SETTLEMENT OF CONTESTED TRANSPORTATION RATE CASES AT FERC: SHOULD THE SQUEAKY WHEEL BE GREASED?

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I. INTRODUCTION

The Federal Energy Regulatory Commission (FERC or Commission) relies heavily upon settlement procedures to resolve the vast majority of its interstate pipeline rate cases.[1] However, recent Commission and judicial decisions have raised serious questions regarding one category of such settlements: contested settlements involving transportation issues.

A recent appellate decision, *Tejas Power Corp. v. FERC*,[2] and the Commission's orders in a recent *Williams Natural Gas Co. (Williams)* rate case[3] have particularly focused attention on the Commission's settlement procedures when contested proceedings involve transportation issues. This article addresses the judicial and regulatory precedent which encourages settlements of Commission proceedings, as well the specific facts in a recent *Williams* rate case, in order to examine the dynamics of contested transportation rate settlements and to suggest some parameters for future Commission consideration of such settlements.

Encouraging settlement of administrative proceedings is not unique to the Commission. Under the Administrative Procedure Act, government agencies are required to give all parties the opportunity for the submission and consideration of offers of settlement during agency adjudicative proceedings.[4] However, due to the enormous number of matters which must be resolved at the Commission, the FERC has developed a set of specific settlement procedures to facilitate settlements in its adjudicative proceedings.[5] This article will focus on how these settlement procedures operate for one type of FERC proceeding: a contested interstate natural gas pipeline proceeding regarding changes to the rates, terms, and conditions of its transportation services.

Any participant in a FERC rate case is entitled to propose a settlement plan which would resolve the proceeding without the necessity of holding an evidentiary hearing. In practice, however, the interstate pipeline which is

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1. *See* Walker, "*Settlement Practice at the FERC: Boom or Bane*," 7 ENERGY L.J. 343 (1986), which noted that over 70% of the Commission's pipeline rate cases are resolved through settlement procedures.

2. 908 F.2d 998 (D.C. Cir. 1990).

3. 47 F.E.R.C. ¶ 61,468 (1989). This proceeding forced the Commission to grapple with the same problems regarding contested settlements in transportation rate cases which were originally identified in Arkla Energy Resources, 48 F.E.R.C. ¶ 61,062 (1989).

4. 5 U.S.C. § 554(c)(1) (1988).

5. 18 C.F.R. § 385.601, (1990).

seeking approval of revised operational tariff terms and conditions usually proposes a settlement. Normally, a pipeline will discuss this plan, usually filed as a "Stipulation and Agreement," with the other participants in hopes that the settlement will meet most of the participants' needs.

For example, the settlement process may be triggered when an interstate pipeline submits revised tariff sheets to the FERC which propose to increase the pipeline's transportation rates and sales rates to compensate for anticipated decreased volumes of gas flowing through the pipeline, increased operating costs, and other factors. Exercising its authority under section 4 of the Natural Gas Act (NGA),[6] the FERC usually suspends such tariff sheets to become effective some months later, subject to refund, and then schedules an evidentiary hearing to be held before an Administrative Law Judge (ALJ). Such a hearing is held to receive evidence in order to determine if the pipeline's rates and terms and conditions of service, as set forth in its filed tariff sheets, are just and reasonable. Evidentiary hearings are normally quite comprehensive, involving extensive discovery, numerous briefs and detailed testimony on the pipeline's operating costs, depreciation rates, proposed volumes of gas to be transported, rate of return on capital, and many other issues.[7]

In such a situation, a pipeline may propose a settlement in order to avoid the expenses and uncertainty involved in an evidentiary hearing on its revised tariff terms. Under the terms of a settlement offer, the pipeline may voluntarily agree, for example, to some fraction of the proposed rate increase and also to changes in its rate design or terms and conditions of service. This settlement plan would be discussed with the pipeline's customers who produce gas for transportation on the pipeline, with the local distribution companies (LDCs) that purchase transported gas, with gas marketers who utilize the pipeline, as well as with the Commission staff personnel who evaluate all rates to determine that they are "just and reasonable" in accordance with section 4(a) of the NGA.[8] However, there is no requirement that all, or even any, other parties be consulted prior to submission of a settlement.[9]

If all parties agree to the terms of the proposed settlement, it is eventually forwarded to the Commission for consideration and virtual automatic approval. However, if one or more parties *raise objections* to a material element in the settlement, the plan may be deemed to be a "contested" settlement. Although it is still possible for such a settlement to be considered by the Commission, the reasonable objections of a party can result in a settlement not being sent to the Commission for its consideration until after an evidentiary

6. All interstate pipeline rates or charges "shall be just and reasonable." 15 U.S.C. § 717c(a) (1976).

7. In part due to the increasing complexity of Commission proceedings, FERC has begun to accept parties' proposals to use alternate dispute resolution techniques to expedite evidentiary hearings. *See* Amerada Hess Pipeline Corp., 53 F.E.R.C. ¶ 61,266 (1990). These techniques are consistent with the Administrative Dispute Resolution Act, 5 U.S.C. §§ 581, which became law on November 15, 1990. In addition, the FERC has increasingly relied upon "paper hearings," in which oral testimony and cross-examination is omitted, to expedite hearings. *See* El Paso Natural Gas Co., 47 F.E.R.C. ¶ 61,108, at 61,305 (1989); and Natural Gas Pipeline Co., 49 F.E.R.C. ¶ 61,137, at 61,584 (1989).

8. 15 U.S.C. § 717c(a) (1976).

9. Pennsylvania Electric Co., 35 F.E.R.C. ¶ 63,094, at 65,299 (1986).

hearing has been held.[10]

This article will focus on the dynamics of a transportation rate case proceeding if one or more participants objects to the proposed settlement. In such a situation, a single "squeaky wheel" who is able to raise a disputed genuine issue of material fact may be able to require that an evidentiary hearing be held to resolve that issue. If so, that single nonconsenting party may be able to derail a transportation rate settlement affecting dozens of parties and thus may force the pipeline and other interested parties to participate in an often lengthy and expensive evidentiary hearing.

II. JUDICIAL AND REGULATORY BACKGROUND OF FERC SETTLEMENTS

In 1972, the U.S. Court of Appeals for the District of Columbia Circuit discussed in some detail the authority of the Federal Power Commission (FPC), the predecessor of the Commission, to accept a settlement rather than holding a full evidentiary hearing.[11] The petitioner in *Pennsylvania Gas & Water Co. v. Federal Power Commission* argued that it had been deprived of due process because the FPC had approved a settlement without a hearing and over the petitioner's objections.[12]

The court in *Pennsylvania Gas* rejected the petitioner's due process challenge and endorsed the FPC's settlement procedures. The court initially noted that settlements in administrative law proceedings share many of the characteristics of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). Such settlements should not be discouraged, because the settlement procedure provides a valuable tool "to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest."[13] Accordingly, the court held that an administrative agency may validly terminate rate proceedings "at virtually any stage on such terms as its judgment on the evidence before it deems fair, just, and equitable, provided of course the procedural requirements of the statute are observed."[14] The court concluded that "in the event no factual controversy exists," the case can be settled without an evidentiary hearing.[15] This analysis has been approved in a variety of other jurisdictions as well.[16]

A. Contested Settlements Treated Differently from Uncontested Settlements

The FERC's current Rules of Practice and Procedure operate to encourage settlements of all proceedings, including transportation rate cases.

10. New England Power Co., 47 F.E.R.C. ¶ 63,003, at 65,007 (1989); and Independent Oil & Gas Ass'n of W. Va., 26 F.E.R.C. ¶ 63,012, at 65,022 (1984).

11. Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242 (D.C. Cir. 1972).

12. *Id.* at 1244.

13. *Id.* at 1247.

14. *Id.* at 1246.

15. *Id.* at 1251.

16. Distrigas of Mass. Corp. v. FERC, 737 F.2d 1208, at 1225 (1st Cir. 1984); New Orleans Public Serv., Inc. v. FERC, 659 F.2d 509, at 512 (5th Cir. 1981); and *In Re* Hugoton-Anadarko Area Rate Case, 466 F.2d 974, at 980 (9th Cir. 1972).

However, these rules raise an important distinction between settlements which are uncontested and those settlements which are objected to by at least one party upon specific grounds.[17] If the Commission determines that a settlement is not contested by any party, the FERC may approve such an uncontested offer of settlement "upon a finding that the settlement appears to be fair and reasonable and in the public interest."[18] In practice, uncontested settlements are routinely approved by the Commission.[19]

In contrast, contested settlements must be closely scrutinized by an ALJ to determine whether or not the nonconsenting party is objecting on the basis of a genuine issue of material fact or on some other basis.[20] The resolution of this question is critical to the progress of any settlement towards ultimate Commission approval and implementation.

1. ALJ Review of Contested Settlements

When a settlement which is contested by a party is submitted to an ALJ, the ALJ does not decide the merits of the settlement. Instead, the ALJ is directed to decide if the settlement can be sent to the Commission to be approved or disapproved; this process is referred to as "certifying" a settlement.[21] In this role, the ALJ has four options.

First, if the ALJ determines on the basis of the record before him that some of the issues of the settlement are not contested, he can sever those issues from the rest of the settlement and certify just those uncontested issues to the FERC.[22] Second, if the ALJ finds that the record lacks substantial evidence regarding issues of material fact, the ALJ can hold a hearing to receive additional evidence upon which a decision on only the contested issues may reasonably be based. After such hearing, if appropriate, the ALJ can then certify the contested settlement to the FERC.[23]

Third, the ALJ may find that, despite the claims of some parties, "there is no [disputed] genuine issue of material fact" for any settlement or partial settlement.[24] For example, the ALJ may determine that the objecting party actually has raised only policy issues or issues based on the implications of agreed-upon facts.[25] In such cases, the ALJ can certify such settlement or partial settlement to the FERC along with the appropriate record, for the Commission's consideration.

The fourth and final option available to an ALJ is applicable if the ALJ

17. 18 C.F.R. § 385.601, *et seq.* (1990).

18. 18 C.F.R. § 385.602(g)(3) (1990).

19. F.E.R.C. Practice and Procedure Manual, ¶ 602.71 (1990).

20. *Cf.* Trunkline Gas Co., 22 F.E.R.C. ¶ 63,114, at 65,398 (1983) (A genuine issue of material fact means a dispute over the basic underlying facts of a proceeding, not the inferences drawn from the facts or expert opinions.)

21. Independent Oil & Gas Ass'n of W. Va., 26 F.E.R.C. ¶ 63,012, at 65,022 (1984) (An ALJ's "function is only to lay the offer alongside certain criteria for certification, take its measure, and decide to certify it or not.")

22. 18 C.F.R. § 385.602(h)(2)(iv) (1990).

23. 18 C.F.R. § 385.602(h)(2)(i) (1990).

24. 18 C.F.R. § 385.602(h)(2)(ii) (1990).

25. *See* United Gas Pipe Line Co., 50 F.E.R.C. ¶ 61,276, at 61,877 (1990).

determines that there are genuine issues of material fact in dispute, but he also determines that the evidentiary record is adequate regarding these issues. In this situation, an ALJ can certify a settlement or portion of a settlement if all three of the following conditions exist: (a) the ALJ determines that the record contains substantial evidence from which the FERC may reach a reasoned decision on the merits of the contested issues; (b) the parties have the right to cross-examine opposing witnesses; and (c) all parties agree that the ALJ may omit an initial decision.[26]

2. Review of Settlements by the Commission

Once all or a portion of a settlement has been certified by an ALJ and sent with the appropriate records to the Commission, there are five possible outcomes. First, of course, the Commission may decide not to approve an uncontested settlement which has been certified. This action can be taken if the FERC finds that the settlement is not "fair and reasonable and in the public interest."[27] There are no reported instances where the Commission has refused to approve a settlement which it deemed to be truly uncontested, although the FERC often makes minor modifications to such settlements to conform to its well-established policies.[28]

Second, the Commission may decide to sever contested portions of a settlement from the rest of a settlement, in order to narrow issues in controversy, and only approve the uncontested portion of the settlement.[29] A third option available under FERC regulations is for the Commission to decide the merits of a contested settlement. The FERC can only do this if either "the record contains substantial evidence upon which to base a reasoned decision" or the FERC determines that "there is no genuine issue of material fact."[30] As discussed in the *Pennsylvania Gas* decision, this is analogous to a motion for summary judgment under Rule 56 of the FRCP.

Often, however, this alternative is not available, either because there is not substantial evidence in the submitted record to allow the FERC to analyze a contested settlement or because genuine issues of material fact exist regarding a settlement. In these situations, the FERC will exercise its fourth option and either request an ALJ to hold an evidentiary hearing to receive additional evidence or take unspecified "other action" which the FERC determines appropriate.[31]

A final option available to the Commission is perhaps the most controversial, and is also the focus of this article. Based upon judicial precedent, the Commission is entitled to approve a contested settlement as to only the consenting parties and "sever out" of a settlement those participants who object to the settlement.[32] An evidentiary hearing is then held for the nonconsenting

26. 18 C.F.R. § 385.602(h)(2)(iii) (1990).
27. 18 C.F.R. § 385.602(g)(3) (1990).
28. F.E.R.C. Practice and Procedure Manual, ¶ 602.71 (1990).
29. 18 C.F.R. § 385.602(h)(1)(iii) (1990).
30. 18 C.F.R. § 385.602(h)(1)(i) (1990).
31. 18 C.F.R. § 385.602(h)(1)(ii) (1990).
32. United Municipal Distrib. Group v. FERC, 732 F.2d 202 (D.C. Cir. 1984).

parties in order to resolve disputed genuine issues of material fact. In theory, the consenting parties thus obtain the benefits of the proposed settlement, and the nonconsenting parties are permitted to participate in an evidentiary hearing to resolve the genuine issues of material fact. However, a number of significant complications result if this procedure is adopted in a contested transportation rate case.

III. THE EFFECT OF THE "*ARKLA* DOCTRINE" ON NONCONSENTING PARTIES

In 1989, the Commission determined in an *Arkla Energy Resources* (*Arkla*) order that FERC rate cases involving the terms and conditions of *transporting gas* on a pipeline are fundamentally different from FERC proceedings regarding the rates that a pipeline charges to *sell gas* to a customer.[33] When a pipeline establishes its rates for sales of gas, there are different rates for "clearly identifiable customers because sales transactions are customer specific."[34] In contrast, transportation service rates are *not* geared toward individual customers, but are established according to the service provided; the group of customers is more diverse and is ever changing. This distinction was critical in FERC's *Arkla* decision.

A. Prohibiting Severing of Nonconsenting Parties

Arkla had obtained the consent of most, but not all, of the participants to a proposed settlement of its transportation rates. Accordingly, Arkla sought to sever the nonconsenting parties from the settlement and allow them to litigate the contested issues. All parties agreed that only the consenting parties would be bound by the settlement.[35]

When the FERC analyzed this proposal it initially noted that in the past the Commission had permitted contesting parties to be severed from settlements regarding sales rates, on the grounds that contesting parties could effectively be bound by the results of such litigation.[36] On the other hand, the FERC concluded that transportation rates were fundamentally different, since they were not "customer specific," as a practical matter. Even if the litigated transportation rate for a contesting party was higher than the settlement rate the contesting party could structure his transaction to avoid the higher rate by obtaining transportation through an entity that had not contested the settlement.[37] Since a contesting party would then have the best of both worlds, the FERC noted that nonconsenting parties would have little incentive to negotiate a transportation rate settlement with a pipeline in good faith.

Accordingly, the FERC held that "the practice of severing contesting

33. Arkla Energy Resources, 48 F.E.R.C. ¶ 61,062 (1989).

34. 48 F.E.R.C. ¶ 61,062, at 61,303.

35. *Id.* at 61,302.

36. United Gas Pipe Line Co., 22 F.E.R.C. ¶ 61,094 (1983); *reh'g denied*, 23 F.E.R.C. ¶ 61,101 (1983) and United Municipal Distrib. Group v. FERC, 732 F.2d 202 (D.C. Cir. 1984).

37. Pipeline customers can avoid a particular transportation rate if they contractually arrange to sell the gas to a party which has a lower transportation rate, and then let that party transport the gas. After such transportation occurs, title can be returned to the initial customer.

parties [from a settlement] should not be applied to settlements of Part 284 transportation rates."[38] Instead, the FERC held that in the future it would view a contested transportation rate settlement as a substitute proposal of the pipeline and decide the contested issues on the merits. If no disputed issues of fact exist, the FERC would approve or disapprove the settlement and bind all parties to it. However, the FERC held that: "If there are *material issues of fact in dispute* that cannot be resolved on the basis of the written record, *the Commission will establish a hearing* to resolve those issues in order *to determine whether any aspect of the settlement proposal should be modified.*"[39]

*B. Application of the "*Arkla *Doctrine"*

A few months after the *Arkla* decision, the Commission applied the "*Arkla* doctrine" in a United Gas Pipe Line Company (United) proceeding, where the FERC had previously severed contesting parties from a proposed settlement. In an October 27, 1989, order,[40] the FERC "reversed field" based upon the *Arkla* doctrine and did not permit the severing of contested parties from the settlement. The FERC determined that the evidence in the written record actually did support the proposed settlement of the sales and transportation rates. However, the FERC held that the record was not adequate to resolve rate design issues.

In a March 8, 1990, order on rehearing, the FERC explained the effect of its application of the *Arkla* doctrine to the *United* rate case. One aspect of the *United* settlement provided that noncontesting parties agreed to waive all rights to judicial review of FERC's orders and would be bound by the settlement. Contesting parties argued that they had retained their appellate rights, notwithstanding FERC's approval of the sales and transportation issues. The FERC not only agreed that contesting parties could pursue their rights to appeal, but stated that *all parties* retained such rights.

> When the Commission rejected the consenting/contesting party mechanism and approved the Settlement with modifications for all parties, it became meaningless to include a provision that consenting parties agreed not to challenge the Settlement. There are no longer any consenting or contesting parties, as those terms were used in the original Settlement, and all parties may pursue their rights to appeal.[41]

The *United* decision clarified that a party which did not consent to a settlement would not lose any rights, such as the right to appeal the Commission's approving the settlement, subject to satisfaction of the standards of section 19 of the NGA.[42] On the other hand, this decision did not clarify the precise circumstances under which an evidentiary hearing would be held to identify whether genuine material issues of fact were actually in dispute and, if so, create an adequate record regarding such issues.

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38. 48 F.E.R.C. ¶ 61,062, at 61,303.

39. *Id.* at 61,303-04 (emphasis added).

40. United Gas Pipe Line Co., 49 F.E.R.C. ¶ 61,096, at 61,431 (1989).

41. United Gas Pipe Line Co., 50 F.E.R.C. ¶ 61,276, at 61,883 n.34 (1990).

42. 15 U.S.C. § 717r (1988). This provision of the NGA provides for rehearing of Commission orders by aggrieved parties and also appeal of final FERC orders to a U.S. Circuit Court of Appeals.

In fact, both the *Arkla* decision and the *United* decision suggested that a "squeaky wheel" could, under certain circumstances, hold a settlement "hostage" by demonstrating that, since genuine issues of material fact existed, an evidentiary hearing was required.[43] Of course, the objecting party would have to do much more than just allege the existence of genuine factual disputes; it would have to demonstrate the existence of such facts and also prove that they were material.[44]

IV. THE *TEJAS* COURT REJECTION OF A COMMISSION SETTLEMENT WHICH HAD BEEN APPROVED

Although the courts have not had an opportunity to address directly the settlement procedures for contested transportation rate cases, in 1990 the United States Court of Appeals for the District of Columbia Circuit issued an important decision which generally discussed FERC's role in approving settlements.[45] This decision, *Tejas Power Corp. v. FERC*, emphasized the importance of an evidentiary record which supports the Commission's approval of settlements of adjudicative proceedings.

A. FERC's Approval of Settlements Without Adequate Records

The D.C. Circuit Court analyzed FERC approval of a gas inventory charge (GIC)[46] settlement proposed by Texas Eastern Transmission Corporation (Texas Eastern). This GIC settlement was unanimously supported by all twelve of Texas Eastern's resale customers, which were LDCs. Based largely on the fact that all of the pipeline's customers had voluntarily agreed to the settlement and no state commission had opposed the settlement, the FERC approved the settlement over the objections of other parties and without the benefit of an evidentiary hearing.[47]

FERC's decision noted that a rival pipeline had argued that the GIC would foreclose competition in a significant part of Texas Eastern's market. In addition, some parties objected to the GIC arguing that the customers had only agreed to the settlement because they lacked any viable alternative.[48] Nonetheless, the FERC approved the settlement because it believed that Texas Eastern's customers retained sufficient flexibility to obtain alternate supplies, received a number of benefits from the settlement, and had all voluntarily agreed to the proposal.[49]

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43. *Cf.* Williams Natural Gas Co., 53 F.E.R.C. ¶ 63,021, at 65,241 (1990). "[I]t is extremely easy for a single participant to contest and block certification of a settlement in a gas rate case involving transportation."

44. *Cf.* Trans-Alaska Pipeline Sys., 35 F.E.R.C. ¶ 61,425, at 61,980 (1986). "[N]o party may automatically create a genuine, material issue in a settlement merely by its opposition to the settlement."

45. Tejas Power Corp. v. FERC, 908 F.2d 998 (D.C. Cir. 1990).

46. GIC is a mechanism to permit a pipeline to recover the cost of maintaining supplies of gas for customers. 908 F.2d at 1000.

47. Texas Eastern Transmission Corp., 44 F.E.R.C. ¶ 61,413 (1988), *reh'g denied*, 47 F.E.R.C. ¶ 61,100 (1989).

48. 908 F.2d at 1002.

49. 47 F.E.R.C. ¶ 61,100, at 61,277.

The court remanded the settlement to the Commission and criticized FERC's failure to justify its decision.[50] The court initially pointed out that if a pipeline actually could exercise monopolistic power, it would not be unreasonable to expect it to be able to coerce all of its customers into consenting to a settlement.[51] Similarly, the Commission was not entitled to assume that lack of objection from state public service commissions was reliable evidence that the settlement was in the public interest, especially since "various end users contested the settlement on their own behalf."[52]

In any event, even if the settlement was favorable to Texas Eastern's customers, the FERC "may not be complacent about the possibility that the GIC is structured so as to enable the pipeline, through the exercise of significant market power, to impose unreasonable terms that will likely be paid for by end users that were not parties to the settlement."[53] The decision pointed out that the NGA requires that a settlement only be approved if in FERC's independent judgment it finds that the settlement is in the public interest.[54] This standard is not automatically met by the "silence of the relevant state commissions" or the support of customers which may be protecting their own interests.[55] In addition, support of interested parties is also not persuasive if the pipeline holds significant market power over its customers.

Based upon the *Tejas* decision, the FERC cannot approve a contested settlement without independently determining that the settlement is just and reasonable, even if the settlement is not contested by the pipeline's customers. This suggests that an evidentiary hearing frequently might be required to provide the FERC with the necessary evidence to prove that a contested settlement was in the "public interest" before such a settlement was approved.

B. Tejas *Decision and Certification of Settlements*

Despite the *Tejas* decision, the FERC recently indicated that an evidentiary hearing is not required if the Commission is merely ordering that a settlement in a contested rate case be certified to the Commission, rather than deciding the case on the merits. In a consolidated transportation rate case involving *Transcontinental Gas Pipe Line Corporation (Transco)*,[56] the FERC was asked to waive Rule 602 of its Rules of Practice and Procedure and order certification of the settlement, absent the agreement of the parties. The ALJ in one of the consolidated proceedings (involving approval of a GIC proposal) determined that the comprehensive settlement should be certified. However, the ALJ for the companion contested rate case determined that "opponents of the settlement raised genuine issues of material fact that require resolution in an evidentiary hearing" and thus prevent certification of the settlement to the

50. 908 F.2d at 1002-03.

51. *Id.* at 1004.

52. *Id.* at 1003.

53. *Id.* at 1004.

54. *Id.* at 1003.

55. *Id. See* Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) and ANR Pipeline Co. v. FERC, 771 F.2d 507 (D.C. Cir. 1985).

56. Transcontinental Gas Pipe Line Corp., 53 F.E.R.C. ¶ 61,301 (1990).

Commission.[57]

The FERC held that both dockets were interrelated such that "Commission review of the gas inventory charge settlement is dependent on review of the rate settlement" and it was "administratively efficient to consider these settlements together."[58] The FERC reached this conclusion based upon the fact that the Commission, under Rule 602(h)(1)(ii)(B), has "considerable flexibility when evaluating the merits of contested settlements."[59] In contrast, the decision expressly noted that ALJs are unable to certify settlements, unless: (1) there are no genuine issues of fact; (2) all parties concur; *or* (3) "[t]he record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues, *and* that the parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and the cross-examination of opposing witnesses."[60]

In the *Transco* situation, the FERC argued that absent an order certifying both settlements, the Commission's ability to consider the interrelated settlements would be frustrated. Nonetheless, the FERC added that its holding was based upon "the unique circumstance of this case" so that the order would not lead to "widespread circumvention of the Commission's rules concerning interlocutory appeals."[61]

Finally, the order directly distinguished the *Tejas* decision regarding the need for adequate findings in support of a settlement. The FERC stated that its order was not inconsistent with the *Tejas* decision, because the FERC was "not reaching a merits decision on the settlement at this stage . . . [nor] making any findings concerning the impact of the settlement on the downstream customers of Transco's LDCs."[62] Instead, the FERC was "only determining who is going to make the decision concerning whether the record is adequate to support a merits decision."[63]

In other words, in the *Transco* order the FERC waived the requirement that there be an adequate evidentiary record before a settlement could be certified, so that the Commission could judge the adequacy of the record, as well as the merits of the settlement. This will be done, presumably based only upon the filed papers of the parties, without any "live" evidentiary testimony or cross-examination.

In the *Transco* order the FERC attempted to distinguish between "making any findings concerning the impact of the settlement on the downstream customers" and making a decision on who will decide "whether the record is adequate to support a merits decision."[64] In other words, the FERC argued that it is proper for the Commission, but not the ALJ, to decide whether the

57. 53 F.E.R.C. ¶ 61,301, at 62,123.

58. *Id.* at 62,125 n.9. The Commission distinguished this holding from its October 16, 1990 order in the *Williams* case, which is discussed *infra*, on the basis that "the Williams case involved only a single proceeding" rather than two proceedings before two different ALJs.

59. *Id.* at 62,125.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

record is adequate to protect the interests of the parties without any evidentiary hearings. It is hard to understand what special expertise the Commission possesses to be able to overrule the prior determination of the ALJ that the record in the rate case was inadequate. This is particularly true given the ALJ's unique knowledge of the proceedings resulting from his exposure to relevant issues during the three years since the case was filed. One possible explanation for this decision is a FERC presumption that the Commission is somehow better-equipped than the ALJ to decide if the record is adequate.

This questionable presumption is remarkably similar to the sort of Commission presumptions which the *Tejas* court had rejected. In order for such a presumption to be valid, the Commission should be able to state affirmatively that the record is sufficient to permit the FERC to determine that no genuine issues of material fact are in dispute; otherwise, the case should be remanded to the ALJ for an evidentiary hearing to permit such a determination to be made. In contrast, the FERC was only able to deny that the record in the *Transco* proceeding was necessarily inadequate; it also was able to weakly state that "the record here *may be sufficiently developed* for the Commission to reach a decision on the merits concerning the rate settlement."[65]

V. THE CLARIFICATION OF THE *ARKLA* DOCTRINE

A recent interstate pipeline rate proceeding provides a valuable forum for examining the application of FERC's settlement regulations to a contested transportation rate case. On May 31, 1989, Williams filed revised tariff sheets for a general rate increase and revision to its rate design under section 4 of the NGA.[66] The FERC accepted and suspended the new rates to become effective on December 1, 1989, subject to refund, and set the case for hearing.[67]

After extensive discovery, an evidentiary hearing before an ALJ was scheduled to begin on September 5, 1990. However, on July 9, 1990, Williams submitted an offer of settlement to resolve all cost-of-service issues as well as to resolve the issue of Williams' "throughput," the projected volumes of gas which Williams would be expected to transport during the effective period of the rates. Although some of the participants to the proceeding, including Commission staff, suggested modifications or clarifications to the proposed settlement, only one party, Amoco Production Company (Amoco), specifically objected to the terms of the settlement.[68]

A. ALJ Refuses to Certify the Contested Settlement

On August 17, 1990, the ALJ issued an order[69] denying Williams' request to certify to the Commission the July 9, 1990 settlement. This order specifi-

65. *Id.* (emphasis added).

66. Williams Natural Gas Co., 47 F.E.R.C. ¶ 61,468 (1989).

67. 47 F.E.R.C. ¶ 61,468, at 62,464.

68. Amoco had been the lone dissenter in Williams' previous rate and tariff cases in Docket Nos. RP87-33-010 and TA88-1-43-004. *See* Amoco Prod. Co. v. FERC, Case No. 90-1601 currently pending before the U.S. Court of Appeals for the D.C. Circuit. In addition, Amoco had initially opposed, but had later consented to a settlement of an earlier Williams' rate case in Docket No. RP86-32-003, *et al.*

69. Williams Natural Gas Co., 52 F.E.R.C. ¶ 63,021 (1990).

cally discussed eight of Amoco's objections to the settlement and determined that these issues raised genuine issues of material fact.[70] The order also emphasized the ALJ's perception of the importance of conducting an evidentiary hearing to resolve these genuine issues of material fact.

> *Cross-examination of the witnesses in this case is crucial to an understanding of these issues* by the undersigned judge and the Commission, particularly in a case as complex as this one where the witnesses so widely disagree on so many issues. Experience shows that *it would be unwise to take the prefiled testimony in this case at face value.* Cross-examination often shows the weaknesses in witnesses' testimony on crucial issues.[71]

In addition, the ALJ based his order upon his determination that despite the voluminous discovery which had been made, substantial evidence upon which to resolve the disputed facts did *not* yet exist. He also stated he was expressly constrained under FERC Rules of Practice and Procedure from submitting the settlement to the Commission without preparing an initial decision, since all of the parties had not agreed to a motion to omit this decision.

When Williams appealed the August 17, 1990, order, the ALJ promptly issued an order[72] granting motions to permit an interlocutory appeal of his order to the Commission, pursuant to Rule 715(b)(5)(i) of FERC's Rules of Practice and Procedure.[73] In addition, the ALJ submitted an accompanying memorandum[74] to the Commission regarding the conflicting interplay between the *Arkla* doctrine and the public interest benefits in certifying the Williams' settlement to the FERC.

The ALJ noted in this memorandum that under the *Arkla* doctrine, the Commission would not allow severance of a contesting party in a case involving transportation rates. On the other hand, he earnestly felt that "in the instant case the public interest may be better served by not following the *Arkla Energy* doctrine, by allowing the $27 million annual rate reduction provided by the settlement offer to take effect, and by letting Amoco litigate the issues it is raising."[75]

B. The FERC Rejects Any Exception to the Arkla *Doctrine*

The FERC did not comply with the ALJ's request to reconsider whether an exception should be made to the *Arkla* doctrine and sever Amoco from the settlement, then allowing settlement as to the consenting parties only, to be certified to the Commission. Instead, the FERC denied the interlocutory appeal and remanded the settlement back to the ALJ and urged him once again to attempt to apply FERC's settlement rules.[76]

In a detailed October 16, 1990, order denying the interlocutory appeal,

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70. The ALJ tentatively identified over 40 relevant issues of material fact in a August 29, 1990 "Tentative List of Issues" in the proceeding.

71. 52 F.E.R.C. ¶ 63,021, at 65,036 (emphasis added) (citation omitted).

72. Williams Natural Gas Co., 52 F.E.R.C. ¶ 63,026 (1990).

73. 18 C.F.R. § 385.715(b)(5)(i) (1990).

74. Williams Natural Gas Co., 52 F.E.R.C. ¶ 63,027 (1990).

75. 52 F.E.R.C. ¶ 63,027, at 65,048.

76. 53 F.E.R.C. ¶ 61,060 (1990).

the FERC reviewed the numerous "techniques available to foster the settlement process where transportation rates are at issue and a contesting party cannot be severed"[77] to assist in the remand. The FERC noted that in many instances, evidentiary hearings are not required for an ALJ to decide if a settlement should be certified to the Commission, even where there is a contesting party:

- No evidentiary hearing is required if the factual disputes in the pre-filed testimony are not material.[78]
- No evidentiary hearing is required "to resolve factual disputes which only concern the significance or interpretation of the facts or predictions as to future facts" since "cross-examination would merely result in a narrowing of the scope of the dispute."[79] The order noted that it is often *not* the case in FERC proceedings that "a witness' motive or intent or credibility needed to be considered in addition to documentary evidence."[80]
- Evidentiary hearings are not required for *all* issues if an ALJ is able to "sever issues for separate consideration." The order acknowledged, however, that such severing may not be practical where severing is viewed as an "unacceptable modification of the settlement by the parties."[81]
- A settlement can also be certified without an evidentiary hearing if the disputes are not as to facts, but involve "an analysis based upon judgment as to the likelihood of future events."[82]
- Also, an evidentiary hearing is not required where the "content of the record can resolve any material factual disputes."[83]
- In addition, where "thousands of pages of testimony," answering evidence, rebuttal and surrebuttal exist, the record may be sufficient even without cross-examination.[84] Where an "extensive paper record exists" the ALJ might find that cross-examination was not necessary, since an "oral, trial-type evidentiary record is necessary only when the material facts in dispute cannot be resolved on the basis of the written record."[85]

The order also reminded the ALJ that even where an evidentiary hearing was required, it need not concern all of the contested issues. In such instances, the ALJ could hold a "short expedited hearing on limited issues to gather a sufficient record to allow certification."[86]

C. *ALJ Adopts an Evidentiary Mini-Hearing*

At an October 30, 1990, prehearing conference, the ALJ questioned counsel for Amoco, Williams and many of the other parties to determine whether genuine issues of material fact actually existed in the case. Based upon the parties' responses, the ALJ determined a sufficient number of issues did exist. Accordingly, the ALJ ordered that the type of "short expedited hearing" suggested in the October 16, 1990, order be held to determine if the

77. *Id.* at 61,187.
78. *Id.*
79. *Id.*
80. *Id.* at 61,188.
81. *Id.* at 61,187.
82. *Id.* at 61,188.
83. *Id.*
84. *Id.* at 61,188-89.
85. *Id.* at 61,188.
86. *Id.*

disputed issues were material to the *Williams* settlement.[87]

Williams objected to such a hearing and promptly filed a motion for reconsideration of FERC's October 16, 1990, order denying interlocutory appeal. Williams made two requests in this motion. First, Williams requested that the FERC reverse its earlier order and require that the contested settlement and the accompanying record be promptly certified to the Commission. The FERC would be able to evaluate the adequacy of the record to see if it supported approval of the settlement. Alternatively, Williams invoked Rule 710[88] by requesting that the FERC waive the Rule 708 requirement[89] that the ALJ prepare an initial decision.

D. The FERC Orders Settlement to be Certified

On November 21, 1990, the FERC responded to Williams' motion by ordering prompt certification of the settlement. The order held that the October 16, 1990, order had correctly directed the ALJ to "closely scrutinize the record, and, if he determined that material factual disputes existed that could not be resolved on the basis of the existing record . . . [that he] expeditiously build a record to resolve the disputes."[90] The order commented that this procedure was appropriate because *it was not clear at the time of the order* "whether the disputes raised by Amoco to the settlement actually went to the material facts underpinning the settlement."[91]

The November 21, 1990, order also directed the ALJ to certify the July 9, 1990, settlement and the existing record at the close of the mini-hearing, *without* preparing an initial decision.[92] The FERC commented that from a review of the transcript of the October 30, 1990, pre-hearing conference, it appeared the ALJ "had not heeded the Commission's guidance . . . but may have initiated a hearing covering unnecessarily broad issues."[93]

In unusually strong language, the order stated the ALJ "had not been as resourceful as the Commission had expected in order to foster the expeditious consideration of the July 9 settlement."[94] The order also lamented that the ALJ "has not appreciably narrowed the scope of issues" as directed by the

87. *Id.* at 61,189. The hearing, which was referred to by some parties as a "mini-hearing," commenced on November 6, 1990 and, after a number of breaks, concluded on November 30, 1990. Approximately 1600 pages of transcript were recorded.

88. 18 C.F.R. § 385.708 (1990) requires that in any proceeding in which a presiding officer, other than the Commission, presides over the reception of evidence, such presiding officer is required to prepare a written initial decision, unless otherwise ordered by FERC or such omission is agreed to by all parties. *Cf.* Section 557(b) of the Administrative Procedure Act, 5 U.S.C. § 557(b) (1988).

89. 18 C.F.R. § 385.710 (1990).

90. Williams Natural Gas Co., 53 F.E.R.C. ¶ 61,231, at 61,966 (1990).

91. *Id.*

92. *Id.* at 61,967. It is interesting to note that the November 21, 1990, order made no finding "on the record that due and timely execution of its functions imperatively and unavoidably" required the settlement to be certified without an initial decision, as mandated by the Administrative Procedure Act, 5 U.S.C. § 557(b). This statute expressly requires that the trier of fact at an administrative agency issue an initial decision absent such showing of necessity.

93. *Id.* at 61,966.

94. *Id.*

October 16, 1990 order.[95] Finally, the order reiterated that "an oral type evidentiary hearing is not necessary to identify whether material issues of fact are in dispute."[96]

E. ALJ Certifies the Settlement

On December 18, 1990, the ALJ formally certified the July 9, 1990, settlement to the Commission,[97] in accordance with FERC's November 21, 1990 order. In this certification, the ALJ took another opportunity to challenge FERC's settlement procedures for contested transportation rate cases and also to defend his orders in the *Williams* proceeding.

First, the ALJ pointed out that a settlement under Rule 602(h)(2)(iii) could not be certified on October 30, 1990, based upon the very standards expounded by the FERC in its November 21, 1990 order because: (1) Amoco refused to concur on a motion to omit the initial decision; (2) no participants had been given an opportunity to present evidence and cross-examine opposing witnesses; and (3) "the record did not contain substantial evidence from which the Commission could reach a reasoned decision on the merits of the contested issues."[98] To justify his decision to conduct a hearing on the offer of settlement, the ALJ presented the following explanation for his conclusion that the record was inadequate.

> The record not only did not contain substantial evidence; *the record contained no evidence at all. None of the proposed testimony and exhibits had been offered and received in evidence.* The participants had *not had an opportunity to object to or move to strike any proffered testimony and exhibits,* and the judge had not yet made any rulings on the admissibility of any evidence, as he is required to do under Commission Rule 509. 18 C.F.R. § 385.509. Moreover, the proposed testimony and exhibits discussed William's [sic] filed cost of service and throughput; the *proposed testimony had not been prepared to support the settlement offer,* even though some of it might be relevant to the settlement.[99]

The ALJ contended that the mini-hearing which was held on the settlement, although denigrated in FERC's November 21, 1990, order, was actually very successful. It accomplished two of the three conditions of Rule 602(h)(2)(iii), since it developed a record containing substantial evidence from which the FERC could reach a reasoned decision on the merits and it gave participants an opportunity to present evidence and cross-examine opposing witnesses. The certification concluded that "*as a result of the hearing the Commission now has a record* which contains substantial evidence from which the Commission can reach a reasoned decision on the merits of the contested settlement issues."[100]

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95. *Id.* at 61,967.
96. *Id.* at 61,966.
97. Williams Natural Gas Co., 53 F.E.R.C. ¶ 63,021 (1990).
98. *Id.* at 65,240.
99. *Id.* (emphasis added).
100. *Id.* at 65,241 (emphasis added).

VI. ANALYSIS OF *WILLIAMS* ORDERS

The *Williams* orders demonstrate the tension that currently exists in two important areas when considering a contested settlement offer: (1) determination of whether genuine issues of material fact are in dispute; and (2) the rights of a nonconsenting party to participate in an evidentiary hearing if such issues exist.

A. Existence of Genuine Issues of Fact in Williams *Orders*

Despite the ALJ's August 17, 1990, determination that at least eight genuine issues of material fact existed, the FERC ordered the ALJ on October 16, 1990, to re-examine this conclusion to see if such factual disputes truly existed.[101] According to the order, factual disputes (i.e., genuine issues of material fact) do not exist if they "only concern the significance or interpretation of the facts or predictions as to future facts."[102]

This novel standard of determining the existence of genuine issues of material facts is somewhat curious. In FERC's November 21, 1990, order the FERC acknowledged that "on the basis of the pleadings" in existence on October 16, 1990, there was *not* sufficient evidence to determine if the "disputes raised by Amoco to the settlement actually went to the material facts underpinning the settlement."[103] In fact, the absence of such evidence was the reason the FERC offered for rejecting Williams' motion to reconsider its October 16, 1990 order.

Nonetheless, the Commission was able to dismiss all such evidentiary concerns and direct that the ALJ certify the settlement, apparently *solely* based upon the transcript from the October 30, 1990, prehearing conference. With very little explanation, the FERC abruptly decided that it could "resolve any factual disputes that may exist with respect to the settlement."[104] The FERC unaccountably held that it could accomplish this task *without* the benefit of final briefs from the parties, *without* an initial decision from the ALJ and *without* any evidentiary hearing of these disputes.[105]

Perhaps the only explanation for this remarkable change in FERC's understanding of the *Williams* settlement is the Commission determined on November 21, 1990, that, in retrospect, the record contained substantial evidence upon which to base a reasoned decision, in accordance with its Rules of Practice and Procedure.[106] Given the thousands of pages of submitted[107] testimony in this case, such a conclusion is plausible. Yet, it is still hard to understand why the FERC felt that it did not have such substantial evidence on October 16, 1990.

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101. *Id.* at 61,187.

102. *Id.*

103. *Id.* at 61,966.

104. *Id.* at 61,967.

105. *Id.*

106. 18 C.F.R. § 385.602(h)(1)(i) (1990). It would have been helpful, however, if FERC had expressly stated in the November 21, 1990 order that this was the basis for its decision.

107. 53 F.E.R.C. ¶ 63,021, at 61,188. However, as the ALJ noted, none of these documents had been *received* into evidence.

B. Rights of Parties to Cross-Examine Witnesses

The second issue, the rights of contesting parties to explore any existing "genuine issues of material fact" in an evidentiary hearing, was given little attention in FERC's November 21, 1990 order. On the one hand, the FERC stated that parties are not entitled to an oral evidentiary hearing merely to "identify whether material issues of fact are in dispute."[108] Thus, the FERC apparently believes that cross-examination of adverse witnesses may be unnecessary to clarify which issues are genuine, material and also in dispute by the parties.[109]

On the other hand, the FERC stated that an oral type evidentiary hearing is "only necessary when material issues of fact cannot be resolved on the written record."[110] Although the FERC provides multiple examples of the *lack* of need for cross-examination ("*e.g.*, where a witness' judgement as to future events is at issue"),[111] the order fails to explain when such evidentiary testimony *is necessary*.[112] Instead, the opinion circularly refers back to Rule 505 of its Rules of Practice and Procedure, which states that a participant only has a right to conduct cross-examination "as may be *necessary* to assure true and full disclosure of the facts."[113]

Although the order advises that "answering . . . testimony usually will be sufficient to adequately ventilate the issues,"[114] it fails to indicate how any party can ever know when cross-examination is "necessary." Given the important role that cross-examination can play in an adjudicative hearing, it is somewhat disappointing that the FERC could, or would, not clarify this important issue in the *Williams* orders.

The ALJ emphasized the actual importance of the cross-examination which occurred in the *Williams* mini-hearing regarding the settlement offer. The following concrete benefits demonstrate "how risky it would be to accept at face value the prepared written testimony and exhibits of witnesses without subjecting those witnesses to an oral confrontation with opposing counsel who can ask follow-up questions."[115]

> In the instant case the cross-examination clarified much of the prepared testimony. All of Williams' witnesses were Williams' employees. They naturally testified as favorably as possible to Williams' position on the issues. Some of their testimony was ambiguous and not understandable without further follow-up questions by opposing counsel and the presiding judge. In addition, counsel probed the weaknesses in the witnesses' testimony, made them explain how they reached conclusions, and subjected the witnesses' positions to further examination. When witnesses were vague or had forgotten certain matters, counsel was

108. *Id.* at 61,966.

109. *Id.* at 61,967. Apparently, the FERC believes that such issues can be readily identified when they are seen, much like Justice Stewart's famous analysis of obscenity. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

110. *Id.* at 61,966, *citing* Amador Stage Lines, Inc. v. U.S., 685 F.2d 333, 335 (9th Cir. 1982).

111. *Id.* at 61,967, n.8.

112. Even the examples provided by the FERC are not overly persuasive of the lack of need for cross-examination, as described *infra*, section B of part VI of this article.

113. *Id.* at 61,967, n.8; 18 C.F.R. § 385.505 (1990) (emphasis added).

114. *Id.* at 61,967.

115. *Id.* at 65,241.

> able to refresh their recollections by showing them certain documents. Sometimes the documents contained statements which contradicted the witnesses' prepared or oral testimony.[116]

More importantly, the Commission's decision in the *Williams* orders, and other rate cases,[117] to deny the parties the right to conduct cross-examination in an evidentiary hearing seriously affects the constitutional due process rights of the parties. The parties in the *Williams* proceeding were advised on June 30, 1989, by the FERC that a "public hearing" before an ALJ "shall be held."[118] Accordingly, all parties reasonably relied upon the opportunity to confront adverse witnesses, rather than solely develop their positions based upon filed testimony. This situation is much different than if the Commission initially advises all parties that evidence would be obtained through a "paper hearing" process, as in the many GIC proceedings.[119] It appears to be a serious infringement of the due process rights of such parties for the Commission to "change the rules of the game" and deny cross-examination by requiring the ALJ to certify a settlement without even providing the nonconsenting parties an opportunity to submit final briefs.

VII. BALANCING ENCOURAGEMENT OF SETTLEMENTS WITH THE RIGHTS OF DISSENTING PARTIES TO HAVE AN EVIDENTIARY HEARING

The series of *Williams* orders thus demonstrate the difficulties inherent in applying the *Arkla* doctrine and balancing the rights of the participants. Until this issue is resolved in the courts, questions will remain regarding under what circumstances a party is entitled to raise genuine issues of material fact (and thus prevent a settlement from being certified to the Commission), and under what circumstances a party can be severed from a settlement with rights to cross-examine adverse witnesses in an evidentiary hearing. Nonetheless, this article will make a few observations and propose a substantive solution to this problem.

A. Conflicts Between the Rights of the Parties

First, it is clear that contesting parties in a transportation rate case have rights to an evidentiary hearing, *if* they truly raise genuine issues of material fact regarding a proposed settlement. However, it may be difficult to determine if such issues actually exist.[120]

Second, the rights of a contesting party must be balanced against the

116. *Id.*

117. *Cf.* Transcontinental Gas Pipe Line Corp., 53 F.E.R.C. ¶ 61,301 (1990).

118. 47 F.E.R.C. ¶ 61,468, at 62,464 (1989).

119. *Cf.* El Paso Natural Gas Company, 47 F.E.R.C. ¶ 61,108, at 61,305 (1989); Natural Gas Pipeline Co. of America, 49 F.E.R.C. ¶ 61,137, at 61,584 (1989).

120. One effective method to allow an ALJ to better understand the positions of the parties and to determine if the contested matters are truly genuine issues of material fact would be to hold an evidentiary hearing. Unfortunately, this option creates the appearance of a circular logic chain where evidentiary hearings are held to determine if there are sufficient genuine issues of material fact to justify the holding of evidentiary hearings regarding such factual disputes. Although the subject matter of each hearing would be different, duplicate testimony would likely be introduced.

rights of the settling parties to avoid lengthy and costly evidentiary hearings and obtain early benefits of a settlement.[121] Frequently, a party may not agree with some of the terms of a proposed settlement, but will still not object to the settlement. This is because the party realizes that the costs of opposing a settlement, in terms of time as well as financial resources, exceed the anticipated benefits.[122]

Third, parties should not be allowed to derail a settlement unless they have a real, vital interest in a proceeding. Parties who lack such affected interests should not be considered to be contesting parties.[123]

B. Importance of Cross-Examination in Contested Rate Cases

Fourth, there is often no real substitute for an evidentiary hearing which includes cross-examination. There are many real benefits which can accrue only through cross-examination of opposing witnesses, even where no material facts are in dispute.[124] Where material facts are in dispute, the FERC has recognized the importance of an ALJ's determination of witness credibility and demeanor as the result of cross-examination.[125] Although the Commission is not strictly bound by such determinations, the FERC has acknowledged that an ALJ's determination of credibility is "entitled to special weight and is not to be easily ignored."[126]

Cross-examination is "the best method yet of testing the trustworthiness of testimony" in situations like a motion for summary judgment.[127] However,

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121. United Gas Pipeline Co., 50 F.E.R.C. ¶ 61,276, at 61,882.

122. *Id.* Pipelines have distinctly different economic motivations than other participants in a rate proceeding. Pursuant to 18 C.F.R. § 154.63 (1990), interstate pipelines are able to "roll into" their rates the reasonable legal fees and expert witnesses costs that are incurred to conduct an evidentiary hearing. Accordingly, the incremental cost of an evidentiary hearing to a pipeline may be fairly minor. In contrast, a pipeline customer, such as a marketer or producer, cannot "pass along" the costs and fees of participating in a complex evidentiary hearing.

123. Parties who are not "immediately and irreparably affected by approval of a settlement," should not be considered to be contesting parties, since they cannot create a genuine, material issue. El Paso Natural Gas Co., 25 F.E.R.C. ¶ 61,292, at 61,673 (1983). *See also* Arctic Slope Regional Corp. v. FERC, 832 F.2d 158, 166-67 (D.C. Cir. 1987).

124. "[E]ven if no material facts are in dispute, the expert opinions produced to draw conclusions from these facts may well generate vigorous disagreement. *See* United States v. FCC, 652 F.2d 72, 91 (D.C. Cir. 1990). In that event, the Commission might be well served to permit each party to *test the credibility of an opponent's expert through cross-examination*. Moreover, the Commission would *almost certainly benefit* from study of the expert witness' demeanor." Astroline Com. Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1571 (D.C. Cir. 1988) (emphasis added).

125. Williams Natural Gas Co., 41 F.E.R.C. ¶ 61,037, at 61,095 (1987). *See* Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 472-73 (1962) ("It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice' ").

126. 41 F.E.R.C. ¶ 61,037, at 61,095. In this decision the FERC approvingly refers to the court decision in Pennzoil Co. v. FERC, 789 F.2d 1128, 1135 (5th Cir. 1986), as well as the following other decisions which held that questions of witness demeanor and credibility should generally be decided by the initial finder of fact: Inwood Lab., Inc. v. Ives Lab., 456 U.S. 844, 856 (1982); Delta Airlines, Inc. v. United States, 561 F.2d 381, 394 (1st Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); United States v. Alpine Land & Reservoir Co., 697 F.2d 861, 867 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983).

127. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944). The U.S. Supreme Court has long-recognized the value of cross-examination when determining summary judgment motions under Rule

cross-examination in an evidentiary hearing does more than just evaluate the "demeanor" of witnesses to determine if they are being truthful. In complex rate cases, witnesses for both sides may be totally sincere and honest, and yet present diametrically opposite conclusions regarding the same evidence. This is due to different analytical methods and approaches which may be used by the witnesses.

Cross-examination, through the process of grappling with "tough questions," can also be extremely useful in highlighting differences of opinion and in "testing" the conclusions of the witnesses.[128] Cross-examination also allows an ALJ to determine if a witness has carefully thought out his position and considered all available evidence. Thus, after an evidentiary hearing, one witness may be found by the ALJ to be more "credible" than an equally "honest" witness. Such a conclusion cannot be drawn by the Commission after reviewing a paper record.

It has been suggested that an evidentiary hearing to determine the existence of disputed genuine issues of material fact could be limited to just one or two witnesses who testify as to the "fair and reasonable" nature of a proposed settlement. Although in rare instances such testimony might be adequate to address the disputed genuine issues of material fact, more often such a witness will not possess the necessary degree of expertise to adequately respond to the questions. Instead, expert witnesses regarding each of the critical issues, such as depreciation rates and projected pipeline throughput, will have to be carefully cross-examined to "test" the disputed facts.

C. *Proposal to Handle Contested Transportation Rate Case Settlements*

In the absence of additional guidance from either the Commission or the courts, it is suggested that proposed settlements of contested transportation rate cases should proceed in the following manner. Once a settlement has been proposed and has been reasonably commented upon by the participants, the ALJ should determine if genuine issues of material fact are in dispute. This important threshold determination should be based upon a careful evaluation of the following questions:

> (1) Does the contesting party have an interest which would be immediately and irreparably affected by approval of the settlement? If the party does not have such an interest, it cannot create a genuine issue of material fact.
> (2) Are the contesting issues material to the settlement? If the contested issues are not relevant to the proposed settlement, they cannot be genuine issues of material fact.
> (3) Does the dispute concern actual facts in the proceeding, or does it relate to application of a FERC policy? If the contested issue concerns interpretation of a policy at the Commission, the party's testimony and arguments should be directed to the Commission rather than trigger an evidentiary hearing.

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56 of the FRCP, which is analogous to an ALJ determination of whether genuine issues of material fact exist.

128. *Cf.* J. Zwerdling, *A Plea for Clemency for Cross-Examination*, 57 A.B.A.J. 45, 46 (1971). (The prepared testimony of expert witnesses "sometimes includes a great deal of puffing and salesmanship, and frequently cross-examination alone makes it possible to separate the puffing from the hard bedrock of firmly grounded expert opinion"). *Id.*

(4) Do the contested issues relate to the significance or interpretation of facts? All critical facts in a proceeding must be placed in the proper context, so they can be understood and evaluated. Therefore, issues regarding the significance or interpretation of facts can create genuine issues of material fact.

(5) Do the contested issues appreciably narrow the scope of consideration and focus attention on elements of the settlement which will significantly affect the parties? If so, the contested issues can create genuine issues of material fact.

(6) Do the contested issues relate to an expert witness' judgment concerning the likelihood of future events? When the FERC determines that rates are "just and reasonable," that determination should apply to the present facts, as well as to those facts which are expected to exist during the term of the tariff. Since interstate pipeline rate cases are normally filed every three years, issues which relate to future events during this time period can also create genuine issues of material fact.

Often, an ALJ will be able to answer all of these questions based upon the terms of the settlement and the comments of affected parties. If the ALJ is in any doubt regarding the existence of such disputed material facts, the ALJ should request the parties to prepare written briefs on such narrow issues to assist the ALJ in answering this important threshold question. In such a determination, the burden of showing the absence of a genuine issue of any contested material fact should be on the party proposing the settlement, similar to the burden of proof under Rule 56 of the FRCP.[129]

If the ALJ determines that the disputed issues relate to generalized or "policy" matters rather than issues specific to the facts in the case, there is no need for an evidentiary hearing.[130] For example, where the specific transportation rates depend upon individual facts involving the pipeline, an evidentiary hearing should be held in order to properly "ventilate" these facts. Where the rates are affected by generalized factors, such as FERC's policy on depreciation of capital facilities, there is less necessity for such a hearing to be held because such a policy determination is properly made based upon the reasonable discretion of the Commission.

In some instances it will be reasonable for the ALJ to determine that a "mini-hearing" evidentiary proceeding be held. This proceeding should be solely devoted to a discussion of those issues raised by the contesting parties to determine if any such dispute constitutes a genuine issue of material fact. This limited hearing would only consider testimony regarding the existence of genuine issues of material fact, not the proper resolution of such disputed issues.

If the ALJ determines that genuine issues of material fact do exist, a full evidentiary hearing should be held to resolve each of those facts. Nonetheless, if the ALJ determines that the genuine issues of material fact can be effectively severed from the rest of the settlement, the ALJ could prepare an initial decision which severs the contesting parties and certifies the settlement as to the remaining parties. If such severance is impossible, perhaps due to the considerations found in the Arkla doctrine, an evidentiary hearing which includes the opportunity to cross-examine opposing witnesses should be held.

129. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

130. Natural Gas Pipeline Co. of America, 32 F.E.R.C. ¶ 63,096, at 65,353 (1985); Tennessee Gas Pipeline Co., 36 F.E.R.C. ¶ 63,012, at 65,052 (1986).

VIII. CONCLUSION

The procedures for handling contested transportation rate settlements are in need of judicial and Commission clarification to better articulate an ALJ's obligations to: (1) determine if disputed genuine issues of material fact exist; and (2) provide parties with the right to participate in evidentiary hearings. A Notice of Proposed Rulemaking[131] might be appropriate to address these obligations and to solicit comments on proposals to balance the competing interests between the settling parties and contesting parties.

131. 18 C.F.R. § 385.1903 (1990).

APPENDIX A

Amoco filed a request for rehearing of FERC's November 21, 1990 order on December 21, 1990. Amoco alleged that the FERC had made numerous procedural errors by permitting the settlement to be certified, including, *inter alia*, failing to include a finding on the record that due and timely execution of its functions imperatively and unavoidably required the omission of an Initial Decision, in accordance with section 557(b) of the Administrative Procedure Act (APA).[132]

In a July 22, 1991, order which conditionally approved the contested settlement, the FERC addressed the procedural concerns that Amoco had raised in its request for rehearing.[133] The Commission's order briefly reviewed Amoco's procedural claims and then held that Amoco had not been deprived of it due process rights. FERC's holding was based upon its conclusion that: (1) an adequate written record in support of the settlement existed, in part as a result of the cross-examination evidence produced at the "mini-hearing;" (2) the demeanor of witnesses was not relevant in this proceeding; and (3) a November 6, 1990, motion by Williams permitted the FERC to waive the APA requirement.

132. 5 U.S.C. § 557(b) (1988).

133. Williams Natural Gas Co., 56 F.E.R.C. ¶ 61,089 (1991).