

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 385

(Docket No. RM05-33-001)

Revision of Rules of Practice and Procedure Regarding Issue Identification

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its regulations regarding pleadings. The regulations are revised to eliminate, in all pleadings except requests for rehearing, a recent formatting requirement that the pleadings contain a section entitled “Statement of Issues.”

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

FOR FURTHER INFORMATION CONTACT:

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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. RM05-33-001

ORDER NO. 663-A

FINAL RULE

( Issued March 17, 2006)

1. The Federal Energy Regulatory Commission (Commission) is revising its rules of practice and procedure to eliminate for all pleadings, except requests for rehearing, a recent change in Order No. 663 requiring that any issues a filer wishes the Commission to address be clearly set forth in a section of the pleading entitled “Statement of Issues” and that “any issue not so listed will be deemed waived.”<sup>1</sup> Several months of experience under the new rule has indicated that it is not necessary in the context of all pleadings; however the Commission is retaining the requirement as it applies to Rule 713, request for rehearing.

2. In Order No. 663, the Commission stated that it believed the changes to 18 CFR 385.203(a)(7) and 385.713 would benefit both the Commission and

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<sup>1</sup> Revision of Rules of Practice and Procedure Regarding Issue Identification, Order No. 663, 70 FR 55723 at P 5 (Sept. 23, 2005), III FERC Stats. & Regs. ¶ 31,193 (Sept. 16, 2005).

participants by providing certainty with respect to issues being raised. In the meantime, the requirement for a “Statement of Issues” section has not proven particularly helpful for a number of common pleadings, and has led to confusion on the part of filers. For instance, many motions to intervene do not contest specific issues in the pleadings. Filers in those types of situations have puzzled over what information, if any, belongs in a Statement of Issues for their motion to intervene. To eliminate this confusion and simplify the pleadings format, the requirement for a separate Statement of Issues section is being eliminated from Rule 203. Parties will not be prejudiced by this formatting change, given that § 385.203(a)(7) will maintain its original requirement that pleadings include, as appropriate, “[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 . . . .” This will provide adequate notice for the issues raised in the pleadings. This rule deletes the following language from § 385.203(a)(7): “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. However, the Commission finds that a “Statement of Issues” requirement is necessary in the context of requests for rehearing. Requiring the party seeking rehearing to specify each issue being raised in a separate paragraph benefits the Commission by clarifying the issues it needs to address on rehearing. More importantly, it benefits parties seeking rehearing. As noted in Order No. 663, both the

Natural Gas Act and Federal Power Act mandate that issues be raised on rehearing as a jurisdictional prerequisite to obtaining judicial review of a Commission order.<sup>2</sup>

Order No. 663 at P 4. Courts have found no jurisdiction to address issues that were not raised on rehearing.<sup>3</sup> Therefore, the requirement for a separate section specifically enumerating issues raised on rehearing benefits parties seeking rehearing because it prevents them from having cases denied on appeal for failure to clearly raise the issue at the administrative level.

4. Moreover, requiring all issues to be set forth with specificity in separately enumerated paragraphs helps to ensure that the Commission will adequately address the issues raised in the rehearing request for purposes of judicial review. As noted in Order No. 663, there are numerous instances where appeals were denied because the

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<sup>2</sup> Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), states that “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.” Section 313(a) of the Federal Power Act, 16 U.S.C. 825l(a) states that “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.”

<sup>3</sup> See DTE Energy Co. v. FERC, 394 F.3d 954, 960 (D.C. Cir. 2005) (finding petitioner’s failure to seek rehearing “fatal” to its court challenge, noting that “[t]he mandatory requirement of filing a petition for rehearing is designed to afford the Commission an opportunity to invoke its expertise or to correct any errors prior to judicial review”); Fuel Safe Washington v. FERC, 389 F.3d 1313 (10<sup>th</sup> Cir. 2004) (“the presentation of a ground of objection in an application for rehearing by the Commission is an indispensable prerequisite to the exercise of power of judicial review of the order on such ground,” quoting Pan Am Petroleum Corp. v. FPC, 268 F.2d 827, 830 (10<sup>th</sup> Cir. 1959)).

court found that a petitioner's position was not clearly articulated before the Commission.<sup>4</sup>

5. This final rule also amends the language in Rule 713 to account for the now-eliminated requirement in Rule 203(a) to include a "Statement of Issues" section. Current Rule 713 states that requests for rehearing must "[c]onform 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; and . . . ."<sup>5</sup> This section is being revised to state that requests for rehearing must "[c]onform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled 'Statement of Issues,' listing each issue in a

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<sup>4</sup> See, e.g., Intermountain Municipal Gas v. FERC, 326 F.3d 1282 at 1285 (D.C. Cir. 2003) (finding no jurisdiction because "so general and vague a statement" in a petition for rehearing fails to meet the requirement in section 19(b) of the Natural Gas Act, which requires that objections be "specifically urged," quoting Louisiana Interstate Gas Corp. v. FERC, 962 F.2d 37, 41 (D. C. Cir. 1992)); California Dep't of Water Resources v. FERC, 341 F.3d 906, 911(9<sup>th</sup> 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] to consider"), reh'g en banc denied, 361 F.3d 517 (2004); California Dep't of Water v. FERC, 306 F.3d 1121, 1126 (D. C. Cir. 2002) (court dismisses petition for judicial review because issue raised in a footnote "does not properly present, and thus does not preserve, the issue the intervenors wish to argue"); and Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC, 297 F.3d 771, 777 (8<sup>th</sup> Cir. 2002) (declining to find jurisdiction where petitioner's "brief does not show that it raised the . . . arguments in any recognizable form"), reh'g en banc denied, 2002 U.S. App. LEXIS 21769 (8<sup>th</sup> Cir. Oct. 17, 2002), cert. denied, 538 U.S. 960 (2003).

<sup>5</sup> 18 CFR 385.713(c)(2), as modified by Order No. 663, P 6.

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 . . . .”

6. The rehearing rule at § 385.713(c)(2) continues to specify that issues not so raised will be deemed to have been waived. As noted in Order No. 663 at P 7, 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.<sup>6</sup>

7. The revisions adopted in this rule are more appropriately characterized as a clarification of the Commission’s rules rather than a change in Commission policy or a significant revision of the existing rules of practice and procedure. Rule 713, prior to the enactment of Order No. 663, required parties filing for rehearing to “state concisely the alleged error in the final decision or final order.” However, Rule 713 was neither adhered to uniformly nor applied in pleadings consistently. Therefore, we are requiring that all rehearing requests include a separately designated section and an itemized and enumerated Statement of Issues, which will help eliminate ambiguities among parties, the Commission, and the reviewing courts, as discussed above.

8. The changes that are made in this rule eliminate one requirement in Rule 203(a)(7) and make necessary amendments to Rule 713(c)(2) to reflect the change in Rule 203(a)(7).

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<sup>6</sup> 18 CFR 385.2001(b)(2005).

**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.<sup>7</sup> 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 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)<sup>8</sup> 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

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<sup>7</sup> Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

<sup>8</sup> 5 U.S.C. 601-612 (1994).

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>) under "What's New" and in FERC's Public Reference Room during normal business 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 1-866-208-3673 (toll free) or 202-502-6652 (e-mail at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov)) or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-Mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto: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 eliminating a requirement 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;

\* \* \* \* \*

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, and, in addition, include 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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