Electronic Hearing Comments

Office of Administrative Law Judges and Dispute Resolution

Survey Results and Analysis
(as of February 2018)
Did Participants Like the Electronic Hearing Process?

Did you like the electronic hearing process?

*Data collected from 44 respondents who participated in a hearing during the 2016-2017 calendar year.*
Electronic Hearing Process

ADVANTAGES

• Very efficient. Eliminates the need for boxes of paper.
• Ability to manipulate spreadsheets and perform calculations on the screens.
• Ability to place on a large monitor the particular part of a document that's being used in cross-examination.

DISADVANTAGES

• Pre-hearing IT Tutorial not sufficient.
• No contingency plan when there is a system failure.
• WiFi connection is poor.
• Poor placement of screens.
• Have increased, rather than decreased, the time of the hearing due to technical issues.
EBA Energizer: Updates to the FERC Paperless Hearing and Settlement Processes

February 27, 2018

Energy Bar Association Webinar

Keith Pierce and Don Gavelek
Settlement Filing Procedures

- Two general categories of settlements are filed with the Commission – different filing procedures

- Settlements of issues in an established proceeding before the Commission
  - Referred to as Rule 602 Settlements

- Settlements of issues between parties that are not before the Commission but need to be filed with the Commission
  - Sometimes informally referred to as Pre-Arranged or Pre-Agreed Filings
Rule 602 Settlements

Definition

- § 385.602 (Rule 602): This section applies to written offers of settlement filed in any proceeding:
  - Set for hearing under Part 385, Subpart E;
  - Before settlement judge; and/or
  - Alternative dispute resolution (Rule 604).

- “Offer of settlement" includes any written proposal to modify or amend an offer of settlement
  - Modifications restart Rule 602 comment period
Rule 602 Settlements
Filing Procedures

- **If a Part 35, 154, 284 or 341 Proceeding:**
  - Chief ALJ instruction and OSEC Notice 12/1/2016: File in eTariff format
    - Effective January 3, 2017
    - Use Settlement specific Type of Filing Codes (ToFC)
    - Associate with the original eTariff Filing Identifier (Filing ID)
      - OSEC will assign a new sub-docket to the Settlement filing (e.g.: -001)
        - No need to re-intervene – existing service list applies to all sub-dockets
        - Once a docket number is given to a Filing ID, continue to use that Filing ID in subsequent eTariff filings’ Associated Filing ID to prevent the proliferation of docket numbers
      - If no Associated Filing ID, OSEC will issue a new root Docket No. (-000)
        - Complaint proceedings usually do not have an Associated Filing ID
        - Parties advised to intervene as a new service list is started in the new root docket (See Electronic Tariff Filings, 130 FERC ¶ 61,047, at P 16 (2010))
      - **NOTE:** The Settlement ToFC provides that the new sub- or new root docket is before the presiding officer – there will NOT be a Commission order “consolidating” or assigning the sub- or new root docket to the underlying proceeding
Rule 602 Settlements
Filing Procedures

If a Part 35, 154, 284 or 341 Proceeding: (con’t)

- For proceedings with multiple dockets, put the non-Associated Filing ID docket numbers in the Filing Title (the Associated Filing ID’s provides the lead docket number)
  - See Electronic Tariff Filings, 130 FERC ¶ 61,047 (2010) for discussion
- File an update in each of the multiple root dockets that reference the docket in which the settlement was filed and the settlement’s eLibrary accession number
  - This procedure also must be followed when filing motions for interim implementation of settlement rates that implicate more than one docket.
Rule 602 Settlements
Comments and Reply Comments

- Rule 602 provides for comments not later than 20 days, and reply comments not later than 30 days after the date of filing.

  - Rule 2007 applies (385.2007(a)(2)):
    - “The last day of any time period is included in the time period, unless it is a Saturday, Sunday, day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business, part-day holiday that affects the Commission, or legal public holiday …, in which case the period does not end until the close of the Commission business of the next [business] day …”
    - The 20th and 30th days are independent of each other.

  - Settlements are not subject to an OSEC Notice requirement
    - But due to eFiling’s automated systems, OSEC’s Combined Notice may incorrectly include a Settlement filing with standard tariff filing notice time lines.
    - Such incorrect OSEC Notices cause considerable confusion for all
    - Bring incorrect OSEC Notices to OSEC’s attention by email FERCOOnline@ferc.gov

  - File Comments and Reply Comments in the Settlement’s sub-docket
Rule 602 Settlements Interim Rates

- File separately actual Tariff Records only when the Settlement provides for interim rates to go into effect before Commission approval of the Settlement
  - Interim rate Tariff Records filings are not subject to separate Notice requirements. They are considered to be part of the Settlement and are subject to the Rule 602 comment periods.
  - Motions to Accept Interim Rates are not subject to a Commission action date.
  - OSEC directs Motions to Accept Interim Rates to OEMR.
  - OEMR may
    - If the proposed interim rates are lower than the effective rates, refer the Motion to the Chief Administrative Law Judge (375.307(a)(1)(iv) and (a)(7)(v));
    - Accept the Interim Rates by Delegated Letter Order (375.307(a)(1)(i) and (a)(7)(i)); or
    - Take other action as appropriate.
Rule 602 Settlements
Supplements and Amendments

- **Keep Supplements and Amendments in the same docket**
  - Use a Settlement ToFC, and associate with the Settlement filing’s Filing Identifier
  - New Rule 602 comment period

- **October 13, 2017 Chief ALJ Notice provides a checklist**
Settlement Rule 602
Filing Procedures Flow Chart

Start

Rule 602 Settlement between parties in a proceeding before the Commission

Settlement

Transmittal Letter should indicate whether parties intend to transmit to presiding officer or Commission for action

Settlement Transmittal Letter

To presiding officer?

Transmittal Letter

Settlement

No

Yes

Commission

OALJDR Chief Judge or Presiding Officer

Interim Rates Motion

OEMR may act on Interim rates or refer to Chief Judge*

Order on Interim Rates

*Chief Judge only has delegated authority for LOWER rates

Settlements without interim rates:
- eTariff format required
- If Pro forma tariff records, as attachments only

Existing eTariff Proceeding:
- Use Settlement ToFC
- Secretary assigns new sub-docket

New eTariff Proceeding:
- Use Settlement ToFC
- Secretary assigns new docket

Settlements with interim rates:
- eTariff format required
- Actual tariff records

Existing eTariff Proceeding:
- Use Settlement ToFC
- Secretary assigns new sub-docket

New eTariff Proceeding:
- Use Settlement ToFC
- Secretary assigns new docket

Parts 35, 154, 284, 300 and 341 Proceedings
As of January, 2017
Questions?
Pre-Arranged or Pre-Agreed Filings

Definition

- Does not involve settlement of a pending or open proceeding before the Commission
- Regulated entity and interested parties have reached an agreement in advance of filing
- There are no Commission regulations that specifically address Pre-Arranged or pre-agreed Filings
- All Pre-Arranged or pre-agreed Filings are managed as if they were standard tariff filings (Business Process), such as
  - No specific ToFC for Pre-Arranged or pre-agreed Filings
  - Standard docketing rules
  - Program standard notice, intervention and comment periods
    - Rule 602 comment periods do NOT apply
Pre-Arranged or Pre-Agreed Filings
Pros and Cons

- **Pro - reduced regulatory risk**
  - Lowers risk of protests
  - Lowers risk of suspension, Commission-determined different effective date, and refund obligations
  - Lowers overall regulatory costs of implementing tariff changes
    - Reduces the tariff filing documentation requirement ("abbreviated filing")
    - Increases the probability proposed effective date will occur
  - Commission has a preference that issues be resolved by consensus
    - Litigated proceedings take considerable amount of time and expense to resolve
    - Significant probability that litigated cases will be appealed to the courts
    - End results of litigated proceedings can be unpredictable for all parties

- **Con – the unexpected**
  - Unexpected protests
    - Abbreviated filing’s supporting documentation may be inadequate to address protests – Commission actions of Suspended or Rejected
    - Reputational risk for not consulting all interested parties
  - Unexpected Commission action
    - Filing found to be deficient – actions of Suspended or Rejected
    - Consensus agreement found to be unduly preferential or discriminatory, not just and reasonable, and/or contrary to Commission policy, regulations or applicable statutes – actions of Suspended or Rejected
Pre-Arranged or Pre-Agreed Filings Business Process

- **Two available Business Processes** (see eTariff Implementation Guide for definitions)
  - Normal/Statutory – filings proposed with a statutory or regulatory action date
  - Compliance – filings with no regulatory action date

- **Choose Business Process on the basis of what is the desired outcome, not on the basis that there is a pre-arranged agreement**
  - Want to place into effect actual Tariff Records with the Commission acting pursuant to a statutory or regulatory action date?
    - Normal/Statutory ToFC with actual Tariff Records
  - Want a pre-approval of the pre-arranged or pre-agreed filing?
    - Compliance ToFC with only Pro Forma Tariff Records (see *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005)); followed up with a subsequent Compliance filing with actual implementing Tariff Records

- **It is the Regulated Entity’s choice as which Business Process to propose, but it is the Commission’s decision as to which Business Process is appropriate**
Pre-Arranged or Pre-Agreed Filings

- Pre-filing meeting with Staff pursuant to §§ 35.6, 154.8, 341.12 or 388.104
  - Pre-arranged agreements often include unique proposals, provisions and time lines. Staff can provide suggestions as to documentation, explanation, and tariff construction
  - Disclaimer: Staff guidance does not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, any individual Commissioner, or other members of its Staff. 18 C.F.R. § 388.104(a)

- Regulations
- OSEC guides and instructions
- Staff’s [www.ferc.gov](http://www.ferc.gov) posted guidance
Pre-Arranged or Pre-Agreed Filings

Filing Procedures Flow Chart

- "Settlement" between individuals (e.g. a regulated entity and others) outside of any Commission proceeding e.g. Tariff Filings

Pre-filing w/ staff

Pre-Approval?

Yes

No

Tariff Filing

Regulated entity eFiles in eTariff using Compliance Type of Filing Code (ToFC). Filing title should not include word "Settlement"

Initiate new proceeding:
1. Assign new docket number
2. Issue notice for interventions, comments and protests

Regulated entity eFiles in eTariff using either Normal/Statutory or Compliance ToFC

Choice of ToFC determines if filing is subject to statutory action date. Filing title should not include word "Settlement"