REPORT OF THE COMMITTEE ON JUDICIAL REVIEW

During the past year a number of developments have occurred which will have an impact upon appeals taken from actions under the Natural Gas Act and the Natural Gas Policy Act of 1978. The Committee anticipates that the items discussed in this report will have a continuing impact upon the appellate process.

I. FIFTH CIRCUIT REORGANIZATION

On October 14, 1980, the Fifth Circuit Court of Appeals Reorganization Act of 1980 became law. P.L. 96-452. Pursuant to this statute the present Fifth Circuit will be divided into two new circuits: (1) the Eleventh Circuit will comprise the States of Alabama, Florida and Georgia and will hold sessions in Atlanta, Georgia; and (2) the new Fifth Circuit will comprise the States of Louisiana, Mississippi and Texas with headquarters in New Orleans, Louisiana. Fourteen judges will sit in the new Fifth Circuit and twelve judges will sit in the Eleventh Circuit.

Section 4 of the new statute provides that annual sessions for the new Fifth Circuit should be held in Fort Worth, Jackson and New Orleans with sessions of the Eleventh Circuit held in Atlanta, Jacksonville and Montgomery. Of the various cities mentioned only Jackson, Mississippi is not now an official place of holding sessions of the appellate court. While senior judges have the right to elect the circuit to which he or she would like to be assigned, Section 5 of the statute assigns present circuit judges to the new Fifth or Eleventh Circuit on the basis of the judge's official station on the day before the effective date of the act.

Section 9 of the statute creates an implementation mechanism pursuant to which pending and future cases will be adjudicated. On and after the effective date of the Act, *i.e.* October 1, 1981, all cases are to be filed in the circuit in which they arise. For appeals pending on the day before the effective date of the Act, the statute provides various procedures for disposing of these cases. If a matter has been submitted for decision, the case stays in the old Fifth Circuit. If an appeal has been filed but not submitted for decision, then the appeal along with all papers, etc. will be transferred to the circuit in which the case would have been brought under the statute. With respect to petitions for rehearing or a suggestion for rehearing *en banc*, these pleadings will be handled as though the statute had not been passed. As noted above, the effective date of this Act is October 1, 1981.

Because of the prominent role that the Fifth Circuit has had in reviewing appeals from Federal Energy Regulatory Commission orders all practitioners should review P.L. 96-452 and be alert to the promulgation of local rules by the new Fifth Circuit and the Eleventh Circuit.

II. REVISED SUPREME COURT RULES

Practitioners before the United States Supreme Court should be familiar with its recently revised Rules, effective June 30, 1981. A number of the salient revisions are discussed below.

Strict page limitations and specific binder colors have been prescribed for documents presented to the Court. Since several ambiguities exist as to what can

or cannot be excluded in determining the length of documents, the Rules, in particular Rule 33, should be read carefully in order to make the best judgment.

Another procedural revision covers the form and content of documents, including the proper placement of sections, such as "Questions Presented," "Jurisdiction," etc. As an aid to the Court, the "Questions Presented" section must now precede all others, including the tables of contents and authorities. A recent revision to Rule 28.1, effective November 21, 1980, requires that all documents filed on behalf of a corporation "shall include a list naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each such corporation." This provision is designed to help judges recuse themselves from hearing cases in which conflicts of interest could arise.

Another revision allows timely filing by mail if, within the time for filing, the documents are deposited in a U.S. post office or mailbox with the proper postage and a notarized statement by a member of the Bar of the Court is filed with Clerk attesting to the proper mailing procedure.

An important clarification has been made concerning the effect of a petition for rehearing below on the time for filing a notice of appeal or petition for certiorari. Rules 11.3 and 20.4 now indicate that the time for filing an appeal begins to run either from the date of denial of rehearing below or from the date of entry of a subsequent judgment entered on the rehearing.

In the case of cross-appeals or petitions, it is now evident that revised Rules 12.4 and 19.5 allow the *cross-appellant* to wait until after the last moment required for the *appellant* to file its appeal papers. After receipt of the appeal, the cross-appellant may then avail itself of a 30-day period in which to file its own papers.

Practitioners should also be aware of the codification in Rule 23.1 of the Court's occasional policy of summarily disposing of certiorari appeals on their merits.

With respect to *amicus* pratice, an *amicus* brief intended to be considered along with a jurisdictional statement or writ of certiorari must now be submitted within 30 days, the time allowed for the appellee or respondent to reply to that jurisdictional statement or writ.

On the subject of oral argument, the Court has emphasized brevity. Rule 38.4 limits the occasions on which more than one counsel may be heard; and Rule 38.7 requires that counsel for an *amicus* obtain consent of the Court before arguing. Previously, only consent of the *supported* party was necessary.

Finally, the Supreme Court practitioner should be familiar with revisions of in-chambers practice. For instance, an application for extension of time, once denied, may not be renewed. The Court no longer permits an applicant to shop around for an extension of time from another Justice.

All practitioners should review the Revised Rules to appreciate the modifications that have been briefly described.

III. THE RACE TO THE COURTHOUSE

Section 2112(a) of Title 28 of the U.S. Code has come under increasing criticism for permitting a "race to the courthouse." The statute provides that, when petitions from the same agency are filed in two or more courts of appeal, the court

in which the first petition is filed has initial and exclusive jurisdiction. As a result, significant costs have been incurred by litigants who have lost the race by seconds and must then pursue an appeal in a distant forum. Moreover, much wasteful litigation has arisen, contesting both the exact time of an order's issuance and the priority of those who filed thereafter.

In an effort to resolve the problem, the Administrative Conference of the United States issued Recommendation 80-5 in December, 1980, at its Twenty Second Plenary Session, which has been published at 45 Fed. Reg. 84,953-54 (1980).

Recommendation 80-5 calls on Congress to amend § 2112(a) to provide that, when petitions for review are filed in two or more courts within 10 days of an agency order, the agency shall notify an appropriate official body, such as the Administrative Office of the United States, to arrange for the random selection of a forum from among the courts where petitions were filed. The ten-day filing period would thus eliminate the race to the courthouse. Of course, transfer to any other court of appeals for the convenience of the parties and in the interest of justice would still be possible.

In the absence of legislation, the Conference recommended that agencies specify in advance a time at which their orders would be deemed issued for purposes of judicial review. This advance notice by the agencies would not forestall the race to the courthouse, but it would reduce the number of premature filing made in anticipation of a final order. The Conference also urged that, in the absence of corrective legislation, the Supreme Court provide a rule or procedure for the random selection of a forum from among courts where petitions have been filed simultaneously. Again, this would not end the race to the courthouse, but it would resolve the outcome of simultaneous filings.

The demand for legislative action is the principal feature of the Conference recommendations. While agencies and the judiciary can ameliorate the situation, the Administrative Conference believed that only Congress can eliminate the race itself.

This report is submitted by the Chairman, Vice Chairman and the members of the Committee.

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