

FERC Mandates Remote Proceedings

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The Federal Energy Regulatory Commission (FERC) has adapted swiftly to being physically closed to the public due to the pandemic. Energy industry participants should understand that wholesale energy regulation is moving forward largely on schedule, including infrastructure reviews and even complex rate hearings, now with the recently released Notice from the Chief Administrative Law Judge (AJL) that all hearings will be conducted remotely until further notice.

Chairman Neil Chatterjee has rebuffed requests from environmental interests and sympathetic members in the House of Representatives to pause action on new natural gas projects. “To shut our door to working on the nation’s critical energy infrastructure would be as irresponsible as it is shortsighted,” he wrote.

The Chairman announced new procedures on March 19, 2020. He established a liaison for all industry inquiries related to impacts of the novel coronavirus and extended deadlines for required non-statutory items such as compliance filings, rulemaking comments, and some periodic form filings. He later said that FERC will exercise appropriate prosecutorial discretion in addressing events that arise during the emergency period. The Office of Enforcement postponed audit visits and is adjusting other deadlines as appropriate. FERC now has a [web page](#) dedicated to these details.

The Office of Administrative Law Judges swung into action to maintain hearing dockets. ALJs have held both procedural and settlement conferences via teleconference and videoconference (WebEx). Technical conferences have been scheduled for full participation via a dial-in number. Such optional arrangements have been made routinely for years at the Commission at the discretion of the participants and judges. With all parties on line, interested parties may dial in on equal footing now.

On April 23, 2020, Chief ALJ Carmen Cintron issued a “Notice To the Public” indicating that all future Commission hearings must be conducted remotely through videoconference software, effective immediately and until further notice. She cited sections 554, 556, and 557 of the Administrative Procedure Act and authority delegated by the Commission Chairman to her under FERC’s rules (18 C.F.R. § 375.304(b)(1)(v)). That delegated authority, however, concerns timing and not method of hearings. There is no FERC regulation to permit remote hearings. Any person believing to be aggrieved by remote hearings could attempt to mount a legal challenge and undermine the certainty of the results of such a

process. FERC may commence an emergency rulemaking to forestall any objection.

The Notice stated that all parties can continue to comply with relevant Commission Rules, guidance, and due process procedures that normally apply to in-person hearings. The chief ALJ hopes to avoid technical difficulties by hosting an “IT Day” prior to hearings to provide all parties the opportunity to inquire about the hearing software and ask IT-related questions to Commission staff.

The Notice claims: “In short, nothing about the hearing changes, except its venue, which will now be remote.” This will be an interesting test of the Electronic Hearing Rules and Procedures that have been required for only eighteen months. The rules require, among other things, uploading hearing exhibits to a Microsoft SharePoint platform and eliminating paper as much as possible. How this process will mesh with videoconferencing remains to be seen because all participants must see (and upload) documents simultaneously. Most likely the two systems will run in parallel so that counsel and the judge will operate two computers simultaneously, requiring more than one pair of hands. That is how the presiding judge’s presentation laptop—required by the rules—now operates in person. FERC instituted optional revised exhibit submission requirements in 2015 to improve the efficiency and administrative convenience of hearings at the agency.

The goal of a FERC hearing is to build an administrative record of authenticated documents and testimony on which the agency can render complex rulings. FERC has successfully transitioned to making the administrative record electronically available. The process of creating the electronic record undoubtedly will be more awkward when done remotely. As for live examination of expert witnesses, FERC hearings seldom if ever produce a “Perry Mason” moment when the witness breaks down. Still, FERC hearing participants will experience similar challenges beginning to be encountered in the nation’s courtrooms as jurisdictions adapt to social distancing requirements. The flow of in-person hearings will be different and arguably less effective. Yet recent days demonstrate that all sorts of organizations have become more tech-savvy as a result of their reliance on a number of now-familiar platforms, including Skype, Zoom, and Jabber.

Finally, the important cultural aspects of in-person FERC hearings and conferences will suffer for the foreseeable future and perhaps permanently if participants elect remote gatherings after the pandemic subsides. The benefits of side bars, breakout sessions, and cafeteria gatherings over coffee will decline. These not only facilitate better understanding of complex issues but create important alliances. FERC applicants often employ a divide-and-conquer strategy that should be enhanced by remote proceedings. Lawyers and others adapted to the culture of conference calls long ago. All FERC participants will have no choice but to adapt to this new technological change. They will be part of large hearings by videoconference, and need to become adept with less familiar videoconferencing software, to advocate effectively.