DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 343 and 385

[Docket No. RM98–13–001; Order No. 602–A]

Complaint Procedures

Issued: July 28, 1999.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order on rehearing and clarification.

SUMMARY: On March 31, 1999, the Federal Energy Regulatory Commission (Commission) issued a final rule (Order No. 602) revising its regulations governing complaints filed with the Commission under the Federal Power Act, the Natural Gas Act, the Natural Gas Policy Act, the Public Utility Regulatory Policies Act of 1978, the Interstate Commerce Act, and the Outer Continental Shelf Lands Act. A number of requests for rehearing and clarification of the final rule were filed. The general framework established by the complaint rule remains the same. The order does, however, grant rehearing and clarification in instances where the suggested changes will improve the new procedures and contribute to ensuring that the process allows the resolution of complaints in the most suitable manner. The order, among other things, clarified the types of relief that may be granted with respect to complaints, modified certain procedures concerning the treatment of privileged information in complaints and answers, modified the requirement concerning simultaneous service of complaints, and reduced the scope of documentation required in an answer. With respect to changes made to the procedural rules applicable to oil pipeline proceedings, the order clarifies that the Commission will be flexible in its application of the complaint procedures to oil pipelines. The order also states that the Commission did not make any changes to the substantive regulations or policies governing oil pipeline complaints.

DATES: The regulations are effective September 10, 1999.

ADDRESSES: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: David Faerberg, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 208–1275.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

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Order on Rehearing and Clarification

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

This order addresses a number of requests for rehearing and clarification of the Commission's final rule revising its complaint procedures. The general framework established by the complaint rule remains the same. The order does, however, grant rehearing and clarification in instances where the suggested changes will improve the new procedures and contribute to ensuring that the process allows the resolution of complaints in the most suitable manner.

I. Background

On March 31, 1999, the Federal Energy Regulatory Commission (Commission) issued a final rule (Order No. 602) revising its regulations governing complaints filed with the Commission under the Federal Power Act, the Natural Gas Act, the Natural Gas Policy Act, the Public Utility Regulatory Policies Act of 1978, the Interstate Commerce Act, and the Outer Continental Shelf Lands Act.[1] Order No. 602 was designed to encourage and support consensual resolution of complaints, and to organize the complaint procedures so that all complaints are handled in a timely and fair manner.

In order to organize the complaint procedures so that all complaints are handled in a timely and fair manner, the Commission revised Rule 206 of its Rules of Practice and Procedure.[2] Among other things, the Commission required that complaints meet certain informational requirements, required answers to be filed in a shorter, 20-day time frame, and provided various paths for resolution of complaints, including Fast Track processing for complaints that are highly time sensitive. The Commission intended these changes to ensure that the Commission and all parties to a dispute would have as much information as early in the complaint process as possible to evaluate their respective positions. The changes were also intended to ensure that the process used to resolve a complaint would be suited for the facts and circumstances surrounding the complaint, the harm alleged, the potential impact on competition, and the amount of expedition needed.

The Commission added a new Rule 218 providing for simplified procedures for complaints where the amount in controversy is less than $100,000 and the impact on other entities is *de minimis.* The Commission adopted these new procedures to provide a process by which small controversies can be resolved more simply and expeditiously than more complicated matters.

The Commission also took a number of steps to support its policy of promoting consensual resolution of disputes among parties in the first instance. The Commission pointed out that the recently created Dispute Resolution Service will work with all those interested in Commission activities to increase awareness and use of alternative dispute resolution (ADR) in all areas the Commission regulates. The Commission emphasized that this new service will also help identify cases appropriate for ADR processes and

[1] Complaint Procedures, Order No. 602, III FERC Stats. & Regs. ¶ 31,071 (1999), 64 FR 17087 (April 8, 1999).

[2] 18 CFR 385.206 (1998).

conduct ADR processes, including convening sessions. To further publicize and establish its Enforcement Hotline as a viable alternative to the filing of a formal complaint, the Commission codified its current Enforcement Hotline procedures.[3]

The Commission also revised its alternative dispute resolution regulations (Rules 604, 605 and 606)[4] to conform to the changes made by the Administrative Dispute Resolution Act of 1996[5] and foster an environment that promotes consensual resolution of disputes by eliminating provisions in its regulations which were seen as having a chilling effect on the use of ADR.

The Commission also revised certain sections of Part 343, Procedural Rules Applicable to Oil Pipeline Proceedings,[6] to conform to the changes in the Commission's complaint procedures in Part 385 of the regulations.

Requests for rehearing and/or clarification of Order No. 602 were filed by ARCO Products Company, and Ultramar Diamond Shamrock Corporation (ARCO); Association of Oil Pipe Lines (AOPL); Chevron Pipe Line Company (Chevron Pipe Line); Chevron Products Company (Chevron Products); Enron Interstate Pipelines (Enron); Express Pipeline Partnership (Express); Indicated Shippers; Interstate Natural Gas Association of America (INGAA); Southern Company Services, Inc. (Southern Company); and the Williams Companies, Inc. (Williams). Their requests for rehearing and/or clarification will be addressed below. The topic headings in the discussion section are those used in Order No. 602.

II. Discussion

The Commission continues to encourage and support consensual resolution of complaints and reaffirms its commitment to resolving disputes in as timely and as fair a manner as possible. The Commission has reviewed the requests for rehearing and concludes that in many instances the suggestions for change will improve the new procedures and contribute to ensuring that the process allows the resolution of complaints in the most suitable manner.

A. Informational Requirements for Complaints

The final rule revised Rule 206 of the Commission's Rules of Practice and Procedure to require that a complaint satisfy certain informational requirements.

Indicated Shippers states that Rule 206(b) requires the complainant to state whether informal procedures were used to resolve the complaint prior to filing. If such procedures were not used, the preamble to the final rule indicates that the complainant must explain why. However, the regulatory text does not expressly require such an explanation. Indicated Shippers submit that the regulatory text should be modified to reflect the requirement that an explanation be provided, as discussed in the preamble.

The Commission grants Indicated Shippers' request. In the final rule, the Commission strongly encouraged parties to attempt informal resolution of their disputes prior to the filing of a formal complaint. The Commission therefore adopted the proposal in the NOPR that parties be required to explain whether alternative dispute resolution was tried, and, if not, why. The regulatory text inadvertently omitted this requirement. Therefore, on rehearing § 385.206(b)(9)(i) is revised to require a complaint to state ''whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used.''

In the final rule, the Commission adopted procedures to allow complainants and respondents to request privileged treatment of information contained in a complaint or answer, and for interested persons to obtain the privileged version of the complaint or answer. These procedures are contained in § 385.206(e) for complaints and § 385.213(c)(5) for answers.

On rehearing, the Indicated Shippers assert that the procedure in the final rule creates the potential that complainants would be required to provide confidential materials to non-parties. Indicated Shippers submit that the ten-day period contemplated for requesting and receiving confidential materials will conclude twenty days before answers and interventions are due. Indicated Shippers contend that a complainant would be required to produce confidential material for an entity that had not intervened at that point, and might not intervene at all. Indicated Shippers propose that the Commission amend the rule to provide that a complainant need not disclose confidential material to a non-party. Indicated Shippers argue that the complainant should be required to serve the material by the later of (1) five days after receipt of the request or (2) the date of the requesting party's motion to intervene. Indicated Shippers states that because respondents are automatically parties, the complainant would be required to provide the confidential materials to the respondent within five days of the respondent's request as provided in the final rule. In addition, Indicated Shippers state that an interested person seeking to examine the material before the intervention deadline could always intervene in advance of the deadline.

Indicated Shippers argue that the wording of Rule 206(e)(3) appears to foreclose any requests for confidential materials once the initial five-day period following the filing of the complaint has expired. Indicated Shippers propose that the Commission not adopt a deadline for requests for confidential materials. Indicated Shippers contend that truly interested person have an obvious motivation to obtain the confidential material as soon as possible, in order to participate meaningfully, and do not need the compulsion of a deadline. However, the Commission should not eliminate the five-day deadline for complainants to furnish the confidential material to parties once a request for such information is made. Indicated Shippers submit that the Commission should similarly modify the corresponding provisions of Rule 213.

The Commission grants Indicated Shippers request for rehearing. The Commission's intention in establishing procedures for privileged information was to allow a complainant to have adequate protection for information it believed was commercially sensitive while allowing the respondent and interested parties an opportunity to receive the privileged information in a meaningful time for filing answers and comments. The Commission did not intend for information to be available to non-parties. The Commission also agrees with Indicated Shippers argument that a deadline for requesting privileged information is not necessary because a party has an obvious motivation to receive the information quickly in order to meaningfully participate in the proceeding. The Commission will therefore make the modifications suggested by Indicated Shippers.

Section 385.206(e)(3), concerning procedures for privileged treatment of information in complaints, will now read:

> The respondent and any interested person who filed a motion to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective

[3] 18 CFR Part 1b (1998).

[4] 18 CFR 385.604–606 (1998).

[5] Pub. L. 104–320, 110 Stat. 3870 (October 19, 1996).

[6] 18 CFR Part 343 (1998).

agreement and, for interested persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

Section 385.213(c)(5)(iii), concerning procedures for privileged treatment of information in answers, will now read:

The complainant and any interested person who has filed a motion to intervene may make a written request to the respondent for a copy of the complete answer. The request must include an executed copy of the protective agreement and, for interested persons other than the complainant, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

In the final rule, the Commission stated that the procedures for requesting privileged treatment have the advantage of enabling the parties to resolve disclosure disputes through consensual agreement among themselves without the need for Commission involvement in every instance involving privileged information. The Commission stated that it could still step in if parties were unable to agree on protective conditions or expressed a need for the added assurance against disclosure that would be offered by a Commission-issued protective order. The Commission stated that, if necessary, it could develop a model protective agreement akin to the model protective order developed recently by the Office of Administrative Law Judges.

While not seeking rehearing, AOPL and Chevron Pipe Line urge the Commission to seek comments on any such model protective agreement before adopting it. Their concerns stem from the fact that what may be an acceptable protective agreement for the natural gas and electric industries may not be acceptable for an oil pipeline subject to Section 15(13) of the Interstate Commerce Act. Section 15(13) of the Interstate Commerce Act makes it a crime for an oil pipeline to divulge information regarding its shippers. In Chevron Pipe Line's view, the only manner in which it can provide Section 15(13) information to another party in a proceeding (absent the shipper's consent) is if the protective agreement limits the availability of that information to outside counsel and expert witnesses. Chevron Pipe Line submits that the model protective agreement adopted by the Chief Judge, referenced by the Commission in Order No. 602, does not include that limitation.

The Commission understands the concerns of the oil pipeline industry and does not intend to adopt any model protective agreements or orders without input from the affected industries. If, in the future, the Commission determines that obtaining consensual agreement concerning privileged information is proving problematic, the Commission will then decide how to proceed in crafting model protective agreements or orders.

Southern Company asserts that while deadlines are imposed for filing answers, complainants are under no obligation to initiate the grievance process within any particular timeframe after the occurrence of the event giving rise to the dispute. This disparate treatment would allow complainants to spend unlimited time preparing a detailed complaint, complete with supporting expert witness testimony and exhibits. The respondent would then only have twenty days to investigate the facts, perform any needed research and prepare an answer. Such an approach is unfair and raises serious due process questions. Southern Company requests that the Commission revise the complaint procedures to limit availability of expedited adjudication to instances when the complainant shows that it initiated the grievance resolution process promptly following the occurrence of the event that underlies the dispute. In this regard, it would be reasonable for complainants to initiate the process within the same time frames applicable for respondents to submit an answer. Southern Company asserts that if a complainant is unable to initiate the process within those deadlines, it would be unreasonable to require respondents to answer within those timeframes. Southern Company contends that such an approach should not bar complaints that do not meet the deadlines, but the abbreviated timeframes for answers and Commission action set forth in the final rule should not apply to those complaints.

The Commission denies Southern Company's request for rehearing. Southern Company's request is essentially that a complainant be required to file a complaint within 20 days after the occurrence of the event underlying the complaint. In the Commission's view, this sort of ''statute of limitations'' requirement is inappropriate. The Commission and the parties would become bogged down unnecessarily in details concerning what is the event or occurrence which gave rise to the complaint, and from what event the deadline should run. Complainants have an incentive to file their complaints as quickly as possible so that they may obtain prompt relief, where appropriate. Further, given the more detailed filing requirements set forth in the complaint rule, it would be burdensome to require a complainant to file a complaint within 20 days after the event giving rise to the complaint. Nevertheless, the Commission clarifies that if a respondent wants additional time to file an answer it may request it. The Commission would consider a long time elapsed between the event giving rise to the complaint and the filing of the complaint as a factor justifying an extension of time. The Commission will be flexible in considering requests for extension and will favor granting them in circumstances where an extension will foster development of a complete record early in the complaint process.

B. Informal Resolution

Throughout the final rule the Commission reiterated its interest in strongly encouraging parties to attempt informal resolution of their dispute. In that regard the Commission had requested information on what professional assistance the Commission might provide to facilitate informal dispute resolution. In response a number of parties requested publication of complaints on the Commission's web site, a complaint status report on the Commission's web site, or a procedural hotline concerning a party's options for complaints. The Commission stated that although it could put certain basic information about a party's options in filing a complaint on the FERC Homepage, the idea of a complaint status report, as well as other electronic access issues relating to complaints, would be considered as part of the Commission's broader review of its information technology capabilities as well as the proceeding in Docket No. PL98–1–000 concerning public access to information and electronic filing.

Indicated Shippers assert the final rule creates the potential that interested persons not actually served with a complaint will not become aware of the complaint in time to intervene and present their legal positions and factual support in a timely manner. The late-filed and or incomplete interventions and answers which could result from inadequate notice may bog down the complaint proceedings with piecemeal record development and due process issues.

Given that the Commission accepts certain types of filings electronically, Indicated Shippers believe that the Commission should be able to post the full text of complaints on its web site. At a minimum, the Commission should post on its homepage a centralized list of pending complaints, comparable to the rate filings list on the Commission's gas page, which provides access to files. The listing should include (1) the names of the complainant and respondent, (2)

the docket number assigned, (3) the date the complaint was filed, and (4) whether the complaint included confidential information submitted under Part 388, for which execution of a confidentiality agreement would be required to obtain access. With this information, potentially affected parties reviewing the Commission's homepage could then access the notice via the Commission Issuances Posting System (CIPS) and the complaint itself via the Records and Information Management System (RMS).

In the alternative, the Commission could require the regulated entity to which the complaint relates to post the complaint, or notice of the complaint including filing date and docket number of the regulated entity's electronic bulletin board or web page.

The Commission agrees that Indicated Shippers' suggestion to include basic information on the Commission's Homepage is reasonable and may prove beneficial in notifying potential parties if issues in a complaint affect them. The Commission's goal continues to be to provide the public with as much information as possible with respect to complaints and the complaint process. Therefore, the Commission will be adding to its Homepage a list of all complaints pending with the Commission. The list will include the information suggested by the Indicated Shippers.

C. Simultaneous Service

In the final rule, the Commission adopted § 385.206(c) to read as follows:

> Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents and affected entities in the same metropolitan area as the complainant. Simultaneous or overnight service is acceptable for respondents and affected entities outside the complainant's metropolitan area. Simultaneous service can be accomplished through electronic mail, fax, express delivery, or messenger.

On rehearing, AOPL and Chevron Pipe Line assert that service simultaneous with filing should be by hand, fax or electronic mail unless demonstrably impossible. AOPL states that while hand service is certainly dependent on the geographic proximity of the complaint and respondent, fax and electronic mail are not. AOPL submits that there is no reason why a respondent should not, at a minimum, get a copy of the complaint the day it is filed unless complainant can prove there was no fax or electronic mail service available because of circumstances outside the complainant's control. A copy of the full filing should then follow by overnight mail. Chevron Pipe Line asserts that there is no practical distinction that simultaneous service is required only if the respondent is in the same metropolitan area as the complainant—that distinction does not take account of the real-life considerations involved in filing complaints with the Commission. If the entity filing the complaint is located outside the Washington, D.C. area, it will generally file the complaint with the Commission by next day delivery or by mail. In that case, there is no reason that the complainant cannot serve the respondent on the same day as the complaint is filed, regardless of where the respondent is located. Chevron Pipe Line asserts that the Commission should remedy this unnecessary distinction and require simultaneous service of all complaints on the respondent, while allowing next day service on any other required entity.

The Commission grants the requests for rehearing. The Commission concludes that the reference to a ''metropolitan area'' in the regulations could lead to unreasonable results. For example, as Chevron Pipe Line points out, under the regulation as written, a Washington, D.C. law firm filing a complaint on behalf of a Houston client would have to make simultaneous service on a Houston respondent, while service on a Philadelphia or Washington, D.C. respondent could be the next day. Therefore, § 385.206(c) will be revised to require simultaneous service on the respondent regardless of the respondent's location. The complainant should take all reasonable steps to serve the respondent simultaneous with filing at the Commission. Simultaneous or overnight service will be acceptable for all other affected entities.[7]

INGAA seeks clarification that, as part of the service requirement, parties must serve the complaint on the corporate official appointed to receive such service by the regulated entity. Thus, all Commission-regulated entities should be required to appoint an official to receive service of complaints, which official is to be designated on the company's electronic bulletin board or web site. INGAA states that absent this requirement, a complaint served on a corporation without identifying a specific individual recipient could be misrouted or its significance overlooked. INGAA submits that by the time the responsible officials become aware that a complaint has been filed, a large portion of time for answering may have been lost, adversely affecting the completeness and timeliness of the answer. INGAA asserts that a uniform requirement that every regulated entity appoint a corporate official responsible for receiving service of complaints, and a corollary requirement that complainants serve that official directly, will ensure that responses to those complaints are filed expeditiously, thus furthering the goals of the final rule.

The Commission finds INGAA's suggestion to be reasonable given the shorter amount of time respondents have to answer a complaint under the revised regulations. The requirement that a corporate official be designated to receive service of complaints should ensure expeditious receipt and handling of complaints by regulated entities. The Commission concludes that designating a corporate official to receive service would also be of benefit in other types of proceedings. The Commission therefore is issuing a notice of proposed rulemaking concurrently with this order proposing to add a new section (i) to § 385.2010 (Rule 2010) to require that all entities regulated by the Commission designate corporate officials or other persons to receive service of certain types of pleadings where a person to receive service has not otherwise been designated under the Commission's regulations.

D. Time Period for Answers, Comments and Interventions

Section 385.206(f) adopted in the final rule requires that answers, interventions and comments to a complaint must be filed within 20 days after the complaint is filed or, in cases where the complainant requests privileged treatment for information in its complaint, 30 days after the complaint is filed.

On rehearing, AOPL asserts that the time to answer should run from issuance of the notice of the complaint. AOPL argues that there is a real potential that interested parties who may be indirectly affected by a complaint may not be among those that would normally receive a copy of the complaint. Thus, not being served under the Commission's rules, they may not learn of the complaint until much of the already limited answer period has passed. AOPL submits that much would be gained from a due process standpoint, and little would be lost in terms of time, if the response, comments

[7] The Commission is also revising section 385.206(c) to require that simultaneous service by electronic mail must be in accordance with section 385.2010(f)(3) as promulgated in Order No. 604, Electronic Service of Documents, 87 FERC ¶ 61,205 (1999).

and intervention period began to run from the issuance of the notice.

The Commission recognizes that there may be interested persons who may not receive service of the complaint even using the broad category of ''others the complainant reasonably knows may be expected to be affected by the complaint,'' as required for service in Rule 206(c). Nevertheless, in the Commission's view, the time for filing answers should be determined from the date of filing of the complaint, rather than the notice. The Commission has found that in most instances interested parties are capable of responding to filings in a thoroughly capable manner even when doing so under time requirements shorter than those for answers to complaints.[8] In addition, AOPL's concerns should be alleviated by the fact that the Commission will be posting basic information on a complaint on the Commission's web site when it is received. This will permit interested persons to have the same amount of time to file answers, interventions, or comments as parties served under the regulations. The Commission also will remain flexible in considering the circumstances supporting any requests for extension of time to answer.

AOPL and Express assert that to the extent that the parties wish to pursue dispute resolution prior to the answer due date, the Commission should toll the answer period. If the complainant and the respondent agree to stay the answer in order to pursue settlement negotiations or some form of dispute resolution, the Commission should support such action. AOPL and Express contend that the Commission's rules should be modified to permit stay of the answer if settlement is being actively pursued.

The Commission will entertain requests to extend the time for answers pending the outcome of settlement negotiations or alternative dispute resolution. This is in keeping with one of the principles of the complaint rule of encouraging consensual resolution where possible. A further change to the regulations to recognize this, however, is unnecessary. The parties can simply file a motion pursuant to § 385.2008 requesting an extension of time within which to file an answer.

Chevron Pipe Line contends that the Commission should restore 30 days as the generally applicable period for filing an answer. Chevron Pipe Line asserts that a 20 calendar day response period, especially with next day service, does not permit sufficient time in which to research the facts and issues raised by a complex complaint and prepare a written response. Chevron Pipe Line argues that it is unnecessary to shorten the standard period to 20 calendar days, especially since the Commission is establishing procedures in which answers to extremely time sensitive complaints may be required in a shorter period under fast track processing. If the Commission believes that fast track processing is not, by itself, sufficient to handle time-sensitive matters, it should amend its rules to allow a complainant to seek a shortening of the answering period when it files its complaint, upon the proper showing. Chevron Pipe Line submits that under such a procedure, the answer would be filed more quickly, but the complainant would be accorded standard, not fast track, processing. Chevron Pipe Line asserts that by allowing only 20 calendar days and by beginning the period with the filing of the complaint rather than its service, the Commission is actually allotting less time for answers to complaints filed with it than is allotted for complaints filed in federal court. Chevron Pipe Line states that Rule 12 of the Federal Rules of Civil Procedure provide that answers must be filed within 20 days of service of the summons and complaint.

The Commission denies Chevron Pipe Line's request for rehearing. The Commission considers twenty days to be appropriate because it provides a respondent with a sufficient amount of time to answer a complaint while furthering the goal of speeding up the complaint resolution process. In addition, as more fully discussed below, the Commission is modifying the requirement that respondents provide ''all documents supporting the answer'' to ''documents supporting the answer.'' This will lessen the burden on respondents when they are preparing their answers. Finally, as also discussed below, and as touched on earlier, where good cause is shown, the Commission will give respondents more time to file an answer.

Williams urges the Commission to clarify that Rule 2008 of the Commission's Rules of Practice and Procedure is applicable to the complaint procedures and that the Commission will grant extensions of time to respond to complaint for good cause shown. Williams is concerned that in certain instances it may be impossible to meet the accelerated deadlines set forth in the complaint procedures.

The Commission clarifies that parties may file requests for extensions of time with respect to filing pleadings in a complaint case and the Commission may grant such requests pursuant to Rule 2008. As stated earlier, the Commission will consider extending the time for answering when an extension will further the goal of ensuring as complete a record as possible early in the complaint process.

The Commission will also be making a conforming change to Rule 213(d). That section currently states that answers to pleadings are due 30 days after the filing of the pleading or, if a notice is published in the **Federal Register**, 30 days after the publication of the notice. The Commission will modify the regulation so it will not be applicable to answers to complaints. This conforming change should have been made in the Final Rule but was overlooked.

D. Revisions to Oil Pipeline Regulations

The final rule revised certain sections of Part 343. Procedural Rules Applicable to Oil Pipeline Proceedings, to conform with the changes to the Commission's complaint procedures.

AOPL, Chevron Products, and Express assert that the Commission should exclude oil pipelines from the new rules and leave the distinctly different and entirely separate oil pipeline complaint procedures in place. Petitioners assert that the Commission's own discussion of the need for the new procedures only cited transitions in the natural gas and electric industries as the motivation for the new rules. They argue that nowhere in that discussion does the Commission recognize any transition or other development occurring in the oil pipeline arena militating for change. Further, petitioners assert that the very nature of the issues traditionally addressed in the oil pipeline arena are far more complex and factually based than the more generic, policy oriented disputes currently arising in the natural gas and electric sectors.

The Commission's purpose in revising the oil pipeline regulations was to ensure the consistency of the complaint procedures for all industries regulated by the Commission, while preserving the rate complaint standards adopted as an integral part of the package of ratemaking changes enacted in response to the Energy Policy Act of 1992. In the Commission's view, this purpose is still valid. Nevertheless, the Commission recognizes that the oil pipeline industry is not undergoing the same changes as the electric and gas industries. The Commission also acknowledges that complaint cases against oil pipelines in many instances may not require or lend themselves to the type of faster decision

[8] See, for example, 18 CFR 154.210, which requires that protests to tariff filings under section 4 of the Natural Gas Act must be filed not later than 12 days after the date of the tariff filing.

contemplated by the complaint rule. Accordingly, where the nature of a complaint against an oil pipeline may not fit neatly into the complaint resolution paths adopted in the Final Rule, the Commission will be flexible and devise a suitable procedure that will ensure resolution of the dispute in a manner that best serves all. Such an approach, which applies to other complaints as well, is best applied on a case-by-case basis, rather than through changes to the complaint regulations.

ARCO asserts that the standard of ''substantially in excess'' of cost based rates [9] is illegal and inconsistent with the decision of the Court of Appeals for the District of Columbia circuit in *Farmers' Union Central Exchange, Inc. et al.* v. *FERC,* 734 F.2d 1486, 1510 (D.C. Cir.), *cert. denied,* 469 U.S. 1034 (1984). ARCO asserts that the final rule fails to state all requirements for qualifying for or complaining against ''market-based'' rates, and is thus inconsistent with *Farmers Union II.* ARCO contends that the final rule conflicts with the actual practice of the Commission with respect to requirements for a complaint against cost-based or market-based rates. One or the other must conform. ARCO submits that the final rule, if it encompasses the process now in effect, discriminates against shippers seeking redress of grievances against oil pipelines and results in the effective refusal of the agency to do its statutory duty of ensuring that all rates are just and reasonable. ARCO contends that the Commission's new complaint process for shippers seeking rate redress from oil pipelines will require six different and sequential order, all subject to judicial review.

In the Final Rule the Commission made only two procedural changes to the oil pipeline regulations with respect to complaints. First, depending on whether the complaint involved rate or non-rate matters, certain information requirements in Rule 206 would have to be followed. Second, the Commission required that answers to complaints must be filed within 20 days after the complaint is filed. The Commission did not make any changes to the substantive regulations or policies governing oil pipeline complaints. ARCO's assertion in its request for rehearing that standards used to examine different types of rates are inconsistent with various court cases is inapposite because the complaint rule did not make any changes to oil pipeline ratemaking standards.[10] Accordingly, ARCO's request for rehearing is denied.

E. Content of Answers

Section 385.213(c)(4) adopted in the final rule requires that answers include ''all documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts, affidavits, and testimony.''

On rehearing, AOPL, Chevron Pipe Line and Express assert that the requirements for answers are too complex and burdensome. AOPL asserts that the final rule applies parallel requirements for supporting affidavits, testimony and documentation for complaint and answer alike. AOPL submits that for practical and procedural reasons, this parallelism is both unreasonable and unnecessary. AOPL argues that respondents should be required to demonstrate in their answers the nature of the factual conflict posed by the complaint. They should not be required to file a responsive case in chief accompanied by ''all documents'' that would support their position. AOPL contends that the Commission should seek a middle ground between the new requirements and the prior rule. Chevron Pipe Line asserts that requiring the provision of all documents may be construed as moving discovery to the answering stage of a proceeding. Chevron Pipe Line argues that the reference to ''testimony'' is unnecessary, since factual support can be provided through affidavits, and is procedurally confusing, since testimony usually means a party's case developed after necessary discovery. Chevron Pipe Line suggests that the Commission remove the word ''all'' from before documents and by deleting the reference to ''testimony'' in Rule 213(c)(4). Chevron Pipe Line states that the rule would then call for a provision of documents supporting the facts in the answer. Chevron Pipe Line submits that respondents will be properly motivated to include supporting documents, especially since they will be aware that certain matters can be decided on the basis of the complaint and answer alone. Chevron Pipe Line also contends that the Commission's regulation should provide that when time to file an answer is shortened for fast track processing, the respondent is required to provide only readily accessible documents.

The Commission concludes that it would be reasonable to require respondents to provide ''documents that support the facts in the answer'' as opposed to ''all documents that support the facts in the answer.'' The reference to ''all documents'' could be considered a burdensome requirement given that respondents have 20 days to file an answer. The Commission's intent was not to move discovery to an earlier stage of the proceeding but rather to ensure that an answer was properly supported by documentation. In the Commission's view, a respondent will be motivated to provide all relevant documents that support its case, even if ''all documents'' are not required. Since a complaint case may be decided on the pleadings alone, a respondent runs the risk of an adverse decision if it decides to withhold documents beneficial to its position. The requirements for an answer need not parallel and be as stringent as those for a complaint because it is the complainant who bears the burden of proof. Accordingly, the Commission will grant rehearing and strike the word ''all'' before the word documents in § 385.213(c)(4).

The Commission clarifies that the reference to testimony in § 385.213(c)(4) does not require a respondent to prepare new testimony for a particular complaint proceeding. In order to avoid any confusion, the Commission will delete the reference to ''testimony'' in § 385.213(c)(4).[11] The references to ''contract, affidavits, and testimony'' in both § 385.206(b)(8) and § 385.213(c)(4) were intended to be examples of the types of documentation that complainants and respondents could provide. If it wishes, a party may prepare and submit testimony for a complaint proceeding. It is more likely, however, that a party would provide preexisting testimony which could shed light on an issue raised in the proceeding. Such testimony, for example, could be prior testimony in

[9] The standard is set forth in § 343.2(c) of the Commission's regulations and refers to the standard for challenging rates established under the indexing regulations of § 342.3 and the standard for challenging settlement rates established under § 342.4(c). The standard was established in Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, FERC Stats. & Regs. (Regulation Preambles 199–1996) § 30,985 (1993). 58 FR 58753 (November 4, 1993), *order on reh'g,* Order No. 561–A, FERC Stats. & Regs. (Regulation Preambles 1991–1996) § 31,000 (1994), 59 FR 40243 (August 8, 1994).

[10] Section 13(1) of the Interstate Commerce Act provides that anyone can file a complaint against ''anything done or omitted to be done by any common carrier * * *'' Thus, any complaint against an oil pipeline's market-based rates would fall under this provision and the burden would fall to the complainant to establish that those rates are no longer just and reasonable. The Commission has not established an evidentiary standard for adjudicating such complaints in this or any other proceeding. As for challenges to rates deemed just and reasonable under Section 1803(a) of the Energy Policy Act, the Act itself at Section 1803(b) establishes a ''substantial change'' standard that a complainant must meet.

[11] The Commission is also making the same change in § 385.206(b)(8).

another case describing certain aspects of a pipeline's operations.

Given the short time frame for an answer when a complaint is assigned to the Fast Track process, the Commission will look at the practicalities of a respondent being able to answer a complaint with extensive detail and documentation on a case-by-case basis. This assurance should alleviate Chevron Pipe Line's concerns.

Indicated Shippers assert that the final rule requires the respondent to serve its answer, without any confidential material and accompanied by a form of protective agreement, to each entity that has been served pursuant to Rule 206. It is possible, however, that an interested person that was not served by the complainant would have intervened in the complaint docket before the respondent files the answer. Indicated Shippers submit that such entities, as parties, should receive service of the response, including a form of protective agreement if the response contains confidential material. Indicated Shippers assert that Rule 213 should reflect this requirement.

Indicated Shippers' request is reasonable, and, accordingly, the Commission grants rehearing. To allow for the possibility of a person intervening early who would like to be served the answer, § 385.213(c)(5)(ii) will be modified to read ''A respondent must provide a copy of its answer without the privileged information and its proposed form of protective agreement to each entity that either has been served pursuant to § 385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.''

F. Complaint Resolution Paths

Section 385.206(g) adopted in the final rule describes a number of procedural options that the Commission may use to resolve issues raised in complaints. These complaint resolution paths are (1) alternative dispute resolution, (2) decision on the pleadings by the Commission, and (3) hearing before an ALJ. Where a highly credible claim for relief is presented, and a persuasive showing is made that standard complaint resolution processing may not provide timely relief as quickly as circumstances may demand, the Commission will put the complaint on a Fast Track, to provide for expedited action by the Commission or an ALJ in a matter of weeks. The Fast Track process is described in § 385.206(h) of the regulations adopted by the final rule. Preliminary relief pending a resolution of the complaint by either the Commission or an ALJ may also be requested. A ruling on preliminary relief by an ALJ would be appealable to the Commission. Such an appeal is provided for in § 385.206(g)(2) adopted in the final rule.

Indicated Shippers supports the fast track concept in general. However, it states that without prompt notice, the procedure will create considerable uncertainty for the respondent and interested persons. Indicated Shippers contend that the Commission could alleviate uncertainty for the respondent and others by providing prompt notice adopting a Fast Track procedure and establishing an answer/intervention deadline or declining to adopt a Fast Track procedure. Ideally, such notice should be provided by the close of the business on the first business day following the filing of the complaint. Indicated Shippers submit that, in that way, the respondent and intervenors will have certainty quickly as to (1) whether the Commission will shorten the answer and intervention deadline, and (2) what the new deadline will be. Moreover, the Commission should not establish an answer/intervention deadline that is shorter than ten days, in keeping with the comments on the NOPR.

When it receives a complaint requesting Fast Track treatment the Commission will endeavor to issue, no later than the next business day following the filing of the complaint, a notice describing the complaint, stating whether the Fast Track process is to be used and, if so, the deadline for answers, interventions and comments, as well as any other information concerning the procedures to be used.

Enron, INGAA and Williams assert that the Commission has exceeded its NGA authority in specifying that interim relief is available for Natural Gas Act Section 5 complaint proceedings. Enron asserts that Section 5(a) of the NGA requires that the Commission must make a finding that a rate, practice or contract is unjust, unreasonable, unduly discriminatory, or preferential prior to fixing a new rate, practice or contract. Thus, Enron asserts, the NGA explicitly states that which must be proven in order for the Commission to impose a change. Enron argues that an order, even an interim order, mandating changes in a pipeline's rates or service must be based on a finding of substantial evidence. Enron submits that the Commission cannot now substitute a different standard. Enron contends that the standard in *Virginia Petroleum Jobber Ass'n* v. *FPC,* 259 F.2d 921 (D.C. Cir. 1958), cited in the final rule, does not satisfy the legal requirement of NGA Section 5(a). Enron states that a court may grant preliminary relief based merely upon the determination that the complainant is likely to succeed on the merits. Enron asserts that it is not sufficient under NGA section 5(a) that the Commission find merely that the action is likely to be found unjust, unreasonable, unduly discriminatory or preferential. Enron also contends that the absence of explicit statutory language authorizing preliminary relief is evidence that Congress did not intend to extend authority to the Commission.

INGAA asserts that the Commission itself has recognized that it has no authority under section 5 to grant interim relief.[12] INGAA asserts that the Commission's self grant of authority to order preliminary relief in this proceeding in a section 5 complaint case flies in the face of the explicit language of the statute that requires a hearing, with a final merits decision that the company's actions are unjust and unreasonable, prior to the imposition of any remedy. INGAA also cites *American Smelting and Refining Co.* v. *FPC,* 494 F. 2d 925, 933 (D.C. Cir. 1974) where the court held that:

> [t]he ''core section'' underlying the orders now before us is section 5(a) which empowers the Commission, on its own motion, after hearing, to correct discriminatory practices by natural gas companies. Like any order issued pursuant to section 5(a), an interim order can only issue after full hearing and must include a statement or reasons based upon findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements.

Thus, INGAA asserts, the court in *American Smelting* recognized that the Commission may not issue an interim order as provided in the final complaint rule.

The Commission will clarify what types of relief the Commission may provide under the complaint rule. At the outset, the Commission wishes to make it clear that it will act only where it has authority under the various statutes administered by the Commission. The final rule was designed to provide potential complainants with as many procedural options as possible to seek redress of their complaints given the short-term and dynamic nature of energy markets. The Commission acknowledges that use of certain terminology in the final rule

[12] *Citing,* Southern Natural Gas Co., 66 FERC ¶ 61,302 at 61,867 (1994) (stating that in *Western Resources, Inc.* v. *FERC,* 9 F.3d 1568, 1578 (D.C. Cir. 1993) the court found unlawful the Commission's attempt to replace the pipeline's pre-existing backhaul rate on an interim basis because it failed to meet the section 5 requirements).

may have led to confusion and concern on the part of many parties. By describing how the Commission envisions the complaint process working, the Commission hopes to eliminate such concern and confusion.

The Commission will eliminate all references to preliminary relief, other than stays or extensions of time, in the complaint regulations. Thus, sections 385.206(b)(7) and 385.206(h) will be modified and section 385.206(g)(2) will be deleted. In addition, the standards in section (b)(7)(i) through (iv), which are based on *Virginia Petroleum Jobber Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958), will also be deleted. In the Commission's view, these changes should eliminate certain parties' concern that the Commission was attempting to establish procedures for granting injunctive-type relief.

There may be cases, however, in which the Commission can issue what could be categorized as an ''interim'' or ''preliminary'' order in a complaint proceeding pursuant to existing authorities. For example, a complainant may assert that a respondent's conduct is so egregious or the evidence is so substantial supporting its case that the Commission needs to take some immediate action. In filing its complaint, a complainant could indicate that its evidence is so substantial as to establish a prima facie case of a violation of the relevant statutory standard or regulatory requirement. In these instances, the Commission could pursue several options. If the Commission were to find the complainant's case compelling based upon substantial evidence, the Commission *sua sponte* could issue a show cause or declaratory order based on the facts known at that time prior to the answer being filed. The respondent would then be directed to address the requirements of the order rather than file an answer. If the Commission did not find that immediate action was appropriate, the Commission would wait for the respondent to file an answer and then decide the appropriate course of action. This type of relief may be appropriate in certain limited circumstances and is within the Commission's authority to grant. Further, a respondent's due process rights are protected because it has the opportunity to respond to the show cause or declaratory order.

The Commission could also take such other ''interim'' or ''preliminary'' actions, as it can now, such as issuing an order granting a stay or an order granting an extension of time, stop work order, or other orders contemplated by certificate or hydroelectric licensing conditions. In addition, a complainant may request forms of relief which it believes is within the Commission's authority to grant. The Commission will decide whether the relief may be granted on a case-by-case basis. Accordingly, the requests for rehearing are granted consistent with the discussion above.

Indicated Shippers assert that Rule 206(g)(1)(i) as codified states that the Commission may assign a case to be resolved through alternative dispute resolution or ''assign the case to a settlement judge in accordance with section 385.603.'' However, Rule 603 states that the Commission, instead of assigning cases directly to settlement judges, directs that the Chief Administrative Law Judge appoint a settlement judge. Indicated Shippers request that Rule 206(g)(1)(i) be revised to conform to Rule 603.

The Commission grants Indicated Shippers' request for rehearing since it accurately reflects the Commission's regulations. Therefore, § 385.206(g)(1)(i) will be modified to read ''The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§ 385.604–606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with section 385.603.''

G. Simplified Procedures for Small Controversies

The final rule codified in new Rule 218 procedures for complaints involving small controversies that will allow them to be resolved more simply and expeditiously than more complicated matters. The procedure will be available if the amount in controversy is less than $100,000 and the impact on other entities is de minimis. Among other things, answers, interventions and comments are due within 10 days after the filing of the complaint.

Chevron Pipe Line asserts that the 10 day answer period is too short a time period (a maximum of seven business days if the complaint is filed on a Friday, including the day of receipt of the complaint) and there is no justification for adopting a shorter time than the normal period for answers. In Order No. 602, the Commission recognized that fast track processing will place a strain on its resources. In the same manner, preparing answers to complaints places a strain on the respondent's resources. Chevron Pipe Line asserts that business personnel necessary for the preparation of answers to complaints have other responsibilities, which cannot be completely ignored in favor of preparing the answer. Chevron Pipe Line contends that the Commission should not intensify that unavoidable strain with a 10 day answering period. Rather, it should allow the normal period for answers to small controversy complaints, and, amend its rules to allow a complainant to seek a shorter period upon the proper showing.

The Commission denies Chevron Pipe Line's rehearing. In the Commission's view, the 10 day answer period is sufficient given the more limited nature of the complaints filed under the simplified procedure. Moreover, a respondent is not required to file relevant documents with its answer, thus reducing its burden. Nevertheless, if a respondent believes that the answer period is too short, it may request an extension of time within which to file an answer pursuant to Rule 2008.

Williams asserts that the complaint procedures erroneously provide simplified procedures for controversies less than $100,000, regardless of the likelihood that such controversies could have significant policy impacts. Williams contends that the simplified procedure ignores the ultimate impact on both the respondent and the industry, especially when policy issues are involved. Williams argues that the value placed on a claim by a complainant in one instance might not accurately reflect the ultimate impact of the complaint proceeding. For example, a controversy that is worth $50,000 to the complainant may be worth millions of dollars to the respondent after a precedent is set and others avail themselves of that precedent. Further, Williams asserts that issues that involve matters of policy, even if the amount in controversy is small, must be given full and adequate consideration. Williams submits that the complaint procedures should be revised to eliminate the discriminatory, special treatment for small controversies and provide everyone with the same treatment and procedures.

The Commission denies the request for rehearing. The simplified procedures for complaints are designed to resolve disputes between the complainant and the regulated entity involving less complex matters, for example, a billing dispute. It was not contemplated that small controversy complaints would have any major policy implications. The procedures are designed to allow a complainant with limited resources to seek relief before the Commission without incurring the time and expense associated with a more formal complaint. The effects of a small controversy complaints were intended

to be limited to the complainant and respondent, hence the *de minimis* impact requirement. Nevertheless, if in a respondent's view, the use of the simplified procedures is not appropriate, it should provide support for such assertion in its answer. In the event the Commission finds that a small controversy case has policy implications affecting an industry, or resolution of the complaint would require the respondent to take action affecting other customers that would have a cumulative effect over $100,000, it can remove the case from the simplified procedures and use the more formal procedures under Rule 206. Such decisions will be made on a case-by-case basis.

III. Effective Date

The amendments to the Commission's regulations adopted in this order on rehearing will become effective September 10, 1999.

List of Subjects in 18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

David P. Boergers,

Secretary.

In consideration of the foregoing, the Commission denies rehearing in part, grants rehearing in part, and clarifies Order No. 602 as described above, and amends Part 385, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

PART 385—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85.

2. In § 385.206, paragraphs (b)(7), (b)(8), (b)(9)(i), (c), (e)(3), and (h)(1) are revised, paragraph (g)(2) is removed, paragraphs (g)(1) introductory text, (g)(1)(i), (g)(1)(ii) and (g)(1)(iii) are redesignated as paragraphs (g) introductory text, (g)(1), (g)(2) and (g)(3), respectively, and newly redesignated paragraph (g)(1) is revised to read as follows:

§ 385.206 Complaints (Rule 206).

* * * * *

(b) * * *

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) * * *

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

* * * * *

(c) *Service.* Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with § 385.2010(f)(3), facsimile, express delivery, or messenger.

* * * * *

(e) * * *

(3) The respondent and any interested person who has filed a motion to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective agreement and, for persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

* * * * *

(g) * * *

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§ 385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with § 385.603;

* * * * *

(h) *Fast Track Processing.* (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

* * * * *

3. In § 385.213, paragraphs (c)(4), (c)(5)(ii), (c)(5)(iii) and (d)(2) introductory text are revised to read as follows:

§ 385.213 Answer (Rule 213).

* * * * *

(c) * * *

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) * * *

(ii) A respondent must provide a copy of its answer without the privileged information and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206 (c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(iii) The complainant and any interested person who has filed a motion to intervene may make a written request to the respondent for a copy of the complete answer. The request must include an executed copy of the protective agreement and, for persons other than the complainant, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

* * * * *

(d) * * *

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

* * * * *

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 151, 174, 178

[T.D. 99–65]

RIN 1515–AB75

Detention of Merchandise

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for procedures regarding the detention of merchandise that is undergoing extended Customs examination. The changes promulgated accurately reflect amendments to the underlying statutory