

Report of the Committee on Rules of Practice and Procedure

During the last year the FERC has been very active in promulgating or proposing new rules of practice and procedure. The Commission has issued a final rule permitting the designation of settlement judges (Order No. 32, "Amendment to Section 1.18 of the Rules of Practice and Procedure", 45 FR 45,902 (July 8, 1980)). Additionally, the Commission has issued two important Notices of Proposed Rulemaking:

- Docket No. RM78-22 (Part 7)—Rules Relating to Trial-Type Hearings;
- Docket No. RM80-60—*Ex Parte* and Separation of Function Rules.

Final Rules have not been issued in these two rulemakings. Also, final rules are still awaited in Docket No. RM78-15, regarding investigation procedures.

I. SETTLEMENT PROCEDURES

In its final rule issued on June 23, 1980, the FERC supplemented its existing settlement procedures contained in Section 1.18 of its Rules of Practice and Procedure by providing for the appointment of settlement judges. A settlement judge has authority to schedule and preside over conferences and settlement negotiations. If a case has been set for hearing, the parties may seek to obtain the appointment of a settlement judge by filing a motion with the presiding judge or, if a presiding judge has not been appointed, with the Chief Administrative Law Judge.

No later than thirty days after his appointment, a settlement judge is required to submit a report regarding the status of settlement negotiations and an evaluation as to settlement prospects. The settlement negotiation procedure will be terminated by order of the Chief Administrative Law Judge after consultation with the settlement judge. Decisions concerning the appointment of a settlement judge or the termination of the settlement negotiation procedure are not subject to review by, appeal to, or rehearing by the presiding judge, the Chief Administrative Law Judge or the Commission.

The Commission emphasized that settlement judges could be sought for proceedings in which the records have been closed and submitted to the Commission for decision. In such cases, the motion for appointment of a settlement judge would have to be filed with the Commission.

II. REVISION OF FERC RULES OF PRACTICE AND PROCEDURE FOR TRIAL-TYPE PROCEEDINGS

On May 9, 1981, the FERC issued a Notice of Proposed Rulemaking, in Docket No. RM78-22 (Part 7), to revise the Commission's rules of practice and procedure governing the conduct of trial-type proceedings. The Commission is currently operating under rules inherited from the Federal Power Commission and the Interstate Commerce Commission.

Revision of the FERC rules of practice and procedure began in 1978. The FERC established an Advisory Committee on Revision of Rules of Practice and Procedure. One of the subcommittees of the Advisory Committee was asked to focus on hearing procedures. The work product of the subcommittee is the subject

of the Notice of Proposed Rulemaking issued in Docket No. RM78-22 (Part 7). The organizational changes which are proposed in the Notice are the second major set of organizational changes in the Commission's rules of practice and procedure. The first occurred in March, 1980, when rules relating to the Commission's internal management were consolidated and placed in a new Subchapter W of Title 18 of the Code of Federal Regulations.

The Notice of Proposed Rulemaking in Docket No. RM78-22 (Part 7) would add a new Subchapter X to Title 18. This new subchapter would contain all of the Commission's rules concerning interaction between the Commission and the public. Thus, the Commission's rules of practice and procedure which were formerly contained in 18 C.F.R. Part 1 would now be placed in Part 385 of the new Subchapter X.

A primary purpose of the proposed rules is to establish uniform procedures for proceedings arising under the various statutes administered by the Commission. Thus, under the proposed rules, generally applicable Commission procedures would apply to oil pipeline proceedings. There would be two exceptions: the ICC *ex parte* rule and the ICC modified procedures rule would remain applicable to oil pipeline matters until a further FERC notice of proposed rulemaking is issued to revise the rules on these subjects. Other purposes of the Notice of Proposed Rulemaking are to reorganize the existing rules of practice and procedure and, in the process of reorganization, to revise the rules with the general aim of expediting FERC proceedings.

In the Notice of Proposed Rulemaking, many of the Commission's existing rules of practice and procedure are simply renumbered and placed in part 385 without any substantive changes. Among these are rules regarding Commission review of remedial orders, rules regarding FERC review of denials of adjustment requests by DOE, rules regarding petitions for adjustments under the NGPA, rules regarding cooperative procedures with state commissions, and rules on appearance and practice before the FERC.

There are several important aspects of the rules of practice and procedure which were specifically left for future notices of proposed rulemaking. The Commission stated that new discovery rules are currently being developed. Pending promulgation of the new rules, the existing rules on subpoenas and depositions would be continued. Also, the Commission stated that it was "tentatively considering" the possibility of reworking its rules on evidence (examination of witnesses, preparation of written testimony, exhibits, admissibility of evidence) to conform its rules more closely with the *Federal Rules of Evidence*.

There are a number of procedural rules which are not only renumbered but are, also, extensively revised in the March 9, 1981 Notice. These include: definitions; rules regarding pleadings, tariff rate filings, orders to show cause, intervention and summary disposition; rules regarding the conduct of hearings; rules regarding settlement procedures; rules regarding decisions by presiding judges and the Commission; and rules establishing the formal requirements for filing and proceedings before the Commission.

A. Rules Regarding Pleadings, Tariff and Rate Filings, Orders to Show Cause, Intervention, and Summary Disposition.

Under the proposal, Sections 1.5 to 1.12 of the present Rules of Practice and Procedure would be replaced by a new Subpart B of Part 385. This subpart contains general rules governing tariff and rate filings, applications, complaints, petitions, protests to oil pipeline valuations, orders to show cause, protests, motions, answers, interventions, amendments, withdrawal of pleadings, and summary dispositions. Generally, the proposed rules reflect current pleading requirements and Commission practice. There are a number of differences, however.

1. Intervention

The rule that would be most changed from current practice is that governing intervention. The proposed rule would make intervention automatic when there is no opposition. Additionally, the rule contains stricter standards for late intervenors. Under the proposed rule, it is required that the grant of intervention to a late intervenor shall not be the basis for delaying any procedural schedule established prior to the late intervention. The presiding judge may impose limitations on the participation of a late intervenor, and the late intervenor is required to accept the record of the proceeding as it was developed prior to his intervention.

Under a new provision, the Secretary of Energy may become a party to a Commission proceeding by filing a notice of intervention which may not be opposed. If the notice is filed late, the Secretary must state his position on the issues in the proceeding.

While state commissions are, as under current rules, permitted to become parties to a proceeding by filing notices of intervention, there is a different provision governing state commissions which file late. A state commission filing to intervene out of time will be treated like any other person seeking to intervene. Thus, the state commission must file a motion to intervene in which it states its position on the issues and states its interest in sufficient detail to demonstrate that it may be directly affected by the outcome of the proceeding or that its participation is in the public interest. Additionally, the state commission which files late must show good cause why the time limitation on intervention should be waived.

2. Complaints

The proposed Rule 206 modifies in some regards the rules regarding the filing of complaints. For example, while under the present rules the person against whom a complaint is directed is "called upon" to satisfy the complaint or to answer the complaint within thirty days, in the proposed rules the person against whom the complaint is directed to respond to the complaint by filing an answer.

The proposed rule on complaints is similar to the current rule in that a complainant is automatically a party to the complaint proceeding, while the respondent does not appear to have automatic status as a party. Presumably, the respondent must file a petition to intervene. Additionally, similar to the current

rule, the proposed rule does not differentiate between (1) complaints tendered under authority of section 306 of the Federal Power Act or Section 13 of the Natural Gas Act regarding "anything done or omitted to be done . . . in contravention of the provisions" of the Federal Power Act or Natural Gas Act and (2) complaints tendered under Section 206 of the Federal Power Act or Section 5 of the Natural Gas Act alleging that some rate, charge, rule, regulation, practice or contract is unjust, unreasonable, unduly discriminatory or preferential. These types of complaints are different in nature. While a complaint under Section 306 or Section 13 is essentially directed towards a violation of a statutory provision, including violations that may be criminal in nature, a complaint lodged under Section 206 or Section 5 is directed, primarily, to rates rather than some potentially criminal act.

3. Motions

Under the current rule regarding motions (Section 1.12), motions are permitted only after a hearing has commenced. In the proposed rule (Rule 212), a motion would be permitted to be filed at any time by a participant or by a person who is seeking to intervene, unless the intervention has been denied. Under another proposed provision, the Commission would designate a member of the Commission to act as a "Motions Commissioner" with authority to rule on motions directed to the Commission. A motion made to the Commission would be deemed denied at the end of thirty days unless the Commission acts on it within that time. The proposed rule regarding motions on interlocutory appeals (Rule 715) would set even shorter deadlines.

4. Summary Disposition

In proposed Rule 216, a section on summary disposition is added to the rules of practice and procedure. A presiding judge may summarily dispose of all or a part of a proceeding if he determines that there is no issue of fact material to the decision.

B. Rules Regarding the Conduct of Hearings

In proposed Subpart E of the new Part 385, rules are established to govern hearings, and would ordinarily apply to proceedings dealing with rates, certificates, or licenses. The subpart contains rules regarding consolidation and severance, presiding officers, witnesses, testimony, exhibits, evidence, stipulations, and transcripts. Generally, the proposed rule is intended to rearrange and simplify corresponding sections of the present rules (Sections 1.20 to 1.27). However, as mentioned above, while the current rules on evidence are recodified in the proposed rules, the Commission is considering reworking the rules of evidence to more closely conform them to the *Federal Rules of Evidence*. The Commission has asked for comments on whether it should initiate a separate rulemaking docket for that purpose.

The Subpart E provisions governing consolidation and severance would, for the first time, permit the Chief Administrative Law Judge rather than the Secre-

tary to determine whether to consolidate or sever proceedings. Administrative law judges would also have the authority to phase a proceeding.

The Commission has asked for comments on draft provisions regarding oral testimony that is not conducted in the presence of a presiding officer and written cross-examination. These provisions have been included in Subpart E in the Notice of Proposed Rulemaking only to provoke comment. The FERC does not propose adoption of the provisions at this time. The purpose of the provisions would be to expedite hearings.

C. Rules Regarding Conferences, Settlements, and Stipulation

Subpart F of the proposed rules contains provisions on conferences, settlements, and settlement judges. The rules are designed to encourage prehearing conferences and the use of conferences to reach a settlement prior to hearing. The recently promulgated rules regarding the use of settlement judges are incorporated into the rules. The proposed rules would provide that decisions regarding the appointment of a settlement judge or termination of settlement negotiations are not subject to review by, appeal to or rehearing by the presiding judge, Chief Administrative Law Judge, or the Commission.

D. Rules Regarding the Decision Process

Subpart G of the proposed new Part 385 contains rules governing decisions and administrative review of decisions in proceedings set for hearing. Generally, it contains provisions regarding participants' rights, briefs, oral argument, types of decision, exceptions to decisions, Commission review, certified questions, interlocutory appeals, rehearing, and reopening. The subpart is designed to encompass the material now appearing in Sections 1.29 to 1.34. The proposed rules eliminate the distinctions in the current rules between intermediate, recommended, and tentative decisions.

The proposed rules permit participants the right either to file initial briefs or to make oral arguments. The presiding judge would have discretion to decide which of the two options, or both, to grant to participants. In the proposed rule, participants are required to file briefs simultaneously. In a new provision regarding the exceptions stage of a proceeding, the rules would provide that failure to take exception to an initial decision will result in a waiver of the right to take exception at a later time.

E. Rules Establishing Form Requirements for Filings in Proceedings Before the Commission

Subpart T of Part 385 applies to all Commission proceedings rather than just those held on-the-record. The subpart governs the manner in which pleadings and other documents are prepared, filed, docketed, noticed, and served. Subpart T also controls time deadlines and the extension of such deadlines.

III. *EX PARTE* AND SEPARATION OF FUNCTIONS RULES

At present the Commission operates under FPC and ICC rules regarding *ex parte* and separation of functions. These rules are inconsistent, and they are inapplicable to FERC proceedings which are conducted under statutes which were not administered by the FPC or the ICC. On May 23, 1980, the Commission issued proposed uniform rules on *ex parte* communications and separation of functions (45 FR 36094). The proposed rules are based on 20 comments submitted to the Commission and a report prepared by the Commission's Advisory Committee on Revisions of Rules of Practice and Procedure. The proposed rules apply to all trial-type proceedings, including proceedings to review remedial orders, adjustment request denials, or grants or denials of adjustments under the NGPA.

A. *Ex Parte Communication*

The proposed rules would prohibit any "interested person" from any "*ex parte* communication" with any "decisional employee" while a proceeding is pending before the Commission. "Interested person" is broadly defined. It includes any person who has an economic or other identifiable interest in the outcome of the proceeding and any person acting on behalf of such a person. Federal agencies are excluded from the category of interested persons unless an agency becomes a party to a proceeding or participates on behalf of a party to a proceeding. State agencies which are not parties to a proceeding are also excluded. The Administrative Procedure Act, according to the Commission, does not seem to provide a basis for this exclusion. The Commission has, therefore, sought comment on the legal basis for permitting an exclusion for state agencies.

The *ex parte* rule is aimed only at interested persons outside the FERC. Therefore, the Commission Staff is not covered by the *ex parte* rules. Prohibitions on communications between Staff and decisional employees are contained in the separation of functions rules discussed below.

"Decisional employee" includes any member or employee of the Commission other than a staff advocate or witness or a staff investigator in a formal investigation. The Commission may designate any employee as a decisional employee, staff advocate, or staff investigator. These designations will be made available to the public.

The proposed rule defines "*ex parte* communication" as an oral or written communication which is not on the public record, which is relevant to the merits of a proceeding, but with respect to which reasonable prior notice to all parties has not been given. The rules, also, define several types of communication which are permissible. These include communications which are made on the record during another proceeding, communications regarding reports, and communications about procedures. Other exclusions from the *ex parte* rule apply to communications authorized by law, such as those which would take place pursuant to statutory requirements that the FERC consult with other federal agencies before taking certain actions. Additionally, communications normally prohibited are allowed if all parties agree that they can take place. Finally, any communication relating to the conduct of military or foreign affairs is exempt from the *ex parte* rules.

Ex parte communication provisions apply only while a trial-type proceeding is pending before the Commission. The proposed *ex parte* restrictions would be triggered when a proceeding is noticed for hearing; when an intervention, petition for review, or opposing protest is filed; or when the communicator obtains knowledge, before the proceeding is docketed, that the subject matter of the proceeding will be noticed for hearing, whichever occurs first. The Commission has specifically requested comments on this last portion of the proposed rule. *Ex parte* provisions are terminated at the time a decision becomes final, at the expiration date for filing applications for rehearing, or ten days after the expiration date for filing exceptions to an intermediate decision, whichever occurs first.

Certain remedies are provided for *ex parte* communications which do occur during the course of a proceeding. If a decisional employee receives a communication that he believes is prohibited, he must decline receipt of it and inform the communicator that the matter is pending before the Commission. *Ex parte* communications which are either made or received by a decisional employee must be brought to the attention of the Secretary of the Commission within eight hours of their occurrence. Oral communications must be put in writing and then given to the Secretary. Such communications will be sent to parties on the service list and placed in the public file. They will not be made part of the record upon which the Commission will reach its decision.

The Commission believes that this should be sufficient to discourage *ex parte* communications. If the remedy is inadequate, however, there is a more severe penalty. The Commission, upon request from a party or a presiding officer, may make a determination as to whether or not the *ex parte* rule was violated. If the Commission does find a violation, it may require the violator to show cause why his claim or interest in the proceeding should not be dismissed.

B. Separation of Functions

The May 23, 1980, Notice of Proposed Rulemaking also covers the separation of advocacy and decision-making functions of the FERC Staff. The proposed rule would prohibit certain Commission Staff members from advising specified decisional employees concerning pending or factually related trial-type proceedings. A trial-type proceeding is "factually related" to another proceeding if there is a substantial identity of facts which are material to both proceedings. The proposed rule, therefore, limits decisionmaking access to Staff and, consequently, to certain points of view. Decisionmakers include the Commission, any Commissioner or Commissioner's assistant, the Oil Pipeline Board, any member of the Office of Opinions and Review, and the presiding administrative law judges.

Employees prohibited from advising decisionmakers would vary according to the case. Generally, a staff advocate in a trial-type proceeding could not give advice to a decisionmaker regarding that proceeding or in a factually related proceeding. A staff investigator in a formal investigation could not give advice to a decisionmaker regarding a pending trial-type proceeding if the advice is factually related to the formal investigation.

C. Other Provisions

Certain Commission proceedings are segmented in such a way that one phase may be conducted as an informal rulemaking proceeding and another phase may be conducted as an on-the-record trial-type proceeding. In these cases, the Commission may designate each segment as a separate proceeding for purposes of the *ex parte* and separation of functions rules. The Commission is authorized to waive any provision of the proposed rules in the event that their strict application might restrict the Commission from making an informed decision.

IV. RULES RELATING TO INVESTIGATIONS

On June 14, 1978, the Commission issued Order No. 8 to set forth, as Part 1b of its Regulations, Commission policy and procedures for investigations (43 FR 27174). Based on comments, Commission experience under the interim regulations, and new authority granted under the Natural Gas Policy Act and the Outer Continental Shelf Lands Act Amendments of 1978, the Commission, in April of 1979, issued a proposed rule establishing a new Part 1a which reorganizes Part 1b and adds and deletes certain provisions (44 FR 21586). Comments have been submitted in response to the Notice, but there has, as yet, been no final Commission action.

The proposed rules apply to investigations carried out by the Commission, the Office of Enforcement, and any designated officers of the Commission. Anyone may request the Commission to carry out an investigation. Based upon this request, the Commission or Office of Enforcement can initiate an investigation.

The Office of Enforcement is principally responsible for the conduct of preliminary and formal investigations. The purpose of the preliminary investigation is to determine whether there is a possibility that a violation has occurred. The Commission's subpoena power is not invoked, so information is collected under voluntary cooperation and is non-public.

A formal investigation will occur if there is a likelihood of a violation or if subpoena power is needed to gather more facts. Commission authorization is necessary and is issued in a formal order delineating the scope of the investigation. Investigations will generally be conducted in a non-public manner and will not be a matter of public record. A subpoena requires a personal appearance and cannot be met by appearance of counsel. However, the subpoena may be served upon the person's counsel. Transcripts will be made available to the person testifying, except for certain instances where the person may be limited to inspection of the transcripts. Intervention is not permitted in a formal investigation.

The rules establish rights and obligations of witnesses and attorneys during the preliminary and formal investigations. A witness will ordinarily be provided with a copy of the formal order of investigation, and he or she may be accompanied by counsel. Multiple representation by counsel is permitted. However, counsel must inform the presiding officer of any possible conflict of interest. The Commission is authorized to sequester a witness if it believes sequestration is necessary to protect the integrity of the investigative fact-finding process. Attorneys practicing before the Commission may also be sequestered. *Ex parte* provisions do not apply to investigations, which are not "on the record proceedings."

Once a person has been advised of a potential enforcement action, a written statement presenting the person's position may be presented to the Commission. The rules establish a procedure whereby a request for confidentiality can be made. The Commission, however, retains the right to make the final determination on any claim of confidentiality of information submitted during an investigation.

Following an investigation where a violation has been found, the Commission may take one or more of several actions. It may institute an administrative proceeding or a civil action, refer the case to the Attorney General for criminal prosecution, refer the case to some other governmental authority, or take other appropriate action. As far as settling matters before the Commission, the defendant or respondent may not consent to a judgment that imposes a sanction while denying allegations in a complaint for injunctive relief or an order for administrative proceedings.

V. FURTHER RULEMAKINGS

The Commission has established several dockets regarding the establishment of various rules of practice and procedures through notices of proposed rulemaking that have not yet been issued:

- Docket No. RM78-22 (part 3), regarding the discovery process during the trial-type proceedings;
- Docket No. RM78-22 (part 4), regarding procedures for reviewing Freedom of Information Act requests and the definition of information which shall be exempt from disclosure requirements;
- Docket No. RM78-22 (part 6), regarding conflicts of interests and defining relationships between the FERC staff and parties to FERC proceedings;
- Docket No. RM78-22 (part 9), regarding procedures for trial-type hearings to determine whether funding should be terminated in instances of alleged discrimination by a state in the administration of its federally-funded energy program.

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