determined that some changes in goals and priorities within the office would be appropriate to meet the current needs of the Commission. In particular, it appeared that the time had come to give special attention to OGC's trial effort.

This report will discuss the new trial program that has been established, describing how it came about, its goals, the changes that have been made to meet those goals, the progress to date, and where we go from here.

A. Background

The OGC trial effort begins when the Commission sets a matter for hearing before an administrative law judge. The majority of hearings involve rate increase filings by natural gas pipelines or electric utilities, but a wide variety of other matters also wind their way through the Commission's hearing process, including gas pipeline certificates, gas wellhead pricing, hydroelectric licensing, and oil pipeline regulation.¹

While numerous Commission hearings on these matters have always taken place as a matter of course, in the recent past OGC placed its emphasis on rulemaking rather than trial work. This approach came about of necessity when Congress passed comprehensive energy legislation in 1978,² much of which was to be administered by the Commission. This legislative package required a massive rulemaking effort employing the skills of all the Commission's offices. Under these circumstances, the allocation of OGC's limited resources did not permit a special focus to be placed on the trial work that went on at that time. It is only now — when most of the rules have been finalized³ — that OGC is in a position to shift its priorities and to develop a program designed to utilize more fully the trial skills of our professional staff.

*B.S. and J.D. University of Houston; Member Texas Bar; General Counsel of the Federal Energy Regulatory Commission.

¹The Commission has major regulatory duties under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (1976 & Supp. II 1978); Federal Power Act, 16 U.S.C. § 791a, *et seq.* (Supp. IV); Natural Gas Policy Act, 15 U.S.C. § 3301, *et seq.* (Supp. II, 1978) (NGPA); Public Utility Regulatory Policies Act, 16 U.S.C. § 2601, *et seq.* (Supp. IV) (PURPA); and Department of Energy Organization Act, 42 U.S.C. § 1701, *et seq.* (Supp. I 1977).

²In addition to the NGPA and PURPA, the legislative package included the Energy Tax Act, Pub. L. 95-618, the National Energy Conservation Act, Pub. L. 95-619, and the Power Plant and Industrial Fuel Use Act, Pub. L. 95-620.

³*See, e.g.*, 18 C.F.R. Subchapters H and K.

B. Goals of the New Trial Program

In speeches before the Federal Energy Bar Association⁴ and other groups, I have noted that I like to view OGC as a firm of some 180 dedicated professionals devoted to the needs of our client, the Commission. The trial staff, of course, has a unique role within this law firm concept. It takes its own position in a case, a position which may or may not eventually prevail before the Commission. But regardless of whether the Commission ultimately adopts the staff position, the trial staff plays a crucial role in meeting certain Commission needs. These needs include the development of a full and complete record on every aspect of the issues in a case, and the expedition of cases in order to reduce the Commission's current backlog. To meet these client needs, the following trial program goals have been established:

1. Development of clear, consistent positions — based on an analysis of the relevant legal and policy precedents;
2. Production of well researched, reasoned and articulated pleadings — based on legal homework, careful writing and judicious editing;
3. Allocation of resources to the trial effort — based on greater emphasis on trial work and the long-range benefits of a strong trial program;
4. Development of reasonable settlement positions — based on the range of evidence that could be established at trial; and
5. Production of a strong litigation effort if a case does not settle — based on management supervision of and support for each trial attorney's work.

Achievement of these goals, each of which is important in its own right, should help lead to well-developed records, streamlining of cases, more settlements, and an eventual reduction in backlog. If this occurs, OGC will have succeeded in meeting several goals that are important to our Commission.

C. Changes Made to Meet These Goals

It was evident from the outset that an energetic and experienced trial lawyer was needed to develop and implement the new trial program. For this task, OGC was fortunate to find James E. Rogers, Jr., who has a broad background in regulatory practice, first as a State consumer advocate, in utility rate proceedings before a state commission, later as a FERC staff attorney, and most recently as a representative of natural gas pipeline and electric utility clients before the Commission. Reallocation of OGC's resources to the trial effort made it possible for Mr. Rogers to appoint a staff of six lawyers as assistants for the trial program, and to give each assistant responsibility for supervising a specific substantive area of practice. This management team was intended to become closely, personally involved in each of the cases set for hearing and thus to serve as a real resource to the staff trial attorneys rather than as merely an added layer of review.

⁴January 14, 1982, Washington, D.C.

In addition to the OGC trial attorneys and senior advisory management, the technical staffs in the Commission's Offices of Electric Power Regulation and Pipeline and Producer Regulation have played a crucial role in the development of the new program. In their roles as analysts of the evidence, advisors to the attorneys, and witnesses in the hearings, these technical experts have provided the meat that makes up OGC's trial plate. The steps described below could not have been taken without their full cooperation and support.

1. *Consistent Positions*

One problem that trial staff faced in the past was inconsistency of positions from case to case. For example, staff has taken several different approaches to a discounted cash flow, or DCF, analysis when trying rate-of-return issues. The approach an applicant faced has depended on which attorney and which technical expert happened to be assigned to that case.

The problem of inconsistent approaches has been overcome in two ways. First, the trial staff has developed what is termed the "lead case" approach to OGC trial practice.⁵ Under this approach, staff attorneys can look to the development of key cases for the trial staff position on major issues. The approach taken in these cases then serves as a model for other cases in which the same or related issues are raised.

An example of a current lead case is *Natural Gas Pipeline Company of America*, Docket No. RP81-49-000. This case involves a rate increase filing by a major gas pipeline. The Commission suspended the rate increase for five months and ordered several issues set for hearing.⁶ Negotiations among the pipeline, staff and the various intervenors resulted in settlement of all issues but one: rate design.⁷ The case was targeted as a lead case on rate design, and the supervisory trial staff provided close assistance to the staff counsel during the preparation of witnesses, the filing of a pre-trial brief to establish a framework for the issue, and the conduct of the hearing. Although an initial decision by the administrative law judge is not expected for some time, other staff attorneys facing rate design issues can look to staff's position in *Natural* as helpful precedent for development of their own cases.

In addition to the lead case approach as a means of developing consistency, that goal is also being achieved by effective use of supervisory trial staff, who monitor progress in all cases in their subject area. Inconsistencies and other problems are thus spotted as they arise. Supervisory trial staff also keep abreast of overall developments at the Commission and are aware of policy shifts or other significant changes that may affect the trial area.

⁵See *New FERC Trial Policy Planned To Reduce Backlog*, *Legal Times Of Washington*, December 21, 1981, at 2, col. 1.

⁶15 FERC ¶ 61,112 (April 30, 1980).

⁷Rate design is the method by which costs of service are allocated among various customers.

2. *Well-Researched, Reasoned, Articulate Pleadings*

Under the new program, every brief filed by an OGC trial attorney is reviewed by the supervisory trial staff. OGC attorneys are given guidance in legal research and writing techniques, and both the style and content of briefs is subject to editing. All motions, answers, and similar documents are also subject to supervisory review before they are filed.

This procedure brings OGC more in line with the concept of the office as one law firm rather than as a cluster of loosely-grouped single practitioners.

3. *Appropriate Allocation of Resources*

As is evidenced by the new emphasis on trial matters, greater staff time is being allocated to settlement, trial and brief preparation. This allocation of time begins as soon as the Commission sets a matter for hearing. The attorney assigned to the case is required to become immediately familiar with all aspects of it. We have stressed that it is impossible to be an effective advocate unless one understands what is being advocated.

As part of the learning process, trial attorneys prepare, in tandem with the technical staff, discovery documents that will unearth the information necessary to present staff's case. Next, case strategy meetings are held with the technical staff and supervisory trial staff. A settlement strategy outline is prepared and the staff counsel enters into settlement discussions confidently, ready to negotiate and with full knowledge of staff's bottom line position.

If settlement is not achieved, the attorney is responsible for developing a complete trial record on the issues the Commission set for hearing. This includes assisting staff witnesses in preparation of their testimony, preparing these witnesses for cross-examination, and establishing the framework for successful cross-examination of other witnesses. All of these steps are taken with the assistance of supervisory staff and are designed to help our attorneys arrive at a hearing confident and fully prepared to litigate in an efficient and effective manner.

4. *Reasonable Settlement Positions*

Trial staff is encouraged to seek out settlements. Initially, it is critical that staff's position be fair, realistic and well supported, *i.e.*, clearly within the range of what could be established at trial. If it is so perceived, settlement prospects are greatly enhanced. Such an approach, coupled with a similarly realistic approach by the regulated entities,⁸ has already had an effect (quantified *infra*) on the settlement success rate at the Commission.

⁸A realistic approach to the filing of rate cases was specifically encouraged by the Commission in *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (February 26, 1972). There the Commission clarified its electric rate suspension policy and offered utilities the opportunity to avoid five-month suspensions by conforming rate increases to Commission precedents and guidelines. Specifically, the Commission made available for public purchase the computerized cost-of-service program it uses to perform suspension analyses, thus allowing electric utilities to closely estimate the rate level that would be considered cost justified.

5. *Strong Litigation Effort*

A strong litigation effort is of the highest priority under OGC's new program. Trial staff has taken the attitude that its realistic approach, noted above, should lead to settlement in the majority of cases, and that if a party is not prepared to settle, it should expect a tough battle in the subsequent hearing. Our trial attorneys are ready and eager to conduct effective litigation, and full support can be expected from supervisory trial staff as well. Absent scheduling conflicts, supervisors attend all hearings in order to become thoroughly familiar with the record and to assist staff counsel with strategy, motions, and so forth. They also review and assist with briefs. All of these efforts are designed to develop such a strong litigation record that applicants will be encouraged to settle their cases rather than face staff in a formal hearing.

D. *Settlement Policy*

As stressed above, the new procedures are intended, among other things, to encourage settlements. These procedures have been designed to augment various steps taken by the Commission in the same direction. The most recent of these steps was Order No. 90, Docket No. RM80-57, 45 Fed. Reg. 45902 (July 8, 1980), which provided for the appointment of settlement judges. Under this procedure, now codified in Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, any participant may request appointment of an administrative law judge whose sole function in the proceeding is to conduct settlement negotiations.⁹ Use of this procedure helps enhance the prospects for settlements by providing a neutral person to preside over the discussions, give them structure, and reduce the adversarial nature of the process.

OGC trial attorneys are encouraged to work with the various parties in a general atmosphere that supports settlement. One approach that has proved quite successful in this regard is the "carving out" of issues that are unresolvable short of a hearing. Such carve-out leaves all other issues ripe for a settlement agreement that can be sent to the Commission for approval.¹⁰ The partial settlement approach is effective in defusing the negotiations and isolating the real problem or problems, which can then be channeled into the hearing forum.

The benefits of this positive approach to settlement are evidenced by the fact that between January 1982, when the new trial program went into effect, and August 15, 1982, staff reached full or partial settlement of 46 electric rate cases initiated by the Commission.¹¹ During that same period, the Commission set for hearing 46 new electric rate increase applications. These figures indicate that OGC trial staff is now keeping pace with the workload set by the Commission.

⁹Examples of cases in which settlement judges have been used are: Carolina Power & Light Co., 14 FERC ¶ 63,015, p. 65,050; El Paso Natural Gas Co., 14 FERC ¶ 61,284, p. 61,545; Northern States Power Company, 13 FERC ¶ 61,055, p. 61,114; Mississippi Power & Light Co., 12 FERC ¶ 61,220, p. 61,539.

¹⁰Cases in which this approach has been successful include Transwestern Pipeline Co., Docket No. RP81-130; United Gas Pipe Line Co., RP81-81, *et al.*; Tennessee Gas Pipeline Co., RP82-12, *et al.*

¹¹Figures for gas pipeline rate cases during the same period show 26 cases settled in full or in part.

E. Future Goals of the Trial Program

In less than one year, marked changes have occurred in OGC's trial program, changes that have resulted in higher trial staff morale, better trial work, and more settlements. Where do we go from here?

OGC and the technical offices are fortunate to possess staffs of high caliber, professionals who have responded cooperatively and positively to the trial program and who have recognized it as providing an opportunity to sharpen their own skills. As the program continues, each trial staff member should be able to strengthen and refine these litigation skills, and in so doing to make an even more meaningful contribution to the Commission's mandate. Continuing emphasis on the trial area should thus provide a basis for individual development within an overall framework of expedition, settlement, and, if necessary, the conduct of a trial.