

Report of The Committee On Practice and Procedure

I. INTRODUCTION

This report covers developments in practice and procedure before the Federal Energy Regulatory Commission during 1983 and through the end of May, 1984. The major developments during this period include the adoption of citation forms to be used in pleadings before the Commission, the establishment of fees to be charged with respect to certain filings by natural gas pipelines and producers, the establishment of fees for computer services, and the adoption of changes in the oil pipeline regulations.

II. FORM FOR CITATIONS

In Order No. 289,¹ the FERC adopted *A Uniform System of Citation*,² “as its official citation manual.”³ The Commission did not permit “the use of any of the several citation forms discussed in Rule 1 of the *Uniform System*,” but adopted “only the form for law reviews, and specifically excepts Rule 1.1 (which applies to briefs and legal memoranda).”⁴ The Commission encouraged the use of parallel citations,⁵ and gave

¹*Rules of Practice and Procedure: Citation Form*, 48 Fed. Reg. 17,066 (1983) (Order No. 289, Docket No. RM83-58-000), published in *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,439 (1982).

²The Harvard Law Review Association. *A Uniform System of Citation* (13th ed. 1981). This publication is known, and referred to herein, as the “Blue Book.”

³48 Fed. Reg. 17,066, 17,067; Order No. 289, slip op. at 1.

⁴48 Fed. Reg. 17,066, 17,067; Order No. 289, slip op. at 4. This form may not be the most desirable form. “[T]he typeface conventions for law review footnotes are more complex than those for briefs, memoranda, and law review text. . . .” Blue Book at 3, Rule 1 (Introduction and Typefaces). This complexity caused the Commission to state that, for purposes of Rule 1.3, “ordinary roman type should be used.” 48 Fed. Reg. 17,066, 17,067 n.5; Order No. 289, slip op. at 4 n.5.

Moreover, unlike most briefs, memoranda, and court opinions (including those of the Supreme Court), “[l]aw review text contains no citations.” Blue Book at 5, Rule 1.2. Does this mean that all citations in pleadings filed with the Commission must be in footnotes? The rule is not clear, but the examples imply that that is preferred. 48 Fed. Reg. 17,066, 17,067; Order No. 289 at 4-5. Commissioner Richard, however, states that the Commission “do[es] not expect strict compliance with the blue book,” but expects full citation to legal authorities. 48 Fed. Reg. 17,066, 17,068; Order No. 289, Richard, Commissioner, concurring at 2. This includes subsequent history including reversals and modifications. *Id.* at 1 n.5. The writer should use his own judgment on this issue. For example, short citations could be placed in the text, while long string citations should be in footnotes.

⁵Parallel citations may be required in many instances because the *FERC Reports*, published by the Commerce Clearing House, are not yet readily available to the general public and to many practitioners before the Commission. 48 Fed. Reg. 17,066, 17,067; Order No. 289, slip op. at 2-3. Also, there is the delay between issuance and publication.

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"examples of correct footnote citations for Commission documents."⁶

The organization of the *FERC Reports* also causes some citation problems. Like other CCH publications, *FERC Reports* designates cases by paragraph numbers as well as page numbers. The Commission recommends that orders be cited as follows:

Louisiana Gas System, Inc., 22 FERC ¶ 61,308 (1983).

What do you do if you want to cite to a particular point discussed in an order? For example, *Louisiana Gas System* discusses transportation versus gathering at pages 61,534 and 61,535; the footnotes are on pages 61,536. The suggested Commission form is:

Louisiana Gas System, Inc., 22 FERC ¶ 61,308, at pages 61,534-61,535 (1983).

This form gives both the page and paragraph numbers for an order or opinion.

The adoption of a standard citation form was long overdue. The particular rules adopted by the Commission, however, may not be the most desirable. That matter and the organization of the *FERC Reports* should be reviewed further. Some suggestions for minor modifications have been set forth above.

II. RULES OF PRACTICE AND PROCEDURE

A. *Reconsideration of Initial Decisions.*

In Order No. 375,⁷ the Commission amended its Rules of Practice and Procedure to require the filing of motions for reconsideration of initial decisions in designated electric rate cases as a prerequisite for seeking judicial review of those decisions. The purpose of this rule is to allow correction of initial decisions in certain cases before the Commission reviews those decisions and to enable the Commission, in many cases, to adopt summarily those decisions.

Under the new rule, the Commission or the Chief Administrative Law Judge will designate those electric rate cases, or phases thereof, which are subject to the new procedures. Rule 717(b), 18 C.F.R. § 385.717(b). These designations will be made only in those cases, or phases thereof, that do not involve major policy issues. The Chief Administrative Law Judge may designate any case pending at the issuance of the rule in which an initial decision has not been issued as subject to the new procedures. Rule 717(b)(2)(iii), 18 C.F.R. § 385.717(b)(2)(iii).

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In addition, where the *FERC Reports* refers the reader to the *FERC Statutes and Regulations* for full text of an order or opinion, the citation to the publication in which the full text appears should be used. This is a case where revision of the *FERC Reports* would be desirable. The full text of rulemaking orders (including the text of new or amended regulations) should be published in the *FERC Reports*. Presently, the Federal Register is the only source for the full text of rulemaking orders; *FERC Statutes and Regulations* publishes only the preamble to the rule. Like the former Federal Power Commission, the Commission should publish the full text of its rulemaking orders in the regular reports. This would eliminate some of the present confusion.

⁶48 Fed. Reg. 17,066, 17,067; Order No. 289, slip op. at 4-5.

⁷*Rules of Practice and Procedure: Reconsideration of Initial Decisions*, 49 Fed. Reg. 21,312 (1984).

Once an initial decision is issued in a designated case, the parties have thirty days to file motions for reconsideration. Rule 717(c), 18 C.F.R. § 385.717(c). Replies to motions for reconsideration are due twenty days after the date for filing motions for reconsideration. Rule 717(c), *supra*.

The presiding administrative law judge must issue a revised initial decision within thirty days after the last pleading is filed. Rule 717(d), 18 C.F.R. § 385.717(d). The Chief Administrative Law Judge may extend this time due to exceptional circumstances. Rule 717(d), *supra*.

Any party not satisfied with the revised initial decision may file a brief on exceptions within twenty days of the issuance of the revised initial decision. Rule 717(f)(1), 18 C.F.R. § 385.717(f)(1). Briefs opposing exceptions are due ten days after the filing of briefs on exceptions. Rule 717(f)(2), 18 C.F.R. § 385.717(f)(2).

The briefs on exceptions and replies may not contain matters not previously raised in a motion for reconsideration or reply. Rule 717(e)(2), 18 C.F.R. § 385.717(e)(2). New matters, however, may be raised where the revised initial decision contains new findings. Rule 717(e)(2).

This rule is effective for only two years. Rule 717(g), 18 C.F.R. § 717(g). The Commission plans to review this rule before it expires to determine if it should be continued.

B. Revisions To the Rules of Practice and Procedure

In Order No. 376,⁸ the Commission (1) amended various provisions of the Rules of Practice and Procedure; (2) made final, without significant change, the rules governing interpretations under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301, *et seq.*; and (3) republished in Title 18 of the Code of Federal Regulations certain regulations governing oil pipeline proceedings. None of these amendments significantly change Commission practice or procedure.

The Commission has eliminated Rule 212(d), 18 C.F.R. § 385.212(d), regarding "motions to the Commission during a hearing." The Commission concluded that any motions made during the course of a hearing are covered by other procedures. *E.g.*, Rules 710 and 715, 18 C.F.R. §§ 385.710, 385.715. In part, the elimination of Rule 212(d) is designed to ensure that either motions are made under procedures or are considered by an administrative law judge before being considered by the Commission.

The Commission amended Rule 213(a)(2) to specifically stipulate that responsive pleadings may not be filed unless the party is given permission to file such responsive pleadings. In some cases, parties had been filing responses to protests, answers, motions for oral argument and requests for rehearing. The Commission expressed concern that its proceedings may become unduly complicated and burdensome. The prohibition of unpermitted responsive pleadings was, therefore, made explicit.

The Commission amended Rule 214(d) which sets forth the criteria to be applied in determining whether to grant late intervention. The Commission added as a criterion whether "the movant's interest is adequately represented by other

⁸*Clarification of the Rules of Practice and Procedure: Establishment of a Final Rule on NGPA Interpretations*, 49 Fed. Reg. 21,701 (1984).

parties in the proceedings." This criterion had been listed as one of four factors considered in *Consolidated Gas Supply Corp.*, 20 FERC ¶ 61,305 (1982). Subsequent opinions frequently have cited this criterion even though it was not listed in Rule 214(d) after the 1982 revisions. The amendment, therefore, simply conforms the rules to the current Commission practice and clarifies that adequate representation may be considered when a decisional authority rules on late interventions.

Rule 503 was revised to reflect that, where the Chief Administrative Law Judge decides either to consolidate or to sever proceedings, an interlocutory appeal is available. The preamble to the 1982 Rules (42 Fed. Reg. 19,018) indicated that interlocutory appeal of such decisions was available; however, the actual rule had not stated this fact.

The Commission amended Rule 710, governing motions for waiver of an initial decision from a presiding officer, and established a 30-day time limit in which the Commission may grant a motion in which fewer than all participants join. Generally, where all participants join in the motion for waiver of the initial decision, the motion is granted under Rule 710 unless the Commission denies the motion within 10 days. Where fewer than all participants join, however, a 30-day time period in which to grant the motion was derived from Rule 212(d). Because the Commission is deleting Rule 212(d), the 30-day period was incorporated into Rule 710.

In order to expedite agency proceedings, the Commission amended Rule 715 to impose a 15-day time limit in which parties must file any motions to permit interlocutory appeals to the Commission from a ruling by the presiding officer. This time parallels the time now allowed by the rule for presiding officers to issue an order on the motion for an interlocutory appeal. 18 C.F.R. § 715(b)(6) (1983).

The Commission announced its intent to revise Rule 1902 with respect to requests for rehearing of an action of staff. Rule 1902 states that parties may appeal delegated staff actions to the Commission and that staff actions are final in the absence of any appeal. After appeal, a party may seek rehearing of any Commission action pursuant to Rule 713. Rule 1902 is being revised to make clear that a party may request rehearing of an action of staff only if that party or another party to the proceeding has appealed the staff action to the Commission.

The Commission amended Rule 2007 to state that all filings must be made by "the close of business" on the prescribed date. Under the former rule, filings could be made up until midnight; however, no Commission employee would be available to accept the pleading after the close of business. The rule was, therefore, changed by deleting "midnight" and inserting "the close of business" as the time by which filings must be made.

The Commission also added a new rule (Rule 104) to Subpart A. Applicability and Definitions. The rule states the standard rule of legal construction that where the text of a rule conflicts with its caption, the text controls.

The Commission adopted interim Rule 1901, which governed procedures for seeking written interpretations from the Commission's General Counsel construing the Natural Gas Policy Act of 1978 ("NGPA") or Commission rules or orders implementing the NGPA, as a final rule. That rule, promulgated pursuant to Section 502(c) of the NGPA, 15 U.S.C. § 3412(c), was issued on an interim basis in 18 C.F.R. § 1.42 and was transferred to Part 385 in 1982.

The Commission rejected the suggestion of several commenters that a company

that relies on an interpretation by the General Counsel should be immune from civil or criminal liability if the Commission revises or modifies the interpretation. The Commission indicated that it had other procedures available — *i.e.*, interpretative rules or declaratory orders — for those individuals wishing to secure binding Commission decisions interpreting the NGPA.

The Commission also rejected the suggestion that requests for interpretations should be published in the *Federal Register* for notice and comment, stating that (i) the requests are intended to apply only to specific factual situations, (ii) the notice requirements would unduly prolong the procedures and (iii) an individual may request an interpretative rule or declaratory order regarding issues under the NGPA that may recur or may have major precedential effect.

III. FEES

A. Filing Fees.

In Orders Nos. 360 and 361,⁹ the Commission established filing fees for processing certain filings by natural gas producers and pipelines. These rules, which add a new Part 381 to Title 18 of the Code of Federal Regulations, set charges that must be paid by a petitioner upon filing.

For producer filings, the Commission will charge the following fees:

- Review of applications for blanket certificate for small producers under Section 7(c) of the Natural Gas Act (“NGA”), filed in accordance with 18 C.F.R. § 157.40(b): \$800.00;
- Review of applications for producer certificate of public convenience and necessity under Section 7(c) of the NGA; filed in accordance with 18 C.F.R. Part 157: \$1,600.00; and
- Review of changes in producer rate schedules under Section 4 of the NGA, filed in accordance with 18 C.F.R. § 154.94: \$300.00.

Order No. 360, 49 *Fed. Reg.* 5074 (1984).

For pipeline filings, the Commission will charge the following fees:

- Review of tariff filings for general changes in rates and for changes other than rates under Section 5 of the NGA, filed in accordance with 18 C.F.R. § 154.38 or pursuant to approved tariff provisions, orders of the Commission or settlement agreements with the Commission: \$2,000.00;
- Review of tariff filings that track changes in costs under Section 4 or Section 5 of the NGA, filed in accordance with 18 C.F.R. § 154.38 or pursuant to approved settlement agreements with the Commission: \$2,300.00; and
- Review of petitions seeking advance Commission approval of rate treatment of research, development and demonstration (RD&D) expenditures filed in accordance with 18 C.F.R. § 154.38(d)(5): Directly billed.

Order No. 361, 49 *Fed. Reg.* 5083 (1984).

⁹*Fees Applicable to Producer Matters under the Natural Gas Act*, 49 *Fed. Reg.* 5074 (1984) and *Fees Applicable to Natural Gas Pipeline Rate Matters*, 49 *Fed. Reg.* 5083 (1984), published in *FERC Statutes and Regulations, Regulations Preambles* ¶¶ 30.542 and 30.543 (1984).

The Commission stated that the imposition of these fees is authorized by the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a) (1976) ("IOAA").¹⁰ As interpreted by the Bureau of the Budget in 1959, the IOAA allows a reasonable charge to be made to an identifiable recipient who derives a special benefit from a measurable unit or amount of Government service. Bureau of the Budget Circular A-25 at 1-2 (Sept. 23, 1959). "Special benefits" accrue where the government service:

- a. enables the beneficiary to obtain more immediate or substantial gains or values . . . than those which accrue to the general public . . .
- b. [p]rovides business stability or assures public confidence in the business activity of the beneficiary . . . [or]
- c. [i]s performed at the request of the recipient and is above and beyond the services regularly received by other members of the industry or group, or of the general public. . . .

As required by a number of courts that have interpreted the IOAA,¹¹ the Commission justified the imposition of the fees by (i) identifying the service, (ii) explaining why each service benefits an identifiable recipient more than it benefits the general public, (iii) showing that the fee was based on as small a category of service as practical; (iv) demonstrating that direct and indirect costs are incurred in rendering the services, and (v) showing that it set a fair and equitable fee for each service.

Several parties filed requests for rehearing in these proceedings. In Docket No. RM83-25-000 (producer matters) the Commission denied requests for rehearing by Phillips Petroleum Company and by the Pennzoil Company. 49 *Fed. Reg.* 17,435 (1984). Phillips' request also sought clarification on the issue of whether the Commission should only charge one fee for a successor certificate filed with a rate schedule supplement. The Commission stated that it intends to charge only one \$1,600 certificate fee because that fee covers related rate schedule filings as well.

¹⁰The IOAA states that:

[A]ny work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefore such fee, charge, or price, if any, which he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration the direct and indirect costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amounts so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts. . . .

¹¹*See, e.g.*, *National Cable Television Association, Inc., v. United States*, 415 U.S. 336 (1974); *FPC v. New England Power Co.*, 415 U.S. 345 (1974); *Mississippi Power & Light v. NRC*, 601 F.2d 223 (5th Cir. 1979); *National Cable Television Association, Inc. v. FCC*, 554 F.2d 1904 (D.C. Cir. 1976); *Electronic Industries Association of Broadcasters v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976); *National Association of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976).

According to the Commission, this policy would apply also to applications for new service and amendments to existing certificates and the accompanying rate schedules. In RM83-2-000 (pipeline rate matters) the Commission denied requests for rehearing filed by United Gas Pipeline Company and others. 49 *Fed. Reg.* 17,437 (1984).

Phillips has filed a petition for review of Order No. 360 in the United States Court of Appeals for the Tenth Circuit (No. 84-1846). Transcontinental Gas Pipe Line Corporation and the Interstate Natural Gas Association of America have filed petitions for review in the United States Courts of Appeals for the Fifth Circuit and District of Columbia Circuit, respectively (5th Cir. No. 84-4461 and D.C. Cir. No. 84-1260).

B. Fees Relating to Freedom of Information Act Requests and Other Public Information Requests.

In Order No. 369,¹² the Commission amended its regulations governing fees to be charged for searching and duplicating documents requested under the Freedom of Information Act (5 U.S.C. § 552) and the Commission's general regulations on public information. The new regulations amend 18 C.F.R. § 3.8(k) to (1) set fees for microform and hard copy computer printouts; (2) permit the Executive Director to establish minimum fees below which no charges will be collected; and (3) specify that the Commission may select the method of duplication and medium of the duplicated documents. The regulations also amend Section 3.8(b) to clarify that the Commission will charge for copies of public information extracted from all of its computer files.

The amendment to Section 3.8(k)(3)(i) establishes a charge of 10 cents per page for the microform and for the hard copy computer printouts generated by the Records and Information Management System (RIMS). The amendment also eliminates the current blanket waiver for FOIA fee assessments of \$5.00 or less (Section 3.8(k)(4)) and provides, instead, that the Executive Director may set fee thresholds. Because documents are provided over the counter in response to walk-in requests, and because an estimated 90 percent of requests for RIMS documents fall below the \$5.00 threshold, the Commission had recommended that the Executive Director be afforded authority to establish separate standard thresholds in response to differing types of requests.

Amended Section 3.8(i)(3)(iii) states that production of duplicates in a medium other than that preferred by the requestors is permissible and satisfies the Commission's obligation under the FOIA. Finally, the new regulation eliminates from Section 3.8(b) the reference to "magnetic tape" computer files in order to clarify that the Commission may charge for reproducing any computerized documents, including RIMS documents.

¹²*Fees Relating to Freedom of Information Act Requests And to Other Public Information Requests*, 49 *Fed. Reg.* 17,751 (1984), published in *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,555 (1984).

IV. OIL PIPELINE REGULATIONS

A. *Oil Pipeline Subscriber Lists*

On October 5, 1983, Rule 1402, 18 C.F.R. § 385.1402, became effective.¹³ This rule requires oil pipelines to request in writing, no later than December 31 of each year, whether current subscribers and other persons who received any tariffs during the preceding twelve months want to remain on the pipeline's subscriber lists for the pipeline's integrated systems. Subscribers must respond in writing within 30 days of receipt of the request.

The regulations of the Interstate Commerce Commission defined a subscriber as "a party who voluntarily or upon reasonable request is furnished at least one copy of a particular tariff and amendments." 49 C.F.R. § 1300.30(g). Although pipelines were required to notify current subscribers of tariff filings, a person had to specifically request copies of future amendments. Rule 1402 adds the requirement that pipelines survey their current subscribers so as to ensure that all interested parties have an opportunity to receive notice of tariff filings and to request copies of tariffs and amendments.

B. *Oil Pipeline Regulations*

In Order No. 367,¹⁴ the Commission transferred oil pipeline regulations from Title 49 to Title 18 of the Code of Federal Regulations. Before October 1, 1977, the Interstate Commerce (ICC) had jurisdiction over oil pipelines. Sections 306 and 402(b) of the Department of Energy Organization Act (DOE Act), 42 U.S.C. §§ 7155, 7172(b), transferred jurisdiction over the establishment of rates or charges for the transportation of oil by pipeline and the establishment of valuations for oil pipelines to the FERC. After the effective date of the DOE Act, the Commission announced that the regulations in Title 49 C.F.R. relating to the ICC's former jurisdiction over pipelines would remain in effect until modified. Most of these ICC regulations were transferred to Title 18 C.F.R., effective January 28, 1981.

The Final Rule transfers the remaining regulations, as follows:

1. 49 C.F.R. Part 1300 (oil pipeline tariffs), transferred to 18 C.F.R. Part 341;
2. 49 C.F.R. Part 1301 (long-and-short haul and aggregate-of-intermediate rates), transferred to 18 C.F.R. Part 342;
3. 49 C.F.R. Part 1305 (posting tariffs), transferred to 18 C.F.R. Part 343;
4. 49 C.F.R. part 1330 (filing quotations for government shipments at reduced rates), transferred to 18 C.F.R. Part 344;
5. 49 C.F.R. Part 1331 (Section 5a applications), transferred to 18 C.F.R. Part 345;
6. 49 C.F.R. Part 1002 (fees), transferred to 18 C.F.R. part 346;

¹³*Amendment to Notice Procedures and Protest and Intervention Time Limits for Oil Pipeline Tariff Filings*, 48 Fed. Reg. 29,477 (1983), and 48 Fed. Reg. 45,388 (1983), published in *FERC Statutes and Regulations, Regulations Preambles* ¶¶ 30,463 and 30,498 (1983).

¹⁴*Transfer of Oil Pipeline Regulations*, 49 Fed. Reg. 12,898 (1984), published in *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,552 (1984).

7. 49 C.F.R. Part 1010 (competitive bids), transferred to 18 C.F.R. Part 347. These changes will be effective July 2, 1984.

C. ICC Modified Procedures And Ex Parte Rules

In Order No. 376, *supra*, the Commission incorporated into the text of Title 18 the modified procedures applicable to oil pipelines, currently published in 49 C.F.R. §§ 1100.42-1100.52 (1977), and the *ex parte* rules in Appendix C of 49 C.F.R. Part 1100. The regulations from Title 49 were previously adopted by reference in Rule 101(b)(4)(i) and (ii). The modified procedures will be codified as new Sections 385.1401 through 385.1414. The *ex parte* rules for oil pipeline matters will be codified as new Section 385.1415.

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