Report of The Committee on Judicial Review

In the area of judicial review of energy-related administrative action, there were significant developments during calendar year 1985 concerning the important role of rehearing requests in establishing the jurisdiction of the reviewing court, and concerning the availability of stays of administrative decisions and other forms of extraordinary relief pending review.

I. Developments Concerning Requests for Rehearing

A. Cities of Campbell and Thayer, Missouri v. F.E.R.C.[1]

In this case, Arkansas Power and Light Co. (AP&L) filed a substantial rate increase in June, 1981 pursuant to Section 205 of the Federal Power Act.[2] Two of AP&L's customers, the Cities of Campbell and Thayer, Missouri, (Cities) intervened and protested the filing, but did not immediately contest AP&L's right to increase its rates unilaterally. The FERC accepted the increase for filing, and suspended its effectiveness for five months on August 28, 1981.

In December, 1981, the Cities moved the Commission to modify the August 28 order and to reject AP&L's rate filing as it applied to them. They claimed in this regard that their contracts with AP&L did not permit the company to make unilateral rate increases, and that AP&L's June 1981 rate filing, therefore, must be rejected under the *Mobile-Sierra* doctrine.[3] The Commission denied the motion and rejected the Cities' *Mobile-Sierra* claim on March 3, 1982.

The Cities filed a request for rehearing of the March 3 order on April 5, 1982, thirty-three days after the March 3 order, which was dismissed as untimely by the Commission on May 5, 1982.[4] On June 4, 1982, the Cities sought rehearing of the May 5 order, urging, *inter alia*, that the Commission grant rehearing or, in the alternative, grant reconsideration of its March 3 order with respect to the *Mobile-Sierra* issue. On July 6, 1982, the Commission reaffirmed its prior denial of rehearing due to the untimeliness of the April 5 rehearing request. It granted reconsideration of the March 3 order, however, stayed that order's effectiveness, and set the *Mobile-Sierra* issue for hearing. The Cities' *Mobile-Sierra* claim was ultimately rejected in an initial decision

---

1. 770 F.2d 1180 (D.C. Cir. 1985).

2. 16 U.S.C. § 824d (1982).

3. The doctrine follows from United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956), where the Supreme Court held that Section 205 of the Power Act does not permit utilities to unilaterally increase their rates where such rate increases are not permitted by the contracts between the utilities and their customers.

4. The rehearing request apparently would have been timely filed on April 2, 1982 but for a word processor breakdown which prevented the pleading from being delivered to the Commission until after 5 o'clock p.m. filing deadline. It was thus officially filed on the next business day, April 5, 1982, 33 days after the March 3 order.

which was affirmed by the Commission in September, 1983. Following the denial by the Commission of the Cities' timely request for rehearing of that order, the Cities petitioned the Court of Appeals for the D.C. Circuit for review.

AP&L, an intervenor in the appellate proceeding, moved to dismiss the petition because of the Cities' failure to file a timely request for rehearing of the March 3, 1982 order, wherein the Commission had first addressed and rejected the Cities' *Mobile-Sierra* claim. The court, however, denied AP&L's motion. It emphasized that "[t]he 30-day time requirement of this statute is as much a part of the jurisdictional threshold as the mandate to file for a rehearing," and indicated that "AP&L's argument would have merit except for the particular circumstances of this case."[5] Here, the court found:

> [t]he dispute over the timeliness of the petition to rehear the March 3, 1982 order . . . is in fact irrelevant to this case, since the controversy was mooted by FERC's July 6, 1982 order.
>
> . . . .
>
> Because the Commission agreed [in the July 6 order] to reconsider its March 3 order and stayed the March 3 order, there was no final appealable order until the Commission finally rejected the Cities' motion to reject AP&L's rate filing on *Mobile-Sierra* grounds. By staying the March 3 order and by granting reconsideration of that *entire* order, the Commission made clear that its administrative decision making process was still ongoing, that no final decision had yet been made, and that no rights or obligations of either party had been fixed or obligations of either party had been fixed for the interim. The March 3, 1982 order therefore was not a final, reviewable order.[6]

Since the Cities had concededly filed a timely request for rehearing of the Commission's September, 1983 order affirming the Initial Decision on the *Mobile Sierra* issue, the court concluded ultimately that:

> . . . this court is not reviewing a final order for which there was no timely Petition for Rehearing. The order for which there was no timely petition, the March 3 order, was not final, and the final order, which issued after the evidentiary hearing, was the subject of a timely petition. Therefore, this court may properly reach the merits of this case.[7]

While the decision in this case seems superficially logical, it raises several interesting questions. Why, for instance, did not the March 3, 1982 order become legally *final* thirty days after its issuance, given that no proper request for rehearing was filed during that period? If that order, which specifically addressed and rejected the merits of Cities' *Mobile-Sierra* claim, did become "final" thirty days after its issuance, why were the Cities not estopped from thereafter continuing to litigate that issue? If, as the Court held, the Commission can render an otherwise "final" order "non-final" by subsequently agreeing to reconsider that order, is there any time limit on this power? Here, the decision to reconsider was issued on July 6, 1982, ninety-five days after April 2, 1982 when the March 3, 1982 order would otherwise have been deemed "final." What if the Commission had waited for six months, or a year, or longer? While the Court did not confront these questions directly in this case, they seem likely to arise in future cases interpreting the *Cities* opinion.

---

5. 770 F.2d at 1183.
6. *Id.* at 1183-84.
7. *Id.* at 1184.

B. Asarco Inc., et al. v. FERC[8]

This case also arose in the context of a *Mobile-Sierra* dispute. It developed as a result of the decision in *Mid-Louisiana Gas Co. v. FERC*,[9] which held that the ceiling prices established under Subchapter I of the Natural Gas Policy Act[10] apply to gas owned and produced by interstate pipelines.

In March, 1982, shortly after the Fifth Circuit's *Mid-La* decision, El Paso Natural Gas Company (El Paso) submitted its regular, semi-annual purchased gas adjustment (PGA) rate filing to the FERC containing two alternate sets of tariff sheets. The "lower" set priced El Paso's own production on a cost-of-service basis, as had traditionally been required prior to the *Mid-La* decision. The "higher" set sought to implement *Mid-La*, both prospectively and retroactively to December 1, 1978 (the date that the NGPA became effective), by valuing El Paso's production at the applicable NGPA ceiling prices. Several of El Paso's customers or their representatives intervened and urged rejection of the higher set of tariff sheets. They contended that prior rate settlements required that El Paso's production be priced on a cost-of-service basis and that, accordingly, the higher set (the "*Mid-La* set") was barred by the *Mobile-Sierra* doctrine.

On March 31, 1982, the Commission accepted both sets of El Paso's tariff sheets for filing, suspending the effectiveness of the lower set for one day and the *Mid-La* set for five months, and set the matter for hearing. It did not rule upon the merits of the *Mobile-Sierra* issue. Several parties, including the California Public Utilities Commission (CPUC), Southern California Gas Company (SoCal), Pacific Gas and Electric Co (PG&E), and Asarco, Inc. (Asarco), filed timely requests for rehearing of the March 31 order.

The Commission acted on the rehearing requests on September 30, 1982. It agreed that prior rate settlements precluded El Paso from valuing its own production at NGPA ceiling levels, but found that the bar extended only until June 1, 1982, when the most recent settlement terminated. Accordingly, it rejected El Paso's *Mid-La* set of tariff sheets (which sought to implement NGPA pricing retroactive to December 1, 1978), and ordered El Paso to submit revised *Mid-La* sheets consistent with the Commission's findings. The CPUC, SoCal, PG&E, and Asarco promptly appealed the March 31 and September 30 orders to the Court of Appeals for the D.C. Circuit, without seeking rehearing of the September 30 decision.

On August 30, 1982, while the dispute regarding its March, 1982 PGA Filing was still pending before the Commission, El Paso submitted the second of its semi-annual PGA filings for 1982. Once again, it sought to value its own production at NGPA prices, and, once again, several of its customers and their representatives intervened and protested, claiming, *inter alia*, that such valuation was barred on *Mobile-Sierra* grounds and that the filing should be rejected. The Commission addressed this filing in another order issued on September 30, 1982. It accepted the sheets for filing with certain revisions,

8. 777 F.2d 764 (D.C. Cir. 1985).

9. 664 F.2d 530 (5th Cir. 1981) *aff'd sub nom.* Public Serv. Comm'n of N.Y. v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983).

10. 15 U.S.C. §§ 3301-3432 (1982).

suspended their effectiveness for one day, and set a number of disputed questions for hearing. With respect to the *Mobile-Sierra* issues, the Commission made the August 30 filing subject to the ultimate outcome of the ongoing proceeding regarding El Paso's March PGA filing.

Asarco and another party, Arizona Electric Power Cooperative, *et al.* (AEPCO), sought rehearing of this order. AEPCO repeated the full panoply of its *Mobile-Sierra* arguments claiming that prior rate settlements permanently bound El Paso to price its own production on a cost-of-service basis unless the Commission ordered otherwise in a proceeding under Section 5 of the Natural Gas Act.[11] Asarco, however, urged merely that the Commission defer action regarding the August 30 filing pending review of the Fifth Circuit's *Mid-La* decision by the Supreme Court. The Commission denied rehearing on November 29, 1982. Thereafter, Asarco and AEPCO appealed the September 30 and November 29 orders to the Court of Appeals for the D.C. Circuit. AEPCO, however, later withdrew its petition for review.

On appeal, the court ultimately dismissed the petitions of the CPUC, So-Cal, PG&E, and Asarco for review of the March 31 and September 30 orders regarding El Paso's March PGA filing, as well as Asarco's petition for review of the September 30 and November 29 orders regarding the August PGA filing. In all cases, the grounds for dismissal concerned inadequacies found by the court in the petitioners' applications for rehearing.

With respect to the four petitions for review of the March 31 and September 30 orders on the March PGA filing, the court began by pointing out that it could only review orders as to which the person seeking review had filed a proper application for rehearing, and that the petitioners here had sought rehearing only of the March 31 order.[12] Thus, "[i]f that [i.e. the March 31 order] was not an appealable order, we have no jurisdiction to hear these four cases."[13]

The court then found that the March 31 order "did not rule upon the merits of the *Mobile-Sierra* issue," but instead merely accepted El Paso's tariff sheets for filing, suspended their effectiveness, and reserved all issues, including the *Mobile-Sierra* issue, for later consideration.[14] "By no stretch of the imagination," the court stated, "does this come within the category of final orders reviewable under Section 19(b) of the NGA, 15 U.S.C. 717r(b). . . ."[15] In this regard, the court quoted with approval from prior opinions holding that a decision to accept a rate filing is interlocutory and thus unreviewable.[16] The only exception to this rule is "where the Commission has accepted an NGA §4 filing *after considering and rejecting* the contention that a *Mobile-Sierra* contract barred §4 rate increases."[17] Applying these principles to the pending case, the court decided as follows:

"We hold that the reviewability of a Commission order accepting tariffs for filing over

11. 15 U.S.C. 717d (1982).
12. 777 F.2d at 771.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 771-72 (emphasis in original).

Mobile-Sierra protests depends upon whether the Commission's order decides or rejects the *Mobile-Sierra* claims or instead reserves them for later disposition. In this case, the March 31 Order was clearly of the latter sort and therefore not reviewable. We thus dismiss the four petitions for review filed by SoCal, PG&E, CalPUC and ASARCO."[18]

With respect to the remaining case, Asarco's petition for review of the Commission's September 30 and November 29 orders regarding El Paso's August PGA filing, the court took a different tack. There, Asarco conceded that the *Mobile-Sierra* issue which it apparently wished to pursue on appeal had not been raised in *its* request for rehearing of the September 30 order. Asarco argued, however, that it should nevertheless be permitted to litigate that matter because the issue had been fully presented to the Commission in AEPCO's request for rehearing of the September 30 order, and had been specifically addressed by the Commission in its November 29 order.

The Court rejected Asarco's claim, holding that use of the definite article in parts (a) and (b) of Section 19 of the Natural Gas Act[19] (*i.e.*, " 'in *the* application for rehearing,' instead of 'in *an* application for rehearing' ") confirmed that in order to litigate an issue an appeal, a party must have raised the issue in its own rehearing request.[20] The fact that another party may have raised it and the Commission may have addressed it in the rehearing order was, in effect, found by the Court to be irrelevant.[21]

C. *Cities of Newark, et al.* v. FERC[22]

In May, 1978, Delmarva Power and Light Company (Delmarva) filed for a rate increase pursuant to Section 205 of the Federal Power Act.[23] When the filing was protested by several parties, including several of Delmarva's wholesale municipal customers (Cities), the Commission accepted the rates for filing, suspended their effectiveness, and set the entire matter for hearing.

Prior to the commencement of hearings, Delmarva reached a settlement with its wholesale cooperative customers which resulted in a substantial reduction in its filed rates as to that group. The same offer was made to and rejected by the Cities. Thereafter, however, the Cities contended that the disparity between Delmarva's filed rates for its municipal customers and its settled rates for its cooperative customers constituted unlawful discrimination.

The Commission ultimately rejected the Cities' position on the discrimination issue in its Opinion No. 185, issued August 1, 1983. The Cities duly sought rehearing on that question, which was denied on September 29, 1983 in Opinion No. 185-A. The Commission discussed several other issues in Opinion No. 185-A which had not been addressed in Opinion No. 185. The Cities filed a timely request for rehearing on two of these issues which was denied on November 28, 1983. On January 26, 1984, within sixty days of the issuance of

18. *Id.* at 772-73.

19. 15 U.S.C. §§ 717r(a), 717r(b) (1982).

20. 777 F.2d at 773.

21. Petitioners' requests for rehearing of the *Asarco* decision, and their suggestions for rehearing *en banc*, were denied by the court on February 3, 1986.

22. 763 F.2d 533 (3d Cir. 1985).

23. 16 U.S.C. § 824d (1982).

the November 28 order, but 119 days *after* the issuance of Opinion No. 185-A, the Cities petitioned for review of the Commission's decision on the discrimination issue.

The FERC and Delmarva, which had intervened in the proceeding, sought to dismiss the Cities' appeal. They argued that the discrimination question was finally resolved when rehearing on that issue was denied in Opinion No. 185-A, and contended that the Cities' petition for review filed 119 days later was accordingly untimely.[24] The court, however, rejected these arguments citing considerations of administrative and judicial economy and efficiency, including the need to avoid both the filing of multiple protective review petitions and the piecemeal review of agency decisions.[25] (*Id.* at 540-45). It held as follows:

> In sum, we hold that the 60-day period under § 313(b) [of the Power Act] is tolled while the Commission considers a timely petition for rehearing of an issue addressed in an earlier order on rehearing, and that a timely petition from the second order on rehearing will allow a party to raise all issues that could have been raised in a timely petition for review of the first order."[26]

II. Developments Concerning Requests for Stays of FERC Decisions and Other Forms of Extraordinary Relief Pending Review

The Court of Appeals for the D.C. Circuit issued three decisions in 1985 denying requests for stays of FERC orders and admonishing counsel, in the most strident terms, as to the rigid requirements necessary to obtain such relief.

In *Wisconsin Gas v. FERC*,[27] the court addressed requests for stays of FERC Order Nos. 380, 380-A, and 380-C filed by three interstate pipelines. The focus of the stay requests was the portions of those orders which declared minimum physical take provisions in pipeline tariffs to be inoperative. The petitioners maintained that the elimination of such tariff provisions would irreparably injure them by constraining their ability to contract for reliable gas supplies and by increasing their exposure to take-or-pay liability to their suppliers.[28] The court issued an order denying the stays on December 18, 1984, and followed up with a formal opinion " . . . for the guidance of the bar . . ." on March 29, 1985.[29]

The court acknowledged at the outset that " . . . the concept of irreparable injury does not readily lend itself to definition . . .".[30] It asserted nevertheless, however, that " . . . the courts have developed several *well known* and *indisputable* principles to guide them in the determination of whether [the irreparable injury] requirement has been met.[31] (*Id.*, emphasis added). In this

24. 763 F.2d at 540.
25. *Id.* at 540-45.
26. *Id.* at 545.
27. 758 F.2d 669 (D.C. Cir. 1985).
28. *See* 758 F.2d at 674-75.
29. *Id.* at 672.
30. *Id.* at 674.
31. *Id.* (emphasis added).

regard, the court stated:

> First, the injury must be both certain and great; it must be actual and not theoretical.
> . . . .
> It is also well settled that economic loss does not in itself constitute irreparable harm.
> . . . .
> Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.
> . . . .
> Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur . . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. [emphasis in original].[32]

Applying these principles to the pending requests, the court concluded emphatically that the irreparable injury standard had not been satisfied because the petitioners' claims were based ultimately upon speculation as to what their customers and suppliers might do in some circumstances.[33] (*Id.* at 674-76). The Court summarized its conclusion, stating, "[p]etitioners have made allegations of irreparable injury which are speculative, unsubstantiated and of a nature which clearly does not warrant the issuance of a stay. The filing of these motions, therefore, has been an abuse of the judicial process and has wasted the time and resources of this court."[34]

In the fall of 1985, following the issuance of the FERC's Order No. 436, several parties applied to the Court of Appeals for the D.C. Circuit for stays of that order pending review and for other forms of extraordinary relief. The court denied all such requests in an unreported order issued on October 31, 1985.[35] It attached a memorandum to its order stating:

> The parties and potential parties in these cases have generated a paper blizzard of often repetitious and therefore unnecessary pleadings and supporting papers. Duplicative efforts may add heat and make noise; they do not shed additional light, and they impose an untoward burden on the efficient conduct of the court's business. Parties with similar interests are admonished to consolidate their briefs and causes to avoid wasting judicial, and their own, resources. The court particularly admonishes counsel not to engage in unnecessary paper production and filings for strategic or client-pleasing purposes. In the event that Order No. 436 of the Federal Energy Regulatory Commission is brought to this court for appellate review in the ordinary course, the Chief Staff Counsel will be instructed to seek the full cooperation of all parties and counsel in implementing the Civil Appeals Management Plan of this court. *See also* D.C. Cir. R. 19.

Shortly thereafter, in November, 1985, the Court issued its decision in *Reynolds Metals Company v. FERC*,[36] denying requests for stay and other alternative forms of emergency injunctive relief regarding FERC Opinion No. 234. In that Opinion, the FERC had imposed a substantial share of the costs of the Grand Gulf nuclear electric generation plant upon Arkansas Power and Light Company ("AP&L"), without providing in advance for refunds in the

32. *Id.* (citations omitted).
33. *Id.* at 674-76.
34. *Id.* at 672.
35. Maryland People's Counsel v. FERC, Nos. 84-1019. *et al.* (1985).
36. 777 F.2d 760 (D.C. Cir. 1985).

event that the decision was ultimately set aside on appeal. Reynolds Metals Company (Reynolds), a large industrial customer of AP&L, moved the court to stay the decision pending review, or, in the alternative, to impose a protective refund condition. Reynolds maintained that the decision would impose enormous additional costs upon AP&L and its customers, which, in the absence of a specific refund condition, might not be recoverable even if the decision were ultimately set aside. It cited in this regard, prior cases in which FERC decisions were reversed, but refunds were found to be inequitable due to the reliance of affected parties on the overturned decisions.

In denying Reynolds' requests, the Court emphasized:

> [the] FERC's unquestioned power to exercise whatever authority it has to order refunds later whether or not it expresses that intention now . . .; this court's unquestioned power to direct FERC's exercise of such authority in connection with our disposition of the appeal . . .; and . . . the fact that required refund [sic] is the usual practice . . . .[37]

The Court concluded that in these circumstances, even if it were assumed that the absence of a specific advance refund condition could make the subsequent recovery of refunds more difficult, Reynolds had not suffered irreparable injury (*Id.* at 763). In this connection, the Court cited its prior decision in *Wisconsin Gas v. F.E.R.C., supra*, and asserted that "The allegations of irreparable harm in this case are no more substantial than those that 'wasted the time and resources of this court' in *Wisconsin Gas.*"[38]

In offering this harsh assessment, the court acknowledged, but obviously was not deterred by, the fact that in *American Public Gas Association v. FPC*[39] it had imposed a protective refund condition, "for the very reason here requested".[40] That case, the Court found, "has been limited to its particular facts".[41] The *APGA* decision, however, apparently led the Court to "decline to consider imposing upon Reynolds liability for the attorneys' fees of the responding parties."[42] (*Id.*). The Court cautioned, however, that " . . . similarly unsubstantiated applications for extraordinary relief will be subject to that sanction in the future".[43]

37. *Id.* at 763.
38. *Id.*
39. 543 F.2d 356 (D.C. Cir. 1976).
40. 777 F.2d at 763.
41. *Id.*
42. *Id.*
43. *Id.*

Joseph E. Mixon
Richard G. Morgan
Peter Goldsmith
Carol White Neelley