

corrected to subparagraphs "(5)(i) through (5)(iii)."

g. In 12 CFR 11.5(m)(2)(ii), the reference to subparagraph "(2)(iii)" is corrected to subparagraph "(1)(ii)."

h. In 12 CFR 11.5(m)(6)(iii)(D), the reference to subparagraph "(6)(ii)(c)" is corrected to subparagraph "(6)(iii)(C)."

i. In 12 CFR 11.5(n)(3), the reference to paragraphs "(1)(3)-(6)" is corrected to paragraphs "(1)(7)-(9)."

j. In 12 CFR 11.5(n)(6)(i), the reference to "Form F-14 (12 CFR 11.55)" is corrected to "Form F-12 (12 CFR 11.53)."

k. In 12 CFR 11.5(n)(6)(ii)(A), the reference to "Form F-14" is corrected to "Form F-12."

l. In 12 CFR 11.5(n)(6)(ii)(B), the reference to "Form F-14" is corrected to "Form F-12."

(m) In 12 CFR 11.5(n)(7), the reference to "Form F-14 (12 CFR 11.55)" is corrected to "Form F-12 (12 CFR 11.53)" and the reference to "Form F-14" is corrected to "Form F-12."

n. In 12 CFR 11.5(n)(7)(i), the reference to "Form F-14" is corrected to "Form F-12."

o. In 12 CFR 11.5(n)(8), the reference to "Form F-14" is corrected to "Form F-12."

p. In 12 CFR 11.5(n)(9)(i)(C), the reference to "this paragraph" is corrected to "paragraphs (n)(6)-(11)."

q. In 12 CFR 11.5(o)(6), the reference to "paragraph (a) of this section" is corrected to "subparagraph (5) of this paragraph."

Dated: September 9, 1981.

Charles E. Lord,

Acting Comptroller of the Currency.

[FR Doc. 81-28765 Filed 9-14-81; 8:45 am]

BILLING CODE 4810-33-M

FEDERAL TRADE COMMISSION

16 CFR Parts 3 and 4

Organization, Procedures, and Rules of Practice; Disqualification of Commissioners

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: The Commission has amended its Rules of Practice and Procedure to specify procedures to be followed when a participant in a Commission proceeding believes a Commissioner ought to be disqualified from further participation in that proceeding. Conforming changes have been made to other sections of the Rules of Practice.

EFFECTIVE DATE: September 15, 1981.

FOR FURTHER INFORMATION CONTACT:

Bruce G. Freedman (202) 523-3865, Office of General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: On December 17, 1980, at 45 FR 82956, the Commission published for comment a proposed amendment to its Rules of Practice and Procedure to specify procedures to be followed when a participant in a Commission proceeding believes that a Commissioner ought to be disqualified from that proceeding. The proposed rule was to apply to both adjudicative and rulemaking proceedings.

The proposed rule, which would add a new § 4.16 to the rules of practice, responded to Recommendation 80-4, Decisional Officials' Participation in Rulemaking Proceedings, adopted by the Administrative Conference of the United States at its last plenary session. The proposed rule did not attempt to prescribe the substantive standards governing disqualification and, instead, codified existing procedures. In proposing the rule, the Commission observed that because such standards have evolved in the context of particular cases, and such evolution can be expected to continue, it believed it advisable not to attempt to fix such standards in its rules, but rather to incorporate by general reference the legal standards applicable to the given proceeding.

Two comments were filed. One, submitted by the Office of the Chairman of the Administrative Conference of the United States, urged the Commission to adopt the guidelines set forth in Recommendation 80-4 with respect to conflicts of interest, decorum, and expression of views. Nevertheless, existing practice already provides guidance with respect to decorum and important safeguards against the potential for financial or nonfinancial conflicts of interest touched upon in the recommendation.

Moreover, the question of prejudgment of fact in rulemaking has been addressed with respect to this agency in a recent case, see *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). Because the significance of the difference between the formulation for prejudgment of fact embodied in Recommendation 80-4 and the Court of Appeals' test is not entirely clear and the D.C. Circuit decision is so recent, the Commission continues to believe it advisable to incorporate in its rule only a general reference to applicable legal standards. The

Commission, however, regards Recommendation 80-4, and the accompanying report by Professor Strauss, see *Disqualifications of Decisional Officials in Rulemaking*, 80 *Colum. L. Rev.* 990 (1980), as useful steps toward clarification of standards for decisionmakers in rulemaking and will take them into account if further issues arise with respect to disqualification of Commissioners in rulemaking.

The other comment (Sullivan & Cromwell) similarly urges that the rule include substantive standards for disqualification in rulemaking and also contends that substantive standards should be included for adjudication. The comment suggests that the rule incorporate 28 U.S.C. 455, one of the provisions in the Judicial Code governing disqualification of federal judges. As noted, the Commission continues to believe that the rule should not embody substantive standards governing disqualification. Even if substantive standards were to be prescribed, standards applicable to federal judges would not take account of the special characteristics of rulemaking which call for standards different from those applied in adjudications conducted by courts and administrative agencies. See *ANA*, 627 F.2d at 1168-75; Strauss, 80 *Colum. L. Rev.* at 993-97, 1027 *et seq.*

Nor do we see any need to codify standards for disqualification in adjudicatory proceedings. The Ethics in Government Act and the Commission's Standards of Conduct already include provisions, similar to those included in 28 U.S.C. 455, to prevent conflicts of interest. We are not persuaded at this time that certain of the other standards are appropriate to administrative adjudication.

Finally, the comment urges deletion of the proposed requirement that motions to disqualify "be filed at the earliest practicable time." The comment observes that "[t]he requirement that a motion to disqualify be filed in a timely manner is considered important at the federal court trial level because of its potential for substantial delay if filed after the start of trial, since the judge's recusal is automatic upon the filing of such a motion (see 28 U.S.C. 144). The rationale for this timeliness requirement is not present in FTC proceedings." However, a timeliness requirement has been applied to motions filed under 28 U.S.C. 455, which, unlike 28 U.S.C. 144, does not provide for automatic disqualification. See *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978). Moreover, it is well established that this

timeliness requirement is "normally applicable to the federal judiciary and administrative agencies alike * * *." *Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044 (D.C. Cir. 1976); see also *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515 (4th Cir. 1974). The rule is designed to avoid disruption that can result from motions that are not filed at the earliest practicable time. The disruptiveness of an untimely motion is not cured because the motion only seeks to disqualify a Commissioner from further proceedings. Rather, such a motion may interfere with or delay the Commission's consideration of other aspects of the same proceeding. The Commission's consideration of the appeal from an initial decision can be delayed unnecessarily by a tardy disqualification motion. Similar disruption can result from untimely motions during pretrial and trial proceedings because the Commission may at any point be asked to review an ALJ's interlocutory ruling.

As a result of the additions to the Rules of Practice announced in 45 FR 36338 (May 29, 1980) and 46 FR 26284 (May 12, 1981), proposed § 4.16 has been redesignated as § 4.17.

The Commission has also determined to amend § 3.22(a) of the rules of practice to provide that motions to disqualify a Commissioner shall be addressed to the Commission and § 3.42(g) to add a requirement that motions to disqualify administrative law judges be timely filed, similar to the requirement set forth in new § 4.17 (b)(2).

Accordingly, the Commission amends 16 CFR Chapter I as follows:

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. By revising § 3.22(a) to read as follows:

§ 3.22 Motions.

(a) *Presentation and Disposition.* During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under §§ 3.42(g) or 4.17, shall be addressed to the Administrative Law Judge, and if within his authority shall be ruled upon by him. Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission, with his recommendation where he deems it appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments or observations. Where the Commission believes that a recommendation or an

amplification thereupon would assist it in its deliberations, it may order the Administrative Law Judge to file a recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

2. By adding a new § 3.42(g)(3) to read as follows:

§ 3.42 Presiding officials.

(g) * * *

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

PART 4—MISCELLANEOUS RULES

3. By adding a new § 4.17 to read as follows:

§ 4.17 Disqualification of Commissioners.

(a) *Applicability.*—This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures.*—(1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.

(c) *Standards.*—Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.

(15 U.S.C. 46(g))

By direction of the Commission dated August 26, 1981.

Carol M. Thomas,
Secretary.

[FR Doc. 81-39754 Filed 9-14-81; 9:45 am]

BILLING CODE 6750-01-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1201

Safety Standard for Architectural Glazing Materials; Statement of Policy and Interpretation

AGENCY: Consumer Product Safety Commission.

ACTION: Statement of policy and interpretation.

SUMMARY: The Commission's safety standard for architectural glazing materials applies to several products, including bathtub and shower doors and enclosures. The Commission is issuing an interpretation of the standard that clarifies that the terms "bathtub doors and enclosures" and "shower door and enclosure" do not include glazing materials in a window located over a bathtub or within a shower stall and in the exterior wall of a building. The interpretation is intended to resolve questions which have arisen among firms whose activities are subject to regulation by the standard.

DATE: The statement of policy and interpretation will become effective on October 15, 1981.

FOR FURTHER INFORMATION CONTACT: Wade Anderson, Directorate for Compliance and Administrative Law, Consumer Product Safety Commission, Washington, D.C. 20207, telephone (301) 492-6400.

SUPPLEMENTARY INFORMATION: In January 1977 the Consumer Product Safety Commission issued a safety standard to reduce unreasonable risks of injury associated with architectural glazing materials and certain products incorporating those materials (42 FR 1428; 16 CFR Part 1201). The standard prescribes tests to ensure that the glazing materials either do not break when impacted with a specified energy or break with such characteristics that they are less likely than other glazing materials to present an unreasonable risk of injury. The standard became effective on July 6, 1977.

The standard is applicable to glazing materials used in six specific products and to the products themselves. These products, each defined in the standard, are doors, storm doors, bathtub doors

and enclosures, shower doors and enclosures, sliding glass doors (patio-type), and glazed panels. On August 28, 1980 the Commission revoked the provisions applicable to glazed panels (45 FR 57383). Therefore, as of August 28, 1981, the standard applies only to five products and the glazing materials used in those products.

Bathtub and Shower Windows

The standard defines the term "bathtub doors and enclosures" to mean "assemblies of panels and/or doors that are installed on the lip of or immediately surrounding a bathtub" (§ 1201.2(a)(2)). The standard defines the term "shower door and enclosure" to mean "an assembly of one or more panels installed to form all or part of the wall and/or door of a shower stall" (§ 1201.2(a)(3)).

Since the effective date of the standard, firms whose activities are regulated by the standard have raised the question of whether these definitions include glazing materials in a window that is located over a bathtub or within a shower stall and in the exterior wall of a building. The definitions of bathtub and shower doors and enclosures contain no specific exemption for glazing materials in such windows. The text of § 1201.2(a)(2), if read literally, could include glazing material in an exterior wall window located above a bathtub because that window could be interpreted as being "immediately surrounding" the bathtub. Similarly, the text of § 1201.2(a)(3), if read literally, could include glazing material in an exterior wall window because that window could be interpreted as forming "all or part of the wall of a shower stall."

Petition From NGDA

In September, 1978 the National Glass Dealers Association (NGDA) petitioned the Commission to amend the architectural glazing standard (Petition CP 78-18). (2) ¹ A portion of the petition requested amendments to the definitions of bathtub and shower doors and enclosures to exclude any glazing material in a window that is located over a bathtub or within a shower stall and in the exterior wall of a building.

In January of 1980, the Commission staff transmitted to the Commission a briefing package that evaluated the issues of the NGDA petition. That portion of the briefing package concerning exterior windows in shower enclosures and over bathtubs observed

that when the Commission issued the standard, it did not express any intent to include such windows within the coverage of the standard. (3) The briefing package also stated that after reviewing injury information associated with glazing materials, the staff was unable to find any report of injury resulting from breakage of such a window by accidental human impact. (4, 5)

After considering the petition and information supplied by NGDA, and the briefing package prepared by the Commission staff, the Commission decided in March of 1980 to grant that portion of the petition relating to exterior windows in shower stalls and over bathtubs by proposing a statement of policy and interpretation rather than by amending the standard. The Commission decided that it had not intended to include windows in the exterior wall of a building in the definition of the term "bathtub doors and enclosures" or "shower door and enclosure" when it issued the Standard. (6, 7) For that reason, the Commission voted to propose a policy statement to clarify its intent that glazing materials in exterior windows are not included within either definition. Later in 1980, the Commission denied the remaining portions of the petition.

In the Federal Register of December 30, 1980 (45 FR 85777), the Commission published a proposed statement of policy and interpretation to clarify the definitions of the terms "bathtub doors and enclosures" and "shower door and enclosure" set forth in the standard. The proposed policy statement observed that while the language in the definitions of those terms may be broad enough to cover windows in exterior walls of shower enclosures and above bathtubs, the Commission did not intend to regulate such windows when it issued the standard. (8) The notice of December 30, 1980, invited written comments from all interested persons on the proposed statement of policy. The notice also described the remaining portions of the petition, and the Commission's reasons for denying them.

Response to Proposal

In response to the notice of December 30, 1980, the Commission received one written comment, submitted by NGDA. In this comment, NGDA expressed its support of the proposed statement of policy in view of the absence of any reports of injuries associated with the glazing materials which are the subject of the proposal. (9) The Commission staff has reviewed reports of injuries associated with glazing materials which have become available to the

Commission since January of 1980, and has found no report of any injury associated with glazing materials used in exterior windows of showers stalls or above bathtubs.

After considering the single comment received in response to the proposal of December 30, 1980, and the most recent information submitted by the staff, the Commission has decided to issue the policy statement on a final basis, without modification.

As stated in the notice of December 30, 1980, the clarification contained in the policy statement does not amend the standard. For this reason, provisions of section 9(e) of the Consumer Product Safety Act (15 U.S.C. 2058(e)) do not apply. The Commission has solicited written comment on the proposed statement of policy only because it desired to obtain the views of any member of the public who might be affected by it.

Accordingly, pursuant to sections 7 and 9 of the Consumer Product Safety Act, 15 U.S.C. 2056, 2058, the Commission amends Title 16, Chapter II, Subchapter B, Part 1201 of the Code of Federal Regulations by adding a new Subpart C, as follows:

PART 1201—SAFETY STANDARD FOR ARCHITECTURAL GLAZING MATERIALS

Subpart A—The Standard

Subpart B [Reserved]

Subpart C—Statements of Policy and Interpretation

§ 1201.40 Interpretation concerning bathtub and shower doors and enclosures.

(a) Purpose and background. The purpose of this section is to clarify the scope of the terms "bathtub doors and enclosures" and "shower door and enclosure" as they are used in the Standard in Subpart A. The Standard lists the products that are subject to it (§ 1201.1(a)). This list includes "bathtub doors and enclosures," a term defined in the Standard to mean "assemblies of panels and/or doors that are installed on the lip of or immediately surrounding a bathtub" (§ 1201.2(a)(2)). The list also includes "shower doors and enclosures," a term defined to mean "(assemblies) of one or more panels installed to form all or part of the wall and/or door of a shower stall" (§ 1201.2(a)(3)). Since the Standard became effective on July 6, 1977, the question has arisen whether the definitions of these products include glazing materials in a window that is located over a bathtub or within a

¹Numbers in parentheses identify reference documents listed in Bibliography at the end of this document.

shower stall and in the exterior wall of a building. The definitions of the terms "bathtub doors and enclosures" and "shower door and enclosure" contain no specific exemption for glazing materials in such windows. If read literally, the Standard could include glazing materials in an exterior wall window located above a bathtub because that window could be interpreted as being "immediately surrounding" the bathtub. Similarly, the Standard, if read literally, could include glazing materials in an exterior wall window because that window could be interpreted as forming "all or part of the wall * * * of a shower stall."

(b) Interpretation. When the Consumer Product Safety Commission issued the Standard, it did not intend the standard to apply to any item of glazing material in a window that is located over a bathtub or within a shower stall and in the exterior wall of a building. The Commission clarifies that the Standard does not apply to such items of glazing material or such windows. This interpretation applies only to the term "bathtub doors and enclosures" and "shower door and enclosure" and does not affect the applicability of the Standard to any other product.

Effective date: October 15, 1981.

Dated: September 9, 1981.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

Bibliography

1. Staff briefing package on petition CP 78-18, prepared by Nick Marchica, OPM; 10 pages; January 29, 1980. The tabs to this package are listed separately.
2. TAB A, Petition from National Glass Dealers Association requesting amendment of Safety Standard for Architectural Glazing Materials; 47 pages; September 22, 1978.
3. TAB B, Memorandum from Allen F. Brauning, C&E to Nick Marchica, OPM, expressing views of Directorate for Compliance and Enforcement on petition from NGDA, with attachments; 14 pages; January 14, 1980.
4. TAB C, memorandum from Paula Present, HIEA, to Nick Marchica, OPM, concerning NGDA petition; 1 page; September 21, 1979.
5. TAB D, memorandum from William Rowe, HIEA, to Nick Marchica, OPM, concerning injury information relevant to NGDA petition; 1 page; September 21, 1979.
6. Vote sheet on petition CP 78-18 from Alan Shakin, OGC, to the Commission; 3 pages; February 15, 1980.
7. Minutes of Commission vote on March 19, 1980, granting portion of petition CP 78-18; 1 page; March 24, 1980.
8. Federal Register notice proposing statement of policy to clarify definitions of "bathtub doors and enclosures" and "shower door and enclosure"; 3 pages; December 30, 1980.

9. Comment on proposal of December 30, 1980, from Jerald A. Jacobs and Richard F. Mann on behalf of National Glass Dealers Association; 2 pages; February 23, 1981.

[FR Doc. 81-26836 Filed 9-14-81; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 282

[Docket Nos. RM79-14, RM80-18, and RM80-75]

Agricultural Exemptions From Incremental Pricing

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order denying rehearing and denying stay.

SUMMARY: On July 31, 1981, the Federal Energy Regulatory Commission (Commission) issued an Order Delineating Effect of Judicial Action on Commission's Regulations regarding agricultural exemption from incremental pricing ("the July 31 Order"). 46 FR 41034, August 14, 1981. On August 5, 1981, the Fertilizer Institute, *et al.*, filed an application for rehearing and stay of the July 31 Order. The Commission hereby denies the application.

FOR FURTHER INFORMATION CONTACT: Carol M. Lane, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357-8511.

Alice Fernandez, Office of Pipeline & Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357-9095.

SUPPLEMENTARY INFORMATION: The July 31 Order informed natural gas suppliers and end-users of a recent D.C. Circuit opinion vacating the Secretary of Agriculture's definition of "process fuel." The Order explained that this development removed the exemption from incremental pricing under the Natural Gas Policy Act currently being claimed by end-users who manufacture fertilizer, agricultural chemicals, or animal feed and food. The order noted that, as a result of this development, these end-users would have to file "Change of Circumstances" notices with the Commission and the supplier pursuant to the "prompt notice" requirements of 18 CFR 282.205(a) of the Commission's incremental pricing regulations.

The application for rehearing and stay of the July 31 Order urged the

Commission to continue the exemption for the affected end-users. The instant order denies rehearing and stay on the basis that it was not the July 31 Order that subjected these end-users to incremental pricing, but rather the court's action; thus rehearing and stay of the July 31 Order would not continue any exemption. The instant order also addresses several other procedural and policy arguments raised by the petitioners.

Issued: September 4, 1981.

In the matter of agricultural exemptions from incremental pricing; order denying rehearing and denying stay.

On August 5, 1981, an application for rehearing and stay of the Commission's "Order Delineating Effect of Judicial Action on Commission's Regulations" was filed jointly by The Fertilizer Institute, the National Council of Farmer Cooperatives, and the American Feed Manufacturers Association ("TFT"). On August 12, 1981, a joinder in TFT's application was filed by W. R. Grace and Company ("Grace"). This order denies the rehearing and stay requested by these petitioners.

Background

The Order Delineating Effect of Judicial Action on Commission Regulations ("the July 31 Order") has a complex factual and procedural background that is set forth in detail in that order. In sum, however, the July 31 Order informed natural gas suppliers and industrial end-users of a recent judicial decision, *Process Gas Consumers Group, et al. v. United States Department of Agriculture (PGCG)* (D.C. Circuit, Nos. 80-1558 and 80-1603), and explained how that decision affects the Commission's regulations under Title II of the Natural Gas Policy Act of 1978 (NGPA) (15 U.S.C. 3301-3432).

The PGCG case concerned Title IV of the NGPA (curtailment). Under Title IV, the Secretary of Agriculture (Secretary) has the authority to certify certain uses of gas as "essential agricultural uses." Once so certified, the user is eligible for priority treatment during periods of gas curtailment. Section 401 defines "essential agricultural use" as follows:

- [A]ny use of natural gas—
 (A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or
 (B) as a process fuel or feedstock in the production of fertilizer, agricultural

¹ Issued July 31, 1981. Docket Nos. RM79-14, RM80-18 and RM80-75; 46 FR 41034, August 14, 1981.

chemicals, animal feed, or food, (emphasis added).

The Secretary's regulations implementing this definition are set forth at 7 CFR Part 2900. These regulations, until the *PGCG* decision, defined "process fuel," as "natural gas used to produce steam which in turn is directly applied in processing of products." As a result of this definition, boiler fuel users of natural gas who use steam directly to produce fertilizer, agricultural chemicals, animal feed, and food (hereinafter referred to collectively as "fertilizer manufacturers") became eligible for curtailment priority as "process" users. The *PGCG* case vacated and set aside this definition, an action which obviously affected Title IV curtailment priorities. But the court's mandate also had an effect on the Commission's implementation of Title II.

Under Title II of the NGPA, industrial boiler fuel users of natural gas are subject to incremental pricing unless an exemption is provided pursuant to section 206. Section 206 (b) provides an exemption for "agricultural uses" of gas and defines those uses in terms similar to those used in section 401 to define "essential agricultural uses." The Commission's regulations implementing the agricultural exemption from incremental pricing (18 CFR 282.202) were set forth in Order No. 49² and defined "agricultural use" to include:

[A]ny use of natural gas:

(1) which is certified by the Secretary of Agriculture under 7 CFR 2900.3 as an "essential agricultural use" pursuant to section 401 of the NGPA * * *

When the Secretary subsequently certified the above-described uses of gas by fertilizer manufacturers as "essentially agricultural uses," most of these manufacturers filed affidavits claiming "agricultural use" exemptions from incremental pricing pursuant to § 282.202. The *PGCG* decision thus affected the incremental pricing status of these fertilizer manufacturers. It removed their use of gas from the Secretary's list of certified uses, and by so doing removed the basis for their "agricultural use" exemption from incremental pricing under § 282.202. The July 31 Order informed affected users that this development would make it necessary for them to file a "Change of Circumstances" notice with the Commission and the appropriate supplier by August 31, 1981, pursuant to the "prompt notice" requirement of § 282.205(a) of the Commission's regulations. The order noted that such

filings would take effect, pursuant to § 282.205(d), as of the billing period beginning September 1, 1981.

Discussion

The following issues are raised by the applications for rehearing and stay of the July 31 Order:

1. *Should the Commission continue the exempt status of fertilizer manufacturers under section 206(b) in view of its imminent consideration of a permanent exemption for these users under section 206(d)?*

TFI and Grace assert that the July 31 Order "threatens a serious but needless disruption" in the status of fertilizer manufacturers under Title II, and that the Commission should stay the Order and permit these users to continue to claim an exemption from incremental pricing. The applicants note in particular the Commission's statement in the Order (at p. 5, *mimeo*) that it intends to act promptly in Docket No. RM80-18 to decide whether to promulgate a section 206(d) exemption for these users since they no longer can claim a section 206 (b) exemption.³ In light of this imminent consideration of another type of exemption, the applicants argue the Commission should stay the July 31 Order so as not to subject fertilizer manufacturers to incremental pricing in the meantime.

In response, the Commission notes that it was not the July 31 Order that subjected fertilizer manufacturers to incremental pricing. The Order merely described the *PGCG* decision and explained how it affected the Commission's already-existing incremental pricing regulations. Rather, it was the effect of the court's decision on those regulations that subjected fertilizer manufacturers to incremental pricing. Once a use of gas is removed from the Secretary's list of certified "essential agricultural uses," that use no longer falls within the definition of "agricultural use" in § 282.202(a). Thus there is no basis upon which to claim an exemption from incremental pricing under that section. With or without the July 31 Order, fertilizer manufacturers have lost the basis upon which their exemption was founded. The only way in which an exemption could be regained would be if the Commission were to take independent action to exempt these gas users. For example, an exemption could be regained if the Commission were to promulgate a rule under section 206(d) specifically

³ Section 206(d) of the NGPA provides that the Commission may exempt any incrementally priced facility or category thereof from the Title II program, but that any rule providing for such an exemption must be submitted to Congress for approval.

exempting the category of fertilizer manufacturers from incremental pricing.⁴

Accordingly, a stay of the July 31 Order would not continue any exemption. It would only cause confusion as to how fertilizer manufacturers and their suppliers are to comply with the existing regulations. Some participants in proceedings in these dockets have stated that the claimed exemptions from incremental pricing by these manufacturers were invalid *ab initio*, since the underlying certification was vacated and set aside by the court.⁵ Under this theory, incremental pricing surcharges should be applied retroactively to the date that the fertilizer manufacturers began claiming exemptions. However, these participants assert that, due to the complexity of the surcharge program, the surcharges should be assessed only as of August 1, 1981.

In order to eliminate potential confusion as to retroactivity, or inconsistency in application of the court's order from supplier to supplier, the Commission issued the July 31 Order. The Order made it clear that incremental pricing surcharges were to be assessed only as of the billing period beginning September 1, 1981. Selection of this date represented a reasonable interpretation of the Commission's already existing "Change of Circumstances" regulations, giving end-users sufficient time to make "Change of Circumstances" filings and suppliers sufficient time to adjust their billing records.

2. *Should the Commission alter the full stay in Docket No. RM80-75 that was issued on April 23, 1981?*

TFI and Grace assert that "it makes no sense to disrupt the current full stay" in Docket No. RM80-75, which stay preserved the incremental pricing exemption for fertilizer manufacturers. This assertion appears to be based upon a misunderstanding of both the rule in that docket and the scope of the stay orders.

In Docket No. RM80-75, the Commission issued an Interim Rule on October 6, 1980 (45 FR 67276, October 9, 1980). The rule amended § 282.202(a) to provide that only those uses of gas that were certified as "essential agricultural

⁴ The Commission notes that in fact such a proceeding has been initiated in Docket No. RM80-18. See Notice of Proposed Rulemaking, issued August 14, 1981, 46 FR 41748 (August 17, 1981).

⁵ See "Motion of United Distribution Companies for Clarification, Dissolution of Stay and Termination of Rulemaking and Answer to Request for Immediate Action on Rulemaking," filed July 24, 1981, in Docket Nos. RM79-14, RM80-75 and RM80-18.

² Docket No. RM79-14, issued September 28, 1979, 44 FR 57726, October 5, 1979.

uses" by the Secretary on or before October 15, 1979, were automatically adopted as "agricultural uses" for incremental pricing. Uses certified after that date are to be evaluated individually by the Commission as to whether they meet the Title II definition of "agricultural use."

This rule, in effect, removed fertilizer manufacturers and certain other gas users from the definition of "agricultural use" in § 282.202(a), since their certifications had occurred after October 15, 1979. However, this rule was stayed on October 23, 1980 (45 FR 76681, November 20, 1980) insofar as it applied to users who had previously claimed exemptions from incremental pricing in reliance on the Secretary's certification. Later the rule was fully stayed to permit all users certified after October 15, 1979, to claim exemptions (46 FR 25599, May 8, 1981).

Contrary to the understanding of TFI and Grace, the full stay remains in effect and is not "disrupted" by the July 31 Order. Under this stay, any user of natural gas whose use was certified by the Secretary after October 15, 1979, may claim an "agricultural use" exemption from incremental pricing pursuant to the definition of "agricultural use" as it was set forth in § 282.202(a) before the Interim Rule was issued in Docket No. RM80-75.⁴ But such a claim can no longer be made by fertilizer manufacturers since, as a result of the court's action in *PGCG*, they are no longer certified by the Secretary. Thus, they cannot fall within the definition of "agricultural use" as it stood prior to the rule in Docket No. RM80-75.

In sum, whether the stay in RM80-75 is in effect or not has no bearing upon the current position of fertilizer manufacturers now that they are no longer certified as "essential agricultural users."

3. Is "agricultural use" currently defined under section 206(d) of the NGPA, not under section 206(b), thus making it impossible for any "agricultural use" exemption to be removed without Congressional approval?

TFI and Grace assert that the "agricultural use" exemption claimed by fertilizer manufacturers is no longer based on section 206(b) of the NGPA. Instead, they assert, all "agricultural use" exemptions are now based solely on section 206(d) as the result of Order

No. 83.⁷ Although their argument is not clearly articulated, they are apparently asserting that they have a section 206(d) exemption pursuant to Order No. 83 that can only be removed if Congress approves its removal. Accordingly, an explanation of Order No. 83 may be helpful in responding to this argument.

The agricultural use exemption set forth in section 206(b) of the NGPA is not permanent. It exempts agricultural uses only for an interim period until the Commission promulgates an alternative fuel test for such uses. Specifically, section 206(b)(2) provides that:

Not later than 18 months after the date of the enactment of this Act [not later than May 9, 1980], the Commission shall prescribe and make effective a rule providing for the exemption from the rule required under section 201 * * * [of] any facility with respect to any agricultural use of natural gas for which the Commission determines that an alternative fuel or feedstock is not—

- (A) Economically practicable; or
- (B) Reasonably available.

Shortly before this statutory deadline occurred, the Commission determined that for several reasons it would require additional time to study the factors upon which an alternative fuel test could be formulated. Accordingly, the Commission promulgated Order No. 83, a rule that continued the interim exemption from incremental pricing for agricultural uses of gas for an indefinite period, pursuant to section 206(d). The rule adopted in Order No. 83 reads as follows:

All gas consumed in an agricultural use shall be exempt from incremental pricing under this part unless by rule or order the Commission determines that there is an alternative fuel or feedstock for the agricultural use that is economically practicable or reasonably available.*

TFI and Grace apparently misunderstand the effect of Order No. 83. The rule promulgated in that order did not eliminate the section 206(b)(1) exemption for agricultural uses. Rather, it extended the section 206(b)(1) exemption for these users by virtue of the Commission's exemptive authority under section 206(d). The rule was submitted to Congress as is required by section 206(d) and no Congressional action to disapprove this continued exemption for agricultural uses was taken.

If the Preamble to Order No. 83, the Commission explained that "Under the rule set forth below, all agricultural uses, as defined in section 206(b)(3) of the NGPA and § 282.202(a) of the

Commission's regulations, will be exempt from being incrementally priced until further action is taken by the Commission." Thus, the Commission made it clear that the continued agricultural use exemption is dependent upon a use falling within the definition of "agricultural use" set forth in § 282.202(a) of the regulations. But there is no language in Order No. 83 to indicate that the scope of § 282.202(a) was forever prescribed by the uses falling within that definition as of the date Order No. 83 became effective. Indeed, if that had been the case, the Commission could not have later amended § 282.202(a), as it did in Order No. 114, to add a number of Standard Industrial Code (SIC) numbers to its list of exempt agricultural uses without getting Congressional approval.⁸ In fact, when the Commission amended § 282.202 to add these uses, it did not send the rule to Congress, and neither TFI/Grace nor any other person objected.

In sum, Congress' approval of Order No. 83 did not represent a Congressional mandate that specific uses of gas be permanently categorized as "agricultural uses." It merely represented approval of a continued generic exemption from incremental pricing for "agricultural uses," as the Commission defines that term.

Accordingly, Order No. 83 has no bearing upon the fact that under the *PGCG* case fertilizer manufacturers do not fall within the Commission's § 282.202(a) definition of "agricultural use."

4. Why should the Commission minimize the impact of incremental pricing by exempting gas used to manufacture "felt goods" and "particle board" but not by exempting fertilizer manufacturers?

TFI and Grace note that the Commission "has taken steps to minimize the impact of incremental pricing" by exempting gas used to manufacture "felt goods" and "particle board," even though these uses have not been certified by the Secretary. Thus, they assert, "there is no policy reason to maximize the application of the incremental pricing program" by subjecting fertilizer manufacturers to surcharges.

In response, the Commission notes that it was the Congress, not the Commission, that established the policy framework for upon which all "agricultural use" exemptions from incremental pricing are based. Section

⁴For example, facilities that use gas to manufacture bottle caps and crowns, which use was certified by the Secretary after October 15, 1979, remain exempt from incremental pricing under the stay in Docket No. RM80-75.

⁷45 FR 33601 (May 20, 1980).

⁸This rule now appears in § 282.203(a)(2) of the Commission's regulations.

⁹See Order No. 114, Docket No. RM80-48, issued December 5, 1980, 45 FR 82915, December 17, 1980.

208(b)(3) of the NGPA defines "agricultural use" as:

[T]he use of natural gas to the extent such use is—

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food.

The Commission exempted the boiler fuel use of gas to manufacture felt goods and particle board because those uses constitute "natural fiber processing" as set forth in the above definition. The manufacture of fertilizer, on the other hand, falls within the above definition only when the gas is used "as a process fuel" (or feedstock). The court has now determined that, due to the deficiencies it found in the Secretary of Agriculture's role in this matter, and the way he defined "process fuel," boiler fuel use in fertilizer production is not "process fuel" use.¹⁰

Thus there is presently no basis for an "agricultural use" exemption for boiler fuel use of gas by fertilizer manufacturers. Accordingly, the argument made by TFI and Grace is not relevant. There is no analogy between boiler fuel gas used for natural fiber processing and boiler fuel gas used in fertilizer production. The statute clearly established a distinction between the two.

The Commission Orders:

The applications for rehearing and stay of the Order Delineating Effect of Judicial Action on Commission's Regulations, filed by the Fertilizer Institute, *et al.*, and by W.R. Grace Company, are hereby denied.

By the Commission.

Kenneth F. Plumb,
Secretary.

[FR Doc. 81-36679 Filed 9-14-81; 8:45 am]

BILLING CODE 6450-85-M

18 CFR Part 375

Publication of Procedures for Closing Commission Meetings

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Publication of procedures for closing Commission meetings.

SUMMARY: On July 31, 1981, by memorandum opinion, the United States

¹⁰ It is still open to the Commission to adopt a definition of "process fuel" under Title II of the NGPA. Whether such a definition would create an incremental pricing exemption for fertilizer manufacturers is a matter upon which the Commission expresses no opinion here.

District Court for the District of Columbia rendered a decision in the case of *Tenneco Inc. v. Federal Energy Regulatory Commission*, C.A. No. 80-3314. As part of this decision, the court ordered that the Commission publish its procedures, as submitted to the Court, for closing meetings under the provisions of section 552b of Title 5 of the United States Code (the Sunshine Act). Those procedures were submitted to the court by copy of the memorandum from the Commission's Deputy General Counsel to the Secretary of the Commission. The Commission's regulations, described in that memorandum are found under 18 CFR 375.204 through 375.206. In compliance with the order of the court, the text of that memorandum is reproduced below.

FOR FURTHER INFORMATION CONTACT: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, D.C. 20426 (202) 357-8400.

SUPPLEMENTARY INFORMATION: This responds to your request for our opinion regarding appropriate procedures to meet the Commission's obligations under the Sunshine Act (the Act), 5 U.S.C. 552b, particularly with respect to public announcement of closed meetings. This memorandum confirms oral communications between your office and our Division of Legal Counsel on January 23, 1981.

The General Counsel will provide you certifications for each matter proposed for consideration in a closed Commission meeting upon determining that the meeting to discuss the matter may properly be closed under one or more of the exemptions in subsection (c) of the Act. Each such certification will state the relevant exemptions under which the meeting may be closed. Through meeting schedules and submission deadlines established by Acting Chairman Sheldon, you will have the substantive materials concerning each matter and the certifications by the close of business eight days before the scheduled meeting date, except where agency business appears to require consideration of a matter in a closed meeting on shorter notice.

As you know, the Commission must vote on each matter proposed for consideration in a closed meeting. A separate Commission vote is also required if it is determined that any information about the meeting should be withheld pursuant to an appropriate exemption. 5 U.S.C. 552b(d)(1); 18 CFR 375.206(a). In order to meet our public announcement responsibilities under the Act (discussed below), these votes should take place at least seven days

prior to the scheduled meeting date. As already mentioned, a meeting may be closed on less than seven days' notice if the Commission determines by a recorded vote that agency business requires that such meeting be called at an earlier date. 5 U.S.C. 552b(e)(1).

Within one day of any Commission vote to either close a meeting, or to withhold any information about the meeting, the Act requires that you make the following information publicly available: (1) A written copy of the Commission vote reflecting the vote of each member (2) a full written explanation of the Commission's action closing the meeting (the reasons, in most instances, will be set forth in the certifications by the General Counsel), and (3) a list of all persons expected to attend the meeting and their affiliation. 5 U.S.C. 552b(d)(3); 18 CFR 375.206(c). We construe "publicly available" to include posting on the Commission's Public Notice Board. We also recommend that the certification by the General Counsel be posted at the same time.

The Act also requires that you make a public announcement, at least one week prior to the meeting, of the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated by the Agency to respond to requests for information about the meeting. If the Commission determines by recorded vote that agency business requires that such meeting be called at an earlier date, this public announcement is to be made at the earliest practicable time. 5 U.S.C. 552b(e)(1).

The public announcement requirements of the Act should be satisfied by one or more of the following: posting the requisite notices on the Commission's Public Notice Board, publishing them in official Commission publications, or sending them to the persons on a mailing list maintained for those who want to receive such material. 18 CFR 375.204(d)(1). We recommend posting in all cases at a minimum.

Additionally, the Act requires submission for publication in the Federal Register notice of the time, place and subject matter of the meeting, whether the meeting is open or closed, any changes in one of the proceedings, and the name and phone number of the official designated by the Commission to respond to requests for information about the meeting. 5 U.S.C. 552b(e)(3).

Notwithstanding the above, the time or place of the meeting may be changed even after public announcement is made

if such change is publicly announced at the earliest practicable time. The subject matter of a meeting, or the determination to open or close a meeting, may be changed following public announcement only if (1) the Commission determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the change as well as the vote to change is made publicly available at the earliest practicable time. 5 U.S.C. 552b(e)(2).

After a closed meeting has been held, the Act requires that you retain a copy of the certification by the General Counsel, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present. 5 U.S.C. 552b(f)(1); 18 CFR 375.206(d). Additionally under the Act, you must maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting or portion of a meeting closed to the public. In the case of a meeting or portion of a meeting closed to the public pursuant to exemptions (8), (9)(A), or (10) of subsection (c), either a transcript or recording, or a set of minutes is required. Any such minutes must fully and clearly describe all matters discussed and must provide a full and accurate summary of any actions taken, and the reasons thereof, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All agenda documents considered in connection with any Commission action must be identified in such minutes. 5 U.S.C. 552b(f)(1); 18 CFR 375.206(e).

Kenneth F. Plumb,
Secretary.

[FR Doc. 81-26942 Filed 9-14-81; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

(Regulations No. 4)

Federal Old-Age, Survivors, and Disability Insurance Benefits; Payment for Medical Evidence of Record

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: These final rules provide that any non-Federal hospital, clinic, laboratory, or other provider of medical

services, or physician who is not employed by the Federal government, and who supplies medical evidence that we ask for and need for making determinations of disability shall be entitled to payment for the reasonable cost of providing the evidence. These rules do not meet the criteria for major rules, as defined in Executive Order 12291.

DATES: Effective date: December 1, 1980.

FOR FURTHER INFORMATION CONTACT: William J. Ziegler, Legal Assistant, Office of Regulations, Social Security Administration, 8401 Security Boulevard, Baltimore, Maryland 21235, telephone 301-594-7415.

SUPPLEMENTARY INFORMATION: Section 309 of Pub. L. 96-265 amends section 223(d)(5) of the Social Security Act to permit us to pay for certain medical evidence which we need to make title II disability determinations. As a result of this change in the law, we will now pay the reasonable cost for existing medical evidence which we ask for and need. However, we will pay only a non-Federal hospital, clinic, laboratory, or other provider of medical service, or a physician who is not employed by the Federal government. This law authorizes us to pay only for evidence which we ask for after November 30, 1980. The date of the request will be the first date that we ask for a medical report and not the date of a later request.

Until December 1, 1980 the claimant was primarily responsible for paying for existing medical evidence submitted to us for making a title II disability determination. The title II law did not allow us to routinely purchase existing medical evidence.

On the other hand, we have always paid for existing medical evidence which we needed for making disability and blindness determinations under the title XVI Supplemental Security Income Program. Under the title XVI program, a claimant must always have limited income and resources in order to get payments based upon disability or blindness.

To reflect this change in the law, we are amending § 404.1514.

Although the law provides that we pay for existing medical evidence which we require and request, we may in some unusual situations pay for evidence of record which we did not require or which we did not request. From our past experience in paying for medical evidence under the title XVI Supplemental Security Income Program, we have found that medical evidence of record which we need is sometimes given to us before we request it. As in the title XVI program we may pay for

such evidence in the title II program (under the authority we have in section 205(a) of the Act to efficiently carry out the purposes of that title) if we believe the evidence helps us to insure the correctness of our payments.

We will generally consider as existing medical evidence any medical report prepared on the basis of a prior medical examination, test, or laboratory study. We will pay a reasonable fee to cover any expenses for processing our request for the evidence, including expenses for preparing, copying, and mailing the report. We will not pay for the cost of the actual medical examination, test, or laboratory study unless we schedule it. Therefore, we are also amending § 404.1517 to make it clear that we will not pay for any medical examination arranged by a claimant or his or her representative without our advance approval. This is the same rule which we are already following under the title XVI Supplemental Security Income Program.

The Social Security Administration found that publication of a Notice of Proposed Rulemaking (NPRM) was "unnecessary" under the Administrative Procedure Act (5 U.S.C. 553(b)(B)). Therefore, interim regulations were published in the *Federal Register* on October 30, 1980 (45 FR 71791). These interim regulations only updated existing regulations to reflect the Social Security Disability Amendments of 1980 (Section 309 of Pub. L. 96-265). However, to insure that the public had an opportunity to give us their views about these regulations, we asked interested persons to send us their comments before proceeding with these final amendments. Following are our responses to the comments which we received.

Comment: One legal service attorney commented that we should pay for nonduplicative medical evidence requested by claimants or their representatives. According to this attorney, the claimant has a better relationship with the physician and can more readily obtain the necessary medical evidence. Also, the commenter stated that the claimant and the representative are frequently better able to prepare individualized questionnaires about the claimant's impairment and its limiting effects.

Response: Payment for existing medical evidence requested by claimants or their representatives would be contrary to section 223(d)(5) of the Social Security Act as amended by section 309 of Pub. L. 96-265. That section provides that we will pay only the reasonable cost for medical