

# MORE ADO ABOUT PREHEARING DISCOVERY AT FERC

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## I. INTRODUCTION

This article examines prehearing discovery as it is conducted by the Federal Energy Regulatory Commission. It does so at a particularly appropriate time, since the Commission's formal rules of prehearing discovery are currently in a state of rehabilitation and change.

Throughout its history as one of our major regulatory agencies, the Federal Energy Regulation Commission, like its predecessor, the Federal Power Commission,<sup>1</sup> has conducted its adjudicative proceedings with virtually no explicit rules governing prehearing discovery. The FERC's Rules of Practice and Procedure<sup>2</sup> contain a rule detailing the procedures for depositions,<sup>3</sup> a rule that inferentially sanctions requests for admissions,<sup>4</sup> but very little else on the subject of prehearing discovery. Nevertheless, a rich tradition of prehearing discovery has grown up at the Commission. It has been based upon a device that is not explicitly sanctioned by the Procedural Rules: the data request.<sup>5</sup>

The absence of procedural rules dealing explicitly with discovery has been the subject of critical comment.<sup>6</sup> For a number of years, a project to codify a set of rules governing prehearing discovery occupied the Commission and its staff. The subject of discovery was deferred when, in 1982, the agency issued a major revision of its Procedural Rules governing adjudicative proceedings.<sup>7</sup> Two years later, the Commission published a Notice of Proposed Rule Making that set forth the text of a new, self-contained, and complete set of procedural rules to govern the conduct of prehearing discovery in "trial-type" proceedings before the agency.<sup>8</sup>

Although the final rule has not been issued as of this writing, it is worthwhile, nevertheless, to examine the proposed discovery rules. For the most part, they run

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\*Administrative Law Judge, Federal Energy Regulatory Commission. The views and errors expressed herein are those of the author in his individual capacity. Neither can, or should, be ascribed to the Commission or any official of that agency.

<sup>1</sup>The Federal Power Commission was transformed, intact, into the Federal Energy Regulatory Commission under Title IV of the Department of Energy Organization Act, enacted in 1977, 91 Stat. 567, 582-587 (1977), 42 U.S.C. §§ 7171-7177.

<sup>2</sup>18 C.F.R. §§ 385.101-385.2103 (1984).

<sup>3</sup>Rule 1906, 18 C.F.R. §§ 385.1906 (1984).

<sup>4</sup>Rule 604, 18 C.F.R. § 385.604 (1984), provides for sanctions against a party who refuses to admit the genuineness of a document or the truth of a matter of fact when the document is later shown to be genuine or the fact is proven.

<sup>5</sup>See Note, *A Colloquy on the Trial of a Case before the FERC: The Administrative Law Judge's Perspective*, 3 Energy L.J. 317, 318 (1982).

<sup>6</sup>See P. Kissell and L. Roscher, *Availability and Use of Discovery at the Federal Energy Regulatory Commission: The Need for Modernization*, 2 Energy L.J. 79 (1981).

<sup>7</sup>Order No. 225, 47 Fed. Reg. 19014 (1982).

<sup>8</sup>Docket No. RM83-41-000, 49 Fed. Reg. 30519 (1984).

in the mainstream of the discovery practice to which practitioners before the Federal courts and agencies have become accustomed. Hence, it is unlikely that major changes would be made in either the format or substance of the draft rules during the Commission's consideration of them prior to final issuance.<sup>9</sup> After discussing them, we will then consider some aspects of discovery practice at FERC that are not codified, or proposed to be codified, but represent matters to which the attention of lawyers practicing before the agency should be addressed.

The legal status of the Commission's discovery rules has been clarified by a recent decision of the United States Court of Appeals for the Ninth Circuit. In *Pacific Gas and Electric Co. v. FERC*,<sup>10</sup> the court rejected a claim that FERC had erred in summarily disposing of a matter without a hearing and, in particular, without giving the participants the opportunity to conduct discovery. The court made two important points about discovery in FERC proceedings. First, the court held that the agency is not required to provide for discovery. Second, the court stated that if the agency's rules do contain provisions for discovery, those rules become binding on the agency and must comport with due process.<sup>11</sup>

## II. A RANDOM WALK THROUGH THE PROPOSED NEW DISCOVERY RULES

As the court in the *Pacific Gas and Electric* case indicated, the FERC is not bound to apply its discovery rules universally. It has elected to make the proposed rules applicable only to proceedings in which a formal hearing has been directed.<sup>12</sup> Proposed Rule 401 expressly exempts from application of the new discovery rules both proceedings under the Freedom of Information Act<sup>13</sup> and a generic category of cases described as requests made "under a statute which entitles the Commission to obtain information" from a party subject to the agency's regulatory jurisdiction.<sup>14</sup> So-called "adjustment proceedings" under the Natural Gas Policy Act of 1978<sup>15</sup> are also exempted from the general applicability of the proposed discovery rules, although saving language in draft Rule 401 would seem to make the deposition and subpoena rules applicable to that class of proceedings. Although the draft rules are silent on the subject, it seems clear that they are also inapplicable to enforcement investigations conducted under Part 1b of the FERC regulations.<sup>16</sup> The regulations governing enforcement investigations have their own specific provision relating to subpoenas.<sup>17</sup> They also provide that they do "not apply to adjudicative proceedings."<sup>18</sup> These provisions demonstrate an intention to exempt enforcement investigations from the scope of the proposed rules on prehearing discovery.

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<sup>9</sup>It should be emphasized that the author of this article, though a Commission employee, is not privy to the deliberations of the agency on this subject.

<sup>10</sup>746 F.2d 1383 (9th Cir. 1983).

<sup>11</sup>*Id.*, at 1387-88.

<sup>12</sup>Proposed Rule 401, 49 Fed. Reg. 30524 (1984).

<sup>13</sup>5 U.S.C. § 552.

<sup>14</sup>49 Fed. Reg. 30524 (1984).

<sup>15</sup>See 42 U.S.C. § 7194. The proceedings are conducted under Subpart K of the Commission's Procedural Rules, 18 C.F.R. §§ 385.1101-385.1117 (1984).

<sup>16</sup>18 C.F.R. §§ 1b.1-1b.20 (1984).

<sup>17</sup>18 C.F.R. § 1b.14 (1984).

<sup>18</sup>18 C.F.R. § 1b.2 (1984).

Proposed Rule 403, dealing with the scope of discovery, is noteworthy for two reasons. First, it creates in participants in FERC adjudications a right to discovery, subject only to the power of the presiding judge to limit it by issuing a protective order. Second, it adopts the Federal Rules of Civil Procedure standard to describe the material that may be obtained in discovery: "any matter, not privileged, that is relevant to the merits of the proceeding or that might reasonably be calculated to lead to the discovery of admissible evidence. . ."<sup>19</sup> This would establish in FERC proceedings the principle, familiar to civil litigation in the U.S. District Courts, that a party resisting discovery may not prevail by asserting that the discovery seeks to reach evidence that is inadmissible. The opposition must instead be grounded in the irrelevance of the material, which is more difficult to demonstrate.

The litany of discovery techniques specified in proposed Rule 404 represents, however, a variation from practice under the Federal Rules of Civil Procedure. Five of the devices proposed to be imported into FERC practice are depositions on oral examination, requests for admission, requests for production of documents or things, requests for inspection, and interrogatories to parties. The first two of these devices are currently found in the FERC Procedural Rules.<sup>20</sup> The functions of the latter two had been performed by the all-purpose data request.<sup>21</sup> However, Rule 404 would also provide for data requests as an authorized discovery device. It is not clear what separate function the data request would serve, now that explicit authority to propound interrogatories is to be included in the Rules. Finally, Rule 404 would authorize the Commission trial staff to serve a request "for performance of a study by a jurisdictional entity."

Rule 404 also would make two significant technical changes in FERC practice. It would require identification of, and a certificate of accuracy by, the preparer of a response to discovery.<sup>22</sup> Under prior practice, responses to data requests were often made by counsel, and the identity of "the man in the green eyeshade" who prepared the substantive information was not required to be made known unless that information had been specifically sought in the data request. As a result, it was not uncommon to have a witness repudiate on the witness stand the data request responses of that party, much to the chagrin of counsel attempting to cross-examine that witness on the basis of alleged inconsistencies between the contents of the response and the witness' testimony. Rule 404(c) would render more risky this approach by a witness.

Proposed Rule 404(d) would impose a continuing duty to supplement responses to discovery with after-acquired information.<sup>23</sup> This is a much broader duty for supplementation of responses than is provided for in the Federal Rules of Civil Procedure.<sup>24</sup> There are significant questions as to the practicability of a general duty to supplement responses, particularly when the discovery pertains to the financial and market data of a public utility or regulated gas pipeline. In many instances, new, updated information may be received daily, or even hourly.

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<sup>19</sup>49 Fed. Reg. 30524. Compare Fed. R. Civ. P. 26(b)(1).

<sup>20</sup>See Rules 604 and 1905, 18 C.F.R. 385.604, 385.1905 (1984).

<sup>21</sup>See Note, 3 Energy L.J. 317 (1982), *supra*, n.5.

<sup>22</sup>See 49 Fed. Reg. 30524 (1984).

<sup>23</sup>*Id.*

<sup>24</sup>See Fed. R. Civ. P. 26(e).

Although the proposed rules do not explicitly confer power on presiding judges to limit the duty to supplement responses, it will obviously be necessary to impose such limits as a routine matter if proposed Rule 404(d) is adopted in its present form.<sup>25</sup>

Proposed Rules 405, 406, and 407, govern deposition practice before the FERC. They would supersede the current Rule 1906,<sup>26</sup> and would make a few significant changes in the existing practice. Gone would be the present requirement to seek, and obtain, prior approval from the presiding judge or the Commission before a deposition can be taken.<sup>27</sup> Also disappearing would be the need to provide at least 10 days' notice of the deposition to the other parties.<sup>28</sup> Under proposed Rule 405,<sup>29</sup> the process of taking a deposition would be touched off in one of two ways. If the deposition of a "participant" is sought, the party taking the deposition would merely serve a notice of deposition. If the deposition of a "non-party" is sought, the party taking the deposition *must* secure and serve a subpoena on the prospective deponent. Since there is no minimum period of advance notice of intent to take a deposition specified in the proposed rule, the notice or subpoena could set the deposition with virtual immediacy, and the other parties would have no recourse except to apply for relief to the presiding judge.<sup>30</sup> If the party taking the deposition wishes to elicit information from a corporation or a Government agency, proposed Rule 405(a)(2), allows the corporation, agency, or similar body to be made the subject of the notice or subpoena and requires it to designate an individual to testify on its behalf.<sup>31</sup> Apparently, if the corporate or governmental body is a "participant" in the proceeding, one may proceed under these special provisions by notice, rather than by subpoena, even though the person whose deposition is taken is literally a "non-party." An interesting anomaly built into this rule is that if the person seeking information from a corporation or agency that is a "participant" knows the identity of the person to be deposed, he must proceed by subpoena, since the deponent, *eo nomine*, is a "non-party." If, however, the name of the potential deponent is unknown, the deposition of the selfsame individual may be initiated by a notice under proposed Rule 405(a)(2).<sup>32</sup>

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<sup>25</sup>Proposed Rule 413(b), 49 Fed. Reg. 30526 (1984), empowers the judges to issue protective orders limiting discovery. However, it is doubtful whether this power was intended to be exercised on a routine basis.

<sup>26</sup>18 C.F.R. § 385.1906 (1984).

<sup>27</sup>See Rule 1906(a), (c), 18 C.F.R. §§ 385.1906(a), (c), (1984).

<sup>28</sup>See Rule 1906(b), 18 C.F.R. § 385.1906(b) (1984).

<sup>29</sup>49 Fed. Reg. 30524 (1984).

<sup>30</sup>In the case of a "non-party" deposition, however, the proposed new rules do introduce a measure of potential protection against sharp practice. Proposed new Rule 412, 49 Fed. Reg. 30526 (1984) provides that a subpoena (which must be secured to take a "non-party" deposition) may be issued only "[o]n motion." The existing rule, Rule 1905, 18 C.F.R. § 385.1905 (1984), provides only for a "petition" to issue a subpoena. Under present practice such petitions are acted upon *ex parte* and summarily (subject, of course, to a motion to quash). A prehearing motion, on the other hand, cannot be the subject of a ruling until non-moving participants have had at least 15 days to answer it. See Rule 213(d)(1), 18 C.F.R. § 385.213(d)(1) (1984).

<sup>31</sup>Compare Fed. R. Civ. P. 30(b)(6).

<sup>32</sup>A lot of potential pitfalls lurk in the concept of the "non-party," particularly when it is juxtaposed against the term "participant." The latter term is specifically defined in the Procedural Rules, see 18 C.F.R. § 385.102(b) (1984), but the former is not. The Commission trial staff, for instance, is always a "participant." It is also always a "non-party" if the term "party" is used in its defined sense. See 18 C.F.R. § 385.102(c) (1984).

The existing technical provisions relating to taking and filing of depositions are for the most part carried over into proposed Rule 406,<sup>33</sup> which has the merit of gathering all of them together in one place. One change that should be noted is the abolition of the requirement for filing all transcript copies with the Commission's Secretary who, in turn, serves each participant with a copy.<sup>34</sup> Under the new rule, each participant would be entitled to buy a copy of the transcript from the reporter.<sup>35</sup>

The major innovation in FERC deposition practice contained in the proposed new discovery rules is the introduction of a provision authorizing depositions to perpetuate testimony. Experience in the *Trans Alaska Pipeline System* proceeding<sup>36</sup> in which two vital witnesses failed to live long enough to testify, demonstrates the wisdom of having in place the machinery to take the deposition of a potential witness in advance of the hearing where good reason to do so is demonstrated.<sup>37</sup> Under proposed Rule 407,<sup>38</sup> a motion for leave to take a deposition to perpetuate testimony must be made to the Motions Commissioner.<sup>39</sup> The contents of the motion are similar to the contents of a motion under Rule 27 of the Federal Rules of Civil Procedure, on which the proposed new Rule 407 was modeled.<sup>40</sup> According to the preamble to the Notice of Proposed Rule Making, the drafters contemplated that the Motions Commissioner would "refer the matter to the Chief Administrative Law Judge if the taking of a deposition appears warranted."<sup>41</sup> However, there is no mention of this kind of referral in the text of the proposed rule.<sup>42</sup>

Proposed Rules 408, 409, and 411 deal with specific discovery devices. Rule 408 addresses data requests, including interrogatories to parties and requests for the performance of studies. Rules 409 and 411 speak specifically to inspection of documents or tangible things and to requests for admissions. Some of these devices may be initiated merely by serving an appropriate request on the participant from whom discovery is sought, while others may be employed only after leave of the presiding judge has been sought, and obtained, by motion. A motion is obligatory in two instances: First, under proposed Rule 409,<sup>43</sup> production for inspection of documents or tangible objects, as well as entry onto real estate for inspection, must be sought by motion. Second, a request by the Commission trial staff for the

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<sup>33</sup>49 Fed. Reg. 30525 (1984).

<sup>34</sup>See 18 C.F.R. § 1906(e) (1984).

<sup>35</sup>Proposed Rule 405(d)(2), 49 Fed. Reg. 30524 (1984).

<sup>36</sup>Docket No. OR78-1.

<sup>37</sup>It is less clear why FERC rules need to allow the taking of a deposition to perpetuate testimony "pending judicial appeal," since appeals to the courts from FERC determinations are considered solely on the basis of the administrative record.

<sup>38</sup>49 Fed. Reg. 30525 (1984).

<sup>39</sup>The Motions Commissioner is a member of the Commission so designated under Rule 715(c), 18 C.F.R. § 385.715(c) (1984).

<sup>40</sup>See 49 Fed. Reg. 30522 (1984).

<sup>41</sup>*Id.*

<sup>42</sup>The quoted language is somewhat enigmatic in any event. It does not explain what the purpose of the reference to the Chief Judge would be. If the drafters believed that a judge was required to preside during the taking of a deposition, that belief was erroneous.

<sup>43</sup>49 Fed. Reg. 30525 (1984).

performance of a special study under proposed Rule 408 may be submitted only "[w]ith the prior approval of the presiding officer."<sup>44</sup>

A request for data under proposed Rule 408 must be served on all participants; however, the response is served only upon "the requesting participant and the Commission trial staff."<sup>45</sup> A Rule 408 request must be responded to within 30 days of its service. However, the data sought need not be provided within that time; all that is necessary is a statement specifying "the time within which the matter sought will be furnished."<sup>46</sup> The rule goes on to authorize the presiding judge to "modify the time as to all or any of the requests."<sup>47</sup> It is not clear whether "the time" refers to the 30 days to state when the data will be furnished or the period of time within which the data actually are supplied. It is also difficult to fit this provision with proposed Rule 413(a),<sup>48</sup> which requires a participant who does not intend to comply with a discovery request to make that intention known "before the date discovery is due."<sup>49</sup> What is "the date discovery is due" in response to a Rule 408 request? The most appealing construction is to say that the due date is the 30-day deadline. The difficulty, with this construction is that no actual "discovery" is to be provided by that deadline. All that is "due" is a statement of what will be provided at some indefinite future date.

All of this suggests that from the standpoint of the practitioner who seeks discovery information in rather short order, the best course of action might be to make a Rule 409 motion for authorization to inspect and copy the relevant documents rather than a Rule 408 request to have the other participant furnish copies of them. In a Rule 409 motion, one can specify time limits for providing access to the material sought. Those time limits will be binding, if the presiding judge grants the motion.

Rule 411, dealing with admissions, combines the important features of the admissions rule in the Federal Rules of Civil Procedure<sup>50</sup> and the existing FERC Rule 604.<sup>51</sup> As the preamble notes, however, the proposal would make the request for admissions a much more powerful discovery device in FERC practice than it is today.<sup>52</sup> It would allow one to require an adverse party to admit or deny the validity of an opinion or a legal position, as well as a matter of fact or the genuineness of a document. This is important in an agency whose cases commonly turn on expert opinion evidence. The admissions rule would also place a 20-day deadline on responses to a request.<sup>53</sup> As is the case under Rule 36 of the Federal Rules of Civil Procedure, a denial for lack of information must specify what exact information is insufficient to permit an unqualified admission or denial. An admission would be usable only in the proceeding in which it was provided.

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<sup>44</sup>*Id.*

<sup>45</sup>49 Fed. Reg. 30525 (1984).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>49 Fed. Reg. 30526 (1984).

<sup>49</sup>*Id.*

<sup>50</sup>*See* Rule 36, Fed. R. Civ. P.

<sup>51</sup>18 C.F.R. § 385.604.

<sup>52</sup>*See* 49 Fed. Reg. 30522.

<sup>53</sup>If the 20-day period runs from date of service, as it apparently does, that time frame seems rather truncated in a case where the party who is subject to the request is located some distance from Washington. The deadline under Rule 36, Fed. R. Civ. P., is 30 days.

An important facet of discovery practice that practitioners often neglect is that these discovery devices are not mutually exclusive and can be employed *seriatim* to reinforce each other. In other words, it is perfectly proper to undertake discovery under one device for the purpose of determining what is discoverable under another. As an example, counsel in a recent case served data requests on an adverse party, seeking identification of the employee of that party who had custody of its records. When the response was received, counsel for the discovering party took depositions of the custodians, solely for the purpose of developing what records were kept, in what format they were kept, and where they were located. With this information in hand, counsel was able to frame a series of data requests and requests for inspection and copying the documents that would have elicited precisely the information his client needed with surgical precision and with great economy. If the case had gone to hearing (it was settled after the discovery phase concluded), there might also have been a request for admissions designed to “lock in” the genuineness of the discovery material that was to be proffered as evidence.

The proposed new discovery rules include a revision of the Commission’s existing rule on subpoenas.<sup>54</sup> The new subpoena rule would dispense with a host of wordy technicalities establishing criteria for the drafting of petitions for issuance of a subpoena. Instead, Rule 412 would simply authorize the presiding judge to issue subpoenas *ad testificandum* or *duces tecum* “on motion.”<sup>55</sup> In this regard, it is interesting to inquire whether the drafters intended to change the current practice, under which subpoenas are usually issued upon *ex parte* written application, subject to a motion to quash. One hopes that a presiding judge will not be required to wait the required 15 days for reply to a motion before acting on a subpoena request. To impose such a requirement would make the issuance of compulsory process entirely too burdensome and prolix. A second change that proposed Rule 412 would make is to authorize service of a FERC subpoena by substituted service (presumably in accordance with state law) or by registered mail. The latter is particularly interesting because under proposed Rule 406<sup>56</sup> attendance of a “non-party” for a deposition by oral examination is secured by serving a subpoena under Rule 412. The authorization for registered mail service goes far to eliminate some of the headaches that would otherwise be involved in securing attendance of a “non-party” witness who is located in a distant city.

Many novel features would be introduced into FERC practice by proposed Rule 413.<sup>57</sup> Although it is entitled “Objections to discovery, motions to compel, and protective orders,” the draft rule consists of many miscellaneous provisions. For one thing, it would change the practice that prevailed until the last few years with respect to the procedures for resisting discovery. In the past, a party who did not intend to comply with a data request, in whole or in part, was allowed to refuse to respond to it or part of it. The party who sought the data would then be obliged to go forward with a motion to compel, seeking enforcement. This has proved to be unsatisfactory for several reasons. First, there never were very strict rules on deadlines for

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<sup>54</sup>Proposed Rule 412, 49 Fed. Reg. 30526 (1984). It would reverse and supersede Rule 1905 of the Rules of Practice and Procedure, 18 C.F.R. § 385.1905 (1984).

<sup>55</sup>49 Fed. Reg. 30526 (1984).

<sup>56</sup>49 Fed. Reg. 30524 (1984).

<sup>57</sup>*Id.*

compliance with data requests. The data were not furnished, but the party who sought the data often proceeded upon the assumption that it would be forthcoming one day, and the whole matter fell into an abyss of mutual misunderstanding until the hearing got underway. At that time, the party who had been served with the data request made it clear he had no intention of complying. His adversary then sought enforcement of the request. But it often was too late to be acted upon. A second disadvantage was that first the presiding judge would hear of the dispute was when a motion to compel was filed. Since the author of the motion usually had little or no knowledge of the reasons why the adverse party was resisting discovery, it was difficult or impossible for the judge to grasp the nettle of the controversy until weeks later when the reply to the motion came before him. This limited the opportunities to resolve the dispute quickly and economically, without a lengthy series of pleadings.

To remedy these problems, many administrative law judges at FERC have recently been routinely placing into their procedural schedules mandatory requirements for a party who does not intend to honor a data request to say so explicitly, to state with specificity the grounds for refusal, and to do so by a date certain. The proposed new Rule 413(c) would codify this salutary practice.

The remainder of Rule 413 deals with protective orders and privileges.<sup>58</sup> In reviewing the somewhat truncated and enigmatic proposed rules on privilege,<sup>59</sup> the practitioner should bear in mind that the current version of this draft rule evolved from a much longer version that would have included a plethora of hornbook law on the subject of privileges. Finally, the special rules in the privilege area do give special status to claims by the Commission trial staff that material sought from the staff is "within a privilege of the Commission."<sup>60</sup> Such a claim may not be rejected by the presiding judge even if the judge concludes that it is without merit. Having reached that conclusion, the judge must "certify the matter to the Commission in accordance with Rule 714."<sup>61</sup> Under Rule 714, the views of all participants on the merits of the privilege claims would have to be solicited and transmitted to the Commission, together with a judge's memorandum on that subject.<sup>62</sup> The Commission has 30 days in which to act on the question. If the Commission fails to act within that time, the matter is remitted to the judge, who will presumably deny the staff's claim.<sup>63</sup> Rule 714(d) provides that a certification does not operate to suspend the proceeding unless the judge or the Commission so orders.<sup>64</sup> In the case of a certification under proposed Rule 413(d)(3), however, the judge would necessarily have to stay the discovery at issue while the matter was before the Commission. Otherwise, the staff's claim could be mooted by disclosure of the materials it sought to protect.

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<sup>58</sup>These subjects are discussed in sections VII and III B, *infra*.

<sup>59</sup>Why was it thought necessary to specify that Federal law would be applied to privilege claims? Why, too, was it considered essential to provide that a claim of privilege will not be sustained in the absence of a showing that the claim is meritorious? These things seem self-evident.

<sup>60</sup>See text accompanying nn.84-101 for a discussion of those privileges.

<sup>61</sup>49 Fed. Reg. 30526 (1984).

<sup>62</sup>See 18 C.F.R. § 385.714(c) (1984).

<sup>63</sup>*Id.*, at paragraph (d).

<sup>64</sup>*Id.*



Proposed new Rule 414,<sup>65</sup> designated "Sanctions," deals with two subjects. First it authorizes a party who had made a discovery request to file a motion to compel discovery with the presiding judge if: (a) there has been a failure to comply with a data request; (b) a witness named in a notice of deposition has failed to testify; (c) a request for admissions has met with a failure to respond; or (d) an order to produce or permit inspection or entry has been disobeyed. Second, it provides for sanctions if a person, participant or not, has disobeyed an order compelling discovery.

Sanctions are possible only for those violations of the rules for which an order compelling discovery may be issued. This produces some anomalies. For instance, an order to compel discovery is not authorized for violation of a protective order.<sup>66</sup> Hence, no sanctions under Rule 414 may be imposed on one who commits such a violation. The sanctions that may be imposed by the presiding judge under proposed Rule 414(b) do not include any general penalties, such as a monetary forfeiture. They relate exclusively to the proceeding at hand. Authorized sanctions include regarding as proven matters to which the discovery relates, refusal to permit evidence to be received, and striking pleadings.<sup>67</sup> However, the presiding judge would not be authorized to impose any sanction that might terminate the proceeding, and, by inference at least, the judge could not impose a sanction that would have the effect of terminating the right of a participant to continue its participation in the proceeding. Proposed Rule 414(b)(1) provides that if the judge concludes that violation of an order compelling discovery ought to be visited with either of the last two sanctions, the judge must certify the matter to the Commission with recommendations.<sup>68</sup> In addition, before taking any action, either by the imposition of sanctions from the bench or by certification of a recommendation for sanctions to the Commission, the judge must, under the draft rule, give the accused participant notice and the opportunity to be heard.

These are rather mild provisions for imposition of sanctions. A person who is subject to the sanctions gets at least three, and sometimes four, opportunities to ventilate his position and avoid the imposition of the sanctions. The first occurs when the discovery request, notice, or demand is made, and the respondent is allowed to file objections under proposed Rule 413. Second, there is the opportunity to answer the motion to compel discovery under the proposed Rule 414(a). Thereafter, a third bite at the proverbial apple is provided at the sanctions hearing under draft Rule 414(b). Finally, if the presiding judge deems the violation serious enough to warrant dismissal of the proceeding, a Commission enforcement suit in the U.S. District Court, or an order ousting the defaulting party from the case, there will be a fourth opportunity for that party to have his views considered by the Commission when it takes up the presiding judge's certification.<sup>69</sup> Despite the absence of general sanctions provisions, comments on the Notice of Proposed Rule Making expressed serious reservations about the agency's power to impose any

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<sup>65</sup>49 Fed. Reg. 30526 (1984).

<sup>66</sup>See text accompanying notes 182-84, *infra*.

<sup>67</sup>Proposed Rule 414(b)(2)-(4), 49 Fed. Reg. 30526 (1984).

<sup>68</sup>*Id.*, 49 Fed. Reg. 30526 (1984).

<sup>69</sup>Under Rule 714(c)(3) of the Procedural Rules, 18 C.F.R. § 385.714(c)(3) (1984), the judge is required to append to his certification, *inter alia*, "the written views submitted by the participants" as well as the transcript of their oral views.

sanctions at all for failure to comply with orders requiring a participant to disclose or provide access to information in prehearing discovery. It was urged that the only remedy available for violation of such an order would be a plenary action in the U.S. District Court to seek the aid of the Federal courts to enforce its orders.<sup>70</sup>

The Commission's own precedents suggest that the agency believes it has the power to impose sanctions, particularly when those sanctions do not exact a general financial penalty but are instead narrowly tailored to the procedures for disposing of the very case in which the violations occurred. In *Pennsylvania Power Co.*,<sup>71</sup> the Commission dealt with a public utility's motion to impose sanctions upon an intervenor for alleged "foot-dragging" in complying with a discovery order. The relief sought was a directive to the intervenor to reimburse the utility for \$46,892.71 in expenses it had incurred by reason of the alleged belated compliance. The Commission denied the utility's request. However, it asserted that, in its view, the FERC was empowered to impose sanctions for noncompliance with a discovery order.

Relief of so extraordinary a character can be granted only in the clearest of cases. We see circumstances that suggest footdragging and indifference to the discovery order. But they do not emerge with the clarity needed to warrant imposition of the requested sanction.<sup>72</sup>

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Some think that administrative agencies lack the power to grant such a relief even then [*i.e.*, in "the clearest of cases"]. \* \* \* We disagree. But the question is not wholly free from doubt.<sup>72</sup>

In a subsequent ruling, the Commission appeared to indicate that it would deem failure to respond to a data request as grounds for estopping parties from asserting substantive rights.<sup>73</sup>

[T]he producer shall either produce the requested data or notify the judge that it does not intend to allege an offset to transportation . . . Any party failing to respond within the 30 day period shall be deemed to have waived the opportunity to assert such an offset.<sup>74</sup>

Another assertion of the power to invoke sanctions is found in an order issued in *KN Energy, Inc.*,<sup>75</sup> in which the presiding judge stated:

Although some doubt still remains, it is now generally recognized that pursuant to Rule 504(b)(5) and 504(b)(19), a presiding judge has authority to impose sanctions for failure to comply with discovery requests.<sup>76</sup>

<sup>70</sup>*See, e.g.*, § 20, Natural Gas Act, 15 U.S.C. § 717s; § 314, Federal Power Act, 16 U.S.C. § 825m; § 504, Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3414.

<sup>71</sup>Op. No. 157, 21 FERC ¶ 61,313 (1982).

<sup>72</sup>*Id.*, at p. 61,821-823. The Commission cited Williams, *Authority of Federal Agencies to Impose Sanctions; the FTC-A Case in Point*, 85 Geo. L.J. 739 (1976).

<sup>73</sup>Tennessee Natural Gas Pipeline Co., 22 FERC ¶ 61,067 (1983).

<sup>74</sup>*Id.*, at p. 61,109.

<sup>75</sup>25 FERC ¶ 63,009 (1983).

<sup>76</sup>*Id.*, at p. 63,009.

Whether or not one likes the institution of prehearing discovery, the fact remains that it is too late in the day to simply dispense with it. It is an institution that is woven into the fabric of administrative adjudication particularly in an agency, such as the FERC, that is called upon to decide in an adjudicative manner complex and difficult questions that cannot be plumbed without extensive prehearing discovery. Some of these matters, such as antitrust issues, were imposed on the agency against its will.<sup>77</sup> It is impossible to imagine any way in which the FERC could exercise this authority effectively without being able to manage and control the prehearing discovery process. To do so requires the agency to have — and occasionally to exercise — the power to impose sanctions upon parties who flout its discovery requirements. Hence the authority to impose such sanctions falls within the well-known doctrine of necessity in administrative law: An agency will not, in the absence of express statutory directive to the contrary, be deemed to lack authority that is indispensable in order to carry out its statutory mission.<sup>78</sup>

The Commission's attempt to put in place a new set of prehearing discovery rules represents an ambitious effort to improve its practice in this area. The formal rules for discovery are only half the story, however. The scope of prehearing discovery at FERC cannot be fully appreciated without understanding some of the subjects that frequently arise when the formal rules are applied in concrete situations. The remainder of this article discusses five of those subjects: the most frequently-interposed defenses to discovery (relevance, privilege, and burden), requests for special studies, problems of multi-party participation in discovery, discovery judges, and protective orders.

### III. NOTES ON RELEVANCE, PRIVILEGE, AND BURDEN

In the world of discovery practice, most of the day-to-day controversies involve issues of relevance, privilege, and burden. Virtually all legitimate objections to discovery can be classified under one of those headings.<sup>79</sup>

#### A. *Relevance*

Matter is relevant if it tends to make a proposition at issue either more probable than not or less probable than not.<sup>80</sup> In the context of FERC proceedings, the term "proposition" includes more than historical facts. It also includes matters of

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<sup>77</sup>See *FPC v. Conway Corp.*, 426 U.S. 271 (1976); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *But see Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975).

<sup>78</sup>See *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968).

<sup>79</sup>The three categories are not the repositories of all objections, however. There are some things that are not discoverable simply because a statute or regulation says they are not. For instance, section 15(3) of the Interstate Commerce Act, 49 U.S.C. 15(13), which is applicable to FERC oil pipeline proceedings, renders it unlawful for a carrier to disclose certain information about its shipper customers. There is also a legitimate place for a general "it ain't fair" objection to a discovery request. More often than not, this objection translates into the assertion that it is easier for the party seeking the information to obtain it through its own resources (and frequently from its own files) than it is for the party on whom the discovery demand was served to provide it.

<sup>80</sup>See *Fed. Rule Evid.* 410.

judgment, predictions about the future, and the validity of corporate or government policies. As a general rule, there is a presumption that matter is discoverable if it is not privileged and is relevant to the proceeding. In FERC practice, the precept set forth in Rule 26(b)(1) of the Federal Rules of Civil Procedure is followed.

It is not a ground for objection that the information sought will be inadmissible at the [hearing] if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>81</sup>

There is an obvious relationship among the various grounds for objecting to a discovery request. As a technical matter, however, relevance and undue burden are distinct defensive contentions. Even though a discovery request seeks relevant information, the request may be denied on the ground that compliance with it would be unduly burdensome for the party to whom it was directed. As one court noted, satisfying minimal requirements of relevance does not provide a license to “go fishing.”<sup>82</sup>

As a practical matter, the use of broad terminology, such as “any and all documents concerning or relating to . . .,” places the author at a disadvantage if the data request is resisted on grounds of relevance. The presiding judge knows, just as counsel should know, that there is virtually no case in which a class of documents described as “any and all” is relevant to the issues. Therefore, the argument over the validity of the objection starts from the premise that the party who served the data request is entitled to something less than all of the material he has sought. The only question for serious consideration is how much less. In drafting data requests or similar discovery devices, overbreadth is a sin to be rigorously avoided.<sup>83</sup>

### B. *Privilege*

Relevance and privilege are related concepts. If a proposition cannot be received as part of the record because it is privileged, discovery relating to it will generally be denied on grounds of relevance. For example, the *Morgan* privilege covering the mental processes of the agency<sup>84</sup> tends to preclude discovery, by data request or otherwise, into the views of the agency members or their staff. As the court held in *International Paper Co. v. FERC*,<sup>85</sup> “the views of individual members of the Commission’s Staff are not legally germane, either individually or collectively, to the actual making of final orders.” Although the state of mind of agency members

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<sup>81</sup>See *Kansas-Nebraska Natural Gas Co.*, 24 FERC ¶ 63,007 (1983) (Administrative Law Judge’s “Order Compelling Discovery”).

<sup>82</sup>*Barnett v. Sears, Roebuck and Co.*, 80 F.R.D. 662 (W.D. Ok. 1978).

<sup>83</sup>See *El Paso Natural Gas Co.*, 18 FERC ¶ 63,062 (1982) (“Presiding Administrative Law Judge’s Order Denying Motion to Refer Rulings on Data Requests to the Commission”), in which the fatal overbreadth consisted of the definition of the term “document.” The presiding judge regarded that definition, quoted in full in his order, as being so ludicrous as to create a presumptively undue burden on the other party. *Id.*, at p. 66,195-96.

<sup>84</sup>See *United States v. Morgan*, 313 U.S. 409, 422 (1941). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

<sup>85</sup>438 F.2d 1349, 1358 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971).

may be relevant in some contexts,<sup>86</sup> a party cannot attack the issue of bias on the part of the agency — particularly whether the agency's motivation in instituting the proceeding was proper — through the mechanism of prehearing discovery.

All of this was rather clear and certain until the Commission issued its recent order in the hotly-contested *Stowers* case. In *Stowers Oil & Gas Co.*,<sup>87</sup> the FERC reversed an administrative law judge's order authorizing a party to take the deposition of one of the agency's advisors in order to develop the rationale upon which the Commission had instituted an enforcement proceeding. The Commission then made an abrupt about-face and authorized the taking of the same advisor's deposition by means of written interrogatories. The agency's reasoning was somewhat cryptic: "there may well be . . . information that is properly elicited from [the advisor] in discovery."<sup>88</sup> The reason for authorizing only written interrogatories was "to permit disclosure of appropriate information while allowing time for careful separation of privileged information."<sup>89</sup> The Commission also ruled that the advisor need not answer hypothetical questions.<sup>90</sup> This ruling has left the status of the *Morgan* privilege at FERC rather unsettled.

Prior to the *Stowers* order, the Commission had made it clear in *McDowell County* that advisory, predecisional documents prepared by its staff would be deemed privileged and, consequently, could not be obtained in prehearing discovery over the objection of the trial staff.<sup>91</sup> The Commission had also held that the privilege was not waived merely because the trial staff members had had access to the materials.<sup>92</sup> In the *McDowell County* case, the Commission also anticipated the Supreme Court's *Grolier* decision<sup>93</sup> when it held that the attorney work-product "privilege" applied to a memorandum prepared by the agency's technical staff at the request of the staff's trial counsel.<sup>94</sup>

More recently, the Commission held that the "general approach" of Rule 26(b)(4) of the Federal Rules of Civil Procedure would be followed to prohibit a party from obtaining through discovery the names of the staff members who had been consulted by a staff expert witness in preparing his testimony.<sup>95</sup> Designed to prevent a party from securing *gratis* expert testimony at the expense of another party who has paid for it, Rule 26(b)(4) restricts parties to civil litigation from pretrial discovery of the opinions of experts retained by their adversaries.

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<sup>86</sup>See *Association of National Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

<sup>87</sup>28 FERC ¶ 61,138 (1984).

<sup>88</sup>*Id.* at p. 61,246.

<sup>89</sup>*Id.* The author of these words obviously had confused interrogatories to a party, which are filtered through counsel before a response is made, with a deposition on written interrogatories. In the latter type of proceeding, the questions are read to the witness by the officer taking the deposition, and there is no more "time for careful separation of privileged information" before the witness must respond than there is when a deposition on oral interrogatories is taken.

<sup>90</sup>*Id.*

<sup>91</sup>*McDowell County Consumers Council, Inc. v. American Electric Power Co.*, 23 FERC ¶ 61,142 (1983).

<sup>92</sup>*Id.*

<sup>93</sup>*FTC v. Grolier, Inc.*, 462 U.S. 19 (1983).

<sup>94</sup>*Supra* n.91 at p. 61,321.

<sup>95</sup>*Northwest Central Pipeline Corp.*, 29 FERC ¶ 61,333 (1984).

Specifically, the “facts known or opinions held by” an adversary’s expert who is not expected to be a witness may be discovered only upon a showing of “exceptional circumstances” that render it impracticable for the party seeking discovery to obtain its own expert advice.<sup>96</sup>

Until the Commission spoke in the *Northwest Central* case,<sup>97</sup> it seemed almost self-evident that counsel for an adverse party, faced with the task of cross-examining an expert witness, had the right in prehearing discovery to secure access to all of the input data on which the witness relied in formulating the opinions to which he was prepared to testify. If the witness had relied on the views of other individuals, also experts in the discipline, certainly their identity was a legitimate subject for discovery.

The *Northwest Central* case appears to have turned this “common law” body of discovery rules on its head, at least as far as the staff’s witnesses are concerned. Under that holding, discovery with respect to Commission employees other than prospective staff witnesses is forbidden, even though they may be the source of the views expressed by those witnesses, in the absence of a showing of “exceptional circumstances.”<sup>98</sup> The Commission has defined “exceptional circumstances” as “a compelling need for information that cannot practicably be obtained by any other means.”<sup>99</sup> In reaching this formulation, the Commission quite correctly refused to distinguish between an expert “who has been retained or specially employed by a party” within the meaning of Rule 26(b)(4)(B) and an employee on the agency’s staff.<sup>100</sup>

Not all of the privileges frequently encountered in FERC proceedings pertain to governmental information. There is also a privilege that attaches to proprietary business information. For some years, proprietary information, *per se*, was not regarded as privileged. Rather, the privilege applicable to business information pertained to a narrower class of data, falling under the rubric of “trade secrets.” The requirements for classification as a “trade secret” were stringent. Applied literally and zealously, they probably would have protected little besides the formula for Coca-Cola.

A turning point of sorts was reached in *Chrysler Corporation v. Brown*,<sup>101</sup> a case which superficially appeared to be a loss for business interests (because it held that there is no such thing as a “reverse” Freedom-of-Information Act suit).<sup>102</sup> Having

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<sup>96</sup>Fed. R. Civ. P. 26(b)(4)(B).

<sup>97</sup>*Supra* n.95.

<sup>98</sup>29 FERC at p. 61,693.

<sup>99</sup>*Id.* The “exceptional circumstances” exception, so defined, is circular, of course, and incapable of ever being demonstrated to be applicable. This is the case because we are here dealing with a rule that precludes discovery into the identities, views, and (most importantly) information possessed by the Staff employees who consulted with the Staff’s witness. If a party cannot ascertain what information they had, that party can scarcely be expected to make a convincing showing that that information could not be obtained by any means other than prehearing discovery.

<sup>100</sup>*Id.*

<sup>101</sup>441 U.S. 281 (1979).

<sup>102</sup>A “reverse” FOIA case involved a suit by someone, usually a business, seeking to have a Government agency enjoined from releasing under the Freedom of Information Act, 5 U.S.C. 552, information the plaintiff had provided under a legal requirement to do so or otherwise. *See Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975).

held that the Freedom of Information Act did not create a right to restrict disclosure of business information, the Court went on to suggest that 18 U.S.C. 1905 might be the source of such a right.<sup>103</sup> That statute makes it a crime for Federal employees to disclose certain business data secured in an official capacity. However, the Court construed it as creating private rights by implication.

Since that time, claims that information sought during prehearing discovery is privileged proprietary business material have burgeoned. The existence of such a privilege, as an abstract matter, has received the blessing of the Commission.<sup>104</sup> The difficulty with administering the proprietary information privilege on a day-to-day basis is that no one really knows — and the agency has never defined — exactly what privileged proprietary business information is.

A more serious problem is its failure to address some of the concrete information-access problems that arise from the FERC's jurisdictional activities. How, for instance, does the language of 18 U.S.C. 1905 or the concept that "proprietary" information may be privileged in some circumstances help us to decide the nettlesome question whether post-NGPA gas purchase contracts negotiated by jurisdictional pipelines can be reached through prehearing discovery in proceedings undertaken for the purpose of assessing the prudence of the pipeline's gas procurement practices?<sup>105</sup> There is no ready answer here, nor is there an easy solution to the problem of discerning what is and is not proprietary business information to which a privilege ought to attach. That is why judges cannot and, in most cases will not, decide these difficult questions without having examined the information for which this privilege is claimed.<sup>106</sup>

One other privilege which frequently arises in FERC proceedings merits our attention. It is the privilege that applies to settlement discussions, positions, and drafts of settlement agreements. Rule 602(e) of the Procedural Rules makes offers of settlement that do not secure Commission approval inadmissible and further provides that

Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.<sup>107</sup>

This language makes explicit the rule that settlement discussions and documents pertaining to them are not discoverable, something that was only implicit in the prior Rule. Section 1.18(e) of the Rules of Practice and Procedure<sup>108</sup> had provided that offers of settlement would be inadmissible in evidence. From the outset, however, settlement offers had been held non-discoverable as well as inadmissible.<sup>109</sup>

Although the Commission has applied Rule 602(e) to strike a portion of a brief discussing the comments filed on a settlement proposal that was withdrawn<sup>110</sup> and to disregard comments on a settlement proposal that included discussion of the

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<sup>103</sup>441 U.S. at 295-316.

<sup>104</sup>*E.g.* Michigan Wisconsin Pipe Line Co., 15 FERC ¶ 61,316 (1981).

<sup>105</sup>*See* discussion at n. 79.

<sup>106</sup>*See* Section VI. *infra*, for a discussion of *in camera* inspection and discovery judges.

<sup>107</sup>18 C.F.R. § 385.602(e)(2) (1984).

<sup>108</sup>18 C.F.R. § 1.18(e) (1982).

<sup>109</sup>*See* Black Marlin Pipeline Co., 9 FERC ¶ 63,015 (1979).

<sup>110</sup>*See* Columbia Gas Transmission Corp., 26 FERC ¶ 61,324 (1984).

parties' negotiations,<sup>111</sup> it has recently refused to read the Rule broadly enough to preclude discovery of a party's settlement negotiations in litigation before forums other than the FERC. In its recent order in *Columbia Gas Transmission Corp.*,<sup>112</sup> the Commission agreed with an administrative law judge's ruling that parties attacking the prudence of a pipeline's gas-purchasing practices were entitled to prehearing discovery of the pipeline's efforts to settle lawsuits with producers involving the wellhead prices for some of its gas supply. The privilege created by Rule 602(e), said the Commission, applied by its terms only to settlement discussions in FERC proceedings, not to settlement discussions in other forums.<sup>113</sup> The Commission also noted that the comparable privilege under Rule 408 of the Federal Rules of Evidence makes offers of settlement inadmissible only for the purpose of proving "liability for or invalidity of the claim."<sup>114</sup> It distinguished the case before it on the ground that material relating to settlement offers in the pipeline's pending lawsuits was not being sought for that purpose but was instead needed to examine the prudence of the pipeline's conduct in dealing with its suppliers. However, the Commission did not go so far as to hold that the privilege against discovery under its Rule 602(e) is as limited as the privilege against admission of evidence under Rule 408 of the Federal Rules of Evidence. Such a holding would have represented a very drastic retreat from the traditional view of the settlement-discussion privilege at FERC.

The presiding judges have generally given that privilege an expansive reading, in order to carry out the agency's general policy of encouraging and fostering negotiated settlements. The *Black Martin* order<sup>115</sup> is an early example of this phenomenon. A more recent instance can be found in an administrative law judge's order in *Montana Power Co.*,<sup>116</sup> holding that, notwithstanding the literal language of Rule 602(e)(2), the settlement discussion privilege attached to, and barred discovery of, a letter written by an individual member of an intervenor Indian tribe in an effort to initiate settlement discussions. The judge refused to distinguish between documents initiating or requesting negotiations for settlement and those produced after negotiations have begun. After all, the settlement process must begin sometime. What is most remarkable, and commendable, is the presiding judge's recognition that the disposition of privilege claims must be resolved by balancing the need for the evidence against the public policy that the privilege purports to serve.<sup>117</sup>

### C. Burden

The question whether a discovery request seeks relevant information and the question whether it would be unduly burdensome to require compliance with the request are related issues. A discovery request may be improper because it seeks

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<sup>111</sup>United Gas Pipe Line Co., 25 FERC ¶ 61,088 (1983).

<sup>112</sup>28 FERC ¶ 61,185 (1984).

<sup>113</sup>28 FERC at p. 61,351.

<sup>114</sup>*Id.*

<sup>115</sup>*Supra* n.109.

<sup>116</sup>27 FERC ¶ 63,077 (1984).

<sup>117</sup>*Id.*, at p. 65,304.



irrelevant information, even though compliance with it may impose no significant burden. Similarly, a judge may be justified in denying a request to compel disclosure of relevant information in response to a discovery request if the burdens of securing and vouchsafing the information are deemed too great in light of competing factors, such as the need to have the material in the record.<sup>118</sup> The decision as to whether a discovery request is unduly burdensome is almost always a discretionary matter. Precedent is of very limited significance to the decision-maker, since the factors that must be weighed are almost always unique to the specific instance presented. Effective advocacy on an issue of whether a discovery request should be denied or cut back because compliance would produce an undue burden should focus on factual matters, rather than on legal theory.

Accordingly, it seems appropriate to discuss this subject in terms of the practical questions that judges are prone to ask when faced with opposition to discovery on undue-burden grounds. There are eight relevant sets of issues that are commonly raised:

1. *What are the parameters of the search required to secure the data?* Most undue-burden claims focus on the effort to which the respondent must go to elicit the information. The extent of the effort can be measured in at least five ways. First, how far back in its historical records must the respondent go to secure the data? Obviously, the more time that a discovery request encompasses, the more likely it is to be deemed unduly burdensome. Second, where are the materials physically located? If the respondent must scour records located in widely dispersed places in order to comply, the burden of compliance seems to be more substantial. Third, does the request seek information in an exotic format, such as tape or special computer runs? Like many lawyers, judges are used to dealing with data on paper, and discovery requests asking for information in other media may make them nervous. Fourth, does the request seek a volume of documents that is so bulky as to make it burdensome to handle and reproduce them? If a request seeks so much material that one doubts whether the recipient could read it, much less absorb it, prior to the hearing, the request begins to resemble an effort to harass the opposition rather than a *bona fide* attempt to secure necessary information. Fifth, how much winnowing through irrelevant materials is required to obtain the information that is sought in the discovery request? The burdensomeness of the request is clearly related to the effort that must be expended to separate the wheat from the chaff. These five considerations suggest that it is worthwhile for the author of a discovery request to phrase it as narrowly as possible. They also suggest that it may be wise to secure some information about the target's filing system before casually dropping a discovery request into the mail.

2. *To what extent are the data produced by the respondent in the usual course of business?* The argument that production of information would be unduly burdensome loses considerable force if it is made on behalf of a person who collects and uses the information in the regular course of business. Nevertheless, we sometimes

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<sup>118</sup>Cases in which a party has been excused from compliance with a data request because the presiding judge determined that compliance would be unduly burdensome include *Mississippi Power and Light Co.*, 28 FERC ¶ 63,031 (1984); *Pacific Gas Transmission Co.*, 26 FERC ¶ 63,117 (1984); *Transcontinental Gas Pipe Line Corp.*, 26 FERC ¶ 63,050 (1984); *Bonneville Power Administration*, 24 FERC ¶ 63,103 (1983); and *Kansas Gas and Electric Co.*, 20 FERC ¶ 63,044 (1982).

encounter that claim by counsel for a business in an effort to protect from disclosure data that the business itself collects for its use. Indeed, there have been such claims asserted with respect to data collected for filing with the agency. It is often the case that the gravamen of the objection to providing this kind of business information is that the material is "confidential." It is difficult to conclude that a business will be unduly burdened by imposition of a requirement to make available material that the business collects and segregates for its own customary use. The other side of the coin involves a discovery request that requires a special effort to produce what is sought. In that case, a presiding judge will be concerned about the time and expense that the effort will entail. If, as is so often the case, the discovery request seeks data from a jurisdictional pipeline or public utility, the expense of compliance will in the long run become part of the jurisdictional rates and will be borne by the ratepayers.<sup>119</sup> Since the agency is charged with minimizing the cost of jurisdictional service to the ratepayers, it is obviously relevant to know whether the respondent will be required to incur significant additional costs in collecting it.

3. *Are there easier and cheaper alternatives to discovery as a means of making the information available?* One thread that runs through the law of prehearing discovery is that a party may have many avenues of access to the information it may need. The judge who manages the discovery process is obligated to ensure that the most convenient, most cost-effective, and least burdensome method of eliciting the information is used. In virtually every case, prehearing discovery will prove to be the least desirable alternative under these criteria. The Federal Rules of Civil Procedure make this clear.<sup>120</sup> Nevertheless, we sometimes find parties in FERC adjudicative proceedings attempting to secure through the discovery process information that is readily available elsewhere. The most frequently-encountered example of this phenomenon concerns discovery requests for reports filed with public agencies and available for public inspection and copying. When asked to explain why the discovery request was served, the party responsible for the request will often counter that the agency's public files do not always contain the reports that are supposed to be in them, and actually securing access to a specified report is a time-consuming process. The presiding judge is hardly in a position to evaluate this kind of assertion, except to record its frequency. One suspects, however, that not a few of these discovery requests are generated simply because counsel assumes that the only way to secure reliable information about the opposition is to make them disgorge it during prehearing discovery.

4. *Are innocent third parties likely to be unduly impacted?* It is well-settled that Federal administrative agencies that conduct adjudicative proceedings are

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<sup>119</sup>Account No. 928 of the Commission's Uniform System of Accounts for both large natural gas pipelines and electric utilities authorizes inclusion in "Regulatory Commission expenses," a so-called "above the line" item, of the expenses of, *inter alia*, litigating and complying with prehearing discovery in proceedings before the regulatory agencies. See 18 C.F.R. (1984 ed.) part 101 at p. 404 (class A and class B public utilities and hydroelectric licensees), part 201 at p. 289 (class A and class B natural gas companies) (1984).

<sup>120</sup>See Rule 26 (b)(1) which provides that the district court shall limit discovery if "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive." See also Rule 26(b)(4)(B), which allows a party to discover facts known or opinions held by a non-witness expert retained by another party only upon showing that "it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

authorized to acquire information from persons who are not parties to those proceedings and that the agencies may use mandatory process to do so.<sup>114</sup> The power to require so-called third parties to respond to prehearing discovery is coextensive with the agency's power over parties to the proceeding. Nevertheless, as a practical matter everyone would agree that special consideration must be given to the expense and inconvenience that prehearing discovery may visit on a person who is not a party, is not affiliated with a party, and consequently has nothing to gain from the proceeding.

It is sometimes difficult to distinguish between parties and "non-parties."<sup>125</sup> Officers and employees of corporate parties present a fairly easy case. They ought to be considered parties. So, too, should consultants and similar individuals retained by the parties. But what of a former officer or employee? The employee of a former consultant? A former contractor? The status of each of the foregoing types of individuals for purposes of prehearing discovery actually arose and was decided in the course of the *Trans Alaska Pipeline System* hearing.<sup>122</sup> When faced with a contested application for leave to take a deposition of someone who is neither a party nor in privity with a party, the presiding judge will attempt to resolve the matter in a manner that imposes the minimum burden on the potential witness. The party proposing the deposition will be asked to contact the witness to attempt to secure consent to the deposition and will, in any event, generally be required to set the time and place to suit the convenience of the witness. If anyone is to be required to travel long distance, it will usually be the lawyers who ask the questions, not the individuals who must answer them.<sup>123</sup> Consequently, counsel preparing an application to take the deposition of a third party should be prepared to demonstrate convincingly that the testimony he expects to elicit is vital to his preparation for the hearing. It would also be appropriate to show that there is no practicable alternative method to obtain the needed information.

5. *Are there less burdensome methods for eliciting the information?* The methodology chosen for obtaining discovery has a bearing on its expense and burden. The data request is the cheapest, handiest, and least burdensome discovery device from the standpoint of the party seeking information. From the standpoint of the respondent, however, the data request may be very burdensome and costly. It is he who must perform the file search, segregate and identify relevant materials, and pay the cost of reproduction. No matter that the cost may turn up in the rates some day, the current reality is that the expense is borne by the person who provides the data. The relative positions of the parties is reversed if the methodology employed is an in-place inspection of documents. The lawyers and the technical and clerical personnel from the party seeking the information must travel to the location of the material, winnow the files to identify the documents of real value, and make any arrangements for reproduction and transportation of the copies. Presiding judges are aware of these factors. The claim that a discovery request is unduly burdensome

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<sup>121</sup>*Comet Electronics Inc. v. United States*, 381 F. Supp. 1233, 1239 (W.D. Mo. 1974), *aff'd*, 420 U.S. 999 (1975).

<sup>122</sup>*See, e.g. Trans Alaska Pipeline System*, 3 FERC ¶ 63,017 (1978).

<sup>123</sup>The opportunity to impose many of these restrictions may be lost when the proposed new rules go into effect, if they retain the current version of the deposition rule. Proposed Rule 405 would abolish the requirement for an application for leave to take a deposition and would reduce the presiding judge's opportunity to protect third-parties from undue burdens.

will often result in an order allowing the information sought to be discovered but requiring the party seeking it to substitute one discovery method for another. For example, a deposition on written interrogatories may be substituted for an oral deposition and in-place inspection of documents may be substituted for a data request. In addition, the format of compliance may be varied in an effort to minimize burden. A participant seeking a special study may be required to make do with the raw materials (*e.g.*, computer tape) with which it can perform the study with its own resources. It is clearly appropriate for counsel attempting to resist a discovery request on grounds of undue burden to suggest a less burdensome method of providing the data, at least as an alternative position, in a request for a protective order.

6. *Are the data in the files of a government agency?* It is not unusual for units of state governments or other public agencies to be parties to proceedings before the FERC.<sup>124</sup> Their participation in FERC cases makes them vulnerable to prehearing discovery requests. If the issue of undue burden arises in connection with a request for information in the hands of a government agency, some special considerations apply. Judges must be, and are, conscious of the fact that public agencies operate with taxpayers' funds and are often undermanned compared to private concerns of similar size. In addition, there may be legal restrictions on disclosures by public agencies. Constitutional provisions, under both Federal and state constitutions, restrict agency activities in ways that are simply irrelevant for private entities. In addition, there are traditions of comity between the FERC and other units of government that must be observed.<sup>125</sup> All of these factors may make it appropriate to give liberal treatment to a claim of undue burden when it is voiced by a government agency.<sup>126</sup>

7. *Would 50% less effort adduce 99% of the data sought?* It is often the case in disputes about the burdensomeness of discovery that most of the information requested is easily supplied. The remainder entails much greater effort, and the last one percent or so comes only at a significant increment of cost and manpower. When this occurs, the presiding judge must balance the burdens of achieving full compliance with the discovery request against the benefits. This is not to say that the balance is always struck in favor of something less than full compliance. Indeed, quite the reverse may be true, particularly when, as frequently happens, the trial staff is the participant making the discovery request and a jurisdictional company is the respondent seeking relief from full compliance. In such a case, two factors

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<sup>124</sup>Both the Federal Power Act, 16 U.S.C. § 825g(a), and the Natural Gas Act, 15 U.S.C. § 717n(a), provide expressly for intervention by state public utility regulatory agencies in FERC proceedings. The Commission also has limited jurisdiction over the rates of Federal power marketing agencies. *See* § 5, Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839c. Jurisdictional wholesale transactions in both the natural gas and electric energy field frequently involve municipalities and other state-created agencies who then participate in FERC cases to protect their financial interests. *See, e.g.*, *FPC v. Conway Corp.*, 426 U.S. 2171 (1976).

<sup>125</sup>*See, e.g.*, *Consolidated Gas Co. of Fla. v. Florida Gas Transmission Co.*, 28 FERC ¶ 61,350 at p. 61,639 (1984); *Natural Gas Pipeline Co. of America*, 28 FERC ¶ 61,173 at p. 61,324 (1984).

<sup>126</sup>There are also a number of special privileges that attach to information in Government files. These privileges restrict or obviate the use of prehearing discovery to secure access to the information. *See United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488 (1984); *Machin v. Zukert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

animate towards requiring 100% compliance with the data request. First the right of the Commission's trial staff to seek information from regulated companies does not rest ultimately on agency rules. It is statutory.<sup>127</sup> Second, in rate cases, the function of the hearing process is to determine a rate that is "just and reasonable."<sup>128</sup> To determine a "just and reasonable" rate does not mean that one approaches it or makes a close approximation. Granted that the target is a range rather than a precise point,<sup>129</sup> the task is still to arrive at it with as much precision as is possible. In general, however, we must in the long run be content with something less than perfection. This is the case because the decision as to whether full compliance with a discovery request would impose an undue burden cannot be made by merely dipping legal litmus paper into a solution. To make these kinds of decisions, one judge has written,

requires the exercise of informed discretion. No one can pretend to omniscience in making the multitude of complex judgments involved in a proceeding of this magnitude, least of all the undersigned. The question to be resolved, however, is not whether the judge called all the turns right; it is whether he weighed and balanced the conflicting interests in a tolerable manner.<sup>130</sup>

These are not the only relevant questions that arise when a claim of undue burden is voiced. They do, however, indicate the wide range of factors that must be considered in disposing of such a claim.

#### IV. SPECIAL STUDIES

There is probably nothing in the proposed new FERC discovery rules that has been as generally misunderstood, even by its draftsmen, as Rule 408(a)'s provision relating to special studies. It permits the Commission's trial staff, with the approval of the presiding judge, to serve on "a jurisdictional entity" a request for performance of a study.<sup>131</sup> The study must be performed, and the results given to the staff, within 30 days of the service date.

The special studies authorization marks a new, though somewhat limited, departure in the area of prehearing discovery. It purports to authorize a participant to require another participant to *create* material for the purpose of satisfying the former's need for information in the litigation of a proceeding.<sup>132</sup> The Commission has, however, proposed restricting the availability of the device by allowing only its

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<sup>127</sup>See § 14 of the Natural Gas Act, 15 U.S.C. § 717m; § 307 of the Federal Power Act, 16 U.S.C. § 825f; § 12(2) of the Interstate Commerce Act, 49 U.S.C. § 12(2).

<sup>128</sup>See § 5 of the Natural Gas Act, 15 U.S.C. § 717d; § 206 of the Federal Power Act, 16 U.S.C. § 824e; § 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15(1).

<sup>129</sup>See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

<sup>130</sup>*El Paso Natural Gas Co.*, 18 FERC ¶ 63,062 (1982) ("Presiding Administrative Law Judge's Order Denying Motion to Refer Ruling on Data Requests to the Commission.")

<sup>131</sup>The rule does not specify whether the Staff's application is on notice or *ex parte*.

<sup>132</sup>The traditional rule had been that prehearing discovery could not be employed to secure documents that did not actually exist. See, e.g., *Continental Access Control Systems, Inc. v. Racial-Vikonics, Inc.*, 101 F.R.D. 418 (E.D. Pa. 1983); *Peck v. United States*, 88 F.R.D. 65, 73 (S.D.N.Y. 1980).

trial staff to employ it and by exempting from its coverage all participants who are not within the "jurisdictional entity" rubric.<sup>133</sup>

There is a relationship between the special studies authorization and another novel provision of Rule 408(a) that allows *any* participant in a FERC hearing to serve on any other participant requests to supply copies of documents in the latter's possession. Both of these deviations from conventional discovery practice represent efforts on the part of the agency to come to grips with the evolution in data-retention and-access that has occurred during the past two decades. No longer do corporate books and records consist of hand-entered sheets of ledger paper. Today, they are maintained in the form of magnetic or non-magnetic "bytes" in the memory media of automatic data processing equipment. The data that such equipment can produce upon being manipulated by one or more retrieval programs form the essence of the "factual" material that the agency must have in the administrative record in order to conform to the law's directive to render a decision that is "supported by substantial evidence."<sup>134</sup>

It makes little sense to limit access of such material to the traditional "production for inspection and copying" mode of discovery. Not only might it be unsatisfactory from the standpoint of one seeking access to the data, it is also likely that any business subject to discovery would resist quite strenuously the notion of another party having the ability to lay hands on its ADP equipment and programs. In this context, the best solution is to allow the presiding judge to require the party in possession of the material to print out the data and furnish it in "hard copy" format to the participant who served the request for it. This is what Rule 408(a) would do.

The data processing equipment, however, has the capability of manipulating the data in its memory and producing a print-out of the result in many formats, as prescribed by a properly-prepared program. This leads to the question whether the discovery rules should be drafted in a manner that permits a participant to require the owner of the equipment, and the data it holds, to produce a print-out of the data in a format different from any the owner would normally produce in the everyday conduct of its business affairs and in a format different from the one the owner may have produced for the proceeding at hand. Such a product is a "special study."

A negative answer to that question would restrict prehearing discovery in an area where, experience shows, the Commission may have a real need for the information that such a study would adduce.<sup>135</sup> An example can be found in the natural gas pipeline curtailment cases that were heard at considerable length in the 1970's.<sup>136</sup> In those cases, it was sometimes imperative to be able to test alternative

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<sup>133</sup>If a natural gas pipeline's data processing is performed by a holding company of which it is a wholly-owned subsidiary, is the holding company subject to an order under Rule 408(a) to perform a study? Similarly, what is the "jurisdictional entity" status of a company that provides clerical and administrative support services to jurisdictional companies but does not by itself provide a jurisdictional service?

<sup>134</sup>§ 19(b), Natural Gas Act, 15 U.S.C. § 717r(b); § 313(b), Federal Power Act, 16 U.S.C. § 825(b).

<sup>135</sup>True, such a study could be required by formal order of the Commission under § 10(a) of the Natural Gas Act, 15 U.S.C. § 717i(a), or § 304 of the Federal Power Act, 16 U.S.C. § 825c(a). But the process of securing such an order is far more unwieldy and time-consuming than a prehearing discovery request.

<sup>136</sup>See, e.g., *United Gas Pipe Line Co.*, 59 F.P.C. 2226, 2227 (1977) (Record in *United* curtailment case had 849 exhibits, 97 items by reference, and approximately 25,000 pages of transcript);

curtailment plans to ascertain their impact on various classes of end-users.<sup>137</sup> As a practical matter, the only data-base with which such a study could be performed was lodged in the pipeline's own ADP resources. Consequently, the Commission, if it were unable to direct the pipeline to perform a study of the impact of alternative plans, including those suggested by customer-intervenors, would have been unable to do the work that the law required.

There are, however, limits to the nature and frequency of the studies that can or should be required. These exercises are expensive. They may utilize resources vital for the conduct of the day-to-day activities of the enterprise in question. They may be requested by participants for purely forensic purposes or with only marginal potential for making a useful contribution to the administrative record. For these reasons, it seems sound to provide discretionary authority in the discovery rules for ordering the conduct of a special study.

Whether it is appropriate to preclude any participant except the trial staff from seeking such a study and whether it is appropriate to subject only parties falling under the "jurisdictional entity" rubric to the presiding judge's power to order such a study are different questions, however. Presumably, those limitations stem from the conviction that the source of authority to order a special study is the Commission's statutory power to require "special reports" by natural gas companies,<sup>138</sup> public utilities, and hydroelectric licensees.<sup>139</sup> It is arguable, however, that the Commission is empowered to require a special study for prehearing discovery purposes under its more general authority to "require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material" to its conduct of a proceeding<sup>140</sup> as well as the general authority of a regulatory agency to govern the conduct of its proceedings.<sup>141</sup> While these latter sources of authority would empower the agency to allow any participant to make a prehearing discovery request for a special study to any other participant, the issue may be academic in any event. This is so for two reasons: First, the trial staff would undoubtedly exercise its authority on behalf of another participant upon a showing of good cause to require a special study. Second, there has been no demonstrated need to subject parties other than regulated entities and their affiliates to the requirement to perform a special study.

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Panhandle Eastern Pipe Line Co., 55 F.P.C. 837, 841 (1967) (Curtailment hearings generated more than 14,000 pages of transcript plus 198 exhibits).

<sup>137</sup>The Commission had issued a General Policy rule specifying a preferred end-use curtailment plan, see Order No. 467-B, 49 F.P.C. 583 (1973), 18 C.F.R. § 2.78 (1984), but had authorized the pipelines to file plans of their own devising. The courts had required the Commission, in approving or disapproving a plan, to specify in some detail what the effects of its action would be on the pipeline's customers and other downstream gas purchasers. See *North Carolina v. FERC*, 584 F.2d 1003 (D.C. Cir. 1978).

<sup>138</sup>See § 10(a), Natural Gas Act, 15 U.S.C. § 717i(a).

<sup>139</sup>See § 304(a), Federal Power Act, 16 U.S.C. § 825c(a).

<sup>140</sup>See § 14(c), Natural Gas Act, 15 U.S.C. § 717m(c); § 307(b), Federal Power Act, 16 U.S.C. § 825f(b).

<sup>141</sup>See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC* 435 U.S. 519 (1978).

## V. MULTI-PARTY PROBLEMS

Although the proposed new discovery rules do not deal directly with the problems stemming from multi-party participation, they touch indirectly on those problems. Accordingly, it is worthwhile to discuss discovery practice in the context of multi-party proceedings.

Proceedings before the FERC generally will have more than two parties. The Commission staff will be a party in almost every case. However, the extent of the staff's participation may vary. In a typical proceeding, the parties will consist of a public utility or natural gas pipeline that is the participant, a number of intervenors, consisting of wholesale customers, *e.g.* municipalities or regional cooperatives, of the utility or pipeline, perhaps one or more State public utility regulatory agencies,<sup>142</sup> and, of course, the Commission staff.

The sheer number of participants often causes some logistical problems in prehearing discovery proceedings. Service of interrogatories and other discovery tools on a host of participants can be burdensome and expensive. By far the most burdensome requirement, however, is that of serving responses to data requests (often very voluminous) on all participants. Among the techniques that have been employed to mitigate the high costs of serving a large number of parties are restricted service lists, the designation of lead counsel, and requiring participants who desire service of discovery materials affirmatively to request it. Restricted service lists are authorized by Rule 2010(d) of the Commission's Rules of Practice and Procedure.<sup>143</sup> In an adjudicative hearing, the presiding judge will usually issue a notice inviting all those participants whose names are on the official service list to request placement on the restricted service list. As a general rule, the presiding judge will grant restricted-list status to any participant who requests it. Nevertheless, experience shows that the number of participants who seek placement on the restricted service list is often considerably less than the number on the official list.

In a case where there are two or more clearly-identified "sides," the judge may designate one law firm representing a participant on each side of the case as "lead counsel" for that side. Service on that law firm is deemed service on all of the participants on that side of the case. It is up to those participants to arrange for reproduction and distribution of materials to the participants who want and need them and to their counsel. This system works best in those "big" cases where large big-city law firms face off against each other. When the technique is used, however, the Commission staff is considered a non-aligned participant and must be served with all documents filed in the case.

Lastly, the presiding judge can require that any party who wants discovery material must affirmatively ask for it. The Commission's proposed new discovery rules incorporate the substance of this device for reducing some of the burden and expense of discovery. Under Rule 408(b), a data request or similar discovery request must be served on "the requesting participants and Commission trial staff."<sup>144</sup>

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<sup>142</sup>The latter are authorized to intervene as a matter of law. See § 15(a) of the Natural Gas Act, 15 U.S.C. § 717n(a) and § 308 of the Federal Power Act, 16 U.S.C. § 825g(a).

<sup>143</sup>18 C.F.R. § 385.2010(d) (1984).

<sup>144</sup>49 Fed. Reg. 30525 (1984). Presumably, the party who is asked to supply the information must also be served.



Further, the response to the discovery request need not be served on participants other than the one who sought the information unless the presiding judge directs more widespread service.<sup>145</sup> It seems, therefore, that the agency is about to take the initiative to alleviate one of the problems caused by the multi-party character of its adjudicative proceedings.

Another class of problems arising from multi-party participation is that the presence of many participants can make depositions unwieldy. Under Rule 1906(g) of the Commission's Procedural Rules, all participants have the right to examine a person whose deposition is being taken in an FERC proceeding.<sup>146</sup> A recent ruling in the *TAPS* case<sup>147</sup> illustrates that there is great peril in counsel's failure to exercise the right to be present and examine the deponent. In that case, the Commission trial staff counsel elected to forego the opportunity to participate in the deposition of a person on the West Coast because of the expense of traveling to the site and in view of the fact that the deponent was expected to be a witness in the hearing. But the deponent died after his deposition was taken. In the course of the deposition, the witness had attested to the accuracy of his previously-filed prepared testimony. When the proponent sought to introduce in evidence the deposition-*cum*-testimony, the presiding administrative law judges received it over the objections of the staff and the other participants who had not taken part in the deposition.<sup>148</sup> Their failure to appear was deemed "a knowing and effective waiver of the opportunity for cross-examination."<sup>149</sup>

The lesson this teaches is that counsel is best advised to participate in deposition sessions at *all* costs because he may find the witness' deposition becoming a part of the hearing record notwithstanding the general rule against receiving discovery depositions as evidence.<sup>150</sup> In a multi-party case, however, the enforced participation of a large number of participants may cause undue protraction and expense.

The new rules deal with the potential problems of multi-party participation only in a tangential and oblique way. They represent a distinct improvement over the current failure to address those problems at all. It may, however, be necessary to deal directly with the subject of discovery in a multi-party context rather promptly.

## VI. DISCOVERY JUDGES

It is difficult, if not impossible, to decide wisely on an issue involving a claim of privilege without examining the materials to which the claim relates, or at least a representative sample of those materials. In practice under the Federal Rules of Civil Procedure, this prerequisite rarely presents a significant problem, as the

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<sup>145</sup>*Id.*

<sup>146</sup>See 18 C.F.R. § 1906(g) (1984).

<sup>147</sup>Trans Alaska Pipeline System, Docket No. OR78-1.

<sup>148</sup>Trans Alaska Pipeline System, Docket No. OR78-1-011 (FERC December 15, 1982), ("Presiding Administrative Law Judges' Order Denying Motions to Strike Testimony") (unpublished).

<sup>149</sup>*Id.*, at p. 2.

<sup>150</sup>This does not, of course, apply in the case of a deposition to preserve testimony taken under Rule 407. In that case, everyone is on notice that the deposition will probably be received as evidence.

District Court will conduct an *in camera* inspection of the materials before rendering a decision.<sup>151</sup>

In FERC practice, however, providing for *in camera* inspection of materials that are said to be privileged and, hence, beyond the reach of prehearing discovery, is sometimes impractical. Counsel for parties resisting discovery have demurred at the prospect of allowing the official who will decide the merits of the case to review the contents of documents putatively privileged in nature and hence inadmissible, assuming the claim of privilege is valid. Having read the materials, the argument runs, the presiding judge's view of the merits is bound to be colored by their contents, even if the claim of privilege is sustained.

A solution to the dilemma is the discovery judge, is appointed by the Chief Administrative Law Judge solely for the purpose of conducting the *in camera* inspection, entertaining the arguments of the parties concerning the privileged status of the materials, and issuing a ruling disposing of the issue. Thereafter, the procedural responsibility for the case reverts to the presiding judge.

The most recent and significant precedent for this practice is the *Stowers* case. In that case, the Chief Judge appointed a discovery judge on the recommendation of the presiding judge. He designated the date and time for the *in camera* inspection. The Chief Judge also directed the production of the documents for that purpose,<sup>152</sup> and, in a later order,<sup>153</sup> made it clear that the discovery judge would rule on issues of materiality and relevancy, as well as the privilege question. A little more than two weeks later, the discovery judge issued a carefully crafted decision, holding that all of the documents at issue were privileged and, hence, not discoverable.<sup>154</sup> It is noteworthy that in describing the materials, the discovery judge relied upon an index prepared by the party resisting discovery, saying that it "not only correctly and accurately summarizes the documents, it also, in my judgment, gives an adequate view of the nature and content of each document listed."<sup>155</sup> On interlocutory appeal, the Commission affirmed the rulings of the discovery judge.<sup>156</sup>

*Stowers* illustrates once more the flexibility of the adjudicative process and its capability for procedural adaptations to fill needs for devices to dispose of the agency's business efficiently and expeditiously. Counsel who are considering the application of the discovery judge technique to their cases should bear three things in mind. First, the request for appointment of a discovery judge must be made in the first instances to the presiding judge. That official must ordinarily be persuaded that the request is meritorious. Second, if an issue involving the privileged status of documents is at stake, counsel must prepare for the discovery judge an index,

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<sup>151</sup>See *Herr v. United States District Court*, 426 U.S. 394 (1976); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

<sup>152</sup>See *Stowers Oil & Gas Co.*, "Order Appointing Special Judge to Examine Documents *In Camera*," 27 FERC ¶ 63,001 (1984). Earlier examples of the use of a discovery judge (called a "motions judge") can be found in *Consolidated Gas Supply Corp.*, 17 FERC ¶ 63,014 (1981) and *United Gas Pipe Line Co.*, 16 FERC ¶ 63,054 (1981).

<sup>153</sup>*Stowers Oil & Gas Co.*, 27 FERC ¶ 63,004 (1984).

<sup>154</sup>*Stowers Oil & Gas Co.*, "Order on *In Camera* Inspection of Questioned Documents," 27 FERC ¶ 63,027 (1984).

<sup>155</sup>*Id.*, at p. 65, 143.

<sup>156</sup>See the Commission's treatment of the attorney work-product privilege in *McDowell County Consumers Counsel v. American Electric Power Co.*, 23 FERC ¶ 61,142 at p. 61,321 (1983).

listing, or description of the documents such that the discovery judge can intelligently discuss them without revealing so much about their contents as to moot the very question being decided. Third, appeals from decisions of the discovery judge lie with the Commission under the same rules that govern taking an appeal from any other administrative law judge's ruling. There is nothing either the presiding judge or the Chief Judge can do to cure alleged errors in the discovery judge's rulings.

## VII. PROTECTIVE ORDERS

"Protective order" is a generic term describing any ruling from the bench that restricts or denies prehearing discovery. In common usage, however, it most frequently refers to an order which limits access to, or future use of, documents for which a privilege has been claimed.

The issuance of a protective order in a FERC proceeding is expressly provided for in Rule 413(b) of the proposed new discovery rules. That rule lists three grounds upon which a protective order may be issued: prevention of undue burden, prevention of delay, and preservation of privilege. It is also worth noting that, under Rule 413(d)(2), the presiding judge may not issue a protective order on grounds of privilege unless he or she first makes an *express* finding that the privilege is applicable. In addition, when the privilege is a qualified one, a protective order may not issue unless the judge first expressly finds that "the participant seeking discovery . . . has not established why the materials should be disclosed." In the case of a qualified privilege, failure to demonstrate that the materials ought to be disclosed would seem to leave the privilege in place and provide the basis for denial of discovery with respect to the privileged material.<sup>156</sup>

Most typically, protective orders are issued to set conditions for access to documents for which a privilege (usually proprietary business information) is claimed but is never adjudicated. In these instances, it is counsel, not the presiding judge, that determine the terms of the protective order. The order is usually entered by the judge on joint motion of the interested participants, and its text simply restates the substance of the terms to which the parties have stipulated.

The typical protective order of this type —

1. Identifies the documents subject to its terms, conditions, and restrictions;
2. Provides that only participants in the proceeding who agree to be bound by the order will be permitted to inspect the protected documents;
3. Requires each person who inspects the protected documents to first execute and file a form, indicating that he or she is familiar with the order and agrees to be bound by the terms (even after the individual ceases to be associated with the proceeding);
4. Deals with disclosure of protected materials to witnesses or potential witnesses, who may be precluded from retaining custody of the documents;
5. Specifies how the Commission will react to a request for protected materials by another Government agency, the Congress, or under the Freedom of Information Act;<sup>157</sup>

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<sup>157</sup>Usually the party claiming the privilege is given a hiatus in which to remonstrate against disclosure.

6. Prohibits use of the materials for any purpose except the conduct of the proceeding and requires the materials, any copies thereof, and all documents (*e.g.* transcripts) reflecting their contents to be treated confidentially, to be excluded from public files, and to be faced with a warning label;

7. Requires an inventory of all copies of the materials and restricts handwritten notes; and

8. Requires that if a portion of the protected materials are introduced into, or used in, the administrative hearing record, the relevant pleadings, transcripts, and exhibits will be kept under seal and testimony and argument relating to them will be heard *in camera*.<sup>158</sup>

In recent months FERC has experienced significant growth in the volume of these protective orders. In part, this increase may be attributable to the enactment of the Natural Gas Policy Act of 1978<sup>159</sup> which eliminated the requirement for the public filing of many contracts between gas producers and pipelines while at the same time making access to the terms of those contracts critical to informed disposition of legal issues that the FERC was required to resolve.<sup>160</sup> In response to discovery requests to secure access to the contracts, pipelines have resisted on the ground that their disclosure would cause unwarranted harm to their competitive and bargaining positions by revealing to competitors and potential suppliers the negotiating strategies and prices paid in dealing with producers of natural gas. The pipelines have sought to have the contractual information covered by a protective order.

In *Michigan Wisconsin Pipe Line Co.*,<sup>161</sup> the Commission agreed with the pipeline's argument for protective-order treatment without a detailed examination of the contents of the documents and the reasons that underlay the request. When a pipeline sought three years later to secure a protective order covering its contracts with large natural gas consumers, however, the Commission balked at its generalized claim for protection of the information.<sup>162</sup> Such a claim, the Commission said, "must clearly identify the information for which nondisclosure is sought and the specific harm anticipated in the event of release."<sup>163</sup> The Commission went on to list five specific elements that must be established to substantiate a request for confidential treatment of contractual information:

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<sup>158</sup>Although there is normally no restriction against discussion of protected materials in the Initial Decision, one case has featured a "Limited Distribution" segment of the initial decision which was withheld from public distribution pursuant to a stipulation of the parties that had been approved by the presiding judge. *Northern Lights, Inc.*, 27 FERC ¶ 63,024 at p. 65,080 (1984). In *Columbia Gas Transmission Corp.*, 21 FERC ¶ 63,100 at p. 65, 269 (1982), portions of an initial decision discussing protected materials were deleted from the published version. However, the decision was later published in full (22 FERC ¶ 63,093) after the protective order was revoked at 22 FERC ¶ 61,137 (1983).

<sup>159</sup>15 U.S.C. §§ 3301-3432.

<sup>160</sup>Section 601(a)(1)(D) of the Act made the Natural Gas Act inapplicable to many wellhead sales. However, section 601(b)(1)(E) required the Commission, in determining whether pipelines buying gas from affiliated producers could include the full purchase prices in their cost of service, to determine whether those prices "exceed the amounts paid in comparable first sales between persons not affiliated with such interstate pipelines."

<sup>161</sup>15 FERC ¶ 61,316 (1981).

<sup>162</sup>*Pan Mark Gas Co.*, 27 FERC ¶ 61,489 (1984).

<sup>163</sup>*Id.*, at p. 61,955.

- (1) that the information is customarily confidential and not otherwise publicly available (i.e. that it cannot be derived from published tariffs, trade reports or the like);
  - (2) that public disclosure of the information will cause specified injury or liability, and how the injury or liability will be caused;
  - (3) the nature and extent of the anticipated harm, quantified to the maximum extent practicable;
- \* \* \*
- (4) the length of time for which nondisclosure is sought and the rationale therefor; and
  - (5) how such injury outweighs the public's benefit from full disclosure.<sup>164</sup>

In another recent case, the Commission sustained the presiding judge's refusal to afford protective-order treatment to a pipeline's documents based entirely on the pipeline's assertion that the contents of the materials were proprietary, sensitive, and confidential. The judge had required the pipeline to produce the documents for inspection and to raise claims for special treatment on an item-by-item basis.<sup>165</sup> In affirming the judge's ruling, the Commission noted that

It would be unreasonable in our judgment to allow [the pipeline] to be the sole judge of whether particular documents should be considered confidential based on its own view of the need for such treatment.<sup>166</sup>

The recent cases indicate a tendency on the Commission's part to adopt a cautious approach towards claims that materials sought in prehearing discovery should be disclosed — if at all — only under the aegis of a protective order. This is a healthy development. Protective orders have a seductive appeal to litigators and trial judges. They forestall litigation over the discoverability of materials sought in preparation for trial, render unnecessary the expenditure of resources to decide a quarrel that is unrelated to the merits of the proceeding, and make the materials available to a participant that must have access to them to prepare a case, frequently under severe time constraints.

Protective orders are difficult and expensive to administer, however. Requirements for segregation of protected materials, logging of access to them, and their retention in a secure environment are difficult to fulfill and, in the case of a Government agency such as FERC, probably impossible to meet.<sup>167</sup> Protective orders rarely, if ever, have self-contained mechanisms for monitoring compliance with their requirements for confidential treatment of protected materials. There are no protective order policemen. Neither presiding judges nor anyone else on the agency's payroll is in a position readily to detect violations of those requirements. A pipeline company recently told the Commission that "providing . . . data subject to a

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<sup>164</sup>*Id.*, at p. 61,956.

<sup>165</sup>Columbia Gas Transmission Corp., 27 FERC ¶ 63,093 (1984).

<sup>166</sup>Columbia Gas Transmission Corp., 28 FERC ¶ 61,185 at p. 61,351 (1984).

<sup>167</sup>The agency's capability probably varies directly with the volume of classified national security information it handles. In FERC's case, the volume is rather small. FERC's ability to cope with protective order requirements is undoubtedly greatest in enforcement cases; for its enforcement staff is trained and equipped to maintain the confidentiality of documents.

protective order is no guarantee of confidentiality since in the 'real world' leaks can and do take place."<sup>168</sup> Only the foolhardy or naive would seriously disagree with that assessment.

The most serious problem with protective orders is the difficulty, if not impossibility, of enforcing them once a violation is detected. In this connection, it is noteworthy that the Commission's proposed new discovery rules do not provide for imposition of any sanctions against a party or an individual who violates the terms of a protective order. Proposed Rule 414(b),<sup>169</sup> would permit the imposition of sanctions only for violation of an order compelling discovery, not for violation of a protective order. It is arguable that a presiding judge could impose sanctions (or recommend their imposition to the Commission) under the general power "to conduct a fair and impartial hearing and to determine the matter justly under the law"<sup>170</sup> or the more specific authority in Rule 504 to maintain order by ensuring that "any disregard by any person of rulings on matters of order and procedure is noted on the record or . . . is made the subject of a special written report to the Commission."<sup>171</sup> However, the first of these provisions is not specific enough, and the latter, read in *pari materia*, appears to relate solely to decorum in the hearing room.

Another troublesome aspect of the sanctions question concerns the posture of the Commission trial staff and the potential liability of its members for violation of the confidentiality requirements of a protective order. A presiding judge can hardly eject the very agency in which he serves from participation in the case, nor can monetary penalties be imposed. The notion that the Commission would impose sanctions on its own staff is unrealistic. The possibility of adverse action against a Commission employee for violation of a protective order issued by an administrative law judge<sup>172</sup> is extant, though remote. From the standpoint of its enforceability in a "real world" situation, protective-order protection for confidential documents appears to be a toothless tiger. Parties who are subject to them may actually be trusting entirely in the good faith of other parties for compliance.

All of these factors suggest that it is not always appropriate to require or authorize disclosure of documents or other materials under a protective order because that appears to be the simplest and least burdensome method of defusing a potential controversy. There are occasions when the wise course of action in the long run is to meet head-on the issues raised by the discovery request and objections to it and to decide those issues on the merits. Protective orders exact a price. Once in place, they tend to remain forever. They present great difficulties and expense from an administrative standpoint. They should, therefore, be used sparingly and judiciously.

### VIII. CONCLUSION

This article has been an effort to discuss how present and proposed discovery mechanisms work at the Federal Energy Regulatory Commission. This major

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<sup>168</sup>Columbia Gas Transmission Corp., *supra* n.179 at p. 61,350.

<sup>169</sup>49 Fed. Reg. 30526 (1984).

<sup>170</sup>Rule 504(a)(1), FERC Rules of Practice and Procedure, 18 C.F.R. § 385.504(a)(1) (1984).

<sup>171</sup>18 C.F.R. § 385.504(b)(14)(i) (1984).

<sup>172</sup>*See* 5 U.S.C. § 7501-7514.

Federal regulatory agency is about to undertake a new departure. It is undergoing the slow and painful process of putting in codified and explicit form the rules that govern prehearing discovery in its adjudicative proceedings. In doing so, it has been necessary for the Commission to examine closely and systematically the “common law” discovery rules that have applied on an *ad hoc* basis to FERC adjudications. This has not been an easy process. Litigators and regulation-draftsmen, like oil and water, do not readily mix. And the urge to “improve” the discovery rules in the guise of codifying them has been difficult, and sometimes impossible, to resist.

The effort, for all its anomalies and dysfunctions, remains a healthy development. It represents a commitment by an important regulatory agency to continued use of the adjudicative process for deciding significant issues. With all its flaws, agency adjudication remains the best solution our law has devised for resolving the questions committed to administrative bodies fairly and accurately. Prehearing discovery is an indispensable part of the process of agency adjudication. The task ahead is not to grouse about the institution of prehearing discovery but to improve and perfect it. The FERC’s proposed new discovery rules are an important step towards achieving that objective.

