

# Report of the Committee on Administrative Practice

## I. INTRODUCTION

Although the Federal Energy Regulatory Commission (FERC) delegates a variety of matters to its administrative law judges (ALJs), certain matters are disposed of through the use of “paper hearings.” The term “paper hearing” is not statutorily defined, and nor has the Commission and any reviewing courts articulated a precise definition of the term. However, the term generally has come to designate a proceeding in which (a) interested parties submit written materials to the Commission for its consideration, and (b) the Commission issues a final order, resolving any disputes on the basis of the written submissions. No witnesses or attorneys appear in person before the Commission or its ALJs. The extent of pre-submission discovery varies, as the Commission deems appropriate.

The basis for this process is found in the Natural Gas Act (NGA), the Federal Power Act (FPA) and in federal appeals court decisions approving the Commission’s use of paper hearings in lieu of trial-type proceedings. Section 15(b) of the NGA states:

All hearings, investigations, and proceedings under this act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this act.<sup>1</sup>

There is little disagreement that the Commission may dispose of a case by means of a paper hearing when there are no disputed issues of material fact,<sup>2</sup> but the license to use paper hearings is substantially broader. Typically, the Commission has stated the criterion as follows: “More [than a paper hearing] is required only where written submissions do not provide an adequate basis for resolving disputes about material facts.”<sup>3</sup>

In *Cascade Natural Gas Co. v. FERC*, the Court of Appeals for the Tenth Circuit provided a detailed discussion of the propriety of paper hearings under the NGA.<sup>4</sup> The Tenth Circuit joined other circuits in approving non-oral hearings for disposition of cases with no material facts in dispute,<sup>5</sup> and described the test for broader use of this procedure:

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1. 15 U.S.C. § 717n (1988). A similar provision is found in the FPA, 16 U.S.C. § 825g (1988).

2. *See, e.g.*, *Pennsylvania PUC v. FERC*, 881 F.2d 1123, 1126-27 (D.C. Cir. 1989).

3. *El Paso Natural Gas Co.*, 48 F.E.R.C. ¶ 61,202, at 61,756 (1989).

4. 955 F.2d 1412, 1425-26 (10th Cir. 1992).

5. *See New England Fuel Inst. v. Economic Regulatory Admin.*, 875 F.2d 882 (D.C. Cir. 1989) (petitioners were not entitled to trial-type hearing on issue arising under NGA § 717b); *New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509 (5th Cir. 1981) (Commission could use paper hearing to resolve rate case arising under NGA § 717c); *Mobil Oil Corp. v. FERC*, 886 F.2d 1023 (8th Cir. 1989) (Commission could use paper hearing to resolve issue arising under NGA § 717d and was not required to hold oral, trial-like hearing); *Pennsylvania Pub. Util. Comm’n v. FERC*, 881 F.2d 1123 (D.C. Cir. 1989) (Commission could use paper hearing to resolve an issue arising under NGA § 717f).

Even when these conditions are met, there is no guarantee that a party will be allowed to present evidence orally or to cross-examine witnesses. Depending upon the nature of the inquiry and the evidence, the full presentation of facts necessary for the Commission's determination may be achieved by the written submission of evidence.<sup>6</sup>

In general, the Commission appears to have the discretion to use paper hearings unless a party can make a compelling case that witness credibility, motive or intent is in question.<sup>7</sup> This characterization was implicitly adopted by the D.C. Circuit in its 1992 review of the procedural aspects of the Iroquois/Tennessee project in *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*.<sup>8</sup>

## II. NATURAL GAS CASES

The Commission has made use of paper hearings to dispose of gas pipeline cases in the past, but has recently begun to accelerate their use in other types of cases.

In restructuring proceedings under Order No. 636,<sup>9</sup> the Commission has, for the first time, announced its *a priori* intent to dispose of an extensive array of cases without trial-type resolution of any disputed issue:

The Commission will use procedures designed to achieve the most expeditious resolution of any contested issues raised with respect to restructuring filings. . . . In proceedings where there are disputed issues that require development of a record, but not necessarily by means of a trial-type hearing, the Commission may use expedited "paper hearing" procedures. The Commission does not intend to require development of a record in a trial-type hearing; therefore the restructuring proceedings will not be set for a hearing before administrative law judge unless they are consolidated with other proceedings already pending before a judge.<sup>10</sup>

Although this suggests the possibility of oral hearings if an Order No. 636 restructuring were to be consolidated with an NGA section 4 rate proceeding, the Commission has denied motions for such consolidation. For example, in denying a request to consolidate pending rate proceedings with Columbia Gas Transmission Corporation's restructuring, the Commission stated:

As noted in Order No. 636, the Commission does not intend to require development of a record on restructuring in a trial-type hearing. The timetable for compliance with the order does not contemplate a procedural schedule like

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6. 955 F.2d at 1425.

7. Transcontinental Gas Pipe Line Corp., 48 F.E.R.C. ¶ 61,199, at 61,752-53 (1989).

8. 958 F.2d 1101, 1113 (D.C. Cir. 1992).

9. Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (April 16, 1992), III F.E.R.C. Stats. & Regs. Preambles ¶ 30,939 (April 8, 1992); Order on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), III F.E.R.C. Stats. & Regs. Preambles ¶ 30,950 (August 3, 1992), order on reh'g, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 F.E.R.C. ¶ 61,272 (1992), reh'g denied January 8, 1993.

10. F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,939 (1992). Over 90 pipelines have been required to comply with the restructuring provisions of Order No. 636, and the Commission has announced its resolute intention that all such restructurings be completed before the 1993-94 heating season. *Id.* at 30,467. No process that involves trial-type hearings for all these cases could possibly meet such a goal.

that in a hearing, with the filing of testimony, discovery, and a full evidentiary hearing with cross-examination. Rather it contemplates restructuring negotiations and discussions among the parties leading to full compliance filing in the fall of 1992.<sup>11</sup>

The Commission similarly rejected motions to consolidate a variety of issues in Texas Eastern Transmission Corporation's Order No. 636 restructuring.<sup>12</sup>

### III. ELECTRICITY CASES

The FERC first applied its paper hearing procedure under the Federal Power Act in 1990 in connection with a proposal by Public Service Company of Indiana (PSI) to sell up to 450 MW of firm power at market-based rates, notwithstanding that several parties had requested a hearing and had raised concerns, *inter alia*, about the terms and operation of PSI's transmission tariff, possible anticompetitive abuse by PSI, and impacts on the reliability of bulk power supply.<sup>13</sup>

In 1992, following a similar paper hearing procedure, the Commission accepted two electricity rate filings after a brief comment period even though intervening parties had requested a trial-type hearing to address rate design and market power issues.

Entergy Services, Inc. (ESI)<sup>14</sup> had filed transmission service tariffs (TSTs) and rate schedules with FERC in August 1991.<sup>15</sup> Several parties intervened, requesting a hearing and raising issues concerning, *inter alia*, exclusion of PURPA qualifying facilities (QFs) and retail customers from the TSTs, ESI's recovery of stranded investment, reliability effects on native load, ESI's ability to discriminate in application of rate schedules, and the relevant product and geographic markets for purposes of determining market power.<sup>16</sup> ESI filed a response, but intervening parties were not given the opportunity to file replies. The Commission approved the filed TSTs and rate schedules, subject to various modifications and conditions, while denying the hearing requests, noting that the pleadings were sufficient to "make a reasoned decision on the merits of the issues" and that there were no "genuine issues of material fact that require a trial-type hearing."<sup>17</sup>

On rehearing, several parties argued that, at a minimum, the Commission was required to hold a hearing to address disputed issues of material fact raised in interventions.<sup>18</sup> The Commission, however, characterized the issues raised by intervening parties as (1) an issue of fact not material to the Com-

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11. Columbia Gas Transmission Corp., 59 F.E.R.C. ¶ 62,261, at 61,982 (1992).

12. Texas Eastern Transmission Corp., 60 F.E.R.C. ¶ 61,226, at 61,756 (1992).

13. Public Serv. Co. of Indiana, Inc., 49 F.E.R.C. ¶ 61,346, at 62,240-243 (1989). In its initial order, FERC solicited written comments and evidence on a preliminary staff analysis within 60 days, and replies 30 days thereafter. *Id.* at 62,245.

14. ESI was acting on behalf of the Entergy companies (Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc.) and Entergy Power, Inc. (EPI), a wholly owned subsidiary of Entergy Corporation.

15. 56 Fed. Reg. 41,338 (1991).

16. Entergy Services, Inc., 58 F.E.R.C. ¶ 61,234, at 61,740-752 (1992).

17. 58 F.E.R.C. ¶ 61,234, at 61,772.

18. Entergy Services, Inc., 60 F.E.R.C. ¶ 61,168, at 61,616-620 (1992).

mission's determinations, (2) an issue raised prematurely, or (3) a policy or legal issue.<sup>19</sup> Noting that "[n]one of these issues requires a hearing," the Commission upheld its initial refusal to grant a trial-type hearing and stated its belief "that the comment period and rehearing process have provided an adequate opportunity to raise issues and challenge the Commission's "new" propositions. Unless they raise genuine issues of material fact, which they have not done here, the parties are not entitled to a trial-type hearing."<sup>20</sup>

In the *Entergy* case, the FERC approved, with minor modifications and conditions, a transmission service filing by Consumers Power Company after a brief comment period, noting that the comment period sufficed to "make a reasoned decision on the merits of the issues" and there were no "genuine issues of material fact that require a trial-type hearing."<sup>21</sup>

#### IV. TREATMENT OF CONTESTING PARTIES

In 1992, the Commission expressed its policy relating to the use of "contesting party" provisions in settlement offers submitted to the FERC for approval. These provisions operate to deny the benefits of a settlement to parties who protest, request rehearing, or seek court review of a settlement approved by the FERC.

In *Tennessee Gas Pipeline Co.*,<sup>22</sup> the FERC modified a contesting party provision as part of its decision on the merits of a settlement which resulted from years of negotiations. As proposed by Tennessee, a party who contested any part of the settlement would not be entitled to take advantage of or receive the restructured services provided for in the settlement.<sup>23</sup> In addition, Tennessee's settlement provided that if any party contested the terms of the transition cost recovery mechanism for recovering costs for incurred take-or-pay costs, Tennessee would consider itself not to be bound by the \$1.3 billion cap on recovery of costs, as well as other transition cost recovery issues provided by the settlement.<sup>24</sup>

Many parties in the proceeding, while not classifying themselves as "contesting" parties, objected to the contesting party provisions of the settlement, arguing, for example, that these were coercive and violated section 19 of the Natural Gas Act.<sup>25</sup> They also argued that the denial of new services would deny general tariff services based on positions that a customer might take in objecting to an unrelated portion of the settlement, such as transition costs.<sup>26</sup>

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19. *Id.* at 61,617.

20. *Id.* at 61,620.

21. Consumers Power Co., 58 F.E.R.C. ¶ 61,323, at 62,045 (1992).

22. 59 F.E.R.C. ¶ 61,045 (1992).

23. Tennessee's settlement provided that a party would be non-contesting if it agreed not to appeal a Commission final order approving the settlement. A party that does not fit within the definition of non-contesting party is considered to be contesting. Benefits that contesting parties could not receive included the ability of shippers to convert from individually certificated section 7(c) service to firm transportation service under new rate schedule FT-A, the ability to participate in Tennessee's capacity assignment program, and the ability to receive new contract storage services.

24. 59 F.E.R.C. ¶ 61,045, at 61,172 (1992).

25. *Id.* at 61,172 (1992).

26. 59 F.E.R.C. ¶ 61,045, at 61,172.

Furthermore, these provisions would be contrary to the FERC's finding in *CNG Transmission Corp.*,<sup>27</sup> where the Commission required modification of CNG's settlement to remove a provision that would have denied access to new restructured services to parties who sought court review of the order approving the settlement.<sup>28</sup> Finally, some parties argued that a decision to allow contesting party provisions in this settlement would discourage negotiation and compromise in future settlements, possibly distorting the outcome of general pipeline restructuring.

The order on the *Tennessee* settlement made the policy determination that

[t]he Commission . . . cannot sanction coercive provisions included in a pipeline's offer of settlement that have the effect of forcing parties to acquiesce to a settlement, or parts of a settlement, by threatening the denial of essential services to silence parties and obtain relinquishment of their legal rights to rehearing and judicial review" and defined "essential services" as "those services that are required to be offered under the final rule in Docket No. RM91-11."<sup>29</sup>

The FERC found that Tennessee could not deny essential services to parties who oppose the settlement.

At the same time, the Commission stated that it "does not object to settlement provisions that compel a party to choose between accepting or rejecting a settlement, without denying essential services to parties."<sup>30</sup> It reasoned that parties who accept a settlement receive the benefits of that resolution and as a trade-off relinquish the right to challenge the settlement. Those that contest a settlement should not be entitled to receive the benefits and litigate issues involving non-essential services. This distinction, FERC stated, is consistent with the court's holding in *United Municipal Distributors Group v. FERC*,<sup>31</sup> in which a pipeline was permitted to charge different rates to those who settled and those who were severed from the settlement and chose to litigate rate issues.

In sum, the Commission found that the restructured services were "essential" and that their benefits could not be denied on the basis of opposition to the settlement. By contrast, parties contesting the transition cost issues could be severed from the proceeding and denied the benefits of the settlement because there would be no denial of essential services.<sup>32</sup> On the merits of the

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27. 55 F.E.R.C. ¶ 61,189 (1991).

28. See *Tennessee*, 59 F.E.R.C. ¶ 61,045, at 61,172.

29. *Id.* at 61,173.

30. *Id.*

31. 732 F.2d 202 (D.C. Cir. 1984). For a discussion of this case and its use in settlements generally, see Mary Ann Walker, *Settlement Practice at the FERC: Boom or Bane*, 7 ENERGY L.J. 343 (1986); Richard Drom, *Settlement of Contested Transportation Rate Cases at FERC: Should the Squeaky Wheel Be Greased*, 12 ENERGY L.J. 339 (1991). See also *El Paso Natural Gas Co.*, 54 F.E.R.C. ¶ 61,316, reh'g granted in part and denied in part, 56 F.E.R.C. ¶ 61,290 (1991); *Transcontinental Gas Pipe Line Corp.*, 55 F.E.R.C. ¶ 61,339 (1991).

32. Issues relating to the volumetric surcharge aspect of the transition cost recovery proposal could not be severed because the Commission cannot sever issues relating to the pipeline's Part 284 transportation rates consistent with *Arkla Energy Resources*, 48 F.E.R.C. ¶ 61,062 (1989) (contesting parties could circumvent severance and still receive the benefits of the settlement by arranging transportation through non-contesting parties).

settlement, the Commission found no issues of material fact in dispute and allowed parties to submit additional comments on rehearing as to whether they would be contesting or non-contesting as to transition cost recovery issues.<sup>33</sup>

In compliance with the April 10, 1992, order, Tennessee submitted a revised settlement which amended the contesting party provisions. In this filing, Tennessee stated that any party that objected to the transition cost surcharge would be considered a contesting party and would be severed from the settlement proceeding respecting those issues. Tennessee also stated that any party objecting to the contested party provisions themselves would be considered a contesting party and severed from the proceeding.<sup>34</sup> On consideration of the amendment, the FERC eliminated, as overly broad, that portion of the amended settlement classifying as contesting any party that objected to the cram-down provision.<sup>35</sup>

In *ANR Pipeline Co.*,<sup>36</sup> FERC again struck down the contested party provisions of a settlement that denied essential services to those parties contesting portions of the settlement. Essential services denied to contesting parties included participation in ANR's capacity assignment program, flexible receipt point provisions, and eligibility for the new no-notice service offered by ANR. In contrast to Tennessee's provisions, ANR's settlement provided that if no party contested the settlement during the comment period, then the cram-down provisions of the settlement would be automatically amended to exclude the provisions. Further, certain portions of the settlement were specifically excluded from application of the contesting party provisions.<sup>37</sup>

The FERC found the contesting party provisions objectionable, despite the automatic removal provision, stating, "The Commission is concerned that the cram-down [contested party] provision may have been viewed as a threat by participants in the settlement process so that comments that otherwise may have been voiced were suppressed."<sup>38</sup> Therefore, the FERC permitted parties to file additional comments indicating whether they were contesting or non-contesting without the objectionable provisions. After the submission of comments, the settlement was approved.<sup>39</sup>

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33. The FERC noted that in any litigation challenging Tennessee's transition costs and transition cost recovery mechanism, Tennessee could argue that it should not absorb any transition costs and should not be restricted to any cap of such costs.

34. This provision, as proposed by Tennessee, would "make parties that contest discrete aspects of the contesting party provision, but who are not opposed to any aspect of the take-or-pay provisions, contesting parties subject to an alternate take-or-pay recovery proposal in the severed proceedings." *Tennessee Gas Pipeline Co.*, 59 F.E.R.C. ¶ 61,361, at 62,342 (1992).

35. *Tennessee Gas Pipeline Co.*, 59 F.E.R.C. ¶ 61,361 (1992).

36. 59 F.E.R.C. ¶ 61,347 (1992).

37. Two issues where parties could comment adversely without being labelled contesting were "(1) the desirability of cram-down provisions generally and (2) ANR's proposed direct billing of Dakota Gasification Costs." *Id.* at 62,259.

38. *Id.* at 62,260.

39. *ANR Pipeline Co.*, 60 F.E.R.C. ¶ 61,145 (1992).

## V. SCOPE OF FERC SUMMARY AUTHORITY

A. *Appealability of FERC's Grant of Partial Summary Disposition*

In *State of Alaska v. FERC*,<sup>40</sup> the Court of Appeals for the District of Columbia held that, as a general rule, an order of the FERC granting a motion for partial summary disposition is not an appealable final order that may be the subject of a petition for judicial review. The case arose out of a 1989 tariff filing by the owners of the Trans Alaska Pipeline System (TAPS), a pipeline transporting crude oil from the North Slope of Alaska to the port of Valdez in southern Alaska. The filing sought substantial rate increases, attributable in part to costs for the repair of corrosion damage to the pipeline.

The State of Alaska intervened and protested the rate increases, claiming that the corrosion damage costs should be excluded from the rates on the ground that they arose from imprudence by the TAPS owners. The Commission instituted an investigation. The TAPS owner-carriers then filed a motion for partial summary disposition under rule 217 of the Commission's Rules of Practice and Procedure,<sup>41</sup> arguing that an earlier settlement of claims for imprudent construction of the pipeline, effective as of January 1, 1985, precluded Alaska from objecting to the inclusion in TAPS rates of costs arising from actions taken before that date. The ALJ agreed and granted the motion for summary disposition as to pre-1985 events.<sup>42</sup> The Commission affirmed,<sup>43</sup> and the State of Alaska sought immediate review.<sup>44</sup>

The D.C. Circuit dismissed Alaska's petition for review without reaching the merits. It held that the Commission's grant of partial summary disposition did not constitute an appealable "final order" under 28 U.S.C. § 2342(5), the statute authorizing judicial review of FERC actions under the Interstate Commerce Act.

The court of appeals recognized precedent which supports treating an order denying intervention in a Commission proceeding as an appealable final order.<sup>45</sup> However, the court distinguished that precedent on the ground that an order denying intervention "represents the end of the line" for the putative appellant, whereas the Commission's grant of partial summary disposition had preserved Alaska's right to petition for review of any action the FERC might take in the proceeding. Hence, the court held, "the Commission's decision placing limitations on the actions Alaska may take as an intervenor in the tariff proceedings is not an appealable final order." The court relied upon the general judicial policy against permitting interlocutory appeals to support this

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40. 980 F.2d 761 (D.C. Cir. 1992).

41. 18 C.F.R. § 385.217 (1992). The rule explicitly authorizes any "decisional authority" to grant summary disposition as to "a proceeding, or part of a proceeding" upon determining that "there is no genuine issue of fact material to the decision."

42. *Amerada Hess Pipeline Corp.*, 51 F.E.R.C. ¶ 63,004 (1990). As required under Rule 217(d)(1), the ALJ's determination took the form of a partial initial decision, which was reviewable by the Commission under Rule 711.

43. *Amerada Hess Pipeline Corp.*, 53 F.E.R.C. ¶ 61,061 (1990).

44. Because the proceeding arose under the Interstate Commerce Act, it was not necessary for Alaska to seek rehearing by the Commission before filing a petition for judicial review.

45. *See Public Serv. Co. of N.Y. v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960).

result.<sup>46</sup>

Finally, the court recognized that the rule barring appeals from non-final orders has exceptions particularly

when a party will irreparably lose important rights unless an immediate appeal is permitted; or when the matter decided is clearly separate from the balance of the lawsuit and there would be no advantage in postponing review; or when an interlocutory appeal will materially advance ultimate termination of the litigation.<sup>47</sup>

None of these considerations, the court held, warranted immediate judicial review in the present case. Alaska was remitted to its right to raise the substantive issues involved in the partial summary disposition upon petition from a final Commission order.

### *B. The Commission's Summary Rejection Discretion*

Altamont Gas Transmission Company (Altamont) sought a section 7(c) certificate to construct a pipeline from the Canadian border to facilities owned by Kern River Gas Transmission Company (Kern River) in Wyoming. Approximately 30% of Altamont's daily load could have been transported to California by facilities already proposed by Kern River, and Kern River had promised Altamont that it would seek authorization to build expanded facilities. Kern River, however, did not amend its pending application.

A few months earlier, Pacific Gas Transmission Company (PGT) had applied for authorization to expand its existing facilities between the borders of Canada and California. Approximately 93% of the additional daily load was to be delivered to California customers by Pacific Gas & Electric Company (PG&E), and the balance was to be delivered by Northwest Pipeline Corporation (Northwest). PG&E and Northwest both had existing facilities which were adequate to receive the proposed additional load.

The FERC rejected Altamont's application and approved PGT's and the rejection was the lone issue before the D.C. Circuit. Altamont argued that the FERC had arbitrarily and capriciously foreclosed a hearing, contrary to the doctrine announced in *Ashbacker Radio Corp. v. FCC*,<sup>48</sup> which requires a comparative administrative hearing where two or more mutually exclusive, bona fide applications are filed for a license or certificate.

In *Altamont Gas Transmission Co. v. FERC*,<sup>49</sup> the D.C. Circuit found that *Ashbacker's* "express" requirement that each competing application be bona fide "implies an agency power to impose a variety of reasonable threshold requirements."<sup>50</sup> In Altamont's case, the Commission had imposed a

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46. The Court of Appeals explained that in civil litigation,

[i]nterlocutory appeals often result in delaying the final outcome and, just as often, needlessly intrude on the district court's conduct of the litigation. It is therefore usually preferable to require the parties to wait for appellate review until the lawsuit is ultimately resolved — to insist on the standard of one case, one appeal. This is desirable in cases coming from the administrative agencies as it is in cases from the district courts.

47. 980 F.2d at 764.

48. 326 U.S. 327, 333 (1945).

49. 965 F.2d 1098 (D.C. Cir. 1992).

50. *Id.* at 1100.



threshold requirement that Kern River file an application to expand its facilities. The court stated that because Kern River did not file an application, "FERC had neither the information necessary to verify Altamont's claims about the proposed downstream facilities, nor the assurance of the facilities' provider that it was committed to bringing them into existence."<sup>51</sup> The court also concluded that the Commission had not acted arbitrarily in distinguishing between PGT's failure to demonstrate downstream commitments for 7% of its projected daily load and the "far larger" (roughly 70%) gap between Altamont's projected daily load and downstream commitments.<sup>52</sup>

Altamont argued that the rejection of its application was inconsistent with action taken by the FERC in later cases, whereas the Commission defended the Altamont orders as consistent with its later decisions. Although the court stated that a later change "cannot retroactively invalidate a decision that was sound when made,"<sup>53</sup> it examined the alleged inconsistencies.

First, it found no inconsistency with the FERC's decision in *El Paso Natural Gas Co.*<sup>54</sup> tentatively to approve a project while conditioning final approval on submission of evidence of essential upstream and downstream facilities. There, El Paso had applied for an optional expedited certificate, which does not require a showing of related facilities. The Commission on its own initiative converted the application to one made under section 7(c) and provided the pipeline an opportunity to submit the newly required information. The court also found no inconsistency in the Commission's approval of Northwest's application<sup>55</sup> without detailed evidence of the related facilities because there, the facilities needed to complete the transportation were already in existence.<sup>56</sup>

## VI. FERC PROCEDURES UNDER THE ENERGY POLICY ACT OF 1992

### A. *Electric Utilities*

The Energy Policy Act of 1992 (Act), which was signed into law on October 24, 1992,<sup>57</sup> contains several provisions which affect procedures before the FERC, most notably regarding applications for the determination of status as an Exempt Wholesale Generator (EWG) and petitions for mandatory wholesale transmission access.

Subtitle A of Title VII of the Act amends the Public Utility Holding Company Act of 1935 (PUHCA) by creating PUHCA jurisdictional exclusion for EWGs which, upon the Commission's determination, are found to meet certain definitional criteria. Under new section 32(a)(1) of PUHCA, an entity wishing to obtain EWG status must file an application for determination with the Commission, which must act on the application within 60 days. An appli-

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51. *Id.* at 1101.

52. *Id.*

53. *Id.* at 1102 (citations omitted).

54. 55 F.E.R.C. ¶ 61,180 (1991).

55. 56 F.E.R.C. ¶ 61,300 (1991).

56. 965 F.2d at 1102 (citations omitted).

57. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3065 (1992).

cant filing in good faith is entitled to the benefits of EWG status pending FERC action on the application.<sup>58</sup>

The Act directs the Commission to adopt rules governing determination of EWG status within one year of the date of enactment,<sup>59</sup> and a new docket prefix, "EG," has been designated for EWG applications.<sup>60</sup> Several IPP projects have filed EWG applications<sup>61</sup> and, on a case-by-case basis, the FERC has begun approval of EWG status for these projects.<sup>62</sup>

Subtitle B of Title VII of the Act broadens the Commission's authority under sections 211 and 212 of the FPA to prescribe compulsory wholesale transmission access. Under amended section 211, an applicant for transmission service must make a request for service to the prospective transmitting utility at least 60 days prior to filing its application for a transmission order. The request must set forth specific rates, charges and other terms and conditions of transmission service acceptable to the requestor.<sup>63</sup> If the transmitting utility does not agree to the requested rates and terms/conditions, it must provide, within 60 days of receipt of the request (or some other mutually agreed-upon period), a "detailed written explanation, with specific reference to the facts and circumstances of the request," including (1) the basis for the transmitting utility's proposed rates and terms/conditions and (2) an analysis of any physical or other constraints that would affect the provision of service.<sup>64</sup>

### B. Oil Pipelines

Title XVIII of the Act institutes oil pipeline regulatory reform in an effort to improve efficiency, increase competition, and reduce burdensome regulation. Specifically, it requires the FERC to issue a final rule establishing a "simplified and generally applicable ratemaking methodology" for oil pipelines within one year of enactment.<sup>65</sup> It further requires the FERC, within eighteen months of enactment, to issue a final rule streamlining its procedures relating to oil pipeline rates in order to avoid unnecessary regulatory costs and

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58. *Id.* at § 711.

59. The FERC has issued a Notice of Proposed Rulemaking for EWG certification procedures and standards which proposes a streamlined agency review process. *Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status*, Docket No. RM-93-1-000 (Nov. 10, 1992).

60. Notice of New Docket Prefix (Oct. 26, 1992).

61. *See, e.g.*, Commonwealth Atlantic L.P., *Notice of Application for Determination of Status as an Exempt Wholesale Generator*, Docket No. EG93-001-000 (Oct. 27, 1992); Doswell L.P., *Notice of Application for Commission Determination of Exempt Wholesale Generator Status*, Docket No. EG93-002-000 (Oct. 29, 1992); Hartwell Energy L.P., *Notice of Filing*, Docket No. EG93-003-000 (Nov. 6, 1992); Costanera Power Corp., *Notice of Filing*, Docket No. EG93-004-000 (Nov. 13, 1992); Nevada Sun Peak L.P., *Notice of Filing*, Docket No. EG93-005-000 (Dec. 10, 1992).

62. *See, e.g.*, Commonwealth Atlantic L.P., *Determination of Exempt Wholesale Generator Status*, Docket No. 93-001-000 (Nov. 25, 1992); Hartwell Energy L.P., *Determination of Exempt Wholesale Generator Status*, Docket No. 93-003-000 (Dec. 1, 1992).

63. Pub. L. No. 102-486, § 722, 106 Stat. 2776, 3065 (1992) (amending 16 U.S.C. § 824j).

64. § 723 (adding requirement to 16 U.S.C. § 824k).

65. *Id.* at § 1801(a).

delays.<sup>66</sup> Issues to be considered in this rulemaking include (1) the identification of information to be filed in support of tariffs; (2) qualifications for standing, including identifiable economic interests; (3) the level of specificity required for a protest or complaint, and guidelines for FERC action on the portion of the tariff or rate filing subject to protest or complaint; (4) opportunities for oil pipelines to file responses to initial protests or complaints; and (5) identification of specific circumstances under which the FERC Staff may initiate a protest.<sup>67</sup> The FERC must also establish alternative dispute resolution procedures and give expedited consideration to any proposed rates that result from such procedures.<sup>68</sup>

Title XVIII also addresses withdrawals of oil pipeline tariffs. If an oil pipeline tariff, which is filed under part I of the Interstate Commerce Act (ICA) and which is subject to investigation, is withdrawn, (1) any proceeding involving such tariff must be terminated; (2) the previous tariff rate must be reinstated; and (3) any amounts collected under the withdrawn tariff rate which are in excess of the previous tariff rate must be refunded.<sup>69</sup> Finally, if a complaint filed pursuant to section 13 of the ICA relating to an oil pipeline's tariff is withdrawn, any proceeding involving that complaint must be terminated.<sup>70</sup>

### C. *Emission Standards for Alternate Fueled Vehicles*

On November 5, 1992, EPA issued a Notice of Proposed Rulemaking concerning emission standards for various alternate fueled vehicles, including NGVs<sup>71</sup>. In this notice, EPA proposed emission standards for NGVs comparable to those for gasoline-fueled vehicles, with limited exceptions based on specific characteristics of NGV emissions. A public hearing was held on December 3, 1992, and comments on the notice were filed January 15, 1993. It is not known when the EPA is likely to issue the final rule.

For NGVs, the notice proposed the following intermediate useful life standards<sup>72</sup>, to be applied to model year 1994 light duty vehicles:

NMHC	0.25 g/mi
CO	3.4 g/mi
NOx	0.4 g/mi
PM	0.08 g/mi
Evaporative hydrocarbons	2.0 g/test

EPA's notice also contained proposed standards for light-duty trucks and heavy-duty engines and proposed regulations concerning the certification of aftermarket conversion equipment. Two aspects of the proposed rule deserve

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66. § 1802(a).

67. § 1802(b).

68. § 1802(e).

69. § 1802(d)(1).

70. § 1802(d)(2).

71. Standards for Emissions from Natural Gas-Fueled, and Liquefied Petroleum Gas-Fueled Motor Vehicles and Motor Vehicle Engines, and Certification procedures for Aftermarket Conversion Hardware, 57 Fed. Reg. 52,912 (1992).

72. These standards would be applicable for the first five years or 50,000 miles. The notice also contains proposed standards for ten years or 100,000 miles.

special mention. First, the proposed standards track, generally, the Tier 1 standards mandated by the 1991 Clean Air Act. EPA noted that the absence of such standards was viewed as a potential barrier to commercialization of NGVs due to the uncertainty regarding emissions requirements. Promulgation of emission standards would also make NGVs eligible for the Corporate Average Fuel Economy (CAFE) program. In addition, the agency proposed that NGVs and other gaseous fueled vehicles be allowed to demonstrate compliance through emissions averaging, trading and banking in the same manner as other vehicles subject to existing regulations.

Second, the notice did not propose a Total Hydrocarbon (THC) standard for NGVs. This decision was one of the most significant aspects of the proposed rule. EPA explained that NGVs have high methane emissions, but have non-methane hydrocarbon emissions comparable or below those of gasoline-fueled vehicles. Accordingly, the EPA chose to defer application of THC standards to NGV, reasoning that compliance with a THC standard is infeasible for NGVs and that promulgation of such a standard would inhibit development and utilization of NGVs.<sup>73</sup> The agency indicated that it would monitor the progress of natural gas-fueled vehicle catalyst technology and would reconsider THC standards for NGVs when appropriate.

#### VII. DISCLOSURE OF DOCUMENTS AND INFORMATION OBTAINED IN STAFF AUDITS OF ELECTRIC UTILITIES

As 1992 drew to a close, the Commission issued a procedural ruling on the disclosure of material made available to the audit staff of the Chief Accountant by a jurisdictional public utility.<sup>74</sup> The FERC audit staff had questioned Wisconsin Electric Power Company's (WEPCO) treatment of some coal mine reclamation costs. WEPCO provided the staff with copies of four legal opinions rendered by its in-house and outside legal counsel "in order to resolve the issue" and on condition that the opinions be treated as confidential and returned at the conclusion of the audit. The company also requested that the opinions be given privileged and confidential treatment under section 388.112 of FERC's procedural rules governing public disclosure of materials submitted to the Commission.

WEPCO and the staff initially attempted to resolve the disputes under the shortened procedures of section 41.3 of the Commission's regulations, but the utility withdrew its consent to a "paper hearing" and asked for a formal trial-type hearing. The Commission allowed WEPCO's request and on May 14,

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73. EPA explained it had discretion under section 202(a) of the Clean Air Act to defer THC standards for NGVs. The need for postponement of a THC standard is due to the fact that current exhaust catalyst technology is ineffective at oxidizing methane, which results in high THC emissions from NGVs. EPA concluded that natural gas is a promising vehicle fuel—both in terms of environmental benefits and national energy security—and that NGVs should not be excluded from the national market until the catalyst technology is developed. The agency also noted that the high methane emissions from NGVs would not be a significant contributor to urban ozone formation.

74. Order Denying Interlocutory Appeal and Amending Policy Statement Concerning Disclosure of Documents and Information Obtained in Staff Audits, (issued December 28, 1992); Wisconsin Elec. Power Co., 58 Fed. Reg. 489 (1993).

1992, issued an order setting the accounting disputes for evidentiary hearing.<sup>75</sup>

During the prehearing phase of the case, the Commission's trial staff indicated that it intended to use the four legal opinions as part of its evidentiary case. WEPCO objected, contending that the documents were privileged and, therefore, inadmissible. The ALJ held that the attorney-client privilege had been waived when WEPCO voluntarily gave the legal opinions to the audit staff.<sup>76</sup> He noted the existence of a split among the circuits on the question whether disclosure of privileged material to an agency for one purpose waived the privilege for other purposes.

He rejected the "limited waiver" theory enunciated by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*,<sup>77</sup> finding that case inapplicable in the absence of a promise by the agency to give confidential treatment to a document. WEPCO's request for confidential treatment under section 388.112 did not amount to the Commission's promise of confidentiality.

WEPCO also argued that release of the legal opinions was proscribed by section 301(b) of the FPA.<sup>78</sup> Section 301(b) prohibits disclosure of information obtained during an audit of a utility "except insofar . . . as may be directed by the Commission or by a court." The judge ruled that the hearing order satisfied the requirement for the Commission's consent to disclosure of the opinions, and that, in any event, the Commission's authorization in Order No. 509-A,<sup>79</sup> for the use by trial staff of material obtained during audits of natural-gas companies supported the trial staff's evidentiary proffer of the WEPCO opinions.<sup>80</sup>

WEPCO sought interlocutory review of the judge's rulings under Rule 715 of the Commission's Rules of Practice and Procedure.<sup>81</sup> The Commission granted discretionary review and affirmed the judge's decision on the merits.

The Commission noted that section 388.112 of its regulations has nothing to do with the attorney-client privilege or work product designation that WEPCO sought for the legal opinions. Under section 388.112, the Commission said, the documents in question might be offered in evidence under seal or otherwise in accordance with a protective order.

The Commission also adopted the "unlimited" waiver theory, of the *Permian*<sup>82</sup> and *Westinghouse*<sup>83</sup> cases and rejected the "selective" waiver theory

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75. Wisconsin Elec. Power Co., 58 F.E.R.C. ¶ 61,332 (1992). Three months later, the Commission expanded the proceeding to include some prudence issues. Wisconsin Elec. Power Co., 60 F.E.R.C. ¶ 61,181 (1992).

76. Judge Lotis' decision was issued orally on the record during a prehearing conference. It was never reduced to a written order and, hence, is available only to those who can review the transcript of the conference.

77. 572 F.2d 596 (8th Cir. 1977).

78. 16 U.S.C. § 825(b) (1988).

79. 52 F.P.C. 389 (1974).

80. The judge ruled that the question whether the documents would be subject to a protective order which limited public access to them could be decided only after they were inspected in camera.

81. 18 C.F.R. § 385.718 (1991).

82. *Permian Corp. v. United States*, 655 F.2d 1214 (D.C. Cir. 1981).

83. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

that the Eighth Circuit had adopted in *Diversified*.<sup>84</sup> While a utility has the right to rely on the attorney-client privilege and work product doctrines, the Commission said, "once the utility has opted to surrender the privileges because the utility believes it to be in its best interest to do so, the utility cannot reassert the privileges at a later date when it believes it better to conceal what it earlier revealed."

The Commission expressed its disagreement with the functional underpinning of the *Diversified* case which was the notion that utilities will be unwilling to provide confidential information to staff auditors if, by doing so, they are deemed to have waived privileges that would otherwise attach to such information. Natural gas pipelines governed by Order No. 509-A have not, the Commission said, "refused to provide confidential data to staff as a result of the statement of policy . . . making information acquired by staff investigation available in contested cases." Finally, the Commission held that WEPCO's voluntary disclosure of the legal opinions to the audit staff constituted a waiver of the work product protection. Disclosure of documents to the staff in order to gain an advantage in an audit, the Commission reasoned, "is inconsistent with the objectives underlying the work product privilege."

In summary, the Commission concluded that WEPCO had waived both the attorney-client and the work product privileges in this proceeding. WEPCO provided the documents in this case in order to resolve an issue, which is the purpose of the evidentiary hearing. Having provided the documents to the audit staff early in the proceeding to help resolve the issue, a company may not assert a privilege with regard to those documents later in the proceeding.

The Commission also held that section 301(b) of the FPA did not preclude release of information obtained during audits of public utilities. Here, the rationale of Order No. 509-A, in which the legislative history of section 301(b) was cited as authority for release of materials secured under the NGA. The Commission concluded that hearing orders, should be construed to authorize the release of information obtained during the course of an audit. Finally, the Commission amended the Order No. 509-A policy statement, extending its general pro-disclosure policy to proceedings under the FPA as well as proceedings involving oil pipelines under the Interstate Commerce Act.<sup>85</sup>

#### VIII. SELECTING A FORUM UNDER 28 U.S.C. § 2112(a) FOR JUDICIAL REVIEW OF FERC DECISIONS

The provisions of 28 U.S.C. section 2112(a) were applied in connection with numerous petitions for review of Order No. 636 to consolidate all related appeals in the U.S. Court of Appeals for the Eleventh Circuit.<sup>86</sup> Section 2112(a) was also used to designate the Tenth Circuit as the appropriate forum

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84. 572 F.2d 596 (8th Cir. 1977).

85. In doing so, the Commission relocated the policy statement from section 2.72 of its regulations (18 C.F.R. § 2.72 (1991)) to a new section 2.1b of its General Policy and Interpretations.

86. See *Atlanta Gas Light Co., v. FERC* (11th Cir., Case No. 92-8782).

to review the Commission's decision concerning the abandonment and transfer of Northwest's gathering facilities to Williams Gas Processing.<sup>87</sup>

Because of the newness of the provisions of section 2112(a) and the procedural posture of the issues arising under such provisions, there are few reported cases on its application.<sup>88</sup>

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87. *See Williams Gas Processing Co. v. FERC* (10th Cir., Case No. 92-9553).

88. *See also AFL v. OSHA*, 965 F.2d 962 (11th Cir. 1992).