

1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because of the minimal cost of compliance per airplane (\$40). A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [AMENDED]

2. By adding the following new airworthiness directive:

Saab-Fairchild: Applies to model SF-340 airplanes, manufacturer's serial numbers SF340A-003 through -078 inclusive, certificated in any category. Compliance required within 90 days after the effective date of this AD, unless previously accomplished.

To ensure the reliability of the emergency main landing gear extension system, accomplish the following:

A. Modify the wiring and connectors of the main landing gear emergency extension system in accordance with the instructions contained in SAAB Service Bulletin SF340-32-028, Revision 1, dated November 25, 1986.

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the modification required by this AD.

All persons affected by this directive who have not already received the appropriate service document from the manufacturer, may obtain copies upon request to SAAB, Aircraft Product Support AB, S-58188, Linköping, Sweden.

This document may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective August 3, 1987.

Issued in Seattle, Washington, on June 19, 1987.

Frederick M. Isaac,

Acting Director, Northwest Mountain Region.

[FR Doc. 87-14501 Filed 6-25-87; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM86-6-000; Order No. 474]

Electric Rates; Construction Work in Progress, Anticompetitive Implication

Issued June 18, 1987.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is adopting revised regulations concerning filings to include costs associated with construction work in progress (CWIP) in the rate base of public utilities, under Part II of the Federal Power Act, pursuant to a remand of the Commission's prior CWIP rule by the United States Court of Appeals for the District of Columbia Circuit, which affirmed in part but vacated in part the Commission's prior CWIP rule (Order No. 298), while expressing concerns about the anticompetitive implications of CWIP in rate base. *Mid-Tex Electric Cooperative, Inc., et al. v. FERC*, 773 F.2d 327 (1985). The present regulations are substantially different from those presented in Order No. 298, but are similar to those put into effect on an interim basis after the *Mid-Tex* decision (Order No. 448), with certain modifications intended to more thoroughly address the *Mid-Tex* court's concerns. The final rule prescribes treatment of CWIP filings generally and establishes procedures and guidelines for addressing and remedying potential anticompetitive effects of CWIP in rate base.

EFFECTIVE DATE: July 27, 1987.

FOR FURTHER LEGAL INFORMATION

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FOR FURTHER TECHNICAL INFORMATION

CONTACT: Ronald Rattey, Office of Economic Policy, Federal Energy Regulatory Commission, 825 North

Capital St., NW., Washington, DC 20426, (202) 357-8293.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

I. Introduction

On remand from the United States Court of Appeals for the District of Columbia Circuit,¹ the Federal Energy Regulatory Commission (Commission) is promulgating revised regulations concerning construction work in progress (CWIP)² for public utilities. These regulations are substantially the same as those adopted by the Commission in Order No. 448 (interim CWIP rule),³ with certain modifications concerning the anticompetitive implications of CWIP in rate base pursuant to the court's remand. In addition, in section III of this preamble, the Commission addresses specific comments concerning the implications of "price squeeze"⁴ and "double whammy"⁵ in considering filings that

¹ *Mid-Tex Electric Cooperative, Inc., et al. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) (hereinafter referred to as *Mid-Tex*).

² CWIP represents the capital expenditures and unrecovered financing costs associated with the ongoing construction of projects for the replacement of operating plant and additions of new plant. To the extent a regulatory commission permits CWIP investment in an electric utility's rate base, the resulting rate level are affected initially only by the return allowed on that CWIP investment and related income taxes on the associated cost of equity embedded within the return on that investment and ultimately by lower rate base when the CWIP goes on-line.

³ Order No. 448, 51 FR 7774 III, FERC Statutes and Regulations (Regulations Preambles) § 30.689 (1986), *reh. denied*, 35 FERC ¶ 61,328 (1986).

⁴ A "price squeeze" occurs when a utility's wholesale rate (in relation to costs) is higher than its retail rates (in relation to costs), creating the potential for an anticompetitive effect because the wholesale customer is inhibited in its ability to compete at the retail level against the wholesale supplier.

⁵ "Double whammy," as defined in the accompanying rule, is a situation which may arise when a wholesale electric rate customer embarks upon its own or participates in a construction program to supply itself with all or a portion of its future power needs, thereby reducing its future dependence on the CWIP of the rate applicant, but is simultaneously forced to pay to the CWIP rate applicant the CWIP portion of the wholesale rates that reflects existing levels of service or a different anticipated service level. It is argued that this is anticompetitive because it would cause the wholesale customer to essentially subsidize other wholesale customers who would shoulder less of the CWIP burden as a result, thereby putting the first wholesale customer at competitive disadvantages *vis-a-vis* the utility and the other wholesale customers. As suggested in Order No. 298, 48 FR 24328, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.496 (1983), the Commission anticipates that double whammy implications will arise principally, if not entirely, in the case of requirements rates as opposed to coordination rates.

include CWIP-related amounts. The definition of price squeeze herein is revised from Order No. 448 in response to the *Mid-Tex* court's concern about price squeezes caused by disparities between Federal and State CWIP policies.

Another anticompetitive effect similar to double whammy is where a wholesale customer contracts to purchase its future power needs from a supplier other than the CWIP rate applicant, thereby reducing its future dependence on the CWIP of the rate applicant, but is forced to pay the CWIP portion of the wholesale rates that reflects existing levels or service or a different anticipated service level. Thus, this anticompetitive effect is similar to double whammy in that the wholesale customer would essentially subsidize other wholesale customers who would shoulder less of the CWIP burden as a result, thereby putting the first wholesale customer at competitive disadvantages *vis-a-vis* the utility and the other wholesale customers. The *Mid-Tex* court did not address the situation of a wholesale customer contracting to purchase its future power needs from an alternative supplier. However, given the similarity of the potential anticompetitive effects between this situation and double whammy, the Commission considers it appropriate to address both situations. Under the final rule, anticompetitive effects can be prevented in both situations. Thus, for purposes of this preamble, double whammy discussion should be deemed to also apply to situations in which a wholesale customer has contracted to purchase future power needs from a supplier other than the CWIP rate applicant.

The final rule does not change the substance of the general provisions of the interim CWIP rule under which public utilities could seek to include in rate base, in addition to pollution control and fuel conversion CWIP, up to 50% of all non-pollution control/fuel conversion (non-PC/FC) CWIP. After reviewing the *Mid-Tex* decision and the comments to the interim CWIP rule,⁶ the Commission believes that the principal reasons for departing from prior practice and adopting the present approach to CWIP remain sound. In this preamble, the Commission addresses the particular anticompetitive concerns expressed by

the *Mid-Tex* court. The Commission believes that it has developed adequate procedures to address and remedy potential CWIP-related price squeeze on a case-specific basis and prevent double whammy situations generally.

II. Background

A. Order No. 555

Prior to Order Nos. 555 and 555-A,⁷ the policy of this Commission's predecessor, the Federal Power Commission, was to prohibit the inclusion of any CWIP in rate base,⁸ even though the Commission had the discretion to consider the justness and reasonableness of a rate supported by the inclusion of CWIP in rate base on a case-by-case basis.

In Docket No. RM75-13,⁹ the Federal Power Commission proposed a change in its policy of prohibiting any CWIP in rate base "primarily to help alleviate the current financing problems being experienced by utility companies."¹⁰ In Order No. 555, the Federal Power Commission modified its prior CWIP policy and agreed to consider requests for CWIP in rate base in three instances:

- (1) Where the construction involved facilities to be used for pollution control;
- (2) Where the construction involved conversion of facilities to the burning of other fossil fuels which previously burned oil or gas; and
- (3) Where the utility requesting CWIP was in severe financial distress which could not be alleviated in the absence of CWIP in rate base without materially increasing the cost of electricity to consumers.

As to pollution control and fuel conversion CWIP, the Commission determined that, because of the current generation's commitment to the control of pollution and to preserve existing stocks of natural resources, it was proper to allow CWIP for these types of facilities. Order No. 555 permitted pollution control and fuel conversion CWIP to be reflected in rates at the same time the non-CWIP portion of a requested rate became effective.

With respect to CWIP requests concerning severe financial distress, the Federal Power Commission noted that it would permit such CWIP only where "the rate of return necessary to enable the utility to maintain its credit and attract capital in accordance with the standards of the *Bluefield* decision

would be materially in excess of the cost of capital for otherwise similar utilities."¹¹ The Federal Power Commission determined that under these circumstances it would be to the benefit of the consumer if the additional earnings necessary to attract capital were permitted by way of an immediate return on CWIP, rather than by way of an inflated return on rate base (excluding the CWIP), since the CWIP treatment would eventually be reflected in a lower rate base, while the rate of return treatment would not. However, the Federal Power Commission decided to permit CWIP claimed under the severe financial distress test only after a final Commission determination on rehearing that financial circumstances justified such inclusion.¹²

During the six and one-half years that Order No. 555 remained in effect, over 275 rate increase applications in which the applicants requested pollution control or fuel conversion CWIP were filed with the Commission. However, given the stringency of the severe financial distress threshold, only thirteen utilities attempted to meet this test; the Commission has not granted CWIP to any company under that very stringent test.¹³

B. Order No. 298

In Docket No. RM81-38, the Commission again considered its policy with respect to requests for CWIP in rate base. Ultimately, the Commission issued Order Nos. 298 and 298-A,¹⁴

¹¹ 41 FR 51395, 56 FPC 2946 (1976).

¹² The Commission granted one waiver from the prospective-only requirement in Montaup Electric Co., Docket No. ER82-325-000, 19 FERC ¶ 61,062 (1982). In that case, the Commission held that the particular facts and circumstances warranted an exception to the Commission's general rule. A CWIP surcharge was suspended for one day and permitted to go into effect subject to refund. The Commission affirmed the judge's initial decision to disapprove the CWIP surcharge. Montaup Electric Co., Opinion No. 267, 38 FERC ¶ 61,252 (1987) order on reh'g, 39 FERC ¶ 61,147 (1987).

¹³ Seven of these cases were settled before an initial decision was rendered. One case, Public Service Company of New Hampshire, Docket Nos. EL78-15 and ER78-339 (Phase I), was settled after an initial decision was rendered [the settlement agreement provided that the Phase I proceedings, which concerned CWIP and rate of return issues, would not be terminated before rates that included the Seabrook No. 1 generating plant in rate base went into effect, and that the company could move to reopen Phase I in the event it needed emergency wholesale rate increases]. The case is pending on appeal of an initial decision which would terminate Phase I. 31 FERC ¶ 63,054 (1985). Five cases resulted in Commission opinions denying the requested CWIP.

¹⁴ 48 FR 24323, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,455 (1983), and 48 FR 46012, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,500 (1983).

⁶ See *Mid-Tex*, 773 F.2d at 344. In Order No. 448, the Commission permitted parties to seek to demonstrate that the relevant conditions, particularly regarding price squeeze and double whammy, have changed since Order No. 298, the prior CWIP rulemaking was issued. (48 FR 24323, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,455 (1983)).

⁷ 41 FR 51392, 56 FPC 2939 (1976), and 42 FR 3022, 57 FPC 6 (1977).

⁸ Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944); Georgia Power Co., 54 FPC 458 (1975); Philadelphia Electric Co., 54 FPC 1394 (1975).

⁹ 39 FR 40787 (1974).

¹⁰ *Id.*

which modified the Commission's basic policy with respect to CWIP. Order No. 298 continued to permit electric utilities to file rates which included pollution control and fuel conversion CWIP in rate base. However, Order No. 298 discarded the prospective-only rule and the severe financial distress test, permitting electric utilities to file and attempt to support rates which, in addition to including pollution control and fuel conversion CWIP, also included up to 50% of all remaining allocable CWIP in rate base.¹⁵

In Order No. 298, the Commission stated that including CWIP in rate base would advance three public interest objectives:

- (1) Mitigation of any bias against the construction of new generating facilities;
- (2) Providing for electric rates to more accurately reflect the costs of future service, allowing the need for new facilities to be tested, so far as possible, by the marketplace; and
- (3) Furthering the goal of rate stability by providing for more gradual increases in electric rates to consumers.¹⁶

With respect to the first objective—mitigating bias against capital investment—the Commission concluded that economic regulation biases utility decisions concerning the construction of new generation facilities in two ways. First, economic regulation creates a bias against the creation of new capacity. Second, to the extent that new capacity is built, economic regulation creates a bias in favor of minimizing capital costs, rather than minimizing total economic costs. These regulatory biases have two sources: utilities' inability to earn a return equal to their cost of capital; and a cash flow problem created by the high cost of new base load plant in relation to present rate base.¹⁷

The Commission concluded that inclusion of CWIP in rate base would reduce but not completely eliminate the first source of bias. As to the second source of bias, the Commission concluded that there were two ways to address this problem. The Commission could either increase the allowed rate of

return to produce higher earnings or allow an immediate return on construction investments by including CWIP in rate base. The Commission elected to permit CWIP in rate base since this action would decrease future rate base, and, thus, lower future rates, while increasing the allowed rate of return would not be matched by similar future reductions.¹⁸

The second public interest objective—ensuring more accurate price signals—was desirable in order to permit the need for new capacity to be tested, so far as possible, by the marketplace. The Commission noted that utilities build new capacity, in part, based upon estimates of future demands, and that these estimates had become more difficult for three reasons. First, the assumption that demand will grow faster than the economy may no longer be valid. Second, the increased length of time between the beginning and the completion of new capacity requires demand projections farther into the future. The third reason was the difference between the price of electricity at the time that demand estimates are made and the price at which electricity must be sold when the new capacity comes on line.¹⁹

The Commission recognized that it could only have an impact on the third cause since the first two causes were not within its regulatory reach. As to the third cause, the Commission determined that since the addition of new facilities is likely to mean higher prices rather than lower ones, CWIP-based rates would provide a more accurate picture of the trends in power costs and, therefore, including CWIP in rate base would tend to lead to more efficient investment decisions by utilities.²⁰

The third public interest objective discussed in Order No. 298—rate stability—is closely related to the second objective. The Commission determined that "[r]atepayers should not face rates that fluctuate radically according to the completion of base load units. . . . Moreover, as large central station generation plants presently under construction are completed over the next few years, the Commission anticipates that the rate shock phenomenon will continue. By revising its CWIP policy, the Commission is

attempting to minimize this problem, to the extent possible."²¹

C. The Mid-Tex Remand

On September 24, 1985, the court issued its opinion in *Mid-Tex* which vacated and remanded certain portions of Order No. 298. The court's mandate issued on November 18, 1985.

The *Mid-Tex* court found that the Commission's stated purposes in adopting Order No. 298 were valid and affirmed the Commission's conclusion that CWIP in rate base would help achieve those purposes. 773 F.2d at 362. However, the court determined that the Commission had not adequately considered whether and to what extent the purposes of the rule outweigh the regulatory objective of promoting competition, in the context of potential price squeeze and double whammy effects.

Therefore, the court vacated those portions of Order No. 298 related to the following decisions: (1) The decision to allow CWIP in rate base; (2) the choice of a 50% CWIP allowance; (3) the rejection of a CWIP rule that tracks the regulatory policies of the several states; (4) the decision to resolve CWIP-related price squeeze issues only on a case-by-case basis; (5) the decision to resolve CWIP-related double whammy issues only on a case-by-case basis; and (6) the decision to allow CWIP in rate base subject to refund. The court concluded that the Commission must reconsider each of these decisions unless it reasonably determines that the CWIP rule will have no significant anticompetitive effects, or unless it convincingly explains why it can consider those effects exclusively on a case-by-case basis (and, in the case of regulatory price squeeze effects, can generally refuse to consider them even in particular cases).²²

D. Order No. 448: The Interim CWIP Rule

In Order No. 448, the Commission adopted interim procedures, pending final action to resolve the *Mid-Tex* court's concerns about the potential price squeeze and double whammy implications of CWIP in rate base. The interim rule followed Order No. 298 insofar as it permitted public utilities to seek to include in rate base, in addition to pollution control and fuel conversion

¹⁵ The 50% cap on non-pollution control and non-fuel conversion CWIP was subject, until July 1, 1985, to the further limitation that any increases in the utility's wholesale revenues directly attributable to such CWIP could not exceed 6% of the utility's wholesale revenues under the rate schedules to be superseded. See 18 CFR 35.26(d) (1985).

¹⁶ 48 FR 24329, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.497 (1983). The *Mid-Tex* court accepted the first two objectives as valid regulatory objectives. It also noted that the Federal Power Act gives the Commission discretion to give at least some weight to the third objective. 773 F.2d at 345.

¹⁷ 48 FR 24330, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.498 (1983).

¹⁸ 48 FR 24330, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.499 (1983).

¹⁹ 48 FR 24330, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.499 (1983).

²⁰ 48 FR 24331, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.455 at 30.499 (1983).

²¹ 48 FR 46019, FERC Statutes and Regulations (Regulations Preambles 1982-1985) § 30.500 at 30.726 (1983).

²² 773 F.2d at 362.

CWIP, up to 50% of all non-PC/FC CWIP.²³

In support of its approach to CWIP in Order No. 448, the Commission stated that it believed it was significant that "the *Mid-Tex* court ratified in large measure the Commission's rationale for departing from its earlier CWIP policy and did not specifically reinstate the Commission's prior rule under Order No. 555. Clearly, the thrust of the court's concern, while significant, was relatively narrow."²⁴ Given that posture, the Commission stated that it did not consider it appropriate to revert generally to the superseded CWIP approach of Order No. 555 on a temporary basis.

The Commission also invited comments to its interim rule in order to assist in its evaluation of the anticompetitive implications of CWIP. Comments and reply comments were solicited concerning the interim procedures for addressing CWIP filings, and the issues of CWIP-related price squeeze and double whammy. The Commission also invited comments concerning whether the relevant circumstances in the electric utility industry have changed since the issuance of Order No. 298. The Commission received comments from several commenter groups, including electric utilities, cooperatives and municipalities, electric industry trade associations, a state regulatory commission, a government agency, and end-use customers.

E. Commission Experience with CWIP Filings

The Commission regulates the rates of approximately 200 public utilities. Since the effective dates of Order Nos. 298 and 448, few utilities have availed themselves of the non-PC/FC CWIP option. As of January 17, 1987, only 27 utilities have filed non-PC/FC CWIP based rates (*i.e.*, rates based upon inclusion of non-pollution control/non-fuel conversion CWIP in rate base) in 46 rate applications, including one rate reduction. Over this same period of time beginning July 1, 1983, 262 rate applications were filed which were eligible to, but did not, include non-PC/FC CWIP in rate base (*i.e.*, rate applications for firm requirements and transmission service, and commitments of system capacity). Trial staff initiated discovery related to the non-PC/FC CWIP programs in 23 of the 46 rate

applications where non-PC/FC CWIP was requested.

Only 10 utilities filed for non-PC/FC CWIP more than once, most notably New England Power Company (NEP) and Montaup Electric Company which are essentially 100 percent jurisdictional. For these utilities, there is little prospect for CWIP-related price squeeze or double whammy since their wholesale sales are made to their affiliates rather than retail competitors. Of the \$702,333,000 of total rate increases requested in these 46 applications, about one-third (\$279,919,000) of the increases was attributable to non-PC/FC CWIP. NEP and Montaup were responsible for \$132,209,000 (47%) and \$38,367,000 (14%), respectively, of the \$279,919,000 of the total non-PC/FC CWIP related increases requested.

Of the 46 non-PC/FC CWIP applications, the non-PC/FC CWIP issue was settled in 33 cases including three in which non-PC/FC CWIP was expressly excluded from rate base under the settlement agreement. Six of the non-PC/FC CWIP rate applications were accepted without formal hearing and one was withdrawn. Three of the applications [made by Southern California Edison Company, Southwestern Public Service Company and Southwestern Electric Power Company (SWEPCO)] are awaiting Commission opinions. In a fourth application (made by Utah Power & Light Company), the initial decision from an administrative law judge did not address CWIP as an issue in contention. Two cases are in hearing.

Price squeeze was alleged in 27 of the non-PC/FC CWIP applications, including 23 that have since settled. Also, in 7 of these 27 dockets, double whammy was alleged. Of the 7 dockets in which double whammy was alleged, one case is pending (Southern California Edison Company, (Docket No. ER84-75-000). Virginia Electric Power Company (Docket No. ER83-618-000), Georgia Power Company (Docket Nos. ER85-659-000 and ER85-660-000), Florida Power & Light Company (Docket No. ER84-679-000), Kansas Gas & Electric Company (Docket No. ER83-628-000), and Gulf States Utilities Company (Docket No. ER84-568-006) have settled.

In a Montana Power Company settlement, which specifically provided for the exclusion from rate base of non-PC/FC CWIP, neither price squeeze nor double whammy was alleged.

Between February 28, 1986²⁵ and January 17, 1987, only 6 non-PC/FC CWIP applications were filed.²⁶

III. Discussion

A. Changed Circumstances in the Electric Utility Industry Do Not Warrant Reversal of the CWIP Policy

The interim rule stated that the Commission did not consider it necessary to revisit its decision to allow CWIP in view of changed circumstances in the electric utility industry. However, the Commission invited comments on this issue. Commenters representing wholesale customers, State of California regulatory authorities, and end-use customers opposed a rule allowing public utilities to request and seek to support non-PC/FC CWIP in rate base. Most of these commenters asserted that circumstances in the electric utility industry have changed since the time Order No. 298 was issued. They argued that, in light of those changes, CWIP in rate base is no longer justified. Generally, the wholesale and end-use customers contended that the industry trends evidence reduced capital costs, improved financial condition of utilities, and less construction. They cited several factors in support of these projections, including increased average market-to-book ratios, decreases in yields for both debt and equity since 1984, decreased inflation, lower interest rates, decreased capital expenditures, increased cash flow as a percentage of construction requirements, and projected excess capacity.²⁷ NRECA stated that several

²⁵ The date on which Order No. 448 was issued.

²⁶ The six non-PC/FC CWIP applications are: Maine Public Service Company (MPS) (Docket No. ER86-180-000); Montaup Electric Company (Montaup) (Docket No. ER86-202-000); Virginia Electric Power Company (Veeco) (Docket No. ER86-372-000); SWEPCO (Docket No. ER86-506-001); Illinois Power Company (IPC) (Docket No. ER86-540-000); and NEP (Docket No. ER86-687-000). The MPS and IPC cases were accepted for filing, the Montaup case settled, and the SWEPCO and NEP cases are pending. NEP has withdrawn its phase II rates which included CWIP for Seabrook I in rate base. In the Veeco case, the CWIP issue was settled, but the parties reserved the right to revisit the issue in the event of modification of Order No. 298 by the Commission or the court.

²⁷ See Initial Comments (I.C.) of National Rural Electric Cooperatives Association, *et al.* (National Rural Electric Cooperatives Association, American Public Power Association, Mid-Tex Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., and Magic Valley Electric Cooperative, Inc., collectively, NRECA)) at 12-17; G&T Systems (North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., and Sam Rayburn G&T, Inc.) I.C. at 52-64; Allegheny Electric Cooperative, Inc., *et al.* (Allegheny Electric Cooperative, Inc., Deseret Generation and Transmission Cooperative, Kansas Electric Power Cooperative, Oglethorpe Power

²³ An appeal of the interim rule is pending before the D.C. Circuit. *Mid-Tex Electric Cooperative, Inc., et al. v. FERC*, No. 86-1414.

²⁴ 51 FR 777, FERC Statutes and Regulations (Regulations Preambles) ¶ 30,689 at 30,142.

utilities are considered potential takeover candidates, citing an industry publication. NRECA I.C. at 12. NRECA viewed that as an indication that the electric utility industry is now recognized as being on solid financial footing by the investment community.

Id. Investor owned utilities (IOUs) and an electric industry trade association disputed arguments that changed circumstances justified the elimination of a rule permitting non-PC/FC CWIP in rate base. For example, Edison Electric Institute (EEI) responded that, while conditions have improved for some companies, many others still face financial difficulty. It added that the financial condition of the industry was only one of the reasons that the Commission adopted its new approach to CWIP. Even if circumstances in the industry are different now than at the time Order No. 298 was issued, EEI states that conditions will eventually change, and allowing CWIP in rate base now will enable utilities to better meet future needs. EEI Reply Comments (R.C.) at 4-8.

The Commission acknowledges that to the extent that financial conditions in the electric utility industry have generally improved, and the cost of financing construction projects has decreased since the issuance of Order No. 298, there is currently less of a bias by public utilities against the construction of necessary new generating facilities. However, the final rule is still supported by the Commission's other two public policy objectives concerning price signals and rate stability discussed in section II-B, *supra*. Further, there is no certainty that the current circumstances in the electric industry will remain as favorable as they are today. Just as financial conditions had worsened in the years preceding Order No. 298 and have improved in the years since Order No. 298 was issued, those conditions may and almost certainly will change again in the future when utilities again are forced to embark on new construction programs to meet the growing loads of their customers. While construction programs are expected to decrease until 1992, after 1992 the need for generating

capacity is projected to increase resulting in additional construction requirements.²⁸ Further, it would frustrate necessary long-range planning by utilities if the Commission's CWIP policy were tied to any kind of financial index with CWIP being allowed or denied depending on the latest financial indicators. Therefore, the Commission believes that the CWIP rule continues to be justified despite the improved financial circumstances in the electric utility industry since the issuance of Order No. 298.

B. Price Squeeze

In vacating portions of Order No. 298, the *Mid-Tex* court expressed particular concern that the combination of two Commission policies—to consider price squeeze only on a case-by-case basis, but not to remedy a "regulatory" price squeeze even where one is found to exist—"come[s] very close to a policy against considering the price squeeze effects of disparities between state and Federal ratemaking policy in either the rulemaking or the ratemaking context."²⁹ The court raised two fundamental legal questions (set forth and discussed below) respecting the potential anticompetitive consequences of allowing non-PC/FC CWIP in rate base.

The Commission, in response to the court's questions, requested in Order No. 448, additional comments on the potential anticompetitive effects of allowing non-PC/FC CWIP in rate base.³⁰ As explained more fully below, the Commission will consider the price squeeze effects of the application of the CWIP rule on a case-by-case basis, and will also remedy proven price squeezes resulting from the application of the CWIP rule on a case-by-case basis, balancing the benefit to the public interest of applying the CWIP rule against the benefit to the public interest of remedying the price squeeze.

1. Consideration of Antitrust Policies

The first question posed by the *Mid-Tex* court is whether the Commission generally is "obliged to consider the potential anti-competitive effects of a rule it proposes to adopt through

informal rulemaking, or should FERC address price squeeze allegations only in the context of setting rates within the zone of reasonableness?"³¹ In carrying out its mandate under the Federal Power Act, the Commission engages in a variety of regulatory activities, including promulgating rules. There is little explicit language in the Federal Power Act concerning what part antitrust policies or considerations have in the context of the Commission's regulatory activities. In 1973, however, the Supreme Court issued two decisions which interpreted the "public interest" and "unjust," "unreasonable," and "unduly discriminatory" language contained in the Federal Power Act as requiring the Commission to evaluate the antitrust ramifications of certain of its regulatory activities. The first of these decisions, *Otter Tail Power v. U.S.*, 410 U.S. 366, *reh. denied*, 411 U.S. 910 (1973), involved a case brought under section 2 of the Sherman Act³² in which Otter Tail Power Company (Otter Tail) was charged with attempting to prevent certain towns from establishing their own power systems when Otter Tail's retail franchise had expired by (i) refusing to sell power at wholesale to proposed municipal systems and (ii) refusing to wheel power to such systems. The Supreme Court held that Otter Tail was not exempt from antitrust regulation by virtue of the fact that it was a regulated entity under the Federal Power Act. The Court interpreted the legislative history of the Federal Power Act as indicating "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."³³ Likewise, in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973), *reh. denied*, 412 U.S. 944 (1973), the Supreme Court held that the Commission must consider the anticompetitive consequences of a securities issuance authorized under section 204 of the Federal Power Act.³⁴ In doing so, the Court indicated that the exercise by the Commission of powers otherwise within its jurisdiction "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in sections 205, 206 * * *."³⁵

³¹ 773 F.2d at 351.

³² "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a felony * * *." 15 U.S.C. section 2 (1962).

³³ 410 U.S. at 374.

³⁴ 16 U.S.C. 824c(a)(1982).

³⁵ 411 U.S. at 759.

Corporation, Old Dominion Electric Cooperative, South Mississippi Electric Power Association, and Wolverine Power Supply Cooperative, Inc. (collectively, Allegheny) I.C. at 20-46; and Municipal Electric Distribution Group (MEDG) (the Kansas Cities of Arcadia, Arma, Augusta, Blue Mound, Burlington, Chanute, Coffeyville, Elmore, Erie, Fredonia, Girard, Haven, Iola, La Harpe, Moran, Mount Hope, Mulberry, Mulvane, Neodesha, Oxford, Savonburg, Wellington, and Winfield; Gallup and Farmington, New Mexico; and Norwood, Massachusetts) I.C. at 1-8.

²⁸ See "Addendum to Environmental Assessment on Construction Work in Progress Rule," by the Energy Information Administration (updated EA), at 25. The updated EA is attached as Appendix I. The updated EA has been filed in the public record in Docket No. RM86-6-000 and is available from the Commission's Division of Public Information, Room 1000, 825 North Capitol Street, NE, Washington, DC 20426.

²⁹ 773 F.2d at 356.

³⁰ 51 FR 7779-7780, III FERC Statutes and Regulations (Regulations Preambles) ¶ 30,689 at 30,145-30,147 (1986).

In 1976, the Supreme court issued its opinion in *FPC v. Conway*, 426 U.S. 271 (1976), in which it held that the Commission, in arriving at a just and reasonable rate, must consider customer allegations of discrimination and anticompetitive effects. The Court cited the prohibition in section 205(b) of the Federal Power Act against any unreasonable difference in rates or service with respect to any sale subject to Commission jurisdiction, and concluded that a jurisdictional sale is necessarily implicated in any claim that the difference between wholesale and retail rates is unreasonable or anticompetitive.

Lower court decisions have also found that other regulatory activities of the Commission under the Federal Power Act require antitrust scrutiny. Citing *Gulf States*, the D.C. Circuit has observed that the Commission has an obligation under section 203 of the Federal Power Act³⁶ to consider antitrust policies in determining whether a merger satisfies the "public interest" standard. *Kansas Power and Light Co.*, 554 F.2d 1178 (D.C. Cir. 1977).

In the context of a challenged Commission regulation, the D.C. Circuit held that the Commission has a general obligation to give reasoned consideration to the bearing of antitrust policy on matters within its jurisdiction. *Alabama Power Company v. FPC*, 511 F.2d 383, 393 (D.C. Cir. 1974). In *Alabama Power*, several electric utilities objected to a Federal Power Commission regulation concerning collection of fuel purchase information, alleging that availability of such information to fuel suppliers could facilitate anticompetitive pricing practices. The Commission rejected the objections on two grounds; one of which was no violation of the Sherman Act had been stated. The court affirmed the Commission, but noted that the petitioners could present a new petition for amendment of the regulation, and indicated that, in considering such a presentation, the Commission has a responsibility to consider the antitrust ramifications of the regulation.³⁷

Finally, we note that in the *Mid-Tex* decision, the court while expressing no opinion on the question, observed that the policies underlying the Federal Power Act may very well require the Commission to consider the anticompetitive effects of a rule.³⁸

On the basis of a reading of the Federal Power Act and the court decisions discussed above, the Commission concludes that, in fulfilling the Commission's responsibilities under the "public interest" standard embodied in the Federal Power Act,³⁹ the Commission is indeed obliged to consider the potential anticompetitive effects of its regulatory activities thereunder. Rulemaking, (like setting rates, authorizing securities issuances and authorizing mergers) is a regulatory activity of the Commission, and the Commission concludes that it must consider the anticompetitive effects of its rules.⁴⁰ Nonetheless, the Commission believes that it is within the Commission's exclusive discretion to decide whether to consider the anticompetitive effects of a Commission rule at the rulemaking stage or on a case-by-case basis as the rule is applied. The Commission finds support for this belief in the Supreme Court's conclusion that "[the Commission] must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."⁴¹ The *Mid-Tex* court itself also indicated that this decision is within the Commission's discretion: "[i]t may well be that FERC's responsibility to 'encourage competitive forces' compels FERC either to consider the potential anticompetitive effects of a proposed rule at the rulemaking stage or to supply an adequate remedy that allows wholesale customers to avoid these effects when the rule is applied in ratemaking."⁴²

This is not inconsistent with the proposition that, in promulgating rules and regulations, FERC is obliged to consider "regulatory" price squeeze effects and any other anticompetitive effects the proposed rule make [sic] have. Federal policy, as expressed in the Federal Power Act, may in fact mandate that FERC do so. We express no opinion on that question."

³⁹ See also *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) ("competitive considerations are an important element of the public interest.")

⁴⁰ Quite recently, Congress affirmed the importance of antitrust concerns in the area of hydroelectric relicensing. The Electric Consumers Protection Act of 1986, Pub. L. 99-495, amended section 10(h) of the Federal Power Act, 16 U.S.C. 803(h) (1982), to provide that prior to issuing a license the commission must condition the license to prohibit conduct under the license that would result in the contravention of the policies expressed in the antitrust laws.

⁴¹ *Permian Basin Rate Cases*, 390 U.S. 747, 767 (1968), *reh. denied* *Bass v. FPC*, 392 U.S. 917 (1968).

⁴² 773 F.2d at 352 n. 4 (emphasis added).

In the interim rule, the Commission solicited comments as to whether the foreseeable price squeeze effects of the CWIP rule can be quantified in any reliable way or whether they are so case specific in nature and degree as to effectively compel a case-by-case analysis.⁴³ The comments received, as well as the Commission's own experience in addressing price squeeze allegations, support a conclusion that the Commission should examine the potential price squeeze effects of the CWIP rule on a case-by-case basis. As several commenters point out, the various states treat CWIP differently (See, e.g., EEI I.C. at 8-10). The People of the State of California and the California Public Utilities Commission (California) point out (California I.C. Response to Question No. 8) that some utilities have larger construction programs than others. Moreover the differing views of Southern Company Services, Inc. (SCS), EEI (SCS I.C. at 21-24 and EEI I.C. at 9-10) and the G&T Systems (G&T Systems R.C. at 42-44) regarding the nature of competition for retail customers and the decision-making processes of retail customers make clear that any analysis of the effect of disparate wholesale and retail rates upon competition is necessarily done on a case-by-case basis. There are wide variations in treatment of numerous ratemaking issues (e.g., return on equity allowances; historic v. future test periods; and average v. year-end rate base investment allowances) which affect the rate (and thus price squeeze effect) of any state/Federal CWIP policy similarities or differences. Consequently, the Commission maintains that it would be a futile exercise to track state CWIP policies without regard to these other interrelated cost-of-service policy differences that can only be examined on a case-by-case basis.⁴⁴

Since other interrelated regulatory policy differences affect the magnitude of any rate effect of a CWIP policy difference, it would be impossible to say that the difference between state and Federal CWIP policies would in every instance be the cause of price squeeze. The Commission, at best, is positioned to consider accelerated remedial procedures in those instances where the Commission's CWIP policy appears to

⁴³ 51 FR 7780, III FERC Statutes and Regulations (Regulations Preambles) ¶ 30.689 at 30.146 (1986).

⁴⁴ In *Public Systems v. FERC*, 709 F.2d 73, 84 (D.C. Cir. 1983) (Public Systems II) the court recognized that "[t]he Commission decided to deal with price squeeze on a case-by-case basis because no single rate-making principle necessarily creates price squeeze."

³⁶ 16 U.S.C. 824b (1982).

³⁷ 511 F.2d at 393.

³⁸ 773 F.2d at 356 n.7 ("FERC's general policy is addressed to situations in which federal ratemaking policy, as expressed in a valid FERC rule or regulation, differs from state ratemaking policy.

operate to the disadvantage of wholesale customers without regard to other interrelated state/Federal policy differences. Thus, in the final rule, the Commission requires a public utility applying for rates based on inclusion of non-PC/FC CWIP in rate base to include in its filing: (1) The percentage of the proposed increase in jurisdictional rate level attributable to non-PC/FC CWIP and the percentage of non-PC/FC CWIP supporting the proposed rate level; and (2) the percentage of non-PC/FC CWIP permitted by the state or local commission supporting the allowed and current retail rates of the public utility against which the wholesale customers compete.

Based on its experience with filings made under Order No. 298, the Commission concludes that it is not possible to say that the CWIP rule will have a generic price squeeze effect; especially in view of the fact that most states allow at least some CWIP in rate base. Rather, any potential price squeezes would occur as the CWIP rule is applied within the context of individual rate filings. Consequently, the Commission rejects SCE's assertion that once a determination has been made on a national basis that CWIP carries benefits to the public interest which surpass any anticompetitive effect, the Commission should not require utilities to defend on a case-by-case basis any disparity between wholesale and retail rates arising from differing state and Federal policies (SEC supplemental reply comments (S.R.C.) at 3). The Commission does not think it possible in this instance to make such a determination on a national basis.

2. Regulatory Price Squeeze

Another question posed by the court *Mid-Tex* is whether the Commission is "obliged to take account—either in rulemaking or in setting rates within the zone of reasonableness—of a price squeeze that is created solely by a disparity between the ratemaking policies of state regulatory agencies and the Commission."⁴⁵ In response to this question, the Commission, in Order No. 448, sought comments regarding the implications of Federal policy objectives, of a shift to a practice of remedying price squeezes attributable to a state commission's failure to allow as much CWIP as this Commission permits jurisdictional utilities to file in proposed rates.⁴⁶ Simply restated, the questions

posed by the court and the Commission are whether the Commission must consider "regulatory" price squeeze and if so, must the Commission remedy a proven "regulatory" price squeeze?

The Commission cannot accept the view of the United States Department of Justice (DOJ)⁴⁷ and SCE that the Commission is only obliged under *Conway* to take account of "predatory" price squeeze (DOJ R.C. at 6, SCE S.R.C. at 2-3). As NRECA (NRECA S.R.C. at 3-8), the G&T Systems (G&T R.C. at 7) and Public Systems (Public Systems R.C. at 2-3) point out, while *Conway* involved predatory manipulation of pricing, that decision does not stand for the proposition that an unintentional, yet anticompetitive effect may be ignored by the Commission. The Supreme Court's conclusion is stated broadly: "[T]he Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect."⁴⁸

While *Conway* did not specifically address the question of regulatory price squeeze, the Commission's and the courts' decisions since *Conway* have made clear that predation is not a necessary element of a price squeeze case brought under the Federal Power Act.⁴⁹

⁴⁷ DOJ did not file initial comments. On July 22, 1986, G&T Systems filed a motion to strike DOJ's reply comments or alternatively, for leave to file supplemental reply comments in this proceeding. On August 25, 1986, the Commission granted an extension of time to file supplemental reply comments. 51 FR 30886 (1986).

⁴⁸ 426 U.S. at 279 (emphasis added). The court in *Mid-Tex* acknowledged that "*Conway*, of course, arose out of a particular ratemaking proceeding, and involved allegations that the wholesale rate increase . . . was an attempt by the utility to squeeze the customer out of competition." 773 F.2d at 351 (citation omitted) (emphasis in original).

⁴⁹ See *Missouri Power & Light Company*, Opinion No. 31, 5 FERC ¶ 61,086 (1978), *aff'd per curiam sub nom. City of Marceline v. FERC*, No. 79-1740 (D.C. Cir. 1980) (unpublished opinion) (rejecting, as inconsistent with the Federal Power Act and *Conway*, the presiding judge's conclusion that price squeeze may not be found without a clear showing of an intent to discriminate); *Commonwealth Edison Company*, Opinion No. 63, 8 FERC ¶ 61,852 (1979), *aff'd sub nom. Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) ("whether the price differential resulted from a calculated plan by Com Ed or from inaction of the state commission is not material to the finding of a price squeeze."); *Illinois Cities of Bethany v. FERC*, 670, F.2d 187, 191 (D.C. Cir. 1981), *affirming Central Illinois Public Service Co.*, Opinion No. 75, 10 FERC ¶ 61,162 (1980) (the Commission's jurisdiction to set wholesale rates "allowed it to take retail rates into consideration where wholesale customers were priced squeezed by dint either of the utility company's desire to drive out retail customers or of the interplay between federally and locally regulated rates.")

In *Pennsylvania Power Co.*, Opinion No. 157, 21 FERC ¶ 61,313 (1982), the Commission found that price discrimination did exist as a result of a difference in timing of state and Federal rate filings. However, the Commission declined to remedy the price squeeze, because it resulted from a difference in state and Federal regulatory policies rather than from predatory pricing by the utility. The Commission stated that while it should "maintain the authority and flexibility to do so," "as a general rule," it should not lower rates to remedy differences between Commission ratemaking policies and procedures and those of a state commission.⁵⁰

Boroughs of Ellwood City v. FERC, 731 F.2d 959 (D.C. Cir. 1984), vacated the Commission's decision in *Penn Power* not to remedy the price squeeze. Although it did not specifically address the Commission's announced "general rule" of not remedying "regulatory" price squeeze,⁵¹ the court said:

We are not persuaded that it would necessarily be inappropriate to adjust wholesale rates downward under those circumstances The Commission's statutory duty to ensure that rates are not unduly discriminatory is not so wholly subordinate to its duty to set just and reasonable rates that it may simply ignore the discriminatory effect of state ratemaking policies and procedures in setting a wholesale rate within the zone of reasonableness.⁵²

In this opinion, the court emphasized several points contrary to the position advocated by DOJ in its reply comments. First, the court noted its approval in prior cases of the Commission's view that "intent is legally immaterial to whether we can or must grant a remedy" in price squeeze cases.⁵³ The court acknowledged that "[i]t seems eminently reasonable in the price squeeze context to preclude lengthy investigations into a utility's motives and to focus instead on objective criteria."⁵⁴

⁵⁰ 21 FERC at 61,819-20.

⁵¹ Despite footnote 97 in Order No. 298, 48 FR 24346 III FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,455 at 30,541, and the repeated references in *Mid-Tex* to the Commission's general policy of not remedying regulatory price squeezes, it is arguable whether the Commission ever had such a policy. In *Penn Power*, the Commission at least hinted that in appropriate circumstances it would remedy a proven regulatory price squeeze.

⁵² 731 F.2d at 975 (emphasis in original).

⁵³ 731 F.2d at 969, quoting from the Commission's decision in *Missouri Power & Light Co.*, 5 FERC ¶ 61,086 at 61,142 n. 17.

⁵⁴ *Id.*

⁴⁵ 773 F.2d at 351.

⁴⁶ 51 FR 7780, III FERC Statutes and Regulations (Regulations Preambles) ¶ 30,689 at 30,147 (1986).

Remedying a proven price squeeze by lowering a company's wholesale rate does not constitute a penalty upon a utility. Differences between state and Federal rate practices and policies ("the paradox of dual utility rate regulation") is one of the basic problems the price squeeze doctrine was designed to deal with.⁵⁵ The court held:

The decision not to ameliorate a proven price squeeze ordinarily must be based on the Commission's determination that the anticompetitive effect of the price squeeze on the wholesale customer/retail competitor is outweighed by the effect of a remedy on the utility's financial viability and its ability to serve all its customers.⁵⁶

As the court made clear, "[i]t is primarily the effects of the price squeeze and its prospective remedy that should guide the Commission's exercise of discretion."⁵⁷ The argument of DOJ and SCE that the Commission is only required to consider and remedy "predatory" price squeeze is incompatible with this judicial declaration of the Commission's role with regard to regulatory price squeeze. The Commission understands its responsibility, as confirmed by the applicable precedents, to be to provide a remedy for proven price squeezes, absent mitigating circumstances based on the Commission's other public interest responsibilities (including those set forth in *Boroughs of Ellwood*).

It does not follow, as DOJ contends, that because the price squeeze doctrine is an antitrust concept, this Commission should, in price squeeze cases brought under the Federal Power Act, apply the same standards as are applied in cases brought under the antitrust statutes (DOJ R.C. at 7). While it has been observed that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible⁵⁸—the Federal Power Act and the antitrust statutes approach this goal differently. The Federal Power Act is ultimately concerned with the justness and reasonableness of utility rates, including the anticompetitive effect of utility rates. See *Conway*, 426 U.S. at 279. The antitrust statutes, on the other hand, are aimed essentially at preventing and penalizing anticompetitive behavior in order to promote competition, as illustrated by the power to award treble

damages to successful complainants suing under antitrust laws and to impose criminal penalties.

Relevant case law and Commission decisions indicate that the scope of Commission review of allegations of anticompetitive effect is different than that of a court in a civil antitrust case. As the Commission emphasized in *Florida Power & Light*:

In evaluating the anticompetitive effects of a proposed rate change and in making findings with respect thereto, we do not make findings that violations of the antitrust laws have occurred. Instead, it is our obligation to evaluate the public policies expressed in Federal antitrust laws and to reflect those policies in the conduct of our responsibilities under the Federal Power Act.⁵⁹

In addition to pursuing price squeeze allegations within the context of a rate case before the Commission, wholesale customers may, and indeed have, raised the issue within the context of a conventional antitrust action against the utility.⁶⁰

In *City of Kirkwood v. Union Electric*, for example, a municipality alleged violations of sections 1⁶¹ and 2 of the Sherman Act, and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.⁶² The court held, *inter alia*, that this Commission and the Missouri Public Service Commission (PSC) did not have exclusive jurisdiction over the municipality's price squeeze allegations.⁶³ The court further

recognized the different concerns of the Commission in enforcing the Federal Power Act and those charged with enforcing the antitrust statutes:

[c]ourts may consider a price squeeze claim without infringing on the regulatory jurisdiction of the FERC and PSC, because the question is not whether the rates themselves are anticompetitive, but whether the defendant utility acted illegally in proposing a certain anticompetitive combination of rates.⁶⁴

The Commission therefore, disagrees with DOJ's argument that the Commission should apply standards used in antitrust cases to price squeeze proceedings before the Commission. Predatory intent, while an important aspect of violations of the antitrust laws, is not the standard to be applied in proceedings under the Federal Power Act.

In Order No. 448, the Commission requested comments as to whether the disparities between Federal and state regulation tend to balance out so that the rate treatment of one issue, such as CWIP, is likely to offset the rate effects of all other rules dealing with other regulatory issues.⁶⁵ Several commenters argued that it is impossible to give a general answer as there are several areas of potential difference in Federal and State rate treatments (see, e.g., NEP I.C. at 17 and Carolina Power & Light Company, *et al.*⁶⁶ (CPL) I.C. at 34). In addition to the aforementioned test period timing differences, rate base averaging techniques and return on equity determination differences, other methodological differences which may counteract or exacerbate the presence or absence of CWIP in rate base include income tax normalization of those non-CWIP related tax expense items not mandated by the Federal income tax statutes and regulations, and the absence of return allowance on prudent expenditures for cancelled construction projects. In *Public Systems II*, the court acknowledged that "[i]t is possible that the divergent [State/Federal] policies have offsetting effects that minimize or eliminate any rate disparity otherwise created by conflicting [tax] normalization practices. Therefore, price squeeze can be shown to exist only by examining the circumstances in a particular rate proceeding."⁶⁷ The

⁵⁵ 8 FERC ¶ 61,121 at 61,449 (1979) (footnote omitted) (emphasis in original).

⁵⁶ See *City of Mishawaka v. American Electric Power Company*, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096, reh. denied, 450 U.S. 960 (1981); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); and *City of Kirkwood v. Union Electric*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

⁵⁷ "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1 (1962).

⁵⁸ "It shall be unlawful for any person engaged in commerce, in the course of such commerce either directly or indirectly, to discriminate in price between different purchasers or commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." 15 U.S.C. section 13(a) (1962).

⁵⁹ 671 F.2d at 1178 ("Enforcing the antitrust laws is not the FERC's paramount objective . . ."); see also, *Missouri Power & Light*, 5 FERC at 61,141 ("The implementation of the policies underlying the antitrust laws cannot become the paramount goal of this Commission . . .").

⁶⁰ 671 F.2d at 1179.

⁶¹ 51 FR 7780, III FERC Statutes and Regulations (Regulations Preambles) ¶ 30,689 at 30,147.

⁶² Carolina Power & Light Company, Monongahela Power Company, Oklahoma Gas and Electric Company, Potomac Edison Company, Virginia Electric and Power Company, and West Penn Power Company jointly submitted comments

⁶³ 709 F.2d at 84.

⁵⁵ 731 F.2d at 978.

⁵⁶ 731 F.2d at 979.

⁵⁷ 731 F.2d at 979 (emphasis in original).

⁵⁸ See *Northern Natural Gas Co. v. FPC*, 399 F.2d at 959.

Commission believes that this analysis is equally valid with respect to the application of the CWIP rule.

The Commission also solicited comments as to how a policy of remedying regulatory price squeeze would affect the price signal rationale for allowing CWIP.⁶⁸ The Commission is persuaded by the arguments of Allegheny (Allegheny I.C. at 73) and the IOUs (see, e.g., EEI I.C. at 19-20) that price signals would be less accurate under such policy. Rates including CWIP in rate base send accurate price signals, as they reflect the actual pay-as-you-go environment in which a utility must operate. To the extent that these rates are reduced to remedy a CWIP-induced regulatory price squeeze, the accuracy of the price signal would be correspondingly reduced.

The Commission first concludes, therefore, that it is obliged to take account—in both rulemaking and setting rates within the zone of reasonableness—of a price squeeze created solely by a disparity between the ratemaking policies of State regulatory agencies and the Commission. The Commission believes that this is consistent with the Supreme Court's finding in *Conway* that the Commission must consider allegations that proposed rates are discriminatory and anticompetitive in effect.

However, in deciding whether to remedy a proven "regulatory" price squeeze, the Commission will, on a case-by-case basis, balance the benefit to the public interest of remedying the price squeeze against the benefit to the public interest of applying Commission regulatory policies—such as those underlying the CWIP rule. The Commission is persuaded by Public Systems' argument that, because the Commission must balance CWIP benefits against any potential competitive injury, there can be no general principle that the Commission ought not to remedy regulatory price squeeze (Public Systems S.R.C. at 7).

As the Commission has explained previously, the promulgation of the Order No. 298 CWIP rule was intended to address specific public interest objectives: (1) Mitigation of any bias against the construction of new generating facilities; (2) providing for electric rates to more accurately reflect the costs of future service, allowing the need for new facilities to be tested, so far as possible, by the marketplace; and (3) furthering the goal of rate stability by providing for more gradual increase in

electric rates to consumers.⁶⁹ The court in *Mid-Tex* accepted the first two objectives as valid, and noted that the Federal Power Act gives the Commission discretion to give at least some weight to the third objective.⁷⁰ Therefore, in future rate cases in which it is alleged and proved that differing State and Commission CWIP policies give rise to a price squeeze, the Commission shall, as suggested by Public Systems (Public Systems S.R.C. at 7), balance the benefit to the public interest of remedying the price squeeze against the benefit to the public interest of application of the CWIP rule. The Commission could, for example, examine on a case-by-case basis the validity of Allegheny's assertion (Allegheny I.C. at 73) that the purported disadvantages of dampening the accuracy of the price signal by remedying a CWIP-induced price squeeze is outweighed by CWIP's adverse effect on competition, as well as DOJ's assertion (DOJ R.C. at 11-12) that the harm to retail competition by a CWIP-induced price squeeze is outweighed by the savings in capital financing costs generated by CWIP. In making its determination, the Commission would consider the magnitude of the anticompetitive effect which resulted from the regulatory price squeeze, and if in the Commission's view, the public interest in a particular case is best served by remedying the price squeeze, the Commission will provide an appropriate remedy, as discussed below. Conversely, if the Commission finds that the public interest is best served by application of the CWIP rule, the Commission will decline to remedy a portion or all of the proven CWIP-induced price squeeze in that particular case. The Commission considers the approach adopted in this rule to be fundamentally different from that which the court found wanting in the *Mid-Tex* opinion.

The Commission believes this policy to be consistent with the Commission's responsibilities under the Federal Power Act and the Supreme Court's interpretation that the legislative history of the Federal Power Act requires the Commission to maintain competition "to the maximum extent possible consistent with the public interest."⁷¹ Competition

is but one of many factors which the Commission must take into account in determining the public interest. As the Commission said in *Missouri Power & Light*:

It is the task of this Commission to reconcile various public policy objectives in the course of executing its regulatory responsibilities. Procompetitive considerations, as well as adequacy of service, reliability, financial integrity and other regulatory goals, as well as the exigencies of the dual system of regulation of the electric power industry, must be balanced in setting rates. The regulatory objectives sometimes may be partially in conflict with each other and the Commission's duty is to find a reasonable balance among these objectives. This exercise is, in our opinion, the essence of sound and effective ratemaking policy.⁷²

In that opinion, the Commission also observed that "[i]n carrying out its responsibility to set just and reasonable rates for public utilities, the Commission must determine what is in the public interest. Such a determination may involve considerations which outweigh the anticompetitive effect of a particular filing."⁷³

The Commission also believes that this policy is entirely consistent with the D.C. Circuit's interpretation in *Boroughs of Ellwood* as to how the Commission should exercise discretion in price squeeze cases: "[I]t is primarily the effects of the price squeeze and its prospective remedy that should guide the Commission's exercise of discretion."⁷⁴

Finally, the Commission believes this policy to be consistent with the Supreme Court's decision in *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 245-46 (1968), which upheld a similar approach to harmonizing regulatory policies with the antitrust statutes: "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest', unless other evidence in the record fairly detracts from the weight of this factor."

The Commission shares the concern of those commenters who argue that a general policy of remedying CWIP-induced regulatory price squeeze could well result in an abandonment of the Commission's authority to set ratemaking policy and transfer such authority to the individual states (see,

found to be of overriding importance." (footnote omitted).

⁷² 5 FERC at 61.141.

⁷³ *Id.*

⁷⁴ 731 F.2d at 979 (emphasis in original) (emphasis added).

⁶⁸ 48 FR. 24329, III FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30.455 at 30.497 (1983).

⁷⁰ 773 F.2d at 345.

⁷¹ *Otter Tail*, 410 U.S. at 374 (emphasis added). See also *Northern Natural Gas Co. v. FPC*, 399 F.2d at 961 ("the agencies . . . can and do approve actions which violate antitrust policies where other economic, social and political considerations are

⁶⁹ 51 FR. 7780, III FERC Statutes and Regulations (Regulations Preambles) ¶ 30.689 at 30.147.

e.g., DOJ R.C. at 13-15 and SCE S.R.C. at 4-5). It must be kept in mind that the state and other regulatory authorities may be charged with differing statutory mandates. The Commission reiterates that:

The Commission must exercise independent judgment in all matters assigned to it by statute. By deferring to the disparate CWIP policies of the states, the Commission might be viewed as having abdicated its responsibility. The significance and impact of deference to state policy would vary dramatically from state to state.⁷⁵

The Commission believes that the policy of remedying CWIP-related regulatory price squeeze on a case-by-case basis, announced today, is the best way of fulfilling its responsibility to maintain competition and, at the same time, maintaining to the greatest possible extent pursuit of the Commission's other policy mandates and objectives.

Beyond the procedures adopted at the suspension stage, (see section III. D.) the Commission's existing price squeeze procedures are sufficient to identify and correct instances of regulatory price squeeze which may result from the CWIP rule. These procedures are addressed in *Arkansas Power & Light Co.*, 8 FERC ¶ 61,131 (1979). In most instances, the Commission has phased the hearings in proceedings involving price squeeze allegations, considering cost of service issues first, to determine the just and reasonable rate but for price squeeze, and then proceeding to a Phase II hearing if the wholesale customers can establish a *prima facie* case of price squeeze.⁷⁶ However, the Commission

has retained authority to determine whether or not to proceed with Phase II,⁷⁷ and as indicated in the interim rule, the Commission may, in unusual circumstances, consider modifying the normal phasing procedures.

3. Remedy for Regulatory Price Squeeze

In Order No. 448, the Commission requested comments regarding appropriate remedies for a proven "CWIP-related regulatory price squeeze." While several remedies were proposed, the Commission believes that the two which have merit are (1) reducing the return on equity to the lower end of the zone of reasonableness, and (2) excluding part or all of non-PC/FC CWIP from rate base to the extent needed to eliminate the price squeeze.

In *Conway*, the Supreme Court said that the Commission could remedy price squeeze by adjusting the wholesale rate so as to place it in the lower range of the "zone of reasonableness."⁷⁸ Court decisions since *Conway* indicate that, in remedying a proven price squeeze by lowering a utility's rate of return, the Commission is limited to placing the rate at the lower end of the "zone of reasonableness."⁷⁹ The court in *Boroughs of Ellwood* acknowledged, as Boston Edison points out (I.C. at 17), this limit on the Commission's remedial discretion "may sometimes leave unremedied and unremediable a degree of price discrimination."⁸⁰ However, the Commission again emphasizes that the Commission's mandate under the Federal Power Act, as interpreted in *Conway*, is to maintain competition to the maximum extent possible consistent with the public interest.

In this regard, the Commission requested in Order No. 448 comments regarding the potential effect of a Commission policy of remedying regulatory price squeeze on (1) capital investment in the electric industry, and (2) the utilities' cost of capital.⁸¹

The Commission agrees with NEP (NEP I.C. at 18) that the impact of such a policy on cost of capital and capital investment depends on the remedy adopted, and believes that remedying a proven price squeeze by lowering the rate of return to the lower end of the

zone of reasonableness would not necessarily adversely affect either capital investment in the industry or utilities' cost of capital. To the extent that the Commission after a Phase II hearing, remedies a proven price squeeze by adjusting the rate of return within the zone of reasonableness, the Commission ordinarily would be providing sufficient revenue for operating and capital costs and to attract investment.⁸² However, if the Commission determines in a particular case that a proven price squeeze requires lowering the rate to the lower end of the zone of reasonableness, this determination may well outweigh any potential harm to capital investment or the utility's cost of capital.

In Order No. 144, the Commission also recognized that the disparate use of tax normalization and flow-through in deriving wholesale and retail rates may contribute to undue discrimination and price squeeze, and that if this were found in individual cases, "the Commission may consider the denial of normalization as one of the remedies for reducing or eliminating the discrimination."⁸³

Adjustments to rate base (or tax recovery mechanisms) may be an appropriate remedy for price squeeze, particularly if the differences between state and Federal ratemaking policies on these issues are the principal cause of the price squeeze. Such remedies may be permissible instead of, or in addition to, a downward adjustment to the allowable return on equity. Thus, the Commission may also consider, in appropriate cases, excluding all or a portion of non-PC/FC CWIP from rate base as remedy for a proven price squeeze caused by differences between Federal and state treatment of CWIP.

Finally, the Commission rejects Public Systems' suggestion (Public Systems I.C. at 44) that the Commission take account of predatory intent in fashioning a remedy, as the Commission previously has made clear that intent is irrelevant for purposes of remedying a proven price squeeze pursuant to the Federal Power Act.⁸⁴

⁷⁵ 48 FR 24348, III FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,455 at 30,527.

⁷⁶ Section 2.17 of the Commission's regulations, 18 CFR 2.17 (1986), provides guidelines for establishing a *prima facie* case of price squeeze. The party alleging price squeeze must show: (1) Specification of the filing utility's retail rate schedules with which the wholesale customer is unable to compete due to purchased power costs; (2) a showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility; (3) a showing that the retail rates are lower than the proposed wholesale rates for comparable service; (4) the wholesale customer's prospective rate for comparable retail service, i.e. the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs; and (5) an indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged. Section 2.17 further states that the burden of proof (i.e. the risk of nonpersuasion) to rebut the allegations of price squeeze and to justify the proposed rates are on the utility proposing the rates under section 205(e) of the Federal Power Act. In *Southern California Edison Company*, Opinion No. 62, 8 FERC ¶ 61,198 (1979), *reh. denied in part and granted in part*, 10 FERC ¶ 61,260 (1980), *aff'd sub nom. Cities of Anaheim v. FERC*, 669 F.2d 799 (D.C. Cir. 1981), the Commission eliminated the necessity of showing the fourth element of the *prima facie* case (the

wholesale customer's prospective rate for comparable retail service).

⁷⁷ See *Kansas Gas & Electric Co.*, Opinion Nos. 80 and 80-A, 10 FERC ¶ 61,243 (1980) and 17 FERC ¶ 61,180 (1981).

⁷⁸ 428 U.S. at 279.

⁷⁹ See *Cities of Batavia*, 672 F.2d at 90 n.52; *Illinois Cities of Bethany*, 670 F.2d at 191; and *Boroughs of Ellwood*, 731 F.2d at 794 n.24.

⁸⁰ 731 F.2d at 974.

⁸¹ 51 FR. 7780, FERC Statutes and Regulations (Regulations Preambles) ¶ 30,689 at 30,147.

⁸² See *Permian Basin Rate Cases*, 390 U.S. 747, 771 (1968).

⁸³ FERC Statutes and Regulations (Regulations Preambles 1977-1981) ¶ 30,254 at 31,542 (1981), *reh'g denied*, Order No. 144-A, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,340 (1982), *aff'd*, *Public Systems v. FERC*, 709 F.2d at 84 (D.C. Cir. 1983).

⁸⁴ *Missouri Power & Light Company*, 5 FERC at 61,140 ("Nor will the Commission examine intent in determining how to correct any undue discrimination which may be found to exist."). Of course, the Commission is not precluded from

C. Double Whammy

1. Double Whammy Policy Generally

Regarding the objection that wholesale customers could be hampered by the CWIP rule in their own efforts to build generating facilities, or engage in joint ventures with utilities or other distributors, the *Mid-Tex* court said "in view of our decision to remand on the price squeeze issue, we think it clear that, on remand, FERC must also reconsider its treatment of potential 'double whammy' effects."⁸⁵ The court said the question is the same as with the price squeeze issue: "whether and to what extent FERC must consider those effects in the course of rulemaking as well as ratemaking." 773 F.2d at 358 (emphasis in original). The court said further:

FERC offered no explanation for its refusal to consider "double whammy" as an objection to its CWIP policy rather than as a defense to its application * * *. As Public Systems correctly says, FERC simply never "examin[ed] the competitive forces at work in the bulk power market." Brief for Public Systems at 34. While it is open to FERC on remand to explain why an assessment of prevailing market conditions is infeasible or unnecessary, we cannot uphold FERC's altogether cursory treatment of "double whammy" effects.⁸⁶

The court also identified as questions for the remand the "imposition of the burden of going forward with issues of allocating 'responsibility' for a utility's decision to build a plant on the utility's customers" and "what kind of 'responsibility' is decisive."⁸⁷ In addition, the court criticized what is considered to be an "all-or-nothing" approach by the Commission to relief from double whammy, *i.e.*, the wholesale customer would apparently not be able to avoid any portion of its CWIP liability even if it could show that its load played a disproportionately small role in the utility's decision to build and that it would take only a disproportionately small share of power from the new facility in relation to its current share of the utility's power.⁸⁸

referring any apparent violations of the antitrust laws to DOJ or other enforcement agencies for appropriate action under the antitrust laws.

⁸⁵ 773 F.2d at 358. The court also rejected a proposal to require joint ventures as an alternative to CWIP, but required the Commission to address—as an objection to the CWIP rule itself—the argument that allowing CWIP will reduce the incentives for utilities to voluntarily enter into joint ventures. *Id.* at 361.

⁸⁶ 773 F.2d at 359.

⁸⁷ 773 F.2d at 359 (emphasis in original).

⁸⁸ *Id.*

The court also focused on the question of the utilities' obligation to serve. The court said, "[t]he weight that can reasonably be attached to that obligation, therefore, obviously depends on the content of the 'public interest' exception, as to which FERC has left us altogether unformed."⁸⁹

In Order No. 448, the Commission stated that it appeared that most utilities requesting CWIP allocate the CWIP on the same basis as public utilities allocate other rate base items, *i.e.*, ratios reflecting expected test period service levels. The Commission stated that test period allocation ratios may not exactly reflect the anticipated changes in the wholesale customer's and system loads that will actually occur during the period the facilities for which CWIP is requested are expected to be in service. The Commission solicited comments concerning whether the utility should employ forward looking allocation ratios to allocate CWIP in cases where a customer establishes that its own construction program will make it increasingly independent of its current supplier. Forward looking ratios would be based on projections or estimates which look beyond the test year. The Commission stated that this practice may better reflect a customer's anticipated relative use of the facility for which CWIP is requested. The Commission asked for comments concerning whether the customer should have to make a threshold showing to trigger the use of the forward looking ratio, and how far forward should such a ratio look.⁹⁰

The Commission stated in Order No. 448 that it would attempt to identify double whammy situations in individual cases and to provide a remedy where warranted.⁹¹ The interim rule provided that where the utility, on the basis of experience or advance communications, should reasonably anticipate CWIP-related double whammy objections by one or more customers, the Commission would require the utility to address these matters in its filing and to suggest mitigative measures. The interim rule also required the rate applicant to make a positive demonstration that the customer's demand was a significant factor in the utility's decision to build the facilities included as non-PC/FC CWIP, or other justification for assessing against the customer the

⁸⁹ *Id.*

⁹⁰ 51 FR 7780-81, FERC Statutes and Regulations (Regulations Preambles 1982-1985), ¶ 30.689 at 30.147-48.

⁹¹ 51 FR 7778, FERC Statutes and Regulations (Regulations Preambles 1982-1985), ¶ 30.689 at 30.143.

particular allocated share of construction costs. That requirement reversed the initial burden of going forward with evidence on this issue, which was of specific concern to the *Mid-Tex* court.⁹²

The cooperatives and municipals supported a case-by-case approach if the Commission determines to allow non-PC/FC CWIP in rate base. They believed that the appropriate remedy would depend on the individual facts and circumstances of each case. These commenters generally favor modification of the 50% cap to the extent necessary to remedy instances of CWIP-related price squeeze or double whammy.

Allegheny would require a showing of need by the utility before allowing the utility to include non-PC/FC CWIP in rate base. Once need is shown, the level of CWIP would be modified as necessary to remedy price squeeze or double whammy. Allegheny I.C. at 56-57.

Public Systems, a collection of municipal and customer-owned electric systems, asserted that the Commission presently provides no timely price squeeze relief. Public Systems contended that the absence of effective case-by-case relief requires that price squeeze be considered generically. Public Systems would not allow non-PC/FC CWIP in rate base, absent unusual circumstances. Public Systems I.C. at 4.

California stated that it generally does not allow CWIP. California said that the Commission's CWIP rule may achieve significant price squeeze effects depending on the facts of the situation, but that it is impossible to quantify these effects. It added that California recognizes an exception to its general disallowance of CWIP for severe financial difficulty and that California recognizes risk in rate of return calculations. California I.C. at 1.

The Commission rejects those proposals by customers and California that would disallow CWIP absent a showing of need, severe financial difficulty, or unusual circumstances. Their approaches would, in effect, reverse the presumption in favor of allowing CWIP in rate base. As stated in Order No. 448, the Commission did not intend to revisit its decision to allow up to 50% of non-PC/FC CWIP in rate base.⁹³ Public Citizen Critical Mass

⁹² *Id.*

⁹³ See 51 FR 7775, FERC Statutes and Regulations (Regulations Preambles) ¶ 30.689 at 30.142.

Energy Project's (Public Citizen) proposal to track the State regulatory CWIP treatment⁹⁴ is not appropriate for remedying double whammy, because double whammy is not dependent upon the existence of disparities between state and Federal CWIP treatments for a utility applicant's retail and wholesale rates. Double whammy is dependent upon the existence of a customer's alternative power supply program.

The Commission also rejects the argument by several IOUs that it should evaluate all ratemaking policies rather than single out CWIP as requiring adjustment to remedy double whammy.⁹⁵ Unlike price squeeze, double whammy by definition involves CWIP payments to the wholesale supplier for a potentially redundant power supply. This is a CWIP allocation matter, not a CWIP policy matter. Accordingly, the Commission believes that the appropriate remedy for double whammy must generally involve adjustment of the allocation of CWIP as required by the final rule.

None of the commenters supported a generic reduction of the 50% cap as a remedy for double whammy. *See, e.g.,* Allegheny I.C. at 56-57; NRECA I.C. at 18-19; NEP I.C. at 7-8; and Electric Utilities I.C. at 10. The Commission agrees with the commenters that a fixed generic reduction would produce CWIP levels that were too high or too low, since such a reduction would not be tailored to the double whammy effect in a particular case caused by a portion or all of an applicant's construction program.

By itself, CWIP in rate base does not lead to double whammy for assured supply customers. Rather, double whammy is caused by the allocation of CWIP which does not accurately reflect anticipated future requirements of customers which have embarked upon obtaining alternative supplies. Customers may pursue alternative capacity and energy supplies through either their own construction programs or contracts with other wholesale suppliers. Order No. 448 recognized that in a double whammy situation, the wholesale customer may be supporting not only its own construction program but an essentially redundant construction program of its wholesale supplier.⁹⁶ Since the wholesale

customer may be in competition in the retail market with its wholesale supplier, the wholesale customer could be put at a competitive disadvantage by in essence paying for the future capacity of its competitors through the proposed allocation of CWIP, *i.e.*, capacity that it does not intend to rely upon. The Commission believes that double whammy can be prevented by requiring the CWIP applicant to allocate CWIP based on the utility's anticipation of customers' use of the system over the life of the CWIP project.

In further support of the use of forward looking allocation ratios, the Commission notes that none of the comments to the interim rule opposed this approach conceptually. However, there was disagreement in the comments concerning whether the customer should be required to make a threshold showing to trigger the use of forward looking ratios, or whether the burden should rest with the utility to develop and file forward looking allocation ratios.⁹⁷

The Commission rejects Electric Utilities' proposal that the customer show that it will never use the facility. Electric Utilities I.C. at 40-42. Given the potential for unforeseen difficulties with obtaining future supplies, or that the wholesale customer will reduce its reliance on the supplier in phases, such a guarantee would not be useful. *See* G&T Systems R.C. at 35. UP&L offers no support for its proposal which would apparently apply the imminent, irreparable harm standard, which had to be met under the interim rule in order for the wholesale customer to request preliminary CWIP relief at the suspension stage of a rate proceeding, to all double whammy allegations. UP&L I.C. at 25.

It was undisputed by the commenters that the accuracy of forward looking projections decreases the farther out the projections extend, because it is increasingly speculative to predict future circumstances the farther out one attempts to predict. *See, e.g.,* Public Systems I.C. at 45-46 and EEI I.C. at 23. However, Boston Edison Company, *et al.*⁹⁸ argued:

This, however, should not be a deterrent. Since the power supplier and its wholesale customers must deal in projections for long periods in making power supply decisions, the Commission should not shirk from

dealing in such projections for purposes of deciding the economic consequences of such decisions. (Boston Edison I.C. at 21).

Even some commenters favoring life-cycle projections acknowledged that preparing such projections could be burdensome. Allegheny I.C. at 77 and NRECA I.C. at 57-58. However, the G&T Systems and Allegheny argued that the extra burden of using forward looking allocation ratios on utilities would not be significant, because utilities routinely forecast load growth and energy sales 10-20 years beyond a future test year. G&T Systems I.C. at 95 and Allegheny I.C. at 77. Further, Electric Utilities said that if a utility may utilize projections prepared for other purposes, the use of such projections for allocation of CWIP is not particularly burdensome. Electric Utilities I.C. at 43.

The Commission does not believe that it would be appropriate to adopt proposals for short or intermediate term projections, *i.e.*, the test year,⁹⁹ the date the CWIP-related facility commences operation,¹⁰⁰ 2 years¹⁰¹ or even 15 years.¹⁰² Under those approaches, the projection may not extend far enough to capture representative and future changes in the customer's power supply sources. For example, many large CWIP projects now in process or that will be initiated (*i.e.* nuclear and coal fired generating units) will not go on-line until a 13-17 year construction period is completed. At the same time, a customer's plans for alternative power supply may essentially call for (1) short but sustained use, (2) no use, or (3) gradually increasing or decreasing use of the utility's production and/or transmission system, and hence, differing utilization of particular CWIP projects depending upon their respective in-service dates.

For some projects, even a 15-year period may cover only the construction period which is not relevant. Even if a customer plans to leave the system completely during the 15-year period, the use of a 15-year average will allocate a portion of CWIP projects to a customer's rate base that the customer will never use. Consequently, a 15-year average method may not be any more effective than the test period approach for reflecting the customer's use of a project. The result could be overcompensation by the customer, because when the customer goes off of the system it would not be receiving one

⁹⁴ Public Citizen I.C. at 1-2.

⁹⁵ *See, e.g.,* Potomac Electric Power Company (Pepco) I.C. at 11; CPL I.C. at 2, 15-16; and Cincinnati Gas & Electric Company (CG&E) I.C. at ii-iii.

⁹⁶ 51 FR 7770, FERC Statutes and Regulations (Regulations Preambles) ¶ 30.689 at 30.147 (footnote omitted).

⁹⁷ *See, e.g.,* MEDG I.C. at 12; Allegheny I.C. at 75-76; G&T Systems I.C. at 94; NRECA I.C. at 54-56; EEI I.C. at 21-22; NEP I.C. at 22-23; UP&L I.C. at 24-25; and CPL I.C. at 43-44.

⁹⁸ Boston Edison Company, El Paso Electric Company, Florida Power Corporation, Montauk Electric Company, Northern States Power Company, and Wisconsin Electric Power Company (collectively, Boston Edison) filed joint comments.

⁹⁹ *See, e.g.,* UP&L I.C. at 27 and CG&E I.C. at 13.

¹⁰⁰ CPL I.C. at 49 and Electric Utilities I.C. at 45.

¹⁰¹ Potomac Electric Power Company (Pepco) I.C. at 34.

¹⁰² NEP I.C. at 24-25.

of the benefits of CWIP, i.e., reduced AFUDC, which is realized over the life of the plant. See *Allegheny R.C.* at 60-61. Boston Edison and EEI proposed that if the customer is removing its total load, the allocation ratios should extend up to the point where the customer changes over to its new supply source. If the customer is removing only part of its load, there may be a need for longer-term projections. They contended that the longer the period of the projections, the less reliable the projections are likely to be. Boston Edison I.C. at 21 and EEI I.C. at 23.

The final rule requires all CWIP applicants to employ for each CWIP project included in wholesale rate base forward looking allocation ratios that represent the average annual use a customer is anticipated to make of the utility's system over the life of each test period CWIP project. The Commission agrees with the cooperative and municipal commenters that the life-cycle approach offers the greatest potential for capturing the anticipated service-life use of each CWIP project.

A desirable characteristic of the life-cycle method is the individual future ratio for each project which recognizes the fact that customers may continue to fully utilize the transmission projects and make differing use of some generation projects. Further, regardless of customer plans for reliance on system power supply, wholesale customer and system load growth rates may vary from that reflected in a fixed-term (i.e., less than life-cycle) average ratio methodology, thereby adversely affecting the allocation of CWIP. The life-cycle method accounts for this factor as well.

The Commission believes that inclusion of life-cycle forward looking allocation ratios with all CWIP rate applications will prevent potential double whammy situations. The Commission believes that the final rule would have this positive effect regardless of the number of wholesale customers engaged in pursuing alternative power supply options. Thus, on this matter there is no need to conduct an examination of the bulk power market in support of the final rule.

Another advantage of the life-cycle approach is that it will allocate CWIP to all customers in a fashion that considers the varying rates of wholesale and retail load growth. Consequently, more accurate price squeeze measurements are possible. This, in turn, may tend to further reduce the incidence of CWIP-induced price squeeze. Further, ancillary benefit of mandatory life-cycle allocation ratios will be a better

allocation of CWIP in general to all customers.

2. The Issues of Waiver and Obligation to Serve

The *Mid-Tex* court requested further explanation from the Commission concerning the source and extent of a public utility's "obligation to serve" its wholesale customers. In Order No. 448, the Commission invited comments concerning whether wholesale customers should be permitted to waive their right to future service from their current suppliers in order to avoid paying CWIP. The Commission further asked for comments concerning the extent of a utility's obligation to serve and the impact of such obligation on competition in the electric utility industry.¹⁰³

Many commenters asserted that wholesale customers should be allowed to avoid paying CWIP by waiving the right to future service. See, e.g., EEI I.C. at 24-25 and Boston Edison I.C. at 22. Obviously, wholesale customers have the ability to arrange for alternative sources of power and to voluntarily forego the benefits of their local utility's efforts to secure an adequate and reliable supply of power on their behalf. To the extent such wholesale customers undertake an alternate supply arrangement and are no longer going to rely on a particular wholesale supplier, that supplier would be expected to adjust its construction program accordingly. Several commenters legitimately questioned the practical effect and enforceability of a waiver approach, however, arguing that the question of waivers is inextricably linked to the question of the utility's obligation to serve. See, e.g., MPL I.C. at 20; CG&E I.C. at 13-14; and UP&L I.C. at 28.

Unlike state statutes granting utilities their franchises, there is no express obligation to serve wholesale customers under the Federal Power Act. Several of the commenters asserted that such an obligation is implicit in the Federal Power Act, and that this implicit obligation is reflected in the Commission's regulatory requirement of a notice of termination of service.¹⁰⁴ The Commission has never determined whether there is an obligation to serve full requirements customers under the Federal Power Act. The Commission has noted that where a utility has

contractually agreed to provide service, the Commission would not allow termination of such service absent a showing that such action was in the public interest. 48 FR 24350, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,455 at 30,538, n. 51. Absent a showing under section 202(b) of the Federal Power Act, however, the Commission has serious reservations concerning its ability to require service where the utility has not contractually obligated itself to provide service in a filing under section 205. Once a utility has filed under section 205, however, it has an obligation to continue such service until the Commission has accepted or approved the termination because the termination is a change in rate under section 205 of the Federal Power Act. See 18 CFR 2.4(c)(4) (1986); *Canal Electric Company*, 29 FERC ¶ 61,330 at 61,685 (1984).

Therefore, the Commission believes that the focus regarding utilities' service responsibilities is in a practical sense related more to the specific nature of the bulk power market than to the specific nature of the service provided to the wholesale customer. Any obligation to continue service will stem from the inability of the wholesale customer to obtain service from sources other than its current supplier. It is the absence of alternative sources that affects the public interest.

Accordingly, the Commission is not rejecting the notion of waiver outright. The Commission does reject, however, the idea that a wholesale customer must waive *any and all* right to future service to avoid paying CWIP. Several IOUs argued that state commissions would not permit retail customers to be cut off from service because the distributor had waived its right to wholesale service. See, e.g., CG&E I.C. at 13-14. The Commission agrees. It is difficult to imagine that the Commission would allow a utility to terminate service to a full or partial requirements customer that has no alternative source of power simply because that customer has not adequately arranged for its own needs, when it is technically feasible to provide service of some sort.

Under such circumstances, the practical issue associated with wholesale customers who avoided CWIP by arranging for alternative sources of power will typically not be whether the utility will continue to provide them with power, but rather the price at which such service is continued. UPL I.C. at 27; CPL I.C. at 51-53. Clearly, wholesale customers who have avoided CWIP based on their representations to the utility that they are arranging for

¹⁰³ 51 FR 7781, FERC Statutes and Regulations (Regulations Preambles 1982-1985) ¶ 30,689 at 30,148.

¹⁰⁴ See, CG&E I.C. at 13-14 and UP&L I.C. at 28. The Commission's termination of service requirements are set forth in section 35.15 of the Commission's regulations. 18 CFR 35.15 (1986).

alternative sources of power and who have voluntarily foregone the benefits of their current supplier's efforts to secure an adequate and reliable source of power on their behalf have assumed the risks of "best efforts" service. These wholesale customers who stay on the system longer than anticipated cannot simply expect to continue to receive service under the same requirements tariff as the other customers who have been paying CWIP. These customers will have made a voluntary decision to leave the security of the utility's service and must live with the consequences of that choice. If it is technically feasible, they may seek to regain their prior service status by paying the unpaid CWIP with interest, plus reimbursement of any system costs due to inefficiencies caused by the utility not having been able to plan to provide them service, or they can continue to forego the local utility's planning responsibilities and simply reimburse the utility for the additional costs, if any, of the utility's best efforts to provide lesser quality service on their behalf.¹⁰⁵

These additional costs may well be far higher than the average system costs charged under traditional regulation to the utility's customers who have paid for CWIP.

The final rule reflects the choices available to the wholesale customer who wants to arrange for alternative sources and avoid CWIP payments. The final rule does not require waiver of the right to future service as a condition to avoiding CWIP payments. Under the final rule, a customer's allocation of CWIP, if any, will reflect its good faith representations that its future loads will be reduced. In the situation in which the customer fails to reduce its load at the planned time, several IOUs argued that the customer should not be permitted to simply continue receiving service (for that load which was not timely reduced) under the same requirements tariff as the other native load customers in order to prevent costs going to the other customers who will have been paying CWIP while the customer that planned to leave avoided paying CWIP. *See, e.g.,* NEP I.P. at 27 and CPL I.C. at 51-53. The IOUs proposed several cost bases for rates, including marginal costs, incremental costs, new plant (rather than embedded) costs, and current (rather than historical) costs. *See, e.g.,*

CPL I.C. at 51-53; EEI I.C. at 24-25; UP&L I.C. at 28-29; and Delmarva I.C. at 30.

As stated above, the Commission agrees with those commenters who would require that a customer who fails to terminate or reduce service on the date specified to either (1) seek to regain its prior status by paying the amount of revenue not paid as CWIP, with interest, plus reimbursement of any system costs due to inefficiencies caused by the utility not having been able to plan to provide it with service (*see, e.g.,* Electric Utilities I.C. at 46-47), or (2) pay rates that reflect the additional costs incurred by the utility to continue service. When the customer successfully regains its former status, the payment of unpaid CWIP with interest would be credited to the rate base of the utility's other customers who assumed a greater CWIP burden as a result of the customer avoiding paying for CWIP costs that were not avoidable by the utility. Reimbursement of system costs due to inefficiencies caused by the customer regaining its prior status ensures that the utility's other customers are held harmless from the procurement decisions of the prodigal customer. The utility will have the burden of establishing such costs. In the second situation where the customer does not seek to regain its prior status, the utility shall have the burden of proof with regard to its costs to continue service. In a situation of excess capacity, the cost to the utility of the power provided to this type of customer is the local utility's opportunity cost of foregone revenue due to lost sales in the wholesale market.

Similarly, under the final rule, if a customer who terminates or reduces its demand for the utility's services at the specified date and at some future date wishes to resume service from its former supplier or increase service from its current supplier, over and above the normal growth of the existing load, that untimely incremental customer load would be treated as any other new customer seeking service or any existing customer seeking additional service from the utility at that time. The Commission does not believe that serving the untimely incremental load of a former customer that avoided CWIP payments based on representations that it would not benefit from the CWIP-related facilities automatically imposes any more costs on a utility other than those resulting from serving a similar load of a new customer that would not have paid such CWIP either. CWIP projects are often not able to be so precisely sized as to account for the loss of certain loads. Thus, this may be more

of a cost allocation matter between steady customers and customers that shop around for alternative supply options, rather than a utility cost avoidance matter.

3. The Impact of the CWIP Rule on the Efforts of Wholesale Customers to Develop Their Own Generation, or Engage in Joint Ventures with Utilities or Other Distributors

The final rule responds to the *Mid-Tex* court's criticism that the Commission did not address this issue. If the potential for double whammy were not addressed in the final rule, a wholesale customer may have a disincentive to build its own generation, because it would have to pay for its own construction program while contributing to its wholesale supplier's construction program. By requiring forward looking allocation ratios with every CWIP filing, however, double whammy generally should be prevented. Any CWIP-induced disincentive to build on the part of the wholesale customer is thus mitigated by the reduction or elimination of its CWIP payments to its wholesale supplier based on the forward looking allocation ratios.

Similarly, the Commission does not believe that permitting a public utility to apply for CWIP under the final rule would hinder the efforts of wholesale customers to engage in joint ventures with their wholesale suppliers. A joint venture is simply an alternative customer power supply plan whereby the customer and its current wholesale supplier jointly participate in a construction program. Indeed, during periods of high cost financing or when there is a tendency to severely underproject costs of certain types of projects, a public utility may prefer a joint venture over CWIP in order to finance a project. Under the final rule's mandatory use of forward looking allocation ratios, there is automatic accounting for the joint venture efforts, as well as any other alternative power supply efforts, of wholesale customers. Thus, the final rule is neutral concerning a utility's decision whether to finance a project through CWIP or through a joint venture with its wholesale customer. The Commission has no preference for one method of financing over the other and does not wish to discourage joint ventures.

D. Filing Requirements

The anticompetitive procedures adopted in the final rule reflect the Commission's attempt to balance the interests of avoiding unnecessary, burdensome filing requirements,

¹⁰⁵ The success of the utility's best efforts to continue to provide firm power at reasonable cost is likely to be directly related to the amount of notice that the customer has given that utility that (1) it will not be able to depart at the scheduled date and (2) the period of time that the customer expects to continue to be served by that utility.

facilitating analysis of CWIP-related price squeeze and double whammy at the suspension stage of a rate proceeding, and providing timely, effective relief from anticompetitive effects where warranted.

The Commission continues to believe that remedies for CWIP-related price squeeze should be applied on a case-by-case basis. A generic approach using predetermined adjustments to the 50% cap of allowable CWIP could overcompensate or undercompensate CWIP applicants by failing to account for the particular circumstances of a given case. Several commenters supported a case-by-case approach. *See, e.g., Allegheny I.C. at 56-57; Electricity Consumers Resource Council (ELCON) I.C. at 3; and SCE I.C. at 7-8.*

The Commission disagrees with those commenters who suggested that the Commission should consider all possible causes of price squeeze rather than singling out CWIP as requiring adjustment in order to remedy a particular regulator-induced anticompetitive effect.¹⁰⁶ As is reflected in the final rule, CWIP may be identified as one potential cause of price squeeze by virtue of the fact that the predominant retail jurisdiction allows less CWIP in rate base than the Commission. With respect to double whammy, the final rule addresses its only cause. There can be no cause of double whammy, as it is defined in the final rule, other than the inclusion of an improperly allocated CWIP project incorporated in rate base. Given this potential for instances of anticompetitive effects caused solely by CWIP, it is appropriate to tailor procedures to the consideration of such CWIP issues.

Several IOUs objected to the requirement of the interim rule's § 35.26(g)(1) that the utility anticipate price squeeze or double whammy objections. They argued that utilities should not be required to suggest measures to mitigate anticipated anticompetitive concerns before it has been shown that there is any basis for the objection.¹⁰⁷ The G&T Systems found the rule to be vague, leaving too much discretion to the utility to anticipate CWIP-related objections. *G&T Systems I.C. at 73.* NRECA contended that such a burden on filing utilities could have a chilling effect on prefiling discussions with the customer, because the utility would have an incentive to keep prospective rate filings

shrouded in secrecy. NRECA added that the lack of prior communications lessens the customers' opportunity to analyze and communicate to the supplier the likelihood of a price squeeze. *NRECA I.C. at 24-25.*

The final rule deletes the "reasonable anticipation" requirement of § 35.26(g)(1). That requirement was appropriate on an interim basis while the Commission contemplated remedies for CWIP-related price squeeze or double whammy. However, since the final rule establishes preventive measures, special procedures, and specific remedies designed to address the potential anticompetitive effects of CWIP, it is no longer necessary to require the filing utility to suggest mitigative measures.

The new § 35.26(g)(1) prescribes filing requirements designed to facilitate the Commission's review of CWIP applications. The required information will assist the Commission in its preliminary review of any allegations of regulatory price squeeze. Section 35.26(g)(1)(i) requires the utility to identify the percentage of the proposed rate increase attributable to non-PC/FC CWIP and the percentage of non-PC/FC CWIP supporting the proposed wholesale rate level. This will enable the Commission and intervenors to more quickly determine and analyze the existence and extent of any anticompetitive effects. The time factor is important because of the limited time available to address CWIP issues between the filing date and the issuance of a Commission suspension order on the rate application.¹⁰⁸

Section 35.26(g)(1)(ii) requires the utility to submit a comparison of the percentages of CWIP allowed by the relevant retail jurisdictions and this Commission. This will assist the Commission in determining the existence and extent of potential CWIP-induced price squeeze.

The Commission considers it unnecessary and inappropriate to require the utility to submit a detailed price squeeze analysis with every CWIP application. Such a requirement would, in effect, presume that the inclusion of CWIP in rate base always causes price squeeze.

The Commission's consideration of preliminary relief under this rule is limited to instances of alleged *CWIP-induced regulatory price squeeze*. Other factors possibly contributing to price squeeze do not lend themselves to, and are not properly the subject of, CWIP filing requirements. The Commission

believes that where general price squeeze is alleged, it is inappropriate to single out the CWIP element of a rate filing to cure a price squeeze which could be caused by the interaction of many other elements. The final rule addresses price squeeze only to the extent that wholesale CWIP may lead to a price squeeze. Due to the interrelated nature of CWIP and other ratemaking policy differences between State and Federal jurisdictions, the magnitude of the CWIP-related price squeeze effect, if any, is more readily identifiable where there are clear differences in State and Federal CWIP policy as reflected in the relevant retail and wholesale rates. Price squeeze not induced by CWIP is not properly the subject of a rule designed to address only CWIP issues pertaining to State and Federal policy differences. The Commission's general price squeeze policy is being considered in two rate proceedings pending before the Commission. (*Southern California Edison Company*, Docket Nos. ER76-205-003 (Price Squeeze Phase) and ER79-150-000 (Phase II, Price Squeeze)). The Commission expects to act on those proceedings in the near future.

Section 35.26(g)(2) retains the interim rule's provision that the Commission may consider preliminary relief at the suspension stage of the case if an intervenor that alleges price squeeze caused by the utility's request for CWIP pursuant to § 35.26(c)(3) makes a concrete, substantial showing that it is likely to incur imminent, irreparable harm if such CWIP is allowed in the rates. The Commission continues to believe that preliminary relief should be considered only in truly extraordinary circumstances. As was discussed in Order No. 448, the Commission is reluctant to implement any procedure that will encourage unfounded or otherwise inappropriate price squeeze allegations. Thus, it is necessary to have a higher standard for granting extraordinary relief based on a preliminary determination of factual and legal issues. Further, the Commission will typically have very little time in which to undertake a complete evaluation of the claims that are raised.¹⁰⁹ A higher standard for extraordinary preliminary relief also protects the utility which otherwise may suffer permanent loss of substantial revenues based on CWIP-related price squeeze allegations ultimately determined to be unfounded. With respect to double whammy, the Commission believes that given its

¹⁰⁶ *Pepco I.C. at 11; CPL I.C. at 2, 15-16; and CG&E I.C. at ii-iii.*

¹⁰⁷ *See, e.g., UP&L I.C. at 3-4; MPL I.C. at 3-4; and CG&E I.C. at 2.*

¹⁰⁸ *See G&T Systems I.C. at 73.*

¹⁰⁹ 51 FR 7779, FERC Statutes and Regulations (Regulations Preambles) § 30.089 at 30.145.

routine requirement of life-cycle forward looking allocation ratios, it is unnecessary to retain the interim rule's extraordinary relief which was designed to protect a customer until a double whammy remedy could be fashioned in a given case.

The final rule sets forth no exact guidelines for showing what would constitute imminent, irreparable harm. The Commission is allowing for considerable flexibility in this regard, consistent with its case-by-case approach to addressing the price squeeze implications of CWIP. The Commission also rejects NRECA's proposed use of a "reasonable likelihood" standard,¹¹⁰ because the granting of extraordinary preliminary relief should be based on the impact of CWIP on the customer. Even if there were a reasonable likelihood of price squeeze directly attributable to CWIP, the extent of the anticompetitive effect may not justify permanently denying the utility CWIP revenues at the suspension stage, until the final Commission order on the issue. The Commission also rejects Allegheny's proposal to place at the filing stage the burden on the utility to demonstrate that CWIP will not cause imminent, irreparable harm.¹¹¹ The Commission believes that this burden of going forward is properly placed on the party asserting the harm. The Commission rejects Allegheny's proposal to use a *West Texas* style standard¹¹² for determining preliminary relief, because revenues need not be excessive to cause price squeeze.

Delmarva proposed establishing more stringent requirements for what would constitute a *prima facie* price squeeze claim. Delmarva I.C. at 4. With respect to Delmarva's proposal, the Commission is considering its general price squeeze policy in two pending rate proceedings, as discussed above. Accordingly, the final rule is confined to addressing CWIP-related price squeeze and double whammy.

Therefore, the Commission believes that the imminent, irreparable harm standard is a fair and reasonable

standard for determining whether conventional phased price squeeze procedures may not sufficiently protect a customer from anticompetitive effects of CWIP.

With respect to Public Citizen's proposal to require the utility to file a demand forecast, assessments of demand-side and supply-side options, and documentation that the proposed project is the cheapest option available,¹¹³ the Commission notes that Order No. 298 originally required, and the Commission continues to require, utilities applying for CWIP to file Statement BM, an economic analysis of alternatives to new construction. For the supply side, the Commission believes that Public Citizen's concern is already sufficiently addressed by the regulations. The Commission believes that the customers are better able to assess their own demand-side options.

SCS proposed that a utility be permitted to file alternative lower rates predicated on exclusion of the contested CWIP portion in the event that the customer makes a substantive showing of imminent, irreparable harm requiring an accelerated remedy. SCS I.C. at 19. Under § 35.26(g)(4)(i), if an intervenor meets the requirements of § 35.26(g)(2), the Commission may suspend the entire rate increase or all or a portion of the non-PC/FC CWIP component for up to five months. Under §§ 35.26(g)(4)(ii) and (iii), the Commission may also allow all or a portion of the non-PC/FC CWIP only prospectively from the issuance of a final Commission order on rehearing of the matter, or take such action as is proper under the circumstances, if an intervenor meets the requirements of § 35.26(g)(2). Thus, it may be necessary for the utility to file interim compliance rates excluding all or a portion of non-PC/FC CWIP.

Delmarva argued that allowing CWIP prospectively from the issuance of a final rehearing order would encourage spurious rehearing requests as a means of delaying the inclusion of CWIP in rate base. Thus, Delmarva would delete the words "on rehearing" from § 35.26(g)(4)(ii). Delmarva I.C. at 11-12. The Commission believes, however, that where CWIP is to be allowed prospectively only, it would be inappropriate to do so before the Commission has heard and addressed all substantive issues raised in a CWIP rate proceeding, including issues raised on rehearing. Further, the Commission cannot predetermine whether rehearing requests will be spurious.

E. Contributions in Aid of Construction

The *Mid-Tex* court affirmed the Commission's rejection of contributions in aid of construction (CIAC) as an alternative to CWIP, noting its uncertain tax status at the time.¹¹⁴ At the time of the *Mid-Tex* proceeding, the viability of CIAC as an alternative to CWIP depended on its status being tax exempt. Since *Mid-Tex*, the Tax Reform Act of 1986¹¹⁵ was passed. Section 824(a) of the Tax Reform Act amends section 118 of the Internal Revenue Service Code by making CIAC fully taxable. The Tax Reform Act also does not recognize the interest expense related to the financing of construction as a tax deductible expense as incurred. Thus, CIAC, like joint ventures, may be a viable alternative or complement to CWIP depending upon the case-specific circumstances of the parties. It is up to the parties to decide whether to avail themselves of the CIAC option.

IV. Finding of No Significant Impact

At the Commission's request, the Energy Information Administration (EIA) prepared an updated Environmental Assessment (EA) to determine the need to prepare an Environmental Impact Statement for the CWIP final rule. Based on the updated EA, the Commission has determined that the proposed action does not constitute a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (1982).

No significant adverse impacts associated with implementation of the CWIP rule change are identified in the updated EA. While the updated EA is attached as Appendix I to this order, the underlying computer programs, etc., are not attached due to their considerable volume. However, copies of the updated EA and all supporting documentation may be obtained from the Commission's Division of Public Information, 825 North Capital Street, NE., Room 1000, Washington, DC. 20426. Anticipated effects of the rule change are summarized below.

The updated EA generally projects lower average near term and about the same or slightly higher average long term economic impacts than the 1983 EA. This is primarily because of changes in the time periods examined. The 1983 study focused on the period 1983 through 1995 while the update studied 1987 through 2000.

¹¹⁰ NRECA I.C. at 36-37.

¹¹¹ Allegheny I.C. at 64.

¹¹² Pursuant to *West Texas Utilities Co.*, 18 FERC § 61.189 (1982), once the Commission decides to suspend a rate change filing, the determination of the length of the suspension depends on the preliminary determination of whether the proposed increase in the rate level would be at least 10% excessive. Under Allegheny's proposal, if the intervenor shows that the filing utility would receive excess revenues (e.g., 10% of the revenue increase due to non-PC/FC CWIP) due to either price squeeze or double whammy, then the non-PC/FC CWIP rates would be suspended for a pre-specified period of time. Allegheny R.C. at 44.

¹¹³ Public Citizen I.C. at 8.

¹¹⁴ 773 F.2d at 361.

¹¹⁵ Public Law 99-514.

The lower average near term impacts result from the reduced significance of CWIP¹¹⁶ in the industry since the 1983 to 1984 period when the aggregate level of CWIP and its magnitude relative to plant in service were at their peaks.¹¹⁷ However, while the report finds lower average impacts, the distribution of impacts across individual companies remains skewed. That is, the projected impacts from some specific companies are substantially above the average.

The 1983 EA projected impacts out to 1995. The updated study projects impacts to the year 2000. For both studies, the national average projected price increments for 1990 and 1995 are all less than one percent. In the updated study, the average impacts are estimated to increase somewhat beyond 1995 because of a projected increase in new construction activity projected in this time-frame.

Results of Updated EA

Results of the analyses performed for this EA update show that the most significant impacts of a CWIP rule are on prices and on utility finances. The impacts on generating capacity, fuel use, and the natural environment are not significant.

Little change in new capacity requirements or fuel use is projected as a result of a rule to include 50 percent CWIP in rate base. In the year 2000, slightly higher electricity prices are projected to cause demand to be 0.2 percent lower and result in 0.2 percent lower fuel consumption nationally. As a result, only minimal impacts on the environment are projected—slight improvements in air quality due to lower fossil fuel consumption—and these impacts might only be detectable in a few localities.

Generally, the projections in the updated EA tend to overstate the economic impacts of CWIP. The projections of price and cash flow increases estimated overstate the average increases for those utilities that have already requested and obtained some CWIP in rate base since the Commission adopted a 50 percent rule in 1983. For those utilities that have not yet requested rate base treatment of CWIP,

the projections assume that they file for and immediately obtain the full 50 percent of their CWIP in rate base.

The results of the updated EA analyses should also be qualified for the fact that the models and data used do not produce precise statistical results. Further, due to the inherent uncertainty in projections of utility construction programs, less confidence should be placed in the more distant impact projections.

Electricity prices are higher initially when CWIP is placed in rate base. Assuming all utilities request and receive the full 50 percent CWIP in rate base during 1987, the weighted-average initial price increase to wholesale customers is projected to be between 1.7 and 4.0 percent, based on projections of national, regional, and individual company data for 1987.

The distribution of impacts across individual utilities is projected to be significantly skewed. That is, the majority of utilities are projected to show little or no initial price changes during 1987; however, some utilities could potentially request relatively large initial rate increases. Available data are not adequate to project estimates of the range of possible increases.

The national average price increment is projected to be 0.7 percent in 1990, 0.5 percent in 1995, and 1.5 percent in 2000. The rise in the increment during the latter half of the 1990's is due to the higher levels of CWIP expected during that period.

Regionally, the projected price impacts vary according to the extent of construction activity. Average initial 1987 price impacts are projected to be greatest in the Southwest and Middle Atlantic regions—4.5 and 3.2 percent higher prices, respectively. In five regions—New England, Central, North Central, West, and the Northwest—the projected initial price impacts are less than .5 percent. Beyond 1987, average prices based on CWIP in rate base are projected to remain above prices that do not reflect rate base treatment of CWIP through the end of the study period (year 2000) for all regions except the Southwest, Central, and West regions.

Like the 1983 EA, the update estimates that about 1 in 8 retail consumers—households and commercial and industrial establishments—could be potentially affected by the CWIP rule if all eligible utilities filed for and received CWIP in rate base. This proportion would vary regionally.

The level of impacts on retail consumers would vary depending on whether the utility serving them was a

total or partial requirements wholesale customer of a utility regulated by the Commission. Retail consumers of total requirements utilities—utilities which have no generating capacity of their own—could experience impacts equal to those of the supplying utility. Retail consumers of partial requirements utilities would experience lesser impacts. Using data from the 1983 EA, the report estimates that one in 16 consumers is served by total requirements utilities.

In general, the financial conditions of the jurisdictional portion of utilities regulated by the Commission would be improved by a 50 percent CWIP in rate base policy. This is because allowing CWIP in rate base effectively changes noncash allowance for funds used during construction (AFUDC) earnings on a utility's books into cash earnings. Internal cash flow and interest coverage ratios are improved through this process.

The average initial increase in internal cash flow for the jurisdictional portion of utilities that file for and obtain CWIP in rate base is projected to be between 4 and 14 percent, based on projections of national, regional and individual utility data for 1987. Like the price impacts, the percent differential generally decreases through the early 1990's and then increases with the increase in construction activity. These impacts also vary regionally. The report shows projections for corresponding improvements in free cash flow to construction expenditure ratios and interest coverage ratios.

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider whether the rule, if promulgated, will have a "significant economic impact on a substantial number of small entities." The Notice of Proposed Rulemaking (NOPR) preceding Order No. 298 contained a certification that the proposed rule would not have a significant impact on a substantial number of small entities.¹¹⁸ Order No. 298 reaffirmed that determination, and the *Mid-Tex* court rejected challenges to the CWIP rule based on a RFA.¹¹⁹ The NOPR concluded that since nearly all of the jurisdictional utilities which must comply with the final rule are too large to be considered "small entities," the RFA is not applicable. Further, since the

¹¹⁶ The updated EA does not attempt to distinguish effects of non-PC/FC CWIP from effects of CWIP associated with pollution control/fuel conversion facilities, because the latter was relatively insignificant industry-wide during 1986. Therefore, the updated EA assumes that pollution control/fuel conversion CWIP is zero.

¹¹⁷ In 1983, the ratio of CWIP to net plant in service reached a peak of 49.6%. That ratio has since dropped to an estimated level of 27.6% in 1986.

¹¹⁸ 46 FR 39445, FERC Statutes and Regulations (Proposed Regulations 1977-1981) ¶ 32.147 at 33.263.

¹¹⁹ 773 F.2d at 342.

utilities regulated by the Commission hold exclusive selling rights within their retail service areas and are presumed to be natural monopolies, they dominate their respective fields of operation and, thus, cannot be considered to be "small entities" as that term is defined in the RFA.¹²⁰ The Commission has considered the impact of the final rule and is again certifying that the final rule has no significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)¹²¹ and the Office of Management and Budget's (OMB) regulations¹²² require that OMB approve certain information collection requirements imposed by agency rule. The information collection provisions in this final rule are being submitted to OMB for approval. Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (Attention: Ellen Brown (202) 357-8272). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission). If OMB has not approved this final rule by the effective date on this rule, the effective date of the rule will be suspended. If the effective date of the rule is suspended, the Commission will issue a public notice to that effect.

VII. Effective Date

This final rule is effective July 27, 1987.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 35, Chapter I, Title 18 of the Code of Federal Regulations, as set forth below.

By the Commission. Commissioner Stalon concurred with a separate statement to be issued later.

Kenneth F. Plumb,
Secretary.

PART 35—FILING OF RATE SCHEDULES

1. In Part 35, the authority citation is revised to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1992); E.O. 12009, 3 CFR 1978 Comp., p. 142; Independent Offices Appropriations Act, 31 U.S.C. 9701 (1982); Federal Power Act, 16 U.S.C. 791a-825r (1982); Public Utility Regulatory Policies Act, 16 U.S.C. 2601-2645 (1982).

2. Section 35.26 is revised to read as follows:

§ 35.26 Construction work in progress.

(a) *Applicability.* This section applies to any rate schedule filed under this part by any public utility as defined in subsection 201(e) of the Federal Power Act.

(b) *Definitions.* For purposes of this section:

(1) "Construction work in progress" or "CWIP" means any expenditure for public utility plant in process of construction that is properly included in Accounts 107 (construction work in progress) and 120.1 (nuclear fuel in process of refinement, conversion, enrichment, and fabrication) of Part 101 of this chapter, the Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (Major and Nonmajor).

(2) "Double whammy" means a situation which may arise when a wholesale electric rate customer embarks upon its own or participates in a construction program to supply itself with all or a portion of its future power needs, thereby reducing its future dependence on the CWIP of the rate applicant, but is simultaneously forced to pay to the CWIP public utility rate applicant the CWIP portion of the wholesale rates that reflects existing levels of service or a different anticipated service level.

(3) "Fuel conversion facility" means any addition to public utility plant that enables a natural gas-burning plant to convert to the use of other fuels, or that enables an oil-burning plant to convert to the use of other fuels, other than natural gas. Such facilities include those that alter internal plant workings, such as oil or coal burners, soot blowers, bottom ash removal systems and concomitant air pollution control facilities, and any facility needed for

receiving and storing the fuel to which the plant is being converted, which facility would not be necessary if the plant continued to burn gas or oil.

(4) "Pollution control facility" means an identifiable structure or portions of a structure that is designed to reduce the amount of pollution produced by the power plant, but does not include any facility that reduces pollution by substituting a different method of generation or that generates the additional power necessitated by the operation of a pollution control facility.

(c) *General rule.* For purposes of any initial rate schedule or any rate schedule change filed under § 35.12 or § 35.13 of this part, a public utility may include in its rate base any costs of construction work in progress (CWIP), including allowance for funds used during construction (AFUDC), as provided in this section.

(1) *Pollution control facilities.*—(i) *General rule.* Any CWIP for pollution control facilities allocable to electric power sales for resale may be included in the rate base of the public utility.

(ii) *Qualification as a pollution control facility.* In determining whether a facility is a pollution control facility for purposes of this section, the Commission will consider:

(A) Whether such facility is the type facility described in the Internal Revenue Service laws, 26 U.S.C. 169(d)(1), as follows:

"A new identifiable treatment facility which is used * * * to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, storing, or preventing the creation or emission of pollutants, contaminants, wastes or heat";

(B) Whether such facility has been certified by a local, state, or federal agency as being in conformity with, or required by, a program of pollution control;

(C) Whether such facility is the type facility described in the schedule of "Environmental Protection Facilities," sections 4(A) through 4(D), page 428, FERC Form No. 1, Annual Report of Electric Utilities, Licensees and Others (Major and Nonmajor) (Revised 12-85); and

(D) Other evidence showing that such facilities are for pollution control.

(2) *Fuel conversion facilities.* Any CWIP for fuel conversion facilities allocable to electric power sales for resale may be included in the rate base of the public utility.

(3) *Non-pollution control of fuel conversion (non-PC/FC) CWIP.* No more than 50 percent of any CWIP allocable to electric power sales for resale not otherwise included in rate base under

¹²⁰ Section 601(6) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined, by reference of section 3 of the Small Business Act, as an enterprise which is "independently owned and operated [sic] and which is not dominant in its field of operation." 15 U.S.C. section 632(a) (1982).

¹²¹ 44 U.S.C. 3501 through 3520 (1982).

¹²² 5 CFR 1320.13 (1986).

paragraphs (c) (1) and (2) of this section, may be included in the rate base of the public utility.

(4) *Forward looking allocation ratios.* Every test period CWIP project requested for wholesale rate base treatment pursuant to § 35.26 (1), (2), and (3) of this part will be allocated to the customer classes on the basis of forward looking allocation ratios reflecting the anticipated average annual use the wholesale customers will make of the system over the estimated service life of the project. Supporting documentation, as required by §§ 35.12 and 35.13 of this part, must be in sufficient detail to permit examination and verification of the forward looking allocation ratio's recognition of each wholesale customer's plans, if any, for future alternative or supplementary power supplies. For the purpose of preventing anticompetitive effects, including CWIP-induced price squeeze and double whammy, sufficient recognition of such plans may require the public utility applicant to provide for separate customer groups or provide for a rate design incorporating selected CWIP project credits.

(d) *Effective date.* If a public utility proposes in its filed rates to include CWIP in rate base under this section, that portion of the rate related to CWIP is collectable at the time the general rates become effective pursuant to Commission order, whether or not subject to refund, except as provided in paragraph (g) of this section.

(e) *Discontinuance of AFUDC.* On the date that any proposed rate that includes CWIP in rate base becomes effective, a public utility that has included CWIP in rate base must discontinue the capitalization of any AFUDC related to those amounts of CWIP is rate base.

(f) *Accounting procedures.* When a public utility files to include CWIP in its rate base pursuant to this section, it must propose accounting procedures in that rate schedule filing that:

(1) Ensure that wholesale customers will not be charged for both capitalized AFUDC and corresponding amounts of CWIP proposed to be included in rate base; and

(2) Ensure that wholesale customers will not be charged for any corresponding AFUDC capitalized as a result of different accounting or ratemaking treatments accorded CWIP by state or local regulatory authorities.

(g) *Anticompetitive procedures.*—(1) *Filing requirements.* In order to facilitate Commission review of the anticompetitive effects of applications for CWIP pursuant to § 35.26(c)(3), a public utility applying for rates based

upon inclusion of such CWIP in rate base must include the following information in its filing:

(i) The percentage of the proposed increase in the jurisdictional rate level attributable to non-pollution control/fuel conversion CWIP and the percentage of non-pollution control/fuel conversion CWIP supporting the proposed rate level;

(ii) The percentage of non-pollution control/fuel conversion CWIP permitted by the state or local commission supporting the current retail rates of the public utility against which the relevant wholesale customers compete; and

(iii) Individual earned rate of return analyses of each of the competing retail rates developed on a basis fully consistent with the wholesale cost of service for the same test period if the requested percentage of wholesale non-pollution control/fuel conversion CWIP exceeds that permitted by the relevant state or local authority to support the currently competing retail rates.

(2) *Preliminary relief.* If an intervenor in its initial pleading alleges that a price squeeze will occur as a direct result of the public utility's request for CWIP pursuant to § 35.26(c)(3) of this part and makes a concrete, substantial showing that it is likely to incur imminent, irreparable harm if such CWIP is allowed, the Commission will consider preliminary relief at the suspension stage of the case pursuant to paragraph (g)(4) of this section.

(3) If the Commission makes a final determination that a price squeeze due solely to allowance of a lower percentage of non-pollution control/fuel conversion CWIP in the public utility's retail rate base than allowed by this Commission, the Commission will consider an adjustment to non-pollution control/fuel conversion CWIP in order to eliminate or mitigate the price squeeze.

(4) If an intervenor meets the requirements of paragraph (g)(2) of this section, the Commission, depending on the type of showing made including the likelihood, immediacy, and severity of any anticompetitive harm, may:

(i) Suspend the entire rate increase or all or a portion of the non-pollution control/fuel conversion CWIP component for up to five months;

(ii) Allow all or a portion of the non-pollution control/fuel conversion CWIP only prospectively from the issuance of the Commission's final order on rehearing on the matter; or

(iii) Take such other action as is proper under the circumstances.

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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 33

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor

AGENCY: Office of Secretary, Labor.

ACTION: Final rule; technical amendment.

SUMMARY: This final rule published today amends the recently published final rule 29 CFR Part 33, "Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor," 52 FR 11600 through 11610 (April 9, 1987), effective May 11, 1987. This action is in accordance with the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1810 (October 21, 1986), section 103 of which amends the Rehabilitation Act of 1973 as follows: (1) The definition is changed by striking out the term "handicapped individual" and inserting in lieu thereof the term "individual with handicaps;" and (2) the Act is amended by striking out "a handicapped individual", "handicapped individual", and "handicapped individuals" each place they appear and inserting in lieu thereof, respectively, "an individual with handicaps." Although the amended language employs the plural form "handicaps", individuals with a single impairment or handicap are covered under these regulations.

EFFECTIVE DATE: July 27, 1987.

FOR FURTHER INFORMATION CONTACT: Ms. Noelia Fernandez, Special Assistant to the Director, Directorate of Civil Rights, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 523-8907 (Voice) or 523-7090 (TTY).

SUPPLEMENTARY INFORMATION:

Waiver of Proposed Rulemaking

This rule is a nondiscretionary, ministerial action which merely incorporates, without change, a statutory amendment into preexisting regulations. Publication in proposed form serves no useful purpose and therefore is unnecessary within the meaning of the Administrative Procedure Act (5 U.S.C. 553(b)(B)). We, therefore, find good cause to waive notice of proposed rulemaking.

Executive Order 12291

The Secretary of Labor has determined that this is not a major rule as defined in Executive Order 12291,

and thus a regulatory impact analysis is not required.

Paperwork Reduction Act

Because this rule does not contain information collection requirements, it is not subject to approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

List of Subjects in 29 CFR Part 33

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Federal buildings and facilities, Handicapped, Government employees.

Signed at Washington, DC this 23rd day of June, 1987.

William E. Brock,
Secretary of Labor.

PART 33—[AMENDED]

For the reasons set forth above, 29 CFR Part 33 is amended as follows:

1. The authority citation for Part 33 is revised to read as follows:

Authority: 29 U.S.C. 794, as amended by sec. 103, Pub. L. 99-506, 100 Stat. 1810.

2. In Part 33, make the following changes:

- a. "A handicapped person" is revised to read "an individual with handicaps."
- b. "Handicapped person" is revised to read "individual with handicaps."
- c. "Handicapped persons" is revised to read "individuals with handicaps."

3. In § 33.3 Definitions, the introductory paragraph to the definition of "Individual with handicaps" (formerly designated "Handicapped person"), paragraph (c) of the definition of "Qualified individual with handicaps" (formerly designated "Qualified handicapped person"), and the definition of "section 504" are revised to read as follows:

§ 33.3 Definitions.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(c) For purposes of employment, a "Qualified handicapped person" as that term is defined in 29 CFR 1613.702(f) which is made applicable to this part by § 33.7.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-

112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 (Pub. L. 95-602, 92 Stat. 2955), and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810).

[FR Doc. 87-14568 Filed 6-25-87; 8:45 am]
BILLING CODE 4510-23-M

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 101

Time Periods for Responding to Board Action; Revision of Statements of Procedure

AGENCY: National Labor Relations Board.

ACTION: Final rules.

SUMMARY: During 1986, the National Labor Relations Board made extensive changes to its rules and regulations that govern the time periods for responding to Board action. The time periods in the statements of procedure are being changed to conform to the revisions in the rules and regulations. In addition, numerous language and stylistic changes have been made to the statements to conform them to the rules and regulations, which have been amended over the years.

EFFECTIVE DATE: July 27, 1987.

FOR FURTHER INFORMATION CONTACT: John C. Truesdale, Executive Secretary, 1717 Pennsylvania Avenue NW., Room 701, Washington, DC 20570, Telephone: (202) 254-9430.

SUPPLEMENTARY INFORMATION: The National Labor Relations Board is revising its statements of procedure. Last year, the Board published extensive changes in its rules and regulations that govern the time periods for responding to Board action. The rules in 29 CFR Part 102 that govern the time periods for responding to Board action were, in most instances, revised to periods of 7 days or some multiple of that period. See *Federal Register* publications 51 FR 23744 (July 1, 1986), 51 FR 30635 (August 28, 1986), and 51 FR 32918 (September 17, 1986). Some of the time periods that are specified in the Board's rules and regulations are also included in the Board's statements of procedure, 29 CFR Part 101. Therefore, to conform the statements of procedure to the rules and regulations the statements are being revised in the following manner.

Section 101.6, which specifies the time for filing an appeal from the dismissal of an unfair labor practice charge, is being changed from 10 days to 14 days.

Section 101.8, which specifies the time for filing an answer to an unfair labor practice complaint, is being changed from 10 days to 14 days.

Section 101.11(a), which specifies the time for filing an answer to a backpay specification, is being changed from 15 days to 21 days.

Section 101.18(c), which specifies the time for filing a request for review of a dismissal of an election petition, is being changed from 10 days to 14 days.

Section 101.19(a)(4), which specifies the time for filing objections to the conduct of an election, is being changed from 5 days to 7 days.

Section 101.19(b), which specifies the time for filing objections to a regional director's or hearing officer's report on objections, is being changed from 10 days to 14 days.

Section 101.27(c), which specifies the time for filing an appeal from the regional director's dismissal of a petition for a referendum under section 9(e)(1) of the National Labor Relations Act, is being changed from 10 days to 14 days.

Section 101.29, which specifies the time for filing objections to an election where no hearing has been conducted, is being changed from 5 days to 7 days.

The statements of procedure also specify the time for filing objections to settlement agreements entered into after the issuance of a complaint. This time period is not otherwise provided for in the rules and regulations. Consistent with previous changes to the rules and regulations and the statements, § 101.9(c)(1) is being revised to provide for 7 days to object to a proposed settlement, instead of the present 5 days.

In addition to the foregoing time changes, many other revisions have been made to the statements of procedure to conform the nomenclature, style, and format of the statements to the rules and regulations, which have been amended over the years. The Board is publishing the statements of procedure in their entirety because of the extensive number of sections that are affected by these revisions.

List of Subjects in 29 CFR Part 101

Administrative practice and procedure, Labor management relations.

Accordingly, 29 CFR Part 101 is revised to read as follows:

PART 101—STATEMENTS OF PROCEDURES

Subpart A—General Statement

Sec.

- 101.1 General statement.

Subpart B—Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

- 101.2 Initiation of unfair labor practice cases.
- 101.3 [Reserved]
- 101.4 Investigation of charges.
- 101.5 Withdrawal of charges.
- 101.6 Dismissal of charges and appeals to General Counsel.
- 101.7 Settlements.
- 101.8 Complaints.
- 101.9 Settlement after issuance of complaint.
- 101.10 Hearings.
- 101.11 Administrative law judge's decision.
- 101.12 Board decision and order.
- 101.13 Compliance with Board decision and order.
- 101.14 Judicial review of Board decision and order.
- 101.15 Compliance with court judgment.
- 101.16 Backpay proceedings.

Subpart C—Representation Cases Under Section 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

- 101.17 Initiation of representation cases and petitions for clarification and amendment.
- 101.18 Investigation of petition.
- 101.19 Consent adjustments before formal hearing.
- 101.20 Formal hearing.
- 101.21 Procedure after hearing.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

- 101.22 Initiation and investigation of a case under section 8(b)(7).
- 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).
- 101.24 Final disposition of a charge which has been held pending investigation of the petition.
- 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

- 101.26 Initiation of rescission of authority cases.
- 101.27 Investigation of petition; withdrawals and dismissals.
- 101.28 Consent agreements providing for election.
- 101.29 Procedure respecting election conducted without hearing.
- 101.30 Formal hearing and procedure respecting election conducted after hearing.

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

Sec.

- 101.31 Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).
- 101.32 Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.
- 101.33 Initiation of formal action; settlement.
- 101.34 Hearing.
- 101.35 Procedure before the Board.
- 101.36 Compliance with determination; further proceedings.

Subpart G—Procedure Under Section 10 (j) and (l) of the Act

- 101.37 Application for temporary relief or restraining orders.
- 101.38 Change of circumstances.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

- 101.39 Initiation of advisory opinion case.
- 101.40 Proceedings following the filing of the petition.
- 101.41 Informal procedures for obtaining opinions on jurisdictional questions.
- 101.42 Procedures for obtaining declaratory orders of the Board.
- 101.43 Proceedings following the filing of the petition.

Authority: Sec. 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a)(1) of the Administrative Procedure Act (5 U.S.C. 551, 552(a)(1)).

Subpart A—General Statement

§ 101.1 General statement.

The following statements of the general course and method by which the Board's functions are channeled and determined are issued and published pursuant to 5 U.S.C. 552(a)(1)(B).

Subpart B—Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

§ 101.2 Initiation of unfair labor practice cases.

The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of the persons' knowledge and belief. The charge is filed with the Regional Director for the Region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the Regional Office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

§ 101.3 [Reserved]

§ 101.4 Investigation of charges.

When the charge is received in the Regional Office it is filed, docketed, and assigned a case number. The Regional Director may cause a copy of the charge to be served on the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the Act is the exclusive responsibility of the charging party and not of the Regional Director. The Regional Director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charge, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violations of section 8(b)(4) (A), (B), and (C), charges alleging violations of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section 10(1) of the Act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violations of sections 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(1) of the Act. The Regional Director may exercise discretion to dispense with any portion of the investigation described in this section as appears necessary in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

§ 101.5 Withdrawal of charges.

If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the Regional Director recommends withdrawal of the charge by the person who filed. Withdrawal may also be requested on the initiative of the

complainant. If the complainant accepts the recommendation of the Regional Director or requests withdrawal, the respondent is immediately notified of the withdrawal of the charge.

§ 101.6 Dismissal of charges and appeals to the General Counsel.

If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of this section, together with a simple statement of the grounds therefor, and the complainant's right of appeal to the General Counsel in Washington, DC, within 14 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington, DC, where the case is fully reviewed by the General Counsel with staff assistance. Oral presentation of the appeal issues may be permitted a party on timely written request, in which event the other parties are notified and afforded a like opportunity at another appropriate time. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of affirmance, or may direct the Regional Director to take further action.

§ 101.7 Settlements.

Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for an appeal to the General Counsel, as described in § 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. Proof of compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform the obligations under the informal agreement, the Regional Director may determine to institute formal proceedings.

§ 101.8 Complaints.

If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the

Regional Director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the Regional Director, at the discretion of the General Counsel, must submit the case for advice from the General Counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 14 days of its receipt, setting forth a statement of its defense.

§ 101.9 Settlement after issuance of complaint.

(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or commenced, the attorney in charge of the case and the Regional Director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, DC. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the Regional Director, who has authority to withdraw the complaint before the hearing (§ 102.18), may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of a complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the Regional Director, the respondent, and any other parties whose consent may be required, the Regional Director serves a copy of the proposed settlement

agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 7 days after service of these documents, the charging party may file with the Regional Director a written statement of any objections to the proposed settlement. Such objections will be considered by the Regional Director in determining whether to approve the proposed settlement. If the settlement is approved by the Regional Director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the Regional Director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the Regional Director's written statements are submitted to Washington, DC, where they are reviewed by the General Counsel. If the General Counsel decides to approve the settlement agreement, the charging party is so informed and the agreement and accompanying documents are submitted to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, DC, a further statement in support of objections to the settlement agreement.

(3) If the settlement agreement approved by the Regional Director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the Regional Director's action to the General Counsel, as provided in § 102.19 of the Board's Rules and Regulations.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26.

(e)(1) In the event the respondent fails to comply with the terms of a settlement

stipulation, upon which a Board order and court judgment are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a settlement stipulation providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the Regional Director may set the agreement aside and institute further proceedings.

§ 101.10 Hearings.

(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the Region where the charge originated. A duly designated administrative law judge presides over the hearing. The Government's case is conducted by an attorney attached to the Board's Regional Office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the General Counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena.

(b) The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice. The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act (5 U.S.C. 556):

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party

and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence.

(2) Every party has the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(3) Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party is on timely request afforded a reasonable opportunity to show the contrary.

(4) Subject to the approval of the administrative law judge, all parties to the proceeding voluntarily may enter into a stipulation dispensing with a verbatim written transcript of record of the oral testimony adduced at the hearing and providing for the waiver by the respective parties of their right to file with the Board exceptions to the findings of fact (but not to conclusions of law or recommended orders) in the administrative law judge's decision.

§ 101.11 Administrative law judge's decision.

(a) At the conclusion of the hearing the administrative law judge prepares a decision stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues, and making recommendations as to action which should be taken in the case. The administrative law judge may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

(b) The administrative law judge's decision is filed with the Board in Washington, DC, and copies are simultaneously served on each of the parties. At the same time the Board, through its Executive Secretary, issues and serves on each of the parties an order transferring the case to the Board. The parties may accept and comply with the administrative law judge's recommended order, which, in the absence of exceptions, shall become the order of the Board. Or, the parties or counsel for the Board may file exceptions to the administrative law judge's decision with the Board. Whenever any party files exceptions, any other party may file an answering brief limited to questions raised in the exceptions and/or may file cross-exceptions relating to any portion of the administrative law judge's decision. Cross-exceptions may be filed only by a party who has not previously filed exceptions. Whenever any party files cross-exceptions, any other party may

file an answering brief to the cross-exceptions. The parties may request permission to appear and argue orally before the Board in Washington, DC. They may also submit proposed findings and conclusions to the Board.

§ 101.12 Board decision and order.

(a) If any party files exceptions to the administrative law judge's decision, the Board, with the assistance of the staff counsel to each Board Member who function in much the same manner as law clerks do for judges, reviews the entire record, including the administrative law judge's decision and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the administrative law judge's staff of the division of judges or with any agent of the General Counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the administrative law judge. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

(b) If no exceptions are filed, the administrative law judge's decision and recommended order automatically become the decision and order of the Board pursuant to section 10(c) of the Act. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

§ 101.13 Compliance with Board decision and order.

(a) Shortly after the Board's decision and order is issued the Director of the Regional Office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the Regional Director submits a report to that effect to Washington, DC, after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to

implement the order with an enforcing court judgment. Subsequent violations of the order may become the basis of further proceedings.

§ 101.14 Judicial review of Board decision and order.

If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent may petition the circuit court of appeals to review and set aside the Board's order. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's judgment, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

§ 101.15 Compliance with court judgment.

After a Board order has been enforced by a court judgment, the Board has the responsibility of obtaining compliance with that judgment. Investigation is made by the Regional Office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's judgment, the General Counsel may, on behalf of the Board, petition the court to hold the respondent in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

§ 101.16 Backpay proceedings.

(a) After a Board order directing the payment of backpay has been issued or after enforcement of such order by a court judgment, if informal efforts to dispose of the matter prove unsuccessful, the Regional Director then has discretion to issue a "backpay specification" in the name of the Board and a notice of hearing before an administrative law judge, both of which are served on the parties involved. The specification sets forth computations showing gross and net backpay due and any other pertinent information. The respondent must file an answer within 21 days of the receipt of the specification, setting forth a particularized statement of its defense.

(b) In the alternative, the Regional Director, under the circumstances specified above, may issue and serve on the parties a notice of hearing only, without a specification. Such notice contains, in addition to the time and place of hearing before an administrative law judge, a brief statement of the matters in controversy.

(c) The procedure before the administrative law judge or the Board, whether initiated by the "backpay specification" or by notice of hearing without backpay specification, is substantially the same as that described in §§ 101.10 to 101.14, inclusive.

Subpart C—Representation Cases Under Section 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

§ 101.17 Initiation of representation cases and petitions for clarification and amendment.

The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petition by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present a claim to be recognized as the exclusive bargaining representative. If there is a certified or currently recognized representative, any employee, or group of employees, or any individual or labor organization acting in their behalf may also file decertification petitions to test the question of whether the certified or recognized agent is still the representative of the employees. If there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation, a party may file a petition for clarification of the bargaining unit. If there is a unit covered by a certification and there is no question concerning representation, any party may file a petition for amendment to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his or her knowledge and belief. It is filed with the Regional Director for the Region in which the proposed or actual bargaining unit exists. Petition forms, which are

supplied by the Regional Office upon request, provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations which claim to represent the employees. If a petition is filed by a labor organization seeking certification, or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification petition. If a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

§ 101.18 Investigation of petition.

(a) Upon receipt of the petition in the Regional Office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. The field examiner conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the Act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the Act, (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the

employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required and the Regional Director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The field examiner, or other member of the staff, attempts to ascertain from all interested parties whether or not the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing in the discretion of the hearing officer upon such terms as he or she deems just.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in paragraph (a) of this section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If the petitioner, despite the Regional Director's recommendations, refuses to withdraw the petition, the Regional Director then dismisses the petition, stating the grounds for dismissal and informing the petitioner of its right of appeal to the Board in Washington, DC. The petition may also be dismissed in the discretion of the Regional Director if the petitioner fails to make available necessary facts which are in its possession. The petitioner may within 14 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington, DC; after a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmation, or may direct the Regional Director to take further action.

§ 101.19 Consent adjustments before formal hearing.

The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as consent-election agreement followed by Regional Director's determination,

and stipulated election agreement followed by Board certification. Forms for use in these informal procedures are available in the Regional Offices.

(a)(1) The consent-election agreement followed by the Regional Director's determination of representatives is one method of informal adjustment of representation cases. The terms of the agreement providing for this form of adjustment are set forth in printed forms, which are available upon request at the Board's Regional Offices. Under these terms the parties agree with respect to the appropriate unit, the payroll period to be used as the basis of eligibility to vote in an election, and the place, date, and hours of balloting. A Board agent arranges the details incident to the mechanics and conduct of the election. For example, the Board agent usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election shall be adequately publicized by the posting of official notices in the establishment whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules.

(2) The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth. The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots.

(3) Customarily the Board agents, in the presence and with the assistance of the authorized observers, count and tabulate the ballots immediately after the closing of the polls. A complete tally of the ballots is made available to the parties upon the conclusion of the election.

(4) If challenged ballots are sufficient in number to affect the results of the election, the Regional Director conducts an investigation and rules on the challenges. Similarly, if objections to the conduct of the election are filed within 7 days after the tally of ballots has been prepared, the Regional Director likewise conducts an investigation and rules on the objections. If, after investigation, the objections are found to have merit, the Regional Director may void the election results and conduct a new election.

(5) This form of agreement provides that the rulings of the Regional Director on all questions relating to the election (for example, eligibility to vote and the validity of challenges and objections) are final and binding. Also, the agreement provides for the conduct of a runoff election, in accordance with the provisions of the Board's Rules and Regulations, if two or more labor organizations appear on the ballot and no one choice receives the majority of the valid votes cast.

(6) The Regional Director issues to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

(b) The stipulated election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, can be the basis of a formal decision by the Board instead of an informal determination by the Regional Director, except that if the Regional Director decides that a hearing on objections or challenged ballots is necessary the Director may direct such a hearing before a hearing officer, or, if the case is consolidated with an unfair labor practice proceeding, before an administrative law judge. If a hearing is directed, such action on the part of the Regional Director constitutes a transfer of the case to the Board. Thus, except for directing a hearing, it is provided that the Board, rather than the Regional Director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. If challenged ballots are sufficient in number to affect the results of the election, the Regional Director conducts an investigation and issues a report on the challenges instead of ruling thereon, unless the Director elects to hold a hearing. Similarly, if objections to the conduct of the election are filed within 7 days after the tally of ballots has been prepared, the Regional Director likewise conducts an investigation and issues a report instead of ruling on the validity of the objections, unless the Director elects to hold a hearing. The Regional Director's report is served on the parties, who may file exceptions thereto within 14 days with the Board in Washington, DC. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the Regional Director's report and take appropriate action in

termination of the proceedings. If a hearing is ordered by the Regional Director or the Board on the challenged ballots or objections, all parties are heard and a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served on the parties, who may file exceptions thereto within 14 days with the Board in Washington, DC. The record made on the hearing is reviewed by the Board with the assistance of its staff counsel and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the Regional Director. If the union has been selected as the representative, the Board or the Regional Director, as the case may be, issues its certification and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the Regional Director, as the case may be, certifies that the union is not the chosen representative.

§ 101.20 Formal hearing.

(a) If no informal adjustment of the question concerning representation has been effected and it appears to the Regional Director that formal action is necessary, the Regional Director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by a decision and direction of election or dismissal of the case. In certain types of cases, involving novel or complex issues, the Regional Director may submit the case for advice to the Board before issuing notice of hearing.

(b) The notice of hearing, together with a copy of the petition, is served on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(c) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In

most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

§ 101.21 Procedure after hearing.

(a) Pursuant to section 3(b) of the Act, the Board has delegated to its Regional Directors its powers under section 9 of the Act to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof. These powers include the issuance of such decisions, orders, rulings, directions, and certifications as are necessary to process any representation or deauthorization petition. Thus, by way of illustration and not of limitation, the Regional Director may dispose of petitions by administrative dismissal or by decision after formal hearing; pass upon rulings made at hearings and requests for extensions of time for filing of briefs; rule on objections to elections and challenged ballots in connection with elections directed by the Regional Director or the Board, after administrative investigation or formal hearing; rule on motions to amend or rescind any certification issued after the effective date of the delegation; and entertain motions for oral argument. The Regional Director may at any time transfer the case to the Board for decision, but until such action is taken, it will be presumed that the Regional Director will decide the case. In the event the Regional Director decides the issues in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.

(b) Upon the close of the hearing, the entire record in the case is forwarded to the Regional Director or, upon issuance by the Regional Director of an order transferring the case, to the Board in Washington, DC. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the issues. All parties may file briefs with the Regional Director or, if the case is transferred to the Board at the close of the hearing, with the Board, within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, briefs may be filed with the Board within the time prescribed by the Regional Director. The parties may also request to be heard orally. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. After

review of the entire case, the Regional Director or the Board issues a decision, either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the Regional Director in the manner already described in § 101.19.

(c) With respect to objections to the conduct of the election and challenged ballots, the Regional Director has discretion (1) to issue a report on such objections and/or challenged ballots and transmit the issues to the Board for resolution, as in cases involving stipulated elections to be followed by Board certifications, or (2) to decide the issues on the basis of the administrative investigation or after a hearing, with the right to transfer the case to the Board for decision at any time prior to disposition of the issues on the merits. In the event the Regional Director adopts the first procedure, the parties have the same rights, and the same procedure is followed, as has already been described in connection with the postelection procedures in cases involving stipulated elections to be followed by Board certifications. In the event the Regional Director adopts the second procedure, the parties have the same rights, and the same procedure is followed, as has already been described in connection with hearings before elections.

(d) The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed. As to administrative dismissals prior to the close of hearing, see § 101.18(c).

(e) If the election involves two or more labor organizations and if the election results are inconclusive

because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

§ 101.22 Initiation and investigation of a case under section 8(b)(7).

(a) The investigation of an alleged violation of section 8(b)(7) of the Act is initiated by the filing of a charge. The manner of filing such charge and the contents thereof are the same as described in § 101.2. In some cases, at the time of the investigation of the charge, there may be pending a representation petition involving the employees of the employer named in the charge. In those cases, the results of the investigation of the charge will determine the cause of the petition.

(b) The investigation of the charge is conducted in accordance with the provisions of § 101.4, insofar as they are applicable. If the investigation reveals that there is merit in the charge, a complaint is issued as described in § 101.8, and an application is made for an injunction under section 10(1) of the Act, as described in § 101.37. If the investigation reveals that there is no merit in the charge, the Regional Director, absent a withdrawal of the charge, dismisses it, subject to appeal to the General Counsel. However, if the investigation reveals that issuance of a complaint may be warranted but for the pendency of a representation petition involving the employees of the employer named in the charge, action on the charge is suspended pending the investigation of the petition as provided in § 101.23.

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition¹ involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that: (1) The employer's operations affect commerce within the meaning of the Act; (2) picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act; (3) subparagraph (C) of that section of the Act is applicable to the picketing; and (4) the petition has been filed within

a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the Regional Director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the Regional Director determines that an election is warranted, the Director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If it is determined that an election is not warranted, the Director dismisses the petition or makes other disposition of the matter. Should the Regional Director conclude that an election is warranted, the Director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in § 101.19, except that the Regional Director's rulings on any objections to the conduct of the election or challenged ballots are final and binding, unless the Board, on an application by one of the parties, grants such party special permission to appeal from the Regional Director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the Regional Director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the Regional Director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other appropriate action.

(c) If the Regional Director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the Director may order a hearing on the issues. This hearing is followed by Regional Director or Board decision and direction of

election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in §§ 101.20 and 101.21, except that the parties may not file briefs with the Regional Director or the Board unless special permission therefor is granted, but may state their respective legal positions fully on the record at the hearing, and except that any request for review must be filed promptly after issuance of the Regional Director's decision.

(d) Should the parties so desire, they may, with the approval of the Regional Director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in § 101.19(a).

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the Regional Director may process it under the procedures set forth in subpart C.

§ 101.24 Final disposition of a charge which has been held pending investigation of the petition.

(a) Upon the determination that the issuance of a direction of election is warranted on the petition, the Regional Director, absent withdrawal of the charge, dismisses it subject to an appeal to the General Counsel in Washington, DC.

(b) If, however, the petition is dismissed or withdrawn, the investigation of the charge is resumed, and the appropriate steps described in § 101.22 are taken with respect to it.

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the Regional Director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the Regional Director advises the petitioner of the determination to process the petition under the procedures described in subpart C. In either event, the Regional Director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the Regional Director's action. Such party must request such review promptly, in writing, and state briefly the grounds

¹ The manner of filing of such petition and the contents thereof are the same as described in § 101.17, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

relied on. Such party must also immediately serve a copy on the other parties, including the Regional Director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the Regional Director, unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

§ 101.26 Initiation of rescission of authority cases.

The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the Regional Director for the Region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. The blank form, which is supplied by the Regional Office upon request, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, and the names of any other labor organizations which claim to represent the employees. The petitioner must supply with the petition, or within 48 hours after filing, evidence of authorization from the employees.

§ 101.27 Investigation of petition; withdrawals and dismissals.

(a) Upon receipt of the petition in the Regional Office, it is filed, docketed, and assigned to a member of the staff, usually a field examiner, for investigation. The field examiner conducts an investigation to ascertain: (1) Whether the employer's operations affect commerce within the meaning of the Act, (2) whether there is in effect an agreement requiring as a condition of employment membership in a labor organization, (3) whether the petitioner has been authorized by at least 30 percent of the employees to file such a petition, and (4) whether an election

would effectuate the policies of the Act by providing for a free expression of choice by the employees. The evidence of designation submitted by the petitioner, usually in the form of cards signed by individual employees authorizing the filing of such a petition, is checked to determine the proportion of employees who desire rescission.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that an election is inappropriate, because, among other possible reasons, the petitioner's card-showing is insufficient to meet the 30-percent statutory requirement referred to in subsection (a) of this section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If the petitioner, despite the Regional Director's recommendation, refuses to withdraw the petition, the Regional Director then dismisses the petition, stating the grounds for his dismissal and informing the petitioner of the right of appeal to the Board in Washington, DC. The petitioner may within 14 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington, DC. The request shall contain a complete statement setting forth the facts and reasons upon which the request is made. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds for its affirmance, or may direct the Regional Director to take further action.

§ 101.28 Consent agreements providing for election.

The Board makes available to the parties two types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are commonly referred to as (a) consent-election agreement followed by Regional Director's determination, and (b) stipulated election agreement followed by Board certification. Forms for use in these informal procedures are available in the Regional Offices. The procedures to be used in connection with a consent-election agreement providing for Regional Director's determination and a stipulated election agreement providing for Board certification are the same as those already described in subpart C of the Statements of Procedure in connection with similar agreements in representation cases under section 9(c) of the Act, except that no provision is made for runoff elections.

§ 101.29 Procedure respecting election conducted without hearing.

If the Regional Director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the Regional Director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as has already been described in subpart C of the Statements of Procedure in connection with the postelection procedures in representation cases under section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the Regional Director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of the Statements of Procedure respecting representation cases arising under section 9(c) of the Act. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the Regional Director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by Regional Director or Board decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full

opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the Regional Director or the Board, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. All parties may file briefs with the Regional Director or the Board within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, briefs may be filed with the Board within the time prescribed by the Regional Director. The parties may also request to be heard orally. Because of the nature of the proceeding, however, permission to argue orally is rarely granted. After review of the entire case, the Board issues a decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the Regional Director in the manner already described in § 101.19.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as has already been described in connection with the postelection procedures in representation cases under section 9(c) of the Act.

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

§ 101.31 Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).

The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in § 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the Regional Director serves on the parties a copy of the charge together with a notice of the filing of such charge.

§ 101.32 Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.

These matters are handled as described in § 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the Act are given priority over all other cases in the office

except other cases under section 10(1) of the Act and cases of like character.

§ 101.33 Initiation of formal action; settlement.

If, after investigation, it appears that the Board should determine the dispute under section 10(k) of the Act, the Regional Director issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the Regional Director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the Regional Director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the Act, or any other satisfactory method to resolve the dispute. If the agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director dismisses the charge against that union irrespective of whether the employer complies with that determination.

§ 101.34 Hearing.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

§ 101.35 Procedure before the Board.

The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

§ 101.36 Compliance with determination; further proceedings.

After the issuance of determination by the Board, the Regional Director in the Region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If satisfied that the parties are complying with the determination, the Regional Director dismisses the charge. If not satisfied that the parties are complying, the Regional Director issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the Act, and the proceeding follows the procedure outlined in §§ 101.8 to 101.15, inclusive. However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director dismisses the charge against that union irrespective of whether the employer complies with the determination.

Subpart G—Procedure Under Section 10 (j) and (l) of the Act

§ 101.37 Application for temporary relief or restraining orders.

Whenever it is deemed advisable to seek temporary injunctive relief under section 10(j) or whenever it is determined that a complaint should issue alleging violation of section 8(b)(4)(A), (B), or (C), or section 8(e), or section 8(b)(7), or whenever it is appropriate to seek temporary injunctive relief for a violation of section 8(b)(4)(D), the officer or regional attorney to whom the matter has been referred will make application

for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business, except that such officer or regional attorney will not apply for injunctive relief under section 10(l) with respect to an alleged violation of section 8(b)(7) if a charge under section 8(a)(2) has been filed and, after preliminary investigation, there is reasonable cause to believe that such charge is true and a complaint should issue.

§ 101.38 Change of circumstances.

Whenever a temporary injunction has been obtained pursuant to section 10(j) and thereafter the administrative law judge hearing the complaint, upon which the determination to seek such injunction was predicated, recommends dismissal of such complaint, in whole or in part, the officer or regional attorney handling the case for the Board suggests to the district court which issued the temporary injunction the possible change in circumstances arising out of the findings and recommendations of the administrative law judge.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

§ 101.39 Initiation of advisory opinion case.

The question of whether the Board will assert jurisdiction over a labor dispute which is the subject of a proceeding in an agency or court of a State or territory is initiated by the filing of a petition with the Board. This petition may be filed only if: (a) A proceeding is currently pending before such agency or court, and (b) the petitioner is a party to such proceeding before such agency or court or is the agency or court itself. The petition must be in writing and signed. When a petition is filed by a private party, it shall either be sworn to or shall contain a declaration under the penalties of the Criminal Code that its contents are true and correct. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by § 102.99 of the Board's Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn at any time before the Board issues its advisory opinion determining whether it would or would not assert

jurisdiction on the basis of the facts before it.

§ 101.40 Proceedings following the filing of the petition.

(a) A copy of the petition is served on all other parties and the appropriate Regional Director by the petitioner.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted at the discretion of the Board.

(c) Parties other than the petitioner may reply to the petition in writing, admitting or denying any or all of the matters asserted therein.

(d) No briefs shall be filed except upon special permission of the Board.

(e) After review of the entire record, the Board issues an advisory opinion as to whether the facts presented would or would not cause it to assert jurisdiction over the case if the case had been originally filed before it. The Board will limit its advisory opinion to the jurisdictional issue confronting it, and will not presume to render an opinion on the merits of the case or on the question of whether the subject matter of the dispute is governed by the Labor Management Relations Act.

§ 101.41 Informal procedures for obtaining opinions on jurisdictional questions.

Although a formal petition is necessary to obtain an advisory opinion from the Board, other avenues are available to persons seeking informal and, in most cases, speedy opinions on jurisdictional issues. In discussion of jurisdictional questions informally with Regional Office personnel, information and advice concerning the Board's jurisdictional standards may be obtained. Such practices are not intended to be discouraged by the rules providing for formal advisory opinions by the Board, although the opinions expressed by such personnel are not to be regarded as binding upon the Board or the General Counsel.

§ 101.42 Procedures for obtaining declaratory orders of the Board.

(a) When both an unfair labor practice charge and a representation petition are pending concurrently in a Regional Office, appeals from a Regional Director's dismissals thereof do not follow the same course. Appeal from the dismissal of a charge must be made to the General Counsel, while appeal from dismissal of a representation petition may be made to the Board. To obtain uniformity in disposing of such cases on jurisdictional grounds at the same stage of each proceeding, the General Counsel may file a petition for a declaratory

order of the Board. Such order is intended only to remove uncertainty with respect to the question of whether the Board would assert jurisdiction over the labor dispute.

(b) A petition to obtain a declaratory Board order may be filed only by the General Counsel. It must be in writing and signed. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by § 102.106 of the Board's Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn any time before the Board issues its declaratory order deciding whether it would or would not assert jurisdiction over the cases.

§ 101.43 Proceedings following the filing of the petition.

(a) A copy of the petition is served on all other parties.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted at the discretion of the Board.

(c) All other parties may reply to the petition in writing.

(d) Briefs may be filed.

(e) After review of the record, the Board issues a declaratory order as to whether it will assert jurisdiction over the cases, but it will not render a decision on the merits at this stage of the cases.

(f) The declaratory Board order will be binding on the parties in both cases.

Dated at Washington, DC, June 23, 1987.

By direction of the Board.

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[FR Doc. 87-14587 Filed 6-25-87; 8:45 am]

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

Currency and Foreign Transactions; Amendment to the Bank Secrecy Act Regarding Administrative Summons Authority

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Anti-Drug Abuse Act of 1986, Pub. L. 99-570, which the President signed into law on October 27, 1986, sets forth a number of statutory provisions relating to the fight against money

laundering and drug trafficking. These provisions include an amendment to the Bank Secrecy Act that authorizes the Secretary of the Treasury or a delegate of the Secretary to summon financial institutions, employees or officers, present or former, and any other person having possession, custody, or care of records required to be maintained under the Bank Secrecy Act, for the purpose of aiding in civil enforcement investigation of possible violations of Title II of the Bank Secrecy Act and other related statutes.

EFFECTIVE DATE: June 26, 1987.

FOR FURTHER INFORMATION CONTACT: Jonathan J. Rusch, Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, Room 4320, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, (202) 566-8022.

SUPPLEMENTARY INFORMATION: The Bank Secrecy Act, Pub. L. 91-508 (codified at 12 U.S.C. 1829b, 12 U.S.C. 1951 *et seq.*, and 31 U.S.C. 5311 through 5324), empowers the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, and regulatory matters. Treasury regulations implementing the Act, 31 CFR Part 103, require a variety of financial institutions to file reports of large currency transactions. The Secretary also has the authority to impose civil penalties for failures to comply with these regulations.

Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, the "Money Laundering Control Act of 1986," contains amendments to, among other statutes, the Bank Secrecy Act. Section 1356 of Subtitle H makes several substantive changes in 31 U.S.C. 5318. Among these changes is an expansion of the compliance authority of the Secretary to permit the Secretary or his delegates to issue administrative summonses for use in investigating civil violations of the Currency and Foreign Transactions Reporting Act (i.e., Title II of the Bank Secrecy Act), section 21 of the Federal Deposit Insurance Act, section 411 of the National Housing Act, chapter 2 of Pub. L. 91-508 (12 U.S.C. 1951 *et seq.*), or any regulation under any such provision. As stated in the Senate Judiciary Committee's report on the Money Laundering Control Act, "It is imperative to the effectiveness of the Bank Secrecy Act that the Secretary have the ability to summon witnesses and documents, both to investigate violations of the act and to assess the appropriate level of civil penalties for

violations of the act." S. Rep. No. 433, 99th Cong., 2d Sess. 17 (1986).

In relevant part, 31 U.S.C. 5318, as amended, gives the Secretary the authority to:

Summon a financial institution, an officer or employee of a financial institution (including a former officer or employee), or any person having possession, custody, or care of the reports and records required under this subchapter, to appear before the Secretary of the Treasury or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation described [above].

The new statute also sets forth various administrative aspects of the summons authority, and the manner for service of the summons and reimbursement of any costs. The statute provides that summoned parties will be reimbursed for the costs of compliance with the summons only with respect to fees and mileage for travel within the United States that are paid witnesses in Federal courts. Other costs, such as the cost of copying or transporting documents, will not be reimbursed. Finally, the new statute provides that summonses may be referred to the Attorney General for judicial enforcement in the event of contumacy or refusal to comply.

The revised regulations below add a new Subpart E to Part 103 of Title 31 of the Code of Federal Regulations in order to incorporate this new authority into the Bank Secrecy Act regulations. In addition to outlining the use and limitations of the summons authority and various administrative aspects of the summons, the regulations also state which Treasury Department or bureau officials are authorized to issue summonses. Authority to issue summonses is delegated to various officials in the Office of the Assistant Secretary (Enforcement), the U.S. Customs Service, and the Internal Revenue Service. The Internal Revenue Service's Criminal Investigation Division is being authorized to issue summonses solely for the purposes of perfecting seizures and forfeitures related to civil enforcement of the Bank Secrecy Act.

Applicability of Notice and Effective Date Requirements

Because this amendment merely conforms the present regulations to a recent statutory change, and promulgates Department procedures and practices for issuance and service of a summons in conformance with the

statute, for such good cause found, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and a delayed effective date pursuant to 5 U.S.C. 553(d)(3) are unnecessary.

Executive Order 12291

As this final rule promulgates a regulation dealing solely with issues of agency management and organization, compliance with Executive Order 12291 and a Regulatory Impact Analysis are not required.

Regulatory Flexibility Act

Since no notice of proposed rulemaking is required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or by any other statute, this document is not subject to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 603 and 604.

Drafting Information

The principal authors of this document are the Office of the Assistant General Counsel (Enforcement) and Jonathan J. Rusch, the Director of the Office of Financial Enforcement, Department of the Treasury. However, personnel from other offices participated in its development.

List of Subjects in 31 CFR Part 103

Authority delegations (Government agencies), Banks and banking, Currency, Foreign banking, Investigations, Law enforcement, Reporting and recordkeeping requirements, Taxes.

Amendment

For the reasons set forth in the preamble, 31 CFR Part 103 is amended to read as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for Part 103 is amended to read as follows:

Authority: Pub. L. 91-508, Title I, 84 Stat. 1114 (12 U.S.C. 1829b, 1951-1959); and the Currency and Foreign Transactions Reporting Act, Pub. L. 91-508, Title II, 84 Stat. 1118, as amended (31 U.S.C. 5311-5324).

2. The table of contents for Part 103 is amended by adding after "§ 103.53 Structured Transactions," the following Subpart E:

Subpart E—Summons

Sec:	
103.61	General.
103.62	Persons who may issue summonses.
103.63	Contents of summonses.
103.64	Service of summonses.

Sec:
 103.65 Examination of witnesses and records.
 103.66 Enforcement of summons.
 103.67 Payment of expenses.
 * * *

2. Part 103 is amended by adding at the end a new Subpart E, to read as follows:

Subpart E—Summons

§ 103.61 General.

For any investigation for the purpose of civil enforcement of violations of the Currency and Foreign Transactions Reporting Act, as amended (31 U.S.C. 5311 through 5324), section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), section 411 of the National Housing Act (12 U.S.C. 1730d), or Chapter 2 of Pub. L. 91-508 (12 U.S.C. 1951 *et seq.*), or any regulation under any such provision, the Secretary or delegate of the Secretary may summon a financial institution or an officer or employee of a financial institution (including a former officer or employee), or any person having possession, custody, or care of any of the records and reports required under the Currency and Foreign Transactions Reporting Act or this part to appear before the Secretary or his delegate, at a time and place named in the summons, and to give testimony, under oath, and be examined, and to produce such books, papers, records, or other data as may be relevant or material to such investigation.

§ 103.62 Persons who may issue summons.

For purposes of this part, the following officials are hereby designated as delegates of the Secretary who are authorized to issue a summons under § 103.61, solely for the purposes of civil enforcement of this part:

(a) *Office of the Secretary.* The Assistant Secretary (Enforcement), the Deputy Assistant Secretary (Law Enforcement), and the Director, Office of Financial Enforcement.

(b) *Internal Revenue Service.* Except with respect to § 103.23 of this part, the Commissioner, the Deputy Commissioner, the Associate Commissioner (Operations), the Assistant Commissioner (Examination), Regional Commissioners, Assistant Regional Commissioners (Examination), District Directors, District Examination Division Chiefs, and, for the purposes of perfecting seizures and forfeitures related to civil enforcement of this part, the Assistant Commissioner (Criminal Investigation), Assistant Regional Commissioners (Criminal Investigation),

and District Criminal Investigation Division Chiefs.

(c) *Customs Service.* With respect to § 103.23 of this part, the Commissioner, the Deputy Commissioner, the Assistant Commissioner (Enforcement), Regional Commissioners, Assistant Regional Commissioners (Enforcement), and Special Agents in Charge.

§ 103.63 Contents of summons.

(a) *Summons for testimony.* Any summons issued under § 103.61 of this part to compel the appearance and testimony of a person shall state:

(1) The name, title, address, and telephone number of the person before whom the appearance shall take place (who may be a person other than the persons who are authorized to issue such a summons under § 103.62 of this part);

(2) The address to which the person summoned shall report for the appearance;

(3) The date and time of the appearance; and

(4) The name, title, address, and telephone number of the person who has issued the summons.

(b) *Summons of books, papers, records, or data.* Any summons issued under § 103.61 of this part to require the production of books, papers, records, or other data shall describe the materials to be produced with reasonable specificity, and shall state:

(1) The name, title, address, and telephone number of the person to whom the materials shall be produced (who may be a person other than the persons who are authorized to issue such a summons under § 103.62 of this part);

(2) The address at which the person summoned shall produce the materials, not to exceed 500 miles from any place where the financial institution operates or conducts business in the United States;

(3) The specific manner of production, whether by personal delivery, by mail, or by messenger service;

(4) The date and time for production; and

(5) The name, title, address, and telephone number of the person who has issued the summons.

§ 103.64 Service of summons.

(a) *Who may serve.* Any delegate of the Secretary authorized under § 103.62 of this part to issue a summons, or any other person authorized by law to serve summonses or other process, is hereby authorized to serve a summons issued under this part.

(b) *Manner of service.* Service of a summons may be made—

(1) Upon any person, by registered mail, return receipt requested, directed to the person summoned;

(2) Upon a natural person by personal delivery; or

(3) Upon any other person by delivery to an officer, managing or general agent, or any other agent authorized to receive service of process.

(c) *Certificate of service.* The summons shall contain a certificate of service to be signed by the server of the summons. On the hearing of an application for enforcement of the summons, the certificate of service signed by the person serving the summons shall be evidence of the facts it states.

§ 103.65 Examination of witnesses and records.

(a) *General.* Any delegate of the Secretary authorized under § 103.62 of this part to issue a summons, or any officer or employee of the Treasury Department or any component thereof who is designated by that person (whether in the summons or otherwise), is hereby authorized to receive evidence and to examine witnesses pursuant to the summons. Any person authorized by law may administer any oaths and affirmations that may be required under this Subpart.

(b) *Testimony taken under oath.* Testimony of any person under this Part may be taken under oath, and shall be taken down in writing by the person examining the person summoned or shall be otherwise transcribed. After the testimony of a witness has been transcribed, a copy of that transcript shall be made available to the witness upon request, unless for good cause the person issuing the summons determines, under 5 U.S.C. 555, that a copy should not be provided. If such a determination has been made, the witness shall be limited to inspection of the official transcript of the testimony.

(c) *Disclosure of summons, testimony, or records.* Unless the Secretary or a delegate of the Secretary listed under § 103.62(a) of this part so authorizes in writing, or it is otherwise required by law, no delegate of the Secretary listed under § 103.62 (b) or (c) of this part or other officer or employee of the Treasury Department or any component thereof shall—

(1) Make public the name of any person to whom a summons has been issued under this part, or release any information to the public concerning that person or the issuance of a summons to that person prior to the time and date set for that person's appearance or production of records; or

(2) Disclose any testimony taken (including the name of the witness) or material presented pursuant to the summons, to any person other than an officer or employee of the Treasury Department or of any component thereof.

Nothing in the preceding sentence shall preclude a delegate of the Secretary, or other officer or employee of the Treasury Department or any component thereof, from disclosing testimony taken, or material presented pursuant to a summons issued under this part, to any person in order to obtain necessary information for investigative purposes relating to the performance of official duties, or to any officer or employee of the Department of Justice in connection with a possible violation of Federal law.

§ 103.66 Enforcement of summons.

In the case of contumacy by, or refusal to obey a summons issued to, any person under this part, the Secretary or any delegate of the Secretary listed under § 103.62 of this part shall refer the matter to the Attorney General or delegate of the Attorney General (including any United States Attorney or Assistant United States Attorney, as appropriate), who may bring an action to compel compliance with the summons in any court of the United States within the jurisdiction of which the investigation which gave rise to the summons being or has been carried on, the jurisdiction in which the person summoned is a resident, or the jurisdiction in which the person summoned carries on business or may be found. When a referral is made by a delegate of the Secretary other than a delegate named in § 103.62(a) of this part, prompt notification of the referral must be made to the Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement). The court may issue an order requiring the person summoned to appear before the Secretary or delegate of the Secretary to produce books, papers, records, or other data, to give testimony as may be necessary in order to explain how such material was compiled and maintained, and to pay the costs of the proceeding. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any case under this section may be served in any judicial district in which such person may be found.

§ 103.67 Payment of expenses.

Persons summoned under this part shall be paid the same fees and mileage for travel in the United States that are paid witnesses in the courts of the

United States. The United States shall not be liable for any other expense incurred in connection with the production of books, papers, records, or other data under this part.

Dated: June 18, 1987.

Francis A. Keating, II,

Assistant Secretary (Enforcement).

[FR Doc. 87-14564 Filed 6-25-87; 8:45 am]

BILLING CODE 4810-25-M

POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual; Miscellaneous Amendments

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service hereby describes the numerous miscellaneous revisions consolidated in the Transmittal Letter for issue 23 of the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations, see 39 CFR 111.1.

Most of the revisions are minor, editorial, or clarifying. Substantive changes, such as the revised regulations on solicitations in the guise of bills, invoices, or statements of account, and on paying for COD parcels with checks made out to the mailer, have previously been published in the Federal Register.

EFFECTIVE DATE: May 1, 1987.

FOR FURTHER INFORMATION CONTACT:

Paul J. Kemp, (202) 268-2960.

SUPPLEMENTARY INFORMATION: The Domestic Mail Manual has been amended by the publication of a transmittal letter for issue 23, dated May 1, 1987. The text of all published changes is filed with the Director of the Federal Register. Subscribers to the Domestic Mail Manual receive these amendments automatically from the Government Printing Office.

The following excerpt from the Summary of Changes section of the transmittal letter for issue 23 covers the minor changes not previously described in interim or final rules published in the Federal Register.

Note.—This is a complete issue of the DMM, containing changes published in the Postal Bulletin through April 30, 1987 (Postal Bulletin 21617) and title changes resulting from reorganization. All future issues of the DMM will also be complete issues.

Summary of Changes

1. Sections 122.141; 127c-f; 128.1; 146.131; 159.11g; 159.151; 159.153; 159.326i; 352.21c-f; 353.4; 392.3; 651.212c-

f; 652.4; and 695 have been revised to clarify the proper criteria for defining the length and height of a mailpiece when defining processing category, mailability, or surchargability and to provide specific guidance to all personnel regarding the handling of nonmailable or nonstandard mail (PB 21614, 4-9-87).

2. Exhibits 122.63e-122.63i and 122.63n have been revised to reflect changes to labeling lists (PB 21611, 3-19-87; PB 21614, 4-9-87).

3. * * *

4. Sections 124.61, 124.62, and 124.63b(2) are revised to clarify requirements concerning the time that mailable perishable matter may be in the mail and the packaging of such matter (PB 21605, 2-5-87).

5. Section 124.335 is revised to reflect the Department of Transportation 50-pound weight limit per parcel for safety matches (PB 21604, 1-29-87).

6. Exhibit 125.2 is revised to reflect changes in openings of, and mailing restrictions applied to mail addressed to military post offices (PB 21606, 2-12-87; PB 21610, 3-12-87; PB 21611, 3-19-87; PB 21612, 3-26-87; PB 21614, 4-9-87; PB 21615, 4-16-87; PB 21616, 4-23-87).

7. Section 137.252, *Agency Authorization Codes*, is revised (PB 21605, 2-5-87; PB 21617, 4-30-87).

8. Sections 144.641-144.643 are revised and 144.952g is added to reflect current data processing requirements with regard to postage meters and meter stamps (PB 21609, 3-5-87).

9. * * *

10. Section 154, *Plant Load Operations*, is revised to clarify what the Postal Service and mailers must do to comply with plant load regulations (PB 21609, 3-5-87).

11. Section 156.27 is added to clarify the policy on granting a rural route customer a change in delivery service from that currently in effect when existing service causes physical hardship to that customer (PB 21615, 4-16-87).

12. Sections 159.2 through 159.5 are revised to reflect changes in the handling of undeliverable and dead mail (PB 21611, 3-19-87).

13. Sections 262, 263, and 294.1 are revised and 294.4j is added to permit mailers to waive the signature of the addressee or the addressee's agent, provided those mailers are willing to accept the postal delivery employee's signature as proof of delivery of Express Mail and they understand that no indemnity will be paid for any loss (PB 21609, 3-5-87).

14. Exhibit 310 (p. 2), sections 325.1-2.