

REPORT OF THE ADMINISTRATIVE PRACTICE AND ADMINISTRATIVE LAW JUDGES COMMITTEE

The Administrative Practice and Administrative Law Judges Committee of the Federal Energy Bar Association is responsible for maintaining a current understanding of the basic administrative practices and procedural regulations of the Federal Energy Regulatory Commission (FERC or Commission). In fulfilling this duty, the committee reviews all substantive changes proposed to the Commission's Rules for Practice and Procedure, in addition to evaluating case-specific procedural Commission decisions or Administrative Law Judge (ALJ) rulings. This Report surveys significant developments affecting the procedural and administrative practices of the Commission during 1998. The report will focus on three major areas of administrative practice: (1) a proposed revision to the Commission's Complaint Procedures; (2) the proposed clarification and modification of existing regulations governing off-the-record Communications; and (3) significant developments in the area of Alternative Dispute Resolution (ADR) practice. The report will also briefly review certain other procedural and practice areas in which developments occurred during 1998.

I. PROPOSED REVISION TO COMPLAINT PROCEDURES

The FERC issued a Notice of Proposed Rulemaking (NOPR) on July 29, 1998, proposing to amend its procedures for handling complaints.¹

The Commission noted that in an environment increasingly driven by market forces, timely and effective resolution of complaints has become crucial to the electric and natural gas industries. The goal of the NOPR is to organize the Commission's complaint procedures so all complaints are handled timely, fairly, and encourage and support the consensual resolution of complaints. To this end, the NOPR would make several significant revisions to the Commission's procedural rules.

First, the NOPR would require complainants to provide significantly more information than they have to adduce under existing rules. The current rules (Rule 206 of the Commission's general Rules of Practice and Procedure, 18 C.F.R. section 385.206; Oil Pipeline Procedures at 18 C.F.R. section 343.2(c)) require only a general statement of complaint. The proposed rules would require the filing of more specific information, including quantification of the financial, operational, and practical impacts the complainant alleges result from the activity or inactivity that is the subject of the complaint. The complainant would also include a claim for the "specific relief" that the complainant deems itself entitled.

1. Notice of Proposed Rulemaking, *Complaint Procedures*, 63 Fed. Reg. 41,982 (1998) (to be codified at 18 C.F.R. pts. 1b, 343, and 385) (proposed July 29, 1998).

Second, the proposal would require the filing of an answer to the complaint within ten days of the date of filing, rather than the thirty day period allowed by the present rules. In addition, the Commission stated in the NOPR that it proposes to strictly enforce Rule 213 which requires an answer "[a]dmit or deny, specifically and in detail, each material allegation of the pleading answered; . . . and set forth every defense relied on."²

Third, the NOPR proposes three different procedural paths the Commission could follow to resolve issues raised in complaints. The first would consist of a Commission decision, on the merits, based entirely upon the pleadings. If the Commission chose this alternative, it would endeavor to issue an order in sixty to ninety days after the answer is filed. If a complaint does not lend itself to a decision based solely upon the pleadings, the Commission could order an expedited hearing before an ALJ, convene a conference, or assign the complaint to an appropriate ADR procedure. In this case, the Commission would attempt to issue an order selecting one of these procedures within thirty days of the filing of an answer. If the parties to a complaint proceeding agree to use ADR under the auspices of the Commission, then the Commission would direct the complaint to be resolved using an alternative dispute resolution technique.

In addition, the NOPR asked for comments regarding: (1) whether use of ADR or other informal procedures, such as use of the Commission's Enforcement Hotline, should be made mandatory prior to the filing of a formal complaint; (2) whether the Commission, in a limited and well-defined category of cases, should delegate authority to adjudicate complaints to an Office Director who would prepare a Letter Order of issuance by the Commission; (3) whether the Commission should resolve requests for interim relief by assigning a case to an ALJ, who would hold an oral argument to determine whether to issue an order to preserve the status quo pending the final decision on the complaint; and (4) whether special procedures should be instituted in cases where small-business customers allege harm or there is a small amount of money in controversy.

Comments regarding the NOPR were due on October 5, 1998. The comments, filed by a cross-section of the electric, natural gas, and oil industries, generally favored adoption of the proposed rules with a few pertinent exceptions. The most controversial aspect of the NOPR is the ten-day deadline to file an answer to a complaint. A number of gas and electric trade associations argued that the ten-day period would be insufficient time to prepare an answer. Another group supported the ten-day response time, provided extensions are granted when necessary.

II. PROPOSED OFF-THE-RECORD COMMUNICATIONS RULES

During 1998, the Commission proposed to revise its rules concerning communications between persons outside the Commission and the Commission and its employees, otherwise referred to as *ex parte* rules.³ The Commission

2. 18 C.F.R. § 385.213 (c)(2)(i)-(ii) (1998).

3. Notice of Proposed Rulemaking, *Regulations Governing Off-the-Record Communications*, F.E.R.C. STATS. & REGS. ¶ 32,534, 63 Fed. Reg 51, 312 (1998) (codified at 18 C.F.R. pt. 385) (proposed Sep. 25, 1998) [hereinafter *Ex Parte NOPR*].

viewed its current rules as needlessly complex and confusing, and providing inadequate guidance to the public and its staff, partially due to the existence of two separate regulations governing *ex parte* communications. The procedural regulations controlling off-the-record communications in all Commission proceedings, with the exception of oil pipeline cases, are set forth in Rule 2201 of the Commission's Rules of Practice and Procedure.⁴ Alternatively, off-the-record conversations within proceedings related to the Commission's economic regulatory jurisdiction over oil pipelines, inherited from the Interstate Commerce Commission, are set forth in a second separate *ex parte* procedural regulation, Rule 1452.⁵ The proposed changes to the Commission's *ex parte* communication regulation will eliminate Rule 1415 in its entirety and subsequently apply the revised Rule 2201 to all proceedings under the Commission's economic regulatory jurisdiction.

The Commission indicated that its current rules also fail to adequately reflect the Administrative Procedure Act's *ex parte* prohibitions.⁶ The proposed rule distinguishes between formal proceedings and more informal regulatory activities, by affirming that *ex parte* communication restrictions apply to all "docketed" Commission matters, except for investigations instituted under Part 1b of its regulations, which involve a party or parties as defined in Rule 102.⁷ The proposed rules would apply to all adjudicated proceedings facing the Commission. The rules, however, would not apply to informal, notice and comment, rulemaking proceedings, any other proceeding not recognizing any formal party status, pure technical or policy proceedings, and conferences intended to either inform the public or solicit input from the regulated industries on issues of interest to the Commission.

All "off-the-record" communications relevant to the merits of a Commission on-the-record proceeding between a party or parties and the Commission's decisional employees would be prohibited.⁸ The prohibitions would apply regardless of who initiated the communication—a Commission decisional employee or a person outside the Commission. The communication could be either oral or written, including e-mail. These prohibitions and restrictions essentially apply to all contested on-the-record adjudications and similar cases required by statute to be decided on-the-record. The proposed changes would not attach to purely procedural inquiries concerning intervention procedures or the number of copies of a pleading to file. However,

4. 18 C.F.R. § 385.2201 (1998).

5. 18 C.F.R. § 385.1415 (1998).

6. 5 U.S.C. § 559 (1994).

7. 18 C.F.R. § 385.102 (1998).

8. Notice of Proposed Rulemaking, *Regulations Governing Off-the-Record Communication*, 63 Fed. Reg. 51,132 at 51,320 (1998) (to be codified at 18 C.F.R. pt. 385) (proposed Sep. 25, 1998). A "decisional employee" would be defined under existing regulation to mean "a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of a particular proceeding . . ." The revised definition is intended to clarify that it would not apply to members of the trial staff or their supervisors, a settlement judge under 18 C.F.R. § 385.603, a neutral in an alternative dispute resolution proceeding, or an employee designated as non-decisional for a particular case. *Id.*

specifications concerning whether to hold a hearing or the timing of a decision are considered highly relevant to the merits of a decision and would be prohibited under the proposed rules.⁹

The revisions to current *ex parte* Commission restrictions set forth in the proposed Rule 2201 retain the important condition precedent of application solely to "contested" administrative proceedings. Under the existing rule, the "contested" nature of a proceeding will attach after the submission of a protest or a petition or notice of intervention in opposition to a request for Commission action.¹⁰ The proposed *ex parte* rules governing off-the-record communications are triggered after the filing of a pleading formally styled and captioned a protest or intervention in opposition in a docketed proceeding. The Commission may also consider pleadings not formally styled protests or petitions in opposition to an application as sufficient to commence the application of the revised Rule 2201 restriction. This would be based upon the substance of the arguments, positions, or issues raised in the body of the document.

Since the proposed regulations would not apply in a particular proceeding until a complaint is filed with the Commission, or a protest or intervention in opposition to a proceeding is initiated by a person outside the Commission, any communication with the Commission prior to commencement of processing the disposition of a contested proceeding would not be prohibited. The prohibitions would end with final disposition of the proceeding by the Commission or with the effective withdrawal of all opposition, a complaint, or all protests to a proceeding.

The proposed rule lists ten exceptions to the general prohibition against off-the-record communications:¹¹

- 1) Off-the-record communications do not include those required for the disposition of *ex parte* matters as authorized by law, or permitted by Commission rule or order in a particular proceeding. Prohibited communications are not intended to cut an agency off from the general information it needs to carry out its regulatory affairs.
- 2) The Commission may engage in off-the-record communications with respect to emergencies, subject to disclosure.¹²
- 3) The Commission is free to take notice of its own decisions as well as published decisions of jurisdictional and other administrative tribunals. The Commission Staff would be permitted to explain events such as actions that courts or the Commission have taken and to objectively describe issues before the Commission.
- 4) Pre-filing communications would be permitted.
- 5) Communications which all parties agree may be made would be permitted.

9. 18 C.F.R. § 385.2201(c)(6)(i) (1998). See *Ex Parte NOPR*, *supra* note 3, at 33,502-03

10. 18 C.F.R. § 385.2201(a) (1998).

11. 18 C.F.R. § 385.2201(d) (1998).

12. The communications would be placed in the public record and noticed, providing an opportunity for review and comment. 18 C.F.R. § 385.2201(g)(1)(i) (1998).

- 6) Written communications from non-party elected officials acting in their official representative capacities would be permitted, but with a disclosure requirement.¹³
- 7) Where an order is pending rehearing, off-the-record communications on issues relating to compliance with other conditions would be permitted.
- 8) Off-the-record communications would be permitted with interceders who are federal, state, or local agencies that have no official interest in, or are not affected by, the outcome of a proceeding to which the communication relates, subject to a disclosure requirement.¹⁴
- 9) Off-the-record communications would be required to comply with the National Environmental Policy Act, and implementing regulations issued by the Council on Environmental Quality and the Commission would be permitted, subject to a disclosure requirement.¹⁵
- 10) Off-the-record communications involving individual, non-party landowners, whose property may be affected by a pending proceeding, would be permitted, subject to a disclosure requirement.¹⁶

When a prohibited off-the-record communication is made, the Commission's decisional employee, who made or recorded such prohibited communication, would be required to deliver a copy of any written communication, or a summary of the substance of any oral communication, to the Secretary for inclusion in the public record associated with, but separate from, the decisional record in the proceeding.¹⁷ The Secretary would periodically issue a notice of such prohibited communications, but, unlike existing procedure, would not serve the material placed in the public file on all parties to the existing proceeding.¹⁸ Any party, however, may file a response on the record.¹⁹

Finally, the Commission proposes to add disqualification, suspension from practice, or appearance before the Commission to the current list of sanctions for a prohibited communication in existing Rule 2201.²⁰

III. ALTERNATIVE DISPUTE RESOLUTION IS BECOMING MORE PROMINENT AS A MEANS OF RESOLVING ENERGY/PUBLIC UTILITY DISPUTES

Alternative Dispute Resolution has been used for many years in administrative cases. The settlement process involved in the typical FERC rate

13. 18 C.F.R. § 385.2201(g)(1)(ii) (1998).

14. 18 C.F.R. § 385.2201(c)(6)(i) and 18 C.F.R. § 385.2201(g)(1)(iii). *Ex Parte NOPR*, *supra* note 3, at 35,508. This generally would apply to requests for information by the Commission or its Staff or a matter over which the other federal, state, or local agency shares regulatory jurisdiction with the Commission. To the extent such communications do not compromise the procedural rights of the parties or the integrity of the Commission's decisional record, any actual information obtained through the off-the-record communication and relied upon by the Commission in reaching its decision would be placed in the public record.

15. 18 C.F.R. § 385.2201(g)(1)(iv) (1998).

16. 18 C.F.R. § 385.2201(g)(1)(v) (1998).

17. 18 C.F.R. § 385.2201(f) (1998).

18. *Id.*

19. 18 C.F.R. § 385.2201(g)(2) (1998).

20. 18 C.F.R. § 385.2201(h)(1) (1998). *See also Ex Parte NOPR*, *supra* note 3, at 33,511.

case lends itself to the ADR-type settlement process. In 1996, Congress continued its prior grant of authority to federal agencies to use alternative dispute resolution to resolve agency disputes.²¹ The ADR Act of 1996 repealed a sunset provision that would have terminated the authority of federal agencies to use ADR after October 1, 1995, except for certain pending proceedings.²² The Act directed each agency to “adopt a policy that addresses the use of alternative means of dispute resolution and case management.”²³ The Act further directed each agency to consult with the agency or interagency committee designated by the President to “encourage and facilitate agency use of alternative means of dispute resolution.”²⁴

On May 1, 1998, President Clinton issued an Executive Memorandum that established an interagency working group.²⁵ The interagency working group was designated as “[the] interagency committees to facilitate and encourage agency use of alternative means of dispute resolution” under title 5, section 573(c) of the United States Code.²⁶ The Executive Memorandum directed agencies to “promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques.”²⁷ The FERC has participated in the interagency task force established under this Presidential directive.

Furthermore, on June 11, 1998, the FERC announced plans to restructure the agency in an initiative known as “FERC First!”²⁸ One of the purposes of this major initiative was to further implement the FERC’s ADR capabilities.²⁹ The FERC expressly stated as one of the objectives the desire to “[s]ignificantly [expand] use of consensual decision-making emphasized by greater reliance on alternative dispute resolution (ADR) techniques.”³⁰

During 1998, the FERC appeared willing to direct the use of ADR in cases where it believed such a procedure might be useful.³¹ In *Houston Lighting & Power Co.*, the FERC stated that “as a general rule [it] prefer[s] that parties resolve disputes on their own, or with the help of a mediator, and thus eliminate the need to bring disputes to [the Commission].”³²

21. Alternative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (1998).

22. *Id.*

23. Alternate Dispute Resolution Act of 1996 § 3(a), Pub.L. No. 101-552, 110 Stat. 3871 (1996), as amended by § 4(a), Pub.L. No. 104-320.

24. 5 U.S.C. § 573 (c)(1) (1998).

25. Presidential Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 34 WEEKLY COMP. PRES. DOC. 749 (May 1, 1998) [hereinafter *Presidential Memorandum*].

26. *Id.*

27. See *Presidential Memorandum*, *supra* note 25, at 749.

28. FERC Media Release, *Commission Plans Major Changes To Keep Pace With Regulated Industries*, (last modified June 11, 1998) <<http://www.ferc.fed.us/news1/pressreleases/ferc1st.htm>> [hereinafter *Media Release*].

29. *Id.*

30. See *Media Release*, *supra* note 28, at 6.

31. See, e.g., *Wisconsin Pub. Power Inc. Sys. v. Wisconsin Pub. Serv. Corp.*, 83 F.E.R.C. ¶ 61,198 (1998) (where the FERC directed the use of ADR to develop procedures for handling transmission disputes).

32. 83 F.E.R.C. ¶ 61,181 at 61,745 (1998); see also *California Power Exch. Corp.*, 82 F.E.R.C. ¶ 61,325 (1998) (parties other than ISO must be allowed to initiate ADR procedures); *Cambridge Elec. Light Co.*,

The FERC has shown a willingness to look at other ways to formalize procedures that allow for the informal resolution of disputes. In 1998, the Commission issued a Notice of Proposed Rulemaking on the use of a “collaborative process” in pipeline construction projects.³³ These proposed regulations would offer applicants an opportunity to participate in a pre-filing consultation process to resolve significant issues prior to the submission of an application.³⁴

The FERC’s initiatives during 1998 evidence the agency’s clear objective of encouraging informal resolution of disputes. The FERC First! project and the FERC’s participation in the interagency task force are on-going. Against the backdrop of the ADR Act of 1996 and the Executive Memorandum of May 1, 1998, the FERC’s effort is part of a comprehensive effort to encourage agency use of ADR.

IV. PRACTICE TIPS

A. *Summary Disposition*

The Commission and its ALJ staff disposed of a number of issues in 1998 through the “summary judgment” procedure of Rule 217.³⁵ Promulgated in Order No. 225, Rule 217 responds “to the need to expedite proceedings.”³⁶

Rule 217 sets forth a rule for summary disposition applicable to proceedings set for hearing under Subpart E of title 18, part 385 of the Code of Federal Regulations, or where the Commission is the deciding authority. Rule 217 does not apply to staff actions delegated under Part 375 of the Regulations. “The summary disposition rule deals with decisions *on the merits* in pending cases.”³⁷

Because it disposes of issues on the merits before trial, Rule 217 resembles Rule 56 of the Federal Rules of Civil Procedure (FRCP).³⁸ The analysis prompted by a motion for summary disposition proceeds through the following steps: 1) the party opposing the motion must have had an opportunity to present evidence in support of its position; 2) the decisional authority must evaluate all evidence in the light most favorable to the party opposing the motion; and 3) the

84 F.E.R.C. ¶ 61,049 at 61,221-22 (1998) (the Commission encourages use of ADR procedures but the parties must agree, among other things, on the circumstances under which they will invoke them).

33. Notice of Proposed Rulemaking, *Collaborative Procedures for Energy Facility Applications*, IV F.E.R.C. STATS. & REGS. ¶ 32,536, 63 Fed. Reg. 53,853 (1998) (to be codified at C.F.R. pts. 4, 153, 157, 375).

34. *Id.* at 33,579.

35. 18 C.F.R. § 385.217 (1998).

36. Order No. 225, *Revisions of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, F.E.R.C. STATS. & REGS. Preambles ¶ 30,358, at 30,170 (1982).

37. *Id.* at 30,177 (emphasis added).

38. See generally *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (describing “Rule 56 [as] the prototype for administrative summary judgment procedures”). Unlike summary judgment in federal courts, summary disposition at the Commission remains within the discretion of the decisional authority, even if the moving party satisfies the prerequisites of Rule 217. See, e.g., *Transcontinental Gas Pipe Line Corp.*, 76 F.E.R.C. ¶ 63,009, at 65,040 (1996) (“Commission rule 217(b) is permissive. Even if there were no genuine issues of material fact, the decisional authority need not grant summary disposition.”).

evaluation must not reveal any genuine dispute over material facts that would make a full trial necessary.³⁹ The Commission and its ALJs had an opportunity during 1989 to address the application of each of the steps inherent in the summary disposition process in a number of cases.

Before granting a Motion for Summary Disposition, the decisional authority must afford the party opposing the motion an opportunity to present evidence. Because its actual construction costs exceeded forty-one percent of the estimate relied on in an earlier certificate order of the Commission, the KN Interstate Gas Transmission Company (KN Interstate) lost the presumption of rolled-in pricing for its Pony Express Pipeline.⁴⁰ The Commission set the issue of the appropriate pricing for the new pipeline transportation service issue for hearing in Docket Nos. RP98-117-000 and RP98-90-001. The ALJ granted a Motion for Summary Disposition filed after KN Interstate failed to supplement, despite "every opportunity," the direct testimony submitted to the Commission. The ALJ found that KN Interstate could not establish a *prima facie* case for roll-in of the costs because: (1) the direct testimony, even evaluated in the light most favorable to KN Interstate, did not satisfy the burden of proof required under the Pricing Policy Statement; and (2) fairness to all the parties precluded KN Interstate from supplementing its testimony during the rebuttal case.⁴¹

In determining the existence of a genuine issue of material fact, the decisional authority is required to view the evidence in the light most favorable to the party opposing the motion. The Commission has granted summary disposition in a number of cases over the objection of the Public Service Commission of the State of New York (PSCNY), where the PSCNY challenged the Commission's preference for pipeline rates designed according to the straight-fixed variable method.⁴² PSCNY argued that its direct testimony must be accepted as true for the purpose of deciding whether genuine issues of material fact exist to be further liquidated. In a procedural scenario where a Motion for Summary Disposition is opposed, the party contesting the motion bears the evidentiary burden to *demonstrate* the factual premises on which it relies, not merely to *raise* the issue. Without the ability to proffer any evidence specifically demonstrating those factual premises, "there is nothing 'to take as true.'"⁴³ The concept of taking evidence as true confuses the standard for a Motion for Summary Disposition with the standard for a Motion to Dismiss under the Federal Rules of Civil Procedure.⁴⁴ As explained by Article III courts,

39. *Columbia Gas Transmission Corp.*, 85 F.E.R.C. ¶ 61,041 (1998), *reh'g denied*, 85 F.E.R.C. ¶ 61,427 (1998); *CNG Transmission Corp.*, 85 F.E.R.C. ¶ 61,033 (1998), *reh'g denied*, 85 F.E.R.C. ¶ 61,443 (1998).

40. *KN Interstate Gas Transmission Co.*, 82 F.E.R.C. ¶ 61,186 (1998).

41. *KN Interstate Gas Transmission Co.*, 85 F.E.R.C. ¶ 63,004 (1998), *exceptions docketed*, F.E.R.C. Docket Nos. RP98-117-003-004.

42. *See, e.g., Columbia Gas Transmission Corp.*, 83 F.E.R.C. ¶ 63,005 (1998), *aff'd*, 85 F.E.R.C. ¶ 61,041 (1998), *reh'g denied*, 85 F.E.R.C. ¶ 61,427 (1998); *CNG Transmission Corp.*, 83 F.E.R.C. ¶ 63,013 (1998), *aff'd*, 85 F.E.R.C. ¶ 61,033 (1998), *reh'g denied*, 85 F.E.R.C. ¶ 61,433 (1998).

43. *Columbia Gas Transmission Corp.*, 83 F.E.R.C. ¶ 63,005 (1998).

44. *Compare, e.g., United States v. Mississippi*, 380 U.S. 128, 143 (1965) ("As a general ground for dismissal, the District Court held that the complaint failed to state a claim upon which relief could be granted.

these motions place differing burdens upon the parties at various times during litigation.⁴⁵ While the Rule 217 entitles the party opposing the motion to favorable inferences from the evidence of record, it does not, however, entitle that party to rest on the presumed truth of its factual allegations.

Rule 217 conditions the granting of summary disposition on the absence of any genuine issue of fact material to a decision on the merits. "Materiality" aims at legal relevance, namely, which facts the governing legal rule makes relevant to the dispute; "genuineness," on the other hand, measures the quantum and quality of proof.⁴⁶ The elements of the governing legal standard essentially define the material facts. Even assuming the party opposing summary disposition cites material facts in the record, that party must also demonstrate that the dispute over these facts amounts to a genuine issue. The decisional authority must evaluate the evidence through the lens of the standard of proof that the party opposing the motion must satisfy to prevail. The U.S. Supreme Court is "convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."⁴⁷ The higher the standard of proof, the less likely the material evidence raises a genuine issue (i.e., the more likely a grant of summary disposition).⁴⁸

Although uncommon, the process of the summary disposition of contested administrative proceedings pending at the Commission serves a number of goals. Commission litigants should avail themselves of this useful procedural device and press Rule 217 into service to test the merits of their opponents' claims. First, nothing in Order No. 225 suggests that Rule 217 should be handled with extreme care. Summary disposition was among "the procedural innovations already recognized *de facto* by the bar and the Commission."⁴⁹ Second, the complexity of issues before the Commission and ALJs pose no obstacle to summary disposition. Complexity is relative, and both the Commission and ALJs possess the expertise to resolve these issues. In any event, "summary judgment practice does not become disfavored simply because a case is complex."⁵⁰ Third, the volume and character of cases before the Commission actually supports summary disposition: "[S]ummary judgment often makes especially good sense in an administrative forum," and "[a]n agency's choice of such a procedural device is deserving of deference" during judicial review.⁵¹

In considering the correctness of this ruling the allegations of the complaint are to be taken as true."), *with Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970) ("As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.").

45. See generally *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990).

46. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

47. *Id.* at 252 (emphasis added).

48. See, e.g., *Columbia Gas Transmission Corp.*, 83 F.E.R.C. ¶ 63,005 (1998) (granting summary disposition because the party opposing the motion had failed to produce evidence that would satisfy its heavy burden of proof), *aff'd*, 85 F.E.R.C. ¶ 61,041 (1998), *reh'g denied*, 85 F.E.R.C. ¶ 61,427 (1998).

49. Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings, F.E.R.C. STATS. & REGS. ¶ 30,358, at 30,172 (1982), 47 Fed. Reg. 19,014 (1982) and 47 Fed. Reg. 23,440 (1982).

50. *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995).

51. *Puerto Rico Aqueduct & Sewer Auth.*, 35 F.3d at 606.

Fourth, summary disposition gains validity as the Commission moves toward a complaint-based regime of lighter-handed regulation as reflected in the recent proposed revisions to its existing complaint procedure.⁵² Finally, decisions on motions for summary disposition have the salutary effect of clarifying the legal standards under Commission policies and the evidentiary standards over parties' burdens of proof.

B. *Settlement Procedures*

During 1998, a significant amount of procedural activity occurred concerning the processing of negotiated settlements under Rule 602 of the Commission's Rules for Practice and Procedure.⁵³ The subject of severing individual parties or specific issues from contested settlement offers for separate administrative litigation under subparagraph (h) of Rule 602 received considerable attention both from the Commission and the Judiciary.⁵⁴ Most notable in this procedural area is the December 11, 1998 decision of the United States Court of Appeals for the District of Columbia Circuit, tentatively reversing and remanding a Commission decision in an El Paso Natural Gas Company (El Paso) rate proceeding relating to the Commission's existing policy concerning intervenors designated to have an "indirect" interest in the substantive issues pending in a pipeline rate proceeding.⁵⁵ In *El Paso*, one intervening party was a direct shipper of natural gas on the pipeline pursuant to contracts for firm transportation service while simultaneously existing as an indirect customer of the pipeline through its position as a state jurisdictional retail customer of another direct natural gas local distribution customer.⁵⁶ The Commission considers parties demonstrating an interest in the rates to be established in a pipeline rate proceeding, but not holding a direct contractual relationship with the pipeline, as having an "indirect" interest in a rate proceeding. Indirect customers of a pipeline do not possess a contractual nexus with the pipeline because they do not directly pay the transportation rates established in the pipeline's rate case. This intervenor's interest as a retail customer of a separate state jurisdictional local distribution company, a direct customer of the pipeline, was considered "indirect" as contrasted to the intervenor's own "direct" interest arising from its position as a direct transportation customer of the pipeline. The intervening party contested the proposed settlement to the rate proceeding for both its direct interest as a

52. Notice of Proposed Rulemaking, *Complaint Procedures*, IV F.E.R.C. STATS. & REGS. ¶ 32,532, 33,416, 63 Fed. Reg. 41,982 (1998). ("The Commission's proposal furthers the goals of promoting early resolution of contested matters and complaints."). This new regime will also promote the development of precedent and procedures for motions to dismiss before the Commission. *Id.* at 33,418 ("[A] complainant who fails to meet the Commission's filing requirements runs the risk that its complaint will be dismissed for a failure to meet its burden."). *Id.*

53. 18 C.F.R. § 385.602 (1998).

54. 18 C.F.R. § 385.602(h) (1998).

55. *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116 (1998) (pending action on a Petition For Rehearing and Suggestion For Rehearing *en banc* filed with the court by *El Paso* on January 25, 1999).

56. *El Paso Natural Gas Co.*, 79 F.E.R.C. ¶ 61,028 (1997), *order on reh'g*, 80 F.E.R.C. ¶ 61,084 (1997), *rev'd and remanded*, *Southern Cal. Edison Co.*, 162 F.3d 116 (1998).

pipeline customer and its indirect interest as a state jurisdictional ratepayer of the separate direct customer of the pipeline. The Commission severed the intervening party for separate administrative litigation but only for the scope of its interests as a direct transportation customer of the pipeline and not for its indirect interests as a state retail ratepayer of the other direct customer.⁵⁷ The court ruled that the Commission had not adequately substantiated its decision to distinguish the interest of the intervenor, as a direct pipeline customer, from its indirect interest as a retail state ratepayer of another direct pipeline shipper; as a result, it severed for administrative litigation only the intervenors direct interest related to service received under its own firm transportation service agreement with El Paso.⁵⁸ The court also questioned whether the Commission's decision provided a proper recognition of an indirect customer's interest consistent with the court's own prior decision in *Tejas Power Corporation*.⁵⁹

In a separate administrative proceeding addressing this issue of the appropriate status to be afforded indirect customers of a pipeline decision, the Commission reversed a presiding ALJ's certification of a contested Northwest Pipeline Corporation (Northwest) rate case settlement that would have had the effect of severing both direct customers and a non-customer, indirect interested party from the settlement for further administrative litigation.⁶⁰ In response to the pipeline's settlement offer, the indirectly interested, non-customer of the pipeline filed comments in opposition to the certification of the settlement. The indirect customer's interest in the proceeding was that of a natural gas producer selling gas to certain other direct transportation customers of the pipeline. The ALJ certified the settlement to the Commission as a contested settlement and severed for further litigation on all issues, not only the single contesting, non-customer natural gas producer, but also two direct customers supportive of the pipeline's settlement, which purchased gas from the opposing producer.⁶¹ In reviewing the ALJ's decision to sever both the indirect and direct interest parties from the settlement, the Commission applied the standard reflected in the prior *El Paso* decision and determined that it was unnecessary for the ALJ to establish hearing proceedings solely for a party that would not directly pay the transportation rates established by the settlement.⁶² The Commission determined that a more appropriate procedural alternative was to consider the issues raised by the contesting indirect interest, natural gas producer within a determination of whether to approve the settlement in its entirety rather than severing certain parties for further administrative hearings.⁶³ The Commission emphasized the equitable advantage of maintaining the benefit of the negotiated settlement for all consenting parties by addressing the concerns of the indirect customer in its

57. *Id.* at 61,127-130.

58. *Southern Cal. Edison Co.*, 162 F.3d 116.

59. *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990).

60. *Northwest Pipeline Corp.*, 80 F.E.R.C. ¶ 63,010 (1997).

61. *Id.* at 65,112.

62. *El Paso*, 79 F.E.R.C. ¶ 61,028 (1997), *order on rehearing*, 80 F.E.R.C. ¶ 61,084 (1997), *rev'd and remanded*, *Southern California Edison Co.*, 159 F.3d 636 (1998).

63. *Northwest Pipeline Corp.*, 81 F.E.R.C. ¶ 61,242 (1997), *order denying reh'g*, 83 F.E.R.C. ¶ 61,001 (1998), *order denying reh'g aff'd*, *Pan Alberta Gas, Ltd. v. FERC*, 159 F.3d 636 (1998).

review of the public interest in accepting the settlement. The Commission acted to avoid an unraveling of the agreement that would result in the severing of the two direct shippers and the non-customer, indirect interest party for a separate litigated disposition.⁶⁴ This specific *Northwest* decision has been affirmed by the United States Court of Appeals of the District of Columbia Circuit.⁶⁵

Also, in 1998, the Commission addressed issues relating to retaining confidential protective status for certain information submitted in a settlement agreement. In *Amoco Production Co. & Amoco Energy Trading Co. v. Natural Gas Pipeline Co. of America*, the Commission determined that it would not be in the public interest to retain a confidential protective status for certain information contained in a settlement document that related to gas transportation contracts because the information is required to be filed separately when filed with the Commission.⁶⁶ Pursuant to a protective order, the Commission required the disclosure of settlement terms relating solely to transportation contracts of the parties in the proceeding.⁶⁷ The presiding ALJ, in *Koch Gateway Pipeline Co.*, certified a settlement agreement over the opposition comments of certain parties on the grounds that the issues raised in the opposition comments were strictly policy or legal questions and did not present a genuine issue of material fact.⁶⁸ Finally, in *Trailblazer Pipeline Co.*, the Commission remanded the certification of a contested settlement on the basis that objections to central elements and major substantive portions of a settlement could not be considered minor details and would not necessarily be outweighed by the overall benefits of the total settlement package.⁶⁹ In applying the same procedural rationale, the Commission also remanded a certificated contested settlement back to the ALJ for further negotiation or possible administrative hearings in *Wyoming Interstate Co. Ltd.*⁷⁰

C. Discovery Process

During 1998, the Commission and its ALJs were required to address several procedural issues relating to the Commission's administrative discovery rules.⁷¹ In applying the Commission's authority to assess sanctions for discovery process violations pursuant to title 18 part 385.411 of the Code of Federal Regulations, the presiding ALJ in *Connecticut Yankee Atomic Power Company* proceeding, imposed monetary sanctions on the applicant electric company in the amount of the additional attorney fees incurred by an intervenor as a result of a unexcused delay in the receipt of information requested through a legitimate discovery

64. *Northwest Pipeline Corp.*, 83 F.E.R.C. ¶ 61,001, at 61,003.

65. *Pan Alberta Gas*, 159 F. 3d 636.

66. *Amoco Prod. Co. & Amoco Energy Trading Co. v. Natural Gas Pipeline Co. of Am.*, 82 F.E.R.C. ¶ 61,037 (1998).

67. *Id.* at 61,151.

68. *Koch Gateway Pipeline Co.*, 83 F.E.R.C. ¶ 63,007 (1998).

69. *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,082 (1998).

70. *Wyoming Interstate Co.*, 85 F.E.R.C. ¶ 61,183 (1998).

71. 18 C.F.R. § 385.401-10 (1998).

request.⁷² The ALJ reaffirmed the Commission's policy that an orderly discovery process is essential to achieving the goals of developing a full evidentiary record and the timely resolution of trial-type proceedings. The ALJ also acknowledged that such monetary sanctions are appropriate only as an extraordinary remedy in the clearest cases of violations.⁷³ In an order issued in *El Paso Electric Co.*, the ALJ refused to order the applicant utility to prepare summary studies or a quantification of certain information submitted in support of its application.⁷⁴ The ALJ determined that the request to require the preparation of summary evidence studies was unduly burdensome for the following reasons: 1) no attempt had been made by the intervenor to review other available supporting data; 2) the intervening party had ample opportunity to seek additional information in further discovery; and 3) nothing exists in the Commission's discovery rules that would require an applicant to prepare studies or supplemental reports summarizing evidentiary presentations.⁷⁵ In *KN Interstate Gas Transmission Co.*, the presiding ALJ addressed the appropriate scope of follow-up data requests and ruled that such follow-up discovery generally may embrace whatever matters were covered or failed to be covered in the initial discovery phase.⁷⁶ Furthermore, neither the opportunity to submit follow-up data requests should not be limited to issues raised in the initial discovery phase nor should a party be limited to subject matters addressed in its own prior discovery.⁷⁷ The ALJ emphasized the potential negative effect that a limitation on follow-up discovery may have by forcing all participants to engage in unnecessary and repetitious initial discovery in order to protect their right to engage in supplemental discovery.⁷⁸

D. Complaint Procedures

The Commission during 1998 found cause to address issues relating to its complaint process under Rule 206 of its Rules for Practice and Procedure.⁷⁹ In accepting a complaint filed by the Amoco Production Company and Amoco Energy Trading Company against Natural Gas Pipeline Company of America, alleging violations of marketing affiliate rules, the Commission ordered its Staff to undertake an audit of the pipeline's procedures.⁸⁰ Thereafter, subsequent to the initiation of Staff audit, the original complainants submitted a request to withdraw the complaint under the provisions of Rule 216 of the Commission's Rules for Practice and Procedure.⁸¹ The Commission refused to allow the

72. *Connecticut Yankee Atomic Power Co.*, 81 F.E.R.C. ¶ 63,006 (1997).

73. *Id.* at 65,038.

74. *El Paso Elec. Co.*, 84 F.E.R.C. ¶ 63,008 (1998).

75. *Id.* at 65,079.

76. *KN Interstate Gas Transmission Co.*, 84 F.E.R.C. ¶ 63,011 (1998) (Order establishing principles, ordering informal negotiations, and setting discovery conference).

77. *Id.* at 65,153.

78. *Id.*

79. 18 C.F.R. § 385.206 (1998).

80. *Amoco Prod. Co. & Amoco Energy Trading Co. v. Natural Gas Pipeline Co. of Am.*, 78 F.E.R.C. ¶ 61,313 (1997).

81. 18 C.F.R. § 385.216 (1998).

withdrawal of the complaint proceeding after an opposition to the proposed withdrawal was filed within the requisite fifteen-day time period.⁸² Alternatively, in addressing the minimum substantive requirements necessary for the acceptance of a complaint, the Commission declined to open an investigation concerning certain charges made in *New Energy Venture Inc. v. Southern California Edison Company and Edison Source*.⁸³ In dismissing the complaint, the Commission concluded that the complainant party had presented no evidence of any violation by the respondent and that mere allegations of disputed facts are insufficient to justify the initiation of an investigation by the Commission.⁸⁴

E. Rehearing-Stay

During 1998, the Commission rendered several decisions concerning its rehearing process and the appropriateness of issuing a stay of the effectiveness of an order. In the relicensing of a hydroelectric project, the Commission declined to grant a stay of its license order in Project No. 2494-008, pending the opportunity for submission of a rehearing.⁸⁵ In reviewing requests to stay the effectiveness of its decisions, the Commission reaffirmed that it has the authority to grant a stay if justice so requires and to prevent the irreparable harm consistent with the provisions of the Federal Administrative Procedure Act.⁸⁶ The Commission determined that the existence of potential pecuniary losses alone is not to be considered irreputable harm under this standard.⁸⁷ In addressing a request to stay its decision in *New England Power Pool*, the Commission again declined to stay the effectiveness of its order on the basis of claims of potential financial burden to an intervening party.⁸⁸ The Commission stated that absent a sufficient threat to the existence of the parties' business, pure economic losses would not justify the stay of a final Commission order.⁸⁹ Finally, the Commission clarified the procedural standing necessary for the submission of a request for a rehearing and/or request to stay in its decision in *Southwest Power Pool, Inc.*⁹⁰ In reviewing a request for rehearing submitted by a trade association representing the interest of its numerous members, the Commission determined that only the individual member of the organization that was an intervenor party of record in the proceeding had the legal standing necessary to request a rehearing of the Commission's decision.⁹¹

F. Administrative Hearings

82. *Amoco Prod. Co. & Amoco Energy Trading Co. v. Natural Gas Pipeline Co. of Am.*, 82 F.E.R.C. ¶ 61,038 (1998).

83. *New Energy Ventures, Inc. v. Southern Cal. Edison Co. and Edison Source*, 82 F.E.R.C. ¶ 61,335 (1998).

84. *Id.* at 62,325.

85. *Puget Sound Energy, Inc.*, 82 F.E.R.C. ¶ 61,142 (1998).

86. 5 U.S.C. §705 (1994).

87. *Puget Sound Energy, Inc.*, 82 F.E.R.C. ¶ 61,142, at 61,526.

88. *New England Power Pool*, 84 F.E.R.C. ¶ 61,315 (1998).

89. *Id.* at 62,418.

90. *Southwest Power Pool, Inc.*, 85 F.E.R.C. ¶ 61,031 (1998).

91. *Id.* at 61,098.

In considering an order on remand by the United States Court of Appeals for the District of Columbia Circuit,⁹² the Commission undertook the opportunity to address its basic purpose of convening public evidentiary hearings. The Commission announced, in *Jack J. Grynberg*, that the purpose of its evidentiary public hearing process is to compile a full factual record to permit the resolution of the issues raised in a case.⁹³ The Commission determined that because it did not have a complete understanding of the factual circumstances surrounding the proposed retroactive abandonment of an interstate natural gas sales obligation, it was necessary in this proceeding to issue an order establishing hearing procedures to address the factual issues on remand from the court.⁹⁴ In *Long Island Lighting Co.*, the Commission reviewed its authority to reopen the record of a proceeding under Rule 716 of its Rules for Practice and Procedure.⁹⁵ The Commission clarified that its Rule 716 reopening remedy applies only to proceedings that have been previously set for evidentiary hearings and that a condition precedent for the submission of a request to re-open the record of any proceeding is the prior establishment of evidentiary hearings in the docket.⁹⁶

G. Intervention

In a January 16, 1998 order granting rehearing in *Columbia Gas Transmission Corp.*, the Commission announced its general policy of considering the issuance of an order on the merits of a proceeding as the logical cutoff point for granting requests for late intervention.⁹⁷ The acknowledged exception to this general rule is where a party presents a compelling reason to justify an intervention at a late stage of a proceeding. The Commission granted a late intervention subsequent to its issuance of a certificate for the expansion of an existing pipeline to a number of individual property owners that were affected by a proposed storage field based upon the following circumstances: 1) the construction activity proposed in the certificate application would affect the property of the late intervenors; and 2) the intervenors claimed to not have been contacted or to have received actual notice of the proposed construction project.⁹⁸ In *USG Pipeline Co.*, the Commission was required to clarify the procedural status of a number of parties submitting requests for rehearing who had not obtained prior intervenor status in the underlying proceeding.⁹⁹ The Commission accepted the petitions for rehearing from the non-party entities as implied requests for late intervention filed under Rule 214 of its Rules For Practice and Procedure.¹⁰⁰ For the purpose of processing these substantive rehearing portions of the pleading filed by the non-party petitioners, the Commission granted late

92. *Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297 (1997).

93. *Jack J. Grynberg*, 82 F.E.R.C. ¶ 61,233 (1998).

94. *Id.* at 61,895.

95. 18 C.F.R. § 385.716(c) (1998).

96. *Long Island Lighting Co.*, 82 F.E.R.C. ¶ 61,216, at 61,848 (1998).

97. *Columbia Gas Transmission Corp.*, 82 F.E.R.C. ¶ 61,033 (1998).

98. *Id.* at 61,130.

99. *USG Pipeline Co.*, 82 F.E.R.C. ¶ 61,117 (1998).

100. 18 C.F.R. § 385.214(d) (1998).

intervention to these petitioners on the grounds that such action would not disrupt the proceeding or prejudice any existing party of record.¹⁰¹

H. Testimony and Evidence

During 1998, the Commission's ALJs were presented with several opportunities to rule on the appropriateness of evidentiary submissions in administrative hearings including the merits of motions to strike evidence and pleadings under Rule 509 of the Commission's Rules For Practice and Procedure.¹⁰² In *Equitrans, L.P.*, the presiding ALJ granted a motion to strike pre-filed testimony at an early stage in the proceeding on the basis that a prompt ruling on the motion would eliminate potential unnecessary discovery relating to the subject matter of the testimony.¹⁰³ In *El Paso Electric Company's* open-access proceeding, the ALJ granted a motion to strike portions of a post-hearing brief that included materials not within the evidentiary record of the administrative litigation.¹⁰⁴ In *Union Electric Co. and Central Illinois Public Service Co.* proceeding, the same ALJ also ruled in favor of a motion to strike certain pre-filed testimony and attached exhibits that were determined to be addressing issues outside of the scope of the hearing established by an earlier procedural ruling.¹⁰⁵ The presiding ALJ in the *New York State Electric and Gas Corporation* proceeding denied a motion to strike testimony containing information allegedly related to negotiations underlying a settlement due to the fact that the Commission had previously determined that the earlier settlement agreement in question was ambiguous and inconsistent with a prior agreement.¹⁰⁶ A request to submit surrebuttal evidence was denied by the presiding ALJ in an *El Paso Natural Gas Co.* general rate proceeding, due to the fact that the consideration of additional testimony would unduly delay the completion of the hearing process and because the moving party would have ample opportunity to cross-examine the opposition witnesses sponsoring rebuttal testimony relating to the issues to be addressed in the proposed surrebuttal testimony.¹⁰⁷

101. *USG Pipeline Co.*, 82 F.E.R.C. ¶ 61,117 at 61,424.

102. 18 C.F.R. § 385.509 (1998).

103. *Equitrans, L.P.*, Docket Nos. RP97-346-000 and TM97-3-24-000 (Feb. 11, 1998) (Morriss, J.).

104. *El Paso Elec. Co.*, Docket No. OA96-200-000 (Apr. 14, 1998) (Young, J.).

105. *Union Elec. Co. and Cent. Ill. Pub. Serv. Co.*, Docket No. EL98-1-000 (Apr. 21, 1998) (Young, J.).

106. *New York State Elec. and Gas Corp.*, Docket Nos. ER97-2353-000 and ER97-2353-002 (July 14, 1998) (Dowd, J.).

107. *El Paso Natural Gas Co.*, Docket No. RP95-363-002 (Apr. 2, 1998) (Levant, J.).

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