

HOW WILL THE EXPANDED DISCOVERY PROTECTIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE AFFECT FERC DISCOVERY PRACTICE?

*James W. Bixby**

Synopsis: Given that litigation before the Federal Energy Regulatory Commission inevitably involves large amounts of money in controversy and extensive expert testimony, it is no surprise that formal proceedings can generate vast amounts of discovery and, correspondingly, large numbers of discovery disputes. As part of its Rules of Practice and Procedure, the FERC has promulgated Rule 402, which governs the scope of discovery in litigation, including expert witness-related discovery. Rule 402 was explicitly designed by the FERC to mirror Federal Rule of Civil Procedure 26, which governs discovery in federal court. FERC Administrative Law Judges have often looked to FRCP 26 for guidance in adjudicating discovery disputes arising from FERC Rule 402, including, by reference, the amendments to FRCP 26, which post-date the FERC's adoption of FERC Rule 402.

In 2010, the Supreme Court adopted significant amendments to FRCP 26 addressing, among other issues, the permissible scope of expert witness discovery. Whereas previous amendments to FRCP 26 had expanded the scope of discoverable material, the 2010 amendments significantly restricted the type of expert witness material that opposing parties could obtain through discovery. This article examines whether, in light of the provenance and prior interpretation of FERC Rule 402, litigants before the FERC may wish to avail themselves of the expanded protections afforded by the 2010 amendments when served with discovery to which those protections would apply in federal court. This article concludes that, in the absence of specific guidance from the FERC addressing the 2010 amendments, litigants should consider asserting their protections with respect to: (i) drafts and revisions of expert witness materials; (ii) certain communications between experts and counsel; and (iii) certain types of information considered by the expert.

I.	Introduction	538
II.	The Relationship Between FRCP 26 and FERC Rule 402	538
	A. FERC Rule 402's Creation was Explicitly Based on FRCP 26	539
	B. FERC Rule 402 Has Consistently Been Interpreted by Reference to FRCP 26.....	540
	C. FERC Uses the FRCP for Guidance on Other Substantially Identical FERC Rules	542

* Trial attorney with the Federal Energy Regulatory Commission's Office of Administrative Litigation. He earned a J.D. from Washington University in St. Louis School of Law in 2008. The views expressed in this article are solely those of the author and do not represent the views of the Federal Energy Regulatory Commission. The author would like to acknowledge the input and comments of his colleague, Derek Anderson.

III.	How the December 2010 Amendments Will Affect Rule 402	
	Disputes.....	544
	A. Drafts and Revisions	545
	B. Communications between Experts and Counsel.....	546
	C. Information Considered by the Expert	549
IV.	Conclusion	550

I. INTRODUCTION

In 1993, amendments to Rule 26 of the Federal Rules of Civil Procedure (FRCP) significantly expanded the scope of discoverable material arising from the use of expert witnesses by parties to federal litigation. Among other changes, these amendments permitted opposing counsel to obtain non-final drafts and revisions of an expert witness's reports, as well as a substantial amount of otherwise privileged attorney-expert communication and related material reviewed by the expert, even where the expert did not ultimately incorporate these communications or materials into his or her opinion or testimony. Ultimately, these amendments produced a surge in litigation expenses and collateral discovery disputes. In late 2009, and upon recommendation of the American Bar Association and other interested groups, the United States Judicial Conference drafted and presented amendments to FRCP 26(a)(2) and (b)(4), limiting the scope of expert witness material subject to discovery.¹ These amendments were ultimately adopted by the United States Supreme Court, and became effective on December 1, 2010.²

While the rules governing discovery at the Federal Energy Regulatory Commission ("FERC" or "Commission") are based on the Federal Rules of Civil Procedure, the question remains as to whether these amendments to the latter will have an effect on discovery practice in FERC litigation and, if so, what that effect will be. This article addresses that question, and concludes that the FERC Rules of Practice & Procedure, which govern discovery,³ are explicitly based on FRCP 26, and it is likely that the modifications to that rule will serve to substantially limit the scope of discoverable expert witness-related material in three respects.

II. THE RELATIONSHIP BETWEEN FRCP 26 AND FERC RULE 402

FRCP 26 sets out general provisions for the conduct of discovery, and contains two subsections specifically addressing discovery related to expert testimony. FRCP 26(a)(2) sets out the mandatory disclosures that all testifying expert witnesses must make as a matter of course, while FRCP 26(b)(4) defines the scope of what an opposing party may seek from an expert witness through discovery.⁴ These subsections govern, among other matters, three types of expert witness material that are relevant to practice before the Commission: (1)

1. Committee on Rules of Practice and Procedure, Excerpt from the Report of the Judicial Conference: FRCP Rules Recommended for Approval and Transmission 4 (2009), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/Excerpt-ST-CV.pdf>.

2. 266 F.R.D. 502 (2009).

3. 18 C.F.R. §§ 385.401 - 385.411 (2011).

4. FED. R. CIV. P. 26(a)(2), (b)(4).

drafts and revisions of an expert witness's reports and testimony; (2) communications between an expert witness and the attorneys representing the expert's client; and (3) information and other data related to the case reviewed by the expert.⁵ Before showing the impact that the 2010 amendments to FRCP 26 might have on these three categories, it is first worth examining the historical relationship between FRCP 26 and FERC Rule 402, and how the former rule has influenced the interpretation and enforcement of the latter by the FERC and its Administrative Law Judges (ALJs) in the adjudication of discovery disputes.

A. *FERC Rule 402's Creation was Explicitly Based on FRCP 26*

FERC Rule 402 governs the scope of discovery during FERC proceedings, and includes a specific provision addressing expert witness discovery.⁶ Rule 402 was originally established as part of the Commission's comprehensive 1982 revisions and reorganization of hearing procedures and rules,⁷ and took its current form in 1987 in Order Nos. 466 and 466-A.⁸

In Order No. 466, the Commission observed that litigants had "generally based their discovery requests on the federal rules" in the absence of specific rules promulgated by the Commission prior to 1982, and that "[t]he Federal rules codify discovery procedures in federal courts and thus provide useful guidance for discovery activities in trial-type proceedings before the Commission."⁹ The Commission went on to state that the new rules established by Order No. 466 were designed to "reflect the spirit of the federal rules. Specifically, they [were] loosely patterned after Rules 26 through 37 of the federal rules."¹⁰ In discussing comments submitted in response to the Commission's Notice of Proposed Rulemaking that resulted in Order No. 466, the Commission observed that the initially-proposed Rule 402, in setting out the standard of relevance for discovery, used the phrase "relevant to the merits of the proceeding" while FRCP Rule 26 used the phrase "relevant to the subject matter involved in the pending action."¹¹ The Commission stated, however, that it "intended no

5. *Id.*

6. 18 C.F.R. § 385.402(c) (2011) provides as follows:

(c) Expert testimony. Unless otherwise restricted by the presiding officer under Rule 410(c), a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at hearing, and the participant seeking discovery shows a compelling need for the information and it cannot practicably be obtained by other means.

7. Order No. 225, *Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, F.E.R.C. STATS. & REGS. ¶ 30,358, 47 Fed. Reg. 19,014 (1982) (to be codified at 18 C.F.R. pts. 1, 385, 388), *reh'g denied*, Order No. 225-A, F.E.R.C. STATS. & REGS. ¶ 30,385, 47 Fed. Reg. 35,952 (1982).

8. Order No. 466, *Rules of Discovery for Trial-Type Proceedings*, F.E.R.C. STATS. & REGS. ¶ 30,731, 52 Fed. Reg. 6957 (1987) (to be codified at 18 C.F.R. pt. 385) [hereinafter Order No. 466], *order on reh'g*, Order No. 466-A, F.E.R.C. STATS. & REGS. ¶ 30,766, 52 Fed. Reg. 35,908 (1987) (to be codified at 18 C.F.R. pt. 385).

9. *Id.* at 30,549 (citing *Pub. Serv. Co. of Colorado v. Colorado Interstate Gas*, 26 F.E.R.C. ¶ 63,051 (1984); *KN Energy Inc.*, 26 F.E.R.C. ¶ 63,068 (1984); *McDowell Country Consumers Council, Inc. v. Am. Elec. Power Co.*, 23 F.E.R.C. ¶ 61,142 (1983); *Nw. Cent. Pipeline Corp.*, 29 F.E.R.C. ¶ 61,333 (1984)).

10. *Id.*

11. *Id.* at 30,550-51.

departure from the approach of the federal rules. Therefore, to avoid any implication that the difference in language signifies a different standard, the Commission has adopted the suggestion of these commenters that the rule more closely track the language of Rule 26.”¹² The Commission also noted that it had intended to follow the guidance of FRCP 26(b)(3) and (b)(4) in establishing FERC Rule 402(b) and 402(c)’s respective limitations on the scope of discovery.¹³ In sum, FERC Rule 402 was clearly intended to conform to both the letter and the spirit of FRCP 26 as it was written at the time.

B. FERC Rule 402 Has Consistently Been Interpreted by Reference to FRCP 26

Subsequent to its adoption in 1987, FERC Rule 402 has consistently been interpreted by the Commission and by the Agency’s ALJs through the lens of FRCP 26, including several instances where post-1987 amendments to FRCP 26 were considered in interpreting FERC Rule 402. As Rule 402’s provenance in Order No. 466 would suggest, the Commission has considered FRCP 26 to be a guiding, although non-binding, source of authority for the interpretation of FERC Rule 402.¹⁴ For example, in *All American Pipeline Co.*, the Commission reviewed an interlocutory appeal of an ALJ’s denial of a motion to compel the production of expert witness materials under FERC Rule 402.¹⁵ In determining whether the requested information was within the scope of Rule 402, the Commission commented that “[i]n adopting Rule 402(c), the Commission followed the guidance of the Federal Rules,” and based its decision to remand the case back to the ALJ partially on the broad scope of FRCP 26.¹⁶ The Commission has similarly interpreted Rule 402 by reference to federal district and circuit court decisions which interpret FRCP 26.¹⁷ FERC ALJs have also been guided by FRCP 26 to resolve disputes arising from Rule 402.¹⁸

FERC ALJs have taken this practice a step further by relying on the 1993 amendments to FRCP 26 in adjudicated disputes arising from FERC Rule 402, even though Rule 402 has not been amended since 1987. For example, in *Oasis Pipeline, L.P.*, the presiding ALJ (Birchman) certified the following question to the Commission:

Under the specific circumstances of the proceeding . . . whether Enforcement Litigation Staff (“Staff”) should be required to provide Oasis Pipeline, L.P., et al. (“Oasis”) all information that Staff provided, in writing or verbally, to its

12. *Id.* at 30,551.

13. *Id.*

14. *Id.* at 30,549 (noting that “while the Commission has been guided by the Federal rules, it is not bound by them”). *See also, California, ex rel. Brown v. Powerex*, 135 F.E.R.C. ¶ 61,178 at P 116 (2011) (noting that “the Commission is not strictly bound by the FRC”).

15. *All-American Pipeline Co.*, 70 F.E.R.C. ¶ 61,210, 61,656-58 (1995).

16. *Id.* at 61,658-59.

17. *See, e.g., Long Island Lighting Co.*, 40 F.E.R.C. ¶ 61,033, 61,095-96 (1987) (referencing *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-94 (3rd Cir. 1984); *Baise v. Alewel’s, Inc.*, 99 F.R.D. 95, 97 (W.D. Mo. 1983); *United States v. IMB*, 72 F.R.D. 78, 80 n.5 (S.D.N.Y. 1976); *North Carolina Elect. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985)).

18. *See, e.g., Chevron Prods. Co., v. SFPP, L.P.*, 115 F.E.R.C. ¶ 63,070 at P 6 (2006) (noting that FRCP 26(c) gives discretionary power to courts to address discovery demands); *Kansas-Nebraska Natural Gas Co.*, 24 F.E.R.C. ¶ 63,002, 65,011 (1983) (stating that FRCP 26(b)(4)(A) had been interpreted as limiting discovery to those expert materials specifically noted in the rule itself).

designated expert witness, Mr. Norris, regarding the Hotline Call that caused Staff to initiate its nonpublic investigation of Oasis (the “Hotline Call”).¹⁹

This question arose from a motion to compel, brought by Oasis, seeking information which had been provided by Commission Enforcement Litigation Staff to one of its expert witnesses concerning a “Hotline Call.”²⁰ Oasis asserted that the information provided to the witness was discoverable under FERC Rule 402(c), which permits discovery of “any facts or known opinions held by an expert concerning any relevant matters, not privileged.”²¹ Enforcement Litigation Staff opposed providing the information, arguing that the information was privileged,²² and that the expert witness did not consider or rely upon the information when preparing his testimony.²³ In accordance with FERC Rule 713(c)(3),²⁴ the judge included in his order a recommendation on how the Commission should address this issue.²⁵

After noting that the Federal Rules can be considered for guidance, and that the Commission has done so in the past, the ALJ resolved the issue of whether the information sought by Oasis was discoverable under Rule 402.²⁶ The judge ruled that although the information related to the Hotline Call was indeed privileged, the disclosure of that information by the Enforcement Staff to its witness “should be viewed as resulting in a waiver of the privilege otherwise attaching to the Hotline Call information.”²⁷ Aside from reference to FERC Rule 402 itself, the ALJ based his recommendation exclusively on FRCP 26, the amendments thereto, and the *All-American Pipeline Co.* order discussed previously.²⁸ Quoting at length from the Advisory Committee notes to the 1993 amendments to FRCP 26(a)(2)(B), the ALJ explained that:

[T]he 1993 amendments to Federal Rule 26(a) (2) (B) are quite clear in emphasizing the aim of Rule 26 is for full disclosure of ‘data and other information considered by the expert.’ The Advisory Committee Notes go on to say that ‘Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.’²⁹

19. *Oasis Pipeline L.P.*, 125 F.E.R.C. ¶ 63,021 at P 1 (2008) [hereinafter *Oasis*].

20. *Id.* For text of the regulation establishing the Commission’s Hotline Call Process, see 18 C.F.R. § 1b.21 (2011).

21. *Id.* at P 11 (citing 18 C.F.R. § 385.402(c) (2011)).

22. *Id.* at P 26. Enforcement Litigation Staff cited 18 C.F.R. § 1b.9, which provides that all materials obtained in enforcement investigations are considered non-public.

23. *Id.* at P 15.

24. The presiding Judge is required to include a recommended disposition of any issue he or she certifies to the Commission. 18 C.F.R. § 385.714(c)(2) (2011).

25. *Oasis*, *supra* note 19, at P 32 (recommending that the Commission authorize disclosure of information from the Staff regarding the Hotline Call). This particular issue was mooted by a settlement of the underlying proceeding before it could be addressed by the Commission. *Oasis Pipeline L.P.*, 126 F.E.R.C. ¶ 61,118 at P 29 (2009).

26. *Oasis*, *supra* note 19, at P 19.

27. *Id.* at P 26.

28. *Id.* (referencing *All-American Pipeline Co.*, *supra* note 15).

29. *Id.* at P 23.

This is consistent with the same ALJ's earlier 1998 ruling in *Grynberg v. Rocky Mountain Natural Gas Co.*³⁰ In that proceeding, the judge ordered the disclosure of a witness's non-final drafts of pre-filed testimony, communications between the witness and counsel regarding the subject matter of the witness's testimony, and related materials that had been shown to the witness by counsel.³¹ The judge based his ruling in part on the 1993 amendments to FRCP 26.³²

More recently, another ALJ (Glazer) relied on the 2010 Amendments to FRCP 26 to resolve a discovery dispute regarding attorney work-product privilege asserted under FERC Rule 402.³³ That proceeding is discussed further in section III.B., below.

So, although the Commission has yet to affirm explicitly a Rule 402 decision which relies on post-1987 FRCP 26 amendments, neither the Commission nor any of its ALJs have rejected the use of the 1993 and 2010 amendments as persuasive authority in resolving FERC Rule 402 disputes. No compelling rationale exists for the Commission not to sanction the application of FRCP 26 amendments in resolving FERC discovery disputes.

C. FERC Uses the FRCP for Guidance on Other Substantially Identical FERC Rules

The applicability of FRCP 26 to FERC Rule 402 is supported by the Commission's use of the FRCP to interpret other analogous FERC rules. The principal criterion upon which the FERC determines whether a federal rule is applicable in interpreting a FERC rule appears simply to be whether the language of the two rules is functionally analogous. For example, a Commission ALJ cited FRCP 26(b)(4) and related precedent for guidance in permitting discovery to be served on an expert witness who had previously been listed and designated to appear at trial, even where that designation was later withdrawn, based on the conformity between FRCP 26(b)(4) and FERC Rule 402(c).³⁴ The Commission has also found that FERC Rule 217(b),³⁵ which governs summary dispositions, is functionally analogous to FRCP 56 with respect to the burden of proof and the weighing of evidence, and is governed by the same precedents.³⁶ Similarly, FRCP 30's provisions governing the appropriate timing of motions to

30. *Grynberg v. Rocky Mountain Natural Gas Co.*, 84 F.E.R.C. ¶ 63,010 (1998).

31. *Id.* at 65,152.

32. *Id.*

33. *Missouri Interstate Gas, L.L.C.*, Order Granting in Part Motion to Compel and Releasing "Enhanced Privilege Log" at P 6, FERC Docket No. CP06-407-007 (Apr. 19, 2011); *Missouri Interstate Gas, L.L.C.*, "Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal" at PP 26, 28, FERC Docket No. CP06-407-007 (May 12, 2011).

34. *Wyoming Interstate Co.*, Order Granting Motion to Permit Interlocutory Appeal, FERC Docket No. RP97-375-007 (Sept. 16, 1999). The motion for interlocutory appeal, which was the subject of this order, was ultimately mooted by a settlement of the underlying case, and thus was never ruled on by the Commission. *Wyoming Interstate Co.*, 89 F.E.R.C. ¶ 61,028, at p. 61,089 (1999).

35. 18 C.F.R. § 385.217(b) (2011).

36. *Sinclair Oil Co. v. Phillips Pipe Line Co.*, 67 F.E.R.C. ¶ 63,002, at p. 65,002 (1994); *Transcontinental Gas Pipe Line Corp.*, 76 F.E.R.C. ¶ 63,009, at p. 65,039-40 (1996) (citing *ANR Pipeline Co.*, 71 F.E.R.C. ¶ 63,004, at p. 65,036 (1995)). See also, *San Diego Gas & Elec. Co.*, 114 F.E.R.C. ¶ 61,070 at P 134 (2006) (citing *Investigations of Certain Enron-related QFs*, 106 F.E.R.C. ¶ 63,038 (2004); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that motions for summary disposition are governed by the same burden of proof and weighting of evidence as FRCP 56)).

quash subpoenas has been cited for guidance in interpreting the parallel provisions of FERC Rule 410.³⁷ The Commission and its ALJs have used FRCP 26(b)(3) itself, and federal appellate caselaw interpreting FRCP 26(b)(3), as guidance in interpreting work-product issues arising under the analogous FERC Rule 402(b).³⁸ The Commission's ALJs have even used the federal rules and related caselaw in numerous instances as guidance where no FERC rule directly addressed a procedural dispute.³⁹

Conversely, where the Commission and its ALJs have determined that a FERC Rule and its FRCP counterpart differ materially in some respect, they have declined to use the FRCP and related appellate caselaw as guidance in adjudicating disputes arising under FERC Rules. For example, while the Commission uses FRCP 56 precedent with respect to the burden of proof in motions for summary disposition, the Commission has found that FERC Rule 217 materially differs from FRCP 56 with respect to the type of evidence that should be considered in adjudicating such motions.⁴⁰ Specifically, the Commission has found that discovery materials and affidavits do not need to be considered in resolving motions for summary disposition of rate cases brought under section 4 of the Natural Gas Act.⁴¹ Unlike federal court proceedings, the FERC reasons that a pipeline filing for new rates under Section 4 "is required to file its case-in-chief at the inception of the proceeding."⁴² Similarly, the Commission has ruled that FRCP 34(a) and (b) do not provide persuasive guidance in adjudicating a motion to compel discovery where the respondent asserts undue burden in compiling requested data.⁴³ According to the FERC, Rule 410(a)(4) is more expansive in allowing parties to discover information compiled in a form requested, even if the responding party maintains the material in a different form, whereas the FRCP only requires production of material in the form in which they are usually kept.⁴⁴

This use of analogous FRCP provisions and related caselaw by the Commission as non-binding guidance serves important goals in resolving FERC procedural disputes. That practice is consistent with the Commission's reliance on the FRCP for guidance prior to the 1982 codification of FERC procedural

37. *Connecticut Yankee Atomic Power Co.*, Order Dismissing Objection to Application for Subpoena, FERC Docket No. ER04-981-000 (Jan. 26, 2005).

38. See, e.g., *Arco Transp. Alaska, Inc.* 75 F.E.R.C. ¶ 61,129, at p. 61,437 (1996).

39. See, e.g., *SFPP, L.P., Mobile Oil Corp. v. SFPP, L.P. Tosco Corp. v. SFPP, L.P.*, 80 F.E.R.C. ¶ 63,014, at pp. 65,203-06 (1997) (relying on FRCP for guidance on the "relation back" of a complaint); *Texaco Refining and Marketing Inc. v. SFPP, L.P.*, 99 F.E.R.C. ¶ 63,009 at PP 12, 20 (2002) (citing FRCP 15 and FRCP 25 on the issues of relation back of complaints and transfer of interest, respectively); *Williston Basin Interstate Pipeline Co.*, Order Granting Motion to Strike and Disregard Certain Portions of Williston Basin's Reply Brief, FERC Docket No. RP00-107-000 (March 30, 2001) (citing FRCP 12(f) on the standard to be applied to motions to strike); *Portland Gen. Elec. Co.*, 103 F.E.R.C. ¶ 61,123 at P 20 (2003) (citing FRCP 30(c) on sequestration of a witness).

40. *KN Interstate Gas Transmission Co.*, 86 F.E.R.C. ¶ 61,229, at pp. 61,828-89 (1999).

41. *Id.*; 15 U.S.C. § 717(c) (2006).

42. *KN Interstate Gas Transmission Co.*, *supra* note 40, at p. 61,828; see also *Northern Border Pipeline Co.*, 115 F.E.R.C. ¶ 63,064, at n. 5 (2006).

43. *Chevron Prods. Co. v. SFPP, L.P.*, 115 F.E.R.C. ¶ 63,070 at P 4 (2006).

44. *Id.*

rules⁴⁵ to ease the transition to the new rules. In addition, the practice promotes predictability in FERC litigation through the use of a more robust body of federal appellate caselaw, which FERC litigants can reasonably expect to be applied consistently in any appellate review of FERC orders.

Conversely, where the Commission believes that its own unique circumstances and goals warrant different procedures than federal court, the Commission has shown no hesitation in crafting rules which clearly reflect those differences from the federal rules, and which litigants need not be overly concerned will be interpreted using a different body of federal caselaw.⁴⁶ Where federal circuits have split in their interpretation of federal rules, and where FERC's own rules are not dispositive, the Commission's ALJs have, in at least one instance, adopted one prevailing interpretation over another.⁴⁷ The Commission's reliance on FRCP in these different circumstances promotes administrative efficiency and fairness by giving FERC litigants the ability to predict more accurately the outcome of procedural disputes. A decision by the Commission to apply the 2010 amendments to FRCP 26 to disputes arising under FERC Rule 402 would further advance these same goals.

III. HOW THE DECEMBER 2010 AMENDMENTS WILL AFFECT RULE 402 DISPUTES

As discussed above, FERC Rule 402 was created to mirror FRCP 26, and has been subsequently interpreted by reference to FRCP 26, its 1993 amendments, and federal court decisions interpreting the same. Therefore, it stands to reason that the Commission and its ALJs will consider the December 2010 amendments to FRCP 26 in resolving Rule 402 disputes going forward, as has been done already in one instance.⁴⁸ At a bare minimum, in the absence of specific guidance from the Commission or its ALJs on the application of the 2010 federal amendments, litigants before the Commission may wish to raise objections based on the enhanced protections of the 2010 amendments, where failure to do so would result in the disclosure of harmful material.

The December 2010 amendments to FRCP 26 serve to limit substantially three categories of discoverable material arising from expert testimony: (1) drafts and revisions of an expert witness's reports and testimony, (2) communications between an expert witness and the attorneys representing the expert's client, and (3) information and other data related to the case reviewed by the expert. The three categories and their implications for FERC practice are discussed in turn.

45. See, e.g., *Boston Edison Co.*, 1 F.E.R.C. ¶ 61,300, at p. 61,762 (1977) (discovery dispute resolved by reference to FRCP 33).

46. See, e.g., *Northern Natural Gas Co.*, Order Granting Motion to Compel, FERC Docket No. RP10-148-000 at PP 6-7 (Feb. 22, 2010) (holding that the FRCP need not be consulted where FERC rules directly address the issue at hand).

47. *Connecticut Yankee Atomic Power Co.*, 110 F.E.R.C. ¶ 63,005 at PP 8-10 (Jan. 13, 2005).

48. *Missouri Interstate Gas, L.L.C.*, Order Granting in Part Motion to Compel and Releasing "Enhanced Privilege Log," FERC Docket No. CP06-407-007 (Apr. 19, 2011); *Missouri Interstate Gas, L.L.C.*, "Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal," FERC Docket No. CP06-407-007 (May 12, 2011). For a full discussion of this case see section III.B., below.

A. Drafts and Revisions

Prior to the 2010 amendments, FRCP 26(a)(2) required that a testifying expert file a report containing “a complete statement of all opinions to be expressed and the basis and reasons for them; [and] *the data or other information* considered by the witness in forming [the opinions].”⁴⁹ In promulgating the 1993 amendments to FRCP 26, the Advisory Committee noted that:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.⁵⁰

Although the comments did not explicitly address drafts and other non-final versions of expert testimony and reports, federal courts interpreted the amendments as requiring disclosure of these drafts.⁵¹ By comparison, FERC Rule 402(c) provides that “a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged.”⁵² While initially modeled after FRCP 26 in Order No. 466,⁵³ the language in FERC Rule 402(c) is significantly more expansive than the language in FRCP 26. As noted earlier, at least one FERC witness was required to disclose non-final drafts of pre-filed testimony based on the 1993 Amendments to FRCP 26.⁵⁴

The 2010 amendments to FRCP 26, however, clearly eliminated this possibility by protecting “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”⁵⁵ The Advisory Committee noted that “[m]any courts read the disclosure provision [of Rule 26(a)(2)] to authorize discovery of . . . all draft reports. The Committee has been told repeatedly that routine discovery into . . . draft reports has had undesirable effects.”⁵⁶ Thus, the Advisory Committee recommended that FRCP 26(a)(2) be amended “to provide that disclosure include all ‘facts or data considered by the witness in forming’ the opinions to be offered, rather than the ‘data or other information’ disclosure prescribed in 1993,” thereby eliminating the specific language relied on by federal courts to authorize the discovery of expert witness drafts.⁵⁷ Subsequent federal court decisions have interpreted these provisions as the Committee intended, holding that drafts of expert reports, affidavits, or other FRCP 26 disclosures are not discoverable, “regardless of form.”⁵⁸ As such,

49. FED. R. CIV. P. 26(a)(2)(i)-(ii) (post-1993 language) (emphasis added).

50. FED. R. CIV. P. 26 advisory committee’s note (1993).

51. See, e.g., *Elm Grove Coal Co. v. Blake*, 480 F.3d 278, 301 (4th Cir. 2007); *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001); *B.C.F. Oil Refining, Inc. v. Consolidated Edison*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

52. 18 C.F.R. § 385.402(c) (2011).

53. Order No. 466, 18 C.F.R. § 385 (1987).

54. *Grynberg v. Rocky Mountain Natural Gas Co.*, 84 F.E.R.C. ¶ 63,010, at p. 65,152 (1998).

55. FED. R. CIV. P. 26(b)(4)(B).

56. FED. R. CIV. P. 26, advisory committee’s note (2010).

57. *Id.*

58. *Graco, Inc. v. PMC Global, Inc.*, 2011 WL 666056, at *14 (D.N.J. 2011); see also *National W. Life Ins. Co. v. W. Nat’l Life Ins. Co.*, 2011 WL 840976, at *2 (W.D. Tex. 2011); *Henriksen v. United States*, 2011 U.S. Dist. LEXIS 46227, at *6-8 (N.D. Ill. 2011).

FERC litigants have a strong basis on which to object to any discovery requests seeking any form of draft or revision created by that litigant's expert witnesses.

B. *Communications between Experts and Counsel*

FERC Rule 402(b) codifies the attorney work-product doctrine, protecting against the disclosure of all "material prepared for litigation," absent a dual showing of "a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship."⁵⁹ This language is substantially identical to FRCP 26(b)(3)(A), changed in neither 1993 nor 2010, both in protecting work-product and in carving out an exception based on substantial need and undue hardship.⁶⁰ Prior to the 2010 amendments, controversy existed over whether the Federal Rules exempted material otherwise protected under FRCP 26(b)(3)(A) from discovery when such material had been provided to an expert witness by an attorney. Given the expansive language of FRCP 26(a)(2) and the accompanying Advisory Committee notes,⁶¹ it is unsurprising that a majority of federal courts interpreted FRCP 26(a)(2) as superseding, and ruled that such work-product was discoverable.⁶² As noted above, there was at least one instance where a witness was compelled to disclose communications between himself and counsel relating to the subject of his testimony, based in part on the 1993 amendments to FRCP 26.⁶³ Similarly, a Commission ALJ found that investigatory privilege could be waived by providing a privileged document to an expert witness for consideration in forming his or her expert opinion.⁶⁴

Beyond these specific cases, the discoverability of otherwise-privileged work-product prior to 2010 was supported by FERC Rule 410(d), which provides that "[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to

59. 18 C.F.R. § 385.402(b) (2011).

60. Federal Rule of Civil Procedure 26(b)(3)(A) provides:

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

61. See *supra* Section III.A, notes 49-58 and accompanying text.

62. See, e.g., *Regional Airport Auth. v. LFG, L.L.C.*, 460 F.3d 697, 714-17 (6th Cir. 2006); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001); *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997). But see *Better Gov't Bureau, Inc. v. McGraw (In re Allen)*, 106 F.3d 582, 599-606 (4th Cir. 1997) (concluding that communications between attorneys and an outside attorney hired to conduct investigations and give legal advice are protected); *Ladd Furniture v. Ernst & Young*, 1998 WL 1093901, at *12-13 (D.N.C. 1998) (finding that attorney opinion work-product provided to an expert is protected even if considered by the expert witness). See also *Manufacturing Admin. and Mgmt. Sys., Inc. v. ICT Grp., Inc.*, 212 F.R.D. 110, 113-17 (E.D.N.Y. 2002) (collecting cases and scholarly treatises); *Oneida, Ltd. v. United States*, 43 Fed. Cl. 611, 618-20 (1999) (collecting cases).

63. *Grynberg v. Rocky Mountain Natural Gas Co.*, 84 F.E.R.C. ¶ 63,010, at p. 65,152 (1998).

64. *Portland Gen. Elec. Co.*, Order Granting Motion to Compel Pending Commission Review of Certification at P 5, FERC Docket No. EL02-114-000 (Mar. 13, 2003).

discharge its regulatory responsibilities.”⁶⁵ Nevertheless, as a Commission ALJ order from that timeframe noted, the issue was unsettled at the FERC level and in the courts due to the multiple conflicting federal appellate court interpretations being relied upon as precedent.⁶⁶ Ultimately, although the ALJ in that proceeding adopted the view of the circuits which held that such documents were protected absent a showing of substantial need and undue hardship, he confined his ruling to the specific facts of that case, and the Commission never provided clear guidance on the issue.⁶⁷

The 2010 amendments to FRCP 26 ostensibly eliminate the discovery of work-product provided to an expert by expressly exempting from discovery “communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications.”⁶⁸ However, although this general exemption applies “regardless of form,” three categories of attorney-expert communications are excepted: (i) those “relat[ing] to compensation for the expert’s study or testimony,” (ii) those that “identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed,” and (iii) those that “identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.”⁶⁹ The expansive language of (ii) and (iii) would, at first glance, effectively seem to nullify the apparent expanded protections of the rule, leaving work-product as vulnerable as it was pre-amendment. Yet a close reading of the language and the related Advisory Committee notes reveals a strong basis for withholding a substantial amount of work-product which would have been discoverable under the 1993 amendments.

In the event that FRCP 26’s 2010 amendments would be applied in a FERC context, there are two categories of work-product which a FERC litigant might object to providing. First, although exception (ii) permits discovery of all attorney-expert communications which identify facts and data provided to the expert and which the expert considered (even if not relied upon), it does not extend to *all* facts that the expert may have discussed with the attorney. Thus, this exception can be narrowly construed such that it does not encompass discussions *about* the facts and data provided, i.e., concerning their relevancy and usefulness in testimony. This interpretation is supported by the Advisory Committee notes, which provide that “[t]he exception applies only to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.”⁷⁰ This interpretation is also supported by federal trial court decisions

65. 18 C.F.R. § 385.410(d)(1)(i) (2011).

66. *See, e.g., Connecticut Yankee Atomic Power Co.*, 110 F.E.R.C. ¶ 63,005 at PP 8-9 (2005).

67. *See id.* at P 10 (“Based upon my in camera review of the documents and the circumstances present here, I find that the rationale of the latter line of cases cited in ¶ 9 is best applicable to the case at bar.” (emphasis added)). As evidence of the unsettled nature of expert testimony-related work-product doctrine at the FERC between 1993 and 2010, one need only realize that the ALJ who issued the *Connecticut Yankee* order protecting work-product from discovery is the same ALJ who compelled discovery of work-product in *Grynberg v. Rocky Mountain Natural Gas Co.*

68. FED. R. CIV. P. 26(b)(4)(C).

69. FED. R. CIV. P. 26(b)(4)(C)(i)-(iii).

70. FED. R. CIV. P. 26, advisory committee’s note (2010).

which examine this portion of the 2010 amendments.⁷¹ Litigants should, therefore, be able to withhold critical trial strategy-related communications which occurred in the context of providing an expert with materials to consider in drafting testimony.

Second, exception (iii) only addresses assumptions provided by the attorney on which the witness actually relied, and not those that were considered but ultimately rejected. This interpretation is supported by the Committee notes, which provide that “[t]his exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.”⁷²

This interpretation is also supported by a recent discovery order (and related denial of a motion for interlocutory appeal) issued by a FERC ALJ (Glazer) in *Missouri Interstate Gas, L.L.C.*, which addressed the discovery of certain materials prepared by an expert witness over which attorney-client privilege had been asserted.⁷³ In that proceeding, the Missouri Public Service Commission (“MoPSC”) asserted work-product privilege over a set of documents sought by MoGas Pipeline (“MoGas”), which were prepared by or addressed to MoPSC’s witness in the proceeding. Although Judge Glazer relied on pre-2010 federal court decisions in finding that “the underlying information provided by counsel to their expert witness may be discovered by an opposing party,”⁷⁴ the judge relied on the post-2010 language of FRCP 26 to hold that the documents were discoverable only “to the extent that they ‘identify facts or data that the party’s attorney provided and that the expert considered in forming the opinion to be expressed’ or ‘identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.’”⁷⁵ MoPSC subsequently filed a motion to permit interlocutory appeal. In denying MoPSC’s motion, the ALJ once again cited pre-2010 federal court decisions for the proposition that “trial preparation materials considered by an expert witness in connection with her testimony, regardless of whether the materials were relied upon by the expert or not in formulating her opinions, are not protected as attorney work-product.”⁷⁶ The judge also supported his decision in equal part by

71. See, e.g., *In re Asbestos Prods. Liab. Litig.*, 2011 WL 6181334, at *7, n.10 (E.D. Pa. 2011) (finding that, while the 2010 amendments do not protect facts, data, or assumptions provided by an attorney to an expert witness, they do protect “‘mental impressions, conclusions, opinions or legal theories of a party’s attorney.’” (quoting FED. R. CIV. P. 26 (b)(3)(B)); *Graco, Inc. v. PMC Global, Inc.*, 2011 WL 666056, at *10 (D.N.J. 2011); *United States v. 73.92 Acres of Land*, 2011 WL 3471096, at *2 (S.D. Miss. 2011).

72. FED. R. CIV. P. 26, advisory committee’s note (2010). It should be noted, however, that this provision does not apply to “facts or data” provided to the witness by an attorney, which must be disclosed regardless of whether the expert actually relied upon them. *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1077-78 (E.D. Ill. 2012).

73. *Missouri Interstate Co.*, Order Granting in Part Motion to Compel and Releasing “Enhanced Privilege Log”, FERC Docket No. CP06-407-000 (Apr. 19, 2011) [hereinafter April 19 Order]; *Missouri Interstate Co.*, Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal, FERC Docket No. CP06-407-000 (May 12, 2011) [hereinafter May 12 Order].

74. *April 19 Order*, *supra* note 73, at P 6 (citing *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001)).

75. *Id.* (citing FED. R. CIV. P. 26 (b)(4)(C)(i)-(ii)).

76. *May 12 Order*, *supra* note 73, at P 25 (citing *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375-1376 (Fed. Cir. 2001); *Elm Grove Coal Co. v. U.S. Dep’t of Labor*, 480 F.3d 278, 301-03 (4th Cir. 2007)).

reference to the post-2010 language of FRCP 26, although not to the subsection of that rule that was cited in the April 19 Order. Instead, the ALJ relied on FRCP 26(b)(3)(C), which “states that a testifying witness’s ‘own previous statement about the action or its subject matter’ is discoverable.”⁷⁷ The judge did not specify the extent to which he may have considered the portions of FRCP 26 which he cited in the April 19 Order, or whether the entirety of the documents sought consisted entirely of the MoPSC’s witness’s own previous statements on the subject of the proceeding.⁷⁸ In any event, the May 12 Order directed the disclosure only of those documents “by or to MoPSC’s sole witness in this proceeding . . . that do not have any connection to an attorney.”⁷⁹ That fact, combined with the prior language in the April 12 Order and the lack of discussion of FRCP Rule 26(a)(2)(B), leaves open the door for FERC litigants to assert privilege over attorney-client discussions about facts and data provided as well as assumptions provided by the attorney that were not ultimately relied upon by the expert.⁸⁰

C. Information Considered by the Expert

Finally, FRCP 26’s 2010 amendments significantly reduce the scope of disclosure requirements related to information considered by the expert in forming his or her opinion. Prior to the 2010 amendments, FRCP 26 required the disclosure of all “[d]ata or other information” considered by the expert.⁸¹ As the 2010 Advisory Committee notes discuss, this language was relied on by numerous courts to require the production of draft reports and otherwise-privileged work product provided to the expert.⁸² However, the 2010 amendments modified that language to require only the disclosure of “facts or data considered by the [expert]” in forming his or her expert opinion.⁸³

In the context of FERC practice, this amendment should largely serve to support the previously-discussed limitations on the discovery of draft reports or testimony and attorney work-product provided to the expert, as the 2003 amendment’s “other information” language could easily be construed to encompass both types of information, while the new “facts or data” language implicates neither. Furthermore, the 2010 amendment establishes the objectionable nature of requests that seek information with which the expert may

77. *Id.* at P 26 (citing FED. R. CIV. P. 26 (b)(3)(C)).

78. MoPSC had argued that, even though its witness was not an attorney and had not prepared the challenged materials at the request of an attorney, MoPSC’s witness had prepared the materials in anticipation of litigation and was protected as a “participant” from disclosing such material under FERC Rule 402. *Id.* at PP 9-10.

79. *Id.* at P 3.

80. MoPSC appealed the May 16 Order. Serving as the FERC Motions Commissioner, FERC Chairman Jon Wellinghoff found that MoPSC had “failed to demonstrate extraordinary circumstances” to warrant “prompt [FERC] review of the contested rulings.” *Missouri Interstate Co.*, “Notice of Determination by the Chairman,” FERC Docket No. CP06-407-007 (May 26, 2011). The notice does not discuss the merits of either order. For additional discussion of this proceeding, see *Report of the FERC Practice & Administrative Law Judges Committee*, 32 ENERGY L.J. 659, 668-73 (2011).

81. *See supra* text accompanying note 49.

82. FED. R. CIV. P. 26, advisory committee’s note (2010).

83. FED. R. CIV. P. 26(a)(2)(B)(ii) (emphasis added).

have come in contact, but which was not considered or ultimately relied upon by the expert in forming his or her opinion.

More interesting, however, is the fact that this amendment, along with the amendments addressing work-product doctrine, is one of the only new aspects of FRCP 26 to have been interpreted by a federal court in the time since its enactment. In *Sara Lee Corp. v. Kraft Foods, Inc.*, the District Court for the Northern District of Illinois considered a motion to compel the production of communication between Kraft Foods's counsel and a non-testifying expert regarding how Kraft might conduct a pilot survey of a series of advertisements, which were the subject of the case.⁸⁴ The court observed that while "[s]uch expert-attorney communications arguably may have been discoverable under the pre-amendment Rule 26," the "requested materials contain neither 'facts or data' nor 'assumptions that the party's attorney provided,' so they are not discoverable."⁸⁵ As such, the court ruled that the communications were work-product protected by FRCP Rule 26(b)(4)(C).⁸⁶

IV. CONCLUSION

The Commission's Rules of Practice and Procedure are unquestionably and inextricably bound-up with the development and interpretation of the Federal Rules of Civil Procedure. Beyond reliance on the Federal Rules in the creation of the FERC's rules, the Commission and its ALJs have regularly looked to the Federal Rules in order to resolve discovery disputes. This practice allows the Commission, in effect, to utilize an established body of federal caselaw to deal with issues of first impression. The federal courts, by their sheer size, are both more often involved in the adjudication of discovery disputes, and more likely to come across new and unusual discovery situations which the existing rules do not squarely address. The Commission has given no indication that it wishes to depart from this approach, and there exists no compelling rationale for doing so. It is therefore likely that the 2010 amendments to the Federal Rules will similarly make their mark on FERC litigation.

84. 273 F.R.D. 416, 417-18 (N.D. Ill. 2011).

85. *Id.* at 420.

86. *Id.* at 420-21. The court also determined that the communications were not discoverable due to the expert's status as a consulting (non-testifying) expert.