

AVAILABILITY AND USE OF DISCOVERY
AT THE FEDERAL ENERGY REGULATORY COMMISSION:
THE NEED FOR MODERNIZATION

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I. INTRODUCTION

The necessity for prompt and effective discovery procedures is important to any decision-making body. For the Federal Energy Regulatory Commission ("FERC" or "Commission"),¹ a quasi-judicial independent agency exercising regulatory jurisdiction over natural gas companies,² public utilities,³ and the licensing of hydroelectric projects,⁴ this necessity has reached severe proportions. Due to (1) the Commission's ever-increasing work load and (2) the Commission's outdated discovery regulations, the discovery mechanism applicable to FERC adjudicatory proceedings⁵ is cumbersome, uncertain and time-consuming. In order to most effectively serve the Commission and the entities which it regulates, the Commission's discovery process must be modernized.

The Commission's administrative work load has become legendary. The additional responsibility imposed on the Commission by the Natural Gas Policy Act of 1978 ("NGPA")⁶ has only served to heighten the Commission's regulatory burden. This has resulted in what the Commission's immediate past Chairman referred to as "the Commission's chronic inability to reach timely decisions."⁷ During the first year following the passage of the NGPA, filings received by the Commission increased thirty-four percent (34%) from 28,329 to 37,953.⁸ The following year, the number of filings nearly doubled to almost 70,000.⁹ As a result

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¹Prior to October 1, 1977, the regulatory duties of the Federal Energy Regulatory Commission were conducted by the Federal Power Commission. By joint regulation effective October 1, 1977 (42 F.R. 55534; October 17, 1977), most of the Federal Power Commission's regulatory authority was transferred to the FERC, in accordance with the Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.* Hence, the term "Commission," when used in the context of actions taken prior to October 1, 1977, refers to the Federal Power Commission; when used with reference to actions taken on or after October 1, 1977, "Commission" refers to the Federal Energy Regulatory Commission.

²The Natural Gas Act, 15 U.S.C. §§ 717-717w, defines "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6).

³The Federal Power Act, 16 U.S.C. §§ 791-825, defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under [Part II of the Federal Power Act]." 16 U.S.C. § 824(c).

⁴16 U.S.C. §§ 796-823.

⁵This article will be confined to a discussion of discovery available to parties in on-the-record administrative proceedings. It will not address the separate procedural regulations applicable to investigations conducted by the Commission's Office of Enforcement. These regulations are as contained in 18 C.F.R. §§ 1b.1-1b.20.

⁶15 U.S.C. §§ 3301-3432.

⁷Federal Energy Regulatory Commission, Charles B. Curtis, Chairman, *Report to Congress on Decisional Delay in Wholesale Electric Rate Increase Cases: Causes, Consequences and Possible Remedies*, DOE FERC-0041, January 23, 1980, at 4. This will hereinafter be referred to as the "Report to Congress."

⁸Testimony of Charles B. Curtis, Chairman, FERC, Before the Subcommittee on Energy and Water Development of the House Committee on Appropriations, March 18, 1980 (mimeo at 1).

⁹*Id.*

of its heavy regulatory responsibilities, the Commission has wisely embarked upon a policy of encouraging more settlements in order to avoid time-consuming hearings. This policy commenced prior to the enactment of the NGPA and has accelerated since. In his 1980 *Report to Congress*,¹⁰ Chairman Curtis identified at least two compelling reasons why the prompt settlement of cases is essential. First, from the Commission's perspective, he stated that "its jurisdiction and its case load are so large that the system cannot possibly work at an expeditious pace unless most cases are settled—and settled early."¹¹ Second, looking at the problem from the regulatee's standpoint, the Chairman emphasized the expense and waste of time involved in litigation.¹²

The effective use of discovery at the administrative level can greatly lighten the Commission's regulatory burden, and by so doing, could and should lead to more effective and timely decision-making. Properly structured rules of discovery help to ensure that complete information is made available to all parties at an early stage of the proceeding, and therefore can be utilized to encourage good faith settlement negotiations. Even for those proceedings in which a settlement is not possible, the effective use of discovery should shorten the time necessary for hearing by eliminating needless on-the-record searches for that information which is truly vital. In effect, good discovery should serve to shorten and greatly improve the quality of the record presented to the Commission, while saving valuable staff and Administrative Law Judge ("ALJ") time which currently is often wasted while the parties spar for information.¹³

The Commission's current discovery regulations provide a good working base and in fact have served the Commission reasonably well until recently. Unfortunately, the principal discovery regulations have not been revised or modified in any way since their codification in 1947,¹⁴ except for one minor technicality.¹⁵ While substantively sound in many respects, the Commission's discovery rules are simply no longer comprehensive enough nor sufficiently tight from a procedural standpoint to best serve all concerned parties. This article will examine the current discovery process at the FERC and propose recommendations which, it is hoped, will contribute in a meaningful way to a revision of the Commission's regulations governing discovery.

II. EXISTING DISCOVERY PROCEDURES

A. FERC

The Commission's authority to adopt regulations governing discovery in administrative proceedings before the agency stems principally from the Natural Gas Act ("NGA"), the Federal Power Act ("FPA") and the Administrative Proce-

¹⁰*Report to Congress, supra note 7.*

¹¹*Report to Congress, supra note 7, at 53.*

¹²*Report to Congress, supra note 7, at 59.*

¹³A Commission Staff task force group has also recognized the problems attendant to poorly-developed records. In recommending that the Commission adopt a generic rulemaking approach to the issue of rate of return on common equity, a Staff Study Group noted that:

The problem [of decisional delay] is probably exacerbated by the poor quality of the evidentiary record in many cases.

Executive Summary, *Establishing the Rate of Return on Equity for Wholesale Electric Sales: Potential Regulatory Reforms*, December 15, 1980, (mimeo at 2).

¹⁴FPC Order No. 141, 12 F.R. 8479 (December 19, 1947).

¹⁵On March 28, 1977, the Commission noted a change in the mailing address of the Commission's offices (42 F.R. 16380). This stands as the only revision to the Commission's deposition discovery provision since 1947.

dure Act ("APA").¹⁶ Section 14(c) of the NGA and Section 307(b) of the FPA state in pertinent part that:

For the purpose of any investigation or any other proceeding under this act, any member of the Commission, or any officer designated by it, is empowered to . . . subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry.¹⁷

The use of the words "relevant or material" is particularly important because such terminology appears repeatedly in the Commission's internal regulations, the administrative cases interpreting them, and in controlling case law at the judicial level. The Commission's authority to prescribe discovery rules is further strengthened and expanded upon by the terminology of Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act, both of which provide in identical language that "the Commission shall have power to preform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act."¹⁸ This broad language becomes particularly important for purposes of the Commission's authority (and obligation) to restructure its discovery regulations at the current time, since the judiciary has interpreted this statutory provision in an expansive manner.¹⁹

The Commission's authority to govern discovery pursuant to its enabling legislation in turn coincides with the statutory language of the APA. Section 555(d) of the APA, for instance, recognizes the important role filled by subpoenas in administrative proceedings by providing that "agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought."²⁰ Section 556(c)(2) of the APA further provides that presiding officers may "issue subpoenas authorized by law."²¹ Three points stand out from these APA provisions governing administrative discovery. First, the general principle of "relevance" is expressly incorporated, thereby echoing the provisions of the NGA and the FPA. Second, the APA states that subpoenas shall issue only "on request," thereby signalling an important departure from the prevailing practice in the federal court system. As will be seen below, the FERC has wisely incorporated, and further refined, this admirable (if unique) procedural characteristic. Third,

¹⁶5 U.S.C. §§ 551-559.

¹⁷15 U.S.C. § 717m(c); 16 U.S.C. § 825f(b). It should be noted at this juncture that the spelling of "subpena" is intentional. While Mr. Black and his successive editors do not recognize such cacography, *Black's Law Dictionary*, 5th ed. (1979), "subpena" is used consistently in most regulatory legislation including the APA, the NGA and the FPA, as well as in the Commission's regulations. Although the origin of this version remains a mystery, the most logical explanation the authors have heard is that "subpena" is the preferred spelling in the Government Printing Office Style Manual. Except where the specific language of referenced orders, laws or regulations differs, this article will employ the NGA and FPA version of "subpena".

¹⁸15 U.S.C. § 717o; 16 U.S.C. § 825h.

¹⁹See, *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 606-607 (3d Cir. 1977); *New England Power Co. v. F.P.C.*, 467 F.2d 425, 430 (D.C. Cir. 1972). In *Niagra Mohawk Power Corp. v. F.P.C.* 379 F.2d 153 (D.C. Cir. 1967), the Court stated in general terms:

[W]e observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.

379 F.2d at 159.

²⁰5 U.S.C. § 555(d).

²¹5 U.S.C. § 556(c)(2).

the APA emphasizes the important role played by the presiding officers in defining and controlling the proper scope of administrative discovery.

The FERC has adopted as part of its Rules of Practice and Procedure ("Rules")²² several regulations providing for explicit forms of discovery. Foremost among these are Sections 1.23²³ and 1.24²⁴ of the Commission's Rules. In Section 1.23, the Commission has expressly adopted the subpoena power contained in the NGA and the FPA and has delegated part of the authority over subpoenas to its presiding officers. That section provides that subpoenas for the attendance of witnesses or for the production of documentary evidence may be obtained only upon application to the Commission or the presiding officer. Subpoenas are to issue only in accordance with a determination as to the "relevancy and materiality" of the evidence sought to be adduced.²⁵ Only after a favorable determination as to relevancy and materiality shall a subpoena be subject to service and return. Section 1.23 further contains express requirements applicable to subpoena application, including verification and a specification of the documents sought and the facts to be proved. The principal defect of Section 1.23 is that it contains no provision for responses or objections to requests for subpoenas. This is in marked contrast to the concise procedures for responding to deposition requests contained in Section 1.24, as discussed immediately below. Nevertheless, Section 1.23 on the whole is an example of conciseness, clarity and procedural orderliness which can serve as a model for other discovery provisions. Its major drawback is that its provisions apply only to the rather drastic measures of subpoenaing documents and compelling the attendance of witnesses at hearings.

Section 1.24 of the Commission's regulations provides a vehicle for developing information through depositions. It specifies that the testimony of a witness may be taken by deposition "upon application" and "upon approval by the Commission or the presiding officer."²⁶ No deposition shall be taken except upon at least ten days notice to the parties, and upon a specification of the name and address of the witness, the subject matter, the time and place of taking the deposition, the name and address of the officer before whom it is to be taken and reasons why such deposition is necessary.²⁷ Other participants are accorded the right to respond to the notice within the ten day time period. The deponent may be examined "regarding any matter which is relevant to the issues involved in a pending proceeding," including the existence, description, nature, custody, condition and location of documents and other tangible things, as well as the identity and location of persons.²⁸ The right of objection by parties or their attorneys and

²²18 C.F.R. Chapter I, Subchapter A, Part 1.

²³18 C.F.R. § 1.23.

²⁴18 C.F.R. § 1.24.

²⁵18 C.F.R. § 1.23(a).

²⁶18 C.F.R. § 1.24(a).

²⁷18 C.F.R. § 1.24(b). This particular section of the Commission's Rules, in contrast to § 1.23, exhibits considerable uncertainty of procedure and apparent inconsistency. § 1.24(a) refers solely to an "application." § 1.24(b), however, is entitled "notice and application," but then initially establishes procedures only for a "notice." "Notice and application" is subsequently referred to jointly in the text of § 1.24(b), conveying an impression of one document. Aside from its obvious lack of clarity, this section poses a troublesome and unacceptable dilemma for a potential deponent. An interpretation favoring only one joint document—notice combined with application—would leave precious little time for a person from whom a deposition is sought to decide whether to appear at the specified time and place. During the ten day notice period, one must not only file a response, but also await a possible order from the presiding officer. If no order issues within the ten day period, a party failing to appear may run the risk of violating Commission regulations; on the other hand, appearing for a deposition in the absence of a ruling may prejudice the prospective deponent's right to object to it.

²⁸18 C.F.R. § 1.24(g).

Staff Counsel is specifically included, but under carefully controlled procedures. Thus, it is stated that "in making objections to questions or evidence, the grounds relied upon shall be stated briefly, but no transcript filed by the officer shall include argument or debate. Objections to questions or evidence shall be noted by the officer upon the deposition, but he shall not have the power to decide on the competency or materiality or relevancy of evidence."²⁹ Furthermore, depositions shall not become a part of the record to a proceeding unless received in evidence by the presiding officer.³⁰

Several other provisions of the Commission's Rules impact upon and appear to be designed to encourage prehearing discovery. Section 1.18 provides that conferences between the parties and Staff may be held at any time prior to or during hearings in order to, *inter alia*, expedite hearings. Among the issues delineated for proper consideration at such prehearing conferences are "the obtaining of admissions as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing."³¹ In keeping with the spirit of the APA and Sections 1.23 and 1.24 of the Commission's Rules, Section 1.18 also provides that the Administrative Law Judge at such conference may dispose of, by order, any procedural matters which he is authorized to rule upon during the course of a proceeding.³² Section 1.25 of the Commission's Rules further complements these provisions by providing a vehicle whereby the parties and Staff Counsel "may stipulate as to any relevant matters of fact or the authenticity of any relevant documents."³³

Thus, it seems clear that the Commission's regulations are designed to encourage prehearing discovery without limitation as to the form of such discovery. Nevertheless, several widely recognized vehicles for discovery are not expressly contained in the Commission's Rules. Among these are the glaring absence of any provisions for interrogatories, written depositions, admissions or the production of documents other than through subpoenas. With respect to the latter point, Section 1.24, while providing that deponents may be examined regarding the existence of books, documents, and other tangible things, does not expressly provide that a person may be ordered to produce documents during the course of a deposition. Rather, the only explicit provision for producing documents is contained in Section 1.23, which governs the attendance of witnesses at hearings. While this may be considered as an overly restrictive interpretation of Section 1.24, this technicality has on at least one occasion been construed so as to deny a party the right to inspect documents in advance of a deposition.³⁴ As such, it exemplifies the types of problems attendant to the Commission's current discovery regulations and underscores the need for organized revision.

B. Comparison With Other Administrative Agencies

Like the FERC, other federal regulatory agencies have necessarily promulgated discovery procedures for application in their respective administrative pro-

²⁹*Id.*

³⁰18 C.F.R. § 1.24(h).

³¹18 C.F.R. § 1.18(b)(3).

³²18 C.F.R. § 1.18(d).

³³18 C.F.R. § 1.25(a).

³⁴See *El Paso Natural Gas Co.*, Section III, B, *infra*.

ceedings. While the FERC's statutory responsibilities and procedural functions are unique in many ways, much useful comparison can be made with the discovery mechanisms utilized by sister agencies. This section will examine some of the more useful provisions of other agencies as well as the rules applicable to the federal courts, with a view toward developing the most practical set of recommendations for the Commission.

1. *Department of Energy*

Even though they both regulate our nation's energy resources and are organizationally related, the Department of Energy ("DOE"), and the FERC have developed somewhat dissimilar discovery procedures. The discovery provisions of the DOE, which conducts evidentiary proceedings through its Office of Hearings and Appeals ("OHA"), have been codified in 10 C.F.R. §§ 205.8, 205.198 and 205.198A.

The DOE's principal discovery provision is 10 C.F.R. § 205.198. Under the procedure established therein, discovery may only be conducted pursuant to an order by OHA.³⁵ While the FERC also requires that permission be obtained before discovery be allowed, the DOE's discovery provision differs from the FERC's in that it expressly permits discovery to take the form of requests for document production,³⁶ written interrogatories,³⁷ and admissions as to facts and the genuineness of documents,³⁸ as well as depositions of "material witnesses."³⁹

Applications for discovery at the DOE, termed "motions for discovery," may only be filed at the time that a statement of objections (an appeal of an order) or a response thereto is filed.⁴⁰ As is the case at the Commission,⁴¹ the discovery application must state why the discovery is necessary in order to obtain relevant and material evidence.⁴² The DOE also requires, however, that the application explain why the discovery will not unduly delay the underlying proceeding.⁴³ After the motion for discovery has been filed, a 20-day period of time is allowed for contesting the motion.⁴⁴ If OHA subsequently concludes that the discovery request satisfies the above two criteria, the motion for discovery will be granted.

Several other key aspects of both the Commission's and the DOE's discovery regulations are not included in the other agency's provisions. For example, the DOE provides that the expenses incurred in a discovery exercise may be charged to the person who initially requested the discovery.⁴⁵ Moreover, the DOE has incorporated a provision empowering OHA to order "appropriate sanctions" against a party who fails to comply with an order relating to discovery,⁴⁶ if requested by the aggrieved participants.⁴⁷

³⁵10 C.F.R. § 205.198(c).

³⁶10 C.F.R. § 205.198(b)(1).

³⁷10 C.F.R. § 205.198(b)(2).

³⁸10 C.F.R. § 205.198(b)(3).

³⁹10 C.F.R. § 205.198(b)(4).

⁴⁰10 C.F.R. § 205.198(a). Compare this limitation to the Commission rule which permits a party to file a request for a subpoena, 18 C.F.R. § 1.23(a), or a deposition, 18 C.F.R. § 1.24(a), any time before the proceeding or hearing is closed.

⁴¹18 C.F.R. § 1.24(b) and (g).

⁴²10 C.F.R. § 205.198(c).

⁴³*Id.*

⁴⁴10 C.F.R. § 205.198(d). The Commission also provides for this in 18 C.F.R. § 1.24(b).

⁴⁵10 C.F.R. § 205.198(g).

⁴⁶10 C.F.R. § 205.198(h)(1).

⁴⁷10 C.F.R. § 205.198(h)(2).

It is particularly instructive to note that the DOE has a regulation dealing with protective orders,⁴⁸ whereas the Commission does not. Under the DOE's regulations, a participant who has unsuccessfully attempted to obtain information that another participant claims is confidential may file a motion with OHA specifying why the information is necessary to adequately present his position in the proceeding. The motion must also propose specific steps to protect the confidentiality of the information sought.⁴⁹ The possessor of the information may file a response to the motion and OHA will accordingly issue a protective order upon consideration of the motion and response thereto.⁵⁰

There is also a good deal of disparity, as well as some similarity, between the agencies' respective subpoena provisions. For example, both the DOE and the Commission provide that subpoenas can only be issued upon applications made to specified officers⁵¹ and both agencies have adopted provisions relating to the service of such subpoenas.⁵² However, the DOE's provision includes several other important topics not covered by the FERC. DOE provides (1) for a 10-day period for a participant to contest a subpoena;⁵³ (2) that upon complying with a subpoena, a person must submit a sworn statement that a diligent search has been made for the requested documents;⁵⁴ (3) that enforcement of a subpoena may be sought in a United States district court;⁵⁵ (4) the circumstances and conditions under which one may assert a privilege over the requested documents;⁵⁶ and (5) the role of a witness' attorney when the subpoena requests testimony instead of documents.⁵⁷

2. Federal Trade Commission.

The federal administrative agency with perhaps the most detailed set of discovery regulations is the Federal Trade Commission ("FTC").⁵⁸ These regulations are so comprehensive that they outline procedures that are remarkably similar to those set forth in the Federal Rules of Civil Procedure ("Federal Rules" or "FRCP").⁵⁹ The Commission's discovery regulations⁶⁰ pale in comparison to those of the FTC both in terms of detail and scope.

The first FTC discovery provision⁶¹ is a general one similar to Rule 26 of the Federal Rules of Civil Procedure. It sets forth the type of discovery devices that are available at the FTC⁶² and also states that FTC ALJ's may authorize "discovery

⁴⁸10 C.F.R. § 205.198A.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹10 C.F.R. § 205.8(b)(1) (DOE) and 18 C.F.R. § 1.23(a) (FERC). The FERC provisions in this respect are much more detailed than DOE's, in that FERC specifies precisely what has to be included in the subpoena application.

⁵²10 C.F.R. § 205.8(c) (DOE) and 18 C.F.R. § 1.23(b) (FERC).

⁵³10 C.F.R. § 205.8(b)(4).

⁵⁴10 C.F.R. § 205.8(f)(1).

⁵⁵10 C.F.R. § 205.8(e).

⁵⁶10 C.F.R. § 205.8(g).

⁵⁷10 C.F.R. § 205.8(j).

⁵⁸These regulations are set forth in 16 C.F.R. §§ 3.31-3.39. Additional FTC discovery regulations can also be found at 16 C.F.R. § 2.10. These regulations specify the subpoena and deposition powers that the FTC staff has at its disposal during investigations.

⁵⁹Mezines, Stein and Gruff, *Administrative Law*, § 23.01 (1980), at 23-5.

⁶⁰18 C.F.R. §§ 1.18, 1.23-1.25.

⁶¹16 C.F.R. § 3.31.

⁶²16 C.F.R. § 3.31(a). Among the discovery methods available at the FTC are depositions upon oral examination or written questions, written interrogatories, production of documents for inspection, and requests for admission. *Id.*

upon a satisfactory showing that the requested discovery may reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent."⁶³ This provision also sets forth the FTC's rules with respect to privileged information,⁶⁴ "work product" material,⁶⁵ reports and opinions of expert witnesses,⁶⁶ and protective orders.⁶⁷ The FERC notably does not have any formal rules regarding these topics.

The Commission and the FTC do, however, have essentially similar provisions when it comes to the issuance of subpoenas.⁶⁸ Both agencies require that written applications be made to the presiding ALJ⁶⁹ and that some showing of relevancy be made before a requested subpoena be granted.⁷⁰ Unlike the FERC, the FTC expressly provides that a person served with a subpoena has 10 days after such service to move to quash or limit it.⁷¹ The FERC is conspicuously silent on this important subject.

The FTC's deposition regulation⁷² is much more comprehensive than the Commission's,⁷³ although there is a great deal of similarity between the two. For example, both agencies require that written applications with claims of relevancy, be made to presiding ALJ's before depositions will be allowed,⁷⁴ that reasonable notice be given before depositions take place,⁷⁵ that deponents be sworn before they testify,⁷⁶ that objections be allowed to be made at the depositions,⁷⁷ and that depositions be reduced to writing and signed by the deponent.⁷⁸ The FTC provision, however, also contains sections dealing with deposition notices to corporations and their required responses thereto,⁷⁹ the use of depositions upon written questions,⁸⁰ and the permitted use of depositions at hearings.⁸¹

⁶³16 C.F.R. § 3.31(b)(1). This provision also states, as does Rule 26 of the Federal Rules, that it shall not be a ground for denying discovery that the information sought will be inadmissible at the hearing, if the information appears reasonably calculated to lead to the discovery of admissible evidence. Cf. 18 C.F.R. § 1.24(g) and cases discussed in Section III, *infra*.

⁶⁴16 C.F.R. § 3.31(b)(2). Essentially, the FTC does not permit the discovery of such information.

⁶⁵16 C.F.R. § 3.31(b)(3). The rule laid down herein is similar to the limitations set forth in Rule 26. That is, work prepared in anticipation of litigation will only be held discoverable upon a showing that the party seeking it has a substantial need for it in the preparation of his case and that he is unable to obtain the substantial equivalent of the materials by other means without undue hardship.

⁶⁶16 C.F.R. § 3.31(b)(4).

⁶⁷16 C.F.R. § 3.31(c). Protective orders will be granted by ALJ's in order "to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." *Id.*

⁶⁸16 C.F.R. § 3.34 (FTC) and 18 C.F.R. § 1.23 (FERC).

⁶⁹The Commission does, however, permit oral applications to be made at the hearing itself. 18 C.F.R. § 1.23(a).

⁷⁰Compare this with the procedure employed at the National Labor Relations Board where subpoenas are issued *pro forma* and the issue of relevancy is only decided at motions to quash or limit such subpoenas. See discussion in Section II, B, 3, *infra*.

⁷¹16 C.F.R. § 3.34(c).

⁷²16 C.F.R. § 3.33. This provision is meant to be read in conjunction with the FTC's subpoena provision, 16 C.F.R. § 3.34, since it governs the issuance of subpoenas (both types) that are returnable at depositions.

⁷³18 C.F.R. § 1.24.

⁷⁴16 C.F.R. § 3.33(a) and (b) (FTC) and 18 C.F.R. § 1.24(a) and (b) (FERC). Note that the FTC expressly allows depositions to take place to either discover relevant information or to preserve the testimony of a witness who will not be available at the hearing. 16 C.F.R. § 3.33(a).

⁷⁵16 C.F.R. § 3.33(a) (FTC) and 18 C.F.R. § 1.24(c) (FERC). The FERC provision goes a step further than the FTC one in this regard by requiring that an application for deposition be filed with the Commission at least 10 days before the requested deposition is to take place. 18 C.F.R. § 1.24(b).

⁷⁶16 C.F.R. § 3.33(d) (FTC) and 18 C.F.R. § 1.24(e) (FERC).

⁷⁷16 C.F.R. § 3.33(d) (FTC) and 18 C.F.R. § 1.24(g) (FERC). Under the FTC rule, objections can also be made at the time of signing the deposition transcript. 16 C.F.R. § 3.33(f).

⁷⁸16 C.F.R. § 3.33(f) (FTC) and 18 C.F.R. § 1.24(e) (FERC).

⁷⁹16 C.F.R. § 3.33(c).

⁸⁰16 C.F.R. § 3.33(e).

⁸¹16 C.F.R. § 3.33(g)(1).

The FTC further has adopted a much more detailed provision regarding waiver of one's objection rights.⁸² While the Commission holds that all objections not made at the deposition will be deemed waived,⁸³ the FTC follows this rule only with respect to irregularities in the manner of taking the deposition, the form of the questions asked therein and the conduct of the parties.⁸⁴ Objections to the competency of a witness or the relevancy or materiality of testimony is not waived by failure to make them before or during the deposition, unless the ground for the objection might have been removed if presented at that time.⁸⁵

Another discovery technique which the FTC employs more extensively than the FERC is the use of the prehearing conference.⁸⁶ The FTC expressly provides that one of the key subjects to be discussed at prehearing conferences is the "plan and schedule of discovery, and such limitations on discovery as may promote expedition[.]"⁸⁷ As further proof of its intent to use prehearing conferences as a discovery tool, the FTC also provides that prehearing conferences may be convened solely for the purpose of accepting returns on subpoenas *duces tecum* issued pursuant to its regular subpoena provisions.⁸⁸ This procedure has been termed a "sensible" way of obtaining documents in those instances where a party needs the documents but is not interested in deposing the possessor.⁸⁹

There are four other FTC discovery provisions that are worth noting herein due to the fact that they highlight the comprehensiveness of the FTC's overall discovery procedures as contrasted with the FERC's. The first of these provisions is the FTC's rule regarding admissions.⁹⁰ This rule, which is substantively similar to Rule 36 of the Federal Rules of Civil Procedure, provides that any party may serve on any other party a written request for admissions as to the truth of any relevant matter or as to the genuineness of any document.⁹¹ Such matters are considered admitted unless the party served with the admission files, within 10 days after service of it upon him, an answer objecting to the admission, specifically denying it, or stating why he cannot either admit or deny it.⁹² Of course, any admission made under the rule can be used only in the instant proceeding and is not for use in any other proceeding.⁹³

Another FTC discovery tool that is available to participants in its proceedings are written interrogatories.⁹⁴ Upon authorization from the presiding administra-

⁸²16 C.F.R. § 3.33(g)(3).

⁸³18 C.F.R. § 1.24(g).

⁸⁴16 C.F.R. § 3.33(g)(3)(iii)(B). Note also that objections as to errors in the notice, 16 C.F.R. § 3.33(g)(3)(i), as to disqualification of the officer before whom the deposition is to be taken, 16 C.F.R. § 3.33(g)(3)(ii), and as to the preparation and signing of the deposition, 16 C.F.R. § 3.33(g)(3)(iv), must generally be made as soon as the defect becomes, or should have become, apparent.

⁸⁵16 C.F.R. § 3.33(g)(3)(iii)(A).

⁸⁶16 C.F.R. § 3.21 (FTC) and 18 C.F.R. § 1.18 (FERC). See also, Rule 16 of the Federal Rules of Civil Procedure. Under the Commission rule, prehearing conferences take place at the discretion of the presiding administrative law judge, 18 C.F.R. § 1.18(a). At the FTC, however, prehearing conferences take place in every case. As 16 C.F.R. § 3.21(a) states: "The Administrative Law Judge in every case shall direct counsel for all parties to meet with him for one or more conferences."

⁸⁷16 C.F.R. § 3.21(a)(3). Another agency which effectively utilizes the prehearing conference for discovery purposes is the Civil Aeronautics Board. See, 14 C.F.R. § 302.23.

⁸⁸16 C.F.R. § 3.21(c).

⁸⁹Tomlinson, *Discovery in Agency Adjudication*, 1971 Duke Law Journal 89 (1971), at 127.

⁹⁰16 C.F.R. § 3.32.

⁹¹16 C.F.R. § 3.32(a).

⁹²16 C.F.R. § 3.32(b).

⁹³16 C.F.R. § 3.32(c).

⁹⁴16 C.F.R. § 3.35.

tive law judge, any party may serve such interrogatories upon any other party to the proceedings.⁹⁵ The interrogatories must be answered under oath, within 30 days,⁹⁶ or they must be objected to on a ground not raised in connection with the authorization by the administrative law judge.⁹⁷

Another FTC provision⁹⁸ of key significance governs motions to compel discovery and the possible sanctions⁹⁹ that may be imposed upon one for a failure to abide with an order granting discovery. Under these provisions, if a party fails to sufficiently object to or answer an admission or an interrogatory, the requesting party may move for an order by the ALJ directing that a matter be admitted or that an amended answer be served.¹⁰⁰ Moreover, if a party substantially fails to comply with any form of a discovery request, the presiding administrative law judge and the FTC are provided with a wide array of sanctions that can be imposed. These sanctions include, but are not limited to,¹⁰¹ ruling that (1) the admission or testimony would be adverse to the noncomplying party;¹⁰² (2) the matter be taken as established adversely against the noncomplying party;¹⁰³ (3) the noncomplying party not be allowed to use any of the testimony or documents sought in support of its claim or defense;¹⁰⁴ (4) the noncomplying party may not object to the use of any secondary evidence to show what the withheld testimony or documents would have shown;¹⁰⁵ (5) any pleading or part thereof or a motion by the noncomplying party concerning the withheld information be stricken; or (6) a decision in the proceeding should be rendered against the noncomplying party.¹⁰⁶

A final FTC discovery related provision, of which the Commission again has no counterpart, contemplates the granting of immunity for a witness in exchange for testimony.¹⁰⁷ Such an order will only be issued upon a finding that the witness has refused or is likely to refuse to testify based upon the privilege against self-incrimination and upon a finding that the testimony may be necessary to the public interest.¹⁰⁸ The approval of the Attorney General is necessary prior to the issuance of an immunity order under this provision.

3. National Labor Relations Board

At the other end of the spectrum from the detailed discovery provisions of the Federal Trade Commission, are the less inclusive discovery regulations promulgated by the National Labor Relations Board ("NLRB" or "the Board").¹⁰⁹

⁹⁵16 C.F.R. § 3.35(a)(1).

⁹⁶Or within 45 days after service of a complaint upon a respondent, 16 C.F.R. § 3.35(a)(2).

⁹⁷*Id.*

⁹⁸16 C.F.R. § 3.38.

⁹⁹The FTC, and indeed all federal agencies lack the inherent power to enforce their discovery provisions through contempt proceedings or through the issuance of fines. See, R.L. Williams, *Authority Of Federal Agencies To Impose Discovery Sanctions: The FTC—A Case In Point*, 65 Georgetown L.J. 739, 752-763 (1976-1977). The FERC, however, can suspend practioners for "contumacious conduct", 18 C.F.R. § 1.4(b)(3), a seldom-used power which ostensibly could be applied in a manner similar to contempt. In addition, at least one FERC judge has ordered dilatory discoverees to pay expenses, as discussed in Section III, B, *infra*. The analogy to a fine is inescapable.

¹⁰⁰16 C.F.R. § 3.38(a).

¹⁰¹16 C.F.R. § 3.38(c).

¹⁰²16 C.F.R. § 3.38(b)(1).

¹⁰³16 C.F.R. § 3.38(b)(2).

¹⁰⁴16 C.F.R. § 3.38(b)(3).

¹⁰⁵16 C.F.R. § 3.38(b)(4).

¹⁰⁶16 C.F.R. § 3.38(b)(5).

¹⁰⁷16 C.F.R. § 3.39(b).

¹⁰⁸*Id.*

¹⁰⁹29 U.S.C. §§ 102.30-102.32.

Though somewhat similar to the discovery provisions of the Commission in terms of what is allowed and the procedures to be followed in order to initiate discovery, there is a major philosophical difference concerning the availability of discovery at the Commission and at the NLRB. As will be shown below, the Board is extremely reluctant to grant certain types of discovery requests, such as depositions.

A comparison of the discovery provisions of these two agencies reveals that they both essentially have only two regulations concerning discovery.¹¹⁰ Each agency has a provision dealing with depositions¹¹¹ and each has a provision covering subpoenas.¹¹² Neither agency has any specific provision authorizing the use of other discovery tools such as interrogatories, admissions or document requests.

There are several notable differences between the respective subpoena provisions of the Commission and the NLRB. Whereas the Commission's subpoena regulation is relatively short and deals mainly with the application for and service of a subpoena, the NLRB's regulation is quite detailed and comprehensive. As is the case with the Commission, applications for subpoenas from the NLRB are made to the administrative law judge presiding over the particular hearing.¹¹³ But while applications for subpoenas may be made orally at a hearing before the Commission or presiding officer,¹¹⁴ applications before the NLRB or its regional directors or administrative law judges must be written at all times.¹¹⁵ Moreover, while the Commission requires that all subpoena applications contain statements as to the "general relevance, materiality, and scope of the testimony or documentary evidence sought,"¹¹⁶ NLRB applications contain no such requirement. The reason for this difference is important. Whereas, the Commission will consider the issues of materiality and relevance before it issues a subpoena, the NLRB's policy is to "forthwith issue subpoenas"¹¹⁷ upon application and to consider such issues only when the subpoenaed person moves to quash, revoke or limit the subpoena.¹¹⁸ According to Board procedure,¹¹⁹ subpoenaed persons have five days from the date of service of the subpoena upon them to petition in writing for the revocation of the subpoena and the Board will grant such petition if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings[.]"¹²⁰

¹¹⁰The NLRB has a third provision dealing with discovery, but it is only of minor significance. 29 C.F.R. § 102.32 authorizes witnesses who are summoned to appear before the trial examiner, witnesses whose depositions are to be taken and officers who preside over depositions to be paid the same fees as are paid for like services in the courts of the United States. Such fees are of course paid by the party at whose insistence the witness testified or at whose insistence the deposition was held. The policy contained in this separate NLRB provision, however, is substantially similar to the Commission's policy regarding the payment of witness and deposition fees. See, 18 C.F.R. §§ 1.22(c) and 1.24(i).

¹¹¹29 C.F.R. § 102.30 (NLRB) and 18 C.F.R. § 1.24 (FERC).

¹¹²29 C.F.R. § 102.31 (NLRB) and 18 C.F.R. § 1.23 (FERC).

¹¹³If requested prior to a hearing at the NLRB, the application is made to the applicable regional director. 29 C.F.R. § 102.31(a).

¹¹⁴18 C.F.R. § 1.23(a).

¹¹⁵See 29 C.F.R. § 102.31(a).

¹¹⁶18 C.F.R. § 1.23(a).

¹¹⁷29 C.F.R. § 102.31(a).

¹¹⁸The NLRB is the only major federal administrative agency which has explicitly adopted this procedure. Tomlinson, *Discovery in Agency Adjudication*, *supra* note 89, at 129, n. 134.

¹¹⁹As set forth in 29 C.F.R. § 102.31(b).

¹²⁰*Id.*

Several other NLRB provisions respecting subpoenas are also worth noting since the Commission does not have any regulations comparable to them. Subsection (c) of 29 C.F.R. § 102.31 authorizes the Board, with the approval of the Attorney General of the United States, to issue an order directing any individual to give testimony or provide other information to the Board if: (1) the testimony or other information may be necessary to the public interest and (2) the individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Moreover, any party may request the issuance of such an order from the Board, either before or during a proceeding, but only the Board itself, and not its regional directors or administrative law judges, has the power to issue this order.¹²¹ Further, the NLRB's general counsel is authorized to institute proceedings in the appropriate federal district court, "on relation" of the private party who requested a subpoena, if necessary to enforce such subpoena against the person to whom it is directed.¹²² If, however, the Board determines that the enforcement of the subpoena would be inconsistent with law and with the policies of the National Labor Relations Act,¹²³ 29 U.S.C. § 151 *et seq.*, the person who requested the subpoena initially must wait until the Board's final order in the proceeding is issued and then raise the Board's refusal to enforce the subpoena on appeal.¹²⁴

A comparison of the deposition provisions that the Board and the Commission have promulgated also reveals several similarities, as well as several differences, some of great consequence, between the two provisions. Like the Commission, the Board requires that agency approval be obtained before a deposition can take place.¹²⁵ Both agencies also prescribe that proper notice be given to the parties before the deposition occurs,¹²⁶ and that it be taken before an officer authorized to administer oaths under the laws of the United States or of the place where the deposition is to occur.¹²⁷ Moreover, both agencies permit all the parties appearing at the deposition to examine and cross-examine the witness and to make objections and exceptions.¹²⁸ Under the rule of both the NLRB and the Commission, the officer before whom the deposition is taken does not have the power to rule upon the objections; he merely has the power to note them upon the deposition.¹²⁹

Real differences emerge between the deposition provisions of the NLRB and the Commission with respect to the conditions for granting a deposition application and the scope thereof.¹³⁰ Concerning the scope of depositions, the NLRB does not have a provision comparable to 18 C.F.R. § 1.24(g) that the "deponent may be examined regarding any matter which is relevant to the issues involved in the

¹²¹29 C.F.R. § 102.31(c).

¹²²29 C.F.R. § 102.31(d).

¹²³*Id.*

¹²⁴*Ex-Cello Corporation v. Little*, 268 F. Supp. 755, 758 (S.D. Ind. 1966).

¹²⁵29 C.F.R. § 102.30(a).

¹²⁶The application for deposition must be filed at least seven days before the deposition is to occur under the NLRB rule, 29 C.F.R. § 102.30(a), and at least ten days before the deposition occurs under the Commission rule, 18 C.F.R. § 1.24(b). Both agencies prescribe a 15 day notice period if the deposition is to take place outside of the United States. *Id.*

¹²⁷29 C.F.R. § 120.30(b) (NLRB) and 18 C.F.R. § 1.24(d)(1) (FERC).

¹²⁸29 C.F.R. § 120.30(c) (NLRB) and 18 C.F.R. § 1.24(g) (FERC).

¹²⁹*Id.*

¹³⁰Another difference of some import is the fact that the Commission has a regulation, 18 C.F.R. § 1.24(h), which states that the deposition does not become a part of the record in the proceeding until it is received into evidence by the Commission or presiding officer. The NLRB has no comparable provision.

proceeding," including the existence and location of any documents or other tangible things.¹³¹ The NLRB provision does, however, contain a requirement that depositions will only be permitted upon "good cause shown,"¹³² and such a determination is entirely within the discretion of the administrative law judge or the regional director to whom the application for deposition has been directed.¹³³

4. Federal Court Discovery Rules

Both in terms of comprehensiveness and complexity, the discovery provisions of the Federal Rules of Civil Procedure¹³⁴ far exceed the discovery regulations promulgated by the Commission. While the FERC essentially has only substantive discovery provisions covering subpoenas and depositions, parties litigating in federal district courts have been provided, by the Federal Rules of Civil Procedure, with a full range of discovery techniques from which to obtain information. These discovery techniques include depositions upon oral examination¹³⁵ and upon written questions,¹³⁶ interrogatories,¹³⁷ requests for production of documents,¹³⁸ physical and mental examinations,¹³⁹ and admissions.¹⁴⁰ Moreover, the Federal Rules contain a provision dealing with one's failure to cooperate in discovery,¹⁴¹ which includes such subjects as motions to compel,¹⁴² and the sanctions that may be imposed upon a person for failing to obey an order compelling such discovery.¹⁴³ The Federal Rules also contain a general provision concerning discovery,¹⁴⁴ which includes such subjects as the scope¹⁴⁵ and timing¹⁴⁶ of discovery, access to material prepared in anticipation of trial¹⁴⁷ and reports by experts,¹⁴⁸ protective orders,¹⁴⁹ supplementation of responses,¹⁵⁰ and discovery conferences.¹⁵¹ It is beyond the purview of this article to go into a detailed analysis of all of the discovery provisions contained in the Federal Rules. Nevertheless, certain of its features are instructive for comparison purposes.

¹³¹18 C.F.R. § 1.24(g). See discussion in Section II A, *supra*.

¹³²29 C.F.R. § 102.30.

¹³³29 C.F.R. § 102.30(a). The NLRB has interpreted this requirement very narrowly so as to limit depositions to those situations where they are necessary to preserve evidence when the deponent is unavailable to testify at trial. It is Board policy that depositions are not to be taken solely for discovery purposes. See, *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857 (2nd Cir.), *cert. denied*, 402 U.S. 915 (1970). At the present time there is a considerable split among the United States Circuit Courts of Appeals over the Board's policy in this regard. Compare, *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2nd Cir. 1976); *NLRB v. Lizard Knitting Mills, Inc.*, 523 F.2d 978 (2nd Cir. 1975); *NLRB v. Interboro Contractors, Inc.*, *supra*; with, *NLRB v. Miami Coca-Cola Bottling Co.*, 403 F.2d 944 (5th Cir. 1968); *NLRB v. Safeway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

¹³⁴These discovery provisions are contained in Rules 26-37 of the Federal Rules of Civil Procedure. Rule 45, which pertains to subpoenas, is also considered a discovery provision for the purposes of this article.

¹³⁵Rule 30 of the Federal Rules of Civil Procedure. (All references to specific Rules of the Federal Rules of Civil Procedure will hereinafter be referred to as "Rule ____").

¹³⁶Rule 31.

¹³⁷Rule 33.

¹³⁸Rule 34.

¹³⁹Rule 35.

¹⁴⁰Rule 36.

¹⁴¹Rule 37.

¹⁴²Rule 37(a).

¹⁴³Rule 37(b).

¹⁴⁴Rule 26.

¹⁴⁵Rule 26(b)(1).

¹⁴⁶Rule 26(d).

¹⁴⁷Rule 26(b)(3).

¹⁴⁸Rule 26(b)(4).

¹⁴⁹Rule 26(c).

¹⁵⁰Rule 26(e).

¹⁵¹Rule 26(f).

By far, the most striking difference between the discovery provisions of the Federal Rules and the Commission's is that no condition of advance approval generally exists in the federal courts.¹⁵² For instance, under the Federal Rules, oral depositions of either a party or a nonparty can be undertaken without leave of court, unless a plaintiff wishes to depose a party within 30 days of service of a summons and complaint upon the defendant.¹⁵³ Thus, unlike the practice at the FERC, most discovery under the Federal Rules is to be undertaken without the involvement of the court itself.¹⁵⁴ This is perhaps the single greatest contributor to the discovery abuse which occurs at the federal court level¹⁵⁵ and is in marked contrast to the discovery scheme established at the Commission, where approval must first be obtained.

Another difference between the two sets of discovery rules concerns the subject of objections to depositions. Under the FERC rule, objections to questions or evidence not taken before the presiding officer are deemed waived.¹⁵⁶ Under the Federal Rules, this rule applies only to objections concerning errors and irregularities occurring at the oral deposition covering the manner of taking the deposition, the form of questions or answers, the oath or affirmation, the conduct of the parties, or errors of any kind which could have been cured if "promptly presented" at the deposition.¹⁵⁷ Objections to the competency, relevancy or materiality of testimony are not waived if not made at the deposition unless the ground for objection is one which could have been cured if presented at that time.¹⁵⁸

As in the case of depositions, the necessity for prior approval represents the major difference between the federal rule governing subpoenas¹⁵⁹ and the Commission's.¹⁶⁰ While the Commission's rule requires that subpoenas may be issued only with the approval of the Commission or the presiding administrative law judge,¹⁶¹ subpoenas in federal court litigation may be issued without prior court approval. In fact, they are issued by the court in blank and are filled in by the party wishing to serve the subpoena.¹⁶² Battles over the relevancy and reasonableness of the testimony or documents sought in the subpoena are fought in hearings on motions to quash or limit the subpoena.¹⁶³ In addition, the scope of the federal court subpoena provision is far more comprehensive than the Commission's. For example, the federal provision has separate, detailed sections dealing with subpoenas for the purpose of taking depositions¹⁶⁴ and for hearings or trials,¹⁶⁵ and a section providing that failure to obey a subpoena may be construed as contempt of court.¹⁶⁶

¹⁵²See, e.g., Rules 31, 33, 34 and 36.

¹⁵³*Id.*

¹⁵⁴For example, newly amended Rule 5(d) now permits courts, either upon motion or *sua sponte*, to order that all discovery filings and evidence not be filed with the court unless the court directs otherwise.

¹⁵⁵See, Section III B, *infra*.

¹⁵⁶18 C.F.R. § 1.24(g).

¹⁵⁷Rule 32(d)(3)(B).

¹⁵⁸Rule 32(d)(3)(A). Objections to notices must be made promptly upon service of the notice, Rule 32(d)(1); objections to the qualifications of the officer before whom the deposition is taken must be made before the taking of the deposition or as soon thereafter as the disqualification becomes known or should have become known, Rule 32(d)(2); and objections to the completion and return of the deposition must be made with reasonable promptness after the defect is or should have been ascertained, Rule 32(d)(4).

¹⁵⁹Rule 45.

¹⁶⁰18 C.F.R. § 1.23.

¹⁶¹18 C.F.R. § 1.23(a).

¹⁶²Rule 45(a).

¹⁶³Rule 45(b).

¹⁶⁴Rule 45(d).

¹⁶⁵Rule 45(e).

¹⁶⁶Rule 45(f).

Furthermore, the Federal Rules also provide for prehearing conferences¹⁶⁷ in a manner that is more comprehensive than the Commission's provision¹⁶⁸ with respect to the purposes for such conferences. The August 1980 amendments to the Federal Rules contain a new provision, Rule 26(f), which expressly calls for a prehearing conference to discuss discovery matters. This new subsection to Rule 26 now allows a party to submit a motion to the court to hold a prehearing discovery conference.¹⁶⁹ The purpose of such a hearing, held among all the parties to the action, is to allow the court to issue an order identifying the issues in the case for discovery purposes, establishing a plan and a schedule for discovery, setting limitations on discovery and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action.¹⁷⁰

III. PRACTICAL APPLICATION OF FERC DISCOVERY RULES

A. *General Principles and Guidelines*

Although the Federal Rules of Civil Procedure governing discovery¹⁷¹ and cases interpreting them have never been specifically adopted by the FERC, it is clear that the spirit of those rules has been endorsed by the Commission. In fact, the frequent use of the terms "relevant" and "material" in the Commission's regulations appear to be taken directly from Rule 26(b)(1) of the Federal Rules, which provides that discovery may be obtained "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .". Thus, in *Trans Alaska Pipeline System*, Docket No. OR78-1 (Phase II),¹⁷² wherein the Commission upheld its Staff's request for comprehensive subpoenas, the Commission cited to federal court precedent¹⁷³ in finding that "... it is enough that 'there is any possibility that the information sought may be relevant to the subject matter . . .'".¹⁷⁴ The Commission therein also reiterated that "... the proper test [of discovery] is the possibility of relevance . . ."¹⁷⁵

While the landmark case of *Hickman v. Taylor*¹⁷⁶ still is viewed by many today as the first and last word on the scope of discovery at the federal level, a more contemporary and well-honed view of this subject was provided by the Supreme Court in the subsequent case of *Oppenheimer Fund, Inc. v. Saunders*.¹⁷⁷ After citing to the express wording of Rule 26(b)(1) of the Federal Rules, the Court stated as follows:

The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.¹⁷⁸

¹⁶⁷Rule 16.

¹⁶⁸8 C.F.R. § 1.18.

¹⁶⁹According to Rule 26(f), these discovery prehearing conferences may be combined with the pretrial conference authorized by Rule 16.

¹⁷⁰Rule 26(f).

¹⁷¹Rules 26-37 and 45.

¹⁷²Order Denying Motions to Quash or Limit the Scope of Phase II Subpoenas (November 6, 1979).

¹⁷³*Mallinckrodt Chemical Works v. Goldman, Sachs and Co.*, 58 F.R.D. 348 (S.D.N.Y. 1973).

¹⁷⁴Order Denying Motions, *supra* note 172, at 5.

¹⁷⁵Order Denying Motions, *supra* note 172, at 6, n. 17.

¹⁷⁶329 U.S. 495 (1947).

¹⁷⁷437 U.S. 340 (1978).

¹⁷⁸*Id.* at 351 (citations omitted).

Commission pronouncements in support of this generally broad view of discovery in Commission proceedings proliferate.¹⁷⁹ For example, in denying a motion to quash subpoenas sought by the Staff in *Florida Gas Transmission Company*,¹⁸⁰ the Commission made the following pronouncement:

It is clear that it is within the Commission's authority to issue this subpoena. An administrative agency's subpoena is enforceable if it is (1) within the authority of the agency, (2) its demands are not too indefinite, and (3) the information sought is reasonably relevant. Our review of this motion leads to the conclusion that this subpoena should be enforced and the motion to quash denied.

Thus, so long as the requested information is in existence and available¹⁸¹ the Commission will generally grant discovery if "the facts which will determine the issues in the case are by their very nature in the possession or knowledge of [another party]".¹⁸²

Moreover, the Commission has furthered the intent of the NGA and the FPA, as well as its own discovery regulations, in this regard by ruling that presiding officers should rule initially on discovery matters. In *Indiana and Michigan Electric Company*¹⁸³ the Commission confirmed that the presiding officer "has full authority to issue necessary subpoenas for data and witnesses and to issue orders for the production of data."¹⁸⁴ This is consistent not only with the authority contained in §§ 1.18, 1.23 and 1.24 of the Commission's regulations, but also with § 1.27(b)(3) which states that presiding officers shall have the authority to issue subpoenas.¹⁸⁵

B. Problem Areas

Despite the positive aspects of certain of the FERC's discovery provisions, there are numerous problems which arise as a result of the incompleteness and lack of organization of the regulations. The more obvious omissions, such as the lack of provisions governing interrogatories, written depositions and admissions, have been mentioned briefly above. The lack of specific provision for a discovery conference, separate and apart from the general, wide-ranging prehearing conference contemplated by 18 C.F.R. § 1.18, could also be added to this list. Equally great problems have arisen, however, due to the lack of clear procedural organization even for those discovery methods which have been adopted. This lack of procedural specificity could be an open invitation to intentional abuse of the Commission's discovery process.

¹⁷⁹See, e.g., *Cities Service Gas Company*, 32 F.P.C. 1258, 1261 (1964); *Atlantic Seaboard Corp.*, 36 F.P.C. 320, 321 (1966); *Indiana & Michigan Electric Co.*, 30 F.P.C. 967, 969 (1963); *Black Marlin Pipeline Co.*, Docket No. CP75-93 (Remand), "Presiding Administrative Law Judge's Order Dismissing Motion to Strike Depositions Or For Alternative And Additional Relief" (November 9, 1979); *Pacific Gas and Electric Co.*, Docket No. E-7777 (Phase II), "Order Granting In Part Motion To Compel Production of Documents" (August 14, 1979).

¹⁸⁰Docket No. CP74-192, Order Denying Motion to Quash Subpoena (November 3, 1975), mimeo at 3. In *Cities Service Gas Company*, *supra* note 179, the Commission similarly stated that subpoenas should issue if they will contribute toward providing a full record relative to the issues involved, and should only be denied if "the information sought would necessarily prove to be irrelevant or immaterial". 32 F.P.C. at 1261.

¹⁸¹*Atlantic Seaboard Corp.*, Docket No. RP65-49, 35 F.P.C. 974, 976 (1966).

¹⁸²*Indiana and Michigan Electric Company*, 30 F.P.C. 967, 968 (1963).

¹⁸³*Id.*

¹⁸⁴*Id.* at 969.

¹⁸⁵18 C.F.R. § 1.27(b)(3). See also, *El Paso Natural Gas Co.*, Docket No. G-16235, 27 F.P.C. 321 (1962).

Before discussing specific problems and setting forth recommendations to solve them, it is important to note that abuse of the FERC's discovery process, in contrast to the situation in the federal court system, has not been a significant problem to date. While this may be due in no small part to the quality of the energy bar in general, it is also a function of the compactness and simplicity of the current Commission regulations governing discovery. For perspective, one must remember that abuse of the discovery process under the Federal Rules has long been identified as a principal concern. The Section of Litigation of the American Bar Association, in recommending amendments to the federal discovery rules in January, 1980, emphasized the "unnecessary costs and delays associated with discovery and abuse of the discovery process."¹⁸⁶ The two principal issues identified therein were disputes over the scope of discovery and failure to make discovery. It seems clear that the extent and complexity of the federal discovery rules fairly invite abuse. *Hickman v. Taylor*,¹⁸⁷ threw the door wide open, and the federal judiciary and bar has been struggling ever since in an attempt to place limits on the extent of discovery. Such a situation is clearly counter-productive to the entire philosophy behind discovery, *i.e.*, shortening litigation and trial time. The lack of such abuse at the FERC is a positive reflection on the relative simplicity of the current rules and is a characteristic which must be preserved in any revision of them.

The defects of the current system at the FERC can be grouped into three broad categories: (1) obtaining discovery; (2) resisting discovery; and (3) enforcing discovery which has been ordered. Most of these, it will be seen, are primarily a function of the lack of procedural clarity.

With respect to obtaining discovery, the problems include both the form of the requests and the nature of discovery which may be sought. The form and content of the requests, of course, raise threshold questions for the applicant. What is the significance of the use of the word "application" in Section 1.23 which governs subpoenas? Will a motion suffice, and if so, which filing and procedural requirements apply? Does a party have a right to respond to a request for subpoenas under Section 1.23? If so, are any time limitations for such responses applicable? What is the significance of the distinction between "application", "notice" and "notice and application", all of which are used in Section 1.24 relating to depositions?

In *Lunday-Thagard Oil Company*,¹⁸⁸ Lunday-Thagard filed for document production in the form of a motion. While the request was denied on substantive grounds, the presiding officer overlooked procedural niceties and rendered his determination based on the relevancy and materiality of the request.¹⁸⁹ On the other hand, a Staff application for depositions and subpoenas was denied in *El Paso Natural Gas Company*,¹⁹⁰ solely on grounds of procedural deficiencies. The

¹⁸⁶Introduction to *Second Report of the Special Committee for the Study of Discovery Abuse*, Philip H. Corboy, Chairman, Section of Litigation, American Bar Association (January, 1980).

¹⁸⁷*Supra* note 176.1976.

¹⁸⁸Docket No. RA79-19.

¹⁸⁹Order of Presiding Officer Denying Motion for Production of Documents and Motion for Discovery (July 16, 1979).

¹⁹⁰Docket No. RP72-6. Order Denying Application to Depose Witnesses and for Issuance of Subpoena (June 19, 1980).

presiding judge therein based his decision on a general lack of conformity with 18 C.F.R. §§ 1.23 and 1.24, and expressly cited the lack of specification as to time and place, the officer before whom the deposition was to be taken and the lack of verification. The judge's order itself intimated the lack of certainty on these matters inherent in the regulations. Thus, it was stated that "applications to take depositions *appear* to require verification and there is none".¹⁹¹ This ambiguity reflects the fact that Section 1.23 specifically states that applications for subpoenas "shall be verified", whereas Section 1.24 does not so state, other than to provide that notices for depositions shall conform "as applicable" to the requirements of Sections 1.15-1.17 of the Commission's regulations.¹⁹² Section 1.16 of the Commission's regulations requires verification for all pleadings, but the use of the words "as applicable" in Section 1.24, when viewed in contrast with Section 1.23, further confuses the issue.

The other problems highlighted by the presiding judge's order in *El Paso Natural Gas Company*, *supra*, were the necessity for specifying the time and place for the deposition and the officer before whom it is to be taken. In light of the response time provided and the necessity for an affirmative ruling from the presiding officer, it makes no sense to require the parties to specify the time and place of appearance prior to a positive ruling. The logical conclusion appears to be that one should file an application for depositions initially, and if an affirmative ruling is issued, then serve a notice of the time and place of the deposition on the deponent.

The latter procedure was effectively utilized in *McCulloch Interstate Gas Corporation*.¹⁹³ Following the judge's order permitting discovery, which wisely left the choice of dates up to the parties,¹⁹⁴ the parties informally settled upon appropriate dates. The subsequent "notices" of depositions then served primarily as a reminder to the various parties as to the time and place of deposition. No further arguments were invited or raised at the time of the notice of depositions, so that all parties could proceed with virtual certainty that the specified dates would be met. By the same token, the necessity for issuing a notice at the time of filing the application for the deposition was obviated, thereby saving all of the parties additional unnecessary paperwork. Yet, this is precisely the type of procedure which was not condoned in the *El Paso Natural Gas Company* case. This divergence of rulings, while intolerable from a practitioner's standpoint, is almost inevitable due to the uncertainty of language in the Commission's regulations.

Another problem already referred to is that of the method for obtaining documents. The presiding judge in *El Paso Natural Gas Company* also denied a staff request for the production of documents because "it isn't clear how the staff would have the documents produced without a witness to produce them" in advance of the deposition dates.¹⁹⁵ From a strict constructionist point of view, this is a proper interpretation of the Commission's regulations. The only specific provision for the production of documents falls under the subpoena powers embodied in Section 1.23, which simultaneously contemplates subpoenaing persons

¹⁹¹*Id.* (emphasis supplied).

¹⁹²18 C.F.R. §§ 1.15-1.17.

¹⁹³Docket No. CP76-274.

¹⁹⁴Order Scheduling Hearing and Discovery (June 17, 1980).

¹⁹⁵*Supra* note 190, mimeo at 2.

solely for the purpose of appearing as "witnesses" at a hearing. The deposition provisions of Section 1.24 do not provide specifically for the production of any documents. The dilemma faced by the staff in the *El Paso Natural Gas Company* case is obvious: what sort of filing does one make to secure the production of documents in anticipation of a deposition? In the *McCulloch Interstate Gas Corporation* case, *supra*, McCulloch Interstate secured the production of documents simply through the filing of an application for depositions pursuant to § 1.24 of the Commission's regulations, specifying the documents to be produced. Although McCulloch Interstate had applied for subpoenas *duces tecum* previously, and conferences among the parties had indicated clearly the nature of McCulloch Interstate's request, there was no certainty that the presiding judge would have the authority or inclination to order the production of documents pursuant to the deposition application. In his discovery order,¹⁹⁶ the presiding judge took the more liberal view and ordered the production of documents as well as approving the depositions.

The variety of problems encountered in the obtaining of subpoenas at the Commission are almost as numerous as the cases dealing with this issue. The questions of proper "form" of application and necessary procedure for producing documents in advance of depositions, posed respectively in the *Lunday-Thavard* and *El Paso Natural Gas Company* cases, *supra*, are but two examples. In Docket No. RM75-14,¹⁹⁷ the Commission directed its Secretary to issue a subpoena *duces tecum* to a regulated producer in order to compel the production of reserve information which the producer had previously been "required" to submit by the terms of an earlier Commission order.¹⁹⁸ In so doing, of course, the Commission had no reason to believe the producer would feel any more obligated to obey a Commission "subpoena" than a Commission "requirement." The subpoena order therein highlighted the twin dilemmas of (1) unnecessary layers of procedural orders and (2) uncertainty of enforcement mechanisms, *i.e.*, sanctions.

In *Connecticut Light and Power Company*, Docket No. ER76-320, the ALJ denied a request for a subpoena directed at company personnel on the grounds that the company had proffered other witnesses for a forthcoming hearing.¹⁹⁹ The reason for the Judge's ruling was that the company stated it "will cooperate to make an appropriate witness or witnesses available" if additional company testimony is necessary after the hearing.²⁰⁰ This type of ruling sidesteps the "relevant and material" inquiry and in effect leaves the determination of whether discovery will occur in the hands of the company from whom information is sought. If nothing else, this formula would certainly minimize discovery if adopted on a broad scale. More important, by allowing the hearing to proceed and subsequently reconsidering whether discovery is warranted, such an approach stands the normal discovery philosophy on its head. Discovery should take place *prior* to the hearing in order to shorten or avoid litigation time. Yet, in the absence of

¹⁹⁶*Supra* note 194.

¹⁹⁷National Rates for Jurisdictional Sales of Natural Gas Dedicated to Interstate Commerce On or After January 1, 1973, For the Period January 1, 1975 to December 31, 1976, "Directive to the Secretary of the Federal Power Commission to Issue Subpoena *Duces Tecum*," (May 29, 1976).

¹⁹⁸Order Instituting Investigation to Update Prior Study, 52 FPC _____ (June 13, 1975).

¹⁹⁹Order of Presiding Judge Denying Application for Subpoena *Duces Tecum* (November 19, 1976).

²⁰⁰*Id.*, mimeo at 3.

definitive guidelines from the Commission, each presiding officer must attempt to apply his own concept of discovery, thereby assuring a wide-ranging divergence of rulings.

Interrogatories can provide a very effective vehicle for producing valuable information without the necessity of time-consuming and expensive depositions. Unfortunately, the Commission's regulations contain no provision whatsoever for interrogatories. Not surprisingly, this omission has not prevented the filing of interrogatory requests at the Commission. As can be expected, such an unregulated approach does not make for the best practice and procedure. Not only are there no requirements that all parties be served and that the form of interrogatories be consistent and understandable, but also there is no time limit for response to this particular form of discovery and, of utmost significance, no method by which interrogatories can be enforced. In fact, the prevailing practice seems to be to refuse to answer interrogatories, thereby forcing the requesting party to go before the presiding officer on a motion to compel. The time delays associated with this procedure can be significant. In *Consolidated Edison Company of New York, Inc.*,²⁰¹ the Staff served interrogatories on Consolidated Edison on February 12, 1980. Consolidated Edison notified the Staff of its refusal to answer the interrogatories on February 29, 1980. This set in motion a series of prehearing conferences and further exchanges of pleadings, with the issue not being settled until a presiding administrative law judge's order compelling response to interrogatories on September 10, 1980.²⁰² Thus, seven months of the parties' and Commission's valuable time was consumed in resolving the issue of the scope and extent of interrogatories, a problem which could have been obviated by clear and precise procedures.

A refusal to respond to interrogatories was also an issue in *Trans Alaska Pipeline System*.²⁰³ Union Alaska Pipeline Company therein served interrogatories on various parties, all of whom ignored the demand. This prompted a motion by Union Alaska to the presiding judge seeking an order compelling compliance. The presiding judge denied the request on the grounds that the relevancy of the information sought had not been established.²⁰⁴ Thus, Union Alaska expended time and effort formulating interrogatories, serving such interrogatories and subsequently applying for a motion which was ultimately denied, when a more orderly procedural regulation may have prevented the serving of such interrogatories at the threshold.

Even when interrogatories are not ignored outright, compliance is often only cosmetic. This leads to the same time-consuming chain of events—service of interrogatories, response thereto, filing of motion to compel and order of presiding officer—that occurs in those cases where no compliance whatsoever is proffered, such as occurred in the *Trans Alaska Pipeline* and *Consolidated Edison* cases. In *Public Service Company of New Mexico*²⁰⁵ the lack of substantive compliance with interrogatory requests ultimately required *two* orders from the presiding judge. In his second order compelling response, the presiding judge noted that the company upon whom the interrogatories were served had filed answers, but found

²⁰¹Project No. 2338 (Cornwall Project).

²⁰²Order Compelling Response to Interrogatories.

²⁰³*Supra* note 172.

²⁰⁴Order on Requests for Production of Documents and Answers to Interrogatories (May 11, 1978).

²⁰⁵Docket Nos. ER78-337 and ER78-338 (Phase II).

that they were “inadequate and completely unresponsive”, and subsequently ordered the company to answer “in a responsive manner”.²⁰⁶ The *Public Service Company* case therefore highlights not only the initial problem of how to seek discovery, but also the related problem of how to enforce proper discovery in light of a complete absence of regulatory guidance.

A second related problem area resulting from the lack of clarity in the Commission’s regulations concerns the basis for, and method by which, a party from whom discovery is sought may properly and fairly resist unwarranted discovery requests. Inherent from the outset of the federal discovery rules is the premise that certain types of materials are not normally discoverable. Rule 26 states that discovery may be obtained as to any relevant matters “not privileged.”²⁰⁷ The same Rule subsequently provides that materials prepared in anticipation of litigation by any attorney²⁰⁸ or expert²⁰⁹ are discoverable only in special circumstances. These limitations on discovery grew out of the *Hickman v. Taylor* application of “public policy” considerations. As the Court therein stated:

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

329 U.S. at 510. Besides these express privileges, Rule 26(c) provides that relief in the form of a protective order may be granted from discovery which constitutes “. . . annoyance, embarrassment, oppression, or undue burden or expense . . .”

The FERC’s regulations contain no comparable provisions for reasonable limitations on discovery. Fortunately, recognition of the basic privileges under the federal rules has been reflected in Commission proceedings. One of the best analyses of the “work-product” and “attorney-client” privileges appeared in an ALJ’s order in *Electric and Water Plant Board of the City of Frankfort, Kentucky v. Kentucky Utilities Company*, Docket No. E-7704.²¹⁰ The judge therein denied a motion by the City of Frankfort requesting the production of notes taken at negotiating sessions by in-house counsel of the Public Service Company of Indiana (“PSCI”) and subsequently shown to an attorney with an outside law firm who also represented the PSCI. The ALJ found as follows:

The notes sought are not brought within the attorney-client privilege, as PSCI asserts, by Mr. Campbell’s subsequent confidential disclosure thereof, in his capacity as an employee of PSCI, to PSCI’s outside counsel in connection with the present litigation. On that theory any document in a corporation’s files could be made privileged simply by sending a copy to counsel . . . However, the notes were made by PSCI’s house counsel in his capacity as an attorney at law, with an eye to possible litigation which in fact has eventuated, and represent his work product.²¹¹

The insight and accuracy of this assessment has recently been confirmed by the Supreme Court in *Upjohn Company v. United States*, 49 U.S.L.W. 4093 (January 13, 1981). The Court in *Upjohn* held that oral interviews between a corporate attorney and other corporate employees fell within the attorney-client privilege,

²⁰⁶Second Order of Presiding Judge Directing Responsive Compliance with Certain Discovery Requests (January 4, 1980).

²⁰⁷Rule 26(b)(1).

²⁰⁸Rule 26(b)(3).

²⁰⁹Rule 26(b)(4).

²¹⁰Ruling on Motion for the Production of Documentary Evidence (January 20, 1975).

²¹¹*Id.*, mimeo at 3. Cf. *Boston Edison Company*, Docket No. E-8187, Ruling on Motion for Disclosure of Certain Documents and for Extension of Procedural Dates (March 13, 1975).

and that the attorney's notes of such communications were "work-product" materials and therefore also exempt from disclosure. The Court's distinction between the "attorney-client" and "work-product" privileges, and holding that one must make a very strong showing of necessity in order to discover notes taken by an attorney with a view towards litigation, echo the ALJ's holding in the *City of Frankfort* case. Unfortunately, there are no codified guidelines for the Commission and its ALJ's and hence no assurance of continuity and consistency in rulings on such matters.

The Federal Rules also provide very clear procedures for objecting to discovery. Foremost among these is the right to file for a protective order pursuant to Rule 26(c). In addition, Rule 34(b) provides that any party upon whom a request for production of documents is served may file an objection within 30 days. Such procedures are wholly lacking at the FERC, so that the form, timing and method of ruling upon any objection to discovery is up to the whim of the parties and personal inclination of each individual judge.

The third major problem area is that of securing compliance with proper discovery requests. As a result of the lack of procedures dealing with the subject of compliance, the presiding judge is often called upon "to settle the dispute",²¹² after the parties have expended much time and effort attempting to resolve matters themselves. In itself, this is not a problem, as judicial time should not be wasted on matters that can be resolved informally. However, the lack of specific sanctions results in such ludicrous situations as occurred in the *Public Service Company of New Mexico* case,²¹³ wherein the presiding judge ultimately had to issue two orders directing compliance. Nor is the problem unique to situations involving interrogatories. In the *Trans Alaska Pipeline System* case,²¹⁴ the presiding judge issued a subpoena directing the production of documents after the parties had met informally in an attempt to resolve their discovery disputes. While the issuance of an order granting subpoena requests in such a situation may appear on the surface to be an appropriate remedy, it in fact constitutes only an order which the Commission's regulations contemplate is necessary to *allow* discovery in the first instance.

A greater issue relates to the types of sanctions which are available in the event of a party's non-compliance with the judge's order. To use an example, Section 1.24(g) of the regulations provides that during the course of a deposition, the deponent or his counsel may state the grounds of an objection, but that no argument on the transcript is to occur and the officer taking the deposition shall not have the power to decide the propriety of the objection. This follows the general philosophy of Rule 30(c) of the Federal Rules, which states that during depositions "evidence objected to shall be taken subject to the objections". Unlike the federal court system, however, the Commission has no provision for a remedy in the event that a deponent refuses to answer a question. In the absence of meaningful potential sanctions, a deponent may be less inclined to answer questions with which he or she is uncomfortable. Of course, a party who has been granted discovery may also file a motion pursuant to Section 1.12 of the Commis-

²¹²Trans Alaska Pipeline System, Docket No. OR78-1, Order On Subpoena Request (April 27, 1978), mimeo at 2.

²¹³*Supra* note 205.

²¹⁴*Supra* note 172.

sion's Rules.²¹⁵ However, that section does not provide especially for motions to compel nor, most significantly, does it or any other provision in the Commission's regulations set forth specific sanctions. The Federal Rules provide numerous alternative sanctions which may be imposed, including admission of the facts sought to be proved, dismissal of the action and payment of fees necessary to secure the discovery.

Notwithstanding the absence of express regulatory sanctions, specific remedies have been imposed in cases at the Commission. In *Pennsylvania Power Company*,²¹⁶ the presiding judge recommended that the Commission direct certain municipalities who engaged in "dilatatory" production under a discovery order to pay costs and expenses in the amount of \$46,892.71 to the party who had obtained the discovery. The judge stated that not to do so would

condone tactics that impede, not advance efforts to clear the Commission's case calendar. Some remedy for excessive discovery delay is necessary, and the imposition of costs would seem to be the mildest remedy that would indicate the seriousness of the Commission's purpose in reducing delays at the trial level.²¹⁷

Due to the lack of certainty and direction in the Commission's regulations, however, such stern measures are the exception rather than the rule. While it is not expected that the existence of specific sanctions would need to be resorted to frequently, the mere presence of them would be an additional inducement to good faith efforts at compliance, and therefore would assist greatly in the Commission's desire to expeditiously resolve discovery disputes and advance proceedings.

IV. RECOMMENDATIONS

In proposing recommendations for the enactment of more comprehensive and effective Commission discovery rules, two overriding precepts must be kept firmly in mind. First, a discovery scheme for the FERC that would closely mimic²¹⁸ the complicated and overly-detailed rules set forth in the Federal Rules of Civil Procedure must be avoided. Practice before federal administrative agencies such as the Commission is substantially different from federal court practice and there is no need to subject Commission practice to the extensive regulations governing discovery in the federal courts. As already discussed, the complexity and detail of the federal rules results in abuse and delay, thereby defeating the very purpose of discovery.²¹⁹ Second is the sometimes countervailing consideration that, given the sophisticated nature of the practice at the Commission and the importance of the issues that are decided by it, a more detailed set of discovery regulations than currently exists must be adopted by the FERC in order to correct the two major shortcomings of the current regulations.

The first of these shortcomings is the aforementioned development of discovery techniques at the Commission that have no basis in, and hence no guidance

²¹⁵18 C.F.R. § 1.12.

²¹⁶Docket No. ER77-277.

²¹⁷Certification to the Commission of a Motion for Sanctions (May 6, 1980), mimeo at 1.

²¹⁸As the Federal Trade Commission has done. See, 16 C.F.R. §§ 3.31-3.39.

²¹⁹See, note 186, *supra*, and discussion relating thereto.

from, the Commission's codified regulations.²²⁰ The second defect in the current regulations is the lack of consistent procedures for applying for, resisting and enforcing discovery. Thus, any revisions must emanate from the basic proposition that effective discovery can only be attained at the Commission through the promulgation of a simple but comprehensive set of discovery regulations. These regulations must reflect *all* of the discovery procedures necessary for Commission practice but must do so in a manner that avoids unnecessary complication so as to avoid any lengthy procedural battles and accompanying delay that would surely follow.

Initially, it is not desirable or necessary to change the present requirement that authorization be obtained from the Commission or the presiding officer *before* any discovery procedures be undertaken. This is a universally accepted procedure at the regulatory level,²²¹ and a key to the prevention of abuse. Contrariwise, one of the major faults of discovery under the Federal Rules is the availability of discovery without any prior judicial approval. This practice has been a major contributing factor to abuses of discovery in the federal courts,²²² and it would be a mistake to permit such leeway in federal administrative practice. Retaining the present system of requiring prior approval for any type of discovery will ensure that the basic purposes of discovery, *i.e.*, refining and clarifying the basic issues between the parties and then ascertaining facts and information relative to those issues,²²³ will be fulfilled.

With these general principles and goals firmly in mind, specific ideas need to be considered at this time. The precise drafting and content of any revised regulations must of course await further debate and exchange of ideas. It is not the purpose of this article to propose draft regulations in any event. Nevertheless, certain areas are in drastic need of improvement and changes regarding them should be effectuated as promptly as possible. The greatest needs at this time appear to be for (1) a general discovery provision similar to Rule 26 of the FRCP; (2) an enforcement and sanctions provision; (3) improved procedural clarity in the existing regulations covering subpoenas, depositions, prehearing conferences and stipulations; and (4) the adoption of regulations dealing with interrogatories and admissions.

The first recommendation is for the promulgation of a general discovery provision similar to Rule 26 of the Federal Rules of Civil Procedure.²²⁴ Instead of piecemeal regulations restating many of the same principles numerous times,²²⁵ a provision of this type would govern general principles that apply to all discovery.²²⁶ Subjects that should be covered under this provision include the scope of

²²⁰For example, it previously has been noted that the Commission permits the use of written interrogatories as a discovery device and allows parties to file motions to quash subpoenas, even though the Commission's regulations do not expressly provide for either of these two items.

²²¹*E.g.*, 10 C.F.R. § 205.198(e) (DOE); 16 C.F.R. § 3.33(a) and 3.34(a) (FTC); 29 C.F.R. § 102.30(a) and 102.31(a) (NLRB); 14 C.F.R. § 302.19(a) and 302.20(b) (CAB).

²²²*Supra* Section III B.

²²³*Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

²²⁴The need for a provision of this type can scarcely be overstated. Indeed, the desirability of having one general provision relating to all discovery was one of the major motivating factors behind the extensive 1970 Amendments to the federal discovery rules. A principal result of those amendments was the establishment of Rule 26 as such a generalized provision. See, 8 Wright & Miller, *Federal Practice and Procedure* § 2003 (1970); 4 Moore's *Federal Practice* § 26.01[11]-[25] (1979).

²²⁵For example, 18 C.F.R. § 1.23 (subpoenas) and § 1.24 (depositions) both include lengthy explanations of what the applications for these two discovery techniques should contain.

²²⁶The Federal Trade Commission has adopted a provision that also accomplishes this result, 16 C.F.R. § 3.31.

discovery in general, the grounds for granting discovery,²²⁷ the necessary content of discovery applications, the Commission's policy regarding privileged information,²²⁸ the treatment of materials prepared in anticipation of trial, the discovery of experts' reports and opinions, and the duty of parties to supplement their responses to discovery inquiries when new or additional information becomes known to them. This provision could also serve to codify the Commission's policy with respect to limiting discovery through the use of protective orders or motions to quash or limit subpoenas. The promulgation of such a provision as this would solve the major omission in the Commission's subpoena provision—the lack of a reference to the means for contesting the issuance of a subpoena. Moreover, a generalized provision would also standardize the format of applications for all forms of discovery.

In addition, the Commission's general provision should contain a separate section dealing with access to Commission or other government records and employees²²⁹ since the considerations with respect to discovery of these matters are somewhat different from the considerations attendant to subpoenaing private persons or documents. For purposes of proof, there is also merit to the DOE's requirement²³⁰ that one execute a sworn statement that a diligent and honest search has been made for requested documents. The Commission should also have a provision relating to the granting of immunity in those instances when a person refuses to testify on the grounds of self-incrimination.²³¹

Second, the Commission needs to promulgate a rule regarding the consequences of a failure to comply with a discovery request or a subpoena. The fact that the Commission's current regulations do not contain any specific provision on this subject is perhaps the most glaring weakness of the Commission's discovery scheme since no set of discovery rules is complete without enforcement and sanctions provisions. Their promulgation is all the more important since the Commission does in fact permit and rule on motions to compel discovery.²³² Consequently, this section should include a provision regarding under what circumstances motions to compel are appropriate, the form and content of such motions, the right of response and the types of relief which may be ordered.²³³ The sanctions provision should contain a reference to how the Commission will enforce subpoenas,²³⁴ and the consequences of one's failure to abide with discovery orders. It must be borne in mind, however, that with respect to sanctions for unfulfilled discovery, the Commission and all administrative agencies only have limited power. As noted above,²³⁵ the FERC cannot hold noncomplying parties in contempt nor impose fines directly. The Commission could still impose several powerful sanc-

²²⁷The basis for subpoenas contained in the existing Section 1.23(b)—"relevancy and materiality"—would be most appropriate as the grounds for all discovery, since it reflects not only the federal case law, but also the requirement for admission of evidence in Commission proceedings as specified in 18 C.F.R. § 1.26(a).

²²⁸Privileged information continues to play a large role in Commission deliberations regarding the scope of discovery.

²²⁹See, 16 C.F.R. § 3.36 (FTC).

²³⁰10 C.F.R. § 205.8(f)(1).

²³¹See, 29 C.F.R. § 102.31(c).

²³²See, e.g., Nantahala Power & Light Co., Docket No. ER76-828 *et al.*, Order Compelling Discovery And Providing For A Protective Order And Other Remedies (October 12, 1979).

²³³See Rule 37(a) of the Federal Rules of Civil Procedure and 16 C.F.R. § 3.38(a) (FTC).

²³⁴Most agencies enforce their subpoenas in federal district court. See, 10 C.F.R. § 205.8(c) (DOE) and 29 C.F.R. § 102.31(d) (NLRB).

²³⁵See note 99, *supra*.

tions, however, such as those employed by the FTC. These include ruling that the matter or matters involved be taken as established adversely to the noncomplying party; prohibiting the noncomplying party from introducing in evidence or otherwise relying on the withheld documents or testimony; ruling that the noncomplying party may not object to the introduction of secondary evidence to prove the matters withheld; striking pleadings of the noncomplying party which rely on the evidence withheld; or ruling that a decision in the proceeding be rendered against such a party. Obviously, this list is not exclusive and the appropriate Commission response in a given case will have to depend on the particular circumstances of this case.

Third, several changes should be made in the Commission's deposition provision to bring it into conformity with other discovery principles and mechanisms. This would include the adoption in the general discovery provision, discussed above, of the grounds upon which it will grant a deposition request.²³⁶ Additionally, the Commission should incorporate rules relating to the expenses of a deposition (including those instances where a requesting party fails to attend its own deposition) and perhaps most importantly, rules regulating the use of depositions at a Commission hearing. Such a regulation could be modeled after Rule 32(a) of the Federal Rules.²³⁷

The Commission's deposition provision should also be revised so as to provide that objections as to the competency of a witness or to the competency, relevancy or materiality of testimony are *not* waived by failure to make them at the deposition unless the ground of the objection is one which might have been obviated if presented at that time. Section 1.24(g) currently requires that all objections must be made at the deposition, or shall be deemed waived. The recommended change would follow Rule 32(d)(3)(a) of the FRCP,²³⁸ which makes more sense from a policy standpoint and is more fair than the current overly-restrictive Commission rule. Moreover, the Commission should adopt the policy of Rule 32(d)(4) of the Federal Rules which permits objections to the way the deposition is prepared, signed, certified, sealed, endorsed, transmitted, or filed to be made as soon as such defect has been, or with due diligence might have been, ascertained.²³⁹ Obviously, it is impossible to make objections to these types of defects at the deposition itself, as the Commission's present rule requires, when such defects can occur only after the deposition is completed.

Fourth, in keeping with the basic premise that the Commission should codify all its discovery rules, several FERC practices now in effect need to have a regulatory base provided for them. For example, Section 1.18²⁴⁰ should expressly state that one of the goals of a prehearing conference is the agreement among the parties to a discovery schedule, since this in fact does happen at many conferences. Coincidental to this, Section 1.25 of the current regulations²⁴¹ could provide

²³⁶This is not intended as an endorsement of the DOE's rule that one requesting a deposition make a compelling showing that the material sought cannot be obtained through one of the other discovery techniques provided for, 10 C.F.R. § 205.198(g), or of the NLRB's requirement that depositions be permitted only for "good cause shown" which is defined as essential for the preservation of testimony.

²³⁷The Federal Trade Commission rule could also serve as an example. 16 C.F.R. § 3.33(g)(1).

²³⁸The Federal Trade Commission also has this rule. 16 C.F.R. § 3.33(g)(3)(iii)(A).

²³⁹Again, the Federal Trade Commission has this rule as well. 16 C.F.R. § 3.33(g)(3)(iv).

²⁴⁰18 C.F.R. § 1.18.

²⁴¹18 C.F.R. § 1.25.

specifically that the parties may stipulate among themselves, as to the dates for discovery matters. Likewise, the Commission needs to promulgate rules relating to the use of interrogatories and requests for admission since both discovery tools are used at the Commission. The admissions regulation, guided of course by the Commission's version of Rule 26, could include such topics as when admissions may be served on the other participants to a proceeding, how and when they must be answered and the effect of an admission as to either facts or the genuineness of documents. The interrogatory provision similarly should specify when interrogatories can be used, the circumstances upon which an application for their use at the hearing will be granted, and when and how a party may submit documents in lieu of specifically answering the interrogatories.²⁴²

V. CONCLUSION

The FERC's discovery procedures, after a promising start in 1947, have stagnated due to a lack of necessary revision over the years to keep pace with the ever-changing nature of the Commission's regulatory responsibilities. Considerable modifications must now be made in order to be responsive to the present type of legal practice before the Commission. Well conceived discovery regulations can play an important role in advancing the Commission's urgent need to expeditiously process matters before it and lighten its caseload. The observations and suggestions herein are offered in the hope that they significantly assist this effort.

²⁴²As models for both its interrogatories and admission provisions, the Commission could examine the Federal Trade Commission's provisions on these topics, which in turn are based on the provisions of the Federal Rules of Civil Procedure. 16 C.F.R. § 3.32 (admissions) and 3.35 (interrogatories).