Report of The Committee on Practice and Procedure

Developments in Federal Energy Regulatory Commission ("Commission") administrative practice in 1985 included rulemaking in the areas of Commission investigations and delegation of authority to change the close of record date, and a number of major opinions by the federal courts of appeals reversing Commission orders, but no action was taken on the Commission's pending rulemaking regarding rules for discovery in trial-type proceedings.[1]

The issues decided on judicial review were diverse, including: (1) requirements to be met by parties seeking a stay of administrative acts and orders; (2) application of the principles of *United Mun. Distrib. Group v. FERC*[2] to contested settlements in which genuine issues of material fact are raised; (3) challenges to compliance filings approved by the FERC; (4) challenges to the courts' jurisdiction to review initial Commission orders by virtue of a petition for review of a subsequent Commission order denying a request for further rehearing of the initial order; and (5) applications of petitioners seeking review of Commission orders for attorney's fees under the Equal Access to Justice Act (EAJA).

I. INVESTIGATIONS

A. *Ferc Proposed Rules*

On November 19, 1985,[3] the Commission withdrew its Notice of Proposed Rulemaking issued on April 10, 1979,[4] in which it had proposed revisions to its "Rules Relating to Investigations," thereby leaving the existing rules in effect. The Commission withdrew the proposed rules after considering written comments submitted and testimony received at a public hearing held on April 15, 1980. It found that the rules as presently written permit the Commission to fulfill its investigatory responsibilities while adequately protecting the interests of those affected by the investigations.

The principal objections raised by commentators to the Commission's proposed procedures governing investigations were that they failed to provide adequate procedural safeguards for those affected by investigations and gave too much discretion to the Commission's Enforcement Staff. The Commission rejected these objections, reiterating its position that an investigation is not an adjudicatory proceeding. Rather, investigations are conducted to gather facts and may or may not result in the commencement of an adjudication.

The areas in which the commentators had urged the Commission to amend the regulations included increasing safeguards against abuse of sub-

1. Rules of Discovery for Trial Type Proceedings, Notice of Proposed Rulemaking, 28 F.E.R.C. ¶ 61,172 (1984).

2. 732 F.2d 202 (D.C. Cir. 1984).

3. Rules Relating to Investigations, Withdrawal of Proposed Rulemaking, 33 F.E.R.C. ¶ 61,174 (1985).

4. Rules Relating to Investigations, Order No. 8, 3 F.E.R.C. ¶ 61,238 (1978).

poena authority, changes in the procedures governing the confidentiality of investigations, and notification of parties under investigation following completion of an investigation when no further action is contemplated. A number of commentators also expressed concern regarding the related issues of separation of functions and *ex parte* communications.

The Commission found these concerns to reveal a misconception regarding the role of the Commission's Enforcement Staff during an investigation. It concluded that the changes proposed by commentators added an administrative layer without improving the investigatory process. Based on its cumulative experience with the existing regulations it chose to withdraw the proposed rulemaking.

B. Judicial Enforcement of Investigative Subpoenas.

In *Belle Fourche Pipeline Co. v. United States*,[5] the United States Court of Appeals for the Tenth Circuit held that until the Commission initiated proceedings in federal district court to enforce investigative subpoenas, the district court lacked subject matter jurisdiction over a request by the subject of the subpoenas for a protective order.

In the course of conducting a private investigation of Belle Fourche Pipeline Company's ("Belle Fourche") oil pipeline activities, a Commission investigative officer issued subpoenas to officials of several Bell Fourche companies. After initially complying with the subpoenas, Belle Fourche filed a complaint in United States District Court seeking declaratory and injunctive relief against the investigation, which it argued was beyond the Commission's authority. The company's first complaint alleged jurisdiction pursuant to certain provisions of the Department of Energy Organization Act,[6] the Administrative Procedure Act,[7] and the Declaratory Judgment Act.[8] The district court granted the Commission's motion to dismiss, finding that none of these provisions gave it jurisdiction. Belle Fourche then amended its complaint to assert jurisdiction based on 28 U.S.C. section 1331 (federal question), section 1337 (commerce and antitrust regulations) and section 1361 (action to compel action by United States officer), as well as on the court's general equitable powers. The district court found that it had federal question jurisdiction under 28 U.S.C. sections 1331 and 1337, on the basis that an interpretation of the Interstate Commerce Act was required to resolve the dispute.[9] On the merits, the district court enjoined the enforcement of the subpoenas on the ground that they were overbroad and unreasonably burdensome to Belle Fourche, and thus not reasonably relevant to the Commission's authority.[10]

The Court of Appeals reversed the district court and held that the dispute was not sufficiently ripe to create subject matter jurisdiction under the rule

5. 751 F.2d 332 (10th Cir. 1984).
6. 42 U.S.C. § 7192(b) (1982).
7. 5 U.S.C. §§ 701-702 (1982).
8. 28 U.S.C. §§ 2201-2202 (1982).
9. Belle Fourche Pipeline Co. v. U.S., 554 F. Supp. 1350, 1355-56 (D. Wyo. 1983).
10. *Id.* at 1362.

announced in *Reisman v. Caplin*.[11] In that decision, the Supreme Court ruled that preenforcement review of investigative subpoenas is improper where an adequate legal remedy exists for challenging the subpoena in a subsequent enforcement hearing. In *Belle Fourche*, the Court of Appeals found that the company could have refused permission for the Commission to examine the subpoenaed documents, forcing the Commission to seek judicial enforcement of its subpoenas. The court noted that the company's business activities would be unaffected until the Commission sought judicial enforcement, at which time it could challenge the validity of the subpoenas based on a good faith belief that they were invalid. Thus, the court held that there was no threat of "immediate, irreparable injury necessary to justify jurisdiction."[12]

III. Procedural Rules Governing Non-Regional Ratemaking Under the Federal Power Act

In *Southern California Edison Co. v. FERC*,[13] the United States Court of Appeals for the Ninth Circuit held that the issuance of a Commission rule establishing procedures for the acceptance of rates set by the Bonneville Power Administration ("BPA") under the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act")[14] was not subject to notice and comment procedures of the Administrative Procedure Act ("APA").[15] The court also held that the rule was void in its failure to apply to non-regional rate proceedings all of the procedural rules established by the Commission for Federal Power Act ("FPA") ratemakings, particularly those regarding *ex parte* communications and case-in-chief filing requirements.

The Regional Act requires BPA, a federal power marketing agency, to set rates for power sold in the Pacific Northwest region ("regional rates") and for energy sold outside the region ("non-regional rates").[16] BPA's rate schedules must be approved by the Commission.[17] On December 4, 1981, the Commission issued an interim rule establishing procedures for the interim approval of rates submitted by the BPA under the Regional Act.[18] On August 9, 1983, the Commission issued a final rule, revising the interim rule as to interim approval of rates and adding provisions for final approval of rates.[19] Southern California Edison Company and Pacific Gas & Electric Company challenged the final rule on the grounds that it was issued in disregard of the notice and comment requirements of the APA, and that it failed to subject nonregional rate proceedings to all of the FPA's ratemaking procedures.

The Ninth Circuit Court of Appeals rejected the challenge based on the

---

11. 375 U.S. 440 (1964).
12. *Belle Fourche*, 751 F.2d at 335.
13. 770 F.2d 779 (9th Cir. 1985).
14. 16 U.S.C. §§ 839-839h (1982).
15. 5 U.S.C. § 553(c)-(d) (1982).
16. 16 U.S.C. §§ 839(a)(2), 839e(k) (1982).
17. *Id.*
18. Confirmation and Approval of the Rates of the Bonneville Power Administration, Interim Rule, 46 Fed. Reg. 60,813 (1981).
19. Confirmation and Approval of the Rates of the Bonneville Power Administration, 48 Fed. Reg. 37,006 (1983).

APA, holding that the rule was a "technical regulation of the form of agency action and proceedings," and thus was exempt from the APA's notice and comment requirements as "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" under 5 U.S.C. section 553(b)(3)(A).[20] In response to the utilities' assertion that the procedures established by the challenged rule would have a substantive effect on parties to BPA final rate approval proceedings, the court reiterated its holding in an earlier case that this exemption applies to "procedural rules with a substantive impact."[21] The Commission was not required, therefore, to give notice to persons subject to the proposed rule and allow them the opportunity to comment.

The Court agreed with the utilities, however, that the Regional Act required the Commission to apply to its non-regional rate proceedings all of the procedural provisions applicable to FPA ratemaking. The Regional Act provides that parties to non-regional rate proceedings must be "afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act."[22] The Commission, however, had taken the position that it would apply certain of the procedural provisions only on a case-by-case basis, specifically, its rules prohibiting *ex parte* communications[23] and requiring a utility to submit its case-in-chief as part of its rate filing.[24] The Commission argued on appeal that because of the differences between FPA rate proceedings and non-regional rate hearings, it was not necessary to apply all of the FPA procedures to the latter. The court held, however, that these differences were not enough to "alter the statute's plain language," and that the rule was therefore void as to its failure to apply the two specified procedures.[25]

IV. HEARINGS

A. *Extension of Record-Closing Date in Expedited Adjudicative Proceedings*

On November 13, 1985, the Commission issued an order[26] amending its Rules of Practice and Procedure to delegate to the chief administrative law judge authority to change the close-of-record date in expedited administrative proceedings. The change was made in the regulations to reduce the administrative burden created when the parties to an expedited proceeding seek an extension or suspension of the record-closing date ordered by the Commission in cases scheduled for hearing on an expedited basis (an increasingly common event in Commission practice). Under the preexisting practice, the parties were required to make their motions to the presiding judge who had to forward the request to the chief judge who then certified the motion to the Commission. Pursuant to the revisions in the regulations, authority has been delegated to the

20. *Southern Cal. Edison*, 770 F.2d at 783.
21. *Id.* (citing Rivera v. Becera, 714 F.2d 887 (9th Cir. 1983).
22. 16 U.S.C. § 839(k) (1982).
23. Ex Parte Communications, Separation of Functions, 18 C.F.R. § 385.2201 (1985).
24. 18 C.F.R. § 35.13 (1985).
25. *Southern Cal. Edison*, 770 F.2d at 784.
26. Revisions of Rules of Practice and Procedure and Delegation to the Chief Administrative Law Judge, Order No. 437, 33 F.E.R.C. ¶ 61,205 (1985).

chief judge to change the close of record date for good cause shown.

B. Sanction or Censure.

On July 19, 1985, the Commission found in *Southwestern Public Service Co.*[27] that an electric utility's conduct as to the treatment of accumulated deferred investment tax credits ("ADITC") in the equity component of its capital structure came "perilously close to constituting an abuse of the Commission's processes."[28] The Commission set forth the following background: (1) the utility, directed earlier to file revised rates excluding ADITC from its capital structure, instead filed rates with ADITC included in the common equity component; (2) when advised of the deficiency, the utility neither timely appealed nor filed the revised rates as directed a second time; (3) the utility untimely objected to the directives; and (4) the Commission again ordered compliance. The Commission rejected the utility's arguments, ordered immediate interim refund payments to customers with interest and, citing section 35.13(g) of its regulations,[29] declared that once a utility has been the subject of a specific Commission order on a ratemaking issue, a subsequent rate filing that does not reflect such company-specific precedent is subject to rejection as "patently deficient" unless substantially changed circumstances are shown.[30]

On July 2, 1985, Presiding Administrative Law Judge Birchman issued an initial decision in *South Carolina Generating Co.*[31] He held that the electric utility had illegally billed a customer through Commission accounts which were not specified in the filed cost of service tariff. He noted that, after the Commission's Staff had moved for summary disposition and the utility had replied, and after a prehearing conference initiating settlement judge procedures had been held and an informal conference had been convened by the Settlement Judge, the utility had filed a revised tariff with the Commission. Judge Birchman then observed that the utility's revised tariff filing had been "wholly silent" in alerting the Commission to the pendency of the Commission staff's summary judgment motion, and declared that the Commission should censure the company and its counsel for a filing that was "disingenuous in nature" and an "abuse of the Commission's process."[32]

On July 15, 1985, Presiding Administrative Law Judge Zimmet, in an apparently unreported "Order Denying Staff Motion To Discipline" in *Florida Power & Light Co.*,[33] ruled that the Staff had "created an unnecessary and unwarranted furor" by moving to discipline an intervenor's counsel because, in another Commission proceeding, that counsel had urged the Commission to examine the staff's "Top Sheet" cost-of-service analysis, which had been distributed among the parties in the case before Judge Zimmet. Judge Zimmet denied the motion, noting that the contents of the "Top Sheets" had not been revealed

27. 32 F.E.R.C. ¶ 61,082 (1985).
28. *Id.* at 61,205.
29. 18 C.F.R. § 35.13(g) (1985).
30. *Southwestern Pub. Service*, 32 F.E.R.C. at 61,205.
31. 32 F.E.R.C. ¶ 63,008 (1985).
32. *Id.* at 65,010-11.
33. No. ER85-380 (1985).

and that the intervenor had believed there was a link between the two cases. He concluded both that that the Staff "should not act so rashly in hurling a charge as serious as . . . questioning the ethics and integrity of other counsel" and that counsel had "done nothing that even hints at a breach of confidentiality of the settlement process or compromises the integrity of this proceeding."[34]

C. *Administrative Stays*

The Commission in *Middle South Energy, Inc.*[35] addressed *inter alia*, a motion by Middle South, *et al.*, to stay Opinion No. 234 pending either rehearing or appellate review pursuant to Section 705 of the Administrative Procedure Act.[36] In support of their motion for stay, the petitioners made allegations pursuant to the requirements set forth in *Virginia Petroleum Jobbers Association v. FPC*,[37] specifically stating that implementation of Opinion No. 234 would "impose immediate considerable harm" on the parties.[38] The irreparable harm alleged by the petitioners was the possible economic loss which would result from the implementation of Opinion No. 234.

In considering the stay request, the Commission acknowledged its authority under Section 705 of the APA to postpone the effective date of an administrative action if "justice so requires."[39] It then proceeded to determine if the petitioners' allegations of economic loss constituted irreparable harm. In making its decision, the Commission relied on the precedent set forth in *Wisconsin Gas Co. v. FERC*,[40] and held that while it was clear that the implementation of Opinion No. 234 would have rate impacts on certain of the petitioners and their customers, their petition for stay must fail because none of the parties had quantified these impacts. Indeed, relying on the *Wisconsin Gas Co.* case, the Commission denied the petitioners' motions for a stay of Opinion No. 234 because the economic loss itself did not constitute irreparable harm and because their motion was based entirely on unsubstantiated allegations of imminent harm.

Subsequently, the United States Court of Appeals for the District of Columbia Circuit dismissed petitioners' appeal of the Commission's denial of the stay.[41] The court found that dismissal of the appeal was mandated by the court's simultaneous denial of an Emergency Petition for Stay Under the All Writs Act also filed by the petitioners, requesting a stay of Opinion No. 234.[42]

D. *Compliance Filingss*

In *Electric District No. 2 v. FERC*,[43] the D.C. Circuit vacated a Commis-

34. *Id.*
35. 32 F.E.R.C. ¶ 61,207 (1985).
36. 5 U.S.C. § 705 (1982).
37. 259 F.2d 291 (D.C. Cir. 1958).
38. *Middle South*, 32 F.E.R.C. at 61,477.
39. *Id.*
40. 758 F.2d 699 (D.C. Cir. 1985).
41. Reynolds Metals Co. v. FERC, 777 F.2d 760 (D.C. Cir. 1985).
42. See discussion *infra* notes 73-90 and accompanying text.
43. 774 F.2d 490 (D.C. Cir. 1985).

sion order that allowed a rate increase to take effect as of the date of the Commission's order directing a compliance filing, rather than upon the date of the Commission's acceptance of the compliance filing. The case arose as a result of a filing by Arizona Public Service Company ("APS") seeking Commission approval of proposed increased electric rates. Following a hearing, the Commission determined in accordance with section 206 of the Federal Power Act,[44] that the filed rates were excessive of that produced by its existing rates. Under Section 206, APS was not entitled to these new higher rates until the Commission acted to "fix" these rates "by order."[45] The Commission therefore ordered APS to file a revised cost of service, revised rate schedules and revised tariff sheets. APS made the required compliance filing and the Commission subsequently determined that the new rates should take effect on the date that it had ordered the compliance filing and not on the later date when it accepted that filing.

On appeal, the D.C. Circuit determined that the Commission failed to comply with the strictures of section 206 because its order directing a compliance filing did not "fix" rates but merely set revenue levels and provided basic principles pursuant to which new rates could be calculated.[46] While sympathizing with the Commission's desire to ensure that just and reasonable rates are made effective as soon as possible, and holding out the possibility that the Commission itself might fix the rates in its initial order following a hearing, the court found that "the Commission cannot fix a rate, as it purports to have done here, without ever seeing it."[47]

In *City of Cleveland v. FERC*,[48] the City of Cleveland ("City") challenged a Commission order accepting a compliance filing by the Cleveland Electric Illuminating Company ("CEI"). CEI had filed a new rate schedule under section 204 of the Federal Power Act,[49] that changed the terms and conditions under which it made available emergency and firm power to the City. The Commission suspended the new rate schedule for five months and set the matter for hearing. Following a full evidentiary hearing, the Commission ordered CEI to set out its practices and policies "in its compliance filing, to which [the] City may raise any objections."[50] The Commission subsequently accepted CEI's compliance filing and rejected most of the City's objections to that filing. On appeal, the City argued that due process required a further evidentiary hearing before the compliance filing could be accepted, that the compliance filing was impermissibly vague.

The court rejected all of the City's arguments. It found that the compliance filing was not impermissibly vague, that the underlying hearing provided the City with ample due process and that the Commission had made good on its pledge to allow the City to raise objections to the compliance filing by allowing it to file written objections and arguments based on the existing rec-

44. 16 U.S.C. § 824e (1982).
45. *Id.*
46. *Elec. Distr.*, 774 F.2d at 492-93.
47. *Id.* at 495.
48. 773 F.2d 1368 (D.C. Cir. 1985).
49. 16 U.S.C. § 824d (1982).
50. Cleveland Elec. Illuminating Co., 23 F.E.R.C. ¶ 61,380 at 61,806 (1983).

ord.[51] While it agreed with the City that CEI's compliance filing did not fully comport with the terms of the Commission's order requiring that filing, it upheld the Commission's authority to "entertain second thoughts and revise its earlier judgment" at the time it accepted the compliance filing.[52] The court stressed that, consistent with its recent decision in *Electric District No. 1 v. FERC*, a compliance filing "is merely one stage in an ongoing proceeding that is not completed until the rates themselves are approved."[53]

V. SETTLEMENT

In *United Municipal Distributors Group v. FERC*,[54] ("*United*"), the court affirmed the Commission's application of rule 602(h)(1)(ii)(B) of the Commission's Rules of Practice and Procedure,[55] the "catch all" section of the Commission's procedural rule on contested settlements, (1) to approve a settlement for all parties except the one party raising an objection to a "package" settlement and (2) to send the objecting party to a full administrative hearing on all the nonseverable issues in the case. In *United*, the single issue raised by the objecting party appeared to be legal in nature.[56] In the last year, however, the Commission has extended the principles of *United* to cases where parties objecting to a proposed settlement have raised issues that involve genuine issues of material fact, rather than legal issues.

Under rule 602(h)(2)(i),[57] nonseverable contested settlement can be certified by an administrative law judge to the Commission only if (1) the contested issues do not involve genuine issues of material fact or (2) the parties concur in a motion for omission of the initial decision, the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits, *and* the parties have had an opportunity to present evidence and cross-examine opposing witnesses. Thus, in theory, a contested settlement not meeting these conditions cannot be preserved for non-contesting parties under *United*. Moreover, the administrative law judge cannot certify a contested settlement to the Commission for non-objecting parties while retaining the case for a hearing for objecting parties, because there is no parallel to the section 602(h)(1)(ii)(B) "catch all" provision available to administrative law judges.

However, in three recent cases, the Commission has found that contested settlements that do not meet the section 602(h)(2)(i) conditions can be certified to the Commission for application of a *United* severance of parties. The Commission also has stated that an administrative law judge does have the power to certify a contested settlement to the Commission for non-objecting parties while retaining the case for a hearing for objecting parties.

In *Northwest Pipeline Corp.*,[58] the applicant filed a comprehensive settle-

51. 773 F.2d at 1374.
52. *Id.* at 1375.
53. *Id.*
54. 732 F.2d 202 (D.C. Cir. 1984).
55. 18 C.F.R. § 385.602(h)(1)(ii)(B) (1984).
56. *See* United Gas Pipeline Co., 22 F.E.R.C. ¶ 61,094, *reh'g denied*, 23 F.E.R.C. ¶ 61,101 (1983).
57. 18 C.F.R. § 385.602(h)(2)(i) (1984).
58. 31 F.E.R.C. ¶ 61,263 (1985), *reh'g denied*, 32 F.E.R.C. ¶ 61,410 (1985).

ment offer in a general rate case prior to hearing. Two parties opposed the entire settlement; five parties opposed portions of the settlement; and the remaining thirty-two intervenors and the Commission's Staff supported the settlement. The presiding administrative law judge found the contested issues nonseverable, made no ruling on whether the contested issues involved genuine issue of material fact, and, citing to "Rule 504 (20) [sic]," certified the entire settlement to the Commission.[59]

The Commission held that, although the administrative law judge was technically incorrect in certifying the entire settlement, the error was harmless since the Commission, relying on *United*, severed the parties contesting all or part of the settlement and sent them to a hearing on all issues.[60] Furthermore, in dicta, the Commission stated that a "judge may certify a settlement for nonobjecting parties" as an uncontested settlement under rule 602(g) while retaining "the case *vis-a-vis* the contesting parties."[61] The Commission added that although rule 602(h)(2)(iv) speaks of the severability of contested and uncontested issues for certification of settlements, "a practical and correct interpretation" of that section includes the severability of contesting and noncontesting parties.[62] However, on rehearing, the Commission treated the settlement as if it had been certified to the Commission under rule 602(g).[63]

A few months later, in *Trans Alaska Pipeline System*,[64] the Commission again was faced with a certification of a contested settlement where neither of the conditions of section 602(h)(2)(i) had been met. A settlement filed prior to the filing of evidence and opposed by two of the seven Trans Alaska Pipeline System (TAPS) owners was certified to the Commission under rules 101(e) and 504(b).[65] The administrative law judges agreed that the arguments of the parties objecting to the settlement had "a great deal of force," but found that the case involved "special circumstances."[66]

When some of the parties objecting to the settlement argued that the settlement had been improperly certified, the Commission, citing *Northwest Pipeline*, disagreed, severed the objecting parties from the settlement, and remanded the case for a hearing "to air the issues they have raised as those issues apply to them."[67] Again, in dicta, the Commission pointed out that "[t]he judges could have retained this case vis a vis the nonsettling parties."[68]

Finally, a month after the TAPS decision, the Commission approved another contested settlement in *Northern Natural Gas Co.*.[69] The case was the product of a previous settlement that reserved for litigation the sole issue of the prudence of the gas purchasing practices of Northern Natural Gas Company

59. Northwest Pipeline Corp., 32 F.E.R.C. ¶ 63,058 (1985).
60. Northwest Pipeline Corp., 31 F.E.R.C. ¶ 61,263 at 61,516 (1985).
61. *Id.*
62. *Id.*
63. *Northwest Pipeline*, 32 F.E.R.C. at 61,919 n.6.
64. 33 F.E.R.C. ¶ 61,064 (1985).
65. Northwest Pipeline Corp., 31 F.E.R.C. ¶ 63,025 (1985).
66. *Id.* at 65,182.
67. 33 F.E.R.C. at 61,140 (footnote omitted).
68. *Id.* at 61,139.
69. 33 F.E.R.C. ¶ 61,261 (1985), *reh'g granted* for further consideration, Jan. 24, 1986.

("Northern"). After the filing of direct evidence by a number of parties, including the Iowa State Commerce Commission (ISCC), alleging imprudence and the subsequent filing of Northern's direct evidence denying imprudence, Northern filed a comprehensive settlement opposed only by the ISCC. The presiding administrative law judge found the settlement contested, found that the contested issues did not present genuine issues of material fact, and certified the settlement to the Commission.[70]

The Commission approved the settlement as to the non-objecting parties and, citing *United*, excluded the ISCC from the settlement. The Commission remanded the case to the administrative law judge for a hearing on ISCC's claims. The case is noteworthy in two respects. First, the Commission implicitly ruled that the certification was incorrect since there were genuine issues of material fact justifying the remand and preventing a Commission decision on the merits. But, consistent with *Northwest Pipeline* and *TAPS*, the contesting and non-contesting parties were severed.

Second, *Northern* is the first case where the sole contesting party left to litigate under *United* is a state regulatory commission. In cases where the Commission's staff has been the sole party protesting a settlement, it has been noted that the settlement could still be certified, since staff is a participant, not a party.[71] A state Commission, however, is a party.[72] Thus, the *Northern* case poses very real questions for the application of the *United* doctrine to non-customer parties to administrative proceedings.

VI. JUDICIAL REVIEW

A. *Petitions for Stay*

In its decision issued on March 29, 1985, in *Wisconsin Gas Company v. FERC*,[73] the United States Court of Appeals for the District of Columbia Circuit set out to educate those parties filing for a stay of administrative acts and orders as to the stringent requirements that must be met in order for such petitions to be successful. In addition, the court strongly chastised those parties filing "frivolous" petitions for stay which do not meet the threshold requirements set forth by the court.[74] The court held that these types of petitions are a "clear abuse of the court's time and resources."[75]

The court in the *Wisconsin Gas* case was addressing a petition for stay of Order No. 380 of the Commission declaring inoperative any pipeline minimum bills which allow for recovery of purchased gas costs from a customer who does not take the gas. In an attempt to support their petitions, the petitioners made allegations of irreparable injury which they claimed would result if the order were not stayed and the *status quo* were not maintained. The irreparable harm the petitioners alleged was the economic loss which they alleged could result

70. Northern Natural Gas Co., 31 F.E.R.C. ¶ 63,043 (1985).
71. *See, e.g.*, KN Energy, 31 F.E.R.C. ¶ 63,062 at 65,213 (1985).
72. *See* rule 214(a)(2) codified at 18 C.F.R. § 385.214(a)(2) (1985).
73. 758 F.2d 669 (D.C. Cir. 1985).
74. *Id.* at 675.
75. *Id.*

from the implementation of Order No. 380. The petitioners did not allege or present evidence as to the certainty of the economic harm or of the effect that the potential economic losses would have upon the petitioners.

In issuing its opinion, the court first looked to see if the injury complained of by the petitioners was actual, and not theoretical[76] and whether the injury alleged was of such imminence that equitable relief was necessary to prevent irreparable harm.[77] Second, the court looked at the alleged economic loss and stated that in order for it to constitute irreparable harm, the loss must threaten the existence of the petitioners' businesses. The court, relying upon *WMATA v. Holiday Tours, Inc.*,[78] also held that bare allegations of these facts are not sufficient to warrant the issuance of a stay. For a stay to issue, these facts must not be speculative in nature, but must be substantiated by evidence presented by the petitioners.

The court held that despite these well established tenets of law, the petitions for stay were premised upon unsubstantiated and speculative allegations of mere economic harm. As an instructional aid, the court again set forth the factors in the *Virginia Petroleum Jobbers Assn*' case,[79] which must be considered in determining whether a stay is warranted, to wit: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. In considering these factors, as well as the established principle that mere economic loss does not constitute irreparable harm, the court held that the petitioners failed to substantiate their bare allegations of economic harm,[80] and that in any event they failed to establish that the economic harm alleged was of such a magnitude as seriously to jeopardize the on-going nature of the petitioners' businesses.[81] Specifically, the court held that "the allegations made by petitioners are so speculative and hypothetical that it would be difficult to conclude that irreparable injury would occur even if the allegations were supported by evidence. The fact that petitioners have not attempted to provide any substantiation is a clear abuse of this court's time and resources."[82]

The instructional nature of the court's decision in *Wisconsin Gas Co.* was obviously intended by the court to reach far beyond the specific facts presented therein and to be used as a guide by parties contemplating the filing of petitions for stay in the future. The court, in reaching its decision, laid out the fundamental factors which must be addressed by parties requesting a stay, and through its ruling warned of the certain failure of those petitions which do not comply with these well-established principles.

---

76. *See* Connecticut v. Massachusetts, 282 U.S. 660 (1930).

77. *See* Ashland Oil v. FTC, 409 F. Supp. 297 (D.D.C. 1976), *aff'd* 548 F.2d 977 (D.C. Cir. 1986); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

78. 559 F.2d 841 (D.C. Cir. 1977).

79. 259 F.2d at 925.

80. *See Holiday Tours*, 559 F.2d at 843.

81. *Wisconsin Gas*, 758 F.2d at 675.

82. *Id.*

The court made its point very clear in *Reynolds Metals Co. v. FERC.*[83] The court there considered a petition for stay of the Commission's Opinion No. 234[84] and a related appeal of the Commission's denial of a stay filed by Reynolds Metals Company pursuant to the All Writs Act.[85] Reynolds Metals alleged that it would suffer economic losses if Opinion No. 234 was implemented, which might not be recouped even if Opinion No. 234 was reversed on review. Specifically, Reynolds claimed that "irreparable harm will result because 'the passage of time without a refund obligation . . . may eventually render more difficult the imposition of a refund obligation later.' "[86]

Relying upon its ruling in *Wisconsin Gas*, the Court held that "[t]he 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.*"[87] The court found that the petition for stay did not "remotely" meet the necessary criteria, and "emphasized the stringency of the requirement that irreparable injury be 'likely to occur . . . .'"[88] In its finding, the court hinted that "unsubstantiated applications for extraordinary relief" may be subject to sanctions in the future.[89]

The court then found that dismissal of the appeal of the Commission's denial of the stay in *Middle South Energy* was also required. It held that *if* denial of agency stays are subject to interlocutory review at all, the same standards for obtaining injunctive relief may apply to such appeals. "Specifically," the court stated, "the requirement of demonstrating the likelihood of irreparable harm cannot be evaded by the simple device of petitioning the agency for a stay and appealing the denial."[90]

B. Petitions for Review

In *City of Newark v. FERC*,[91] the court determined it had jurisdiction over a petition for review filed more than sixty days after the Commission's order denying rehearing of the substantive issue raised in the petition, but within sixty days of a later Commission order in the same case disposing of a motion for further rehearing.

In its Order No. 185-A, the Commission denied rehearing on a claim of undue discrimination raised by the petitioners resulting from the method of demand cost allocation approved for use in setting Delmarva Power and Light Company's rates. This order was determined by the court to be "final" for purposes of judicial review. The petitioners, however, did not seek judicial review of this order within the sixty days allowed. Instead, they chose to seek further rehearing before the Commission. When the Commission denied the second petition for rehearing, the petitioners sought judicial review on the un-

83. 777 F.2d 760 (D.C. Cir. 1985).
84. 31 F.E.R.C. ¶ 61,305 (1985).
85. 28 U.S.C. § 1651 (1982).
86. *Reynolds Metals*, 777 F.2d at 763.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 764.
91. 763 F.2d 533 (3rd Cir. 1985).

due discrimination issue. The Commission argued that the court lacked subject matter jurisdiction because the Petitioners had failed to seek judicial review within sixty days of Order No. 185-A, as required by Section 313(b) of the Federal Power Act.[92]

While recognizing the inherent danger that "the sixty day review period could be frustrated through the *seriatim* filing of rehearing petitions with FERC," the court felt such abuses could be remedied by the Commission's regulations.[93] The court found no evidence in the record before it that the municipalities' second petition was frivolous. In fact, the court found the Commission order denying the request for further rehearing clarified and modified an ambiguity in its earlier opinion in Order No. 185-A. The court rejected the Commission's argument that the municipalities should have filed their petition for review of the first order and then requested a stay of the petition pending Commission disposition of their second request for rehearing. The court found that this approach would run counter to the policy of federal courts that militates against piecemeal appeals and in favor of concluding related proceedings at the administrative level without interference from the courts.

In *Panhandle Eastern Pipe Line Co. v. FERC*,[94] questions were also raised regarding the timeliness of a petition for review. In proceedings before the Commission, Panhandle Eastern had requested permission to amortize substantial sums in one of its deferred accounts over thirty-nine months, rather than the six months authorized by the Commission's regulations and to recover the carrying charges associated with these sums.

The Commission issued two orders addressing Panhandle's requests. The first order (issued in May 1983) granted the request to amortize the account over thirty-nine months, but limited recovery of carrying charges to those that would have been recovered if the balance had been amortized over twelve months. The second order (issued in February 1984) denied Panhandle recovery of all charges on unrecovered gas costs for the months June-August 1983 on the grounds that Panhandle had not lived up to representations recorded in the first order regarding the target purchased gas prices that it would attain for the months at issue.

Panhandle filed a petition for review with the court. The Commission challenged the petition as untimely because it was not filed within 60 days of the first order. Alternatively, the Commission argued that if the second order was deemed to toll the sixty day period, the petition for review was premature because Panhandle had not yet filed a petition for rehearing with the agency.

The court concluded that Panhandle had no reason to petition the court for review until the second order was issued. That order informed Panhandle that all carrying charges on the amounts in question would be disallowed. Given the unique circumstances of the case, the court held that the second order constituted a ruling on Panhandle's request for a rehearing and commenced the 60 day filing period for a petition for review. It found that the second order was in substance the conclusive decision on rehearing, not a new directive, and

92. 16 U.S.C. § 8251(b) (1974).
93. *City of Newark*, 763 F.2d at 542.
94. 777 F.2d 739 (D.C. Cir. 1985).

thus did not require a petition for rehearing before the Commission. With the issuance of the second order, the court found that the Commission had been given an adequate opportunity to address the issues on which Panhandle sought judicial review. Thus, the court deemed the purposes of both the timeliness and exhaustion doctrines to be satisfied.

In *ASARCO, Inc. v. FERC*,[95] the Court considered whether it had jurisdiction over a petition to review the Commission's acceptance of a filing as to which a *Mobile-Sierra* claim has been made but had not been ruled upon by the Commission, and whether a petitioner may seek judicial review of an objection which others presented to the Commission in their applications for rehearing but which the petitioner itself did not raise below.

The facts in *ASARCO*, which are quite complicated, can be summarized as follows. In 1977, the Commission approved a settlement between El Paso Natural Gas Company and its customers which permitted El Paso to price certain pipeline production on a cost-of-service basis rather than at the applicable area or national rate. After the United States Court of Appeals for the Fifth Circuit's *Mid-Louisiana* decision,[96] however, El Paso attempted to implement that decision by valuing this pipeline production in a purchased gas adjustment ("PGA") filing at NGPA ceiling prices both prospectively and retrospectively.

Several of El Paso's customers intervened and asked the Commission to reject the filing outright, alleging that it was barred by El Paso's prior rate settlements and invoking the *Mobile-Sierra* doctrine.[97] The Commission accepted the filing, suspending it for five months subject to refund, in an order dated March 31, 1982. A number of parties sought rehearing of this order.

In an order on rehearing issued September 30, 1982 ("September 30 Order No. 1"), the Commission first addressed the merits of the *Mobile-Sierra* objections. It held that the company was barred from implementing NGPA pricing by its existing rate settlements and the *Mobile-Sierra* doctrine. However, the Commission found that after June 1, 1982 (the expiration date of its latest settlement agreement), El Paso would be free to price its gas at NGPA price levels. Only El Paso filed a petition for rehearing of this order with the Commission. The other petitioners immediately sought review of both the March 31 and September 30 Orders in the Court of Appeals.

On September 30, 1982, the Commission also issued a second order in a subsequent El Paso PGA proceeding ("September 30 Order No. 2"). In that order, the Commission ruled that resolution of the *Mid-Louisiana* issues raised by El Paso's subsequent PGA filing would be in accordance with the Commission's September 30 Order No. 1. Certain parties did petition for rehearing of the September 30 Order No. 2, but only to seek suspension of El Paso's subsequent PGA filing pending disposition of the Fifth Circuit's *Mid-Louisiana* decision by the Supreme Court. Two other parties, the Arizona Electric Power Cooperative and the City of Willcox, Arizona, ("AEPCO"), jointly petitioned

95. 777 F.2d 764 (D.C. Cir. 1985) (pending rehearing).

96. Mid-Louisiana Gas v. FERC, 664 F.2d 530 (5th Cir. 1981).

97. The *Mobile-Sierra* doctrine which governs rate filings inconsistent with contractual obligations, was articulated by the Supreme Court in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and in FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

for rehearing, specifically addressing the merits of the Commission's *Mobile-Sierra* determination. On November 29, 1982, the Commission denied all petitions for rehearing of both September Orders. ASARCO and AEPCO, among others, filed petitions for review of the November 29 Order as well. AEPCO, however, subsequently withdrew its petition for review.

Of the five remaining petitions for review before the court, four pertained to the March 31 Order. The court determined that this was not a "final" order as contemplated by section 19(b) of the NGA.[98] According to the court, the *Mobile-Sierra* issues raised by El Paso's filing were not reached until the Commission issued its September 30 Order No. 1. The court concluded that granting review of the March 31 Order would only frustrate the purpose of the application for rehearing requirement. Thus, it dismissed the four petitions seeking review of the March 31 Order.

As to ASARCO's petition for review of the November 29 Order denying rehearing of the September 30 Order No. 2, its own application for rehearing to the Commission had raised only the issue of delaying disposition of the *Mid-Louisiana* issues pending the Supreme Court's decision in that case. However, ASARCO sought to litigate in the Court of Appeals the arguments raised by AEPCO in its application for rehearing. The court rejected ASARCO's position, concluding that the language of section 19(b) clearly limits a party to litigating in court the issues it has raised in its *own* application for rehearing to the Commission. Thus, ASARCO's petition was dismissed for raising an objection not raised in its own application for rehearing.

C. *Res Judicata Effect of Prior Decisions*

In *Clark-Cowlitz Joint Operating Agency v. FERC ("Clark-Cowlitz")*[99] the United States Court of Appeals for the District of Columbia Circuit held that the Commission's reversal of an earlier interpretation of the Federal Power Act was precluded under the doctrine of *res judicata*, and that the revised interpretation was not reasonable. The court also held that the Commission's factual analysis, which was offered as an alternative ground for its decision, was arbitrary and capricious.

Section 7(a) of the Federal Power Act,[100] provides a preference in favor of municipalities when the FERC issues new licenses for hydroelectric projects, provided that the municipal applicant's plans are deemed "equally well adapted . . . to conserve and utilize in the public interest the water resources of the region."[101] In *City of Bountiful ("Bountiful")*,[102] the FERC issued a declaratory order, at the request of numerous municipal applicants for various expiring licenses. It interpreted the municipal preference provisions of the Federal Power Act as applicable to all relicensing proceedings under section 15 of

98. 15 U.S.C. § 171r(b) (1982).

99. 775 F.2d 336 (D.C. Cir. 1985), *reh'd granted*, Jan. 16, 1986.

100. 16 U.S.C. § 800(a) (1982).

101. *Id.*

102. 11 F.E.R.C. ¶ 61,337, *reh'g denied*, 12 F.E.R.C. ¶ 61,179 (1980), *aff'd sub nom.* Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

the Act.[103] The Commission thereby rejected the opposing argument that the municipal preference did not apply against incumbent licensees. The decision was upheld by the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court denied *certiorari.*

After the Commission's ruling in *Bountiful*, Clark-Cowlitz, a municipal joint operating agency between two county public utilities districts, and one of the intervenors in *Bountiful*, requested a Commission hearing on its application for the license to operate the existing Merwin Hydroelectric Project, for which it was competing with the incumbent licensee, Pacific Power & Light Company ("PP&L"). The administrative law judge ("ALJ") who heard the case ruled in favor of Clark-Cowlitz on the municipal preference issue, finding the applicants' plans "equally well-adapted to conserve and utilize in the public interest the water resources of the region," and relying on the Commission's decision in *Bountiful.*[104] PP&L appealed to the Commission, which by this time had experienced a change in membership and in its position on the issue of municipal preference. The Commission reversed the ALJ's award to Clark-Cowlitz, announcing that it was overruling *Bountiful* and declaring that the municipal preference was not available in any relicensing proceeding involving the original licensee.[105] The Commission also held as an independent basis for reversal that the ALJ had erred in finding the applicants "equally well-adapted," and that broad economic considerations weighed in favor of PP&L.

On appeal, the D.C. Circuit reversed the Commission and ordered it to reinstate the initial award to Clark-Cowlitz. In discussing the related concepts of *res judicata* and collateral estoppel, the court observed that both doctrines advance the same interests:

> protection of litigants from the vexation and expense of repetitious litigation, protection of the courts from the burden of unnecessary litigation, promotion of respect for the judicial process and confidence in the conclusiveness of judicial decision-making, avoidance of disconcertingly inconsistent results, and securing the peace and repose of society.[106]

The court also noted that the application of the two doctrines has been marked by confusion. As a contribution to conceptual clarity, the court offered the following statement:

> res judicata is a preclusion problem where the alignment of parties, facts and allegations is exceedingly close; collateral estoppel is generally applied when the alignment is less tight—when the same legal issues arise in connection with a different subject matter or different parties.[107]

The court also stated that it would categorize the issue before it as one involving *res judicata.* Regardless of the correct designation, however, the court concluded that the issue of the scope of the municipal preference could not be relitigated:

> The fact of this case, the procedure adopted by the Commission, and the flouting of a

---

103. 16 U.S.C. § 808 (1982).
104. Pacific Power and Light Co. 23 F.E.R.C. ¶ 63,037 at 65,094 (1933).
105. Pacific Power and Light Co., 25 F.E.R.C. ¶ 61,052 (1983).
106. *Clark-Cowlitz*, 775 F.2d at 373.
107. *Id.* at 374.

decision on a statutory interpretation question decided by a court of competent jurisdiction all make this case a model for the application of preclusion principles.[108]

The court noted that the parties before it were the same parties that devoted "enormous resources" to litigating the same issue with the same facts before the same agency in *Bountiful*. As to these parties, therefore, the court held that the Commission as precluded under *res judicata* from asserting its new interpretation.[109]

The court also held that the Commission's revised interpretation was not a reasonable one, based on the statutory language and its legislative history.[110] Finally, the court held that the Commission's analysis of the relative merits of the competing applications was arbitrary and capricious and in conflict with the statute's underlying policies.[111]

The final outcome of this case remains uncertain. On January 16, 1986, the D.C. Circuit granted rehearing, vacating its earlier decision, although none of the many requests for rehearing sought to have the court vacate the original decision. The court said it would issue another order at an unspecified date governing further proceedings in the case. Among the Court's options are to request new briefs on all issues or selected issues. The court's order leaves unclear the principles governing agencies' changes in the interpretation of their own decisions.

VII. Equal Access to Justice—Fees

The Equal Access to Justice Act ("EAJA")[112] expired on October 1, 1984, under a repealer clause. The repealer clause was itself repealed and the EAJA revived,[113] making the reenacted provisions effective retroactively, commencing October 1, 1984.

In two related cases involving the Commission, *Hirschey v. FERC*,[114] the Court of Appeals for the District of Columbia Circuit has considered the award of fees under the EAJA. In those cases, the court awarded attorney's fees to a petitioner who had been granted an exemption from the licensing requirement of the Federal Power Act ("FPA"), had the exemption revoked by the Commission, and had appealed the Commission's revocation. Costs for the petitioner's proceeding before the Commission were denied by the court, on the grounds that Section 317 of the Federal Power Act[115] prohibits the assessment of costs against the Commission.[116]

Fees were awarded under the EAJA for (1) petitioner's time spent in pursuing the EAJA fee application, (2) petitioner's time spent on the successful appeal of the Commission's revocation of the exemption, and (3) for the por-

108. *Id.*
109. *Id.* at 375.
110. *Id.* at 376-79.
111. *Id.* at 379-82.
112. 5 U.S.C. § 504 (1982); 29 U.S.C. § 2412(d) (1982).
113. Pub. L. No. 99-80, 99 Stat. 183 (1985).
114. *See* 777 F.2d 1 (D.C. Cir. 1985); 760 F.2d 305 (D.C. Cir. 1985).
115. 16 U.S.C. § 825p (1982).
116. *Hirschey*, 760 F.2d at 307.

tions of an earlier unsuccessful appeal that were useful for the successful appeal.[117] The court rejected the Commission's argument that the limiting language on *costs* in the FPA prohibited the award of attorney's *fees* under the EAJA, finding that the two matters were not linked.[118] The court rejected the approach taken in *Tulalip Tribes of Washington v. FERC*,[119] where the award of fees was conditioned upon the award of costs. The court remanded to the Commission for "initial consideration" the question of an award of attorney fees for representation before the Commission.[120]

The court allowed an upward adjustment of the rate of compensation for attorney time from the $75 per hour level to $89.73, on the basis of a 19.6% cost of living increase in Washington, D.C. between 1981 and May, 1985.[121] Finally, the court denied recovery of costs and expenses of the appeals, except for computer research and uncontested hours of work by paralegals on the appeals.[122]

On a related point, on June 7, 1985, the Commission in Order No. 424 terminated rulemaking proceedings in four rulemaking dockets, including Docket No. RM82-12-000, "Rules Implementing Equal Access to Justice Act."[123] The Commission had proposed rules on January 29, 1982, which would have added provisions to its Rules of Practice and Procedure delegating to the presiding officer the authority to make initial decisions on EAJA petitions and would have added provisions to implement the EAJA. In Order No. 424, the Commission said it was withdrawing those proposed rules because the expiration of the EAJA had eliminated the need for any rules. Since the EAJA requirements continue for any adversary adjudication begun before October 1, 1984, the Commission stated that it would meet fully its remaining obligations under the EAJA. Few Commission proceedings are adversary adjudications, the Commission found, so that a case-by-case approach would be adequate to comply with its remaining EAJA obligations, rather than expending its resources to promulgate a rule.

The Commission adopted the perspective in June, 1985, that it was unclear whether the EAJA would be reauthorized. If it was, the Commission indicated it would then consider whether rules may be necessary to implement the provisions of a new statute. No mention of rules to implement the since-revised EAJA, however, was made in the Commission's Fall 1985 Semiannual Regulatory Agenda.[124]

Susan N. Kelly, Chairman
Mary A. Walker, Vice-Chairman

Mark E. Barham	Michael J. Manning
Tracy Bridge	J. Michael Marcoux

117. 777 F.2d at 3-4.
118. 760 F.2d at 308-09.
119. 749 F.2d 1367 (9th Cir. 1984).
120. *Hirschey*, 760 F.2d at 311.
121. 777 F.2d at 5.
122. *Id.* at 6.
123. 31 F.E.R.C. ¶ 61,292 (1985).
124. 50 Fed. Reg. 44,932 (Oct. 29, 1985).

Thomas P. Brown, Jr.
Paul J. Chymiy
Frank J. Cooley
Roger B. Cooper
Bruce R. Coulombe
Carroll L. Gilliam
Ralph S. Hubbard
Jeffrey Lloyd Kirk
Roy P. Lessy, Jr.
John T. Miller, Jr.
Edward Petrini
David R. Richardson
A. Hewitt Rose
Christopher K. Sandberg
Charles F. Thensted
Robert P. Wax
Woodrow D. Wollesen
John F. Whitney