

Report of the Committee on Administrative Practice

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission or FERC) issued a Notice of Inquiry on April 24, 1991,¹ seeking comments on (1) how to best implement the Administrative Dispute Resolution Act (ADRA),² and (2) whether changes in the Commission's regulations, including the regulations concerning settlements, are necessary or appropriate to facilitate the use of alternate dispute resolution techniques.

The ADRA, an amendment to the Administrative Procedure Act, became law on November 15, 1990. It requires agencies to adopt policies addressing the use of alternate dispute resolution (ADR) in connection with formal and informal adjudications, rulemaking, contract administration, issuing and revoking licenses or permits, litigation brought by other government agencies, and other agency actions. Under section 3, each agency is required to designate a senior official as its dispute resolution specialist responsible for implementing the provisions of the ADRA and the policy developed thereunder. Section 3 also provides for the appointment of a neutral third party to assist in the resolution of proceedings and for confidentiality of the ADR proceedings.

An agency is not required to consider using ADR: (1) if a definitive resolution is required for precedential value; (2) if the matter involves significant questions of government policy requiring additional procedure before final resolution; (3) when maintenance of established policy is of special importance; (4) when the matter significantly affects persons or organizations who are not parties to the proceeding; (5) when a full public record of the proceeding is important, and such a record cannot be provided by ADR; or (6) when the agency must maintain continuing jurisdiction over the matter, and dispute resolution may interfere with its authority to alter the disposition of the matter.

The ADRA allows for arbitration as a means of ADR when all parties consent and sets forth the procedures to be used in arbitration proceedings. An agency may terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final. If an award is vacated, a party to the arbitration proceeding may petition the agency for an award of attorney's fees and expenses incurred in connection with arbitration. The agency must award the petitioning party those fees and expenses which the party would not have incurred in the absence of an arbitration proceeding.

The notice of inquiry also asked whether the FERC's regulations should be revised to accommodate "omnibus" settlements of multiple proceedings and, if so, how this should be done. The Commission also requested comments on whether a motion to omit the initial decision by an Administrative

1. 56 Fed. Reg. 18,789 (1991).

2. 5 U.S.C. §§ 581-593, Pub. L. No. 101-552 (Supp. II 1990). Agency authority to use alternate dispute resolution is terminated on October 1, 1995, except as to matters then pending or ongoing.

Law Judge (ALJ) could be based on less than concurrence of all the parties in a contested settlement involving a genuine issue of material fact.

Two recurrent themes in the comments were the need for flexibility in establishing rules and the need to allow parties creativity in developing appropriate ADR techniques. The Federal Energy Bar Association (FEBA) requested that the Commission give parties the flexibility to fashion ADR techniques and promulgate regulations separate from the settlement rules. Any rule should provide guidance for binding arbitration, mediation, mini-trials and selection of a neutral official.³ FEBA commented that the FERC staff should be bound by any ADR procedure, that rules should be established for vacating and appealing arbitrations, and that categorical exclusions of certain proceedings from ADR might stifle experimentation.

The American Gas Association recommended that the settlement rules be amended so that settlements could be reviewed and decisions rendered in a more timely manner. It also took the position that: (1) unanimous support should not be required to waive the ALJ's initial decision; (2) parties lacking a real interest in the issues to be addressed should not be able to block the use of ADR proceedings; (3) the Commission should bar ADR only if the process would be inappropriate in the totality of the circumstances; and (4) the Commission should review ADR awards just as it now approves settlements.

The Indicated Producers discussed detailed changes in the settlement rules that would expedite the Commission's process in resolving cases, including the need for meaningful deadlines. They do not believe that arbitration is appropriate because of the need for agreement by all parties. They stated that non-binding ADR rules, such as mediation and facilitation, can be devised to dovetail with the settlement rules to improve the settlement process, and that specific rules should be promulgated for omnibus proceedings to expedite the hearing and review process and to permit the Chief ALJ to order consolidation.

Besides urging the FERC to act more promptly, the Process Gas Consumers Group, recommended that the rules require unanimous agreement of all parties or allow any party who feels "excluded" from a settlement to petition the ALJ or the Commission for redress. It also commented that when a settlement is filed in multiple proceedings, one ALJ should be assigned to the settlement.

The American Public Power Association supported the ADRA, as did the Colorado River Energy Distributors Association. The latter group suggested the use of ADR techniques in power marketing administration rate proceedings and provided examples of how this could reduce conflict between parties and other agencies while permitting the FERC to provide guidance on ratemaking issues.

The Interstate Natural Gas Association of America (INGAA) suggested the Commission's settlement rules be clarified to remove unnecessary procedural impediments. It contended that review of settlements should not be

3. A neutral official is a permanent or temporary officer or employee of the federal government who is acceptable to the parties to a dispute resolution proceeding. 5 U.S.C. § 583(a) (Supp. II 1990).

delayed by parties who are not “substantially affected,” and a blanket prohibition against severing contesting parties from part 284 transportation rate settlements, even if they are not substantially affected, would be particularly inappropriate. INGAA also proposed that the FERC adopt broad guidelines implementing ADRA, rather than specific regulations, so parties can develop and submit appropriate ADR proposals on a case-by-case basis. As of February 1992, the Commission had taken no action on the notice of inquiry since comments were filed.

II. ADR PROCEDURES IN USE AT THE FERC

Parties to Commission proceedings have recently begun using ADR procedures—including arbitration, mediation, mini-trials, fact-finding, early neutral evaluation and summary trials—to resolve disputes. Although these procedures have always been available, the Commission expressly approved the first such procedure on November 28, 1990, shortly after the ADRA became law. In *Amerada Hess Pipeline Corp.*⁴ the parties proposed and the Commission approved a two-stage ADR process—use of a mini-trial, followed by mediation using a third-party neutral.⁵ Besides approving the proposed ADR procedure, the Commission reiterated its long-standing policy of encouraging settlements.⁶

The mini-trial stage of the ADR process in *Amerada Hess* is not a formal hearing but rather an informal forum for summary presentations by the parties before a panel comprised of an ADR neutral, official representatives of each party, and one member of the Commission Staff. After a three-day mini-trial, the parties would attempt to negotiate a settlement. If unsuccessful, they would begin mediation proceedings under the direction of the ADR neutral. If mediation was also unsuccessful, the case would revert to the ALJ for a full administrative hearing.

The agreement that the Commission approved in *Amerada Hess* also provided that any settlement arising from this process would be submitted first to the Commission’s staff delegate who had been assigned to participate in the ADR process, and then to the Commission for approval. The settlement would not become effective until issuance of a final Commission order of approval.

Parties in at least two other Commission proceedings have accepted the invitation to enter into ADR agreements. In *Kansas Power & Light Co.*,⁷ the ALJ established a “conditions committee,” the mission of which was to reach a consensus regarding “how to structure or design a set of conditions that, to the maximum extent possible, would come to grips with the operational con-

4. 53 F.E.R.C. ¶ 61,266 (1990). See also *Order Certifying Alternative Dispute Resolution Agreement*, *Amerada Hess Pipeline Corp.*, 53 F.E.R.C. ¶ 63,004 (1990) and *Notice Concerning the Use of Alternative Dispute Resolution Techniques*, 50 F.E.R.C. ¶ 63,018 (1990).

5. Although advance Commission approval was not required under the Commission’s Rules, the ALJ and the parties concluded that the Commission should have the opportunity to express its views on this new development in dispute resolution at the FERC. 53 F.E.R.C. ¶ 63,004, at 65,047-48 (1990).

6. 53 F.E.R.C. ¶ 61,266, at 62,053 (1990).

7. 54 F.E.R.C. ¶ 63,019 (1991).

cerns or reservations that parties may have if the [two companies'] systems are merged, without detriment to the operation of the newly[-]formed company."⁸ In *Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Co.*,⁹ the ALJ issued a notice suggesting the parties consider the use of ADR generally, and either mediation or a third-party neutral in particular. The parties subsequently entered into a mediation agreement.

Despite the Commission's expressed interest in ADR, it rejected the use of an ADR technique in *Northeast Utilities Service Co.*¹⁰ The ALJ's initial decision had approved the appointment of an ombudsman experienced in electric bulk power matters to mediate customer disputes for a term of five years. Although the ombudsman would not be affiliated with Northeast Utilities, the individual would be selected and paid by the utility. The Commission rejected this approach on the ground that its "complaint procedure is a sufficient means of addressing any jurisdictional disputes between [Northeast Utilities] and its customers. The appointment of an ombudsman would establish an unnecessary intermediary and is not justified by the evidence in this proceeding."¹¹

III. THE REGULATORY FAIRNESS ACT

The Regulatory Fairness Act (RFA), enacted in October 1988, as an amendment to section 206 of the Federal Power Act,¹² authorizes the FERC to require regulated public utilities to make refunds to their wholesale customers when the Commission determines, as the result of an investigation under section 206, that a utility's wholesale rates are unjust, unreasonable or otherwise unlawful. Before the enactment of the RFA, the remedies available to the Commission in a section 206 proceeding extended only to prospective relief for wholesale customers. The Commission's experience with the first three years of administering this statute appears to have created some novel and complex problems, many of which remain unresolved.

The RFA requires the Commission to "establish a refund effective date" when it institutes an investigation under section 206.¹³ At the conclusion of the proceeding, the Commission may order the utility to refund amounts paid by its customers after the refund effective date. The refund period in a section 206 proceeding expires fifteen months after the refund effective date if the proceeding is still ongoing at that time.¹⁴

8. *Notice Concerning the Establishment of Conditions Committee, Publishing List of Committee Members and Setting Prehearing Conference*, 54 F.E.R.C. ¶ 63,109, at 65,048 (1991). See also *Kansas Power & Light Co.*, 56 F.E.R.C. ¶ 61,356, at 62,376 (1991) and *Certification of Uncontested Settlement*, 55 F.E.R.C. ¶ 63,039, at 65,265-66 (1991).

9. 55 F.E.R.C. ¶ 63,027 (1991).

10. Opinion No. 364, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991).

11. *Id.* at 62,048.

12. The substance of the Regulatory Fairness Act is found in § 206(b) and (c) of the Federal Power Act, 16 U.S.C. § 824e(b), (c) (1988).

13. The RFA does not distinguish between investigations into rates and other investigations. In non-rate cases this has the effect of allowing the Commission to prescribe retroactive relief at the conclusion of any proceeding begun under § 206.

14. There is one exception to this rule. If the Commission determines that the proceeding was not

Under the RFA, the Commission may set the refund effective date at any date within five months after the filing of a complaint under section 206. In the case of an investigation initiated on the Commission's own motion, the five-month period begins to run sixty days after publication in the *Federal Register* of the Commission's intention to initiate the investigation. The Commission announced in its first order establishing a refund effective date that, as a general rule, it would fix the effective date at the earliest possible date in order to afford maximum protection to consumers.¹⁵

The RFA extended to section 206 investigations the same preference over other matters pending before the Commission as had always applied to proceedings under section 205. It also required the Commission to establish a target date for the conclusion of cases instituted under section 206. If the Commission has not issued its final decision by the earlier of the refund effective dates or 180 days after the proceeding has commenced, the Commission must publicly state: (1) the reasons why it failed to render a decision within that time, and (2) its best estimate of the date when a final decision will be issued. In cases set for formal hearing, the Commission has delegated the task of establishing the target date to the presiding ALJ. Complications have arisen in cases where section 206 and section 205 issues have been combined in the same proceeding or when a section 205 proceeding and a section 206 proceeding involving the same utility have been consolidated for hearing. In such cases, there has been a tendency for the parties to request phasing of the case, so that the section 206 issues can be the subject of a final Commission decision before the remaining issues are decided. Nevertheless, there is no evidence that the Commission has found a way to adhere to the implicit fifteen-month deadline in the statute. For example, in *Town of Norwood v. New England Power Co.*,¹⁶ which involved a section 206 complaint filed on August 23, 1991, the Commission estimated the final decision completion date to be June 30, 1994, almost three years later.

When a utility filing under section 205 is received, the Commission must issue its suspension order on or before the proposed effective date. As a result, both the utility and its customers know in advance whether a rate increase has been suspended and, more significantly, whether the increase is being collected

resolved within the 15-month period "primarily because of dilatory behavior by the public utility," it may order the utility to pay refunds of amounts collected until the date the proceeding is concluded. As of this writing, the Commission has not ruled on the question whether a utility's dilatory behavior has unduly attenuated a proceeding.

15. *Canal Elec. Co.*, 46 F.E.R.C. ¶ 61,153, *reh'g denied*, 47 F.E.R.C. ¶ 61,275 (1989). In *Golden Spread Elec. Coop. v. Southwestern Pub. Serv. Co.*, 49 F.E.R.C. ¶ 61,364 (1989), *reh'g denied*, 50 F.E.R.C. ¶ 61,193 (1990), the Commission emphasized that it would exercise its discretion to establish the refund effective date in the interest of justice and common sense, rather than apply a mechanical 60-day rule. In that case, the section 206 complaints were filed during the pendency of a section 205 rate case that had been initiated by the utility. The Commission issued its decision in the section 205 case on the same day that it dealt with the question of the appropriate refund effective date. The Commission declined to set the refund effective date at the 60-day mark because that would have created the possibility that the utility would be collecting rates subject to refund when the Commission had previously found those rates to be just and reasonable. Hence, the refund effective date was set at the day that the Commission issued its decision in the section 205 proceeding.

16. 57 F.E.R.C. ¶ 61,305 (1991).

subject to refund. By contrast, a refund effective date established under section 206 may be set retroactively. For example, in *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*¹⁷, the Commission dealt with a complaint filed some eight months earlier, in April 1991. Following its *Canal Electric* rule, the Commission set the refund effective date at June 12, 1991, sixty days after publication of the notice that it was instituting an investigation.

A complaint proceeding may follow on the heels of a section 205 utility tariff filing or the reverse may be true. The RFA did not change the right of a public utility to make a section 205 filing or restrict the right of utility customers to file a section 206 complaint at times of their own choosing. As a result, the timing of the initiation of a proceeding under section 206 or the filing of a case under section 205 may have strategic significance.

In *Southwestern Public Service Co.*,¹⁸ the Commission had held that the filing of a section 206 case during the pendency of a section 205 proceeding created a "locked in" period, ending on the section 206 refund effective date. In *Blue Ridge Power Agency v. Appalachian Power Co.*,¹⁹ the Commission dealt with a situation that it termed "the flip side of *Southwestern*." Customers of the utility had filed a complaint under section 206 on September 13, 1989. Following the *Canal Electric* policy, the Commission set a refund effective date of November 13, 1989, sixty days after the filing date.²⁰ Fifty-one days later, on the day before the hearing on the complaint was to begin, the utility filed a section 205 rate increase case. The Commission suspended the rate increase filing until August 4, 1990, when it went into effect.²¹

The case of a section 205 filing following a section 206 filing, said the Commission, should be given the same treatment as a case like *Southwestern*, where the order of those filings is reversed. Thus, the Commission ruled that the period from the refund effective date to the date when the section 205 rate increase took effect, after expiration of the suspension period, was a "locked in" period. This result was required, the Commission said, because the legislative history of the RFA demonstrated that Congress' objective was "to provide greater comparability than had previously existed between sections 205 and 206 of the Federal Power Act."²²

The Commission explained the significance of the "locked in" rate issue in Opinion No. 363:

Because the period that a rate will be in effect may extend beyond the record-based data and the date of Commission action, we may elect to consider extra-record evidence to set a return allowance, so long as it remains within the record-based range of reasonable returns. Where the rate under consideration is "open-ended" as it is here, the Commission views the time period from when the rate at issue went into effect up to the day before the date of issuance of the commis-

17. 57 F.E.R.C. ¶ 61,332 (1991).

18. Opinion No. 339-B, *order denying reh'g*, 53 F.E.R.C. ¶ 61,406 (1990).

19. Opinion No. 363, 55 F.E.R.C. ¶ 61,509, *order on reh'g*, Opinion No. 363-A, 57 F.E.R.C. ¶ 61,100 (1991).

20. 49 F.E.R.C. ¶ 61,314 (1989).

21. 50 F.E.R.C. ¶ 61,261 (1990).

22. Opinion No. 363-A, 57 F.E.R.C. at 61, 371 (1991).

sion's opinion as, in effect, a locked-in period to which a single allowance on common equity is applied. A different equity return allowance, calculated using the most recent capital cost data, may then be permitted to go into effect prospectively.²³

The Commission is required by the RFA to perform a study of the impact of the RFA no later than October 5, 1992, and to report that study to Congress.

IV. THE NEGOTIATED RULEMAKING ACT

The Negotiated Rulemaking Act²⁴, was signed into law on November 29, 1990. Its purpose was "to establish a framework for the conduct of negotiated rulemaking . . . [and] to encourage agencies to use the process when it enhances the informal rulemaking process."²⁵

Among other provisions, the Act sets out factors for agency consideration in deciding when to utilize negotiated rulemaking procedures. The agency head should consider whether:

- (1) there is a need for a rule;
- (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—
 - (A) can adequately represent the interests identified under paragraph (2); and
 - (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
- (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
- (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.²⁶

The Act requires that an agency issue a notice announcing its intent to establish a negotiated rulemaking committee to develop a proposed rule, setting out the description of the subject, scope of the rule, issues to be considered and an identification of the interests which would likely be significantly affected. The notice should also solicit comments on the proposal to establish the committee and its proposed membership, and should explain how a person may apply for membership on the committee.²⁷

The Act provides for the committee to designate a facilitator, to serve as

23. Opinion No. 353, *Blue Ridge Power Agency v Appalachian Power Co.*, 55 F.E.R.C. ¶ 61,509 at 62,785-86 (footnotes omitted).

24. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 581-590, Pub. L. No. 101-648 (Supp. II 1990).

25. 5 U.S.C. § 581 (1988).

26. *Id.* § 583(a).

27. *Id.* § 584(a)(7).

an impartial committee chairman and manage the keeping of minutes and records as required by the Act.²⁸ If the committee reaches a consensus on a proposed rule, it must transmit a report to the agency containing a proposed rule. If it fails to reach a consensus, it may transmit to the agency a report specifying any areas in which it did reach consensus.²⁹

A negotiated rulemaking committee terminates upon the promulgation of the final rule under consideration.³⁰ Upon receiving the recommendation from the committee, the agency will utilize rulemaking procedures under the Administrative Procedure Act to proceed with any formal rule proposal, receive comments on the proposal, and establish a final rule.

Agency decisions to establish a negotiated rulemaking committee or concerning the composition of its membership are not subject to judicial review. Rules which are the product of negotiated rulemaking are subject to judicial review, however, the reviewing court shall accord them no greater deference than any other rule.³¹

VI. STATUS OF FERC *EX PARTE* RULEMAKING PROCEEDING

On December 12, 1991, the FERC issued a Notice of Intent to Establish a Negotiated Rulemaking Committee.³² The committee is to undertake a revision of the Commission's *ex parte* rules and develop a uniform and comprehensive set of proposed regulations. The Notice identifies the proposed members of the committee, establishes its agenda, and invites comments on both the proposal to establish a committee and its composition.

The proposed committee consists of nineteen representatives of associations that regularly appear before the Commission, as well as representatives of the National Association of Regulatory Utility Commissioners, Citizens Action, the National Wildlife Federation, FEBA, the Council on Environmental Quality, the Administrative Conference of the United States, two FERC staff lawyers, and each of the Commissioners on an *ex officio* but non-voting basis. The committee has been asked to transmit its report to the Commission by April 16, 1992, and the Commission plans to issue a notice of proposed rulemaking a month later.

In his dissent, Commissioner Trabandt stated his opposition to using the negotiated rulemaking process to draft *ex parte* rules and to including the informal rulemaking issue in the negotiations. He suggested that the extent and application of the *ex parte* rules are defined by an existing body of law and that the particular issue is inappropriate for negotiated rulemaking procedures, which rely on consensus and compromise.

28. *Id.* § 586(d).

29. *Id.* § 586(f).

30. *Id.* § 587.

31. *Id.* § 590.

32. Notice of Intent to Establish a Negotiated Rulemaking Committee, 56 Fed. Reg. 65863 (1991) (to be codified at 18 C.F.R. Ch. I) (proposed Dec. 12, 1991).

VII. COPIES OF TESTIMONY AND EXHIBITS

Rule 2004 of the Commission's Rules of Practice and Procedure³³ provides that each document filed in an adjudicated case must be accompanied by fourteen copies "unless otherwise required." Rules 506 and 507 include the general requirement that testimony of a witness in a FERC hearing be proffered in written form and offered in evidence as an exhibit. In addition, if the witness wishes to sponsor a document, that too must be offered as an exhibit. Prepared written testimony and exhibits are filed with the Secretary of the Commission and are served on the other parties to the proceeding in accordance with the procedural schedule set by the presiding ALJ.³⁴

On March 2, 1990, the Chief ALJ issued an unpublished Notice to the Public, pointing out that "when an exhibit is filed with the Secretary it is filmed and entered into the Commission's computer database." The Commission's electronic recordkeeping protocols also prescribe that materials admitted into evidence at hearings (and thus included in the administrative record under the Administrative Procedure Act and other organic statutes) are microfilmed and placed in the electronic database. Hence, the Chief ALJ noted, the practice of filing prepared testimony and exhibits before the hearing and then proffering additional copies to the ALJ and the reporter at the hearing itself resulted in duplicate reproduction of those materials for the Commission's records at considerable expense to the government.

The Chief ALJ ruled in his March 2, 1990, notice that participants in FERC hearings no longer need to file fourteen copies of exhibits that have been served on the parties and are intended to be offered in evidence. They need only provide one copy for the ALJ and two for the reporter at the time of the hearing.³⁵

On August 8, 1991, however, the Chief ALJ issued another unpublished Notice to the Public, modifying his earlier directive. This notice stated that participants submitting prepared testimony and exhibits must file in advance an original and seven copies of the materials with the Office of the Secretary. In addition, the Chief ALJ pointed out that the rule 508 requirement that copies be furnished to the ALJ and the hearing reporter would continue to apply.

The Chief ALJ noted that while the duplicative records problem that had inspired his previous notice had apparently been resolved by internal Commission action, the Commission's litigation staff had encountered difficulties because multiple copies of prepared testimony and exhibits were no longer filed as a matter of course and that more copies are needed in addition to the one served on staff trial counsel. He also stated that although the staff has been able to obtain extra copies from the filing parties, a standard procedure would assist all parties.

33. 18 C.F.R. § 385.2004 (1991).

34. See Rule 601(c)(2), 18 C.F.R. § 385.601(c)(2) (1991).

35. The notice stated that a copy of the materials must be furnished to the ALJ at the hearing only "if he or she has not previously been served." However, the usual practice is for parties always to give the ALJ at the hearing a copy of every exhibit they intend to proffer. See also Rule 508(a).

Therefore, the current rules on copies of hearing exhibits are as follows:

(1) An original and seven copies of prepared testimony and each exhibit must be filed with the Secretary.

(2) One copy of the prepared testimony and exhibits sponsored by the witness must be served on every other participant in the proceeding.

(3) One copy of the prepared testimony and exhibits must be provided to the Presiding ALJ either by service in advance of the hearing or at or before the time the material is proffered to be marked for identification.

(4) Two copies of the prepared testimony and exhibits must be provided to the reporter at the hearing no later than the time they are marked for identification.

VIII. SERVICE

On July 19, 1991, the Secretary of the Commission issued a Notice explaining the procedures necessary to notify the Commission and parties of a change in the name or addresses of a person on an official Commission service list. Parties are to file an original and one copy of a letter explaining the change, which is to be served on all parties to all relevant dockets pursuant to rule 2010(c)(2).³⁶ The letter must be separate from any other pleading that is also filed with the Commission. The notification of the change should include a list of docket numbers for all proceedings whose records must be corrected to reflect the change. The Commission will return to the filer the extra copy of the filed letter to confirm that the change was made.

In August 1991, the Commission issued a notice of proposed rulemaking on the role of interstate pipelines in today's natural gas market, which provided for both initial and reply comments.³⁷ In response to inquiries whether reply comments were required to be served on persons filing initial comments, the Secretary of the Commission informally stated that service was not required, because commenters to rulemakings are not "participants" under rule 102(b) for purpose of service. Likewise, no service is required for rehearing requests in rulemaking matters, unless specifically ordered by the Commission.

IX. OFFICIAL NOTICE

Judicial notice of facts after the conclusion of an evidentiary hearing was an issue in *Colorado Interstate Gas Co.*³⁸, where the pipeline requested that judicial notice be taken of certain information in its FERC Form No. 2 after the official close of the record. Pursuant to rule 508(d) of the Commission's Rules of Practice and Procedure, the ALJ held that a participant must give reasons to justify its failure to request official notice prior to the close of the hearings, and participants must have the opportunity to rebut the requested

36. 18 C.F.R. § 385.2010(c)(2) (1991).

37. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, IV F.E.R.C. Stats. & Regs. ¶ 32,480, 56 Fed. Reg. 38,372 (1991).

38. 56 F.E.R.C. ¶ 63,018 (1991).

facts. After reviewing the participants' pleadings on this matter, judicial notice was granted.

X. PAPER HEARINGS

In recent years, the Commission has initiated a selected number of paper hearings to explore various natural gas pipeline issues.³⁹ The apparent purpose of paper hearings is to expedite proceedings by eliminating cross-examination, initial and reply briefs, initial decisions by ALJs, and briefs on and opposing exceptions. Streamlined hearing procedures also promise significant savings of time, money and resources.

On October 31, 1991, the Commission issued its first order on the merits following a paper hearing procedure.⁴⁰ Both Great Lakes and TransCanada Pipelines Limited sought rehearing of the order establishing the paper hearing procedure. These parties argued that trial-type proceedings are required to test the factual basis of a change in rates.⁴¹ They contended that paper hearing procedures are discriminatory violations of the Transit Treaty⁴² and the Free Trade Agreement⁴³ between the United States and Canada. Great Lakes also claimed that the issue which was heard in the paper process, rolled-in versus incremental rates, could not be isolated from other rate issues. The case is still pending.

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39. See, e.g., Great Lakes Gas Transmission Ltd. Partnership 55 F.E.R.C. ¶ 61,336, *order on reh'g*, 55 F.E.R.C. ¶ 62,426 (1991); Tennessee Gas Pipeline Co., 47 F.E.R.C. ¶ 61,245 (1989); Transcontinental Gas Pipe Line Corp., 47 F.E.R.C. ¶ 61,244, *reh'g denied*, 48 F.E.R.C. ¶ 61,199 (1989).

40. Great Lakes Gas Transmission Ltd. Partnership, 57 F.E.R.C. ¶ 61,140 (1991).

41. *Id.* at 61,527.

42. Agreement Between the Government of Canada and the Government of the United States of America Concerning Transit Pipelines, T.I.A.S. No. 8720 (1977).

43. United States-Canada Free Trade Agreement, H.R. Doc. No. 216, 100th Cong., 2d Sess. 297 (1988), *reprinted in* 27 I.L.M. 281 (1988).