

## Report of the Committee on Practice and Procedure

Our Committee report highlights certain practice and procedure developments at the Federal Energy Regulatory Commission (FERC or Commission) during the calendar year 1987.

### I. PLEADINGS

#### A. *Answers to Motions for Dismissal*

On August 3, 1987, the Commission declared that Rule 213<sup>1</sup> does not bar answers to motions for dismissal.<sup>2</sup> Duke and the complainants entered into separate but identical interconnection agreements related to the sale of energy and capacity from Duke's Catawba Nuclear Generating Station. Following the filing of the complaints of a violation of the filed rate doctrine and Duke's motion to dismiss the complaints, the North Carolina Municipal Power Agency (NCMPA) answered Duke's motion. On April 15, 1987, Duke moved to strike that answer, alleging that nothing was raised therein that could not have been raised in the original complaint and, as such, it was an impermissible answer to an answer. The Commission disagreed, stating it to be in the public interest to permit NCMPA to raise all salient issues at the pleadings stage.

#### B. *Answers to Rehearing Requests*

On May 7, 1987, the Commission waived Rule 713<sup>3</sup> and permitted Pacific Gas and Electric Company's (PG&E) answer to Northern California Power Agency's (NCPA) request for rehearing of a Commission order of February 25, 1987 regarding an interconnection agreement.<sup>4</sup> On April 13, 1987, PG&E answered NCPA's request for rehearing, disagreeing with NCPA's interpretations of the interconnection agreement. On April 14, 1987, NCPA responded to PG&E's answer, controverting PG&E's argument without objecting to the answer by PG&E. Under Rule 713 answers to requests for rehearing are not permitted. However, this provision was waived in this instance since NCPA raised no objections. Similarly, the Commission accepted NCPA's response to PG&E's answer.

On July 24, 1987, the Commission granted rehearing to Central Maine Power Company regarding charging fees for occupancy of access roads on the Indian Pond Project No. 2142.<sup>5</sup> On May 21, 1954, a license was issued to Central Maine for the project. A commercial whitewater-rafting outfitter filed a complaint against Central Maine, contending that the fee was unreasonable and in violation of both article 7 of the license and section 10(a) of the Federal

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1. 18 C.F.R. § 385.213 (1987).

2. North Carolina Mun. Power Agency No. 1 v. Duke Power Co., 40 F.E.R.C. ¶ 61,138 (1987).

3. 18 C.F.R. § 385.713(d) (1987).

4. Northern Cal. Power Agency, 39 F.E.R.C. ¶ 61,130 (1987).

5. Central Maine Power Co., 40 F.E.R.C. ¶ 61,075 (1987).

Power Act<sup>6</sup> (FPA) because it generated annual revenue that exceeded Central Maine's annual costs. On August 23, 1984, the Commission ruled on the complaint, finding the allegations correct. Central Maine filed a timely request for rehearing or clarification. The Complainants moved to file a response. Central Maine moved to reject that Complainant motion. Nearly two years later, the Commission accepted for filing Complainants' answer to Central Maine's rehearing request, waiving Rule 713 in order to consider all arguments.

### C. *Certificate of Service*

On August 5, 1987, Presiding Administrative Law Judge Benkin issued an order granting reconsideration of his prior order of July 23, 1987, which had granted an intervention out of time by ITRP/Kimball Gas Ventures, Inc.<sup>7</sup> When ITRP filed its late motion for leave to intervene, it failed to append a certificate of service that conformed to the provisions of Rule 2010(h). A party to the case sought reconsideration of the Judge's July 23 order granting the intervention, pointing out this defect and claiming that service of ITRP's motion had not been made upon it. Accordingly, the Judge found that the lack of service of ITRP's motion on the participants rendered his granting of ITRP's motion premature, and granted the request for reconsideration. The Judge then vacated his order of July 23 and denied ITRP's motion to intervene out of time without prejudice to ITRP's right to renew the motion in conformity with the Commission's Rules of Practice and Procedure.

### D. *Ex Parte Communications*

On June 29, 1987, the Commission issued Opinion No. 277, affirming in part and modifying in part an initial decision.<sup>8</sup> Tapoco and Nantahala Power and Light Company proposed to terminate existing agreements and filed with the Commission two new agreements to replace them. On February 26, 1985, Presiding Administrative Law Judge Zimmet issued an initial decision<sup>9</sup> approving the new agreements. On June 20, 1985, the Tennessee Valley Authority (TVA), which was not a party, sent the Secretary a letter commenting on several aspects of the initial decision. Tapoco sent the Secretary a letter on July 2, 1985, asking that TVA's letter be made part of the official record, copying each of the Commissioners and stating it would serve the other parties. Rejecting objections to making TVA's letter a part of the record because it was an *ex parte* communication, the Commission ruled that the letter had been placed in the public file associated with the case, but was separate from the material relied on for decision.

### E. *Rhetoric in Briefing*

On November 13, 1987, in his initial decision on take-or-pay buyout and

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6. Federal Power Act, § 10(a), 16 U.S.C. § 803(a) (1982).

7. Mojave Pipeline Co. (FERC issued Aug. 5, 1987).

8. Opinion No. 277, Tapoco, Inc., 39 F.E.R.C. ¶ 61,363 (1987).

9. Tapoco, Inc., 30 F.E.R.C. ¶ 63,050 (1985).

buydown costs, Presiding Administrative Law Judge Kane admonished against use of

somewhat picturesque, rather than legally precedential, references contained in the briefs, such as the "Unsinkable Titanic, Transco embarked upon its Maiden Voyage into the Uncharted Waters of Gas Purchasing Under the NGPA" and "Admiral Bowen's 'damn the torpedoes, full speed ahead' did not result in the capture of Mobile Bay, but the enslavement of Transco to Mobil Oil, and its fellow producers" and "Transco's Rambo-like gas purchasing department."<sup>10</sup>

#### *F. Striking Portions of Brief*

On June 9, 1987, Presiding Administrative Law Judge Nacy, in an initial decision in a PGA proceeding, granted a motion to strike concededly relevant and material reply brief appendices consisting of extra-record matter.<sup>11</sup> The appendices were part of the record before another federal agency that were unavailable prior to the record closing date in the PGA proceeding. The ruling noted both the absence of a motion to reopen under Rule 716 and a concern with fairness and orderly proceedings.

On June 16, 1987, Presiding Administrative Law Judge Megan struck a portion of an initial brief dealing with take-or-pay allocation formulae and denied a motion to reopen.<sup>12</sup> The stricken text contained material that the Judge had found irrelevant in a previous order limiting discovery. Although the Commission issued a take-or-pay policy statement subsequent to an unsuccessful interlocutory appeal of that order to the Commission, the Judge again found the stricken material irrelevant and extra-record.

#### *G. Supplement to Request for Rehearing*

On August 24, 1987, the Commission refused to accept a late-filed supplement to a previously-filed rehearing request on jurisdictional grounds.<sup>13</sup> Relying on section 19(a) of the Natural Gas Act (NGA), previous court decisions (*Boston Gas Company v. FERC*<sup>14</sup> and *Pan American Petroleum Corporation v. FPC*<sup>15</sup>) and a previous Commission decision on point (*Phoenix Hydro Corporation*<sup>16</sup>), the Commission concluded that it lacked authority to extend the thirty day period following a final order during which any so-called rehearing supplements must be filed.

## II. HEARINGS

#### *A. Admissibility of Evidence*

On March 18, 1987, Presiding Administrative Law Judge Fitzpatrick

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10. Transcontinental Gas Pipe Line Corp., 41 F.E.R.C. ¶ 63,020, at 65,125 (1987).

11. Texas E. Transm'n Corp., 39 F.E.R.C. ¶ 63,036 (1987).

12. Tennessee Gas Pipeline Co. (FERC issued June 16, 1987).

13. Columbia Gas Transm'n Corp., 40 F.E.R.C. ¶ 61,195 (1987).

14. Boston Gas Co. v. FERC, 575 F.2d 975 (1st Cir. 1978).

15. Pan Am. Petroleum Corp. v. FPC, 268 F.2d 827 (10th Cir. 1959).

16. Phoenix Hydro Corp., 26 F.E.R.C. ¶ 61,389 (1984).

granted two motions to strike portions of initial briefs.<sup>17</sup> First, the Judge granted the motion of the staff to strike an argument based upon remarks made by another judge in an unrelated proceeding on the grounds that the other judge's out-of-context statements might confuse the issues in the instant proceeding. Second, the Judge granted Kuparuk's motion to strike portions of an intervenor's brief containing rate calculations that used a methodology not introduced at the hearing. The Judge granted the motion to strike on the ground that fairness required the new material to be sponsored by a witness and to be subject to cross-examination.

On May 20, 1987, Presiding Administrative Law Judge Levant denied a motion to strike cross-examination testimony and exhibits admitted into evidence that quoted or discussed portions of earlier drafts of a settlement agreement negotiated in the pipeline's last rate case where the scope of that settlement was an issue in the instant proceeding.<sup>18</sup> While noting the existence of a general exclusion for settlement offers or proposals on the ground of privilege, the Judge ruled that an exception to this rule adopted by the Commission in *Independent Oil and Gas Association of West Virginia*<sup>19</sup> was controlling. In accordance with that earlier Commission decision, the Judge permitted the introduction of materials from the draft settlement agreements for the narrow purpose of showing the intent of the parties regarding assertedly ambiguous language in the final settlement document.

### B. Data Requests

On August 3, 1987, Presiding Administrative Law Judge Benkin denied the Northwest Industrial Gas Users' (NWIGU) request to submit untimely data requests.<sup>20</sup> In denying NWIGU's request, the Judge noted that as a later intervenor, NWIGU had to accept the record and procedural schedule as NWIGU found it. Moreover, the Judge emphasized in his decision that the deadline for such data requests had long since passed and that severe disruption to the proceeding would result from further discovery.

### C. Discovery Generally

On March 2, 1987, the Commission issued a final rule codifying rules for conducting discovery in trial-type proceedings.<sup>21</sup> Those new rules of discovery are the subject of an article by H.L. Reiter.<sup>22</sup>

### D. Discovery (Attorney-Client Privilege)

On January 13, 1987, the Commission issued an order overruling the decision of a Presiding Administrative Law Judge which, among other things,

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17. Kupa-ruk Transp. Co. (FERC issued Mar. 18, 1987).

18. Northwest Pipeline Corp. (FERC issued May 20, 1987).

19. Independent Oil & Gas Ass'n of W.Va., 18 F.E.R.C. ¶ 61,289 (1982).

20. Mojave Pipeline Co. (FERC issued Aug. 3, 1987).

21. Order No. 466, *Rules of Discovery for Trial-Type Proceedings*, III F.E.R.C. Stats. & Regs. ¶ 30,731, 50 Fed. Reg. 6957 (1987), modified, Order No. 466-A, III F.E.R.C. Stats. & Reg. ¶ 30,766 52 Fed. Reg. 35,908 (1987).

22. Reiter, *The FERC's New Rules of Discovery: A Welcomed Approach*, 8 ENERGY L.J. 35 (1987).

rejected the application of the attorney-client privilege to a communication from Northern's management to a Northern in-house attorney requesting legal advice.<sup>23</sup> The Commission deemed the fact that the communication was not generated by an attorney, the consideration upon which the Judge had based his decision, to be irrelevant in determining whether the prerequisites for application of the privilege had been satisfied.

On March 13, 1987, Presiding Administrative Law Judge Bullock issued a ruling concerning, among other things, Transcontinental Gas Pipe Line Corporation's (Transco) claim that certain documents relating to take-or-pay buyout and buydown settlements were protected by the attorney-client privilege.<sup>24</sup> Although the Judge did not expressly rule on whether the privilege applied, he expressed doubts as to its applicability because the factual matters contained in the allegedly protected materials had been or would be provided by Transco to other parties under a protective order. The Judge did, however, reject the claim that Transco had impliedly waived any privilege it might have by filing the rate case to recover the buyout and buydown costs. The Judge also ordered an *in camera* inspection of the documents in question to determine whether Transco could show the prerequisites for application of the privilege as set forth in the ruling.

On May 18, 1987, Presiding Administrative Law Judge Bullock issued an order denying Transco's claim that an independent consultant's evaluations of Transco's reserve estimates were protected by the attorney-client privilege, and directed Transco to produce the reports.<sup>25</sup> Transco had asserted that the reports were privileged because they were prepared by a consultant pursuant to the request of Transco's attorneys using information supplied by Transco, and that the reports were analogous to take-or-pay calculations which the Judge had previously held to be privileged. The Judge found that Transco had failed to establish that the consultant was an extension of the client or the attorney, and thus had failed to meet its burden of establishing that the privilege applied. The Judge further found that, even if the attorney-client privilege applied, Transco had impliedly waived the privilege by putting the protected information at issue through seeking to recover its take-or-pay costs where the requested information was vital to the intervenors' ability to analyze Transco's take-or-pay liability.

#### *E. Discovery (Attorney Work Product Privilege)*

On January 13, 1987, the Commission overruled the decision of a Presiding Administrative Law Judge which, among other things, had rejected the application of the attorney work product privilege to a portion of a legal memorandum prepared by Northern's outside counsel in anticipation of litigation.<sup>26</sup> The Commission found that the Judge had ruled improperly in requiring production of that portion of the legal memorandum which summarized the underlying facts for the legal opinion. The Commission indicated

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23. Northern Natural Gas Co., 38 F.E.R.C. ¶ 61,012 (1987).

24. Transcontinental Gas Pipe Line Corp. (FERC issued Mar. 13, 1987).

25. *Id.*

26. Northern Natural, 38 F.E.R.C. ¶ 61,012.

that the attorney's factual recitation probably came within the scope of protected "mental impressions" and, even if it did not, the parties seeking production of the document had failed to make the required showing of substantial need and undue hardship if the document were not made available.

On March 13, 1987, Presiding Administrative Law Judge Bullock issued a ruling concerning, among other things, Transco's claim that certain documents relating to take-or-pay buyout and buydown settlements were protected by the attorney-work-product privilege.<sup>27</sup> The documents in question concerned Transco's original contract negotiations with its producer/suppliers as well as the subsequent renegotiations of those contracts. While the Judge did not expressly rule on whether the privilege applied, he questioned Transco's ability to demonstrate that the documents, particularly those dealing with the original contract negotiations, had been prepared in anticipation of litigation or trial. The Judge also ordered an *in camera* inspection of the documents in question to determine whether the necessary elements for application of the privilege were present.

On August 19, 1987, Presiding Administrative Law Judge Benkin ruled that a document submitted by an intervenor, Northwest Pipeline Corporation, for *in camera* inspection was protected from disclosure by the attorney-work-product privilege.<sup>28</sup> The Judge concluded that the document, which concerned estimates of Northwest's gas balance if it were to supply capacity to the Kern River project, was prepared to assist Northwest's representatives in negotiating a settlement in a separate, pending Commission proceeding. Thus, the documents were covered by the privilege for material prepared for purposes of settlement and the privilege for attorney work product, and Northwest did not have to make the document available in discovery.

#### F. *Discovery (Deliberative Process Privilege)*

On March 23, 1987, Presiding Administrative Law Judge Miller considered requests for production of documents in the possession of the staff, to which the staff objected on the grounds of the deliberative process privilege.<sup>29</sup> Judge Miller allowed discovery of three portions of those documents. Two of the portions for which discovery was allowed consisted of memoranda to the file by an auditor, with no indication that they were ever shown to a decisionmaker by an advisor. Allowing discovery of the opinions of the auditor would not amount to the probing of the mental processes of a decisionmaker, the Judge reasoned. The third portion was an auditor's conclusions regarding a position taken by the Office of Pipeline and Producer Regulation (OPPR), with no indication that the OPPR's position was ever part of an advisory exchange. The matter was also a statement of fact, rather than an advisory opinion, according to the Judge. However, the Judge denied the discovery of a memorandum from an Audit Manager to the Chief, Audit Branch III, which was intended to form the basis for a decision by the Chief (or by someone

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27. Transcontinental Gas Pipe Line Corp. (FERC issued Mar. 13, 1987).

28. Mojave Pipeline Co. (FERC issued Aug. 19, 1987).

29. Stingray Pipeline Co. (FERC issued Mar. 23, 1987).

else). The Judge found nothing in the Commission's rules that would indicate that the decisional process at that level is not entitled to the privilege, rejecting a more restrictive definition of decisional employee found in the Commission's *ex parte* rules.

On April 22, 1987, however, the Commission reversed Judge Miller's rulings permitting discovery, finding that the memoranda to the file could be contributing sources that lay the groundwork for an advisory exchange.<sup>30</sup> These sources require protection, the Commission held, in order to protect the free flow of ideas from the staff to decisionmakers. The memoranda contained opinions as well as facts and, as such, were predecisional documents. The staff's claims of privilege were upheld for all the documents sought.

On June 17, 1987, Presiding Administrative Law Judge Benkin considered requests for materials reviewed by a staff witness in preparing his testimony to which staff posed a deliberative process objection.<sup>31</sup> The Judge noted the Commission's *Stingray* decision, just discussed, but reasoned that, when the Staff puts on an employee as an expert witness, it is entirely appropriate for an adverse party to probe the witness' mental processes. The Judge found it would be unfair to deny the cross-examining utility access to the materials reviewed by the staff's expert witness while preparing his testimony. The Judge rejected the staff's proposed distinction between materials reviewed by a witness and those upon which the witness relied, describing it as much too slippery. He found adequate cross-examination requires access to all the relevant materials reviewed by the witness and required the staff to produce the documents. As to other internal communications regarding a contested issue in the proceeding, the Judge found the materials were not shown to have been reviewed by or relied upon by a witness, so that the *Stingray* precedent squarely applied, and the request for production was denied. On July 16, 1987, the Commission found that all of the documents in question were privileged information not to be produced.<sup>32</sup> The Commission concluded that while it is appropriate to probe the mental process of an expert witness, that in itself is not sufficient to waive the deliberative process privilege for documents that reflect more than the witness' own mental process. The fact that privileged documents were reviewed by a witness does not alter their status, the Commission ruled, and they will not be disclosed absent a demonstrated compelling need. Since the materials sought were those which the witness had reviewed, but not those on which he had relied, the Commission found no compelling need for the materials to aid in cross-examination of the witness. Balancing that lack of need against the harm to the deliberative process that disclosure of the opinions and mental processes of its audit staff would cause, the Commission declined to allow discovery.

On November 24, 1987, Commissioner Naeve, sitting as Motions Commissioner, declined to refer a discovery dispute to the full Commission where the staff apparently had dropped an objection that the information sought

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30. *Stingray Pipeline Co.*, 39 F.E.R.C. ¶ 61,037 (1987).

31. *Long Island Lighting Co.*, 39 F.E.R.C. ¶ 63,042 (1987).

32. *Long Island Lighting Co.*, 40 F.E.R.C. ¶ 61,033 (1987).

would be used to probe the thought processes of staff personnel.<sup>33</sup> The information sought might aid the party in seeking information that is properly privileged, Commissioner Naeve reasoned, but allowing release of the names, titles and job descriptions of Commission personnel involved in an investigation would not intrude on the thought processes of advisory staff. Enforcement staff's appeal to the Commission, thus, was denied.

*G. Discovery (Motions to Compel/Protective Orders)*

On March 12, 1987, the Commission issued an order establishing guidelines for protective orders to be used by Presiding Administrative Law Judges in resolving discovery disputes with respect to pipeline take-or-pay liabilities.<sup>34</sup> The order arose from separate appeals from discovery disputes in which Transco and Trunkline Gas Company claimed that documents related to their take-or-pay liabilities should be treated confidentially. Transco had sought a protective order that would have precluded intervenors' employees involved in gas purchases, sales or marketing from access to confidential take-or-pay information. Trunkline had refused to produce copies of gas purchase contracts and settlements under a protective order limiting access to outside counsel and consultants.

The Commission found that discovery disputes should be resolved under a uniform set of standards. Protective orders must be crafted to suit the facts of each particular case, and the goal should be to issue the least restrictive protective order that accomplishes the protective purpose. Generally, the factors that should guide the fashioning of a protective order are the nature and source of the injury that could result from disclosure and the business relationship of the party seeking discovery to the party objecting to disclosure. Once a Judge determines that material should be protected, it should remain so throughout the proceeding. If the Judge decides that the need for public disclosure outweighs the company's need for confidential treatment, the company should be given advance notice and an opportunity to obtain the return of the previously disclosed material. The Commission remanded the Transco and Trunkline matters to the respective Judges for reconsideration.

On March 13, 1987, the Commission granted Texaco Inc.'s interlocutory appeal.<sup>35</sup> In so doing, the Commission took the opportunity to explain the burden placed on parties and on Presiding Administrative Law Judges in discovery disputes involving attempts by parties to obtain information which the possessor claims is confidential and proprietary and, hence, should not be disclosed to a competitor. According to the Commission, Rule 410 allows a party to file a motion to compel discovery. The moving party has the initial burden of demonstrating the relevance of the requested material to the proceedings or that the information will lead to the production of relevant information. Once relevance has been demonstrated, the objecting party must then present all arguments against disclosure to the Presiding Judge, including

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33. Mobil Expl'n & Prod'g N. Am. (FERC issued Nov. 24, 1987).

34. Transcontinental Gas Pipe Line Corp., 38 F.E.R.C. ¶ 61,245 (1987).

35. Mojave Pipeline Co., 38 F.E.R.C. ¶ 61,249 (1987).

arguments that the request should be denied or limited on the grounds that the information is confidential business information, or will give the requesting party some unfair advantage, and (if merited) that the harm caused by disclosure would outweigh the requestor's need for the material.

The Judge must weigh the various interests at stake, considering factors such as the availability of the material from other sources, and the business relationship between the parties. If the Judge determines that requested information merits confidential treatment, the Judge must then decide whether the material would be adequately protected by a protective order. After providing those guidelines, the Commission remanded the case to the Judge for reconsideration of the requestor's need for the information sought and for Texaco's response, including the reasons, if any, why a protective order would be insufficient to prevent competitive harm.

On June 3, 1987, Presiding Administrative Law Judge Benkin granted Southern California Gas Company (SoCal) permission to appeal an order compelling SoCal to respond to certain discovery requests.<sup>36</sup> The Judge ruled that SoCal should disclose the requested documents (long-term contracts to render service to the Enhanced Oil Recovery market in California). In so doing, he weighed SoCal's claim that the contracts were commercially sensitive against the requesting party's claim that the contracts were necessary for it to prepare adequately to rebut SoCal's filed testimony. The Judge granted SoCal permission to appeal his ruling, however, because the Commission had previously indicated interest in the merits of like questions and because the question was close and difficult. The Commission subsequently affirmed the Judge's ruling.<sup>37</sup> In the Commission's view, the issue was the balance of a party's right to discover relevant information against a competitor's desire not to disclose proprietary information. The Commission noted that the Judge had presented the Commission with a complete record on which to form a decision. The Commission then affirmed the ruling on the basis that the Judge was in a better position to weigh the competing interests and that the Judge had taken adequate steps to limit the potential harm from disclosure.

On August 27, 1987, Presiding Administrative Law Judge Benkin denied a motion by Mojave Pipeline Company to compel Kern River Gas Transmission Company to allow Mojave a second opportunity to view more than 2,000 aerial photographs taken by Kern River.<sup>38</sup> The Judge noted that while previous access to the documents sought is usually not a valid objection to a request for inspection, the facts in the case militated against granting the request. The Judge noted that the deadline for discovery requests on Kern River's environmental case-in-chief had expired. Hence, the Judge interpreted Mojave's data request to be directed at Kern River's rebuttal case on the environmental issues. The Judge, however, deemed the photographs irrelevant to Kern River's rebuttal case. Citing the need for orderly development of the record and fairness to the parties, the Judge denied Mojave's request.

On August 27, 1987, Presiding Administrative Law Judge Lewnes issued

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36. Mojave Pipeline Co. (FERC issued June 3, 1987).

37. Mojave Pipeline Co., 39 F.E.R.C. ¶ 61,336 (1987).

38. Mojave Pipeline Co. (FERC issued Aug. 27, 1987).

an order denying the Northwest Parties' motion to compel production of confidential information.<sup>39</sup> The Northwest Parties had sought prequalification data submitted to Bonneville Power Administration (BPA) by various utilities, some of whom were parties to the proceeding and some of whom were not. BPA refused to provide the requested material, claiming it was privileged, proprietary, commercial information supplied to it under a pledge of confidentiality, and therefore prohibited from disclosure under the Trade Secrets Act and the Freedom of Information Act. BPA also contended that disclosing the requesting data would inhibit its ability to obtain similar data in the future. The Judge denied the motion to compel, noting that the Northwest Parties could seek the information directly from the parties who provided it to BPA. The order also denied a request that BPA be directed to produce data (previously provided in the form of a computer printout) in the form of a computer tape.

#### *H. Discovery (Privilege Generally)*

On July 16, 1987, the Commission issued an order upholding Commission staff's claim of privilege with respect to documents reviewed by the staff's witness in preparing testimony.<sup>40</sup> The Commission's accounting staff had audited Long Island Lighting Company (LILCo), and found that LILCo improperly had included advance payments for uranium ore in its nuclear fuel accounts and had failed to revise improper capitalization of certain carrying charges. LILCo had sought to compel production of all material reviewed by the staff witness in preparing his testimony. The staff asserted that the documents withheld were audit workpapers which the witness reviewed, but did not rely upon, and that staff had no authority to waive the privilege applicable to those documents. The Presiding Administrative Law Judge had recognized the general applicability of the deliberative process privilege to the documents, but concluded that to enable LILCo to probe the mental process of the witness, the privilege was waived when the trial witness had access to them.<sup>41</sup> The Commission reversed, finding that the deliberative process privilege is not waived because the witness reviewed the privileged documents. Based on the lack of a compelling need for documents that were not relied upon and the potential harm to the Commission's deliberative process that would result from disclosure of predecisional audit workpapers, the Commission declined to waive the privilege.

#### *I. Ground Rules for Hearings*

On November 23, 1987, Presiding Administrative Law Judge Fitzpatrick provided an example of an order setting an initial procedural schedule for a matter set for hearing and including ground rules for discovery, submission of evidence, cross-examination and similar matters.<sup>42</sup> With respect to discovery,

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39. United States Dep't of Energy—Bonneville Power Admin. (FERC issued Aug. 27, 1987).

40. Long Island Lighting Co., 40 F.E.R.C. ¶ 61,033 (1987).

41. Long Island Lighting Co., 39 F.E.R.C. ¶ 63,042 (1987).

42. Kanawha Valley Power Co. (FERC issued Nov. 23, 1987).

the order (i) requires parties to verify that they have attempted to resolve discovery disputes informally before filing discovery motions, (ii) states that the Judge will entertain motions to limit discovery in the event of redundant or harassing discovery requests and (iii) describes the form and effect of discovery motions. The order also prescribes the form in which testimony and exhibits are to be submitted, suggests that parties with similar interests make joint evidentiary presentations and sets out procedures for simplifying sponsorship of testimony and authentication of documents. The evidentiary record is to be limited to factual material. Argument should be presented in the briefs. Limitations on and procedures for cross-examination are prescribed. Finally, the participants are required to explore reasonable possibilities of settlement and must so certify in their trial briefs.

#### *J. Intervention Denied*

On January 6, 1987, Presiding Administrative Law Judge Gordon ruled that a timely motion for intervention may be denied under Rule 214 if the intervenor fails to show that it may have a direct interest in the outcome of the proceeding.<sup>43</sup> Thus, a would-be shipper's attempt to intervene in a rate case filed by a pipeline that did not offer and did not intend to offer open-access transportation service was rejected on the ground that the intervenor's interest in the pipeline's rates was too remote and speculative to justify intervention in the proceeding. The Judge asserted that the shipper had misconceived the nature of the proceeding, which concerned only sales and storage service rates, not transportation service rates.

On August 4, 1987, the Commission denied a motion by a gas marketer to intervene out of time in seventeen pending proceedings, each involving a different interstate pipeline.<sup>44</sup> The marketer sought intervention in each docket in order to raise an issue relating to open-access transportation that had been decided in another case, which was already final. The marketer alleged that it had not been given notice of the existence of this issue in the prior case and therefore should be permitted late intervention in subsequent proceedings that might rely on that case. The Commission, in denying intervention, did not reach the question of whether inadequate notice had been given in the prior proceeding. Rather, it disposed of the motion on grounds that the time for seeking rehearing of the Commission's action in all but one of the proceedings had long since passed and that allowing intervention would cause hardship to other parties and delay the proceedings. The marketer did not present sufficient countervailing considerations to warrant its extremely late attempts to participate in the proceedings. Intervention in the one proceeding for which the time for seeking rehearing had not expired was denied on grounds of mootness.

#### *K. Intervention in Related, Consolidated Dockets*

On April 21, 1987, Presiding Administrative Law Judge Benkin issued an

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43. East Tenn. Natural Gas Co., (FERC issued Jan. 6, 1987).

44. Alabama-Tennessee Natural Gas Co., 40 F.E.R.C. ¶ 61,149 (1987).

order dismissing a motion to intervene.<sup>45</sup> A party in one docket in a consolidated proceeding need not intervene in any other docket in the same consolidated proceeding. The same order also granted a motion to intervene by a customer group that had formerly been part of another customer group already granted intervention. The order noted that the motion was unopposable as a practical matter.

#### *L. Intervention Out-Of-Time*

On August 3, 1987, Presiding Administrative Law Judge Benkin granted the NWIGU's contested motion to intervene out of time.<sup>46</sup> The Judge noted that since NWIGU's motion was almost two years out of time, and since the questions NWIGU sought to litigate had been in the case early on, it would have been consonant with precedent to deny NWIGU's request for lack of good cause under Rule 214(d)(1)(i). The Judge, however, found that there was an overriding consideration, i.e., the importance of the issues raised by NWIGU and the unique interests of NWIGU's members. Accordingly, the Judge allowed NWIGU to intervene. He did, however, condition NWIGU's intervention on the group's acceptance of the existing record and procedural schedule, and its acknowledgement that its participation would be limited to the question of Northwest Pipeline Corporation's capacity to provide adequate service to its existing customers in the event Northwest's application in the case was granted.

On November 17, 1987, Presiding Administrative Law Judge Miller granted Koch Hydrocarbon Company a late intervention.<sup>47</sup> Koch had argued that it was not notified of Colorado Interstate Gas Company's revised tariff and was concerned that a proposed standby service was anticompetitive. While the Judge found Koch had met the requirements of Rule 214, he stated that the question of whether publication of notice in the Federal Register was sufficient notice was a close question and decided in favor of intervention based on the circumstances. The Judge rejected arguments that the late intervention would disrupt the proposed settlement that had been reached in view of the fact that even if Koch were not a party, it could comment on the proposed settlement pursuant to Rule 602.

#### *M. Protective Orders Generally*

In *Mojave Pipeline Company*,<sup>48</sup> the Commission explained how protective orders can be used as a bridge between opposing parties' competing interests. According to the Commission, the goal is the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure. Protective orders, for example, may require disclosure only of summaries of relevant information, may limit those who can view the material to outside counsel or consultants, or may require deletion of non-essential, sensitive information

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45. Mississippi River Transm'n Corp. (FERC issued Apr. 21, 1987).

46. Mojave Pipeline Co. (FERC issued Aug. 3, 1987).

47. Colorado Interstate Gas Co. (FERC issued Nov. 17, 1987).

48. Mojave Pipeline Co., 38 F.E.R.C. ¶ 61,249 (1987).

before disclosure. The Commission remanded for reconsideration under the standards set out in the order.

On October 2, 1987, Presiding Administrative Law Judge Miller approved a protective order involving disclosure of information on various investments made with respect to nonregulated activities by an electric power company (Tucson Electric Power Company).<sup>49</sup> The Judge ordered disclosure of the information on a limited basis and required the response to be accompanied by an affidavit from a corporate officer stating reasons why nonprotected disclosure would possibly put the company at a competitive disadvantage.

#### *N. Summary Disposition*

On October 16, 1987, Presiding Administrative Law Judge Nelson granted a motion for summary disposition.<sup>50</sup> In this PGA proceeding, the Commission had directed a hearing to resolve two issues. The Commission's order directing the hearing contained a further provision that the Commission was not permitting the parties to relitigate issues that had been previously raised in a rate case. In a memorandum to the Judge, which was treated as a motion for summary disposition, Tennessee Gas Pipeline Company complained that both issues set for hearing by the Commission had been previously litigated, and therefore there were no issues left and the PGA proceedings should be terminated. In his ruling on this matter the Judge stated that the Commission's summary disposition procedure is like the civil remedy of summary judgment in that both procedures are designed to avoid wasteful, unnecessary and time-consuming litigation. In terminating the PGA proceedings, the Judge ruled that if every Commission order inevitably required a hearing, Rule 217 would have no meaning.

On September 17, 1987, Presiding Administrative Law Judge Nancy ruled that Columbia Gas Transmission Corporation was not entitled to a summary determination that Quaker State Oil Refining Corporation had bargained away and waived its rights to receive a certain price for gas incident to an agreement between Columbia and Quaker State.<sup>51</sup> Columbia alleged that the waiver had come about as a result of a 1980 settlement agreement between the parties. Judge Nancy ruled that Rule 217 requires that there must be a determination that there is no genuine issue of fact material to the decision of a proceeding or a part of a proceeding before summary disposition lies. The Judge found that the motion filed by Columbia did not meet that standard, but rather confirmed the existence of a genuine issue of material fact (which was the intent of the parties, a question held by the Commission to be factual, material and genuine).

#### *O. Subpoenas Denied and Granted*

On April 16, 1987, Presiding Administrative Law Judge Bullock sustained an objection of Transco to the taking of the depositions of three of

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49. Alamito Co. (FERC issued Oct. 2, 1987).

50. Tennessee Gas Pipeline Co., 41 F.E.R.C. ¶ 63,006 (1987).

51. Independent Oil & Gas Ass'n of W.Va. (FERC issued Sept. 17, 1987).

Transco's employees.<sup>52</sup> Philadelphia Gas Works (PGW) had filed a notice to take the depositions of certain of Transco's officers and employees in order to explore all aspects of Transco's system deliverability from 1978 forward. In its answer Transco stated that these three employees had not participated in the development of Transco's policy regarding gas deliverability or in the management of the company. According to Transco, with regard to the three employees, PGW's rationale for deposing did not apply. Judge Bullock held that in accordance with Rule 410, Transco's answer stated adequate grounds for the objection to the proposed depositions. However, subpoenas regarding three *other* officers and employees involved in the establishment of policy and management of the company were sustained.

On July 7, 1987, Presiding Administrative Law Judge Murray rejected requests by Sacramento Municipal Utility District for a protective order barring further depositions and subpoenas.<sup>53</sup> The Judge found that there was no good reason to disturb a deposition schedule that had been previously agreed to by all parties. Because the issuance of the subpoenas would delay unduly the disposition of the matter, and because the materials sought were irrelevant to the proceedings, the Judge also declined to issue subpoenas for certain persons, but granted Sacramento's request to subpoena two individuals who were to be witnesses for another party.

#### *P. Subpoena Enforcement*

On May 13, 1987, Presiding Administrative Law Judge Bullock certified his request for the enforcement of a subpoena duces tecum to the Commission.<sup>54</sup> The certification was prompted by the response filed by a former employee of Transco to a May 7, 1987, Notice Concerning Failure of Depo-  
nent to Comply with a Subpoena issued by the Judge in the same docket, wherein the Judge informed the witness that he would take appropriate action under Rule 411 if the witness did not indicate on or before May 8, 1987 his willingness to comply with a previously issued subpoena. The notice was caused by a statement made by the witness in May 5-6, 1987 telephone conversations with the Judge wherein the witness indicated his intention not to comply with the subpoena.

In issuing the May 13 Certification of Request to the Commission, the Judge rejected the witness's arguments (i) that his testimony was irrelevant, (ii) that compliance with the subpoena would be an unnecessary burden because he was no longer employed by Transco and (iii) that he need not comply with the subpoena because neither the Judge nor the Commission had the authority to compel compliance. The Judge specifically found that the witness's testimony would be relevant and requested the Commission to institute civil action under section 14 of the NGA<sup>55</sup> to enforce the subpoena. The Judge declined to recommend that the Commission take action against Transco for its alleged role in the refusal of the witness to comply with the

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52. Transcontinental Gas Pipeline Corp. (FERC issued Apr. 16, 1987).

53. Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co. (FERC issued July 7, 1987).

54. Transcontinental Gas Pipe Line Corp. (FERC issued May 13, 1987).

55. Natural Gas Act, § 14, 15 U.S.C. § 717m (1982).

subpoena because it was not shown that Transco could have required compliance or that the witness would have complied voluntarily with the subpoena in the absence of certain statements made by Transco's counsel that no adverse consequences would result from noncompliance.

On May 27, 1987, the Commission took steps to enforce the subpoena *duces tecum*.<sup>56</sup> In accepting the Judge's recommendation, the Commission addressed the witness's claim of unreasonable burden by balancing the inconvenience to the witness, which the Commission found had been kept to an absolute minimum, against the great importance of the witness's testimony in the proceeding, a conclusion of the Judge with which the Commission agreed even though two other individuals were to be deposed on the same subject. The Commission afforded the witness one additional chance to comply with the subpoena by ordering that the return date be amended to allow the witness's appearance, and further ordered that the Judge report immediately to the Commission if the witness failed to comply with the amended return date and that General Counsel promptly institute judicial proceedings on behalf of the Commission to obtain compliance with the subpoena and such additional sanctions as may be appropriate.

### III. SETTLEMENT

#### A. *Breadth of Commission Settlement Rules*

On October 27, 1987, the United States Court of Appeals for the D.C. Circuit emphasized the breadth of the Commission's rules governing settlements in affirming the Commission's action approving a multi-party settlement of extended oil pipeline litigation concerning rates filed by the owners of the Trans Alaska Pipeline System.<sup>57</sup> In June 1986 the Commission severed Arctic Slope from the proceeding, and approved the settlement as uncontested under Rule 602(g), in reliance on *United Municipal Distributors Group v. FERC*.<sup>58</sup> Arctic Slope argued on appeal that the Commission had acted improperly in view of Arctic Slope's vigorous opposition and the Commission's duty to assure just and reasonable rates. Arctic Slope also argued that the Commission could not approve the settlement as uncontested when, unlike the United Municipal Distributors Group, Arctic Slope was contesting the entire settlement and not seeking to benefit from the agreement at all.

The court noted the critical importance to the case of the Commission's rules governing settlements, which rules are quite broadly worded. The court focused particularly on the rather sweeping terms of Rule 602(h)(1)(ii)(B) stating that the Commission, when faced with a party contesting a settlement, may take such action which the Commission determines to be appropriate. The court, holding both the wording of that rule and its construction by the court to be quite generous and flexible, concluded that neither the NGA nor the Commission's corpus of rules requires it under any and all circumstances to prescribe just and reasonable rates whenever a party requests that it do so.

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56. Transcontinental Gas Pipe Line Corp., 39 F.E.R.C. ¶ 61,221 (1987).

57. Arctic Slope Regional Corp. v. FERC, 832 F.2d 158 (D.C. Cir. 1987).

58. United Mun. Distribs. Group v. FERC, 732 F.2d 202 (D.C. Cir. 1984).

### *B. Contest by the Staff Alone*

On August 7, 1987, Presiding Administrative Law Judge Zimmet certified a settlement agreement to the Commission.<sup>59</sup> The Commission's staff alone opposed the proposed settlement. Because only the staff took exception, the Judge certified the settlement while noting that the Commission's regulations provide that in these circumstances a proposed settlement can be certified to the Commission without regard to whether a genuine issue of material fact is in dispute or whether the record contains substantial evidence on which to base a reasoned decision. It should be pointed out, the Judge stated, that in this proceeding the settlement was reached without hearings, but after all written testimony and exhibits, including the submissions of the staff, had been filed with the Commission and exchanged among the participants, giving the Commission the ability to compare various positions.

### *C. Denial of Certification (Settlement Judge Proceeding Recommended)*

On May 22, 1987, Presiding Administrative Law Judge Harfeld declined to certify to the Commission a settlement proposal because of genuine issues of material fact and the absence of a record upon which the issues could be decided.<sup>60</sup> However, he recommended to the Chief Judge that Settlement Judge proceedings be instituted.

### *D. Denying Requests For Certification Of Settlement Offers*

On August 6, 1987, Presiding Administrative Law Judge Bullock denied requests to certify two offers of settlement which, if approved by the Commission, would have resolved most issues in the case.<sup>61</sup> Transco and the indicated shippers each filed an offer of settlement, with each offer purporting to settle most issues, but on a different basis. The Judge determined, after review of the pleadings and record, that genuine issues of material fact were present which could not be resolved upon the record as it existed and he refused to certify the settlements.

### *E. Extrinsic Evidence of Meaning*

On June 12, 1987, Presiding Administrative Law Judge Miller denied a staff motion, in an accounting proceeding, to strike testimony about the meaning of a prior rate settlement.<sup>62</sup> According to the Staff's motion, a calculation in the settlement order conclusively proved that Stingray's settlement rates were based on fully normalized taxes and, therefore, Stingray's books of account must be adjusted to conform to the fully normalized basis. Stingray offered testimony that the settlement agreement was a compromise which established no basis for the rates and that the calculation showing tax normalization was a workpaper not intended to be part of the settlement agreement. The Judge held that the testimony was relevant to proving the meaning of the

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59. South Ga. Natural Gas Co. (FERC issued Aug. 7, 1987).

60. Niagra Mohawk Power Corp. (FERC issued May 22, 1987).

61. Transcontinental Gas Pipe Line Corp., 40 F.E.R.C. ¶ 63,027 (1987).

62. Stingray Pipeline Co. (FERC issued June 12, 1987).

rate settlement and to the related issue of whether Stingray's books of account needed adjustment to conform to its rate basis.

#### *F. Intervention Allowed After Settlement Filed*

On November 17, 1987, Presiding Administrative Law Judge Miller allowed late intervention to a party raising a new issue during the comment period of Rule 602, noting that Rule 602 allows comments by persons who are not parties in any event.<sup>63</sup>

#### *G. Right to Withdraw*

On January 16, 1987, the Commission denied rehearing and held that the Minnesota Public Utilities Commission and the Minnesota Department of Public Service could not withdraw their consent to a settlement.<sup>64</sup> According to the Commission, Minnesota's only justification was, in effect, a change of mind, which did not constitute good cause for disrupting the settlement process.

On August 24, 1987, the Commission denied rehearing and held that Mountaineer Gas Company could not withdraw its consent to a settlement.<sup>65</sup> The Commission had modified the settlement, and the settlement agreement purported to be inoperative if modified. The Commission held, however, that, because Mountaineer did not apply for rehearing of the modifications the Commission had made, it was bound by the settlement order and could not complain of an infringement on its procedural rights.

#### *H. Settlement Offers in Testimony*

On May 20, 1987, Presiding Administrative Law Judge Levant denied a motion to strike cross-examination testimony and exhibits admitted into evidence that quoted or discussed portions of the earlier drafts of a settlement agreement negotiated in the pipeline's last rate case where the scope of that settlement was an issue in the instant proceeding.<sup>66</sup> While noting the existence of a general exclusion for settlement offers or proposals on the ground of privilege, the Judge ruled that an exception to this rule adopted by the Commission in *Independent Oil and Gas Association of West Virginia*<sup>67</sup> was controlling. In accordance with that earlier Commission decision, the Judge permitted the introduction of materials from the draft settlement agreements for the narrow purpose of showing the intent of the parties regarding assertedly ambiguous language in the final settlement document.

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63. Colorado Interstate Gas Co. (FERC issued Nov. 17, 1987).

64. Northern Natural Gas Co., 38 F.E.R.C. ¶ 61,017 (1987).

65. Columbia Gas Transm'n Corp., 40 F.E.R.C. ¶ 61,195 (1987).

66. Northwest Pipeline Corp. (FERC issued May 20, 1987).

67. Independent Oil & Gas Ass'n of W.Va., 18 F.E.R.C. ¶ 61,289 (1982).

## IV. MISCELLANEOUS

A. *Close of Record v. Reopening*

On June 9, 1987, Presiding Administrative Law Judge Nancy considered the interrelationship between Rules 716 and 510(c).<sup>68</sup> Rule 716 permits the decisional authority to reopen an evidentiary record if good cause is shown. A motion by the party seeking to reopen the record must state clearly the facts to be proven and the reasons claimed to constitute grounds for reopening. Rule 510(c) allows the Presiding Officer to designate when an evidentiary record is to close and prohibits including items in the record unless reopening is granted under Rule 716. Philadelphia GasWorks (PGW) moved to strike appendices to briefs filed by Texas Eastern and ProGas Ltd. Judge Nancy reviewed the appendices, which contained the record in an Economic Regulatory Administration proceeding. He found the information in the appendices to be material, relevant, substantive and not merely supplemental or explanatory. However, he granted PGW's motion to strike, concluding that parties should not be entitled to add periodically to the record once it is closed. To do so would make proceedings unmanageable and would deny parties the opportunity to refute the late evidence.

On July 9, 1987, Presiding Administrative Law Judge Leventhal denied a motion of the Vermont Department of Public Service (VDPS) under Rule 716 to reopen the record in two consolidated cases.<sup>69</sup> The VDPS sought to reopen the record to introduce a state statute adopted by the Vermont Legislature after the record had closed. The Judge denied the request. While agreeing with *Mobil Exploration and Producing North America, Inc.*<sup>70</sup> that it was the Judge's duty to consider the matters justly under the law, he also stated that that consideration, however, did not resolve whether the new legislation was pertinent to the record. The Judge noted that the matter had been adjudicated under the old statute and that all parties had substantial opportunity to brief all issues and stated that there comes a time in every proceeding when the record must close.

B. *FOIA Requests*

On June 18, 1987, the Commission denied a request by United Gas Pipe Line Company for advance notice of any request under the Freedom of Information Act (FOIA).<sup>71</sup> United had asked for a protective order for information supplied in response to discovery requests claiming the information represented trade secrets and sensitive business information that could disadvantage United in negotiations with producers on take-or-pay issues. All parties had agreed that some protection was required. United wanted five days/notice before any information was released pursuant to an FOIA request. In denying United's request, the Commission noted that recent revisions to Commission rules eliminated the need for the request. Rule 388.110(d) codifies

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68. Texas E. Transm'n Corp., 39 F.E.R.C. ¶ 63,036 (1987).

69. Municipal Elec. Utils. Ass'n v. Power Auth. (FERC issued July 9, 1987).

70. Mobil Expl'n & Prod'g N. Am., Inc., 39 F.E.R.C. ¶ 63,007 (1987).

71. United Gas Pipe Line Co., 39 F.E.R.C. ¶ 61,319 (1987).

prior Commission practice and provides that five days' notice will be given to any person claiming information is confidential if the Commission intends to deny the claim of confidentiality and disclose the information in response to a FOIA request. United's requested protective order was unnecessary under the new rules.

### C. *Refusal to Stay Order*

On June 29, 1987, the Commission discussed the standards upon which it evaluates a request for a stay of its orders.<sup>72</sup> The Commission stated that it evaluates requests for stay using the standard set forth in the Administrative Procedure Act<sup>73</sup> (APA), which provides that a stay should be issued if justice so requires. The Commission interpreted the APA standard as requiring that a party seeking a stay must demonstrate that it will suffer irreparable harm if a stay is not granted and that a stay is in the public interest. The Commission denied a stay on both grounds, holding that financial injury is not irreparable harm and that the public interest would not be served because others could be harmed if the Commission stayed its orders.<sup>74</sup>

### D. *Updating Official Service List*

On November 6, 1987, the Commission confirmed that a party which fails to notify the Commission of a change of address does so at its peril.<sup>75</sup> The Commission staff had dismissed two applications for hydroelectric project licenses because the applicant had failed to supply requested information in a timely fashion. In denying the appeal of those dismissals, the Commission stated that the applicant had an obligation to inform the Commission of any change of address and the fact that the applicant had not received the staff's letter until two days before the information was due was entirely the fault of the applicant.

J. Michel Marcoux, *Chairman*  
Christopher K. Sandberg, *Vice Chairman*

Tracy Bridge  
Thomas L. Blackburn  
Kenneth R. Carretta  
James R. Choukas-Bradley  
Douglas A. Crockett  
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David R. Richardson  
Henry C. Rosenthal, Jr.  
Alan J. Roth  
Dan L. Sanford  
John C. Sprangers  
David M. Sparby

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72. Aquenergy Sys., Inc., 39 F.E.R.C. ¶ 61,373 (1987).

73. Administrative Procedure Act, § 10(d), 5 U.S.C. § 705 (1982).

74. See also Pacific Gas Transm'n Co., 41 F.E.R.C. ¶ 61,023 (1987).

75. Eastern States Energy & Resources, 41 F.E.R.C. ¶ 61,147 (1987).

