Report of the Committee on Practice & Procedure

I. SETTLEMENTS

During the past year, the Commission has dealt with some difficult problems that arose in connection with its administration of the settlement process.[1] To illustrate this phenomenon, we shall examine the recent series of orders dealing with *Williams Natural Gas Co.*, a rate case. The case began as a routine, though complex, filing of new rates by a natural gas pipeline under section 4 of the Natural Gas Act.[2] A large number of intervenors had protested the rate changes, which included increases in the pipeline's rates for transportation services performed under its so-called "open access" certificate authority.[3] After the parties had filed their case-in-chief testimony, and shortly before the start of the formal hearing for the purpose of cross-examination of the witnesses sponsoring that testimony, Williams Natural Gas Co. filed a proposed settlement of the case. Williams' proposal included a substantial reduction of the pipeline's sales rates from those it had originally filed.[4]

Under Rule 602 of the FERC procedural rules, the presiding administrative law judge was obliged to permit participants in the case to file written comments on the settlement proposal and to consider those comments before deciding whether to certify the settlement to the Commission for disposition on the merits. The comments on Williams' proposal indicated that at least one party, Amoco Production Co., was vigorously contesting the merits of Williams' offer. In plain terms, Rule 602 told the presiding ALJ that because the settlement was contested, he could certify it only if he found that one of a narrow range of conditions existed.[5] A contested settlement offer may be certified to the Commission only when the presiding judge determines that either (1) "there is no genuine issue of material fact" raised by the contest; or (2) the parties have all concurred in a motion to omit the initial decision, the record contains "substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues," and the parties have had the opportunity to exercise their rights to present evidence and cross-examine opposing witnesses.

It is clear that the second set of conditions can seldom, if ever, be achieved. A party who is dissatisfied enough with the merits of a settlement proposal to submit comments opposing its adoption would almost certainly object to waiver of the initial decision. That objection alone is sufficient to preclude certification of the settlement proposal under the latter of the two

1. *See* 18 C.F.R. § 385.602 (1991).

2. 15 U.S.C. § 717c (1982).

3. *See* 18 C.F.R. § 284.1-284.305 (1991).

4. When Williams first filed the rates, the Commission had exercised its authority to suspend them for five months, the maximum period allowed by law. Williams Natural Gas Co., 47 F.E.R.C. ¶ 61,468 (1989). By the time the settlement proposal was filed, the suspension period had elapsed and the customers were paying the filed rates, subject to refund.

5. 18 C.F.R. 385.602(h)(2)(ii), (iii) (1991).

formulations.[6]

The presiding judge in the *Williams* case turned to the question of whether Amoco's opposition raised a genuine issue of material fact. After carefully canvassing the comments and the filed prepared direct testimony, he concluded that several genuine issues of material fact had been raised.[7] Among them was Amoco's argument that the throughput projections submitted by the pipeline in support of its rate filing were understated, and that Williams had selected inappropriate base year and test year volumes in making the throughput projections it used to support its new transportation rates.[8] As noted in a memorandum he filed with the Commission six days later,[9] the judge recognized that adoption of the settlement proposal would be very advantageous to some of the parties, especially Williams' sales customers, who would receive the benefit of an immediate and substantial reduction in their rates under the proposal. He concluded, nevertheless, that the settlement offer could not be certified under the existing rules and issued an order denying the pending request to certify the proposal to the Commission.

In casting about for alternative courses of action, the presiding judge considered adopting a practice the Commission had employed in a few earlier cases—severing the dissenting parties from the settlement, permitting them to continue the litigation with the pipeline, and certifying the settlement for Commission approval as an agreement between the pipeline and the non-contesting parties.[10] That alternative he rejected because the Commission had, in its *Arkla Energy Resources* decision of the previous year, ruled that "the practice of severing contesting parties should not be applied to settlements of Part 284 transportation rates."[11] The Commission's reasoning in *Arkla* was based on administrative considerations. The settlement process, it said, would not be advanced by applying the severance device "where the class of rate payers is a constantly changing group, not all of whom are before the Commission in the rate case."[12] Further, the Commission noted, dissident transportation customers could evade the consequences of an adverse decision on the merits by structuring their transactions so that some other party[13] would be the shipper. As the presiding judge noted, the Commission in the *Arkla Energy Resources* proceeding had expressly ruled that contested throughput issues, similar to

6. Indeed, one wonders why the draftsmen of the rule bothered to insert a provision that would allow certification of a settlement proposal only with the consent of a party who is opposed to its approval and who can preclude approval merely by withholding consent. As we shall see, this problem reared its head in the *Williams* proceeding. *See infra* note 32.

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

8. Amoco had submitted prepared testimony and exhibits disputing the validity of the data Williams had used. *See* 52 F.E.R.C. ¶ 63,021, 63,035. Amoco's basic charge was that Williams was guilty of discriminatory refusal to provide adequate transportation service for Amoco's gas production. Absent this kind of discrimination, Amoco argued, Williams would move greater volumes than its papers supporting the filing had predicted.

9. 52 F.E.R.C. ¶ 63,027 (1990). *See infra* note 17.

10. *See* United Gas Pipe Line Co., 22 F.E.R.C. ¶ 61,094 (1983), *aff'd sub nom.* United Municipal Distributors Group v. FERC, 732 F.2d 202 (D.C. Cir. 1984).

11. Arkla Energy Resources, 48 F.E.R.C. ¶ 61,062, 61,303 (1989).

12. *Id.*

13. *Id.* For example, the buyer or the seller of the gas.

those before him in the *Williams* proceeding, must be determined only after a trial.[14]

Finally, the presiding judge considered and rejected the notion of certifying the settlement, together with the prepared testimony, to the Commission for disposition of the factual disputes on the basis of the documentary record. He noted that the Commission had approved the procedure in a recent *United Gas Pipe Line Co.* case,[15] although it seemed clearly unauthorized under Rule 602. The *United* approach was inapposite, the judge held, because the issues involved in the Williams-Amoco dispute, unlike those in the *United* proceeding, could not be intelligently decided without the benefit of cross-examination of the witnesses whose prepared testimony had been filed.

> 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.[16]

Six days after he denied the request to certify the Williams settlement proposal, the presiding judge issued another order in which he granted a motion by the pipeline and one of its customers to permit an interlocutory appeal of his action.[17] In his memorandum to the Commission that accompanied the order,[18] the judge noted that the application of the Commission's precedent in *Arkla Energy Resources* "leads to a somewhat harsh result,"[19] for example, the inability of Williams' customers to secure an immediate reduction of their gas rates amounts to approximately $27 million per year because of the intransigence of one potential shipper. In these circumstances, the judge said, "The Commission may want to reconsider the scope of the *Arkla Energy* doctrine."[20]

> [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.[21]

On October 16, 1990, the Commission issued its "Order Denying Interlocutory Appeal" in the *Williams* case.[22] Although its title would lead one to

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14. *See* Arkla Energy Resources, 48 F.E.R.C. ¶ 61,305 (1989).

15. 50 F.E.R.C. ¶ 61,276 (1990).

16. 52 F.E.R.C. ¶ 63,021 at 65,036, (1990).

17. Williams Natural Gas Co., 52 F.E.R.C. ¶ 63,026 (1990). Under the FERC Rules of Practice and Procedure, 18 CFR § 385.715, a participant seeking to take an interlocutory appeal from a ruling of a presiding judge must, in all but a few instances, first ask the presiding judge for permission to do so. The judge's refusal to allow such an appeal is itself appealable without further formality, and the Commission will customarily consider the merits of the judge's ruling in determining whether the judge correctly denied the request to take an interlocutory appeal.

18. 52 F.E.R.C. ¶ 63,027 (1990). A presiding judge who authorizes an interlocutory appeal from one of his rulings must prepare and send the Commission "A memorandum which sets forth the relevant issues and an explanation of the ruling on the issues." 18 C.F.R. § 385.715(b)(5) (1991).

19. *Id.*

20. *Id.*

21. 52 F.E.R.C. ¶ 63,027, at 65,048.

22. Williams Natural Gas Co., 53 F.E.R.C. ¶ 61,060 (1990).

believe that the Commission had approved the handling of the case by the presiding ALJ, in fact, the reverse was true. The Commission thoroughly disavowed the presiding judge's analysis and remanded the matter to him for more mature consideration of the questions relating to certification of the settlement.

First, said the Commission, the judge had misconstrued the *Arkla* precedent. According to the Commission's October 16 order, *Arkla* must be read to hold "that transportation *parties* could not be severed from settlements."[23] It left open, according to the Commission's *Williams* ruling, the question of "what techniques can be used to encourage transportation rate settlements and avoid the potential problem identified by the ALJ here, one party could potentially thwart a settlement."[24] Hence, the Commission said, the judge should again scrutinize the filed testimony and exhibits to determine whether certification and approval of the settlement was in order, notwithstanding Amoco's opposition to it. It rejected the judge's view regarding the need for cross-examination to resolve the conflicting positions that witnesses had taken in their filed testimony. The Commission wrote:

> A hearing is not necessary to resolve factual disputes which only concern the significance or interpretation of the facts or predictions as to future facts. For example, the record here contains an extensive amount of prefiled testimony and exhibits concerning throughput and cost of service that is useful for this purpose. While we recognize that this evidence has not been subjected to cross-examination, it does set forth the positions of the parties and defines the scope of the disputes. Cross-examination would merely result in a narrowing of the scope of the dispute.[25]

This restrictive view of the function of cross-examination in Commission proceedings is consistent with recent indications that the Commission is impatient with the hearing process. It is, however, in conflict with the FERC's traditional view that the opportunity for cross-examination of filed testimony is prerequisite to its inclusion in the adjudicative record. That was the view that prevailed at the time the Commission adopted its current procedural rules. For example, Rule 505 of the rules guarantees participants in an adjudicative proceeding the right "to conduct such cross-examination . . . as may be necessary to assure true and full disclosure of the facts."[26] In responding to this point, the Commission said that "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. This would result, for instance, when a witness' motive or intent or credibility needed to be considered in addition to documentary evidence, which often is not the case in FERC proceedings."[27]

The Commission's October 16 order also directed the presiding judge to look at the filed testimony one more time "to determine not only whether

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23. 53 F.E.R.C. ¶ 61,060, at 61,187 (emphasis in original).

24. *Id.*

25. *Id.*

26. 18 C.F.R. § 385.505 (1991). *See also* 5 U.S.C. § 556(d)(1988): "A party [to an administrative proceeding] is entitled to . . . conduct such cross-examination as may be required for a full and true disclosure of the facts."

27. 53 F.E.R.C. ¶ 61,060, at 61,188.

factual disputes exist, but whether they are material to the proposed settlement."[28] It suggested that the apparent contradictions between the witness' prognostications might be resolvable on the basis of their filed written testimony, without the need for cross-examination.

> The ALJ should reexamine closely the record to determine whether the disputes are as to facts or whether the content of the record can resolve any material factual disputes. If so, certification may be appropriate. Thus, disputes over throughput need not preclude certification since they may not be disputes about material facts.[29]

In addition, the Commission suggested that even though the settlement as a whole might not be certifiable, the disputed issues might be severed for hearing while the balance of the settlement could go forward. The Commission recognized, however, this approach might constitute an unacceptable modification of the bargain that the pipeline had put on the table: "Admittedly, severing issues for further consideration may be viewed as an unacceptable modification of the settlement by the parties because determination on severed issues might affect the settlement rates."[30] The pipeline, the Commission suggested, might be willing to put its settlement proposal into effect either as an interim measure or as a new section 4 rate filing that would make the lower rates effective based on the settlement cost of service.[31]

In response to the Commission's remand, the presiding judge again examined the papers that had been filed in the proceeding. In spite of the Commission's veiled hints to the contrary, he decided that he could not certify the settlement in conformity with the provisions of Rule 602. As he explained in an order issued on December 18, 1990,[32] the prepared testimony and exhibits had not been vetted for admissibility, had not been subjected to the test of cross-examination, and, in any event, dealt with the pipeline's original rate filing rather than the settlement proposal.[33] Hence, he decided to invite the filing of new evidence, going specifically to the *bona fides* of the settlement proposal, and to conduct a "mini-hearing" to permit cross-examination upon, and otherwise deal with, the new evidence. His intention was to compile a record that would permit him to issue an initial decision ruling on the merits of the settlement proposal with fidelity to the mandate of Rule 602.[34]

Williams then returned to the Commission, filing a motion for reconsideration of the October 16 order in which the settlement had been remanded for the judge's further consideration. The motion also asked the Commission to waive the issuance of an initial decision by the presiding judge.[35]

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28. 53 F.E.R.C. ¶ 61,060, at 61,187.

29. 53 F.E.R.C. ¶ 61,060, at 61,188.

30. 53 F.E.R.C. ¶ 61,060, at 61,187.

31. 53 F.E.R.C. ¶ 61,060, at 61,189.

32. 53 F.E.R.C. ¶ 63,021 (1990).

33. Apparently, the settlement rates were based on throughput estimates that were markedly different from those that underlay the filed rates.

34. At a prehearing conference held on October 30, 1990, counsel for Amoco had expressly refused to concur in a motion to omit the initial decision, thereby rendering certification of the settlement impossible under the terms of Rule 602.

35. According to the judge's December 18 order, *supra* n.30, Williams had asked the judge to certify

The Commission, in an order issued November 21, 1990,[36] denied the request for reconsideration but granted the alternative motion to omit the initial decision. In reaching this result, the Commission reiterated its stand that a trial-type hearing is rarely required or appropriate to resolve disputes among expert witnesses about the merits of the estimates that underlie rate filings. After examining the transcript of the October 30 prehearing conference, the Commission rebuked the presiding judge for venturing into a hearing on the Williams-filed settlement proposal without adequately scrutinizing the record to determine whether the disputes involved material factual issues or whether the evidentiary filings, standing alone, provided sufficient fodder for resolving the disputes.

> We reiterate that an oral type evidentiary hearing is not necessary to identify whether material issues of fact are in dispute. Such a hearing is only necessary when material issues of fact in dispute cannot be resolved on the written record. *See, e.g. Amador Stage Lines, Inc. v. U.S.*, 685 F.2d 333, 335 (9th Cir. 1982). Thus, it is imperative that the ALJ review the record to determine what issues actually warrant exploration at an oral hearing. We point out that it is not unusual for agencies to rely extensively on written submissions and only conduct oral hearing in limited circumstances. * * * Accordingly, the ALJ should review the written record to narrow the scope of the hearing which should be limited solely to those issues where Amoco's objections raise material issues of fact. Under Rule 602(h)(iii)(C) [*sic*], a party does not have a broad right to cross-examine all witnesses. Rather cross-examination should be limited to those areas in which live cross-examination is necessary. Otherwise, answering written testimony usually will be sufficient to adequately ventilate the issues. The Commission's rules do not give parties an absolute right to cross-examine all witnesses, only an opportunity to cross-examine witnesses where cross-examination is necessary to the development of the record. Accordingly, the hearing here should be a narrow, focused one in light of the fact that extensive written testimony has already been filed.[37]

By the time the Commission issued these prescriptions for the hearing on the settlement proposal, the hearing was already underway. According to the judge who presided at the hearing, the opportunity for cross-examination produced a record of much better quality than the one which existed when the Commission addressed the question of the need for, and scope of, the hearing. In this instance, as in so many others, cross-examination demonstrated that much of the prepared testimony was not what it appeared to be on its face. Some of it turned out to be ambiguous, and some of the documentary material on which the witnesses had relied was contradicted by their prepared testimony or their testimony on cross-examination.[38]

The judge pointed out in his order transmitting the record to the Commission that a trial-type hearing was the only way to examine the validity of Amoco's claim that the pipeline's evidentiary submissions were tainted by its

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the record of the hearing on the settlement without issuing an initial decision, but the judge refused to do so in the belief that under the F.E.R.C. Procedural Rules, 18 CFR § 385.708 (1991), he was required to issue an initial decision.

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

37. 53 F.E.R.C. ¶ 61,231, at 61,966-67 (footnote omitted).

38. *See* Williams Natural Gas Co., "Certification of Contested Settlement and Record," 53 F.E.R.C. ¶ 63,021 (1990).

bad-faith effort to shut in its wells by denying it adequate transportation service. In support of that assertion, Amoco had argued that the credibility and motives of Williams' witnesses were questionable. Quixotically, the Commission's order waiving the initial decision had prohibited the judge from making findings concerning the credibility of the Williams' witnesses, and he expressly declined to make such findings when, on December 18, 1990, he certified the record to the Commission.[39]

In *Transcontinental Gas Pipe Line Corp.*, another case dealing with the question of whether a settlement proposal should be acted upon notwithstanding its disputed status, and the existence of unresolved material issues of fact, the Commission wrote:

> [U]nder section 602 of the Commission's procedural rules, the presiding judges have less discretion than the Commission in reviewing offers of settlement. Under section 602(h)(1), and particularly section 602(h)(1)(ii)(B), the Commission retains considerable flexibility when evaluating the merits of contested settlements. In contrast, under section 602(h)(2), in order to certify a contested offer of settlement, presiding judges must either find that there is no genuine issue of material fact, or find that the parties concur on a motion for omission of the initial decision, that the 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.[40]

In the *Transcontinental* proceeding, the Commission explicitly dispensed with the application of Rule 602's provisions, as it has reserved the right to do.[41] The Commission also commented on the different perspectives from which the Commission and its administrative law judges approach a contested settlement.

II. PROCEDURAL CLARITY

It has been nearly ten years since the last major overhaul of the Commission's procedural rules. In that time, the Commission's practice has continued to evolve so that there are now a few areas in which current practice is not reflected in the regulations.

A. Filing Written Testimony

The current rules require fourteen copies of most documents to be filed with the Commission.[42] Written testimony falls within those strictures. Testimony can be voluminous and reproducing fourteen extra copies can be extremely expensive. The staff and the administrative law judge must be served, but the Commission keeps only one of the filed copies. The rest are unused. The Chief Administrative Law Judge recognized and attempted to

39. *Id.*

40. 53 F.E.R.C. 61,301, at 62,125 (1990) (emphasis in original).

41. 18 C.F.R. § 385.101(e) (1991), provides that the Commission may, "for good cause," waive any of its procedural rules or provide for special procedures in a specific case.

42. 18 C.F.R. § 385.2004 (1991).

reduce this burden.[43] However, in light of the current filing requirements, he later exempted written testimony from his ruling.[44]

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Christine P. Benagh, *Vice Chairman*

Allan W. Anderson, Jr.	Rebecca S. Haney
Isaac D. Benkin	JoAnn P. Russell
James M. Costan	Christopher K. Sandberg
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Carroll L. Gilliam	Channing D. Strother, Jr.

43. Notice to Public, *Filing of Exhibits in Hearings Cases*, (Mar. 2, 1990.)

44. *See* Colorado Interstate Gas Co., Docket No. RP87-30-000, *reported in* Federal Programs Advisory Service, F.E.R.C. Practice and Procedure Manual, Rule 508 at 13 (1991).