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### "FERC Cases Require Knowledge of Facts and Policy"

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The impact of the energy industry on the nation is daily news. Alan Greenspan appeared before Congress repeatedly in 2003 to comment on the supply crisis in natural gas and its effect on gas and electricity prices. The meltdown in California electricity markets led to a recall vote and a new governor. The Enron collapse was followed by the bankruptcy or near-bankruptcy of several energy companies. Congress, businesses and consumers all look to the Federal Energy Regulatory Commission [FERC] for remedies. FERC decisions set prices for gas pipelines, electric transmission, wholesale power and oil pipelines. FERC prefers to regulate through rule-making and nonadjudicative procedures. Yet litigation at FERC remains important in resolving cases that set or affect energy prices and the rules for getting energy to markets.

Some participants view FERC litigation as just an expensive nuisance, and have formed the opinion over the years that FERC decides cases based on its policies rather than on the factual record developed at trial. Although FERC policies are the filter through which it views an evidentiary record, FERC is legally bound to decide cases based on the factual evidence. When it does not so decide, a reviewing federal court of appeals has the opportunity to overrule FERC.

So, although expensive, FERC trials are not just a nuisance. They are a party's opportunity to supply the record with facts sufficient to dictate a result that may not correspond with the result FERC would have reached had a trial not occurred and FERC was free to rely only on its policies. If a company is sent to trial by FERC, it should view the trial as its opportunity to lock in the facts that support its desired result.

FERC litigation demands of its participants that they understand at least three crucial realities: the players, the process and the evolution of the energy industry. The players are the administrative law judges [ALJs], FERC trial staff and the attorneys and expert witnesses; their interaction in the trial process directly affects the development of the trial record [which remains unchanged through years of appeals, and policy and industry changes].

#### An evolving trial setting

FERC has developed a strong and efficient group of ALJs. As an aside, there is an old story about FERC litigation from decades ago [pre-1978, when FERC was the Federal Power Commission]. It seems a veteran ALJ had difficulty keeping his eyes open at trial after lunch, in a case that had gone on for months. One attorney-whose witness was experiencing a difficult cross-examination from the opposing side-found a way to cope with the situation. He would slide several heavy books off the counsel's table and onto the floor [bang!] before rising to make an objection. Those sleepier days at FERC trials are long gone.

Litigators should learn which FERC ALJs have 20 or more years of experience in presiding over FERC trials [about half of them do]. They know the regulated industries well, have lived through the evolution of FERC policy and know many of the attorneys and expert witnesses from previous trials. Trials before them differ from trials before the handful of relatively new ALJs at FERC.

For the newer ALJs, the nature of the industry, the regulatory history and the litigating attorneys can be matters of first impression. Before newer ALJs, there may be a higher premium on a presentation that includes a favorable historical context; such ALJs may not have lived through changes in the industry and in FERC policy. Before a veteran ALJ the history usually is known, and it behooves the attorney to identify and emphasize the key fact or facts in all presentations before the

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ALJ. The veteran ALJ will be influenced by that approach.

Consider 'staff' carefully

A second important player is the FERC trial group [referred to as staff], a different group from 20 years ago but still including many veteran attorneys and expert technical witnesses. Before the actual trial begins, the written, filed testimony of the staff's technical witnesses will show their position in the case. Often the staff position reflects FERC policy, but it must rely on facts in the case [from pleadings filed earlier and from discovery responses]. Be aware that one's client is vulnerable to how the staff will construe and borrow from every document in the case, including documents filed before any testimony is filed.

In a typical FERC trial, there customarily are several-sometimes dozens-of intervening parties, most of which take positions adverse to the regulated company and sometimes adverse to each other. The more numerous the intervening parties and the more active they are, often the less active the FERC staff is. In that regard, FERC attorneys and the energy bar form a group of lawyers who litigate against each other regularly and probably as much as in any agency or court litigation in this country; trials may be shaped by the prior dealings between the lawyers. When such relationships are good, shortcuts in discovery are available, costs can be reduced and witnesses will feel more comfortable.

Although FERC staff will never adopt a position because an attorney or witness in the case is known and likable, prior "fair dealing" by the witness and attorney often means that the staff will carefully consider any disagreements in the current case. Again, though, the facts admitted into the record ultimately are what matter, and developing favorable facts in the evidentiary record is the single best use of a FERC trial proceeding.

The process that characterizes FERC litigation, which has changed fairly dramatically over the last two decades, is crucial. The world is a faster place, and quicker results are expected from FERC. FERC now often sets its trials for expedited decisions; it never used to. There are "tracks" for the trial of other, nonexpedited cases, which prescribe time frames for discovery, trial, briefing and an ALJ decision. Only the chief ALJ can alter the tracks-a clear change from the days when the parties and the trial ALJ would set a schedule on their own and would then amend it [i.e., postpone due dates].

Significantly, today's FERC trial often is set in a broader context than the specific factual dispute among the litigants. FERC policy will overshadow the dispute and will be known to the ALJ and will be presented in staff testimony. The opportunity a litigant once had to obtain a case-specific result is the rare outcome now. FERC has standardized most aspects of what it requires from regulated companies, and it is in the process of seeking to standardize the rest. A litigant must understand not only its own case, but how its case fits into the broader FERC policy in the area of dispute.

If a litigant fits within FERC policy, it must develop a trial record proving that. If a litigant's position conflicts with FERC policy [and settlement is not available], the litigant must resign itself to persevering to a federal appellate court, and be armed in court with evidentiary facts as to why the FERC policy is wrong, or wrong when applied to it. In the rare case in which FERC does not have a policy that pertains to the dispute, the ALJ's decision takes on increased importance as a guide for FERC's decision-making.

The trial before the FERC ALJ is only one small step in a long climb to final resolution. The trial is followed by the losing party's brief to the commission arguing that the ALJ was wrong; the prevailing party then will file its brief to the commission arguing that the ALJ was right. Because the commissioners rarely schedule oral argument, the briefs are the best chance to make one's case to the commissioners. After the commission issues its order, the losing party files a brief seeking rehearing. The commission rarely grants rehearing, but the rehearing brief is crucial nonetheless because only the arguments raised on rehearing can later be raised in court.

A long, slow road

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Although FERC cases move faster than they used to, it still can take several years to progress from the setting of a trial date to an appellate court decision. And that's often not the end of the road for the prevailing party; the federal court usually will remand the case to FERC for reconsideration in light of the court's holdings, rather than mandate an outright reversal. The remand to FERC can result in another year or two of limbo, often with FERC issuing a remand order reaffirming its original result [which the court questioned] or, worse yet from the standpoint of achieving finality, sending the case back to the ALJ for further factual development or updated evidence.

The process [albeit infrequently] might be slowed before it gets to court. The briefs filed with the commission after the ALJ's initial decision, or subsequent industry developments not addressed in the evidentiary record, may cause FERC to send a case back to the ALJ for a second trial.

Changes in the energy industry form a third crucial aspect of FERC litigation. Two decades ago, regulated industries were better situated to plan their business even with prolonged FERC litigation. In those days, FERC regulation strictly controlled most day-to-day operations; revenues being collected subject to possible refund as a result of litigation were "reserved" in the company's financial statements, so that financial uncertainty from lengthy litigation did not present a problem. But the industry has changed, and this change is the third key aspect of FERC litigation today.

Due to statutory and regulatory changes, regulated companies over the last two decades have increasingly become essentially deregulated. They have received authority to charge market-based rates and to negotiate nontariff rates, they have taken on affiliated businesses that are not regulated even though they operate in energy markets and they have been allowed or encouraged by FERC to establish new mechanisms for conducting regulated business that rely on less frequent filings at FERC. These changes have placed energy companies and their customers in a new environment in which their former tolerance of the glacial pace of some FERC litigation is now challenged by their desire to respond to competition more quickly than litigation permits.

FERC is well aware of this, and has responded by encouraging techniques other than full-blown litigation. One is the technical conference, during which interested parties gather at FERC with FERC advisory [not litigation] staff, and present information and positions in the case. The FERC advisory staff then prepares a report to the commissioners who decide the case based on the staff report and the parties' comments, avoiding the trial process before an ALJ. While this alternative can work, it may create a denial of due process when cross-examination of individuals under oath, on a transcribed record, is necessary to pin down the relevant facts.

Another option encouraged by FERC is alternative dispute resolution. The parties meet with a trained FERC mediator to exchange views before a person knowledgeable of the industry and the FERC policies that would apply if the case went to trial. A third alternative is settlement, of course, and FERC has encouraged settlements for decades. But a new development is that FERC has sought to promote settlement by appointing a settlement ALJ to certain cases before sending them to different ALJs for trial. FERC even designates an ALJ to be on standby duty as the "on-call settlement ALJ" for each day when trials are being conducted at the FERC building.

Despite the energy industry's need and desire for quicker decisions from FERC, and despite FERC's molding of its processes to achieve quicker decisions, there will always be FERC litigation. Under current law, cases that are dependent on the facts must be resolved with adjudicated fact-finding. In addition, FERC sometimes determines that it needs the benefit of a fully litigated record and an ALJ's analysis of the facts before it can render a decision in a case of first impression. Then, too, the more that is at stake in a case, the less the parties may be willing to compromise on a rough-justice settlement to avoid trial. In that regard, involving one's adversaries in a FERC trial that does not go well for them may be the best way ultimately to resolve a case by settlement.

The industry may be better off with less FERC litigation, but it cannot avoid it completely. Understanding the players and the process of FERC litigation is crucial to getting the best result from an expensive nuisance.