

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 385

(Docket No. RM05-33-000; Order No. 663)

Revision of Rules of Practice and Procedure Regarding Issue Identification

(Issued September 16, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its regulations regarding filings. The regulations are revised to clarify that any issues that the movant wishes the Commission to address must be specifically identified in a section entitled "Statement of Issues." This change will benefit the Commission by clarifying issues raised, and benefit movants by ensuring issues are addressed promptly and preserved for appeal.

EFFECTIVE DATE: The rule will become effective **[upon publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT:

Carol C. Johnson
Office of the General Counsel, GC-13
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
202-502-8521

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Revision of Rules of Practice and Procedure
Regarding Issue Identification

Docket No. RM05-33-000

ORDER NO. 663

FINAL RULE

(Issued September 16, 2005)

1. The Federal Energy Regulatory Commission (Commission) is revising its rules of practice and procedure to clarify that any issues a movant wishes the Commission to address must be clearly set forth in a section entitled “Statement of Issues,” that will reference representative Commission and court precedent on which the participant is relying. While the current rules require that pleadings include “[t]he position taken by the participant filing any pleading . . . and the basis in fact and law for such position,” the Commission has found that movants sometimes fail to specify the issues they want the Commission to address, or the case law supporting their position. 18 CFR 385.203(a)(7). This revision will benefit movants, and other parties to the proceeding, as well as the Commission.

2. The way to ensure that an issue is addressed is for a movant to place it squarely before the Commission in a filing. Under the Administrative Procedures Act (APA),

5 U.S.C. 554(b)(3), “[w]hen private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law”

These amendments are consistent with that provision of the APA in that they require that a movant identify with specificity those issues he is raising with the Commission, and provide the applicable legal authority supporting his position.

3. This rule will benefit all participants. Other parties will know with certainty which issues to address in any responsive pleadings. The Commission will know with certainty the issues being raised and the legal support cited as supporting that issue, enabling the Commission to respond promptly and thoroughly to such issues. Finally, movants will benefit by placing the issue squarely before the Commission for resolution.

4. There have been numerous instances where appeals have been denied because an appellant failed to clearly raise an issue before the Commission on rehearing. See, e.g., California Dep’t of Water Resources v. FERC, 341 F.3d 906, 911(9th Cir. 2003) (issue not preserved for review where petitioner “raised the issue in a single sentence at the end of an unrelated section of its request for rehearing, without citing the statutory language it now urges [the court of appeals] to consider.”); Intermountain Municipal Gas Agency v. FERC, 326 F.3d 1282, 1285 (D.C. Cir. 2003); Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC, 297 F.3d 771, 777 (8th Cir. 2002) (declining to find jurisdiction where petitioner’s “brief does not show that it raised the . . . arguments in any recognizable form”).

Both the Natural Gas Act and the Federal Power Act require that issues be presented with specificity to the Commission on rehearing prior to any court appeal. 15 U.S.C. § 717r(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.”); 16 U.S.C. 825l(a) (“The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. . . . No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.”).

This is a threshold issue; courts have found no jurisdiction to address issues that were not sufficiently raised in a request for rehearing. See, e.g., Intermountain v. FERC, 326 F.2d at 1285 (concluding the court lacked jurisdiction to address an issue because “so general and vague statement” does not satisfy the requirement in the Natural Gas Act that objections be “specifically urged.”) (citations omitted).

5. The general rules regarding content of pleadings are found in Rule 203, Content of pleadings and tariff or rate filings. 18 CFR 385.203. Rule 202 defines pleadings to include “any application, complaint, petition, protest, notice of protest, answer, motion, and any amendment or withdrawal of a pleading.” 18 CFR 385.202.¹

To date, § 385.203(a)(7) has required that each pleading include, as appropriate,

¹ Rule 202 specifically excludes comments on rulemakings or comments on offers of settlement from the definition of pleading.

“[t]he position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position.” The

Commission is revising this provision to specify that the issues be set forth in a separate titled section. Revised § 385.203(a)(7) requires that pleadings include:

“[t]he position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position, including a separate section entitled ‘Statement of Issues,’ listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.”

6. This final rule also adds language to Rule 713 to clarify that a “Statement of Issues” section is also required in requests for rehearing as well as pleadings.

Existing Rule 713 states that requests for rehearing “must . . . [c]onform to the requirements in Rule 203(a) which are applicable to pleadings.” 18 CFR 713(c)(2).

Therefore, the amended language in revised Rule 203 already applies to rehearings;

however, the requirement for a section entitled “Statement of Issues” is important

enough that it warrants repeating in the rule on requests for rehearing. Revised

18 CFR 385.713(c)(2) is, therefore, revised to clarify that requests for rehearing must

“conform to the requirements in Rule 203(a), which are applicable to pleadings,

including, but not limited to, the requirement for a separate section entitled ‘Statement of Issues,’ listing each issue in a separately enumerated paragraph that includes

representative Commission and court precedent on which the party is relying.”

7. If a movant fails to list issues in a separate section entitled “Statement of Issues,” such issues will be deemed to have been waived. This is consistent with existing Rule 2001, which states that filings that fail to meet applicable statutes, rules or orders may be rejected in full or all or part of the filing may be stricken. 18 CFR 385.2001(b). Sections 385.203 and 385.713 are both revised to specify that issues that are not presented in separate paragraphs in the “Statement of Issues” section will be deemed waived.

8. The changes that are made in this rule are essentially formatting changes. The existing regulations already require issue identification and the basis in fact and law for positions asserted; this order simply requires that the issues and legal support for the position taken be set forth in a section entitled “Statement of Issues,” thus making it easier for staff and others to know with certainty the issues and legal arguments being raised.

Information Collection Statement

9. The Office of Management and Budget’s (OMB’s) regulations require that OMB approve certain information collection requirements imposed by agency rule. 5 CFR 1320.12 (2005). This Final Rule contains no additional information reporting requirements, and is not subject to OMB approval.

Environmental Analysis

10. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse

effect on the human environment.² The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural that do not substantially change the effect of the regulations being amended. This proposed rule is procedural in nature and, therefore, falls under this exception; consequently, no environmental consideration is necessary.

Regulatory Flexibility Act Certification

11. The Regulatory Flexibility Act of 1980 (RFA)³ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analysis if a rule would not have such an effect. The Commission certifies that this rule will not have such an impact on small entities as it merely clarifies existing requirements. An analysis under the RFA therefore, is not required.

Document Availability

12. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business

² Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

³ 5 U.S.C. 601-612

hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

13. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

14. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact the Commission's Online Support at 1-866-208-3676 (toll free) or TTY (202)502-8659, or e-mail at FERCOnlineSupport@ferc.gov. You may also contact the Public Reference Room at (202) 502-8371 or e-mail at public.referenceroom@ferc.gov.

Effective Date

15. These regulations are effective immediately upon publication in the Federal Register. In accordance with 5 U.S.C. § 553(d)(3), the Commission finds that good cause exists to make this Final Rule effective immediately upon publication. It concerns only a matter of procedure affecting formatting of filings.

16. The provisions of 5 U.S.C. § 801 regarding Congressional review of Final Rules does not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

17. The Commission is issuing this as a final rule without a period for public comment. Under 5 U.S.C. § 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. This rule concerns only a clarification of a matter of agency procedure and will not significantly affect regulated entities or the general public.

List of subjects in 18 CFR Part 385

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends Part 385, Chapter I, Title 18, Code of Federal Regulations, as follows.

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; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1085 (1988).

2. Section 385.203 is amended by revising paragraph (a)(7) to read as follows:

§ 385.203 Content of pleadings and tariff or rate filings (Rule 203).

(a) * * *

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position, including a separate section entitled “Statement of Issues,” listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying; any issue not so listed will be deemed waived;

* * * * *

3. Section 385.713 is amended by revising paragraph (c)(2) to read as follows:

§ 385.713 Request for rehearing (Rule 713).

* * * * *

(c) * * *

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, including, but not limited to, the requirement for a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

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