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Title 17—Commodity and Securities Exchanges

CHAPTER I—COMMODITY FUTURES TRADING COMMISSION

PART 14—RULES RELATING TO SUSPENSION OR DISBARMENT FROM APPEARANCE AND PRACTICE

Adoption of Rules

The Commodity Futures Trading Commission has adopted rules relating to suspension or disbarment from appearance and practice before the Commission. These rules comprise a new Part 14 of Title 17 of the Code of Federal Regulations.

For the purpose of efficient and proper administration of the Commission's duties, and to prevent situations in which the Commission and the public place reliance on or trust in attorneys or accountants who have shown themselves to be unqualified or untrustworthy, the Commission is adopting rules whereby such persons may be temporarily or permanently denied the privilege of appearing or practicing before the Commission.

Appearance and practice are general terms intended to encompass any type of professional conduct before the Commission on behalf of another person. "Appearance," as defined in § 14.2, means the appearance of one person on behalf of another at any proceeding conducted by the Commission; "practice" means the transacting of any formal business with the Commission on behalf of another person, including the preparation of any document, of whatever nature, to be submitted to the Commission, by an attorney or accountant.

Hearings may be held under several of the provisions in Part 14. Section 14.3 provides that the hearings shall be held before an administrative law judge, utilizing procedures establishing in the Commission's rules of practice applicable to adjudicatory proceedings (Part 10) and shall generally be prosecuted by the General Counsel of the Commission or representatives from his office.

The Commission may disqualify, pursuant to § 14.4, any person who is found to have violated, caused, or aided and abetted violations of the Commodity Exchange Act and the rules adopted thereunder. It is contemplated that under this section relief would be requested during the administrative proceeding in which the charges of violation are made, and would generally involve a request for other sanctions as well.

The opportunity for a complete review of the factual basis for denial is afforded when the Commission's action is taken pursuant to §§ 14.4 and 14.8. Sections 14.5 through 14.7, on the other hand, would permit the Commission to deny the privilege of appearing and practicing based on prior adverse administrative or judicial action against that person, without an independent review by the Commission of the facts upon which that adverse action was predicated.

Any person who after a licensing or certification to practice his or her profession has been convicted of any felony or of a misdemeanor involving fraud or involving moral turpitude in matters related to the regulatory responsibilities of the Commission, and whose conviction has not been reversed by an appellate court, is automatically barred under § 14.5 from appearing and practicing as long as that conviction stands. Likewise, under § 14.6, anyone who has been suspended or disbarred by any court or licensing authority is, during the period of suspension or disbarment, prohibited from appearing or practicing before the Commission even if he or she holds a valid license from another jurisdiction. Under both § 14.5 and § 14.6 the Commission's prohibition stands even if an appeal is pending and even if the conviction or action was on a plea of nolo contendere or its procedural equivalent.

Section 14.7 establishes a procedure whereby a person may be suspended or his privilege of appearing and practicing revoked if he or she has been (1) enjoined by any court of competent jurisdiction in an action brought by this Commission for violation of the Commodity Exchange Act; (2) found by any court of competent jurisdiction, in an action brought by this Commission, to have committed, caused or aided and abetted a violation of the Commodity Exchange Act; or (3) found by the Commission in an administrative proceeding to have committed, caused or aided or abetted a violation of the Commodity Exchange Act. The third provision, however, is not applicable where the Commission was not a complainant in the initial administrative proceeding (i.e., in a reparation proceeding brought pursuant to Part 12 of these rules). The Commission has adopted this exception with respect to reparation proceedings in order to facilitate settlements between the parties; if a settlement were to have a collateral effect under these rules, it might cause matters to be litigated that might otherwise be settled. Of course, the Commission could in any event, if the circumstances warranted, initiate proceedings to suspend or deny the privilege pursuant to the provisions of § 14.8 based on unethical or improper professional conduct or lack of character or integrity.

Because of the often close relationship between the type of activities that constitute violations of the Commodity Exchange Act and those which are violations of the federal securities laws, the Commission has determined that violations of the federal securities laws may also be a basis of action by this Commission to deny the privilege of appearing and practicing before it.[1] Accordingly, under § 14.7, action may be taken if a person has been enjoined by any court of competent jurisdiction based on actions brought by the Securities and Exchange Commission for violations of the federal securities laws (15 U.S.C. 77a to 80b–20) or found by any court of competent jurisdiction in an action brought by the Securities and Exchange Commission, or found by the Securities and Exchange Commission in an administrative proceeding initiated by it to have committed, caused, or aided or abetted a violation of the federal securities laws. However, unlike the situation where the legal action was brought by this Commission, where a violation of the federal securities laws is involved in court or administrative action taken by the SEC, an injunction or other finding which was entered upon consent or by default will not be a sufficient basis for disqualification. This limitation has been adopted to prevent this Commission from interfering with the ability of the Securities and Exchange Commission to settle matters it initiates. The Commission could, however, if appropriate, use the facts involved in the consent action to bring separate proceedings pursuant to § 14.8.

Action taken pursuant to § 14.7, whether based on violations of the Commodity Exchange Act or the federal securities laws, is at the discretion of the Commission. The Commission may take preliminary action, giving due consideration to the public interest, without a preliminary hearing. The individual then has 30 days after service of the order of temporary suspension to petition to lift the suspension. Otherwise the order becomes permanent.

When a petition to lift the temporary suspension is received the Commission must within 30 days either lift the temporary suspension or set the matter

[1] Provisions of the Act recognize that persons who have violated the federal securities laws may for that reason be disqualified from registration as a futures commission merchant or associated person, floor broker, commodity trading advisor, or commodity pool operator. See sections 4n(7)(B) and 8a(2)(B), 7 U.S.C. 6n(7)(B) and 12a(7)(B), and the Commission's interpretation of the latter provision, published at 40 FR 28125 and 28126.

down for hearing or both. Following a hearing, or opportunity therefor, the Commission may (1) disqualify the petitioner from appearing or practicing for a period of time or permanently; (2) censure the petitioner; (3) determine that no sanction is warranted.

In any hearing, a showing by the Commission staff that an injunction has been entered or findings made in accordance with the criteria set forth in § 14.7 shall be a sufficient basis for censure or disqualification. The burden shall then be on the petitioner to show mitigating or other factors why the sanctions should not be imposed. He or she, however, may not relitigate the factual or other questions which were litigated or might have been litigated in the earlier proceeding. In this respect, where a person has consented to entry of any injunction or the imposition of administrative sanctions without findings or without admitting the allegations of the complaint, where the complaint had been filed by this Commission, that person will nonetheless be presumed to have engaged in the conduct alleged in the complaint.

Section 14.8 contains a general provision whereby, after notice and opportunity for hearing, the Commission may deny, either permanently or temporarily, the privilege of appearing or practicing before it to any person based upon a showing of substantial evidence on one of three grounds. This may be done on the basis, first, that he or she does not possess the requisite qualification to represent others; secondly, that he or she may is lacking in character or integrity; and thirdly, that he or she has engaged in unethical or improper professional conduct either before the Commission or elsewhere.

As noted above §§ 14.4 through 14.7 will permit or require a professional disqualification based by judicial action or by the administrative action of state or other federal agencies. Section 14.9 will impose a duty upon any person who appears or practices before the Commission promptly to notify the Commission of the adverse decision or action taken against him. A person who fails within thirty days to advise the Commission of the adverse decision or action will for that reason alone automatically be disqualified from appearance and practice before the Commission unless and until the appropriate filing has been made. Of course, the Commission may act under the rule upon such information as may come to its attention either under this filing requirement or otherwise. And no filing or failure to file under this section will affect the applicability of the operative sections of the rules.

The final section of this part, § 14.10, permits anyone who has been disqualified under any of the prior provisions to apply for reinstatement at any time. A hearing will be granted on the application in the discretion of the Commission.

Pursuant to authority contained in the Commodity Futures Trading Commission Act, Pub. L. 93-463, Section 101(a)(11), 88 Stat. 1391, 7 U.S.C. 4a(j), the Commodity Futures Trading Commission hereby adopts a new Part 14 of Title 17 of the Code of Federal Regulations as set forth below:

AUTHORITY: Pub. L. 93-463, Sec. 101(a)(11), 88 Stat. 1391, 7 U.S.C. 4a(j).

§ 14.1 Scope.

The rules of this part describe the circumstances under which persons may be denied, either temporarily or permanently, the privilege of appearing or practicing before the Commission as an attorney or accountant. An attorney may also be excluded from further participation in a particular adjudicatory proceeding in accordance with the provisions of § 10.11(b) of this chapter or from further participation in a particular investigatory proceeding in accordance with the provisions of § 11.7(c)(2) of this chapter.

§ 14.2 Definitons of appearance and practice.

(a) *Appearance*. For the purpose of this Part, "appearance" refers to the representation of a person by another who appears in his behalf at any adjudicatory, investigatory or rulemaking proceeding conducted before the Commission, including but not limited to those proceedings encompassed in Parts 10 through 13 of the Commission's rules.

(b) *Practice*. For the purpose of this part, practicing before the Commission shall include but shall not be limited to:

(1) The preparation of any statement, opinion or other paper by any attorney or accountant filed with or submitted to the Commission on behalf of another person in or in connection with any application, notification, report or other document; and

(2) Transacting any other formal business with the Commission, on behalf of another person, in the capacity of an attorney or accountant.

§ 14.3 Hearings.

Hearings required or permitted to be held under provisions of this part shall be held before an Administrative Law Judge, utilizing the procedures established in the rules of practice (Part 10) for adjudicatory proceedings. Any proceeding brought under provisions of this part shall, unless otherwise determined by the Commission, be prosecuted by the General Counsel of the Commission or by such attorneys in his office as he may assign.

§ 14.4 Violation of Commodity Exchange Act.

The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission, after notice of and opportunity for hearing in the matter, to have violated, caused, or aided and abetted any violation of the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or the rules and regulations adopted thereunder.

§ 14.5 Criminal conviction.

Any person who after licensing or certification to practice his profession by any competent authority has been convicted of any felony or of a misdemeanor involving fraud or involving moral turpitude in matters related to the regulatory responsibilities of the Commission, and whose conviction has not been reversed by an appellate court, may not appear or practice before the Commission. A conviction within the meaning of this section shall be deemed to have occurred when the convicting court enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment on a plea of nolo contendere.

§ 14.6 Disbarment or suspension by licensing authority.

Any attorney who has been suspended or disbarred by a Court of the United States or any state or territory or the District of Columbia and any person whose license to practice as an accountant has been revoked or suspended in any state or territory or the District of Columbia may not appear or practice before the Commission during the period when such suspension or revocation is in effect. A suspension or revocation shall be deemed to have occurred when the disbarring, suspending or revoking agency or tribunal enters its order, regardless of whether appeal is pending or could be taken, and includes a judgment or order on a plea of nolo contendere or the procedural equivalent of such a plea. For purposes of this section it shall be irrelevant that any attorney or accountant who has been suspended, disbarred, or otherwise disqualified from practice before a court or in a jurisdiction continues in professional good standing before other courts or in other jurisdictions.

§ 14.7 Finding of violation of Commodity Exchange Act or Federal securities laws in another proceeding.

(a) *Temporary suspension*. The Commission, with due regard to the public interest, and without preliminary hearing, may by order temporarily suspend from appearing or practicing before it any person who, on or after the effective date of this rule has been by name:

(1) Permanently enjoined by reason of his misconduct by any court of competent jurisdiction (i) whether by consent,

default, upon summary judgment or after trial, in any action brought by the Commission based upon violations of any provision of the Commodity Exchange Act, as amended, or of the rules and regulations adopted thereunder, or (ii) after trial or upon summary judgment in any action brought by the United States Securities and Exchange Commission based upon any violation of the federal securities laws (15 U.S.C. 77a to 80b-20) or of rules and regulations adopted thereunder;

(2) Found by any court of competent jurisdiction (whether by consent, default, upon summary judgment or after trial) in any action brought by the Commission to which he is a party, or found by the Commission (whether by consent, default, upon summary disposition or after hearing) in any administrative proceeding in which the Commission is a complainant and to which he is a party, to have committed, caused, or aided and abetted a violation of any provision of the Commodity Exchange Act, as amended, or of the rules and regulations promulgated under any of those statutes;

(3) Found upon summary judgment or after trial by any court of competent jurisdiction in any action brought by the United States Securities and Exchange Commission to which he is a party, or found by the Securities and Exchange Commission, upon summary disposition or after hearing, in any administrative proceeding in which the Securities and Exchange Commission is a complainant and to which he is a party, to have committed, caused, or aided or abetted a violation of any provision of the federal securities laws (15 U.S.C. 77a to 80b-20) or of the rules and regulations adopted thereunder.

(b) *Petition to lift suspension.* Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (a) of this section may, within 30 days after service upon him of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order by mail the suspension shall become permanent.

(c) *Consideration of Petition.* Within 30 days after the filing of the petition described in paragraph (b) of this section the Commission shall either lift the temporary suspension or set the matter down for hearing or both. After opportunity for hearing, the Commission may censure the petitioner or may disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently or may determine that no action is appropriate.

(d) *Hearing.* A showing that the petitioner has been enjoined or has been found to have committed, caused or aided or abetted violations as described in paragraph (a) of this section, without more, may be a basis for censure or disqualification; that showing having been made, the burden shall then be on the petitioner to show why he should not be censured or disqualified. A petitioner will not be heard to contest any findings against him or admissions made by him in the judicial or administrative proceedings upon which the proposed censure or disqualification is based. A petitioner who has consented to the entry of a permanent injunction as described in paragraph (a)(1) of this section without admitting the facts set forth in the complaint shall nevertheless be presumed for all purposes under this section to have been enjoined by reason of the misconduct alleged in the complaint.

§ 14.8 Lack of requisite qualifications, character and integrity.

In addition to those matters specifically referred to in §§ 14.4 through 14.7, the Commission may, after notice and opportunity for hearing in the matter, deny, temporarily or permanently, the privilege of appearing or practicing before it to any person who is found by the Commission by a preponderance of the evidence:

(a) Not to possess the requisite qualifications to represent others; or

(b) To be lacking in character or integrity; or

(c) To have engaged in unethical or improper unprofessional conduct either in the course of an adjudicatory, investigative, rulemaking or other proceeding before the Commission or otherwise.

§ 14.9 Duty to file information concerning adverse judicial or administrative action.

Any person appearing or practicing before the Commission who has been the subject of a conviction, suspension, disbarment, revocation, injunction or finding of the kind described in §§ 14.5 through 14.7, unless based on action instituted by the Commission, shall promptly file a copy of the relevant order, judgment or decree with the Secretariat of the Commission at 2033 K Street, NW., Washington, D.C. 20581, together with any related opinion or statement of the agency or tribunal involved. Any person who has been the subject of administrative or judicial action of the kind described in §§ 14.5 through 14.7 and who has not filed a copy of the order, judgment or decree within thirty days after its entry shall for that reason alone be disqualified from appearing or practicing before the Commission until such time as the appropriate filing shall be made, but neither the filing of these documents nor the failure of a person to file them shall in any way affect the operations of any other provision of this part.

§ 14.10 Reinstatement.

Any person who is disqualified from appearing or practicing before the Commission under any of the provisions of this part may at any time file an application of reinstatement and the applicant may, in the Commission's discretion, be afforded a hearing on the application. However, denial of the privilege of appearing or practicing before the Commission shall continue unless and until the applicant has been reinstated by order of the Commission.

The foregoing rules shall be effective July 12, 1976. The Commission finds that the foregoing action relates solely to agency practice and procedures and that the public procedures and publication prior to the effective date of the rules in accordance with the Administrative Procedure Act, as codified, 5 U.S.C. 553, are not required. Nevertheless, the Commission is interested in the views of attorneys, accountants and other interested persons concerning the merits of these rules, and will welcome any suggestion that may be forthcoming concerning ways in which they may be improved. Comments should be sent to CCU, 2033 K Street, NW., Washington, D.C. 20581.

Issued in Washington, D.C. on July 7, 1976.

By the Commission.

WILLIAM T. BAGLEY,
Chairman, Commodity Futures Trading Commission.

[FR Doc.76-20062 Filed 7-9-76;8:45 am]

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

General Composition and Authority

The Commodity Futures Trading Commission is adopting a new Subpart B to Part 140 of Title 17 of the Code of Federal Regulations, setting forth the general statutory composition of the Commission (§ 140.10), and granting authority to act on behalf of the Commission to the Senior Commissioner present at the time an emergency situation arises if it is not feasible to convene a quorum of the Commission and action must be taken prior to the next scheduled meeting of the Commission (§ 140.11). Even then, the Senior Commissioner will be required to consult with such other members of the Commission as may be present at the Commission's principal offices and to attempt to reach all other members of the Commission by telephone (§ 140.11(b)).

All actions taken under Senior Commissioner authority are required to be reported to the Commission within one business day (§ 140.11(c)) and the Commission may affirm, modify, alter or set aside any action taken (§ 140.11(d)). The Commission will review emergency action taken under Senior Commissioner authority at the request of any of its members (§ 140.11(d)(1)) or at the request of any person directly and adversely affected (§ 140.11(d)(2)). The Commission may, in its discretion, review emergency action of the Senior Commissioner upon petition by any other person (§ 140(d)(3)). All persons directly affected by action taken under Senior Commissioner authority will be notified that the Senior Commissioner present, and not the full Commission, had acted on the matter so that he may seek Commission review under this rule.

The emergency action taken under Senior Commissioner authority will be deemed the action of the Commission unless and until the Commission shall direct otherwise (§ 140.11(a)).

Pursuant to authority contained in section 2a(11) of the Commodity Exchange Act, as amended, 7 U.S.C. 4(a)(j), 88 Stat. 1391, the Commodity Futures Trading Commission hereby adopts a new Subpart B to Part 140 of Chapter I of Title 17 of the Code of Federal Regulations as set forth below:

Subpart B—Functions

AUTHORITY: Sec. 2a(11) of the Commodity Exchange Act, as amended, 7 U.S.C. 4(a)(j); 88 Stat. 1391.

Subpart B—Functions

§ 140.10 The Commission.

The Commission is composed of a Chairman and four other Commissioners, not more than three of whom may be members of the same political party, who are appointed by the President, with the advice and consent of the Senate, for 5-year terms, one term ending each year. The Commission is assisted by a staff, which includes lawyers, economists, accountants, investigators and examiners, as well as administrative and clerical employees.

§ 140.11 Emergency action by the senior Commissioner available.

(a) *Authority of senior Commissioner.* When it is not feasible to convene a quorum of the Commission, the Senior Commissioner present at the principal offices of the Commission (or, during non-business hours, available in the Washington, D.C. area) may take emergency action on behalf of and in the name of the Commission in accordance with the procedures set forth in this section. Members of the Commission shall be considered senior in the following order: The Chairman, the Vice-Chairman, and other Commissioners in order of their length of service on the Commission. Where two or more Commissioners have commenced their service on the same date, the Commissioner whose unexpired term in office is the longest will be considered senior.

(b) *Exercise of authority.* Subject to the right of the Commission to review any emergency action taken as hereinafter provided, the Senior Commissioner may act on behalf of and in the name of the Commission with respect to all of the functions of the Commission except general rulemaking functions: *Provided, however,* That the Senior Commissioner shall not exercise any authority on behalf of the Commission (1) without consultation with such other member of the Commission as may at the time be present at the Commission's offices in Washington, D.C., and without a reasonable attempt to consult, by telephone, with other members of the Commission; and (2) unless, in the opinion of the Senior Commissioner (after consulting with the General Counsel or his deputy or associate, and such other members of the Commission staff as the Senior Commissioner deems appropriate) the public interest requires that action be taken prior to the next scheduled meeting of the Commission.

(c) *Report to the Commission.* The exercise of Senior Commissioner authority shall be reported to the Commission within one business day thereafter either by the Senior Commissioner or at his direction, and shall be recorded by the Secretariat in the Minute Record of all official actions of the Commission. The Secretariat shall promptly notify any directly affected person of the action taken and that it was the Senior Commissioner available, rather than the Commission as a whole, who took the action.

(d) *Review by the Commission.* The Commission may, in the following circumstances, review any action taken under Senior Commissioner authority and may affirm, modify, alter or set aside the decision:

(1) Upon the request of any member of the Commission, any action taken by a Senior Commissioner shall be reviewed by the Commission.

(2) In the event action by a Senior Commissioner suspends, denies or revokes or otherwise directly and adversely affects any license, right or privilege of any person, that person may in writing request review by the Commission and shall be entitled to have the action of the Senior Commissioner reviewed by the Commission.

(3) The Commission may, in its discretion, review any action taken by a Senior Commissioner upon petition by any other person.

(e) *Final effect of action by Senior Commissioner.* In any matter, the action taken under Senior Commissioner authority shall be deemed the action of the Commission unless and until the Commission shall otherwise direct.

The foregoing rules shall be effective July 12, 1976. The Commission finds that the foregoing action relates solely to agency practice and procedure and that the public procedures and publication prior to the effective date of the rules in accordance with the Administrative Procedure Act, as codified, 5 U.S.C. 553, are not required.

Issued in Washington, D.C. on July 7, 1976.

WILLIAM T. BAGLEY,
Chairman, Commodity Futures Trading Commission.

[FR Doc.76-20063 Filed 7-9-76;8:45 am]

Title 18—Conservation of Power and Water Resources

CHAPTER I—FEDERAL POWER COMMISSION

[Docket Nos. R-424; 446; Order No. 530-B]

PART 101—UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR CLASS A AND CLASS B PUBLIC UTILITIES AND LICENSEES

PART 104—UNIFORM SYSTEM OF ACCOUNTS FOR PUBLIC UTILITIES AND LICENSEES (CLASS C AND CLASS D)

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

PART 201—UNIFORM SYSTEM OF ACCOUNTS FOR NATURAL GAS COMPANIES

PART 204—UNIFORM SYSTEM OF ACCOUNTS FOR NATURAL GAS COMPANIES (CLASS C AND CLASS D)

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

Uniform System of Accounts; Order Revising Prior Orders

JULY 6, 1976.

In the matter of: Accounting for premium, discount and expense of issue, gains and losses on refunding and reacquisition of long-term debt, and interperiod allocation of income taxes, and amendments to the Uniform Systems of Accounts for Classes A, B and C Public Utilities and Licensees and Natural Gas Companies: Deferred Income Taxes.

I. On February 17, 1976, a group of public utilities, listed in Appendix A ("Utility Group") filed a petition for rehearing of Order No. 530-A. Since that was a final order denying rehearing, the Commission treated the petition as one for reconsideration, and granted it solely for the purposes of further consideration on March 18, 1976. The Commission also allowed 20 days for parties to file responses to this motion, which time was later extended. A large number of utilities filed responses supporting the reconsideration, and generally urging that the Commission return to what was seen as the holding of Order No. 530 (see Appendix B for listing). A group of public systems filed a response urging the Commission to deny reconsideration of Order No. 530-A. We now have before us for final decision the entire record in Docket Nos. R-424 and R-446 as well as our prior decisions in Orders No. 530 and 530-A. (Order 530 (40 FR 26981, June 26, 1975), Order 530-A (41 FR 3849, Jan. 27, 1976).)

In Order No. 530 the Commission reviewed the changes in circumstances which supported the implementation in general of normalization, stated that normalization would be in the public interest and that "the Commission, as a matter of general policy, would favor ratemaking treatment upon a normalization basis, provided appropriate factual showings are developed in each instance." The nature of these factual showings was not elucidated in Order No.

530, and in fact, reflected some ambivalence on the part of the Commission concerning both the legal permissibility and the policy desirability of allowing normalization when its use resulted in what is variously described as a tax deferral or a tax savings. In Order No. 530-A the Commission asserted that "courts have required a finding that a tax deferral will occur rather than a permanent tax savings" in order to permit normalization of liberalized depreciation. And it stated that it would "of course * * * require a showing by the utility requesting normalization * * * that a tax deferral rather than a tax savings would occur * * *"

Upon reconsideration, we find this reasoning to have been incorrect. For the reasons set forth below we find that there is no legal bar to the Commission either permitting or denying normalization of the tax effect associated with timing differences in the recognition of expenses for tax purposes and for book purposes. The principles of setting just and reasonable rates forbid the normalization of tax effects only when there will in fact be a permanent difference between treatment of items for tax purposes and book purposes. Examples of such permanent differences include treatment of municipal bond interest, political contributions, or depletion allowances permitted by statute.

In light of this conclusion, we reiterate our finding in Order No. 530 that the use of normalization for rate purposes would be beneficial and in the public interest, and announce that it shall be our policy to permit such normalization upon a showing simply that the tax effect being normalized relates only to timing differences rather than to permanent differences between book and tax treatment.

II. An early case concerning the legality and propriety of the Commission's granting tax normalization was Amere Gas Utilities, 15 F.P.C. 760. In that case the Commission upheld normalization of liberalized depreciation even though both the examiner's decision and a dissent pointed out that assuming an expanding plant in service, the deferred tax account treated as a whole would never reach a cross-over point and diminish. Id. at 771-773, 783-785. The Commission did so largely because of its view that this result was intended and mandated by Congress. Id. at 782. The Commission addressed the question of tax deferral versus tax savings by noting that with increasing plant in service "there is a continuing tax deferral so long as additional facilities are being installed." The Commission thus distinguished a "continuing deferral" from a true savings.

The Commission's approval of normalization was upheld in a series of cases including El Paso Natural Gas Company v. F.P.C., 281 F. 2d 567, 573 (5th Cir., 1960); Cities of Lexington, Kentucky, et al. v. F.P.C. 295 F. 2d 109 (4th Cir., 1961); and Panhandle Eastern Pipeline Company v. F.P.C., 316 F. 2d 659 (D.C. Cir., 1963). In these cases, however, the courts specifically rejected the idea that Congress had intended that normalization be used. See, e.g. 281 F. 2d at 572-573; 295 F. 2d at 114-115. The court in El Paso specifically recognized, as an exception to the principle that ratemaking could only recognize the actual taxes paid in a given year, "the treatment to be afforded the tax saving or deferral resulting from the use by the taxpayer of the declining balance method of depreciation of new equipment. In practical effect this works a tax deferral rather than a tax savings." Thus, the courts in considering Commission approval of normalization during this period upheld such approval even though they specifically found that such a treatment was not required by Congress and even though they were cognizant of the effect of an ever-increasing plant balance.

In 1966, in the *Alabama-Tennessee* case (31 F.P.C. 208, affirmed 359 F. 2d 318 (5th Cir. 1966)), the Commission denied normalization of liberalized depreciation, because of changed conditions, and the policy implications of the continually increasing plant anticipated in that case. The Court of Appeals upheld that decision against the argument by the gas pipeline that the Commission was required to allow normalization. Both the Commission and the court emphasized the Commission's freedom to choose how to treat the effect of timing differences between tax and book accounting. 31 F.P.C. at 212; 359 F. 2d at 339.

This case has been taken by some as authority that the Commission must deny normalization in any case where its effect will be to create what is characterized as "Tax Savings" rather than a "Tax Deferral." To the contrary, the court emphasized at some length the Commission's discretion in establishing and applying the standards for cost of service.

The court noted approvingly the summary of the state of the law given in the brief by the Solicitor General, opposing Supreme Court review of the *El Paso* case where he stated as follows:

> From this survey, it appears that, whatever merit there may be in either [the flow-through or normalization] method, the least that can be said is that a regulatory commission's choice between the two is assuredly within its discretion, depending on the particular views of the particular agency. No general issue of law is involved, only a discretionary choice among competing accounting systems. (Brief at 11-12)[1]

The series of statutes and cases concerning the treatment of liberalized depreciation do not significantly alter this underlying state of the law, that the Commission is free, unless specifically bound by statute, to adopt any accounting treatment which will result in a just and reasonable rate. In the Tax Reform Act of 1969, section 441, Congress did mandate that companies had an absolute right to abandon the flowthrough method of accounting for post-1969 expansion property. Even here, Congress impinged only lightly on the Commission's jurisdiction, giving the companies an absolute right to use straight-line depreciation, but requiring Commission approval for normalization. The Commission gave that approval for post-1969 expansion property in Order No. 404, 43 F.P.C. 740.

It should be noted that the Commission thereby approved normalization in a situation which would lead to exactly the type of deferral which is alleged to be an illegitimate "tax savings" if constantly increasing plant in service is assumed. The Commission decision was nevertheless upheld in *Memphis Light* v. *F.P.C.*, 462 F. 2d 853, 865 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 941 (1972).

The Commission also decided that since post-1969 expansion property would be treated separately, there could thus be no additions or expansions to counterbalance the declining depreciation on pre-1970 property. Therefore, it allowed normalization for such property, as well. *Texas Gas Transmission*, 43 F.P.C. 824. This ruling was upheld by the Supreme Court and the Court of Appeals in *F.P.C.* v. *Memphis Light*, 411 U.S. 458; 500 F. 2d 798 (D.C. Cir., 1974), on remand. It should be noted that in this case the Commission itself recognized that prior court rulings had not mandated a particular outcome. It stated, 43 F.P.C. at 829, "[i]t should be observed that while we were upheld in requiring flow-through in both these cases [*Alabama-Tennessee, supra*, and *Midwestern Gas Transmission*, 36 F.P.C. 61], the court in neither case indicated that we were required to order that the companies use flow-through."

Again, the courts dealt with the situation in terms of the Commission's own standard of deferral versus savings. They never held that this distinction was required, nor that the Commission in its expertise might not decide to allow normalization even where there was the possibility of continual increments to plant. See 500 F. 2d at 807, and n. 61, noting that while any "normalization" literally violates the principle that rates should be based only on actual taxes paid, it is permissible because "while Texas Gas is not currently paying taxes at straight-line rates, it is incurring the liability now to pay increased taxes in the future."[2]

Thus, this sequence of statutes and cases provides no authority for the proposition that the Commission is prohibited from ruling either for flow-through accounting or normalization, in the absence of a specific Congressional mandate.

The reasons given in Order No. 530 for allowing normalization (especially pp. 9-11) amply support the Commission's gen-

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[1] 359 F. 2d at 335, note 34 (also cited at 31 F.P.C. at 212, note 8).

[2] The "actual taxes paid" principle has also been somewhat eroded recently by rulings such as *Texas Gas Transmission, supra*, p. 3, concerning post-1969 expansion property, and Commission Order 448, allowing natural gas companies to retain the benefits of investment tax credits.

eral policy. The Commission there stated:

The adoption of normalization of income taxes for rate purposes will contribute to the health of the electric and natural gas industries by increasing cash flow and by reducing external financing requirements. In addition, normalization will contribute to the financial stability of companies and improve fixed charge coverages.'

For the aforestated reasons, we believe that the cash flow which would result from the use of normalization for rate purposes would be beneficial and in the public interest * * *

III. We agree that in general a company may not be considered as having paid taxes when such taxes will, in fact, never be paid. With regard to the items at issue in Orders No. 530 and 530-A, however, the most that can be said is that the accounting for any particular item or piece of plant, simply causes taxes to be deferred. A company will pay lesser taxes in the current year, or the next several years with respect to an item, but it will pay greater taxes in years further in the future because of the earlier treatment. Thus, it is only appropriate that the benefits of that tax treatment be normalized, that is, spread over the ratepayers in all of those years. And this analysis is correct even if later construction means that a similar cycle is starting on another piece of plant, as the initial cycle is ending.

It has been argued that under conditions of constantly increasing plant in service, the unfavorable tax treatment in the later period of the life of a plant will always be offset and outweighed by the favorable treatment of the early life of recently constructed plant. This possible outcome was rejected as a basis for denying normalization of liberalized depreciation in Order No. 404, *supra*. We again reject that logic as a basis for denying normalization. The actual outcome of a series of years' use of normalization cannot be known until the time comes. But if the tax effect of each year's construction is spread equitably over the plant's life, the aggregate result cannot but be equitable.

The discussion above indicates the legality of the Commission's allowing normalization even in the situation of liberalized depreciation and a constantly increasing plant in service. The additional items for which normalization is authorized under Order No. 530 are even less subject to the argument that an unfair tax savings will result. This is because the condition which triggers the tax benefit in the most important of these cases is not the existence of a large amount of plant in service on which depreciation is being taken, but rather the incidence of uncompleted construction. Thus, the tax timing differences associated with items 2, 3 and 7 listed at pages 6-7 of Order 530, all of which relate to the treatment of expenses during construction, are affected only by the amounts of uncompleted construction, rather than by the total plant in service.

The net tax effect of the timing differences created by the immediate deduction of such items for tax purposes while they are capitalized for book purposes can essentially be gauged by comparing the tax deferrals created in any given year by the deduction of such items during construction with the proportionate amortization of tax deferrals from all prior years. It is thus obvious that in any year in which plant construction slackens, a company's deferred taxes amortized could exceed its new deferrals. Since, in reality, the amount of construction in progress for any specific company will vary significantly from year to year, normalization is especially appropriate.

The other items listed are generally less significant in amount, and are items on which it is again unlikely that any consistent pattern of continuous growth can be found. The relationship between tax and book lives of property in the future is quite uncertain, and dependent on future Congressional action (item 4); it is certainly not the policy of this Commission that regulatory commission expense may be confidently assumed to grow indefinitely (item 1); and the amounts of fuel costs deferred, to the extent, if any, such deferrals are approved by the Commission, may vary widely depending on market factors and the actions of regulatory commissions (item 6). Finally, the timing differences rising from normalization of item 5, the use of the "removal cost" feature of the Revenue Act of 1971, would be quite the opposite of a tax saving, as such amounts are depreciated for book purposes over the life of plant, but not taken for tax purposes until the plant is actually retired.

In short, we believe that the Commission's intention in Order No. 530-A should be restated so as to allow normalization in any case where the difference in the recognition of an item for tax and book purposes is clearly only a timing difference. The seven items specifically listed in Order No. 530 at pages 6 and 7 represent items for which there is only a timing difference. Normalization will not be permitted for items on which it can be shown that the difference between the recognition of such items for tax and book purposes is a permanent difference.

Short of that situation, the Commission is legally free to adopt any of the various competing accounting systems, and it does hereby choose to adopt the method of normalization as set forth in Order No. 530. Thus, where the accounting treatment of any item differs from the tax treatment so that tax benefits or expenses accrue at times different from those indicated on the company's books, the tax effects so involved may be normalized.

As we have concluded that there is no judicial bar to the allowance of normalization in these cases, we now believe there is no need for a specific factual showing supporting normalization in each rate proceeding, and the Commission's policy favoring normalization should be implemented in each case. There are several benefits from this procedure. By a finding that tax normalization is appropriate in all cases, we reduce uncertainty concerning allowable revenues of regulated companies. The ability to attract capital is thus improved, with resultant lower costs to consumers. Financial planning by both utilities and customers is facilitated. In addition, a consistent determination of this issue should help in our effort to reduce the length of time rate cases remain pending with accompanying benefits to both the public and the industry.

Finally, as noted in Order No. 530-A, we shall continue our policy of deducting the deferred taxes in Accounts 282 and 283 from rate base. This will result in a sharing of the benefits of normalization with the customers of the utility.

The Commission finds. Good cause exists to grant the application for reconsideration filed by the Utility Group as herein ordered and conditioned.

The Commission orders. (A) The application for reconsideration filed by the Utility Group is granted.

(B) The original decision of the Commission in Order No. 530 is affirmed and readopted, except that for rate purposes normalization will be permitted of the tax effect of all timing differences in the treatment of items for tax purposes and book purposes. Normalization will not be permitted where the difference in treatment of the items for tax purposes and book purposes is a permanent difference.

By the Commission.

KENNETH F. PLUMB,
Secretary.

APPENDIX A

THE UTILITY GROUP

Alabama Power Company
Baltimore Gas and Electric Company
Boston Edison Company
Central Illinois Light Company
Commonwealth Edison Company
Iowa Power & Light Company
Jersey Central Power & Light Company
Long Island Lighting Company
Metropolitan Edison Company
Montana Power Company
New England Power Company
Pacific Power & Light Company
Pennsylvania Power & Light Company
Public Service Company of Indiana
Public Service Company of New Hampshire
Virginia Electric and Power Company

PERSONS FILING JOINDER IN THE UTILITY GROUP PETITION

Northern States Power Company
Florida Power Corporation
Minnesota Power and Light Company

APPENDIX B

Arkansas-Missouri Power Company
Arkansas Power & Light Company
Arthur Andersen & Company
Carolina Power & Light Company
Central and Southwest Corporation
Cincinnati Gas & Electric Company
Commonwealth Edison Company
Consumers Power Company
Duke Power Company
Federal Energy Administration
Florida Power & Light Company
Georgia Power Company
Gulf Power Company

Interstate Natural Gas Association of America
Iowa-Illinois Gas and Electric Company
Louisiana Power & Light Company
Middle South Utilities, Inc.
Mississippi Power and Light Company
Nevada Power Company
New Orleans Public Service Inc.
Northeast Utilities and its System Companies
Northern Natural Gas Company
Oklahoma Gas and Electric Company
Potomac Electric Power Company
Southern California Edison Company
Southern Services, Inc.
Southwestern Electric Power Company
Tampa Electric Company
Utah Power & Light Company

[FR Doc.76-20037 Filed 7-9-76;8:45 am]

Title 23—Highways

CHAPTER I—FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

SUBCHAPTER G—ENGINEERING AND TRAFFIC OPERATIONS

[FHWA Docket No. 76-11]

PART 655—TRAFFIC OPERATIONS

Subpart H—Right-Turn-on-Red at Signalized Intersections

• *Purpose.* These interim regulations are being issued by the Federal Highway Administration (FHWA) in order to establish an interim national policy on permitting vehicular turns on a steady red traffic signal after stopping and yielding the right-of-way to vehicles and pedestrians in the intersection. •

The Energy Policy and Conservation Act (Pub. L. 94-163) enacted December 22, 1975, at Part C, section 362(c) (5) requires that State energy conservation plans, to be eligible for Federal assistance, include "a traffic law or regulation which, to the maximum extent practicable consistent with safety, permits the operator of a motor vehicle to turn such vehicle right at a red stop light after stopping." In recent years, many States have permitted right-turn-on-red (or left-turn-on-red for one-way streets onto which the traffic is not permitted to turn right). In 1975, section 11-202 of the Uniform Vehicle Code was amended to permit a right turn after stopping for traffic facing a steady red traffic signal, except when a sign is in place prohibiting such turn. Thirty-six States now follow this recommendation. Twelve States allow a right-turn-on-red (RTOR) only when a sign is in place permitting the turn. Two other States permit RTOR at all intersections. At the request of the National Advisory Committee on Uniform Traffic Control Devices the FHWA conducted a study (1) to determine whether permitting RTOR is desirable and, if so, (2) to recommend guidelines for uniform application of the practice nationwide. This study concluded that the RTOR feature:

1. Reduces delay, especially to the right-turning vehicles, for nearly all conditions;

2. Increases intersection capacity over a given period of time, thereby improving the level of service;

3. Reduces fuel consumption and auto emissions as a result of the reduced de-street in the travel lane nearest the left lay for right-turning vehicles at intersections; and

4. Results in an insignificant number of accidents.

Uniformity of traffic control devices and traffic laws is needed in order to maintain safe and efficient motor vehicle travel. Therefore, FHWA recommends a national policy regarding RTOR (or left-turn-on-red where appropriate) whereby this turn is permitted after stopping except where signs are in place prohibiting the movement at selected intersections.

The interim regulations will remain in effect pending the issuance of final regulations. Interested parties and governmental agencies are urged to submit written comments, views and data concerning these interim regulations and to make recommendations as to possible final regulations. Please send three (3) copies of all comments and materials to: Federal Highway Administration, Room 4230, 400 Seventh Street, SW., Washington, D.C. 20590, and refer to the above docket number (76-11). Any comments submitted should include the name and address of the person or organization submitting it. All comments must be submitted on or before August 26, 1976 (the closing date) in order to be considered. Comments and materials received will be available for public inspection both before and after the closing date in Room 4230, Office of Chief Counsel, Federal Highway Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590.

The interim regulations are effective as of July 15, 1976.

Issued on: July 2, 1976.

NORBERT T. TIEMANN,
Federal Highway Administrator.

Chapter I of Title 23, Code of Federal Regulations, is amended by adding a new Subpart H to Part 655 as set forth below:

Subpart H—Right-Turn-On-Red at Signalized Intersections

Sec.
655.801 Purpose.
655.803 Policy.
655.805 Action.

AUTHORITY: Pub. L. 94-163; 23 U.S.C. 109 (d), 315, 402(a); 49 CFR 1.48.

Subpart H—Right-Turn-On-Red at Signalized Intersections

§ 655.801 Purpose.

The purpose of this subpart is to set forth an interim national policy on permitting vehicular turns at a steady red traffic signal.

§ 655.803 Policy.

It is the policy of the Federal Highway Administration (FHWA) that after stopping and granting the right-of-way to vehicles and pedestrians lawfully using the intersection, vehicular turns on a steady red traffic signal should be permitted as follows unless a sign prohibiting this movement is placed at the respective intersection:

(a) A vehicle traveling on a one-way hand curb or other defined edge of the roadway may turn left onto another one-way street on which all the traffic is moving to said vehicle's left.

(b) A vehicle traveling in the travel lane nearest the right hand curb or other defined edge of the roadway may turn right onto a two-way street or onto another one-way street on which all the traffic is moving to said vehicle's right.

§ 655.805 Action.

Guidelines for prohibiting the right-turn-on-red (RTOR) (or left-turn-on-red (LTOR) where appropriate) movement at specific intersections are as follows:

(a) RTOR should be prohibited where:

(1) Sight distance of vehicles approaching from the left is less than the following minimums:

Cross street speed limit (m.p.h.):	*Minimum sight distance (feet)* [1]
20	120
25	150
30	190
35	220
40	270
45	320
50	360
55	410

[1] Sight distance as measured from the stop line if pedestrian crosswalks are present, or if none, from the edge of the cross street pavement or curb line.

(2) The intersection has more than four approaches or has restricting geometrics which cause additional conflicts. (The restriction should apply to only those approaches which have multiple or unusual conflicts that are not easily identified by the motorist).

(3) There is an exclusive pedestrian phase during which pedestrians can cross all crosswalks.

(4) The intersection is within 200 feet of a railroad grade crossing, and the signal controller is preempted during train crossings. (The prohibition should apply only to the approach from which right turns are made into the railroad crossing lane.)

(b) RTOR may be prohibited where:

(1) Significant pedestrian conflicts are resulting from RTOR maneuvers.

(2) More than one RTOR accident per year has been identified for any particular approach.

(3) There is an unusual movement such as double left turns from opposing traffic that would not be anticipated by the RTOR driver.

(4) There are school crossings or any areas where there are large numbers of children expected.

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