

REPORT OF THE E-COMMERCE COMMITTEE

I. FORMATION AND ORGANIZATION OF THE E-COMMERCE COMMITTEE

The E-Commerce Committee was formed during the summer of 2000. Its initial “pre-organizational” meeting was held in cyberspace, in a password-protected chat room that was useful for those who were able to attend, but frustrating for a greater number whose corporate or law firm firewalls apparently prevented them from accessing the site and participating. The Committee held its first full meeting in September. The agenda included the approval of the Committee’s charter and developing the scope of issues to which the Committee would dedicate itself.

The objective of the Committee, as stated in the Charter is to provide a knowledge-exchange forum for all Bar members interested in e-commerce issues and developments, and the manner which such changes are likely to affect members’ practices and the discharge of their professional responsibilities.

II. LEGISLATION AFFECTING E-COMMERCE: E-SIGN & UCITA

There are three recent legislative developments that will affect e-commerce with which practitioners should at least be acquainted. The first is the Federal Electronic Signatures in Global and National Commerce Act (E-SIGN).¹ The second is the proposed Uniform Computer Information Transactions Act (UCITA), a statute recommended to state legislatures for adoption by the National Conference of Commissioners on Uniform State Laws (NCCUSL).² The third is another uniform state law, the Uniform Electronic Transactions Act (UETA), also proposed by the NCCUSL.³ Since the Federal E-SIGN legislation is intended to create a uniform federal framework for electronic transactions pending adoption of the UETA by the state legislatures (and is largely identical to the provisions of UETA), we discuss E-SIGN first, referring briefly to UETA and the progress of the state legislatures in adopting UETA, and then turn to a discussion of the UCITA.

1. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (*to be codified at* 15 U.S.C. § 7001-06, 7021,7031, and 47 U.S.C. § 23) [hereinafter E-SIGN].

2. An overview of the proposed uniform statute is available at the NCCUSL’s website. See generally Carlyle C. Ring, Jr., *The need for Uniform Rules for the Information highway: An Overview of UCITA*, available at http://www.nccusl.org/uniformact_overview/uniformacts-ov-ucita.htm.

3. The text as approved and recommended for enactment is available at the NCCUSL’s website. See generally National Conference of Commissioners of Uniform State Laws, *Uniform Electronic Transactions Act* (1999), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucta99.htm>.

A. ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

E-SIGN addresses both electronic signatures as well as electronic recordkeeping. While much of the public attention has been on the provisions validating electronic signatures, the provisions addressing electronic recordkeeping are likely to be equally significant. The provisions addressing electronic signatures first took effect on October 1, 2000. These sections generally provide for the legal enforceability of interstate contracts that have been formed with electronic signatures. The provisions allowing for the use of electronic records to be used to satisfy recordkeeping requirements imposed by federal or state law are to take effect five months later on March 1, 2001, subject to a delay until June 1, 2001 if certain rule-making proceedings have not been completed by March 1.

1. *What is an "electronic signature?"*

The statute uses a very open-ended definition of the term "electronic signature." Under section 106(5), the term "electronic signature" means "an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."⁴ The term "electronic" in turn is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."⁵

E-SIGN is not accompanied by any "official comments," as is, for example, the Uniform Commercial Code (UCC). The proposed UETA, upon which the text of E-SIGN was largely based, does, however, include such commentary from the drafters. The official Comment on the identical definition of the term "electronic signature" in UETA states that the term is intended to be broadly encompassing and is "not specifically defined." The Definition provides:

No specific technology need be used in order to create a valid signature. One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication also may suffice as may the firm's name on a facsimile. . . . The definition requires that the signer execute or adopt the sound, symbol or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequences of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with an intent to do a legally significant act. It is that intention that is understood in the law as a part of the word "sign," without the need for a definition.

In short, the intention of the UETA drafters was to leave the decision of whether something constitutes an "electronic signature" to be largely determined under the existing body of laws and court decisions. While this

4. E-SIGN § 106(5), 114 Stat. at 472.

5. E-SIGN § 106(2), 114 Stat. at 472.

6. *Id.*

comment from the UETA does not formally apply to E-SIGN, one would expect that federal courts may refer to it in interpreting the federal statute.

2. *Applicability of E-SIGN.*

a. In General

E-SIGN is intended to apply principally to the sales, licensing, and lease transactions covered by Articles 2 and 2A of the UCC. As noted above, E-SIGN is intended to create a uniform federal framework for electronic signatures that will apply until the individual states adopt the UETA. E-SIGN creates a general rule that contracts for interstate transactions (as specifically defined in the statute), which are entered into with electronic signatures along with various records relating to interstate transactions, may not be denied legal force and effect simply because an electronic signature was used in the formation of the contract or because the record of the transaction is maintained electronically. This has been termed the “General Rule of Validity” for electronic signatures, contracts, and records, and is indeed referred to as such in the caption of section 101 of the Act.⁷

The new statute thus permits parties to move to electronic signatures and recordkeeping. The Conference Report states that the provision is intended to ensure that parties have “maximum flexibility” in the use and acceptance of electronic signatures and records in affected transactions and that they, therefore, have the “same latitude to use and accept electronic records as they have with paper records.”⁸

Section 102(a) allows state laws to “modify, limit or supersede” the general rule of validity for electronic signatures and records in certain circumstances.⁹ It allows a state, for example, to adopt “alternative requirements” governing the use or acceptance of electronic signatures and records, but only if such alternatives are “consistent with” the federal law and do not require or accord greater legal status or effect to the implementation of a specific technology.¹⁰

But while state governments are given some “wobble room” by this provision, another provision, section 102(c), explicitly prohibits the use of this authority by a state government to “circumvent” the General Rule of Validity. In addition, section 104(c)(1), captioned “Reimposing paper prohibited,” states that the provisions of the new law ensuring state authority to interpret the federal General Rule of Validity, with respect to state laws, may not be construed to grant any state regulatory agency the authority to “impose or reimpose any requirement that a record be in a tangible printed or paper form.”¹¹

7. E-SIGN § 101, 114 Stat. at 464-65.

8. S. Rep. No. 106-131 at 7 (1999).

9. E-SIGN § 102, 114 Stat. at 467-68.

10. *Id.* at 468.

11. E-SIGN § 104, 114 Stat. at 470.

The General Rule of Validity applies to private commercial transactions, not to governments, when they are acting in their governmental capacity, although it does apply to government procurement actions. In addition, the General Rule of Validity is subject to some very significant exemptions and caveats.

Acceptance by private parties is voluntary. No one is required to accept electronic signatures or contracts. No non-governmental party is required to accept an electronic signature if the party chooses to insist on a paper-based transaction.¹²

Courts and agencies may still require paper filings. The General Rule of Validity does not apply to court orders, court notices, or to official court documents (specifically including briefs, pleading, and other writings) that are required to be executed in connection with court proceedings.¹³

Agencies may require records with "specified standards or formats." The new law does not limit or supersede any requirement by Federal and State regulatory agencies that records be filed "in accordance with specified standards or formats."¹⁴

Utility service terminations notices. Of particular interest to energy practitioners, the statute exempts all notices of cancellation or termination of utility services (explicitly including water, heat, and power) from the General Rule of Validity.¹⁵ Thus, E-SIGN does not affect the various provisions in retail restructuring proceedings detailing how notice of termination of gas or power service must be given.

Limited exception for certain other consumer protection and public safety notices. The statute also exempts notices of default, foreclosure, and the like "under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;"¹⁶ cancellation of health insurance or life insurance benefits (excluding annuities); product recall notices that risk endangering health or safety; and documents required to accompany transportation handling of certain hazardous or toxic materials.¹⁷

Wills and testamentary trusts. Records and contracts governed by statutes or rules of law governing the "creation and execution of wills codicils, or testamentary trusts" are exempt from the General Rule of Validity.¹⁸

Divorce, adoption, and family law. Rules governing matters of adoption, divorce, and other matters of family law are excluded from the E-SIGN law.¹⁹

12. E-SIGN § 101(b)(2), 114 Stat. at 464.

13. E-SIGN § 103(b)(1), 114 Stat. at 468.

14. E-SIGN § 104(a), 114 Stat. at 469.

15. E-SIGN § 103(b)(2)(A), 114 Stat. at 469.

16. E-SIGN § 103(b)(2)(B), 114 Stat. at 468.

17. *See generally* § 103(b)(2)-(3), 114 Stat. at 468.

18. E-SIGN § 103(a), 114 Stat. at 468.

19. E-SIGN § 103(a)(2), 114 Stat. at 468.

Non-Sales provisions of UCC. E-SIGN applies to the sales, licensing, and leasing articles of the UCC (Articles 2 and 2A), but not to the other titles, including, for example, the articles governing negotiable instruments and secured transactions.²⁰

As noted above, the federal statute has been described as intended merely to fill a gap pending adoption of the UETA by state legislatures. As of this writing, the UETA has been adopted by nearly half of the state legislatures.²¹

b. Applicability to PUC “wet signature” and recordkeeping requirements.

It is unclear to what degree E-SIGN will be viewed as pre-empting state public utility commission rules regarding the paper signature, so-called “wet signature” requirements, and/or labeling requirements. One early sign of how a state commission might respond to the federal law comes from New Jersey, where the Board of Public Utilities (BPU or Board) cited E-SIGN as one of the factors leading it to eliminate a ten percent cap on the number of customers who could enroll via the Internet.²²

The order cited a number of other reasons for favoring the use of alternatives to the “wet signature” requirement, including the statement that enrolling customers via a wet signature process is five to six times more expensive for suppliers than Internet enrollment. The Board also noted that the single most common reason given by marketers for not being more active in the New Jersey residential market was the wet signature requirement, due to the increased time, complexity, and cost which it added to the enrollment process.²³

With regard to electronic recordkeeping, the Board’s new rules required licensed retail suppliers, as a matter of state regulation, to comply with the provisions of E-SIGN as a condition of retaining contracts and records electronically including, but not limited to:

the use of a conspicuous and visually separate consent obtained from the consumer, allowing the contract to be kept and made available in electronic form, a separate statement as to the hardware and software requirements for access to and retention of electronic records and an acknowledgement from the consumer that he/she has an affirmative obligation to provide the Supplier with any change in e-mail address or his/her withdrawal of consent for the electronic retention of contracts.²⁴

20. *Id.*

21. For an excellent online resource on the UETA, including articles, commentary, and current information on adoption by the states see <http://www.uctaonline.com>.

22. Order issued In the Matter Of The Electric Discount and Energy Competition Act of 1999 - Internet Enrollment Program, Docket Nos. EX94120585Y (Sept. 12, 2000), available at <http://www.bpu.state.nj.us/wwwroot/energy/EX94120585YORD.PDF>.

23. *Id.*

24. Licensed Supplier Condition 11, in Attachment A to Internet Enrollment Program Order, *supra* note 22, available at <http://www.bpu.state.nj.us/wwwroot/energy/EX94120585YDOC.PDF>.

B. Uniform Computer Information Transactions Act (UCITA)

The NCCUSL's UCITA was recommended to the state legislatures for adoption in 1999. The Commonwealth of Virginia adopted the UCITA during calendar year 2000 (effective July 1, 2001) and it has also been introduced in a few other states' legislatures in 2001.²⁵ For reasons discussed below, however, it has become the source of some controversy and it is unclear how quickly other states will move to enact it.

The Act is intended to provide a comprehensive set of rules analogous to those of the UCC for computer information transactions, especially licensing computer information. Thus, the Act is intended to cover transactions involving access to computerized databases, storage devices, and the like. While the statute is largely aimed at addressing transactions over the Internet, it applies to all "computer information" transactions that can include software distributed through other media as well.

To a large degree, the statute will be familiar to anyone who is knowledgeable of the UCC. There are significant differences, however, in a number of areas including the ability to modify the terms of a license over time, for example, modifying the "terms of use" posted on a website. There are also a number of differences in terminology that carry differences in scope or meaning. For example, the UCITA uses the term "authenticate" to include "signature," but also to otherwise execute or adopt a "record" (in place of "document" or "contract"). The statute expands on basic concepts such as contract formation in ways that go considerably beyond the traditional rules of the UCC and which are of course intended to encompass electronic contracting, among other things. Other provisions are intended to specifically apply to disclosure of the terms of the agreement, which are intended to address the usual manner in which "terms and conditions" are presented to a customer in an online transaction.

There has been considerable criticism of the UCITA on the grounds that it is overly favorable to sellers/licensors of information. This criticism has slowed adoption by state legislatures such that, as noted above, the Act has to date only been adopted by two jurisdictions.

However, because of the nature of electronic commerce and the fact that the UCITA as adopted in Virginia allows parties to begin contracting under the new statute even before the July 1, 2001 effective date where the parties agree to do so per code section 59.1-509.2, practitioners may be affected nationwide. Note also that the statute as adopted in Virginia allows broad latitude to the parties to select an exclusive "court" (defined to include arbitral authorities where the parties so specify) and an exclusive venue for the resolution of disputes (subject of course to the caveat that the choice not be "unreasonable and unjust").²⁶ Hence, the choice of Virginia law in the "terms of service" provisions of an Internet website may result in disputes being adjudicated pursuant to the UCITA in a wider uni-

25. The Virginia law appears as part of the Virginia Code.

26. VA. CODE ANN. § 59.1-501.10 (Effective July 1, 2001), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+59.1-501.10>.

verse of transactions than might otherwise be anticipated.

III. B2B TRADING PLATFORMS

A. *Antitrust and competitive implications*

The term “B2B” refers to “business-to-business” electronic transactions and “P2P” refers to “peer-to-peer” (e.g., Napster, gnutella, etc.). During 2000, a large number of B2B trading platforms were announced for the trading of energy products and services, transmission bandwidth (capacity), and other products. The energy-related B2B trading platforms represented but a small component of the overall number of B2B trading platforms and services across the economy. The emergence of such procurement, distribution, and trading platforms immediately raised questions as to the competitive consequences these ventures might have on their respective industries. In June of 2000, the Federal Trade Commission (FTC) conducted an intensive two-day workshop on the competitive implications of B2B e-commerce in general. The EBA’s Antitrust Committee has summarized these workshops in some detail in its report.

B. *Developments affecting the California Power Exchange*

One of the largest B2B trading platforms for energy during 2000 was the California Power Exchange (Cal-PX). Created as a result of the 1996 restructuring legislation in California, the Cal-PX was the vehicle for spot market in electricity to serve the California market. The supply, price, and credit difficulties faced by the California utilities during 2000, and continuing into 2001, resulted in the closure of the exchange in early 2001. While this report is by no means intended as a summary of the complex California electricity issues, a few points are illustrative of how a B2B energy exchange may be affected by traditional legal and/or regulatory rules.

1. Emergency seizure of Cal-PX forward contracts.

On January 31, 2001, the Governor of the State of California, acting under a declared state of emergency, seized the forward market positions held by Southern California Edison Company (SCE) and Pacific Gas and Electric Company (PG&E). The Governor was exercising broad powers granted to him under section 8572 of the California Emergency Services Act,²⁷ after having proclaimed, on January 17, 2001, a “State of Emergency” by reason of a “sudden and severe energy shortage.”²⁸ While the exercise of emergency powers to seize property is more typically thought of in terms of movies where soldiers commandeer horses and supplies in time of war, in fact, the Governor of California has broad discretion under the State’s emergency services law to seize any property. In this case, the

27. The California Emergency Services Act is available in the Findlaw.com database at <http://caselaw.lp.findlaw.com/cacodes/gov/8550-8551.html>.

28. *Id.*

property was intangible, consisting of forward contract positions created through e-commerce trading services offered by the Cal-PX. In this instance, the Cal-PX had booked forward contracts for the benefit of SCE and PG&E for purchase, and delivery of substantial amounts of energy during 2001 at prices negotiated during 2000 which were significantly below the January 2001 spot market prices, thus constituting a valuable intangible asset. In his press release announcing the seizure, the Governor explained he was using his emergency powers "to seize options to buy very inexpensive power that would otherwise be lost forever" and to "provide reliable power through the end of the year."²⁹

The ultimate effect of the emergency action is unclear. If the state is required to pay the market value for the seized forward positions, the state will presumably be in the same financial position as it would have been by purchasing energy in the spot market.

2. Closure of the Cal-PX.

In early 2001, the Cal-PX closed its doors completely. The exchange pointed to the precipitous drop in the number of transactions conducted through its electronic exchange, a decline resulting from several factors, including the Federal Energy Regulatory Commission's (FERC or Commission) decision to allow certain transactions to be conducted without going through the exchange. The exchange concluded that it could not survive without a larger transaction base and, thus, decided to suspend trading operations.

IV. FERC PROCEEDINGS AFFECTING E-COMMERCE ACTIVITIES

A. Federal Power Act Jurisdiction over Automated Power Exchange.

On March 7, 2000, the United States Court of Appeals for the D.C. Circuit upheld the FERC's assertion of Federal Power Act (FPA) jurisdiction over Automated Power Exchange, Inc. (APX).³⁰ The FPA gives the FERC jurisdiction over public utilities, which are defined as entities that own or operate facilities used in the transmission or the wholesale sale of electricity in interstate commerce. APX does not sell or transmit power. Instead, APX operates an electronic exchange through which buyers and sellers of electricity trade power at prices that are facilitated through an algorithm in the APX exchange software. Because of the nature of its operations, APX asserted that it is not a "public utility" under the FPA. The FERC disagreed, ruling that, because APX played a role in setting the price at which power is traded in its market, APX exercised effective con-

29. Governor Seizes Low Cost Power Contracts (February 2, 2001), available at http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?BV_SessionID=@@@@0760444310.0982791788@@@@@BV_EngineID=jalkejflhmbemfcfkmchegi.0&sCatTitle=Press+Release&sFilePath=/govsite/press_release/2001_02/20010202_PR01047_energy_exec_order.html&sTitle=GOVERNOR+SEIZES+LOW+COST+POWER+CONTRACTS+&iOID=13238.

30. Automated Power Exchange, Inc. v. FERC, 204 F.3d 1144 (D.C. Cir. 2000).

trol over wholesale sales.³¹ Because APX exercised such control, the FERC ruled, APX is a jurisdictional public utility under the Act. APX appealed the FERC's ruling to the D.C. circuit.³²

The D.C. circuit, relying on *Chevron*, deferred to the FERC's broad application of the FPA. The court found that, based on the "broad language" Congress chose to describe the FERC's jurisdiction, the FERC's application of the Act to APX, due to APX's price setting activities, was not unreasonable.³³

B. Order No. 587 Developments

The Commission continued its ongoing efforts to implement uniform business practices across pipelines and to move the industry increasingly towards electronic communications for operational matters.

1. Order No. 637

In Order No. 637, the Commission made significant changes to its regulations governing capacity release and short-term transportation transactions.³⁴ Of relevance here, the Commission found that pipelines would not be required to support Electronic Data Interchange formats for imbalance netting and trading until the Gas Industry Standards Board (GISB) completes these formats.³⁵ Order No. 637 also required pipelines to establish imbalance management services and to ensure that penalties, including imbalance penalties were imposed only to the extent necessary to prevent impairment of reliable transportation services. The actual implementation of these standards is increasingly done through electronic communications, leading the Commission to consider these electronic communications procedures in several other orders during the course of the year, particularly in Order Nos. 587-L, 587-M, and related orders discussed below.

2. Imbalance Netting and Trading: Order No. 587-L and implementation filings

Commencing in 1996, the Commission began systematically working to promote standards for business practices of interstate pipelines.³⁶ In

31. *Id.*

32. *Automated Power Exchange, Inc.*, 204 F.3d 1144.

33. *Id.*

34. Order No. 637, *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,091, at 31,334, 65 Fed. Reg. 10,156 (Feb. 25, 2000).

35. *Id.*

36. Order No. 587, *Standards For Business Practices Of Interstate Natural Gas Pipelines*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,038, 61 Fed. Reg. 39,053 (Jul. 26, 1996); Order No. 587-B, III F.E.R.C. STATS. & REGS. ¶ 31,046 (1997), 62 Fed. Reg. 5521 (Feb. 6, 1997); Order No. 587-C, III F.E.R.C. STATS. & REGS. ¶ 31,050 (1997), 62 Fed. Reg. 10,684 (Mar. 10, 1997); Order No. 587-G, III F.E.R.C. STATS. & REGS. ¶ 31,062 (1998), 63 Fed. Reg. 20,072 (Apr. 23, 1998); Order No. 587-H, III F.E.R.C. STATS. & REGS. ¶ 31,063 (1998), 63 Fed. Reg. 39,509 (July 23, 1998); Order No. 587-I, III

1998, Order No. 587-G adopted a regulation, which requires pipelines to establish provisions permitting shippers and their agents to offset imbalances accruing on different contracts, and to trade imbalances with other shippers where such imbalances have similar operational impact on the pipeline's system.³⁷ At the time, however, the FERC deferred implementation to provide the GISB an opportunity to consider standards for implementing such netting and trading. During 2000, the Commission returned to the matter with Order No. 587-L, adopting a November 1, 2000 implementation date, and requiring all interstate pipelines to implement the netting and trading regulation by that date.³⁸ On October 27, 2000, the Commission issued its order addressing the bulk of the pipeline tariff filings to implement the netting and trading requirement.³⁹ The order generally requires pipelines to allow netting and trading across rate schedules, but allows the pipeline to propose an "appropriate mechanism" to ensure that it is made whole for all appropriate transportation charges. In addition, the order clarified that all pipelines must permit netting and trading by shippers' agents, not merely the shippers themselves. Further revisions were required of a number of pipelines and at least one further order on the implementing tariffs is to be expected.

3. Order No. 587-M: Adoption of GISB Version 1.4, Standards for interactive Internet web sites

In February of 2000, the GISB notified the FERC that it had adopted a revised version of its business practice and communications standards. Version 1.4, included, *inter alia*, standards for implementing pipeline interactive Internet websites. During the second half of the year, the Commission conducted a rulemaking proceeding to implement Version 1.4 and to address certain related issues upon which the GISB had been unable to reach a consensus. The Commission's final rule on this matter was designated Order No. 587-M.⁴⁰ Pipelines are required to implement these regulations by May 1, 2001.

With regard to the question of whether shippers may utilize "cross-contract ranking," the ability of a shipper to allocate gas supply across transportation contracts so that the shipper can choose the contract which provides for the most economical transportation, Order No. 587-M further deferred the decision pending the outcome of a technical conference which

F.E.R.C. STATS. & REGS. ¶ 31,067 (1998), 63 Fed. Reg. 53,565 (Oct. 6, 1998); Order No. 587-K, III F.E.R.C. STATS. & REGS. ¶ 31,072 (1999), 64 Fed. Reg. 17,276 (Apr. 9, 1999); Order No. 587-L, III F.E.R.C. STATS. & REGS. ¶ 31,100, 65 Fed. Reg. 41,873 (July 7, 2000); Order No. 587-M, III F.E.R.C. STATS. & REGS. ¶ 31,114, 65 Fed. Reg. 77,285 (Dec. 11, 2000) (to be codified at C.F.R. part 284).

37. See generally *Certain Sales And Transportation Of Natural Gas Under The Natural Gas Policy Act Of 1978 And Related Authorities*, 18 C.F.R. § 284.12 (c)(2)(ii) (2000).

38. Order No 587-L, *supra* note 36.

39. Order on Filings to Establish Imbalance Netting and Trading Pursuant to Order Nos. 587-G and 587-L, *Standards for Business Practices of Interstate Natural Gas Pipelines*, 93 F.E.R.C. ¶ 61,093 (2000).

40. Order No. 587-M, *supra* note 36.

it scheduled for late February, 2001. Action following the technical conference is likely later during 2001.

Order No. 587-M moved the industry considerably closer toward reliance on electronic communications for operational matters. One commenter had expressed concern over the reliability of systems for having an electronic notification by a pipeline trigger, a telephone, or pager in order to contact the relevant operations personnel. The commenter requested that pipelines be required to continue their current method of communication until the customers' software was working satisfactorily. The Commission agreed that pipelines "should provide shippers with a reasonable opportunity to test the Internet communications" before the pipeline dispenses with existing methods of notifying shippers of critical events.⁴¹ But the Commission made it clear that pipelines will not be required to continue existing forms of communication to individual shippers until that shipper has been able to configure its software correctly, noting that "[t]he shipper should have the responsibility, within a reasonable time period, to correct problems with its own software."⁴²

C. The FERC's Electronic Filing Initiative

During 2000, the FERC moved forward with its electronic filing initiative, terminating the pre-existing pilot program and commencing the actual phase-in of electronic filing. The rules governing electronic filing were promulgated by Order No. 619.⁴³ In addition, the Commission issued a User Guide with detailed practical instructions on electronic filing. The most current version of the User Guide as of this writing is dated October 6, 2000 and is available at the Commission's website.⁴⁴

Initially, only a small universe of types of pleadings will be able to be filed electronically (e.g., comments on applications or other filings, comments on technical conferences, comments on environmental documents, reply comments, and protests). Importantly, motions for leave to intervene are *not* yet able to be filed electronically. But the plan is to expand the list of qualified filings in phases to embrace the entire universe of FERC filings.

V. ELECTRONIC AVAILABILITY OF INFORMATION AT STATE PUCS

A number of State Public Utility Commission's (PUC) made major strides in adopting e-commerce techniques to their own operations and websites. Hence, a practitioner is increasingly able to access pleadings as well as commission orders at an increasing number of PUCs. The kinds of information that are available via the web continue to vary enormously across PUCs, both in terms of the scope of the documents available (in

41. *Id.* at 31,941.

42. Order No. 587-M, *supra* note 36 at 31,941.

43. Order No. 619, *Electronic Filing of Documents*, III F.E.R.C. STATS. & REGS. ¶ 31,107, 92 F.E.R.C. ¶ 61,203 (2000).

44. *See generally* http://www.ferc.fed.us/efi/userguideofOct6_2000.pdf.

particular documents submitted *to* the agency) as well as the formats used. The lack of common functionality and document coverage across the various PUCs tends to limit the usefulness of some of these sites to some degree.

E-COMMERCE COMMITTEE

Philip M. Martson, Chair

William L. Aprea	Steven R. Hunsicker
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