

# FERC PRACTICE AND PROCEDURE MANUAL

Edited by Stephen A. Herman  
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Reviewed by

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When asked to comment on his first Vienna piano concertos, Mozart said:

"There are passages here and there from which connoisseurs alone can derive satisfaction; but these passages are written in such a way that less learned cannot fail to be pleased."<sup>1</sup>

Mozart's observation also is appropriate to describe the newly published *FERC Practice and Procedure Manual*, which is edited by a member of the Federal Energy Bar Association, Stephen A. Herman.

The *Manual* is timely. The FERC's new Rules of Practice and Procedure became effective August 26, 1982.<sup>2</sup> In the rush to preempt the field, the *Manual* is a good beginning with the promise of being a significant reference tool. The maturation process of the *Manual* which is a looseleaf service with quarterly updates, under the competent hands of Mr. Herman, will make it an indispensable addition to the practitioner's library.

The organization of the *Manual* is well planned. For each Rule, the *Manual* provides the text of the Rule, its derivation, the preamble to the Final Rule, FERC Staff analysis, editorial comment, FERC and FPC precedent and sample documents. For almost all of the Rules, there currently is no citation to precedent or sample documents. This will be remedied with the first Supplement to the *Manual*, which will be issued in January 1983, and will contain substantial editorial comment, annotations of FERC precedent, discovery materials and a full index.

One of the strengths of the *Manual* is the editorial comment by Steve Herman. For example, in an analysis that a lawyer can savour, Mr. Herman observes with regard to Rule 209:

The preamble and Staff Analysis contain an interesting discussion of the words "will," "shall" and "must" not only in terms of Rule 209, but also as used throughout the Final Rule. The Commission uses the word "will" with respect to actions contemplated by the Commission, while directions to those subject to Commission rules are expressed by "must." Generally, "shall" is avoided because, in the Commission's view, this word may be interpreted as either intentional or directive. Whether the Courts will attach any significance to the difference between "will" and "must" when deciding whether the Commission is bound by its regulations is problematical.

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<sup>1</sup>R. Baker, MOZART (1982).

<sup>2</sup>*Fed. Reg.* 19014 (May 3, 1982); revised 47 *Fed. Reg.* 35952 (Aug. 18, 1982).

This type of editorial comment is helpful and will make the *Manual* useful.

Although the *Manual* recognizes that "discovery plays a significant part in FERC proceedings" and "a substantial discovery practice has developed," the *Manual* does not include, at this time, any materials on discovery. As indicated *supra*, this deficiency will be remedied. In this Section it is hoped that the *Manual* will refer to Kissell and Roscher, *Availability and Use of Discovery at the Federal Energy Regulatory Commission: The Need for Modernization*, 2 Energy L.J. 79 (1981), which is a 36 page analysis of the discovery process at FERC.

Another area for prompt completion in the *Manual* is the Index. At the present time, there is none. It, however, should be noted that there is provision for an Index, but time constraints apparently precluded inclusion of an Index.

In sum, the *Manual* has many good qualities. The most significant attribute of the *Manual* is that it has, in Mr. Herman, an experienced, intelligent and hard working practitioner as its editor. In addition, its organizational structure gives the *Manual* the promise of an outstanding research tool. Finally, the *Manual* will be important to the FERC practitioner because it is the only work in the field.