

SUBMITTED COMMITTEE REPORTS

As a general policy, the Federal Energy Bar Association does not take positions in published Committee Reports on substantive issues that are the subject of pending litigation.

REPORT OF THE COMMITTEE ON ADMINISTRATIVE PRACTICE

During 1996 there were several significant developments in administrative practice related to the Federal Energy Regulatory Commission (FERC). They included the enactment of the Small Business Regulatory Enforcement Fairness Act of 1996, the adoption by the FERC of standards for business practices of interstate pipeline companies and further development and clarification of the FERC's settlement rules. This report also will review to her practice areas where there were developments during 1996.

I. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

The FERC's involvement in generic, industry-wide rulemaking proceedings continued throughout 1996. However, certain action taken by the Congress of the United States during 1996 will have a direct impact upon all future federal agency rulemaking activities including the FERC's interstate natural gas, electric, oil pipeline, and hydroelectric regulatory duties. Specifically, on March 28, 1996, Congress passed a unique package of legislation, identified as the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), providing a new mechanism for Congress to review most new administrative rules and regulations proposed by federal agencies.¹ The new legislation amends Title 5 of the U.S. Code by requiring federal agencies to submit to Congress all new regulatory initiatives for review of the "appropriateness" of the new regulations by both houses of Congress.² The FERC's rulemaking activities are specifically included within the scope of the SBREFA as the legislation defines "federal agencies" consistent with the definition set forth in Section 551 of the federal Administrative Procedure Act (APA).³ The new legislation requires that a copy of the proposed regulations, inclusive of a requisite cost-benefit analysis and certain other compliances, be submitted to each house of Congress and to the Comptroller General of the United States.⁴ The effectiveness of any proposed regulation is stayed for a minimum of 60 days pending Congressional review of the new rules. A report of the substantive impact of each new regulation must be completed by the Comptroller General within 15 days after the initial receipt by Congress.⁵ Thereafter, Congress has the legal right to formally disapprove the implementation of regulations through the enactment of a Joint Resolution of Disapproval.⁶

1. Pub. L. No. 104-121, 110 Stat. 847 (1996).

2. 5 U.S.C. § 801 (1996).

3. 5 U.S.C. § 804(1).

4. 5 U.S.C. § 801(a)(1)(A).

5. 5 U.S.C. § 801(a)(3).

6. 5 U.S.C. § 802.

However, the potential for disapproval by Congress of the FERC's future rulemaking initiatives will certainly be influenced by several major limitations inherent in the SBREFA. First, Congressional review of federal agency regulations is limited to rulemaking activities defined as "major rules".⁷ "Major rules" are defined as regulations that have resulted or will likely result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.⁸ In addition, Congressional oversight of federal agency regulatory initiatives is prohibited in the following substantive areas: (1) rules of particular applicability including a rule that approves or proscribes for the future rates, wages, prices, surpluses, or allowances thereof, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, accounting practices, or disclosures bearing on any of the foregoing; (2) any rule related to agency management or personnel; or (3) any rule of agency organization, procedure, or practice that does not substantially effect the rights or obligations of non-agency parties.

While the potential of an additional layer of review, analysis, and approval of the FERC's current rulemaking activities by Congress could have a substantial impact on this FERC's rulemaking activities, so far it has not. During 1996 the issuance of three rulemaking orders were not impeded by the potential of Congressional review under this legislation. In Order No. 589, the FERC issued regulations for employees, which supplement the standards of Ethical Conduct for Employees of the Executive Branch issued by the Office of Government Ethics.⁹ The FERC determined that this action fell within the statutory exception from the SBREFA for rules relating to agency management of personnel. Two other rules, one for changes to FERC Form No. 1 Instructions and one related to an amendment to the filing requirements for persons seeking exempt wholesale generator status, were found by the FERC to be exceptions to the requirement to report proposed rulemakings to Congress under SBREFA.¹⁰ However, the FERC in 1996 also determined that two of its final rules issued as part of its efforts to restructure the electric utility industry were major rules within the meaning of Section 351 of the SBREFA and submitted them to both houses of Congress and the Comp-

7. 5 U.S.C. § 804(2).

8. *Id.*

9. Supplemental Standards of Ethical Conduct For Employees of the Federal Energy Regulatory Commission, 61 Fed. Reg. 43,411 (1996), III F.E.R.C. STATS. & REGS. PREAMBLES ¶ 31,040 (1996).

10. Changes in Form 1 Instructions, Order No. 590, 61 Fed. Reg. 49,662, III F.E.R.C. STATS. & REGS. PREAMBLES ¶ 31,041 (1996); Amendment to Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Order No. 591, 61 Fed. Reg. 57,325 (1996), III F.E.R.C. STATS. & REGS. Preamble ¶ 31,042.

troller General prior to their publication in the Federal Register.¹¹ The rules were not disapproved.

II. ADOPTION OF STANDARDS FOR BUSINESS PRACTICES OF INTERSTATE NATURAL GAS PIPELINES

On July 17, 1996 the FERC in Order No. 587 issued a Final Rule revising its regulations to require natural gas pipelines to follow standardized procedures for business practices in five (5) major areas — nominations, allocations, balancing and measurement, invoicing, and capacity release; and standardized mechanisms for electronic communications between pipelines and their customers.¹² The FERC stated that standardizing business practices and communications are important elements in creating an interstate natural gas pipeline grid, which is a goal of the FERC. The required standards would reduce the variations in pipeline business practices and would allow buyers to easily and efficiently obtain and transport gas from all potential sources of supply. The FERC incorporated by reference the standards which were issued by the Gas Industry Standards Board (GISB). The FERC reviewed the GISB's process in developing these standards, the standards themselves proposed by GISB, and comments received by the FERC on its Notice of Proposed Rulemaking to incorporate the GISB standards by reference.¹³ It found that the GISB process was open and fair, the resulting standards were supported by a broad consensus across all segments of the industry and the standards were appropriate.

The FERC's authority to incorporate these GISB standards by reference was challenged. The FERC, however, found that the adoption of the GISB standards was consistent with the intent of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTT&AA)¹⁴ and OMB Circular A-119.¹⁵ The FERC stated that the standardized data elements and the communications protocols for delivering this information electronically fell within the NTT&AA's definition of performance-based or designed-based technical specifications. Further, the FERC held that regardless of Section 12(d) of the NTT&AA, the FERC

11. Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (1996), III F.E.R.C. STATS. & REGS. Regulations Preambles ¶ 31,035 (1996); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs By Public Utilities and Transmitting Utilities; Order No. 888, 61 Fed. Reg. 21,540 (1996), III F.E.R.C. STATS. & REGS. Regulation Preambles ¶ 31,036 (1996).

12. Standards For Business Practices of Interstate Natural Gas Pipelines, 61 Fed. Reg. 39,053 (1996), III F.E.R.C. STATS. & REGS. Regulations Preambles ¶ 31,038 (1996).

13. Standards For Business Practices of Interstate Natural Gas Pipelines, 61 Fed. Reg. 19,211 (1996), IV F.E.R.C. STATS. & REGS. Proposed Regulations ¶ 32,517 (1996).

14. Pub. L. No. 104-113; § 12(d), 110 Stat. 775, 783 (1996).

15. "Federal Participation in the Development and Use of Voluntary Standards" (October 20, 1993). The Circular can be obtained from the Internet at <http://www.whitehouse.gov/WH/EOP/OBM/html/circulr.html>.

can rely on private sector standards when it finds that these standards further the achievement of its regulatory goals.

The FERC denied rehearing of this issue on October 2, 1996 in Order No. 587-A.¹⁶ The FERC again held that even if Section 12 of the NTT&AA did not strictly apply to this situation, the FERC was warranted in giving significant weight to the consensus standards. The FERC also pointed out that, well before the passage of Section 12 of the NTT&AA, government agencies relied on private sector standards for regulatory purposes. Further, the FERC stated that the Freedom of Information Act and implementing regulations establish that, to be eligible for incorporation by reference, a copyrighted document must be reasonably available to the class of persons affected by the publication, a copy must be provided to the Office of the Federal Register for viewing, and the material must be available and readily obtainable.¹⁷ The FERC noted that the standards and associated data sets could be purchased from GISB.

III. SETTLEMENT DEVELOPMENT AND CLARIFICATION

In several cases, the FERC in 1996 explained and further clarified its procedures for contested settlements, particularly the principles to be followed in determining whether contesting parties can have their objections heard on the merits, while giving consenting parties the benefit of their bargain.

In *Koch Gateway Pipeline Co.*,¹⁸ the FERC approved a settlement with modifications and in so doing, rejected an interpretation of the settlement rules by the Presiding Administrative Law Judge (ALJ). The ALJ ruled that additional evidentiary procedures were necessary before the settlement could be certified to the FERC for the consenting parties. This ruling was premised on the view that once a settlement issue has been contested, it remains contested regardless of whether the parties contesting that issue are severed. The FERC, however, agreed with the consenting parties that the purpose of severing contesting parties from a settlement is to permit the settlement to be treated as uncontested for the consenting parties and thus avoid the time and expense of litigation. Although the FERC acknowledged that an ALJ has discretion to rule on certifications of settlements, it stated that the ALJ had exceeded his discretion in this case by requiring the consenting parties to submit additional evidence on uncontested issues.

The *Koch Gateway* order stated that severance is appropriate if the FERC has fulfilled its obligations to review the substance of the settlement and can find that it is fair and equitable with respect to the consenting parties. Where a settlement is contested, the FERC must determine whether the nature of the objection prevents the settlement from being

16. Standards For Business Practices of Interstate Natural Gas Pipelines, Order No. 587-A, III F.E.R.C. STATS. & REGS. Preambles (1996).

17. 5 U.S.C. § 553(a)(1); 1 C.F.R. 51.7(4). See 28 U.S.C. § 1498.

18. 74 F.E.R.C. ¶ 61,088 (1996).

imposed upon the objecting party, either because the record is insufficient to reach a decision on the merits or is barred by law. If the disputed issues are questions of fact, then the ALJ or the FERC must further determine whether the record contains sufficient evidence to resolve the contested matters.

On rehearing, the FERC further clarified the evidentiary standards to be used in evaluating whether the record contains sufficient evidence to resolve the contested matters or whether a trial-type hearing is needed. It rejected the contention that a new evidentiary standard had been established and reaffirmed the use of abbreviated paper hearing procedures to approve Koch Gateway's settlement.¹⁹ The FERC explained that the statutory "substantial evidence" standard may include matters beyond the confines of the formal record in the proceeding. As a result, the FERC will be able to resolve issues more efficiently because trial-type hearings would be held only when further information is necessary.

The FERC continues to follow its *Arkla*²⁰ policy in evaluating when parties can be severed from a settlement. As it explained in an order approving a partial contested settlement in *Transcontinental Gas Pipe Line Corp. et al.*²¹

[I]n the context of open-access transportation service, severing contesting parties from the terms of a settlement may be undesirable at least in some circumstances. For example, severance may create a "no-lose" situation for the contesting parties, in which the contesting parties would pay a litigated rate lower than the settlement rate if they won but, if they lose, might still take advantage of the settlement rate by restructuring their transportation transactions to use the services of consenting parties.²²

Parties opposing the pipeline's settlement could not "game" the settlement in this manner because they were not open-access transportation customers. The FERC concluded that the opposing parties could be severed because they would not be harmed by approval of the settlement for the consenting parties and would have a full opportunity to litigate the issues to which they objected. However, the FERC declined to require the pipeline to provide additional evidence in support of its cost allocation methods so that a party could decide whether it wanted to become a contesting party. The FERC explained:

A settlement need not be supported by record evidence for the Commission to approve it as uncontested for consenting parties. In fact, the purpose of a settlement is to avoid the costs and risks associated with litigation. Parties that agree to a settlement to avoid litigation avoid the risk that litigation might have produced results worse than the settlement result, and accept the risk that they might have fared better by litigating. This settlement is a negotiated resolution that is acceptable as an uncontested settlement; requiring the production of evidence to support it would defeat the purpose of settling the issues in the first place.²³

19. *Koch Gateway Pipeline Co.*, 75 F.E.R.C. ¶ 61,132 (1996).

20. *Arkla Energy Resources*, 48 F.E.R.C. ¶ 61,062, *order on reh'g*, 49 F.E.R.C. ¶ 61,051 (1989).

21. 77 F.E.R.C. ¶ 61,118 (1996).

22. *Id.* at 61,457.

23. *Id.* at 61,460.

The Transcontinental Gas Pipe Line Corp. order gave parties 15 days to notify the FERC whether they intended to be consenting or contesting parties. The same policy was followed in Panhandle Eastern Pipe Line Company, Docket No. RP91-229-021, et al.,²⁴ where the FERC declined to require the pipeline to provide additional information so that parties who claimed to have been excluded from settlement negotiations could evaluate the settlement. Since one of these parties was a state commission, the order approving the settlement alerted parties that the Commission could not approve the settlement as uncontested for local distribution companies in that state if the state commission chose to become a contesting party. Instead, such a challenge triggers the FERC's obligation to review the settlement as a contested settlement under Rule 602(h)(1)(i), and the LDCs are bound by their state commission's decision to litigate.²⁵

In an unreported June 7, 1996, procedural order in Natural Gas Pipeline Company of America, Docket No. RP95-326-000, the ALJ concluded that some discovery should be permitted after the filing of a settlement in order to enable potential contesting parties to comply with Rule 602(f)(4). This subsection of the settlement rule was added in 1995²⁶ and requires any commentater contesting an offer of settlement on the basis of a dispute over a genuine issue of material fact to "include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim."

The ALJ reasoned:

It must be assumed that the Commission intended for some settlement discovery to take place if the revision to Rule 602 meant anything. Rules are not amended casually, and it could hardly have been intended for this revision to be rendered meaningless by denials of discovery, the only purpose of which is to make conformity with the revision possible.²⁷

However, the ALJ did not permit open-ended discovery, limiting it instead to the bare minimum necessary to satisfy the demands of Rule 602(f)(4). He stated that the resubmission had to be in the form of a motion to compel, which must both "explain the relevancy of that request to the pending offers of settlement" and "illustrate the impossibility of drafting a Rule 602(f)(4) contest without the information sought."

An arguably different result was reached in El Paso Natural Gas Company, where the Chief Judge waived the FERC's Rule 403 requirement to issue an order on discovery rulings after hearing extended argument on motions to compel discovery.²⁸ The procedural posture resulted from the filing of two offers of settlement, one filed by the pipeline and supported by

24. 77 F.E.R.C. ¶ 61,284 (1996).

25. *Id.*, mimeo at 24-25, citing *Transcontinental Gas Pipe Line Corp.*, 42 F.E.R.C. ¶ 61,407 (1988) and *United Gas Pipe Line Co.*, 42 F.E.R.C. ¶ 61,197 (1988).

26. 60 Fed. Reg. 19,494 (1995).

27. Procedural Order, mimeo at 2.

28. *El Paso Natural Gas Co.*, Docket No. RP95-363-002, "Order of Chief Judge Waiving Requirement of Rule 403(b)(1)" (October 9, 1996) (unpublished).

most parties, and the other filed by Southern California Edison Company (Edison). Edison maintained that it needed discovery to respond to El Paso's offer and to satisfy Rule 602(f)(4). For the most part, Edison's requests for discovery were denied; however, in a later ruling on another party's motion to compel discovery, the judge justified his ruling by stating that settlement comments are only required to "demonstrate that there is a disputed issue of material fact."²⁹

IV. HEARING DE NOVO

In an order issued December 13, 1996, in ANR Pipeline Company,³⁰ the Chief Judge denied a request for a de novo hearing following the retirement of the Administrative Law Judge who presided over the original hearing. The original judge had not issued an initial decision at the time of his unexpected retirement. The Chief Judge appointed another judge to prepare an initial decision. At the time of the appointment, the Chief Judge provided parties with an opportunity to present argument to the newly appointed judge. The parties declined. Subsequently, however, one of the parties filed a motion requesting that a new hearing be convened, to allow the new judge to (i) hear the evidence in person, (ii) become thoroughly familiar with the existing record, and (iii) allow him to assess the demeanor or expertise of the witnesses. Most of the parties opposed the motion.

In denying a new hearing, the Chief Judge relied largely on the administrative burden that honoring such a request would create. The original hearing took three months, and resulted in 7,700 pages of transcript, 750 exhibits, and 880 pages of briefs. Moreover, the new judge assigned to the case had already familiarized himself with the proceeding.

The Chief Judge's order also addressed the need to assess witness demeanor and credibility. The Chief Judge determined, based on a review of the pleadings and record, that there was no question concerning witness demeanor or credibility. He stated further that even if the original judge had prepared the initial decision in the case, "it is doubtful his mind could recall the demeanor of any one of the 50 witnesses," and that therefore he too would have had to rely on the cold record.³¹ The Chief Judge noted further that the parties had an opportunity to raise issues of demeanor with the new judge at oral argument, but had waived this opportunity.

The Chief Judge noted further that the FERC's Rules of Practice and Procedure do not provide for a new evidentiary hearing when it becomes necessary to appoint a new presiding judge, and no new hearing had previously been ordered in such a circumstance. In addition, the Commission could direct the judge to certify the record in lieu of an initial decision, but the Chief Judge acknowledged that certification was an "unusual practice."³² Indeed, because this was a rate case, the FERC is not required to

29. *El Paso Natural Gas Co.*, Docket No. RP95-363-002, "Order of Chief Judge Confirming Rulings on Motions to Compel" (October 29, 1996), *mimeo* at 3 (unpublished).

30. 77 F.E.R.C. ¶ 63,022 (1996).

31. *ANR*, *mimeo* at 2.

32. *ANR*, *mimeo* at 2.

hear such cases in a trial-type proceeding, "but in its discretion can dispose of such cases by rulemaking."³³

V. REHEARING

The United States Court of Appeals for the District of Columbia in 1996 in *Frank J. Kelley, Attorney General of the State of Michigan v. FERC*³⁴ addressed the Federal Power Act requirement that a party seek rehearing of a Commission order prior to appealing the FERC's decision.³⁵ The Michigan Department of Natural Resources (Michigan) petitioned for review of a license the Commission issued to the Indiana Michigan Power Company (Company) to operate the Constantine Project located on the St. Joseph River in Constance, Michigan. Michigan, pursuant to Section 10(j) of the Federal Power Act, urged the Commission to condition the license to reduce the number of fish trapped in the project's turbines and to compensate the state for fish killed. Section 10(j) of the FPA obligates the FERC to afford significant deference to state agency recommendations.

The FERC's Director of the Office of Hydropower Licensing (Director) issued a license for the project on October 20, 1993, but found that fish protection devices at the project were economically infeasible and inconsistent with the best comprehensive use of the waterway.³⁶ The Director also rejected Michigan's suggestion on how to value the fish killed by the project. The Director's Order further included a "bookmark" requiring the company to set aside funds for the eventual decommissioning of the project. The bookmark, however, was not inserted under the auspices of Section 10(j). Michigan appealed the Director's decision to the full Commission in a pleading seeking "rehearing."³⁷

The FERC rejected Michigan's claims and further disavowed the Director's treatment of Michigan's recommendations for fish protection as Section 10(j) matters.³⁸ Michigan sought rehearing of the FERC's decision, but did not raise in its petition for rehearing the specific objection that its recommendations and the bookmark should have been considered as Section 10(j) matters.

The Court of Appeals held that Michigan had not preserved the Section 10(j) question for review. The Federal Power Act precludes review of an objection to a FERC order which was not put before the FERC in a petition for rehearing. Michigan in this case did not raise the Section 10(j) issue in its petition for rehearing filed after the full FERC issued its order. Further, the Court stated that an argument implicit in prior requests before

33. *ANR, mimeo* at 2.

34. 96 F.3d 1482 (D.C. Cir. 1996).

35. Federal Power Act § 313(b), 16 U.S.C. § 8251(b) (1988).

36. 65 F.E.R.C. ¶ 62,063, at 64,083-84 (1993).

37. Michigan disputed the Director's determination to value fish killed by the project on a replacement value basis, rather than on restitution values codified in Michigan State Law. Michigan also argued that the Director should have required a comprehensive assessment of fish protection devices.

38. *Indiana Michigan Power Company*, 72 F.E.R.C. ¶ 61,153 (1995).

the FERC's Staff does not satisfy the strict standards for rehearing in Section 313(b) of the FPA.

The Court also noted that the appeal of a Director's order which is labeled as a "rehearing request" under the FERC's administrative practice is somewhat misleading. The first rehearing before the actual FERC under Section 313(b) of the FPA occurred after the full Commission issued its decision disavowing the Director's treatment of Michigan's recommendation for fish protection as a Section 10(j) matter.

VI. RULEMAKING VERSUS POLICY STATEMENT; NEED FOR HEARING

Parties in 1996 have challenged several FERC "statements of policy" on the grounds that they are in fact rules, which require opportunity for prior notice and comment. The Alternative Rate Policy Statement³⁹ established guidelines to provide the industry with the criteria which the FERC will consider when evaluating proposals for market-based rates. The FERC determined that where a natural gas company can establish that it lacks significant market power, market-based rates are a viable option for achieving the flexibility and added efficiency required by the current market-place. In addition, the Policy Statement announced that the FERC would be willing to accept, on a "shipper-by-shipper" basis, filings to charge negotiated rates if shippers retain the ability to choose a cost-of-service based tariff rate.

Following issuance of the Policy Statement, the FERC issued a number of pipeline-specific orders permitting interstate pipelines to amend their tariffs to provide for negotiation of rates for jurisdictional services. Parties challenged those orders, arguing among other things that the Commission should require a hearing to resolve market power issues. These challengers contended that hearings are required by: (i) Section 554(c) of the Administrative Procedure Act (APA);⁴⁰ (ii) the FERC's policy of setting rate changes for hearing under a general Section 4 rate case;⁴¹ and (iii) precedent established in *Cajun Electric Power Cooperative, Inc. v. FERC*,⁴² and in *Koch Gateway Pipe Line Company*.⁴³

The FERC declined to set these negotiated rate and market-based rate filings for hearing. In *NorAm Gas Transmission Company*,⁴⁴ which involved a proposal to implement several negotiated rate arrangements, the FERC noted that "[c]ourts have repeatedly held that the FERC is not required to set matters for hearing where there are no material issues of fact in dispute. . . . No such issues exist here. The questions raised by the

39. Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 F.E.R.C. ¶ 61,076 (January 31, 1996).

40. 5 U.S.C. § 554(c) (1994).

41. *CNG Transmission Corp.*, 62 F.E.R.C. ¶ 61,306 at 62,962 (1993).

42. 28 F.3d 173 (D.C. Cir. 1994).

43. 72 F.E.R.C. ¶ 61,216 (1995).

44. 77 F.E.R.C. ¶ 61,011 at 61,032-61,033, *on reh'g of*, 75 F.E.R.C. ¶ 61,091 (1996).

petitioners can be answered based upon the information presented in NorAm's filing."

The FERC similarly rejected requests for an evidentiary hearing with regard to market-based rate proposals, finding that the FERC "need not conduct trial type hearings where disputed issues may be adequately resolved on the written record."⁴⁵

The FERC has also rejected the argument that it is applying the Policy Statement as though it were a binding rule subject to APA procedures, relying on the "well-established" precedent holding that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency."⁴⁶ At this writing, a number of individual pipeline negotiated rate orders, as well as the Policy Statement itself, are pending on review before the District of Columbia Circuit.

VII. THE COMMISSION'S TREATMENT OF LATE INTERVENTIONS

Under the FERC's Rules of Practice and Procedure, unopposed motions to intervene are granted by operation of law 15 days after filing, assuming the motion was submitted within the designated time period established for intervention.⁴⁷ In addition, the FERC retains discretionary authority to expressly grant intervention status to petitioners filing after the designated time for intervention upon a demonstration of good cause for waiver of the time limitation and a consideration of certain other standards delineated in Rule 214 of the FERC's Rules of Practice and Procedure.⁴⁸ During 1996 the FERC had a number of opportunities to clarify and explain its policy relating to granting late interventions, specifically under the unusual circumstances of requests being made after the issuance of certificate authorization, licenses, permits, or in the late stages of elongated settlement processes.

In *El Paso Natural Gas Company* (El Paso) a general rate case proceeding that was being processed pursuant to the FERC's Alternative Dispute Resolution (ADR) procedural mechanisms, the Administrative Law Judge (ALJ) expounded upon the five considerations for granting a late intervention. The ALJ summarized the FERC's precedent that late interventions would be granted only upon the showing of: (1) good cause for the tardiness; (2) no disruption to the disposition of the proceeding resulting from the late intervention; (3) the late intervenor's interests are not currently represented by other parties in the proceeding; (4) the late intervention would not prejudice or place additional burdens on any current party; and (5) the late intervenor has a basic interest supporting a right to

45. See *KN Interstate Gas Transmission Company*, 77 F.E.R.C. ¶ 61,256 at 62,052 (1996), citing, *Louisiana Ass'n of Independent Producers and Royalty Owners v. F.E.R.C.*, 958 F.2d 1101, 1113-5 (D.C. Cir. 1992).

46. See, e.g., *KN*, supra, 77 F.E.R.C. ¶ 62,051, citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (market-based rates); *NorAm*, 77 F.E.R.C. ¶ 61,039 (also citing *Chenery*).

47. 18 C.F.R. § 385.214(c)(1996).

48. 18 C.F.R. § 385.214(d).

intervene but for the late intervention.⁴⁹ In applying these considerations to the factual circumstances underlying the late petition submitted in El Paso, the ALJ denied late intervention on the basis that the late intervenor did not demonstrate good cause for not intervening in a timely manner. The ALJ also placed considerable emphasis on the fact that the late intervention was filed after a settlement to the proceeding had already been submitted to the FERC, thereby placing an undue burden and inequitable delay on the efforts of the current parties to reach settlement. The ALJ's decision reaffirms the FERC's disfavor of motions to intervene out-of-time based on assertions that the substantive provisions of offers of settlement already submitted to the FERC are not acceptable to "would be" intervenors.⁵⁰ Finally, the ALJ distinguished the factual circumstances of this late intervention from a previous grant of a late intervention after the filing of a settlement document on the basis of the unique circumstances in the earlier case where, due to a corporate reorganization, the late intervenor did not exist as a legal entity at the time of the original notice of the proceeding.⁵¹

Another example of late interventions not being granted for a lack of "good cause" was the denial of two late interventions submitted over a year after the filing of a rate proceeding for the Columbia Gas Transmission Corporation.⁵² In a similar manner, another ALJ determined that a late intervention submitted four years after the statutory intervention date should be denied due to its potential disruptive effect on existing settlement negotiations and a lack of a demonstration that the late intervenor's interest was not already adequately represented by other parties to a Panhandle Eastern Pipeline proceeding.⁵³ Also, in a Washington Water Power electric rate proceeding, a requested late intervention was denied primarily on the basis that the alleged interest of the late intervenor would not have been sufficient to support any level of participation in a timely filed intervention.⁵⁴ Finally, the FERC itself denied several motions to intervene, combined with requests for rehearing, of a final order authorizing certain blanket construction certificate activities for the Mojave Pipeline Company on the basis that the late intervention would have a considerable burden on the applicant pipeline and the late intervenors lacked a direct interest in the subject matter of the proceeding.⁵⁵ The FERC afforded considerable weight to the impact of delaying an already approved construction project and the fact that the alleged potential interests of the intervenors could be more suitably protected in future proceedings directly involving their operations.⁵⁶

Finally, during 1996 the FERC acted on two requested late interventions involving its hydroelectric licensing authority within the unusual con-

49. 75 F.E.R.C. ¶ 63,011 at 65,032 (1996).

50. *Id.*

51. *Koch Gateway Pipeline Co.*, 70 F.E.R.C. ¶ 63,024 at 65,141 (1995).

52. Docket No. RP95-408-000 (Phase I) (October 8, 1996) (Grossman S.) (unreported).

53. Docket No. RP92-166-013 (March 4, 1996) (Grossman H.) (unreported).

54. Docket No. EC94-23-000 (January 3, 1996) (Leventhal J.) (unreported).

55. 74 F.E.R.C. ¶ 61,288 at 61,921 (1994), *re'aff on reh'g* 76 F.E.R.C. ¶ 61,080 at 61,463 (1996).

56. *Id.*

text of addressing interventions filed after the issuance of the respective permits or licenses. First, in *Silver Lake Hydro, Inc.*, the FERC reaffirmed its general position that late interventions would be denied after a permit had been issued, and the time for requests for rehearing had expired, on the basis that no pending proceeding existed in which to intervene.⁵⁷ Alternatively, the FERC granted a late intervention after a hydro-power license had been issued in a *Ketchikan Public Utilities* proceeding where the late intervention was submitted with a corresponding timely filed request for rehearing of the original license issuance order.⁵⁸ The FERC additionally emphasized that while it does not normally allow interventions once a license has been issued, this action should be considered an exception based upon the fact that the intervening party possessed a unique, Congressional legislative interest in the federal lands at issue in the proceeding.⁵⁹

As a result of these 1996 decisions and rulings, it is apparent that late interventions requested after the issuance of a certificate authorization, a hydro-power license or permit, or in the late stages of extensive settlement proceedings, will be subject to considerable scrutiny. Parties contemplating a request for late intervention at these stages of a proceeding would appear to be able to improve their chances by demonstrating a firm justification for participating in the proceedings and a minimal or no potential disruption of, or burden to, the continued disposition of the proceeding. In addition, parties finding themselves in this position should attempt to eliminate any formal opposition to their late interventions by negotiation with the current parties and participants to the proceeding.

VIII. WITHDRAWAL OF PLEADINGS

In 1996 the FERC dealt with the rare issue of whether to allow the withdrawal of pleadings in two contested situations.

A. *Granted with Condition - Pacific Gas and Electric Co., et al.*,⁶⁰ concerned the applications of three California electric utility companies to establish an independent system operator (ISO) and a power exchange (PX). One of those utilities, San Diego Gas & Electric Company (SDG&E), submitted certain alternative proposals to the applications supported by the other two utilities. Specifically, SDG&E submitted alternative exhibits to both the ISO application and the PX application accompanied by an explanatory statement, and a motion for leave to file these alternative documents. An intervenor, Transmission Agency of Northern California (TANC), filed an answer in favor of SDG&E's motion for leave to file this material.

However, SDG&E then filed a notice of withdrawal of the material, stating that it had resolved its differences with the other two applicants as

57. 74 F.E.R.C. ¶ 61,131 at 61,467 (1996).

58. 74 F.E.R.C. ¶ 61,051 at 61,117 (1996).

59. *Id.*

60. 77 F.E.R.C. ¶ 61,204 (1996).

to Phase I of the application and was narrowing differences as to Phase II. TANC and several other intervenors filed opposition to the withdrawal, arguing that critical information was contained in SDG&E's alternative submissions and that, in the interests of ensuring a complete record, the withdrawal of SDG&E's alternative proposals should only be granted on the condition that the information submitted be retained in the record.

The FERC agreed with the procedural approach recommended by the intervenors. Finding that the issues could be better developed with the alternative material in the record, particularly in light of the unresolved Phase II issues addressed in that material, the FERC ruled, pursuant to Rule 216(c) of the FERC's Rules of Practice and Procedure,⁶¹ that SDG&E's withdrawal of its position was granted but that, pursuant to Rule 216(c) of the FERC's Rules of Practice and Procedure,⁶² the material would remain in the record.

B. Denied - In *Hanley & Bird, Inc.*,⁶³ the FERC dealt with the issue of whether or not to accept the withdrawal of a complaint against an interstate natural gas pipeline by a gas distribution customer when one of the complainant's own end-users opposed the withdrawal on procedural and substantive grounds as an aggrieved party in its own right. The complaint alleged that the pipeline unlawfully required the complainant to ship its full daily contractual entitlement under a small customer rate schedule before shippers behind the complainant's city-gate would be allowed to transport gas in their own names using interruptible or released capacity on the pipeline. One of these industrial shippers, *Williamette Industries, Inc.* (*Williamette*), intervened in support of the complainant, *Hanley & Bird, Inc.* (*Hanley*), and requested relief for itself in the form of restitution from the pipeline, *CNG Transmission Corporation* (*CNG*) for the economic losses suffered from the prohibition on shipper transportation.

Hanley stated in its motion to withdraw its complaint that it had successfully resolved the issue with *CNG* in that the restriction would be removed effective the next month. *Williamette* opposed the termination of the complaint proceeding on the ground that its restitution request had not been satisfied and that the agreement reached between *CNG* and *Hanley* should be made subject to approval by the FERC through the filing of a settlement offer under Rule 602 of the FERC's Rules of Practice and Procedure.⁶⁴ Procedurally, *Williamette* also objected to the withdrawal motion on the ground that it failed to include the respondent's own statement and signature as required by FERC Rule 206(c).⁶⁵ *CNG* filed a statement and

61. 18 C.F.R. § 385.216(c).

62. 18 C.F.R. § 385.216(c) ("[A] decisional authority may . . . condition the withdrawal of any pleading upon a requirement that the withdrawing party leave material in the record or otherwise make material available to other participants").

63. 74 F.E.R.C. ¶ 61,125 (1996).

64. 18 C.F.R. § 385.602.

65. 18 C.F.R. § 385.206(c) ("If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file: (i) A statement setting forth when and how the complaint was satisfied; and (ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction").

response to Willamette contending that Willamette's claim for a monetary award was not a part of the complaint, and that CNG's restrictions on Willamette's use of interruptible or secondary point deliveries will be removed under the agreement. CNG also adopted Hanley's description of the agreement contained in the motion to withdraw the complaint.

The FERC concluded that CNG's signed statement satisfied the signature requirement of Rule 206(c). The FERC further concluded that the terms of the agreement were adequately set forth by the complainant in the motion and by the respondent in its adoption of the representations contained in the motion. Willamette was found by the FERC to be neither a complainant nor bound by the agreement between CNG and Hanley. In addition, the facts underlying Willamette's allegations against CNG were not developed in this proceeding, and it was not clear to the Commission that it had jurisdiction over the subject matter of Willamette's grievances in any event. Accordingly, the FERC dismissed the complaint and terminated the proceeding.

IX. STAY

Williston Basin Interstate Pipeline Co.,⁶⁶ decided on February 1, 1996, stands for the proposition that when a party is in a position to reduce or eliminate the economic consequences of a proposed change in rate design, it is not entitled to a stay pending final determination of the issues raised by the filing. In this case, the FERC, upon motion of the pipeline, Williston Basin Interstate Pipeline Company (Williston), permitted previously filed and suspended general rate adjustment tariff sheets to take effect, subject to refund and the outcome of a hearing. Among the rates proposed to be changed in those tariff sheets, was that applicable to small customer firm transportation under Rate Schedule ST-1. The filing reflected a two-part rate for Rate Schedule ST-1 customers that do not take all of their contract entitlement quantities (in lieu of a one-part volumetric rate) in order for Williston to be able to recover its costs of maintaining capacity available for subsequent demand by such customers. In permitting this rate filing to take effect, the FERC rejected the protest and motion for a stay filed by an intervenor-customer, Wyoming Gas Company (Wyoming Gas).

Wyoming Gas alleged that the proposed ST-1 rate is unduly discriminatory because the two-part rate feature of the filing would apply only to Wyoming Gas, and not to the two other eligible ST-1 customers. In rejecting Wyoming Gas' protest, the FERC found that Wyoming Gas can avoid the proposed rate increase during the pendency of the hearing by taking its contracted-for transportation service from Williston. This is because the proposed two-part rate for Rate Schedule ST-1 is applicable only when less than the contracted-for transmission service is taken. In addition, the FERC found that the terms of the proposed two-part ST-1 rate are equally applicable to any eligible ST-1 customer, and not just to Wyoming Gas.

66. 74 F.E.R.C. ¶ 61,081 (1996).

Wyoming Gas also alleged that, absent a stay of the effectiveness of the ST-1 rate filing until the justness and reasonableness of the proposed rate change is established at the hearing, it would suffer irreparable harm in the form of monetary loss threatening its very existence. A supporting affidavit indicated that the company stood to incur a 157 percent rate increase, which could cause many of its own customers to switch to alternate suppliers. The FERC found that, since the unit cost of the reservation charge declines with each unit actually taken, Wyoming Gas is able to control the adverse impact of the rate filing. Based on this finding, the FERC was unable to make a merits determination for rejecting Williston Basin's filing, and therefore was without authority to preclude the rate filing from taking effect following a five-month maximum suspension period. However, the FERC encouraged the parties to negotiate a settlement of their differences.

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