

REPORT OF THE COMMITTEE ON ADMINISTRATIVE PRACTICE

This report surveys significant developments in administrative practice before the Federal Energy Regulatory Commission (Commission) in 1995. The report will focus primarily on the two most significant developments: (i) adoption of alternative dispute resolution (ADR) rules and modification of the settlement rules; and (ii) substantial modification of the procedures governing the filing of interstate natural gas pipeline tariffs and proposed tariff modifications. The report also will review briefly other practice areas in which developments occurred during 1995.

I. ALTERNATIVE DISPUTE RESOLUTION/SETTLEMENT PRACTICE

THE ADR RULE. On April 12, 1995, the Commission issued Order No. 578, the final rule implementing the Alternative Dispute Resolution Act of 1990.¹ The final rule establishes: (i) guidelines for applying ADR techniques and definitions from the ADR Act; (ii) procedures for submission, review, and monitoring of proposals to use ADR in specific proceedings; (iii) rules regarding binding arbitration proceedings, awards, and review of arbitration results; (iv) modifications and additions to the settlement rules; and (v) consolidation of almost all of the regulations governing the use of ADR in oil pipeline proceedings into the general practice and procedure rules.

The Order No. 578 policy directives and corresponding regulatory modifications reflect the Commission's strong support of employing alternative procedures to the traditional protracted administrative litigation process for the disposition of contested administrative proceedings arising within its jurisdiction. Specifically, the Commission described its action as effectuating a policy in support of alternative dispute resolution within its administrative practice by the issuance of a final rule that implements certain substantive provisions of the Alternative Dispute Resolution Act of 1990 (ADRA).²

The Commission's action officially adopting regulations to implement the specific ADRA provisions within its administrative practice reflects a general policy supporting alternatives to resolving contested proceedings through formal administrative litigation. There has been a significant decrease in the number of contested proceedings set for full hearing before the administrative law judges (ALJs) over the past year. First, the mandatory settlement procedures convened by the Commission's "advisory" staff, as a substitute for setting contested take-or-pay proceedings for hearing, were successful in disposing of all but four of all interstate pipeline

1. Final Rule to Implement the ADR Act of 1990, *Alternative Dispute Resolution*, III F.E.R.C. STATS. AND REGS. ¶ 31,018 (1995). One party sought rehearing, which the Commission denied by operation of law by notice issued June 12, 1995.

2. 5 U.S.C. 571-83 (1994).

take-or-pay cost recovery filings initiated pursuant to the Commission's Order No. 528 guidelines.³ The remaining four pipeline Order No. 528 take-or-pay filings not resolved through the settlement process were brought directly before the Commission for final disposition through "paper hearing" proceedings or generic "global" system-wide settlements rather than formal administrative litigation.⁴

In addition, the use of the informal "technical conference" for the resolution of contested Section 7(c) certificate proceedings and all contested tariff and non-major rate proceedings is now a mainstay of administrative practice before the Commission. Therefore, the formal action of the adoption of the Order No. 578 ADR principles undertaken by the Commission on April 12, 1995, may represent the final step in a concerted policy avoiding the full administrative litigation of contested administrative proceedings.

Several features of the final rule are particularly noteworthy. The Commission stressed that the ADR procedures are voluntary, and must be agreed to by unanimous consent. The final rule rejected arguments that only parties with a "substantial interest" should be able to veto use of an ADR procedure. The Commission urged parties and judges to be flexible and creative, suggesting that particular issues or parties in a given case could be the subject of an ADR procedure.⁵

In addition, the final rule modified Rule 601⁶ to explicitly provide for conferences to address the possibility of using ADR techniques, and provides further that the failure of any party to attend such a conference would bind that party to any ADR procedure adopted, except for binding arbitration under new Rule 605. The Commission rejected the concerns of some commenters that they might be unable to attend due to financial and logistical constraints. Thus, the Commission will not allow participants to block use of ADR simply by mailing in a written objection; any participant seeking to block use of ADR must attend the hearing and engage in a dialogue regarding the use of ADR.

Mechanisms and Procedures. New Rule 604⁷ provides a mechanism for parties seeking to initiate an ADR procedure, and identifies the factors that the Commission will consider in determining that ADR is inappropriate. Participants may submit a written proposal at any time during a proceeding to use ADR to resolve all or part of any matter in controversy or anticipated to be in controversy in the proceeding. The rule defers to the

3. *Mechanisms for Passthrough of Pipeline Take-or-pay Buyout and Buydown Costs*, 53 F.E.R.C. ¶ 61,163, at 61,594 (1990), *reh'g granted in part and denied in part*, Order No. 528-A, 54 F.E.R.C. ¶ 61,095 (1991), *reh'g denied*, Order No. 528-B, 55 F.E.R.C. ¶ 61,372 (1991).

4. *National Fuel Gas Supply Corp.*, 67 F.E.R.C. ¶ 61,147 (1994), *reh'g denied*, 68 F.E.R.C. ¶ 61,132 (1994); *East Tennessee Natural Gas Co.*, 59 F.E.R.C. ¶ 61,355 (1992); *Transwestern Pipeline Co.*, 64 F.E.R.C. ¶ 61,145 (1993), *reh'g denied*, 66 F.E.R.C. ¶ 61,287 (1994); *Northwest Pipeline Corp.*, 67 F.E.R.C. ¶ 61,265 (1994), *on reh'g*, 69 F.E.R.C. ¶ 61,359 (1994), *reh'g denied*, 71 F.E.R.C. ¶ 61,012 (1995).

5. See Rule 604(a)(1), 18 C.F.R. § 385.604(a)(1) (1996).

6. 18 C.F.R. § 385.601.

7. 18 C.F.R. § 385.604.

participants with respect to the selection of a particular ADR method, and the procedures to be followed, except for binding arbitration under new Rule 605.⁸ A proposal to use ADR will be deemed approved unless the decisional authority issues an order denying approval within thirty days after the proposal is filed.

The final rule clarified that in any ADR procedure, the neutral's authority to issue orders is derived from the participants, not the Commission. Therefore, the extent to which the neutral may compel parties to issue subpoenas, direct production of documents and approve protective agreements is controlled by the participants. The neutral derives no authority from the Commission or its organic statutes.

In the final rule, the Commission declined the requests of several parties that it announce a policy of adopting the results of ADR unless it would contravene a statutory obligation. The Commission stated that it "obviously must reserve authority to ensure that decisions reached through ADR procedures are not contrary to the public interest or inconsistent with statutory requirements."⁹

Arbitration. New Rule 605 sets forth the arbitration procedure.¹⁰ The method for requesting arbitration, and the criteria for considering the request, are the same as for the other ADR methods as set forth in Rule 604. The Commission clarified that the new rule does not prevent parties to a settlement from agreeing to use future binding arbitration to resolve disputes under the settlement. The Commission may vacate an award upon the request of any person (not necessarily a participant) filed within ten days of the entry of the award, following an opportunity for responses. If the Commission vacates an arbitration award, *all* parties may petition the Commission for fees and expenses associated with the arbitration. A decision to vacate is not subject to judicial review. *Vacatur* returns the parties to the *status quo ante* as if the arbitration proceeding had never occurred.

New Rule 606¹¹ governs the confidentiality of ADR proceedings. It establishes procedures and guidelines to prevent the disclosure of information communicated during ADR proceedings, except in specified circumstances. Any communication disclosed in violation of this rule will not be admissible in any proceeding relating to the issues in controversy.

Settlement Practice. The final rule also modified the Commission's existing settlement rules in several significant respects. The Commission codified its existing practice to permit any participant to file a consolidation request with respect to an offer of settlement that covers multiple proceedings pending in part before the Commission and in part before one or more ALJs. The final rule notes, but does not codify, the Commission's goal to act on uncontested electric and gas rate settlements within 45 days of the

8. 18 C.F.R. § 385.605.

9. III F.E.R.C. STATS. & REGS. ¶ 31,018, at 31,326.

10. 18 C.F.R. § 385.605.

11. 18 C.F.R. § 385.606.

close of the comment period or date of certification to the Commission, and to act within 90 days on contested settlements.¹²

The Commission emphasized the requirement, reflected in the case law,¹³ that the Commission must make an independent determination that a settlement is in the public interest, even when uncontested. The Commission clarified that it is not limited to a choice between rejecting an uncontested settlement or remanding to the parties; the Commission also may "refashion" an uncontested settlement to comport with the public interest, and it may remand for the development of greater record support.

The final rule amended Rule 602(h)(1)(ii) and (iii) and Rule 602(H)(2)(iv)¹⁴ to permit the ALJ or the Commission to sever *contesting parties* as well as *contested issues* in its consideration of a contested settlement. The Commission explained that its policy regarding severance of parties, as reflected in *Arkla*¹⁵ and *Columbia*,¹⁶ is to avoid a "no lose" situation for the severed party.

In addition, the Commission clarified that it did not, by its amendments to the rules governing certification of contested settlements, intend to limit the opportunity of parties to present evidence and cross-examine witnesses to determine the existence of a contested issue of material fact. The ALJ will have to determine whether to permit a party to present evidence and cross-examine witnesses under new Rule 602(h)(2)(iii)(B), which requires, *inter alia*, a determination that the settlement is supported by substantial evidence.

The final rule also made the ADR rules adopted in Order No. 578 applicable to oil pipelines. The Commission had previously promulgated separate but essentially similar ADR rules for oil pipelines under Section 1802(e) of the Energy Policy Act of 1992.¹⁷ The Commission retained separately one feature of the oil pipeline ADR regulations, the required negotiation provision,¹⁸ which is not a part of the general ADR rule.

APPLICATION OF THE ADR RULE. Although in existence only since April 12, 1995, the Commission has already experienced several case-specific applications of the new ADR techniques under Order No. 578. These initial endeavors of incorporating ADR techniques within the Commission's administrative practice may provide certain insights into the future of the application of ADR within the jurisdictional regulatory interstate energy industry.

On June 30, 1995, El Paso Natural Gas Company (El Paso) submitted to the Commission tariff sheets proposing an overall system-wide \$136.7

12. III F.E.R.C. STATS. & REGS. ¶ 31,018, at 31,330.

13. See *Tejas Power Co. v. FERC*, 908 F.2d 998 (D.C.Cir. 1990), cited at III F.E.R.C. STATS. & REGS. ¶ 31,018, at 31,330 and 31,331.

14. 18 C.F.R. §§ 385.602(h)(1)(ii), 385.602(h)(1)(iii), and 385.602(h)(2)(iv).

15. *Arkla Energy Resources*, 48 F.E.R.C. ¶ 61,062, *reh'g denied*, 49 F.E.R.C. ¶ 61,051 (1989).

16. *Columbia Gas Transmission Corp.*, 64 F.E.R.C. ¶ 61,366, *reh'g denied and clarified*, 66 F.E.R.C. ¶ 61,214 (1994).

17. 42 U.S.C. § 7172 (1993).

18. See § 18 C.F.R. 343.5.

million increase in jurisdictional interstate transportation revenues. El Paso's general rate increase application included a specific request to convene an informal settlement structure similar in concept to the Commission's new ADR procedures. Specifically, El Paso proposed the use of an impartial third party to undertake and facilitate immediate settlement negotiations with the objective of achieving a full settlement to El Paso's Docket No. RP95-363-000 rate filing by December 31, 1995.

Thereafter, on July 26, 1995, the Commission formally accepted El Paso's Docket No. RP95-363-000 tariff sheets, subject to suspension and refund, and established a unique administrative "settlement" process.¹⁹ Specifically, the Commission established a public hearing but suspended the formal hearing process for approximately five months to allow parties to attempt to settle the proceeding by December 31, 1995.²⁰

The Commission's specific choice of an ADR technique was the employment of a Settlement Judge pursuant to Rule 603 of the Commission's Regulations to act as the mediator/facilitator "neutral" within the five-month time period designated as an initial "settlement" window. The Rule 603 "Settlement Judge" process, traditionally employed by the Commission to assist in reaching a conclusion on a particularly difficult individual ratemaking issue or discovery controversy, was implemented here to reach a comprehensive settlement of all pending issues in El Paso's general rate proceeding.²¹

The Commission encouraged all parties to devote all resources in the initial time period towards reaching a settlement of the proceeding and refused requests to immediately implement a simultaneous litigation procedure to move forward in a parallel tract with the "Settlement Judge" ADR technique. If the parties had not achieved a settlement within the five-month period, terminating on December 31, 1995, an alternative ALJ would be appointed to immediately institute the formal public process to be completed with an initial decision issued on an expedited 18-month time frame.²²

The "Settlement Judge" ADR process proceeded on a fast track through the late summer and fall of 1995. Numerous settlement conferences were held at the Commission's Washington, D.C. offices. In addition, the Settlement Judge convened several settlement conferences at locations within the geographic area served by El Paso's interstate pipeline, specifically in San Francisco, California and Phoenix, Arizona. The Commission required monthly status reports on the progress of the ADR techniques.²³ Furthermore, the Commission permitted some discovery to proceed within the ADR process under the supervision of the Settlement Judge.²⁴

19. *El Paso Natural Gas Co.*, 72 F.E.R.C. ¶ 61,083 (1995).

20. *Id.* at 61,442.

21. 18 C.F.R. § 385.603 (1996).

22. 72 F.E.R.C. ¶ 61,083, at 61,440 (1995).

23. *Id.* at 61,440.

24. *Id.*

As the Commission's designated December 31, 1995, termination date for the formal ADR "Settlement Judge" process approached, the parties were unable to settle all issues pending in the proceeding. On December 21, 1995, the Chief Administrative Law Judge implemented the Commission's alternative July 26, 1995, directives by designating a new ALJ to act as trial judge for the disposition of Docket No. RP95-363-000 by public hearing process, formally relieving the previously appointed ALJ of any further responsibility and terminating the initial "Settlement Judge" ADR experiment.

During 1995, an ADR technique was also employed in an attempt to resolve a general rate proceeding filed by the Columbia Gas Transmission Corporation (Columbia) in Docket No. RP95-408-000. Columbia submitted to the Commission on August 1, 1995, a tariff filing reflecting a proposed increase in annual jurisdiction revenues of approximately \$147 million.²⁵ Columbia's filing did not contain a specific request for the Commission to implement ADR procedures. However, after the docket was formally set for hearing, a special procedural structure was requested essentially suspending the hearing proceedings for four months to provide an initial limited time for engaging in settlement discussions prior to instituting normal public hearing discovery and testimony activities. The ALJ did establish a procedural date for the commencement of public hearings in November 1996, but refrained from establishing any other interim procedural dates prior to receiving periodic reports on the progress of the settlement negotiations during the initial four-month settlement window. As this report is written, this proceeding is now back on a traditional public hearing schedule after the completion of the four-month intensive settlement process without a final resolution.

Both initial examples of the use of an ADR process in full interstate pipeline general rate proceedings during 1995 adopted the concept of refraining from full implementation of a normal public hearing litigation schedule for an initial time certain to allow for the opportunity of an expedited disposition of the various ratemaking issues pending in these case-specific pipeline rate proceedings.²⁶

While neither the *El Paso* nor the *Columbia* rate proceeding was fully resolved within the initial time frame established for the limited ADR process, these procedures may serve as examples of this Commission's future use of ADR techniques in general rate cases. Both cases were similar in that the Commission and the parties chose to incorporate the employment of the new ADR techniques within the context of the established settle-

25. *Columbia Gas Transmission Co.*, 72 F.E.R.C. ¶ 61,201 (1995).

26. In *Tennessee Gas Pipeline Co.*, 73 F.E.R.C. ¶ 63,007 (1995), which involved Tennessee's filings under Order No. 636 to recover gas supply realignment (GSR) costs, the Commission's trial staff initiated an intensive two-day, ADR-style mini-trial procedure among the parties to facilitate settlement. As of the time this report was submitted, however, no settlement had been reached. See also *ARCO Transportation Alaska, Inc.*, 73 F.E.R.C. ¶ 61,197 (1995) (November 13, 1995) (letter orders approving settlement reached through ADR/mini-trial).

ment and settlement judge process established pursuant to Rules 602 and 603 of the Commission's Rules of Practice and Procedure.²⁷

If this initial experience is any reflection of the Commission's future use of ADR techniques, it is evident that: (i) the Commission may prefer to employ as "neutral" mediators or facilitators existing employees of the agency; (ii) the Commission's coordination of ADR techniques will be initiated within its existing settlement practice; and (iii) the Commission will closely monitor the progress of ADR techniques through the use of status reports and, upon receipt of evidence that further use of the ADR techniques is no longer appropriate, thereafter take prompt action to institute formal hearing proceedings thereby terminating the ADR mechanism.

Based upon these examples, participants in future contested proceedings before the Commission can anticipate use of ADR techniques but may expect that those techniques will remain an entirely voluntary opportunity to be implemented within the Commission's existing public hearing and settlement structure.

SETTLEMENT PRACTICE. In *Tennessee Gas Pipeline Company*,²⁸ the Commission approved a settlement over the objections of two parties that contended they had been precluded from participating. The Commission rejected procedural objections raised by those parties that non-noticed settlement meetings had been held to which they were not invited, and that they were unable to gain an audience for their concerns at the publicly noticed conferences:

It is true that not all of the settlement conferences were formally noticed
However, no regulation precludes parties from negotiating privately in an effort to reach consensus by stages.

* * * *

The other parties . . . were not obligated to accept proposals that run counter to their positions, and this disagreement was not tantamount to denying . . . a meaningful opportunity to negotiate.²⁹

In a separate order, *Tennessee Gas Pipeline Company*,³⁰ the Commission approved a contested unilateral "Stipulation and Agreement" filed under Rule 602 following a series of technical conferences and one settlement conference that did not resolve significant areas of disagreement):

The S&A is the result of lengthy and detailed discussion between Tennessee and its customers, with the assistance of Commission Staff. In examining, the S&A, the Commission finds that as a whole it is a fair and reasonable proposal. The Commission finds that Tennessee has made a great effort to meet the divergent interests of the parties and has commonly chosen a middle ground when those different interests were in direct conflict. Moreover, the Commission finds that Tennessee is proposing major changes and enhancements in its system that should benefit the majority of its users. Thus, as discussed below, the S&A will be accepted with only minor modifications.³¹

27. 18 C.F.R. § 385.602-603 (1995).

28. 73 F.E.R.C. ¶ 61,222 (1995).

29. *Id.* at 61,614.

30. 73 F.E.R.C. ¶ 61,158 (1995).

31. *Id.* at 61,456.

In *Koch Gateway Pipeline Company*,³² an ALJ construed Order No. 578 as it applied to the certification of a contested settlement in a pipeline rate case under Section 4 of the Natural Gas Act (NGA). The Judge held that the portion of a settlement that raised a contested issue of material fact could be certified only if the provision meets the requirements of new Rule 602(h)(2)(iii), i.e., the parties concur or do not oppose certification, and substantial evidence in the record supports that provision. The fact that the settlement severed all of the parties contesting that feature of the settlement did not alter the requirements of Rule 602(h)(2)(iii). The Judge rejected the argument, advanced by a proponent of the settlement, that by severing the parties that raised the contested issues, the settlement in effect resolved the contested issues.

In *CNG Transmission Corporation*,³³ an ALJ held that parties may file reply comments on a settlement to address initial comments on an issue that they did not address in their own initial comments.

II. INTERSTATE PIPELINE RATE FILINGS PRACTICE AND PROCEDURES

On September 28, 1995, the Commission issued Order No. 582, a final rule amending the Commission's regulations under Sections 4 and 5 of the NGA³⁴ and Section 311 of the Natural Gas Policy Act of 1978³⁵ governing: (i) the form and composition of interstate natural gas pipeline tariffs; (ii) the procedures for filing tariffs and tariff changes; and (iii) the initial proceedings involving such tariff proposals.³⁶ The rule extensively revised Part 154 of the Commission's regulations. This report will focus on the procedural changes required under the new rule.

The final rule was a major overhaul of the Commission's regulations governing pipeline filings and reporting requirements. It is intended to reduce the burdens imposed by the previous regulations without sacrificing "rational and necessary protections."³⁷ The Commission emphasized that the new regulations did not reflect any changes to substantive rate policies, but update the filing requirements and procedures to reflect post-Order No. 636 practices and realities. In addition, the changes made in the final rule are intended to reduce delays and provide interested parties with timely and useful information regarding the filings.

The procedures for filing and initial participation in tariff change proceedings is set forth in Subpart C revised Part 154. Some of the principal changes are described below.

32. 72 F.E.R.C. ¶ 63,001 (1995), *on reconsideration*, 71 F.E.R.C. ¶ 63,012 (1995).

33. Order Denying Motion For Leave to File A Response To Certain Reply Comments and Order Scheduling Oral Argument, Docket No. RP94-096 (August 15, 1995)(Unreported).

34. 15 U.S.C. §§ 717c, 717d (1994).

35. 15 U.S.C. § 3371 (1994).

36. *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, III F.E.R.C. STATS. & REGS. ¶ 31,025 (1995). At the time this report is written, fifteen requests for rehearing and/or clarification are pending before the Commission.

37. III F.E.R.C. STATS. & REGS. ¶ 31,025, at 31,379-31,380.

Text and number changes proposed in pipeline tariff filings must be marked. Text and numbers on maps must be marked in the same manner as in the filing generally, or, if not practical, in some clear manner. Supporting workpapers must be sufficient to permit anyone attempting to recreate the calculations to be able to do so.³⁸ Tariff filings to initiate a new rate schedule (either as the result of issuance of an NGA Section 7 certificate or under a blanket authorization) must contain specific information that will permit Commission staff and others to review the rates and charges.³⁹

The Commission promulgated a new provision to govern filings made to comply with prior Commission orders.⁴⁰ Compliance filings may include only changes required by Commission orders, and must not include other rate or tariff changes. The Commission "may" reject a filing that includes other changes or does not comply with the prior order in "every" respect. This new provision was intended to codify existing Commission practice.

Changes in rate schedules, forms of service agreements or general terms and conditions must explain the necessity for the change and the impact on existing customers.⁴¹ The final rule permits two exceptions to the general prohibition against tariff filings during a suspension period for: (i) changes made under previously accepted tariff provisions permitting periodic limited rate changes; and (ii) accepted limited rate changes.⁴²

The final rule revised the rules on motions to put rates into effect following suspension. The new provision: (i) codified the practice of allowing pipelines to file motion rates one day before the effective date unless otherwise ordered; and (ii) requires the transmittal letter to include either (a) a motion to place suspended rates into effect, or (b) a specific statement that the pipeline reserves its right to file a later motion.⁴³ The NOPR had proposed that where rates have been suspended for more than a minimal period and the Commission has ordered changes, or the rates include costs of facilities that are not in service, the motion should be filed not more than 30 or less than 60 days in advance. The final rule retained the one-day prior filing practice currently utilized, but added that individual suspension orders may require pipelines to make compliance filings earlier.⁴⁴

Pipelines must serve an abbreviated form of a proposed tariff change filing on its customers on or before the Commission filing date. Customers of the pipeline with a contract for service as of the date of the filing may request the full filing, which the pipeline must then provide within 48 hours. In addition, any customer may also make a standing request to

38. 18 C.F.R. § 154.201(b)(2) (1996).

39. 18 C.F.R. § 154.202.

40. 18 C.F.R. § 154.203.

41. 18 C.F.R. § 154.204.

42. 18 C.F.R. § 154.205.

43. 18 C.F.R. §§ 154.7(a)(9), 154.206.

44. III F.E.R.C. STATS. AND REGS. at 31,401.

receive a complete copy of the filing as the initial served filing.⁴⁵ The final rule also modified the form of notice provision to reflect current practices, and to distinguish filings that require action within 30 days from those that do not.⁴⁶ The Commission also shortened the fifteen-day time period for interventions, protests and comments to twelve days from the date of filing.⁴⁷

Pipelines must file their Statement P supporting testimony with the initial filing, instead of doing so on a deferred basis, as was allowed under the previous regulations. This requirement is intended to allow for earlier review by staff and potentially affected parties, and to eliminate unnecessary protests. In addition, the filing pipeline must be prepared to sustain its burden of proof on the proposed changes solely on the basis of the prepared testimony submitted with its initial rate filing. In the final rule, the Commission clarified that this policy did not require a pipeline to anticipate every challenge in advance; instead, the policy reflected the Commission's expectation that a pipeline would make its case-in-chief at the outset of the case, and not in answering or rebuttal testimony.⁴⁸

III. NEED FOR HEARING

During 1995, the Commission maintained a practice of limiting the issues raised in a general pipeline rate increase filing under NGA Section 4 that would be set for an evidentiary hearing. Northern Natural Gas Company (Northern) filed a general rate increase on March 1, 1995. The filing also proposed other changes to Northern's rates and tariff terms applicable to several services. The Commission's order on Northern's filing⁴⁹ set some of the filed tariff sheets for an evidentiary hearing; other issues were set for a technical conference with subsequent comments; and, one matter, Northern's proposal to establish, on a prospective basis, market-based rates for firm and interruptible storage service, was made subject to a paper hearing procedure under which parties could provide briefs and evidence prior to a Commission decision. The paper hearing procedure included an opportunity to file data requests and to file briefs and supporting affidavits.⁵⁰

In response to requests for rehearing regarding the storage issue, the Commission stated that it "does not have to hold an evidentiary hearing, even if genuine issues of material fact exist if the disputed issues can be adequately resolved on the written record, or if there is not an adequate

45. 18 C.F.R. § 154.208. See also *Koch Gateway Pipeline Co.*, 72 F.E.R.C. ¶ 61,266 (notice of petition for waiver of regulations)(unreported)(sought waiver of 18 C.F.R. § 154.16 and Rule 2010 to permit service of an abbreviated copy of tariff filings on customers that so elect).

46. 18 C.F.R. § 154.209.

47. 18 C.F.R. § 154.210.

48. III F.E.R.C. STATS. AND REGS. at 31,424.

49. *Northern Natural Gas Co.*, 70 F.E.R.C. ¶ 61,371, *on reh'g*, 72 F.E.R.C. ¶ 61,163 (1995).

50. *Northern*, 72 F.E.R.C. at 61,799.

proffer of evidence to support the allegation of material issues of fact.”⁵¹ In this instance, the Commission found no proffer of evidence to support an allegation that a material issue of fact existed. Further, the Commission believed that under its established paper hearing procedures, it would be able to evaluate the issues in a satisfactory manner.

In the order regarding a general rate increase proceeding initiated by Columbia Gas Transmission Corporation,⁵² discussed above in connection with the use of a settlement judge/ADR procedure, the Commission also followed technical conference procedures similar to those used in *Northern*. The Commission set for technical conference and comments issues related to: (i) a revision of the Transportation Retainage Adjustment; (ii) a revision in the auctioning time for releases of capacity; (iii) a revision to the availability and quality of Rate Schedule SIT balancing service; (iv) provisions concerning the emergency relief from curtailment; (v) a provision for a change in nominating deadlines; and (vi) other tariff changes related to terms of service.

In another proceeding, the Commission held that where claims of increased rates are premature and speculative, it will not provide for an evidentiary hearing. In *Panhandle Eastern Pipe Line Company*,⁵³ Panhandle sought to abandon certain facilities in Kansas and Oklahoma by selling some of the facilities to Anadarko Gathering Company, and transferring the other facilities to Panhandle's wholly owned affiliate, Panhandle Field Services Company. Anadarko Gathering and Panhandle agreed that, as part of the facility sale, Anadarko Gathering would pay Panhandle an additional \$4 million, in return for which Panhandle would assume all liability for environmental claims associated with the facilities.

A customer group argued that Panhandle, not its customers, should be responsible for any environmental liability associated with the facilities to be sold. This group also contended that while the transfer could result in an interim reduction in rates, it also could result in a larger cost to be recovered later from; (i) the environmental expenses; (ii) labor costs; and (iii) allocated administrative and general costs, absent future workforce reduction. The group requested a hearing.

In response, the Commission stated that the customer group's claim, that Panhandle may, at a later date, be compelled to contribute to costs arising out of pre-transfer environmental liability and other costs, was premature and speculative. The Commission pointed out that if Panhandle incurred such costs, they could only become part of Panhandle's rates if Panhandle filed a new NGA Section 4 rate case. The Commission reasoned that a future rate proceeding would be the appropriate forum in which to address the proper accounting for and disposition of the \$4 million insurance premium that Anadarko Gathering will pay Panhandle, and Panhandle's recovery, if any, of the amounts which Panhandle may become

51. *Northern*, 72 F.E.R.C. at 61,799, citing *Cajun Electric Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994).

52. *Columbia Gas Transmission Co.*, 72 F.E.R.C. ¶ 61,201 (1995).

53. 73 F.E.R.C. ¶ 61,343 (1995).

contractually liable to pay Anadarko Gathering as a result of the indemnification arrangement. Thus, the Commission found that no hearing on the proposed abandonment was necessary, and granted Panhandle's application.

IV. PRACTICE TIPS

A. Party Standing

El Paso Natural Gas Company v. FERC,⁵⁴ involved a petition for review of two Commission orders holding that a proposal by San Diego Gas & Electric Company (SDGE) and Southern California Gas Company (SoCal), two local distribution companies (LDCs) located in California, to extend their pipeline network into Mexico, would not be subject to the Commission's jurisdiction under Sections 4 and 7⁵⁵ of the NGA. Both SDGE and SoCal are Hinshaw pipelines exempt from NGA Sections 4 and 7. In the orders on review, the Commission declared that because the Commission had jurisdiction over the proposed project under NGA Section 3, the LDCs would retain their exempt Hinshaw status. The LDCs therefore did not require Section 7 authorization to construct and operate the export point and related facilities at the Mexican border.

On review of the Commission's orders, the District of Columbia Circuit held that El Paso, the petitioner, lacked standing under NGA Section 19(b)⁵⁶ because it failed to demonstrate aggrievement or a likelihood of imminent injury. The court rejected El Paso's contention that as an "upstream transporter" for SDGE and SoCal, its interests could be adversely affected by their continued Hinshaw status because the gas sold to and transported by the LDCs would not be subject to NGA protections. The court stressed El Paso's concession that California Public Utility Commission regulation of the LDCs could prove more favorable than FERC regulation. In *Shell Oil Co. v. FERC*,⁵⁷ the District of Columbia Circuit rejected a similar claim that a party was injured because the Commission exercised jurisdiction over an Outer Continental Shelf pipeline under the Outer Continental Shelf Lands Act (OCSLA) rather than the Interstate Commerce Act, which provided for rate regulation. In *El Paso*, the court also rejected El Paso's contention that it was aggrieved as a competitor to SDGE and SoCal, because El Paso was subject to (arguably more stringent) federal regulation and the LDCs were subject to (arguably less stringent) state regulation. The court found it "insufficiently clear"⁵⁸ that El Paso would in fact ever compete with the LDCs for customers in Mexico. The court added that under its "competitive standing"⁵⁹ doctrine, the purportedly aggrieved party must show that it "will almost surely lose busi-

54. 50 F.3d 23 (D.C.Cir. 1995).

55. 15 U.S.C. § 717(f) (1994).

56. 15 U.S.C. § 717r(b) (1994).

57. 47 F.3d 1186 (D.C.Cir. 1995).

58. See *supra* note 54, at 27.

59. See *supra* note 54.

ness”⁶⁰ as a result of the order under review, and held that El Paso failed to make the required demonstration.

In *Louisiana Gas System, Inc. v. Panhandle Eastern Corp.*,⁶¹ the Commission held that in order to bring a complaint before the Commission, a party need only show that it is a “person” within the meaning of the NGA and that a violation of the NGA has or will occur based on facts alleged.

B. Discovery

In *New England Power Co.*,⁶² an ALJ held that the attorney work-product protection does not apply to studies that were not prepared by an attorney or at the direction of an attorney. The data request in question sought studies prepared by consultants regarding comparative costs of the proposed project and alternative sources of power. Although the respondent objected on the grounds that the studies were prepared at the direction of counsel in anticipation of litigation, it also admitted that the studies were, in fact, prepared at the direction of a non-lawyer. Moreover, it offered no support for its assertion that the studies were prepared in anticipation of litigation.

A series of orders issued both by the presiding ALJ and the Commission addressed the appropriate scope of discovery of affiliates of a party.⁶³ A party sought documents from affiliates of an interstate pipeline company. Although some question apparently existed with respect to the relevance of the documents, the significance of the dispute related to an apparent attempt by the pipeline to recover costs attributable to the affiliates. Although the orders are somewhat ambiguous, it appears that the Commission would require discovery of documents or facts that “refer to, relate to, or, in any way discuss, matters that may affect the flow-through of affiliated company costs” to the regulated interstate pipeline.

C. Transcript Corrections

In *Tennessee Gas Pipeline Co.*,⁶⁴ the ALJ rejected a transcript correction that “seeks the injection of new evidence into the record and a substitution of what Tennessee wishes had happened for what did happen.”

D. Testimony

In *New England Power Co.*,⁶⁵ the ALJ was presented with a request for leave to file surrebuttal testimony in an electric rate proceeding. The party seeking leave contended that the applicant had first raised a prudence issue in the rebuttal round. The applicant contended that since it

60. See *supra* note 54, at 27.

61. 73 F.E.R.C. ¶ 61,161 (1995).

62. Docket No. ER95-267-000 (July 12, 1995)(order granting motion to compel)(unreported).

63. *Williams Natural Gas Co.*, 72 F.E.R.C. ¶ 61,170 (1995)(order granting interlocutory appeal), *on remand*, 72 F.E.R.C. ¶ 63,008 (1995)(and orders discussed therein).

64. Docket No. RP92-132-042 (August 22, 1995)(Nacy J.)(unreported).

65. Docket No. ER95-267-000 (October 16, 1995)(Lewnes J.)(unreported).

had the ultimate burden of proof it should be permitted to respond in a final round of testimony (the "opportunity to close"). Ultimately, the ALJ permitted the surrebuttal testimony subject to conditions, including the condition that the applicant's witnesses would be presented at a hearing prior to the challenger's witnesses with the applicant reserving the right to recall its witnesses afterward. In a separate order in the same proceeding,⁶⁶ the presiding ALJ permitted the use of depositions in lieu of live cross-examination, where the parties sponsoring the deposition testimony agreed to make the witnesses available on twenty-four hours' notice if a matter arose during the hearing that required further testimony.

E. Late Intervention

DENIED. In *MIGC, Inc.*,⁶⁷ the Commission denied a motion for leave to intervene out-of-time when the subject rate increase filing occurred two and one-half years prior to the motion to intervene, an initial decision had issued, and a settlement had been filed. Similarly, in *City of Seattle*,⁶⁸ the Commission denied late intervention in a proceeding that had commenced in 1977, and in which opportunities to intervene or comment had arisen throughout its duration.

In *El Paso Natural Gas Co.*,⁶⁹ the Chief Administrative Law Judge denied late intervention in the settlement phase of a proceeding. The "interest" cited by the would-be intervenors was precedential impact. The Chief Judge rejected the argument, reasoning that settlement by definition cannot have precedential impact. In *Tennessee Gas Pipeline Co.*,⁷⁰ an ALJ denied unopposed intervention six months after the suspension order, because the moving party offered no reason for the late filing.

GRANTED. In *Illinois Power Co.*,⁷¹ the Chief Administrative Law Judge granted an unopposed late intervention where the intervenor's interest only became apparent during the drafting of state legislation, and the moving party had been diligent in moving to intervene promptly upon realization of the potential impact. In *Pacific Gas and Electric Co.*,⁷² the ALJ granted an unopposed late intervention in which the moving party justified its late intervention by contending that the issue was not directly applicable to the party, but might have a bearing on potential future interests. In *Iroquois Gas Transmission System, L.P.*,⁷³ the Commission granted late intervention based on the moving parties' agreement to accept uncontested partial settlement. The order further permitted the late intervenors to file a brief on contested issues not resolved as part of the settlement.

66. *New England Power Co.*, Docket No. ER95-267 (October 17, 1995)(order denying motion to quash and modifying subpoenas)(Lewnes J.)(unreported).

67. Docket No. RP93-89-002 (September 15, 1995)(unreported).

68. 72 F.E.R.C. ¶ 61,023 (1995).

69. Docket No. RP95-363-000 (August 29, 1995)(unreported).

70. Docket No. RP95-112-000 (August 2, 1995)(Hermele J.)(unreported).

71. Docket No. ER95-764-000 (August 16, 1995).

72. Docket No. ER95-980-000 (August 16, 1995)(Kane J.).

73. 72 F.E.R.C. ¶ 61,021 (1995) (order granting interlocutory appeal and late intervention)(unreported).

F. *Administrative Res Judicata*

In *Williams Natural Gas Co.*,⁷⁴ the purported "failure" of a state commission to intervene and participate in a prior proceeding was not necessarily binding on that agency's right to raise, in a subsequent proceeding, an issue that had been resolved in the prior proceeding. In *Conoco, Inc. v. Trans-Alaska Pipeline System*,⁷⁵ the Commission dismissed a complaint where all issues related to the substance of complaint were resolved in a separate related proceeding, and "the failure to consolidate . . . was inadvertent,"⁷⁶ and the order in the separate proceeding inadvertently omitted the complaint docket from a list of proceedings to be terminated.

G. *Rehearing*

Several orders in 1995 addressed Section 19(a) of the NGA and Section 313 of the Federal Power Act,⁷⁷ which permit persons, states, or states commissions that are parties to a proceeding and that have been aggrieved by a final order of the Commission to file a petition for rehearing within thirty days of issuance of that order.

First, in *Williams Natural Gas Co.*,⁷⁸ the Commission granted a waiver of its requirement that requests for rehearing must be filed during normal business hours.⁷⁹ The waiver allowed a request for rehearing filed by the Missouri Public Service Commission (Missouri PSC) to be considered as timely filed, even though the request was not filed within normal business hours on the thirtieth day following issuance of the final order, and was in fact not physically accepted by the Secretary's office until the next business day.

The Missouri PSC attempted to file its request for rehearing on the thirtieth day, but its courier was turned away by security guards at the Commission because the filing room was closed. The Missouri PSC indicated that its courier had left the offices of its D.C. counsel at 4:05 p.m., but due to his inexperience went to the wrong door at the Commission building. When the courier finally located the correct door, it was after 5:00 p.m., and the filing room was no longer accepting pleadings that day. The Commission held that under these circumstances, good cause had been shown to waive the regulations and accept the rehearing request as if it had been timely filed.

Second, in *City of Seattle*,⁸⁰ the North Cascades Institute (North Cascades) filed a timely request for rehearing. However, North Cascades had neither intervened in nor otherwise established party status in the proceed-

74. 72 F.E.R.C. ¶ 63,006 (1995) (Nelson J.) (order denying motion for summary disposition).

75. 72 F.E.R.C. ¶ 61,007 (1995).

76. *Id.* at 61,013.

77. 16 U.S.C. § 825(l)(a).

78. 70 F.E.R.C. ¶ 61,202 (1995).

79. 18 C.F.R. § 375.105(c) (1996). This requirement applies to all filings with the Commission.

80. 72 F.E.R.C. ¶ 61,023 (1995).

ing in which the Commission had issued the order. The Commission held that only parties to a proceeding may file a request for rehearing.⁸¹

Finally, in *Arkla Gathering Services Co.*,⁸² the Arkansas Royalty Membership (Arkansas Royalty) filed a request for rehearing one day following the expiration of the thirty-day statutory time period. The Commission treated Arkansas Royalty's late request as a request for reconsideration, in keeping with the Commission's standard practice. The Commission commented further that the request for rehearing contained arguments concerning the grant of an abandonment in another proceeding, noting that Arkansas Royalty had not intervened in that proceeding. The Commission held that the Arkansas Royalty could not request rehearing of the Commission's action in that other proceeding.

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81. See, 18 C.F.R. § 385.713(b) (1996).

82. 71 F.E.R.C. ¶ 61,297 (1995).