Report of The Committee On Regulations—Parts II and III of The Federal Power Act

DURING THE YEAR 1979-80 the FERC has been active in rulemaking with several important orders dealing with implementing programs mandated by the Public Utility Regulatory Policy Act (PURPA) and notices of proposed rules in areas such as rate filing requirements, price squeeze and the calculation of cash working capital. Otherwise, rate cases have brought forth a number of opinions dealing with usual rate case issues, plus the troublesome issue of price squeeze. The issue of CWIP also remains important with several decisions by Administrative Law Judges awaiting Commission action. In the courts there have been a number of proceedings in various circuits on the propriety of the Commission's rejection of a surcharge that was claimed to be needed to recover lost revenues in the changeover of purchased fuel adjustment clauses from a past period to a current basis. After several decisions which seemed to provide a conflict among circuits, it now appears that the Commission has explained itself to the satisfaction of the courts and certiorari has been denied by the Supreme Court. Other court proceedings have included approval of the MAPP coordinating agreement and a *Mobile-Sierra* interpretation.

Because of the deadline necessitated for publication of committee reports in the Association's Journal, the coverage of this report will be truncated to the period May 1979 through February 1980.

I. Rulemaking

There follows a list of rules and rulemaking proceedings that are pertinent to the Commission's regulation of Titles II and III of the Federal Power Act:

1. Order No. 32 issued June 13, 1979 and Order No. 32-A issued August 13, 1979 in Docket No. RM 78-16 prescribing procedures for the submission of settlement agreements.
2. Interim regulations issued June 15, 1979 in Docket No. RM79-52 prescribing procedures to be followed and requiring a report as to procedures in the event of a shortage of electric energy and the current likelihood of curtailments.
3. Order No. 37 issued June 28, 1979 in Docket No. RM79-10 prescribing methods for determining power plant design capacity.
4. Order No. 38-B issued January 23, 1980 in Docket No. RM79-59 amending rules relating to the delegation of Commission authority and delegating to the Director of the Office of Electric Power Regulation authority to grant exemptions, extensions and withdrawal petitions with respect to the data to be filed by electric companies pursuant to Section 133 of PURPA. In connection with this authority, a number of such applications have been filed with the Director.
5. Order No. 39 issued August 2, 1979 in Docket No. RM79-61 prescribing amendments to the notice requirements of the Federal

Power Act in accordance with Section 207(a) of PURPA, which extended the notice requirements for electric rate filings contained in Section 205(d) of the Federal Power Act from thirty days to sixty days.*

6. Order Nos. 47, 47-A and 47-B issued September 10, 1979, November 8, 1979 and December 26, 1979, respectively, providing that the rate of interest on refunds shall be tied to the prime rate.
7. Order No. 48 issued September 28, 1979 and Order No. 48-A issued January 4, 1980 in Docket No. RM79-6 prescribing procedures governing the collection of data associated with the cost of providing service as required by Section 133 of PURPA.
8. Order No. 57 issued November 8, 1979 in Docket No. RM80-5 revising the reporting of salaries of officers and directors by raising the minimum reporting salary to $50,000 and by limiting the definition of whose salary is to be filed principally to policymakers.
9. Order No. 61 issued December 6, 1979 in Docket No. RM79-25 revoking Section 2.14 of the rules to eliminate the need to report conservation measures.
10. Order No. 67 issued January 21, 1980 in Docket No. RM80-9 amending Section 46.3 of the rules with respect to interlocking directorates to reflect the amended requirements of Section 211 of PURPA.
11. Order No. 69 issued February 19, 1980 in Docket No. RM79-55 regarding rates and exemptions to be applicable to Small Power Production and Cogeneration Facilities pursuant to Section 210 of PURPA.

In addition to the above actions amending and supplementing FERC rules, there are a number of important rulemaking proposals now pending before the Commission. These include a proposal for revising the Commission's rate filing rules which was the subject of a Notice of Proposed Rulemaking issued February 15, 1980 in Docket No. RM79-64. This notice followed the release of a preliminary staff draft of an amended Section 35.13 dated August 27, 1979.

There are also before the Commission proposed rules on price squeeze issued on November 19, 1979, including a proposed procedural rule in Docket No. RM79-79 and a proposed substantive rule in Docket No. RM79-80. Additionally, on June 7, 1979 the Commission issued a Notice of Proposed Rulemaking in Docket No. RM79-49 on the calculation of the cash working capital allowance for electric utilities. Another important pending rulemaking involves tax normalization for deferred taxes. On June 8, 1979 the Commission issued an order in Docket Nos. R-424 and R-446 establishing interim procedures pending further action on the D.C. Circuit's remand of Order

*The Chairman of the Commission also responded to the requirement of a study of Commission procedures set forth in Section 205(b) of PURPA, with a report to Congress dated January 23, 1980, entitled "Decisional Delay in Wholesale Electric Rate Increase Cases: *Causes, Consequences and Possible Remedies.*"

No. 530-B. *Public Systems et al* v. *FERC,* ______ F.2d ______ (D.C. Cir. February 16, 1979, *reh. denied,* March 30, 1979).

II. Rate Case Issues

A. *The Mobile-Sierra Doctrine*

In Opinion No. 31-A, *Missouri Power & Light Company,* May 16, 1979, the Commission held that contract language providing that rates may be changed only with the approval of the appropriate regulatory agency having jurisdiction provides only for a change in rates prospectively, and the ALJ properly excluded testimony that would have been necessary under the *Mobile-Sierra* burden of proof.

The Commission rejected rate changes with respect to two out of eight customers since those customers were being served under fixed rate contracts with fixed terms and no reservations of the power to unilaterally change the rates. But as to the other six customers, there was no *Mobile-Sierra* ground for rejecting the utilities' filing. *Missouri Public Service Company,* Docket No. ER80-108, January 22, 1980.

In an order issued October 12, 1979 in *Central Power and Light Company,* Docket No. EL79-26, the Commission held that an adjustment to a demand charge to reflect changed investment in steam generating and transmission facilities is not a changed rate since it was prescribed by a formula. A change in the formula, however, would have been a change in rate. Nevertheless, the Commission ordered the utility to support its latest demand charge by a showing of the rate of return earned thereunder.

Subsequent to the expiration of a fixed rate contract, (1) the filing of an unexecuted service agreement, (2) the Commission's acceptance of that service agreement for filing, and (3) the taking of service under the applicable rate schedule all act to bind the customer and the utility to the terms of the service agreement under the filed rate doctrine. *Missouri Utilities Company,* Docket No. ER79-642, et al., January 16, 1980.

In an order on remand directing the refund of rate increase payments, issued January 9, 1980 in *Illinois Power Company,* Docket No. E-9520, the Commission required refunds in the situation where it had erroneously rejected customer arguments that they had fixed rate contracts and were thus protected from rate increases under the *Mobile-Sierra* doctrine, Rehearing Granted for Reconsideration, March 7, 1980.

B. *Test Period*

The Commission explained the FPC's past references to "productivity" and "productivity offsets." These have been used to characterize attempts to match salary levels with corresponding sales and revenues during the same period. When examining requested wage adjustments, possible changes in energy sales must also be considered. Opinion No. 31-A, *Missouri Power & Light Company,* May 16, 1979.

In Opinion No. 53, *Boston Edison Company,* July 31, 1979, the Commission held that where a proposed rate increase is less than one million

dollars, Period II data is not required to be filed by Order No. 487 and the test period is not specified. In this instance, the Commission used a test period applicable prior to Order No. 487 of twelve months actual plus eight months of known and measurable changes.

In Opinion No. 55, *Southern California Edison Company,* August 1, 1979, the Commission held that where actual experience overtakes Period II estimates, the estimates can be challenged on the basis that (1) they were not reasonable when made or (2) they were substantially in error because of not reasonably foreseeable events, citing Opinion No. 783-A, *Public Service Company of Indiana, Inc.,* February 25, 1977, *aff'd,* 575 F.2d 1204 (7th Cir. 1978). In this case the Commission held that a load factor decrease from 66.6 percent estimated to 64.8 percent actual did not require an adjustment since the lower figure was based on recent trends and the higher figure is significantly higher than that experienced in recent years and is expected to decrease.

In Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979, the Commission affirmed the ALJ's exclusion of post-test year wage and salary increases in accepting post-test year adjustments to a tax deduction and accumulated deferred taxes. Although Period II regulations provide that there should be no adjustments except in the area of rate of return, the adjustments in question represented timing differences between book and tax accounting and refunds had been received from the Internal Revenue Service. Under these circumstances, it was held that the changes adjusted the actual test year data to reflect the company's intended tax deductions which were applicable to current year tax accounts.

C. *Expenses*

The Commission reversed the ALJ's decision holding there to be a need for an investigation of the prudence of utility management. It held that the ALJ's decision was based solely on relatively high operation and maintenance expenses and the need for the investigation had not been adequately established. Opinion No. 75, *Central Illinois Public Service Company,* February 21, 1980.

In Opinion No. 53, *Boston Edison Company,* July 31, 1979, the Commission reversed the ALJ's decision which had adopted nuclear maintenance expenses found by the Massachusetts DPU. These included start-up costs after the unit was shut down to determine the possible need for repairs. The Commission held that such expenses were not necessarily abnormal and are of a recurring nature, but they cannot be expected to occur every year. The Commission instead used an average of two years' expenses exclusive of warranty payments. In Opinion No. 53, the Commission also determined regulatory expenses on the basis of a three-year amortization in accordance with its prior determination as to Boston Edison in Opinion No. 809.

The Commission in Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979, refused to adjust the utility's production expenses downward to reflect the operation of nuclear units at less than a 70% capacity factor. It held that 70% had not been shown to be "normal" and nuclear units

frequently operate at less than 70% during the early years of operation. Additionally, there was no showing of imprudence in building nuclear units from the proper prospective of when the decision was made rather than hindsight.

Intervenor cities had proposed to eliminate abandonment losses from Edison's administrative and general expense account. The Commission held that in such instances the utility must first prove that the abandonment was prudent. The Commission is then concerned with whether it is an atypical expense that should not be perpetuated in the Company's test year cost of service. The Commission affirmed the ALJ's decision as to two projects, one of which the ALJ found should not be written off. In that instance, the Commission stated that Edison did not come forward with specific evidence justifying the write-off but merely presented vague generalizations about problems inherent in building all projects. As to the other project, the Commission agreed with the ALJ that the prudency of the write-off was not in dispute and the loss was not atypical. Opinion No. 62, *Southern California Edison Company,* August 22, 1979.

The Commission held that the utility had not borne its burden of showing that a fixed rate contract to sell at retail to a state agency was related to a fixed rate purchased contract under which low cost energy was purchased and sold systemwide to wholesale and retail customers. Hence, losses from the retail fixed sales contract should not be offset proportionately by benefits of the inexpensive energy purchase to both wholesale and retail customers. Instead the losses should be borne wholly by retail customers. Opinion No. 55, *Southern California Edison Company,* August 1, 1979.

D. *Rate Base*

The Commission refused to find that excess generating reserves were the result of imprudent management decisions in past years and rejected an intervenor argument that overcapacity should be normalized because experience in the test year was atypical. It distinguished atypical events such as a breakdown of units or a strike from the use of test year data which is to determine a relationship that will prevail over a period of years. In such an instance, there may be spare capacity at the beginning of the cycle but this is not atypical. Opinion No. 63, *Commonwealth Edison Co.,* September 14, 1979.

Another Commission holding with respect to rate base involved the cancellation of the Salem Harbor No. 5 project in Opinion No. 49, *New England Power Company,* July 19, 1979. The Commission denied rate base treatment for costs already expended in the project, but allowed a five-year amortization of those costs through the cost of service. The amortization is to be of the entire 13 million dollar gross amount of the loss rather than $7.063 million which takes into account the offsetting tax reduction. Also the amortization will be of the total investment including that related to 25% of capacity that was to be sold to other utilities. In so holding, the Commission stated that unless security holders are shielded, risk of loss must be

borne by the ratepayers directly through the cost of service or indirectly through the rate of return.

With respect to another aspect of rate base, the Commission in Opinion No. 54, *Alabama Power Co.*, August 1, 1979, reversed the ALJ and adopted an average of 13 months experience in determining the rate base rather than the utilities' proposal for an average of the plant in service as of the beginning and the end of the period. In so holding, the Commission said that the utility has the burden to show that the rate base is not distorted by treating new plant items as useful for longer than is actually the case.

E. *Construction Work in Progress*

In a news release of December 11, 1979 pertaining to an ALJ's decision denying CWIP in Docket No. ER77-533, *Louisiana Power & Light Company*, it was noted that this was one of three cases in which ALJ decisions on the issue are pending. In *Public Service Company of New Hampshire*, Docket No. EL-78-15, the ALJ granted CWIP relief, whereas in *El Paso Electric Company*, Docket No. ER77-488 and the aforementioned *Louisiana Power & Light Company*, CWIP relief was denied.

CWIP is also pending before the ALJ in *Public Service Company of New Mexico*, Docket No. ER78-337. In an order issued December 18, 1979, in *Public Service Company of New Mexico*, Docket Nos. ER79-478 and ER79-479, the Commission denied rehearing as to its rejection of tendered CWIP rates, stating that if the request for CWIP in the proceeding now before the ALJ is granted by the Commission, the utility could file modified rates based on full CWIP without a *de novo* showing of financial distress. Absent a final decision in the pending docket or a *de novo* showing in the current filing, however, the rejection of the CWIP rates was proper.

F. *Working Capital*

In *Southern California Edison Company*, Opinion No. 62, August 22, 1979, the Commission stated that it generally applies the one/eighth formula but had recently held that this is not unassailable based on a reliable lead-lag study, citing Opinion No. 19-A, *Carolina Power & Light Company*, February 21, 1979; Opinion No. 49, *New England Power Company*, July 19, 1979, and Opinion No. 55, *Southern California Edison Company*, August 1, 1979. The Commission affirmed the ALJ with respect to the exclusion of non-cash items, the calculation of average days lag for the resale class only, the rejection of an adjustment for purchased power in which the only prepayments included were for nuclear fuel, and the rejection of lag for fuel oil expense where fuel oil inventories in the rate base had been reduced for unpaid invoices.

The Commission again cited Opinion No. 19-A, *Carolina Power & Light Company* for the proposition that 45 days is not unassailable and lead-lag studies will be considered. Noncash items should be excluded entirely rather than included at zero lag. The Commission also held that there is no reason to reduce working cash allowance by amounts representing credit extended by trade creditors. It was also proper to use lag in receipts applic-

able to the resale class rather than the company as a whole. The availability of tax accruals was not reached as a separate item as they were reflected in the expenses in the lead-lag study. Opinion No. 55, *Southern California Edison Co.,* August 1, 1979.

In Opinion No. 53, *Boston Edison Company,* July 31, 1979, excess interest was eliminated from working capital but a 10% carrying charge was allowed on it.

G. *Rate of Return*

In Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979, the Commission affirmed the Administrative Law Judge's findings of a 13% return on equity and 8.89% overall. In so doing, the Commission rejected the notion that more than a fair share of the costs would be required from wholesale customers unless the return is limited to no more than that earned on non-jurisdictional operations. The Commission must determine independently the just and reasonable rate of return. The Commission also rejected the argument that a low rate of return was warranted because only a small portion of the utility's business is jurisdictional and hence the rate of return could not have measurable effect on the Company's position in the financial community.

The Commission affirmed the ALJ's grant of 12.7% on equity (ratio: 36.96%) and rejected the utility's claim that 15% is needed to maintain an AA rating. It indicated that decisions of the California Public Utilities Commission are more likely the cause of fears of a reduced rating. The Commission also rejected the claims of intervenors that there has been too much reliance on staff testimony and recent Commission decisions. Instead, the Commission held there is ample market evidence and low weight given to the DCF analyses appears warranted by the deficiencies pointed out in the ALJ's decision of December 1, 1978. *Southern California Edison Company,* Opinion No. 62, August 22, 1979.

In Opinion No. 55, *Southern California Edison Company,* August 1, 1979, the Commission permitted updating of the utility's capital structure beyond the test period since the update was presented and examined at hearing. Also, as to capital structure, in accordance with Opinion No. 12, *Minnesota Power & Light Company,* April 14, 1978, the Commission held that deferred taxes should not be included in the capitalization at zero cost but should be reduced from the rate base. A 13% equity allowance (ratio: 35.22%) was adopted, and a DCF analysis was rejected as being biased toward low-growth years, failing to reflect how growth rates were calculated and utilizing data that are not current. The Commission also took note of stock market conditions in effect during the locked-in period.

The Commission allowed 13% on equity (ratio: 31.1%) and 9% overall and rejected an intervenor computation based on a risk premium for Southern Services in comparison with the return on comparatively riskless long-term government securities. The Commission held that realized rates of return over an extended historical period have little relationship to investor future expectations and rates of return have varied greatly in the 23-year

period chosen by the intervenor witness. Instead, the record suggests increased risks resulting from decreasing price-earnings ratios, an increase in AFUDC in net income and lowered interest coverages. Opinion No. 54, *Alabama Power Co.,* August 1, 1979.

In Opinion No. 53, *Boston Edison Company,* July 31, 1979, as to capitalization, the Commission rejected staff objections to including refunds in equity, but adopted staff's position that investment in a joint venture in nuclear plants should not be included in equity. Respecting common equity, the Commission affirmed the ALJ's rejection of a statistical model determining return, but disagreed on the ALJ's rejection of a DCF analysis. The Commission relied, however, on the ALJ's analysis of the staff witness and on a comparison of risk and financial conditions cited in Opinion No. 768, *Nevada Power Company.* These included the impact of AFUDC. Based on this analysis the Commission adopted 14% on equity (ratio: 29.44%) and an overall return of 9.5%. Deferred taxes were removed from capitalization and deducted from rate base.

In Opinion No. 49, *New England Power Company (NEP),* July 19, 1979, the Commission held that the allowance on common equity was the most significant issue in determining rate of return and analyzed the presentations of seven witnesses. It also discussed in some detail the relationship and rates of return appropriate to the New England Electric System (NEES) and NEP's investments in the Yankee Nuclear plants and in its other operations. The equity allowance was fixed at 13.12 percent rather than the 13.5 percent found by the ALJ. The Commission found that regression analysis is a valid technique of statistics that is frequently ignored in forecasting; however, equity return estimates are not a purely forecasting exercise. A DCF analysis was found to be helpful and to provide a yield of 8.8% and a growth of 3.2 to 4.1%. This was stated to be corroborated by comparative earning studies and risk analyses to provide 12.75% for NEES during the locked-in period. Allowing 12.75% for NEES (ratio: 31.82%) which is a proxy for NEP, amounts to 13.12% on NEP's operation after giving effect to the 10% it earns on its Yankee investments, based on the less risky cost of service tariff.

As to capital structure, the Commission in Opinion No. 49 affirmed the ALJ on the cost of long-term debt, but modified the ALJ's decision as to NEP's equity investment in the Yankee Company and the source of NEP's equity. It held that NEP's equity investment should be deducted from its common equity component in the capital structure rather than only from undistributed earnings in the capital structure. The ALJ had determined that 62% of NEP's investment should be deducted from equity and 38% from preferred. The Commission also rejected the intervenors' proposal to adjust NEP's capital structure to reflect NEES's debt where the intervenors claimed there to be double leverage. The Commission held that use of the subsidiary's capital structure is preferable where it will produce a reasonable end result.

H. *Tax Issues*

In Opinion No. 73, *Public Service Company of New Mexico,* January

17, 1980, the Commission rejected a decision of the ALJ that would have allowed in the test period a reduction in the Federal corporate income tax rate from 48% to 46% when legislation reducing the rate was enacted subsequent to the test year. The utility had also argued that if the reduced tax rate were allowed the increase in FICA taxes during 1979 should also be allowed. In reversing the ALJ, the Commission cited its decision in Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979, where the Commission had adjusted actual test year data to reflect the utility's intended tax deductions that would reflect refunds from the IRS and an allowance of certain claimed deductions on the utility's amended returns. See also as to the change in tax rate from 48% to 46% *Virginia Electric and Power Company,* Docket No. ER78-522, January 22, 1980.

In Opinion No. 73, the Commission followed opinion No. 19, *Carolina Power & Light Company,* August 2, 1978 and held that the accumulated deferred income tax credit (ADITC) should be reflected proportionately in the capital structure and that the return allowed on ADITC should be measured by the overall rate of return rather than the higher common equity rate of return. The Commission ruled similarly with respect to the 6% investment tax credit (ITC) of the Tax Reduction Act of 1975 in Opinion No. 62, *Southern California Edison,* August 22, 1979. See also order issued December 18, 1979 in *Public Service Company of New Mexico,* Docket No. ER79-478 and ER74-479.

In Opinion No. 62, *Southern California Edison Co.,* August 22, 1979, as well as in Opinion No. 54, *Alabama Power Co.,* August 1, 1979, the Commission ruled that in view of the D.C. Circuit's remand of *Public Systems* v. *FERC,* it would review its Order No. 530-B, but pending its determination upon such review and subject to possible refunds upon its final determination it would permit the utility to retain a portion of its rate increase reflecting the effects of tax normalization of timing differences. See also Opinion Nos. 75 and 76 *Central Illinois Public Service Co.,* February 21, 1980; Opinion No. 31-A, *Missouri P & L Co.,* May 16, 1979.

In Opinion No. 54, *Alabama Power Co.,* August 1, 1979, and also in Opinion No. 55, *Southern California Edison Company,* August 1, 1979, the Commission ruled that it would follow Opinion No. 47, *Columbia Gulf Transmission Corp.,* July 2, 1979 (*appeal pending, City of Charlottesville* v. *FERC,* CADC No. 80-1175), with respect to the treatment of consolidated tax returns, *i.e.,* permitting a utility to charge the statutory tax rate despite having a lower effective tax rate.

The Commission in Opinion No. 55, *Southern California Edison Company,* August 1, 1979, expanded on the ALJ's decision to point out that since Edison uses a net of tax allowance for AFUDC, it is not necessary to set aside deferred income taxes related to the interest component of the AFUDC rate. The Commission also noted that a net of tax AFUDC is permissible in complying with the Order No. 530 series, but Edison will be required to recompute a net of tax AFUDC rate in accordance with Order No. 561, February 2, 1977. In another AFUDC ruling, the Commission reversed the ALJ's "flow through" of AFUDC interest deductions to ratepayers on a cur-

rent basis. Intead, it approved of the utility's method of normalization which appeared to fall within the net of tax method allowed by the Order No. 530 series. Also this method is apparently acceptable to the Illinois Commerce Commission. The Commission affirmed the ALJ, however, in holding that the utility failed in its burden of proving the derivation of $13.7 million deferred tax figure and instead adopted the staff's figure of $9.3 million. Opinion No. 75, *Central Illinois Public Service Company,* February 21, 1980.

In Opinion No. 76, *Central Illinois Public Service Company,* February 21, 1980, the Commission distinguished Opinion No. 75 as to the proper level of the deferred tax account because the staff and intervenors had in the Opinion No. 75 proceedings specifically objected to the Company estimate whereas they did not in the Opinion No. 76 proceeding. The issue here is more one of whether the utility should be allowed to normalize at all. In this regard, the Commission held that the utility had sought normalization and had followed Order No. 530-B and therefore it should be allowed to do so. The Commission also decided as to Opinion No. 76 that there was no need to reach the question of whether a tax adjustment clause in a tariff is just and reasonable, since it was not triggered during the one-year locked-in period covered by the case.

In a further ruling on the issue of taxes, the Commission excluded Federal taxable income to be used in the calculation of taxes related to a generating credit for an integrated facilities arrangement. In this instance, intrastate purchasers served by the other party to the arrangement had benefitted from tax normalization prior to the arrangement, but the interstate purchaser would be bearing the burden once the cross-over point was reached. Although the utility argued that it should recoup the appropriate portion of the tax expense allocated to its wholesale customers and the State Commission as affirmed by the State Supreme Court had taken this approach, as had the ALJ, the Commission held that it is inappropriate for interstate wholesale customers to be burdened now with the additional expense when book depreciation exceeds guideline depreciation, and it would not shift this tax burden to the interstate wholesale customers where it does not belong. Opinion No. 49, *New England Power Company,* July 19, 1979.

In Opinion No. 54, *Alabama Power Co.,* August 1, 1979, the Commission affirmed the ALJ in its holding that the computation of a tax deduction related to interest should be related to the debt cost used in the rate of return calculation and not on estimates or projections for the text year. The Commission similarly synchronized interest expenses for capitalization in determining rate of return in Opinion No. 53, *Boston Edison Company,* July 31, 1979.

I. *Allocation*

In Opinion No. 63, *Commonwealth Edison Co.,* September 14, 1979, the Commission affirmed the ALJ in functionalizing administrative and general expenses on the basis of operation and maintenance salary and wage ratios. In so doing, it rejected the utility's effort to functionalize a portion based on other administrative and general expenses. The Commission held

that unless the utility is prepared to analyze components by accounts individually, a unitary method should be used. Also, a thorough analysis can mean that some A&G expense should not be allocated to the wholesale customers. The Staff has no burden to functionalize, and its method is reasonable while the utility's is open to question. The Commission reversed the ALJ, however, in his use of twelve coincidental peaks. Instead, it held that it could use one or two coincidental peaks based on evidence of low reserves during July and August. It chose to use one coincidental peak and held that the Commission will continue to look to relevant circumstances in such allocations.

In another allocation determination, the Commission reversed the ALJ and held that fuel stocks are energy related in accordance with Opinion No. 19, *Carolina Power & Light Company,* August 2, 1978. It pointed out, however, that fuel handling and storage facilities are demand related. Opinion No. 62, *Southern California Edison Company,* August 22, 1979.

As to the allocation of transmission costs, the Commission adopted the staff's rolled-in method rather than the utility's proposal for an allocation based on variations in the kw level of service. The Commission pointed out prior decisions where it rolled-in transmission costs and noted that the utility's system is well integrated so that customers are served by the system as a whole. Opinion No. 54, *Alabama Power Company,* August 1, 1979.

In Opinion No. 53, *Boston Edison Company,* July 31, 1979, the Commission allocated fuel between steam operations and electric operations based on materials and supplies. It also rejected the use of a minimum of kva and a 92% power factor. Instead it used the kw billing without foreclosing future consideration of the issue. Labor ratios were used in functionalizing general plant in accordance with Opinion No. 20, *Minnesota Power & Light Company,* August 3, 1978. The Commission also allocated costs to three firm service transactions rather than credit to them revenues which may or may not be compensatory.

Despite its use of a single peak day in Opinion No. 63, the Commission used an average of twelve monthly coincidental peaks to allocate demand in Opinion No. 54, *Alabama Power Co.,* August 1, 1979. In so doing, it rejected the average of five highest days of peak demand proposed by the utility. The Commission noted that it has never endorsed a single allocation method and the results depend on the record in individual cases. The Commission also noted that it is not bound to use the same allocation as that of the State Commission.

J. *Rate Design*

In Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979 the Commission adopted a billing demand keyed to summer peaks and providing for a 100% ratchet throughout the year. In so doing, the Commission rejected the utility's proposed 100% summer demand ratchet combined with a 75% 23-month demand ratchet for five full requirement customers. It also rejected the ALJ's 65% summer demand ratchet. The Commission held that keying the billing demand to the summer season peaks

could operate to improve the existing system load distribution and discourage further disproportionate contributions to peak by the intervenor cities. Additionally, the Commission held that its changes in the demand ratchet and in the blocking of the energy charge from five declining energy blocks to a single energy block should be prospective only.

In Opinion No. 62, *Southern California Edison Company,* August 22, 1979, the Commission agreed with the ALJ that the utility had consistently underestimated its future sales volumes, but disagreed that the remedy should be the use of historical sales since there might be an increase in costs and allocation factors may differ. Instead, the Commission required a combining of the utility's R-1 and R-2 rates.

In Opinion No. 49, *New England Power Company,* July 19, 1979, the Commission rejected an intervenor contention that NEP's customers should be broken down into two classes: "high voltage" and "standard delivery point" rather than to include the third class to cover costs of sub-transmission facilities beyond the standard delivery point. The Commission also (1) approved rolling in of all taxes—local, state and federal—rather than to have a franchise tax surcharge applicable to the particular taxing jurisdictions, (2) affirmed the ALJ in using the December coincidental peak power use to develop the CD customers demand requirements while using a different approach to derive total system demands, (3) agreed with the ALJ with respect to determining the transformer discount from costs of an affiliate, and (4) reversed the ALJ as to his treatment of the R-9 settlement with respect to sub-transmission rates.

In Opinion No. 54, *Alabama Power Company,* August 1, 1979, the Commission affirmed the ALJ in adopting high voltage discounts, but provided they should be related to the utility's new rates to be filed in accordance with the Commission's decision rather than the intervenors' proposed rates.

K. *Purchased Fuel Adjustments*

The Commission in Opinion No. 62, *Southern California Edison Company,* August 22, 1979, affirmed the ALJ in rejecting a fuel service charge paid to a wholly-owned subsidiary for exploration and development of fuel resources. It agreed that the projects involved are not currently benefiting ratepayers, and consequently the company is not entitled to earn a current return, *cf.* Order No. 555, (CWIP). The ALJ had also likened the charges to advance payments. The Commission determined, however, that Edison could keep a separate account of deferred costs, and when fuel deliveries commence, jurisdictional costs will be considered in determining an appropriate price for the fuel.

Also with respect to the purchased fuel adjustment, the Commission in Opinion No. 62, affirmed the ALJ that a one-month write-off of oil pipeline and storage costs was impermissible under the uniform system of accounts since charges must be based on when the fuel is used rather than a current basis. Additionally, on the basis of its prior decision issued April 26, 1978, in G-8570, the Commission held that only expenses related to the transpor-

tation function and not the storage function should be included in Account No. 151(4) and passed through the fuel adjustment clause.

In Opinion No. 55, *Southern California Edison Company,* August 1, 1979, the Commission treated four elements of the fuel adjustment clause which it had not previously considered with respect to Edison. In so doing it (1) rejected separate loss factors for differing sales voltages as being contrary to its rules and inconsistent with its precedent; (2) rejected the need to reflect changes in the ratio of generation by fuel to total system kwh input between the base period and the current period as being not yet required under Order No. 517; (3) rejected the use of FIFO accounting for off-system sales; and (4) rejected the use of actual data for the Period II test year.

In Opinion No. 54, *Alabama Power Company,* August 1, 1979, the Commission permitted a fuel clause to go into effect even though it had not been filed as a rate schedule, since it was consistent with the Commission's Order No. 517. In adopting such a clause, the ALJ had revised it with a direct fuel credit for energy costs recovered through intersystem sales. The Commission held this to be consistent with Order No. 517 which was designed to provide an incentive to utilities to purchase energy in other than conventional firm power transactions. This is consistent with *Pennsylvania Power & Light Company,* Docket No. ER76-398, January 15, 1979, which additionally held that a utility is not required to update the base rate in connection with the filing of a modified fuel adjustment costs clause. The Commission further held that the correction to the utility's prior filing was proper and although the Commission may not increase the utility rates filed in the proceedings, it may adopt the correction involved in the hearing process in determining any refunds for the locked-in period.

L. *Power Pooling, Interconnection, Wheeling, and Coordination*

In Opinion No. 50, *American Electric Power Service Corporation,* the Commission approved AEP's proposed modification 3 method for calculating the primary capacity equalization charge in AEP's interconnection agreement. The modification was proposed to increase the charge when it became apparent that the desired rotation of surplus generation would not occur and Ohio Power would be surplus while Indiana and Michigan would be deficient for some time. Hence, the existing charges would not reflect a proper sharing of benefits and burdens of generating capacity. The Commission rejected staff's position that charges should be based on the latest units rather than invested cost of all units and staff's further position that rate of return should be based on associated capital costs of the latest units. The Commission also determined that foreign or subsidiary capacity is a member's capacity and guidelines to this effect should be filed; that sales of unit capacity and non-firm sales should be deducted from the selling member's sale; that the Cook nuclear plant should be treated as a steam plant, and there should be a straight split-the-savings arrangement for energy purchases without a 125% out-of-pocket ceiling. In calculating the carrying charge factor, the Commission accepted AEP's unified capital structure, but not its incremental cost of debt and preferred. It adopted a 12.75% return on com-

mon equity, a 9.42% overall return and a 1.37% monthly carrying charge.

In *Southern Company Services, Inc.*, Docket No. ER 80-60, *et al.*, February 29, 1980, the Commission accepted without suspension a rate schedule for a long-term power sale between Southern Company Services and Florida Power Corporation. Nevertheless, it set the proposed rate formula for hearing and provided that any subsequent revision in the capacity charges should be treated as a change in rates. It held, however, that the full filing requirements would be waived on condition that the revisions should be subject to refund pending the proceedings ordered. See also order issued February 12, 1980 in *Southern Services, Inc.*, Docket No. ER80-58.

In an order issued February 21, 1980 in *Northern States Power Company*, Docket No. ER79-616, the Commission denied a motion of the Wisconsin PSC to dismiss the proceeding and granted a request for a joint conference with the South Dakota and Minnesota Commissions. The proceeding involved an amendment to a coordinating agreement filed by Northern States Power, pertaining to the manner in which the companies would share in the expenditure of approximately $80 million incurred in connection with the planned construction and the subsequent cancellation of the Tyrone Energy Park Nuclear Generating Plant.

In an order issued December 21, 1979, in *Florida Power & Light Company*, Docket Nos. ER78-19, *et al.*, the Commission directed the utility to submit a transmission tariff in substitution for a number of individual rate schedules covering its transmission services. On February 6, 1980, the Commission denied rehearing.

In an order issued October 3, 1979 in *Central Power and Light Company*, Docket No. EL79-8 and an order denying rehearing issued February 13, 1980, the Commission in another phase of the far-ranging conflict over whether the Texas Power pool shall be inter-connected with utilities in neighboring states, the Commission denied a request by the Central South West Companies seeking exemption from orders of the Texas Public Utility Commission under Section 205(a) of PURPA. The Commission ruled that Section 205(a) concerned only instances where the Commission would be exempting a utility from constitutionally permissible state regulation. In this instance, it held that there was a restraint on voluntary interstate coordination which has the effect of forbidding this form of interstate trade.

By a declaratory order issued January 23, 1980 in *Municipal Electric Utilities Association*, Docket No. EL79-29, the Commission extended to all customers of the Power Authority of the State of New York (PASNY) its holding of March 28, 1979 in *Village of Penn Yan*, Docket No. EL78-29. In the instant order, the Commission determined that all contracts wich limit a municipal utility's use of power wheeled by New York State Electric & Gas Corporation (NYSEG) to retail service within the municipal utility's border as of the date of the contract are unjust and unreasonable. The Commission also held that any transmission contract which NYSEG has entered into with PASNY customers is subject to Commission jurisdiction and must be filed with the Commission. Also restrictions on the use of wheeled power contained in the contracts are unenforceable.

Another proceeding involving wheeling was instituted by the Commission in an order issued January 7, 1980 in *Buckeye Power, Inc.,* Docket No. EL79-20. In that case, Cincinnati Gas and Electric Company contended that it was willing to provide transmission service to Buckeye to effectuate a sale for resale, but not at the contract rate. The Commission provided for a hearing to enable CG&E to raise any non-anticompetitive reasons at the time of the agreement for restricting the rate to customers. It noted, however, that CG&E will carry a heavy burden of justifying a proposal to charge different rates for what appears to be virtually identical transmission service.

In a proceeding having aspects similar to the *Penn Yan* and the *Municipal Electrical Utilities Association* proceedings, the town of Massena, New York, revived a complaint against Niagara Mohawk Power Corporation and PASNY in Docket No. E95-65. The Commission provided for hearing by an order issued August 1, 1979 and the ALJ issued an order establishing procedures on September 25, 1979. In the Massena case, however, the issue is not a restrictive provision in a wheeling contract, but a situation where there is no obligation to wheel on the face of the contract to Massena. There is, however, an issue of discrimination and the obligation of PASNY under its license for the Niagra Project.

The issue of discrimination may make the Massena case analogous to two proceedings before the Commission on court remand. The cases under remand are *Town of Norwood* v. *FERC,* 587 F.2d 1306 (D.C. Cir. 1978); *Public Service Company of Indiana* v. *FERC,* 575 F.2d 1204 (7th Cir. 1978). *See also Borough of Chambersburg* v. *FERC,* 580 F.2d, 573 (D.C. Cir. 1978). Orders on remand as to *Town of Norwood* and *Public Service Company of Indiana* were issued on August 27, 1979.

M. *Price Squeeze*

In Opinion No. 75, *Central Illinois Public Service Co.,* February 21, 1980, the Commission summarily affirmed the ALJ's decision of July 26, 1979 which found no price squeeze and no discrimination of any kind. The ALJ also found that since there was no price squeeze as to the proposed rates, there could be no price squeeze as to the lower just and reasonable rates that were allowed.

In Opinion No. 63, *Commonwealth Edison Company,* September 14, 1979, the Commission held that the Staff definition of price squeeze as a difference in rate not based on cost was limited, but satisfactory in the instant case because the parties agreed that the question is whether the difference was cost-justified. The Commission further held that the intervenor Cities' showing of comparable billing determinants, though not dispositive of the price discrimination issue, was sufficient to shift the burden to the utility to show that cost differences exist. Differences in load factor and coincidence factors had been shown but they must be quantified to justify rate differentials. As to the utility's showing comparing earned rates of return to demonstrate that there was no discrimination, the Commission held that under a rate of return analysis the relevant question is which retail customers comprise the group for which there is competition, not which group of retail

customers is of like size to wholesale customers. In this case, the Commission found that the competition is for all types of customers served under Edison's Retail Rate 6 and the rate of return comparisons should be made between all customers served under that rate and the customers served under the wholesale rates. The comparison should not be for a selected group of industrials. If the compared rates of return show that the retail earned rate of return is equal or greater than the wholesale, this will be an affirmative defense to price squeeze. If the retail earned rate of return is less than the wholesale, the Commission will decide whether the discrimination is undue. The Commission also affirmed its prior holding that intent is not a factor in price squeeze. Neither is actual injury.

In Opinion No. 63-A, issued November 16, 1979, the Commission defended its determination as being consistent with the *Cities of Batavia et al.* v. *FPC*, 548 F.2d 1056 (D.C. Cir., 1977). The Commission also held that wholesale customers should not be ousted from competition, but they do not have a claim for a rate that permits them to compete for every customer in the area.

Opinion No. 62, *Southern California Edison Company*, August 22, 1979 contains an extensive summary of the price squeeze issue, mimeo pages 23-36, including discussions of the proper rates for comparison, state action exemptions, price discrimination, and competition.

The Commission in Opinion No. 62 also held that a *prima facie* price squeeze case had been made and had not been rebutted; however, it could not tell if price squeeze exists until it examined the compliance filing. The Commission gave the intervenors thirty days after the filing to request a further hearing. In that hearing, there would be no further evidence of a *prima facie* case or rebuttal. It would only determine if there were a disparity in rates and how much.

The Commission also found in Opinion No. 62 that in demonstrating price squeeze, a comparison can be made of wholesale generation and transmission costs with the average retail rate for serving all customer classes with generation and transmission service. This method should not be used exclusively, however, because wholesale customers take at higher voltage levels and incur lesser costs. Also, a comparison of wholesale and retail classes as a whole is not helpful.

The Commission in Opinion No. 53, *Boston Edison Company*, July 31, 1979, rejected a price squeeze argument on the basis that the rates do not show that wholesale and retail rates are comparable and there is no evidence comparing wholesale and retail costs. Also, the rates used are those effective prior to the Commission's action and the intervenors may renew their request after the compliance rates are determined. The Commission further held that there is a rebuttable presumption of competition and the intervenors need not identify specific potential customers who decided not to locate in their community.

In Opinion No. 31-A, *Missouri Power & Light Company*, May 16, 1979, the Commission held that under Section 206 of the Federal Power Act, the period for comparison of wholesale and retail rates is forward-looking

when the wholesale rates go into effect. It also held that even when there is no rate disparity it is necessary to examine costs, and while it would prefer to make a rate-cost comparison on the same time period, under Section 206 the best alternative is a comparison of the currently effective rates with test period costs if there is no reason to believe that retail costs have increased at a significantly greater rate than wholesale costs during the proceeding. As to the evidence in this case, the Commission held that no price squeeze had been established since the wholesale customers bill would have been approximately 20% higher if it had been billed under the retail rate, rather than the wholesale rate found just and reasonable in the proceeding. As to the intervenors argument that the rate disparity in its favor at the time the utility proposed increased rates to its wholesale customers was the result of hard bargaining on its part and it should continue to be rewarded, the Commission found that it was not obliged to maintain a particular competitor by perpetuating the non-cost justified rate differential which favors that competitor.

N. *Miscellaneous*

The Commission denied rehearing on a request for a one-day suspension as to a rate increase to permit the recovery of coal conversion costs. The Commission pointed out that there are other elements in the increase that are questionable and that the utility could have separately stated its coal conversion cost in its application. The Commission then suggested that the utility may supplement its original filing to request an interim increase for the coal conversion facilities along with a request for a waiver of notice. The Department of Energy had supported the recovery of prudent costs for coal conversion but had not suggested any particular mechanism. *New England Power Company,* Docket No. ER80-66, *et al.,* February 13, 1980.

In an order directing compliance issued October 15, 1979 in *Minnesota Power & Light Company,* Docket No. E-8494, the Commission determined that the utility had been billing on the basis of a rider rejected on April 29, 1974. It then ordered the utility to refile its compliance filing based on annual system demand, to develop demand charges using such billing demands, and to refund in accordance with those charges.

In *Nantahala Power & Light Company,* Docket No. ER76-828, November 2, 1979, the Commission designated Aluminum Company of America (ALCOA) a party respondent to a complaint filed against it by the Town of Highlands, North Carolina in Docket No. EL78-18. The Commission found that under Section 301(c) of the Federal Power Act, it may make ALCOA a party by reason of its ownership and control of Nantahala which is a public utility under the Act. Although it recognized that ALCOA appears not to be a public utility and the Commission has not the authority to enforce any remedy directly against ALCOA, it believes that its plenary jurisdiction over Nantahala's wholesale rates is sufficient to protect the interest of that company's jurisdictional customers.

II. Litigation

A substantial portion of the Commission's litigation in the past year

has been a continuation of proceedings first decided in 1978 with respect to the propriety of a surcharge to compensate for revenues claimed to be lost when a utility changes from a purchased fuel adjustment predicated on fuel costs incurred in a prior period to a purchased fuel adjustment based on estimated fuel costs in the current billing month.

The D.C. Circuit joined the Third* and Fourth** Circuits and took a position contrary to the First Circuit*** in affirming the Commission's rejection of surcharges because the fuel adjustment clauses were fixed rate clauses and approval of the surcharges would be retroactive ratemaking. *Public Service Company of New Hampshire* v. *FERC,* 600 F.2d 944, (D.C. Cir. 1979) *cert. denied,* 48 USLW 3387 (1979). In the same opinion, however, the D.C. Circuit reversed the Commission as to the Appalachian Power Company on the ground that the Commission acted summarily without hearing where there was a material issue of fact (*id.* at 956). Subsequently, the First Circuit took the same position as the D.C. Circuit and rejected the surcharge on the ground that in the prior case it decided, *Maine Public Service Company,* the Commission had relied principally on the filed rate doctrine rather than presenting a coherent analysis that led to the principle of retroactive ratemaking. *Boston Edison Company* v. *FERC,* 611 F.2d 8, 10 fn. 4 (1st Cir. 1979).

In *Central Iowa Cooperative et al.* v. *FERC,* 606 F.2d 1156 (D.C. Cir. 1979), the court affirmed the Commission's determination that the Agreement of the Mid-Continental Area Power Pool (MAPP) was discriminatory as to membership criteria, but was acceptable in all other respects. Among the arguments ruled on and rejected by the court were contentions of unlawful price fixing, anti-competitive effect, a failure to establish a fully integrated electric system, and undue discrimination in the Agreement's exclusion of generating systems with only one interconnection and less than a specified level of transmission capability. The court also affirmed the Commission's failure to require pool members to wheel for nongenerating electric systems and the Commission's direction that MAPP participants and the FERC develop a formula for fair compensation to be paid by those unable to reciprocate in kind for transmission service.

The Court of Appeals for the Ninth Circuit in an opinion by Judge Hufstedler affirmed the Commission's requirement that a utility's purchase of an electric transmission line from a railroad upon the railroad's changeover to diesel locomotives should be recorded on the utility's books at the depreciated original cost of $156,117, rather than the purchase price of $3,250,000. The opinion relies on a strict reading of the Commission's uniform system of accounts although it expresses the opinion that the utility's choice was proper and it was penalized by the Commission's accounting regulations. Judge Goodwin dissented on the ground that the Commission should have

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**Jersey Central Power & Light Co.* v. *FERC,* 589 F.2d 142 (3d Cir. 1978) *cert. denied,* 48 LW 3222 (1979).

***Virginia Electric Power Co.* v. *FERC,* 580 F.2d 142 (4th Cir. 1978).

****Maine Public Service Co.* v. *FPC,* 579 F.2d 659 (1st Cir. 1978).

looked to the facts of the case including estimates that the line would now cost $6,000,000 to construct. Also the prior dedication to the public service upon which the accounting treatment was predicated had been by a privately owned railroad to its customers rather than by an electric utility. *Montana Power Co.* v. *FERC,* 599 F.2d 295 (9th Cir. 1979).

Citing *Richmond Power & Light Co.* v. *FPC,* 481 F.2d 490 (D.C. Cir. 1973) *cert. denied,* 414 U.S. 1068, the court held that the contract limitations of the *Mobile-Sierra* doctrine may be properly measured against the level of retail rates regulated by state commissions. In so doing, the court rejected the utility's argument that it was relieved of its obligation to limit its rate increases by reference to the retail rates because its customer had opposed its rate filings at the FERC. The court also affirmed the Commission's fixing of refunds based on the utility's most recently approved retail rate rather than the retail rate in force before the utility initiated its current rate filing. The court noted that the customer did not assert its position in a review of the original filing, but waited until the final rate reduction and refund order. Based on the Commission's broad latitude in fashioning refund orders, the fact that all parties had been somewhat delinquent, and the meandering course of the proceedings, the court held that the Commission acted equitably in providing for refunds. *Wisconsin Electric Power Co.* v. *FERC,* 602 F.2d 452 (D.C. Cir. 1979).

The D.C. Circuit in *Papago Tribal Utility Authority* v. *FERC,* 610 F.2d 914 (D.C. Cir. 1979) affirmed the Commission's denial of a request that a rate increase filing be rejected for failure of the workpapers to demonstrate assumptions and methods of calculating each of the numbers in the filed statements and the workpapers. The court held that at the filing stage the Commission has need only for enough data to make the "first cut" and take the "first look." It is only at the hearing stage that it may inquire into the merits of the rate increase.

Also in the *Papago* case, the D.C. Circuit reversed the Commission's *Mobile-Sierra* determination with respect to a contract provision stating that rates shall remain in effect until changed by the FPC or other regulatory authority, but either party is free unilaterally to take appropriate action before the agency in connection with changes which such party may desire. The court ruled that pursuant to the *Mobile-Sierra* doctrine, a Section 205(d) filing was not authorized. The court held that the reference to freedom to unilaterally take appropriate action connotes merely procedural steps and not the self-effectuation of new rates without express Commission approval. Also in providing that either party may unilaterally take the action, the contract means that the unilateral action must be open to both parties, and there is no way for the consumer to trigger the rate changing mechanism.

In another *Mobile-Sierra* type case, the D.C. Circuit in *City of Oglesby et al.* v. *FERC,* 610 F.2d 897 (D.C. Cir. 1979), reversed the Commission as to its determination that a wholesale contract which referenced to change by state regulatory authority reflected an intent of the parties that rates could be changed unilaterally. The court held that state law is relevant only to the extent intended by the parties, and even when it is mentioned in the contract,

it cannot be lightly assumed it was intended to be made a part of the contract. Even if state law is clearly adopted in the contract, however, it will be considered only when constructing contractual terms that otherwise cannot be deciphered without extrinsic aids.

As to another contract, the court in *City of Oglesby* affirmed the Commission's holding that there was contractual authorization where the contract provided that it ". . . is subject to change, from time to time, by addition, amendment or substitution, all as provided by law."

In *The City of Piqua, Ohio* v. *FERC,* 610 F.2d 950 (D.C. Cir. 1979), the court affirmed the Commission's order waiving its filing rules and permitting a negotiated rate to go into effect prior to the date that the rate was filed. Piqua had argued that the Commission's action was unauthorized by statute, prohibited as retroactive ratemaking, and unsupported by substantial evidence. The court pointed out that the statute allows less than the prescribed notice for good cause shown and rejected the argument that this means less than full notice after the filing and not a retroactive effective data that is prior to the filing. The court held that this literal interpretation was too restrictive and the notice provision should be read to conform to the spirit of the Act. The court also noted that there was no retroactivity since the Commission merely approved a rate change and the effective date agreed upon by the parties. Additionally, there was substantial evidence supporting the Commission's finding of good cause for waiving the notice requirement since (1) the delay was due to an Ohio statutory procedure requiring review of the contract by the City Commission, (2) the effective date had been explicitly agreed upon by the parties, and (3) there had been no objection at the time of the filing.

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