NOTE

A COLLOQUY ON THE TRIAL OF A CASE BEFORE THE FERC: THE ADMINISTRATIVE LAW JUDGE'S PERSPECTIVE

The dialogue that follows sets forth, with some amendments, revisions, and elisions, the content of a panel discussion among four FERC Administrative Law Judges at the May 6, 1982 Annual Meeting of the Federal Energy Bar Association at the Capitol Hilton Hotel, Washington, D.C. The four Judges participating on the panel were Curtis L. Wagner, Chief Judge, FERC, Isaac D. Benkin, Administrative Law Judge, FERC, Jacob Leventhal, Administrative Law Judge, FERC, and Jon G. Lotis, Administrative Law Judge, FERC. The views expressed in the discussion are solely those of the individual judges and do not purport to represent the views of the Federal Energy Regulatory Commission or the Department of Energy.

Chief Judge Wagner: Discovery is perhaps the most important tool in an attorney's tool box in defending or prosecuting his or her client's case. However, as pointed out by the United States Supreme Court in *Herbert v. Lando,*[1] discovery has frequently been exploited to the disadvantage of justice. Among t he accusations against discovery are that it is often used as a delaying tactic, that it can be a pure fishing expedition at the expense and inconvenience of the other parties, that it can be burdensome and costly, and, at times, even used strictly to harass the other parties. Judge Benkin, to what extent is discovery to blame for protracting adjudicative proceedings at the Federal Energy Regulatory Commission? Along the same line, do you feel that the data request device, which is the primary discovery tool utilized by FERC practitioners, is fulfilling its purpose?

Judge Benkin: It seems that we have come a long way from *Hickman v. Taylor,*[2] in which the Court rhapsodized at great length about the benefits of civil discovery, to the court's perception in *Herbert v. Lando* of the dark side of discovery. The current debate about the utility of discovery in administrative proceedings is part of a larger concern about whether the administrative adjudicative process as a whole has outlived its usefulness and needs drastic restructuring. The process was originally designed to produce a simple, quick, and cheap disposition of disputes. It is clear today that administrative hearings in general and those at FERC in particular fulfill none of those goals; the proceedings are complex, expensive, and prolix.

The use and abuse of discovery must bear some responsibility for this situation and the disquiet it produces. There is no doubt about the fact that discovery can be used as a device to harass and delay. In our present environment, there are very few disincentives to the misuse of discovery for ulterior purposes. One suspects that a substantial proportion of the abuses occur in

[1] 441 U.S. 153 (1979).
[2] 329 U.S. 495 (1947).

cases where the party seeking discovery cannot be required to bear some financial burden until the proceeding is over. It is probably no coincidence when we find substantial and manifold complex discovery rulings are required in electric rate cases where one or more customers enjoy contracts that prohibit rate increases until after the administrative proceedings have concluded and a finding under section 206 of the Power Act[3] is entered.

Nevertheless, we must resist the urgings of those who would sharply restrict, if not eliminate, the availability of discovery in FERC proceedings. A moment's thought will demonstrate that we really cannot get along without mechanisms for eliciting information in the hands of participants in those proceedings. Imagine, if you will, trying to regulate the rates of a large public utility without the ability to examine financial records of the utility to audit the contentions it makes in support of its rate requests.

In this connection, I think it is particularly important to recognize, and preserve, the data request as a discovery device. As we all know, the FERC rules nowhere explicitly provide for the data request. It has evolved from felt necessity, in the same manner in which lawyers trained in the common law have traditionally created needed legal institutions even in the absence of any formal basis for those institutions. The data request is a most flexible and efficient instrument of discovery. It performs the functions of a number of the discovery devices sanctioned by the Federal Rules of Civil Procedure: Requests for Admissions, Interrogatories to Parties, and Depositions Upon Written Interrogatories. But the data request enables a participant to go even further than he could under the Federal Rules. Under the data request device, a party may be required to reproduce documents and furnish copies to the participant making the request. This is something that the Federal Rules do not provide for, as they allow only inspection and copying of documents by the party who seeks access to them. In addition, the data request device authorizes one party to compel another to create information and furnish it to others, something that simply cannot be done under the Federal Rules. This latter extension of discovery power has proven to be indispensable in certain types of FERC proceedings. For instance, it would be impossible to produce as useful a record in a pipeline curtailment case as we have been producing if the agency's discovery mechanisms did not authorize ordering the pipeline to utilize its automatic data processing capabilities to develop, and print out for the record, the results of applying alternative priority schemes to the extant data base.

This leaves us with the question why we have the feeling that the existing system of discovery in FERC proceedings is dysfunctional and the question what, if any, remedies are appropriate. I confess that I do not have any sovereign panaceas to recommend. There are a great variety of situations in which discovery problems have arisen in my experience, and, like most Administrative Law Judges at the Commission, I have tried to cope with them on an *ad hoc* basis. In this regard, it is somewhat disquieting to note that the new FERC Rules of Practice and Procedure that appeared on Monday, May 3

[3]*See* Federal Power Act, 16 U.S.C. §824(e)(1976).

make no effort to tackle the job of revising and, perhaps, rationalizing the agency's discovery rules; instead, they merely restate the incomplete (and therefore somewhat misleading) provisions that appear in the Code of Federal Regulations today.[4]

On a practical note, it has been my experience that we often have difficulty with data requests that are too broadly phrased. I am particularly concerned about "prefabricated" data requests, standard inquiries that are simply pulled from a file drawer and served without any real attention to their application to the specific matters at issue in the proceeding. Also abhorrent from my standpoint are data requests that ask the opposing party to vouchsafe "any and all' documents pertaining to a particular subject. There is virtually no chance that the record would be improved by the availability of "any and all" documents having to do with any subject under the sun. To be perfectly fair about this, there are at least as many instances of the course of discovery being unduly protracted by respondents who are either unwilling to make needed information available or prone to treat the entire contents of their clients' files as "proprietary" data. There is, in other words, ample blame to go around.

Under the press of these controversies, we have been developing some devices (again extra-Rules-of-Practice-and-Procedure) for dealing with complex problems of discovery. One that bears special mention is the so-called technical conference. The technical conference is held before the hearing, and it is primarily a mechanism for permitting dialogue between technical advisors (including potential witnesses). Normally, the order for the conference requires the presence of at least every person who is expected to testify. It also requires the potential witnesses to respond to questions about how they arrived at their opinions. If the testimony has been filed, it allows the parties to ask, off the record, the kinds of definitional questions that otherwise might tend to burden the formal hearing record unduly with the type of inquiries that have been characterized as "discovery in the courtroom."

This kind of development is, we would agree, all to the good. But it is happening far too slowly. Because discovery controversies are usually regarded as "a pain in the neck" both at the ALJ level and at the Commission level, and because of the diffuse nature of the problems, we are paying far too little attention to the subject of discovery. As a result, we are in danger of seeing the progress we have made swept away by those who see in discovery in administrative proceedings just another weapon in the Federal bureaucracy's ideological assault on business. That would be a regrettable development, indeed.

Chief Judge Wagner: The Federal Energy Regulatory Commission Rules of Practice and Procedure provide that the direct testimony of any witness within his special field may be in written form and submitted as an exhibit. Judge Lotis, are FERC litigants correctly using written testimony, and do you

[4]*See* Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings, 47 Fed. Reg. 19,014 (1982) (to be codified in scattered sections of title 18 C.F.R.). These revisions became effective August 26, 1982. *Id.* at 19,022.

think it is really a necessary mechanism in every case? In replying to this question, I would also ask whether in your opinion the parties do enough to stipulate facts and focus on issues.

Judge Lotis: Are litigants correctly using written testimony?

The answer I suppose is a qualified yes. Qualified in the sense that litigants are not always using it to their best advantage.

Before the judge can decide the merits of the parties' arguments and evidence he must, of course, first understand and come to grips, at least within his own mind, as to the precise nature and dimensions of the issue before him. Written testimony offers a splendid opportunity for the parties to educate the judge. I, for one, welcome that education. By virtue of the practice of filing expert testimony in advance on highly technical issues, the judge has the time to sit back and digest a party's evidence before trial. He should be able to come to a fairly complete understanding of the issues and the parties' position prior to cross-examination. This does not mean he has reached any conclusions yet. It only means tht he knows the nature of the case before him. This makes for a more complete and meaningful record. For example, cross-examination conducted before a judge familiar with the evidence will have a more lasting impression upon him. If your are successful in your cross the judge will know it at the time and make a mental, if not written, note of it right then and there.

If there is one message to convey on the subject of written testimony and evidence, in general, is that we as judges are *not* technical experts. We depend on you as attorneys to ask those questions of your technical experts which will elicit answers that we as fellow members of the bar can understand. The task is not easy when you are dealing with highly complex economic, engineering or accounting concepts. But, written testimony should not be viewed merely as one expert rebutting another expert on the other side. It matters not if your expert can marshall evidence and arguments which devastate the other side's expert when you are unable to communicate that evidence and those arguments to the judge in a way so that he can appreciate the force of your position.

All too frequently the judge awaits the receipt of written testimony hoping to receive some real background and insight into the issue to be litigated. Instead, he finds himself reading technical rationale for positions taken with very little background, explanation or definition of terms. For the judge it's like reading a novel with the first few chapters missing and being called upon to write the last chapter resolving all conflicts and controversies in the story. So, what does the judge do when he receives such testimony? He files it away in the hope that the other testimony remaining to be filed would better explain the issue for him. Unfortunately, this does not always happen. Again, it's experts talking to experts. After cross-examination the issue may be completely shrouded in fog and the last hope is that the attorney will come to the rescue in brief. Fortunately, he does so in many cases. Of course, the judge may always question witnesses himself, or require supplemental testimony or statements from the parties to provide the background information, definitions and explanations necessary for an understanding of the issue. But, attorneys miss a real opportunity when they fail to take the initiative and

chauffeur their technical experts through a line of direct questioning in their written testimony designed to explain to a non-expert why their client's position should be adopted. This does not mean that the technical expert's judgment or rationale for positions taken should ever be compromised or discounted for the sake of improved communications with the decision-maker. I only mean to suggest that attorneys may choose to be more vigilant in assuming their traditional role of conducting examination of their witnesses in the most forceful and effective manner.

A few other observations about written testimony and testimony in general:

In successive or pancaked rate filings as we call them, the attorney should take care to read the cross-examination of his expert witness from the last case *before* written testimony is prepared—a seemingly simple proposition but sometimes overlooked. If the witness had problems in particular areas on cross in the last case, you may choose to address those areas head-on in written testimony where careful thought and consideration can be given to the matter rather than sitting back and awaiting cross—counting on your witness to do better this time.

Frequently, in pancaked or successive rate filings the Commission will have issued a decision in the earlier case on the same issues being tried in the new case. The same witness appears in both cases and his position is rejected by the Commission in the earlier case. Yet in the new case he or she files testimony without regard to the changes which may have occurred since the last case which would allow the judge to reach a different result. In other instances, I've seen witnesses completely ignore the existence of an earlier decision adverse to their position. From a judge's perspective, we are, of course, bound to follow Commission precedent in factually similar cases and where the record on the issue is the same in both cases, one cannot expect a different result. We, as judges, are not policy-makers.

Is written testimony really necessary in all cases?

Probably not. Expert witnesses should be able to explain their exhibits, that is, their studies, graphs, charts, diagrams and models via an oral presentation from the witness stand. But written testimony, if properly developed with the aid of counsel, makes for a more concise, thorough, organized and reasoned explanation of one's position. For these reasons it is preferable to the taking of oral testimony in the technical areas of our work. In the last analysis written testimony is really a luxury which the parties have grown accustomed to but really have not taken full advantage of.

There are limited situations where the taking of oral testimony *may* be preferable to written testimony. I am thinking now of those issues which are very narrow or less technical in nature. For example, if the Commission and/or the presiding judges were to decide to set the Order 23 cases for hearing, oral testimony *may* save considerable time over the written testimony route. I emphasize the word "may" because there could be sound reasons for the use of written testimony even in those cases. Order 23 cases are those cases dealing with contract interpretation where one of the principal issues in the intent of the parties at the time the contract was executed.

Before passing on to the third part of your question, Curt, it may be of some interest to those historians in the audience to know that the Commission first recognized and sanctioned the use of written testimony in advance of trial when it amended its Rules of Practice on March 6, 1942.[5] In those amendments the presiding officer was given the discretion to direct the filing of written expert testimony. If the presiding officer found written expert testimony appropriate, that testimony had to be served 5 days in advance of the witness taking the stand. Our present day rule is very similar to the 1942 version. One other comment—both the 1942 original and the current rule are couched in terms of written *"expert"* testimony. Non-expert testimony, which is a somewhat rare animal in our practice, could be taken by direct oral examinations.

Do the parties do enough to stipulate facts and focus issues?

From the judge's perspective the parties can never do enough in the way of stipulations. Except in isolated instances, however, I find the parties do not, on their own accord and initiative, enter into stipulations. Some prodding and direction from the judge is usually necessary. In multi-issue cases I've found it helpful to *require* the parties to file a joint statement of the issues signed by all parties in advance of trial. If the case is a rate case, I have also found it useful to require the parties to identify the jurisdictional dollar impact of each issue. This assists the judge, the Commission, and the parties in determining the significance of the issue in terms of the overall rate increase sought and allows everyone to budget their time and energies accordingly.

I've also found it useful on occasion to set dates for informal technical conferences after all testimony has been filed and immediately prior to trial. One of the purposes of these conferences is to allow the parties the opportunity to sit down together to attempt to reach a common ground on the less controversial issues in the case and to enter into whatever stipulations are possible.

Judge Benkin: I commend to you all Judge Lotis' remarks on the preparation of written expert testimony. They are the best sermon you are ever likely to hear on the subject. I would like to reinforce two points that Judge Lotis made, because they exactly correspond with my experience and my views in this area. First, the preparation of written testimony to be filed in a FERC proceeding is, in the ultimate event, the responsibility of counsel. While most of the work may in fact be done by the witness, counsel cannot evade his or her responsibility for the quality of every document that is filed on behalf of the client in the proceeding. Testimony should never be filed directly by the witness (or the consulting firm by which the witness is employed) without having first been reviewed by counsel.

Second, it is not sufficient to file evidence demonstrating that the position urged by the witness is correct as a technical matter of accounting, engineering, economics, or some other discipline. To be effective, the filing must also show the Judge why it is fair, just, reasonable, and equitable to adopt the position espoused by the witness. Here again, you should take to heart Judge Lotis' statement that verbal battles between technical experts over the fine

[5]*See* Order No. 92, 7 Fed. Reg. 1973 (1942).

points of some narrow discipline are not especially helpful to a Judge who is duty-bound to reach a result that comports with "just and reasonable" rates or some similar statutory or regulatory standard. In preparing the testimony, therefore, counsel are best advised to include, if they can, material demonstrating why the interests of justice would be served by adopting the witness' views.

Judge Leventhal: The subject of stipulations has given me considerable trouble. In my view, counsel should be reasonable about stipulating as to facts about which there can be no dispute. Yet, we often find a refusal to stipulate about such facts. It sometimes appears to me that counsel are refusing to stipulate because they are carrying on a feud that has its origins in prior cases. On occasion, a refusal to stipulate has been explained as being in retaliation for the other side's reprehensible refusal to stipulate about some equally undeniable facts in another, earlier case. Such retaliation may bring some satisfaction to one of the pending parties because of the additional difficulty visited upon the other. However it protracts the proceeding, lengthens the record, and exacerbates the prior disagreement, all with no discernable benefit to the business on hand, trying the case. I would think, however, that counsel could and should be more willing to enter into stipulations when they know that the subject-matter of the proposed stipulation is not really likely to be debatable.

Chief Judge Wagner: One of the questions we were asked to discuss today is whether FERC litigants correctly use expert witnesses in FERC proceedings and whether the right experts are being used. The real problem as I see it is not whether expert witnesses are correctly used, but, rather, whether the person offered as an expert is actually qualified in his or her field. This is particularly true with regard to witnesses presented by the Commission Staff, who, through no fault of their own, have not had the opportunity to gain the expertise really required to be a witness before they are thrown into the arena to testify. The same holds true with regard to educational background; it is just not sufficient. The Staff is not alone here; the same applies equally to some intervenors and, on occasion, to the company as well. With regard to the unqualified witness, should the Judge refuse to admit his or her testimony into the record, particularly where the testimony is often the only testimony offered on behalf of the consumer? Even if testimony of a witness not truly qualified is let into the record, it certainly can't be given a great deal of weight when it is compared with that of a recognized expert. This situation creates a very difficult problem for our Judges in reaching a decision in a particular case.

With regard to the testimony of truly qualified experts, the problems that exist are generally: (1) The testimony is too lengthy, too technical, and it makes very little sense to the non-expert in the particular field. I would suggest that each expert give a plain-meaning summary of his or her testimony in the fewest possible words either at the beginning or at the conclusion. Those of you who have presented experts before me know that I usually require an expert to summarize his testimony in 25 words or less. (2) Most experts fail to tell the Judge and ultimately the Commission, what it is they really want. In other words, an expert should clearly state what finding he or

she expects the judge to make from his or her testimony in the particular case.

I feel that the testimony of experts, particularly in proceedings before economic regulatory agencies, is absolutely essential. We are, after all, attempting to predict future conditions, and we must necessarily rely upon the knowledge of experts who have studied the past in making this determination. Judge Benkin, how do you feel about this problem on the use of expert witnesses, and particularly, their qualifictions?

Judge Benkin: We are, I sometimes think, excessively concerned with "expertise" on the part of witnesses and not concerned enough with "qualifications" of the opinion witnesses. The two are not identical.

We are taught in law school that there are two kinds of witnesses — fact witnesses and expert witnesses. The latter were allowed to testify broadly as to matters of opinion; the former were not, except in some very narrow areas. These distinctions do not seem very meaningful when they are applied to FERC hearings. Yet, we continue to talk in terms of determining whether or not witnesses have the requisite formal educational backgrounds or occupational experience to be regarded as real "experts," thus able to don the elysian mantle of "witness before the FERC." In this report, we may all be victims of a delusion caused by our law professors' pigeonholes.

In many of our hearings, the issues at stake transcend those on which we must hear from *bona fide* expert witnesses or none at all. The issues involve matters of fundamental Government policy. On those issues, I suggest, there is no such thing as real "expertise" or, alternatively, all of us who think about them are equally expert. Consider, for example, the question whether our electric utilities ought to continue to use nuclear technology to increase their generating capacity. Is there any particular formal educational background or work-experience that would tend to make one person more qualified than another to answer the question whether we as a nation ought to put the nuclear genie back into his bottle for good? If one thought about the kind of educational credentials that would provide the most reliable insight into the right anwer to that question, he would probably conclude that the appropriate academic discipline is Theology.

Yet, because of the nature of the Commission's business, this kind of issue must be debated in FERC proceedings. And the forum for conducting that debate is cross-examination of a witness in the open courtroom. Not a bad way to get at the vitals of an important issue, all things considered.

Hence, I sugest that we have need of a third type of witness in our proceedings, someone who is neither a "fact" witness nor an "expert" witness but is rather a "policy" witness. The main qualification for such a witness is the ability to withstand cross-examination on his or her views about a policy question pending before the Commission in the particular proceeding. If the witness has researched and thought about the issue, examined the pros and cons of the position of the party on whose behalf the testimony is offered, and can intelligently participate in the process of debate-by-cross-examination, that is about all we can legitimately expect of the "policy" witness. The result will be an informed and fully-developed record, enabling the agency to select the position it decides to take on the policy question, fully aware of the pitfalls

in, and arguments against, that position. This is about the best we can do with the adjudicative hearing as an element of the administrative process.

It would be unproductive and senseless in these circumstances to insist that the "policy" witness must possess specific educational credentials or occupational longevity. We must recognize that such a witness, though not technically an expert on anything, may well be fully qualified to testify in a FERC hearing.

Chief Judge Wagner: I want to say that I disagree with Judge Benkin on this point. I believe that we should have only two categories of witnesses and that we should apply the same standards of qualifications to all witnesses who offer opinion testimony in FERC cases.

One of the most difficult jobs in the practice of law is that of cross-examining an adversary witness. Even more difficult is knowing when not to cross-examine and when to stop. Judge Leventhal, what is the proper role of cross-examination in developing a complete hearing record in an FERC proceeding? Along the same line, what is the proper role of the Judge in the examination of witnesses?

Judge Leventhal:

The proper role of cross-examination in developing a complete hearing record.

To start with, I'm sure that we are all in agreement that cross-examination is valuable in developing a complete record.

Before we discuss cross-examination, let me remind you that the record is aided by a display of competence by competing counsel. Equally important is a display of civility and courtesy by lawyers to one another, to witnesses and, incidently, to the Judge. The contest among lawyers should be to determine issues of fact and law. The contest should not be to determine who can best abuse or bait the other lawyer.

Cross-examination should be purposeful. If you don't have a point to make, don't try to make it. Questions should be crisp and concise.

The most effective cross-examination I have ever witnessed took place in a hearing I was holding some years ago when I was with the Interstate Commerce Commission. This proceeding involved a complaint filed by a shipper against a railroad seeking damages in the amount of 2 to 3 million dollars, caused by overcharges on shipments handled by the railroad. The issue was the identity of the commodity that was transported. The shipper owned a mine in the middle of a desert area in southwest Texas. The closest settlement to the mine was a crossroads some 5 to 6 miles distant, which had a half dozen buildings. The distinguishing landmark was one building three stories high. Both sides called eminent geologists as expert witnesses to establish the identity of the commodity. The shipper's expert identified the commodity as substance "A" which carried a lower tariff. The railroad presented as its expert the head of the department of geology of a well-known western university. His direct testimony took 1½ days. He testified that there are only three people, of whom he was one, that had the necessary qualifications to determine the composition of the commodity in question. He testified how he had visited the mine surreptitiously to obtain samples and he described the various tests he performed, reaching the conclusion that the commodity was substance "B"

which carried the tariff charged by the railroad. The cross-examination concentrated only on one phase of the witness' testimony. The witness was asked in detail to describe the manner in which he found the mine, using the crossroad building as a point of reference and the road he followed to reach the mine. He was then asked to locate the mine on a map of the area that was already in evidence. The witness placed the mine at a point some five miles southeast of the landmark in the settlement that I have previously mentioned. That was the entire cross-examination.

On the following day, the shipper put on the stand the president of the company to testify in rebuttal. He located the mine on the same map used by the railroad's expert at a point five miles northwest of the landmark. It was obvious that the expert had visited a wrong mine. In 15 minutes the cross-examination had demolished not only the testimony of the railroad's expert witness, but the railroad's case as well. The lesson we can learn from this example is that the effectiveness of a cross-examination is not measured by how long you keep a witness on the stand.

A common concurrence that I have observed on cross-examination is that counsel confers with the technician seated alongside him before he puts a question to the expert witness. Then, without waiting for the answer, he turns to confer with the technician once again. It occurs to me that if counsel is not interested in the answer given by the witness, why should the Judge be interested. If the answer is not important to counsel, it certainly is not important to the Judge.

Questions on cross-examination should not seek to elicit information explaining the expert's direct testimony. That should have been done in pretrial discovery. When an explanatory question is put to the witness, he is given an opportunity to lecture counsel and the Judge and to emphasize the strong points of his direct testimony. Again I emphasize to you that cross-examination should have some specific purpose. If it doesn't, don't conduct one. Not every witness needs to be subjected to cross-examination nor does every innocuous statement have to be covered.

I have often seen counsel get a good answer to the question put to the witness. The witness has now contradicted some portion of his direct testimony. However, counsel cannot resist putting the same question to the witness once again, perhaps to make sure that the Judge understood the significance of the answer. This time, however, the witness realizes that he has contradicted himself and he has an opportunity to correct the contradiction. The fish has now gotten off the hook. My advice is that if you have a good answer to a question, leave it. Go on to the next point. Don't be concerned about the Judge understanding the answer. Have confidence in the intelligence and acuity of the Judge.

The Role of the Judge in the Examination of Witnesses

The Judge is charged with conducting the hearing and development of a complete record. But you and I know that lawyers are the ones who make the record. In my opinion, the Judge's role should be minimal in the examination of the witness. My practice is to intervene only to ask a witness questions to clarify an answer he has given so that I understand what the testimony is.

If counsel has obviously omitted a necessary portion of his *prima facie* case, I will call his or her attention to that fact. Or on cross-examination, if a witness is repeatedly evading the answer to a specific question and counsel requests a direction to the witness, I will require the witness to give a clear answer. There are also some instances where a witness genuinely does not understand the question put to him by the cross-examiner. When that occurs I usually attempt to rephrase the question for the witness.

Except in the limited circumstances such as those I have described, it is my opinion that the Judge should permit the respective lawyers to try his or her own cases.

Chief Judge Wagner: With regard to the examination of witnesses, I am reminded of a situation that occurred during the trial of a case before the United States Court of Claims when I was an attorney with the United States Department of Justice. In that case, following the Judge asking a question of an expert witness, counsel for the railroad plaintiff rose to his feet and stated that if the Judge was asking that question on behalf of the Government, he vigorously opposed it for reasons which I will not repeat here. He then added that if the Judge was asking the question on behalf of the railroad, then he would like to withdraw the question.

We come now to a question concerning limitations on length on briefs and whether parties in FERC proceedings use briefs to their best advantage in educating the Judge? At the outset, I would point out that the brief is absolutely the most important document filed by the trial lawyer in any case. It is his or her opportunity to put the case in proper perspective and demonstrate what the witnesses, both factual and expert, are actually proposing. Many times the tentative decision in my mind at the end of a proceeding is completely turned around after reading the briefs of the parties.

With regard to the length of briefs, I believe that there should be some limitations on the length, particularly in the voluminous record cases. For instance, in the *TAPS Case,*[6] parties filed briefs of 500 to 600 pages and reply briefs of equal length. Such voluminous briefs are really not comprehensible.

I would call the parties' attention to Section 1.29 of the current Commission's Rules of Practice and Procedure[7] and to Rule 706 of the Revised Rules of Practice,[8] which set forth the requirements for the contents of briefs. These rules require, (1) a concise statement of the case, (2) separate sections containing proposed findings and conclusions, and (3) arguments in support

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[6]*See* Trans Alaskan Pipeline System, Docket No. OR 78-1, Initial Decision, 10 FERC ¶ 63,026 (Feb. 1, 1980) (Phase I).

[7]18 C.F.R. § 1.29 (1982) ("Briefs and oral arguments before presiding officers and proposed findings and orders."), *as amended by* 47 Fed. Reg. 19,014, 19,032 (1982) ("Initial and reply briefs before initial decision (Rule 706)") (to be codified at 18 C.F.R. § 385.706).

[8]47 Fed. Reg. 19,014, 19,032 (1982) (to be codified at 18 C.F.R. § 385.706).

of the particular participant's position. This is a rule that in the past has seldom been complied with. I would hope that in the future our Judges, particularly in the larger, more involved cases, will require the parties to make proposed findings in serially numbered paragraphs, setting out in detail and with particularities all evidentiary facts developed on the record with appropriate citations to the transcript of the record or the exhibit relied on for each criteria or fact supporting the conclusion proposed by the party filing the brief, and a separate submission of proposed conclusions with detailed legal arguments. Such a format will enable the Judge to be completely aware of what the parties want from the case, and in my opinion, will result in better decisions faster. Judge Leventhal, What are your feelings concerning the length and format of briefs?

Judge Leventhal: I believe that the first rule is that briefs should be brief. A 500-page brief, for example, is valueless because the Judge simply will not have time to digest it, much less examine its contents with care.

In addition to brevity, briefs should be concise and to the point. Counsel should avoid diffuse, long-winded discussions that do not relate very specifically to an issue that the Judge must decide in order to dispose of the case. I recall that in one electric rate case, one of the parties' initial briefs contained a 135-page history of the Tennessee Valley Authority. While such a display of learning may constitute a virtuoso performance as an abstract intellectual exercise, it is of utterly no use to the Judge who must decide the case. Indeed, it probably produces negative effects, since it reduces the time the Judge can spend on careful examination of the rest of the brief.

Judge Lotis: The primary problem I have with briefs is that the arguments are often not sufficiently supported by citations to the record. I find myself impressed with a position taken in a brief and having a vague recollection that there is material in the record supporting that position. Yet, I cannot find any reference to that record evidence in the brief. As a result, I find myself going into the record too frequently to do independent research, when ideally my review of the record should be directed and guided by the briefs. In the ideal situation, I should be able to write an initial decision based entirely on the contents of the briefs, going to the record only to verify the material cited in support of the positions taken in the brief. It is not normally possible to do so.

Judge Benkin: I would like to make just two points about briefs. First, counsel should pay strict attention to technical accuracy in preparing briefs, particularly to the accuracy of quotations. This is important in cases that frequently turn on which of the parties' presentations seems most trustworthy. Second, in citing precedents, it is obviously better to cite to a reference source that is available to the Judge rather than one that is not. For example, do not cite to the Federal Power Service for FERC decisions; we do not have it available to use. If an Opinion or Order has been published in the FERC Reports, a reference to that Opinion or Order in a brief should cite the Judge to the FERC Reports for it and should not merely refer to the mimeographed version.

Chief Judge Wagner: We turn now to the question of settlements and whether our requirements truly facilitate the settlement of cases and whether the top sheet and Settlement Judge procedures are working. The fact that more than 80 percent of all cases are settled pretty much answers the question concerning whether our Rules truly facilitate settlement. I am told by persons monitoring procedures of all agencies at the Administrative Conference of the United States that the FERC settlement procedures are by far the most advanced in the Federal Government. Our settlement procedures usually start with the filing of top sheets by the Commission Staff pursuant to Administrative Order No. 157.[9] Top sheets are summary cost of service schedules prepared by the Commission Staff on the basis of a detailed cost of service analysis for rate-making purposes. In effect, top sheets are the Staff's talking papers for settlement purposes. When top sheet procedures are followed, the Judge is supposed to schedule a top sheet or settlement conference within ten days of the filing of top sheets. Many parties argue that this is not sufficient time to give them an opportunity to digest and analyze the Staff's objections to the proposed rate or the Staff's settlement proposal. On the other hand, I have found that a settlement conference or pre-trial conference should be held at the very earliest point in the proceeding. For one thing, it starts parties talking to each other. In today's busy world, lawyers are prone to put things off until that time when they are ordered to perform the task. The early conference is desirable even if the parties have not digested the meaning of Staff's top sheets. It gives that Staff an opportunity to ask questions and to correct any failure of communication. In addition, it brings the Judge in his or her role as case manager actively into the picture and allows the Judge to consider and view the total process and assume responsibility for the case. It also enables discovery to get underway at an earlier date and results in a faster final disposition of the case.

I want to briefly mention our Settlement Judge procedures provided for by Section 1.18(g) of the Rules of Practice and Procedure.[10] Under this Rule, any party or the Staff can, by motion, request the appointment of a Settlement Judge to preside over and conduct settlement negotiations. The motion is made to the Presiding Judge if one has been designated, to the Chief Judge directly where a Presiding Judge has not been designated, or to the Commission where a hearing order is not outstanding. The Chief Judge may appoint a Settlement Judge where the Presiding Judge makes the request or concurs in the motion for such by any party. He must appoint a Settlement Judge where ordered by the Commission. This procedure has been extremely successful. Many times the parties are so close to a matter, or bad blood has flowed to the extent that they simply cannot communicate. A Judge presiding over the settlement conferences and negotiations can often pull the parties together and arbitrate a middle ground agreeable to all. Further, this procedure allows the

[9] 41 Fed. Reg. 15,090 (1976).

[10] 18 C.F.R. § 1.18(g) (1982) ("Conferences; offers of settlement."), *as amended by* 47 Fed. Reg. 19,014, 19,031 (1982) ("Settlement negotiations before a settlement judge (Rule 603)") (to be codified at 18 C.F.R. §385.603).

parties to talk freely in front of a Judge who will not be hearing and deciding the case should it go to hearing. We have experienced better than 90 percent success where the procedure has been used.

Judge Lotis, how do you view the success of out settlement procedures?

Judge Lotis: I agree with the Chief Judge's assessment of the importance of achieving settlements. The statistics he cited testify to the degree of success we have had under the so-called "top-sheet" procedures. I want to mention some problems we have encountered with the time scheme that is built into the Order No. 157 procedures. As Judge Wagner mentioned, under Order No. 157, the top sheet settlement conference is held within ten days after the staff serves its top sheets. Thereafter, the parties are given a maximum of five days to negotiate for settlement in principle. The Order goes on to provide that the Staff shall serve its evidence within 30 days after the end of the negotiations. When I attempt to carry out this directive, I find that the Staff is usually not in a position to serve evidence within 30 days. Instead, the Staff wants to begin formal discovery at the point where the top sheet settlement negotiations have ended, and I am asked to relax the 30-day deadline to allow the Staff to do so. Order No. 157 does not explicitly vest in the Judge discretion to vary the 30-day requirement. In these circumstances, the Judge is beset by two inconsistent goals; on the one hand, it is reasonable to give the Staff some additional time to undertake discovery before it must file its evidence; on the other hand, the mandate of Order No. 157 seems plain and unvariable. Something has to give in these cases. It appears to me that the authors of Order No. 157 were under the misapprehension that the Staff would always complete its discovery before top sheets are served. In reality, the Staff frequently performs no more than a type of desk audit of the company's case before it prepares the top sheets. Perhaps Order No. 157 should be amended to conform to the Staff's current practices or those practices should be modified to conform to Order No. 157.

Judge Benkin: Since time is short, I want to make only one point about settlements. Our success in achieving settlements is, in my opinion, directly related to whether the parties believe that they will get a more expeditious result by settling than by litigating. With a few notable and vexing exceptions, the Commission has kept its promise, made at the time the new settlement procedures were instituted, to expedite its consideration of settlement agreements. The excellent record we have attained in this area is the result in large measure of this praiseworthy action on the Commission's part.