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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FEBRUARY 13, 1979

B-194002

Bill of form #115

requested by:

The Honorable John D. Dingell
Chairman, Subcommittee on Energy
and Power
House Committee on Interstate and
Foreign Commerce

HSE 02303

Dear Mr. Chairman:

In response to your letter of June 2, 1978, we have examined the practices and procedures of Administrative Law Judges at the Federal Energy Regulatory Commission, *AGC 61452* as well as the practices of all parties in selected Commission proceedings, to determine where delays are occurring in the hearing process and why. As you requested, the questions we addressed were (1) how Administrative Law Judges budget their time, (2) what is done to monitor their caseload, (3) how assignments are made to them, (4) how often they schedule hearings and on what days, (5) the causes of delay in handling cases, and (6) to what extent parties to a proceeding cause or substantially contribute to delay.

This examination was conducted as part of a broader review of the Commission's regulatory process which will be completed later this year. However, as requested by your office in a meeting held on October 31, 1978, we are separately reporting information obtained to date on the Commission's Administrative Law Judges and hearing process for your use during the coming appropriation hearings. As discussed with your office, no recommendations are included in this report.

We discussed a draft of our report with Commission officials on January 23, 1979, and their comments were considered in preparing this report.

During our review of the hearings process, we discussed the issues you raised with several Commission Administrative Law Judges, staff attorneys and other appropriate Commission officials. We also examined all available Commission and

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Administrative Law Judge records of case progress on the 22 regulatory cases for which Administrative Law Judge initial decisions were issued over the last 6 months of fiscal year 1978. In addition, we interviewed the Administrative Law Judges and attorneys assigned to 11 of these 22 cases to help us better determine the reasons for problems and delays on those specific cases.

We selected these 11 cases because 9 of them had taken over 2 years in the hearing process and were likely to contain delays, and 2 were cases designated by the Commission as "energy critical." Of these 11 cases, 3 were classified by the Commission as electric rate cases, 5 as natural gas rate cases, 2 as pipeline certificate cases, and 1 as an electric license case. Our examination also included a review of comments submitted by industry representatives in response to a recent request for public comment by the Commission regarding what improvements can be made in its existing regulatory process.

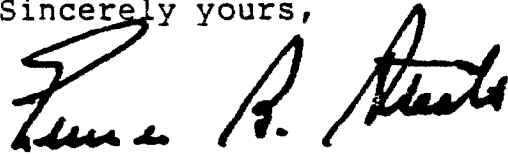
In commenting on our report, Commission officials said that our sample was too small to be representative of anything meaningful on the Commission hearing process. However, the problem areas discussed in our report have also been identified by FERC officials we interviewed, industry officials in response to proposed rulemakings and the Commission's own management information system. In addition, this sample was consistent with a recent Commission report that about 70 percent of cases ordered to hearing are classified as electric and gas rate cases.

The officials we interviewed and the records we examined indicated that the responsibility for time consumption during the various stages of the hearing process is not typically attributable to any one party or group of parties. The applicant, intervenor, Commission staff, and Administrative Law Judge, as well as the Commission itself, all consumed variable portions of time from one case to the next. We also found that the reasons for time consumption were many and varied, and considerations for due process of law and judgmental decisionmaking on the

part of the Commission and the Administrative Law Judges made it difficult for us to determine whether the time consumed was justified or not. Therefore, in the absence of specific guidelines or criteria with which to verify the existence of delay, we do not define actions that resulted in additional time taken during the hearing process as delay. Instead, we have attempted to determine the extent and cause of time consumption during selected hearings.

Our answers to your specific questions are included in the enclosure to this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James R. Steeds". The signature is written in a cursive style with a large initial "J" and "S".

Comptroller General
of the United States

Enclosure

REVIEW OF ADMINISTRATIVE LAWJUDGE ACTIVITIES AND THE HEARING PROCESSAT THE FEDERAL ENERGY REGULATORY COMMISSIONTHE HEARING PROCESS AND THE ALJ'S ROLE

The Federal Energy Regulatory Commission (FERC) receives thousands of docketed cases per year. These cases involve numerous types of applications, requests for licenses, permits, etc. The five-member Commission reviews these cases along with FERC technical staff comments and orders a small percentage of cases to hearing. Over the past year, less than 5 percent of the Commission's entire caseload was processed through hearings; however, FERC estimated that about half of its most energy-critical cases would go through the hearings process.

FERC's Chief Administrative Law Judge designates the Administrative Law Judge (ALJ) to preside over the administrative hearings to resolve disputes on cases, and the ALJ makes an initial decision subject to Commission approval. The ALJ is faced with the difficult task of reaching his decision quickly, yet fairly. As discussed below, the ALJ has a great deal of independence and authority, but seems to lack adequate incentives to expedite hearings.

FERC's ALJs are required to follow the Administrative Procedures Act and FERC's own Rules of Practice and Procedure (18 C.F.R. 1.1 et seq). To help assure that ALJs are fair and objective in hearing cases, and to insulate them from political pressure, the act gives ALJs a great deal of independence and makes it difficult for their agency to remove them from office.

The ALJ has authority to control most of the time consumed during the hearing process. The ALJ conducts hearings, develops a record of the proceeding which solidifies the major issues, and makes initial decisions. With few exceptions, once an ALJ is assigned to a case he is in almost complete control of the proceeding until he issues his initial decision. During this time he is responsible for supervising discovery (a request that a party supply additional information), hearings, motions, testimony, submission of evidence, and regulating cross examination.

The ALJ might also influence the amount of time taken after his decision, i.e., a quality ALJ decision might result in reducing the time required for subsequent review.

Although ALJs control most of the time spent in the hearing process, there appears to be a lack of adequate incentives to induce them to expedite the process. The Chief ALJ said that ALJs are left to manage their own cases, and are subject only to their own sense of professionalism, peer pressure, and informal suggestions by the Chief ALJ.

Establishment of ALJ performance standards by FERC and assignment by the Congress of responsibility for periodic evaluation of ALJ performance to a specific independent organization, such as the Office of Personnel Management, were among several recommendations recently made in our May 1978 report 1/ on the administrative law process at 28 Federal agencies, which included FERC. However, neither FERC nor the Congress has acted on these recommendations to date.

In commenting on our report, agency officials expressed serious doubt that FERC has the administrative or legal authority to develop and apply such standards. Further, FERC ALJs, like all ALJs throughout the Federal Government, are generally dependent on the Office of Personnel Management that replaced the Civil Service Commission in January 1979, not on FERC, for decisions on pay, advancement, retention, or removal.

MANAGEMENT OF ALJs

How assignments are made to ALJs

Selection of an ALJ is made by the Chief ALJ on a rotational basis, as required under the Administrative Procedures Act, and is premised on the nature and complexity of the case, existing caseload, urgency of the case, and availability of the ALJ. Generalized experience by the ALJs is encouraged and specialized expertise is not considered in making assignments.

1/"Administrative Law Process: Better Management Is Needed," FPCD-78-25, May 15, 1978.

According to the Chief ALJ, to manage the ALJ caseload on a more timely basis, he normally never assigns an ALJ to a case until 1 week before the first scheduled date of hearing set by the Commission. In some instances this can amount to a considerable length of time. In three of the 22 cases we examined, the first date of hearing was not scheduled until 4 months after the hearing order was issued and in one case not until 6 months later. The American Petroleum Institute, in response to a proposed rulemaking, recommended earlier assignments to the ALJ, which would allow more time to prepare for involved cases and to develop a total scheme for the hearing process. However, FERC has not acted on this recommendation.

Efforts to monitor ALJ caseload

The Chief ALJ maintains various records to monitor ALJ caseload. This includes (1) an index card system to record the status of each case in the hearing process, (2) an ALJ workload binder, and (3) a daily schedule of hearings, which the Chief ALJ reviews when making case assignments. Additional caseload monitoring information is available on a form which ALJs submit to the Chief ALJ whenever scheduled hearings are recessed for more than a day. Reasons for recesses and postponed procedural dates, if any, are recorded on this form.

Until recently, the Chief ALJ also provided the Chairman of FERC a report at the end of each fiscal year showing the number of initial decisions issued during that year by each ALJ. This report also contained the number of cases ordered to hearing, the number of available ALJs, average caseload per ALJ, and the initial decisions issued per ALJ. The Chief ALJ also, until recently, provided a quarterly report to the Chairman, FERC, showing the status of each case charged to each ALJ and the number of days spent in hearings during this quarter. Both of these reports have, however, been replaced by a monthly "Hearing Process Status Report." (See p. 4.)

The table below summarizes annual ALJ caseload information, as reported in recent annual and quarterly ALJ workload reports:

| | <u>Cases carried over from prior year</u> | <u>Number of new cases set for hearing</u> | <u>Total cases set for hearing (note a)</u> | <u>Number of initial decisions issued (note a)</u> | <u>Number of ALJs available</u> | <u>Average caseload per ALJ</u> | <u>Average initial decisions per ALJ</u> |
|--------------------------|---|--|---|--|---------------------------------|---------------------------------|--|
| FY 1976 | 278 | 226 | 504 | 126 | 18.5 | 27.2 | 6.8 |
| FY 1977 | 260 | 175 | 435 | 103 | 19.4 | 22.4 | 5.3 |
| FY 1978 | 227 | 139 | 366 | 61 | 18.7 | 19.5 | 3.4 |
| FY 1979-1984 (projected) | - | 250 per year | - | - | - | - | - |

a/Settlements and backlog are the two primary reasons for the difference in total cases ordered to hearing and total cases resolved by initial decision. According to recent FERC management report, over 50 percent of the cases resolved between Jan. 1, 1978, and Nov. 1, 1978, were resolved by settlement (see pp. 19 to 21). The balance of those cases unresolved by initial decision or settlement represent case backlog and were carried over into the following year.

According to a number of ALJs we interviewed, the caseload per ALJ cited in the preceding table can vary widely on any given day during the year. In fact, as of November 1, 1978, caseload per ALJ ranged from 8 to 11 cases, except for one ALJ who has a single complex case. In addition, the table shows a decreasing volume of new cases assigned to ALJs. According to an FERC official, one reason for this decline in new cases is the decline in applications by companies previously awaiting the outcome of the new energy act. The table also shows a decline in ALJ workload and initial decisions over the last 3 years. According to the Chief ALJ, the primary reasons for this decline were increasing complexity of cases being heard, and the loss of three experienced ALJs during fiscal year 1978. Finally, the table also reveals a projected increase by FERC in the number of cases ordered to hearing during fiscal year 1979 through fiscal year 1984 because of anticipated increases in workload under the new energy act.

As part of a recently implemented agency-wide management information system, FERC has developed a monthly "Hearing Process Status Report." The Acting Chief ALJ has said that the ALJ quarterly and annual reports to the Chairman, FERC, would be replaced by this new management report. This report describes each pending hearing case, identifies the assigned ALJ, and shows (1) elapsed time for each stage of the proceeding, (2) problems encountered

in disposing of a case, (3) expected and actual time frames, and (4) the status of all cases pending and completed by the ALJs.

It is significant to point out, however, that none of the foregoing management tools are currently being used to evaluate ALJ productivity or performance by either the Commission or the Chief ALJ. These tools instead are used only to monitor individual case progress.

According to the Chief ALJ, the problems encountered in attempting to use these reports to objectively measure productivity is that in economic regulatory agencies, such as FERC, there are too many significant variations between cases (such as the type, number, complexity, and scope of the issues involved, and the number of contesting parties). One alternative to this problem, however, has been proposed by GAO in a report entitled "The Administrative Law Process: Better Management Is Needed" (FPCD-78-25, May, 1978). In this report, we recommended the development of objective performance standards by the Chief ALJ and ALJs of this Commission and 27 other Federal agencies which would take into account variations in the composition of ALJ caseloads. GAO also recommended that Congress should assign the responsibility for periodic evaluation of ALJ performance to an organization other than the employing agency, thereby protecting the ALJ's independence.

Performance standards have already been established at the National Labor Relations Board, where each ALJ within a fiscal year is expected to issue a minimum of 12 decisions on cases of average size and complexity. Although the cases before FERC are of a different nature and complexity than NLRB's, one FERC ALJ told us that implementation of performance standards at FERC might be successful as an evaluation tool if it were controlled independently by parties outside the Commission. He said that this procedure avoids compromising an ALJ's independence and subjecting the ALJ to internal political pressure. FERC officials, however, said that no attempt has been made by FERC to develop such performance standards, because FERC has serious doubt that the Commission has the administrative or legal authority to develop and apply such standards.

ALJ SELF-MANAGEMENTHow ALJs budget their time

Information obtained from FERC's management information system and the Office of ALJ's quarterly caseload report indicates that, on the average, ALJs spend 18 percent of their time in hearings, 12 percent performing general administrative duties, and 70 percent performing hearing-related duties such as research and writing decisions. Office of ALJ records show that, in fiscal year 1978, ALJs took an average of 3.6 months after receiving final briefs to write their initial decision. However, according to three of the ALJs we interviewed and selected records we examined, all of these average times may vary widely depending upon individual caseloads and the nature, complexity, and urgency of cases. In fact, three ALJs estimated that they spent from 25 to 40 percent of their time in hearings during 1978, as compared to the annual average of 18 percent mentioned above.

We also found that FERC does not presently attempt to record or control how individual ALJs budget their time. Instead, records are limited to a periodic compilation of historical averages used for budget and planning purposes. In addition, the Chief ALJ advised us that he and the Commission, like their counterparts in other Federal agencies, are reluctant to in any way compromise the ALJ's independence, which is protected under section 11 of the Administrative Procedures Act. Therefore, ALJs are left to manage their own cases, subject only to their own sense of professionalism, peer pressure, and informal advice and counsel by the Chief ALJ.

How often do ALJs schedule hearings and on what days?

Based on data from FERC's management information system and the Office of ALJ's quarterly caseload report, FERC's ALJs spend on the average about 44 days per year in hearing. Although, as mentioned earlier, these averages vary widely. We examined Office of ALJ records on hearing schedules for fiscal year 1978 and found that hearings were conducted throughout the week and most hearings were commenced at 10:00 a.m. Centralized records were not kept on the daily duration of these proceedings or the length of adjournments.

Approximately 90 percent of the hearings were held on Tuesday, Wednesday, Thursday, and Friday, and the balance on Mondays. According to the Chief ALJ, new cases are rarely scheduled on Monday due to the Monday Federal holiday law and to accommodate traveling time of parties to a proceeding.

CAUSE AND EXTENT OF TIME CONSUMPTION
DURING THE HEARING PROCESS

According to a recent Commission management study, the hearing process typically takes about 2 years to complete. The results of our own examination of the 22 cases for which ALJ initial decisions were issued over the last 6 months of fiscal year 1978 add further support to this 2-year figure. The following table summarizes our findings on the 22 cases examined:

Approximate number of
calendar days to completeAveragePrior to hearing

| | |
|--|-----|
| Application filing date to hearing order date | 235 |
|--|-----|

Hearing stages

| | |
|--|-----|
| Hearing order date to date ALJ assigned | 62 |
| ALJ assignment to 1st hearing date (note a) | 258 |
| Length of hearing | 122 |
| End of hearing to ALJ initial decision | 197 |

Total hearing process

| | |
|---|-----|
| Total days from hearing order to ALJ initial decision | 639 |
|---|-----|

a/This figure is the average for all 22 cases; however, it can be broken further into those cases which had a prehearing conference (see definition on p. 15-16) and those cases that did not. Out of the 22 cases examined, 17 had prehearing conferences and the following was computed.

| | <u>Average</u> |
|--|----------------|
| ALJ assignment to prehearing conference | 26 |
| Prehearing conference to 1st hearing date | 241 |

For the 5 cases on which no prehearing conference was held:

| | |
|---------------------------------------|-----|
| ALJ assignment to 1st hearing date | 226 |
|---------------------------------------|-----|

We found wide variances in the time consumed to complete various stages of the hearing process. For example, time consumed from the end of hearing to ALJ initial decision ranged from 24 to 598 days and total hearing processing time ranged from 112 to 1,300 days. We also found a number of reasons for such variances, although considerations for due process of law made it difficult for us to determine whether an instance of time consumption was justified or necessary. Some time factors were directly measurable such as postponements of procedural dates, hearing recesses, and extensions of time for staff summaries on rate cases. Other factors were not always measurable, but nevertheless add to the length of proceedings these include late interventions, insufficient use of prehearing conferences, disagreement over data requests (discovery), incomplete filings, interlocutory appeals, and transfers of ALJs and staff attorneys. Both measurable and unmeasurable factors will be discussed throughout the balance of this report.

We will also briefly discuss settlements because over half of the cases ordered to hearing over the last year were settled, and because settlements take less time than cases going through the full hearing process. The detailed results of our findings in this regard follow.

Postponement of procedural dates

Various participants in a hearing may request that an ALJ grant a postponement of an established procedural date or grant a recess in hearings for a specified reason. For example, an applicant's attorney may file a motion stating that he needs an additional 2 weeks to prepare initial briefs. These extensions of time were a frequent and major factor of time consumption in the cases we reviewed.

In addition to discussions with several FERC ALJs and staff attorneys as to the typical reasons for these time extensions, we questioned them and examined individual case filings regarding all written requests for time extensions on 11 cases (case selection method stated on page 2 of our letter). In the 11 cases we examined, postponements of procedural dates and hearing recesses accounted for, on the average, over one-third of the total time a case was in hearing and in 3 cases accounted for nearly one-half of the time. Further, requests for time extensions appeared to be frequently granted and rarely denied, particularly when all parties agreed. In this regard, we found that, out of 149

time extensions requested in the cases we examined, only 10 were denied. However, one Commission attorney stated that such denials are frequently reversed or appealed to the Commission.

We also found that, according to current Commission rules, motions for time extensions must be made prior to the expiration of four-fifths of the time previously prescribed in procedural dates set by Commission or ALJ Order (18 C.F.R. 1.13 (d)). However, two of the ALJs contacted indicated that in the interest of due process and lack of disagreement by any of the parties, this rule was often ignored. Out of the 11 cases we examined, we found 6 instances in 4 cases where the four-fifths rule was applicable, and in all instances but one it was waived.

Time extensions granted to the applicant, the Commission staff, intervenors, ALJs, and the Commission itself, all contributed to additional time consumed in the hearing process. However, such time consumptions were not generally attributable to any one party. Although time consumed by postponements of procedural duties and hearing recesses was measurable, we could not determine whether the time consumed was justified or not.

According to the Chief ALJ and other FERC officials we contacted, time extensions can have a positive benefit in reducing overall hearing processing time. For example, time extensions allowed for settlement, preparation of staff summary and position, and necessary discovery may result in significant reductions in hearing processing time.

In the following pages of this report we will discuss our findings regarding these factors and others in detail. However, for now, it is significant to point out that the reasons for these time extensions were many and varied, and frequently involved requests for additional time for not only settlement and discovery but also to accommodate schedule conflicts of the Commission staff, the ALJ, witnesses, and other parties.

The following table summarizes our findings regarding the extensions in the 11 cases we examined:

Number of Time Extensions (note a)
Requester

| <u>Type of extension request</u> | <u>Staff</u> | <u>Applicant</u> | <u>Intervenor</u> | <u>Not identified (note b)</u> | <u>Grand total</u> |
|--|--------------|------------------|-------------------|--------------------------------|--------------------|
| Prepare testimony | 7 | 7 | 8 | 7 | 29 |
| Schedule conflict | 4 | | | 12 | 16 |
| Unavailable witness | | | 3 | | 3 |
| Settlement discussion | | | 3 | 4 | 7 |
| Discovery | | | | 6 | 6 |
| Convenience of witness | | | | 3 | 3 |
| Other reasons (note c) | 9 | 13 | 5 | 20 | 47 |
| Documents not in file or reasons not stated (note d) | <u>6</u> | <u>8</u> | <u>5</u> | <u>19</u> | <u>38</u> |
| Total requests | <u>26</u> | <u>28</u> | <u>24</u> | <u>71</u> | <u>149</u> |
| Total granted | 26 | 27 | 17 | 69 | 139 |
| Total denied | | 1 | 7 | g/ 2 | 10 |
| Average days extended | 24 | 35 | 21 | 18 | 23 |
| Range (in days) | 5-91 | 7-102 | 3-50 | 4-119 | 3-119 |

a/This chart summarizes the most frequently occurring reasons for requesting time extensions in the 11 cases we examined. However, when parties requested time extensions two or less times they were recorded under "other reason" category. (Also see footnote c.)

b/Includes time extensions granted to requesters who were not identified in the documents we examined or by the officials we interviewed.

c/Includes reasons for time extensions that occurred only two or less times in our sample. This category included top sheet preparations, deficiency of evidence, Commission action, etc.

d/FERC's official files did not contain supporting documents, or the documents on file did not state purpose of time extensions.

Initial staff preparations

Over 70 percent of FERC's cases being processed by hearing are categorized as rate cases. In an effort to expedite settlement in these rates cases, FERC implemented a "top sheet" procedure by Order No. 157, April 1, 1976, which requires the staff to summarize key rate information in a case going to hearing for the Commission as well as other parties to the proceeding. Use of top sheets can also significantly reduce the time required to provide the staff's position to the parties of a proceeding.

According to the Acting Chief ALJ, the top sheet, or summary, also frequently serves as a basis for settlement negotiations and its absence during the early stages of the hearing process can substantially reduce the possibility of early settlement. However, FERC has been unable to encourage early preparation of top sheets even by establishing a deadline. Although top sheets are presently required to be prepared within 90 days of the hearing order date, according to a number of FERC officials we contacted, this time limit is rarely met and is viewed as unrealistic.

Of the 11 cases we examined there were 8 rate cases. However, only 3 were ordered to hearing after the top sheet requirement was implemented on April 1, 1976. In two of these cases, top sheet preparation took longer than 90 days. In one case, the ALJ granted a 90 day extension for submitting the top sheet, and in the other the Commission itself set the initial top sheet deadline for over 120 days from the hearing order date.

According to the Acting Chief ALJ, to go on with the hearing when FERC staff is not prepared would not be in the best interest of the public. As a result the ALJ has no choice but to automatically approve postponements requested by the staff. Recent additions to the legal and technical staff are expected to significantly improve the staff's ability to meet the 90 day limit. However, it is still too early to determine whether any actual improvement will result.

Early preparation of staff position is even more of a problem in non-rate cases. Neither top sheet summaries nor statements of staff position are required in non-rate cases. As a result, according to a number of the ALJs we contacted, staff frequently does not prepare a position statement until

late in the hearing process. However, most ALJs and attorneys we contacted viewed formulation of a staff position prior to hearing in both rate and non-rate cases as critical to their timely disposition. Without at least a solidification of the issues by the staff prior to commencement of the hearings, research on the part of the ALJ may be unnecessarily compounded, the potential for settlement reduced, and the initial discovery period as well as the overall hearing process unnecessarily extended.

Cases pending Commission action

In some instances, action on a case can be suspended while awaiting Commission action on various matters. On one case, two extensions totaling 114 days were granted by the ALJ because the Commission was expected to issue an order soon on a similar case. The presiding ALJ felt the suspension was justified because the Commission could be expected to rule the same way on the present case.

On another case, a 37-day extension, followed by an indefinite extension, was granted by the ALJ because an intervenor complained before FERC concerning the scope of the proceeding. The presiding ALJ and the attorneys felt the extensions were justified while awaiting FERC action on the complaint.

In a number of other instances, cases set for hearing were held back by the Commission pending its further action prior to ALJ assignment. According to a recent FERC management study, as of November 1, 1978, 13 cases had been pending Commission action for over 3 years. On June 27, 1978, the Office of ALJs sent a memo to another FERC office in an attempt to trace the current status of these 13 cases. However, as of November 1, 1978, these attempts had proven unsuccessful.

Interventions

In accordance with FERC Rules of Practice and Procedure a petition to intervene must be filed by any person claiming a right to participate or having an interest in a proceeding. State and local regulatory bodies, however, may intervene simply by filing a notice of intervention without a petition for intervention. In practice, the petitions to intervene by other interested parties were rarely denied in the cases

and filings we examined. Further, all of the ALJs and attorneys we interviewed agreed that most intervenors have a legitimate interest in the case and may contribute invaluable information and arguments to the hearing process.

However, intervenors also contributed significantly to the time consumed. In the 11 cases we examined, there were numerous intervenors who (1) introduced voluminous evidential material, (2) made numerous motions, and (3) raised many issues. A total of 296 petitions to intervene were filed, of which 225 were granted, 1 was denied, and no action was taken by the Commission on the remaining 70. FERC officials we contacted on some of these 70 cases could not determine why no action had been taken, nor whether these intervenors actually participated in the proceedings.

Intervenors often request to participate in cases already underway. FERC sometimes sets a deadline for petitions to intervene, but we found 47 such petitions that were approved after the established deadlines. Also, 22 of these 47 interventions were allowed after the prehearing conference on the case, and two were allowed over 1 year past the prehearing conference. Although we did not determine the time consumed by these late interventions, the overall effectiveness of the prehearing conference may be reduced when all parties are not present. Some of these late interventions were by State commissions, which FERC allows automatically.

A FERC official said some instances of intervenor delay may be caused by many intervenors who are inexperienced or unfamiliar with FERC procedures. However, in other instances, according to FERC, intervenors have an incentive to delay cases. For example, a FERC official said that in one rate case we examined there was an incentive for the intervenor to delay because the threat of adverse publicity would keep the applicant from filing additional rate increase requests while the case was pending.

FERC, in its response to our report on Administrative Law Judges (FPCD-78-25, May 15, 1978) stated that steps were being taken to limit interventions. However, we did not find an increase in the number of petitions denied. FERC recently delegated to ALJs the authority to grant or deny interventions, but most ALJs we interviewed felt

that any party with a reasonable concern in the case should be allowed to intervene. Intervenors increase the case processing time, but some ALJs felt it was necessary because they may introduce important issues or represent other interests, including consumer interests, which are not adequately represented by other parties in the case.

Prehearing conferences

The primary function of prehearing conferences is to provide the participants with an opportunity to exchange views about the case in the presence of the ALJ, solidify the major issues, and settle on a timetable for subsequent steps in the hearing before formal hearings begin. Based on the records we examined, we could not determine how much time was saved by use of prehearing conferences. However, according to FERC Rules of Practice and Procedures, although prehearing conferences are not required, such conferences are intended to simplify and expedite further proceedings on the case (18 C.F.R. 1.18). In addition, according to the Chief ALJ, prehearing conferences frequently provide a basis for early settlement and need to be mandatory. However, despite their recognized value, we found prehearing conferences were not always held. Of the 22 cases we examined, 5 did not have prehearing conferences.

Although we did not determine why prehearing conferences were not held on each of these cases, the Chief ALJ stated that some ALJs feel that such conferences are not always necessary. He also said that the test is whether the prehearing conference is held under conditions which insure the effective use of prehearing conference techniques. One of the key factors in this regard, according to the Chief ALJ, is adequate preparation and submission of evidence by all parties in advance of the prehearing conference.

In response to a FERC request for public comments on its regulatory procedures, the Federal Energy Bar Association and the American Petroleum Institute stated several improvements could be made in prehearing procedures, and included comments on the need for better advance preparation.

It is unclear who is responsible for directing advance preparation on a case. The Federal Energy Bar Association, in its comments to FERC, said that "The Administrative Law Judge has a powerful set of tools for expedition in the judicious use of pretrial procedures and he should be strongly encouraged by the Commission to use those tools." However, one deterrent to an ALJ's ability to control advance preparation by staff and other parties to a case is the current practice of normally assigning cases to ALJs only 1 week prior to hearing (see p. 3).

We believe that prehearing conferences may not be used to their full potential. We found that:

(1) Although proceedings may be expedited if discovery requests are resolved at the hearing conference such requests were sometimes not resolved until well after the prehearing conference (see pp. 16-17).

(2) Although the success of prehearing conferences depends largely on participation by all concerned parties, we found that, in the cases we examined, 22 interventions were allowed after the prehearing conference. (See pp. 13-14).

Discovery

Parties in a hearing may request the "discovery" of data beyond the data in applications FERC routinely requires. These data requests may be made by and directed to anyone in the hearing. For example, FERC staff may ask an applicant who is requesting an increase in wholesale electric rates to provide more financial data, or the applicant may ask an intervenor to provide support for his allegations regarding the adverse impact of the rate increase. A party may state that the data requested of it is not necessary to the case or that it is overly burdensome. If the requests are not resolved among the parties themselves, the ALJ may have to decide which data will be required and set a deadline for when it must be furnished.

The FERC Chief ALJ stated that discovery requests frequently occur in hearings and suggested that, to prevent delay, these requests should be made as early as possible in the hearing, preferably before or at the prehearing conference. In the 11 cases we examined, discovery requests appear to have added significant time to 4 of them. Some

of the additional time resulted from parties being granted more time to prepare the requested data. Time was also required to resolve disagreements on whether the requested data was necessary to the case. In three of the four cases we found that disagreement on discovery lasted over a year, including one case where discovery problems lasted over 2-1/2 years. We also found that in three of the cases, discovery requests were made after the prehearing conference.

Incomplete applications

The filing of incomplete data sometimes causes significant time consumption. Before a case is referred to hearing, FERC technical staff determines whether the application includes all required information. FERC attorneys told us that in 2 cases out of our sample of 11, the applicants did not furnish complete information until 6 and 14 months respectively after the applications were filed.

Interlocutory appeals

An interlocutory appeal is a process whereby a party or parties appeal to FERC the rulings issued by ALJs. Section 1.28 (a) and (c) of FERC's Rules of Practice and Procedures states that a ruling of an ALJ may not be appealed during the course of hearings or conferences except in extraordinary circumstances where prompt decision by FERC is necessary to prevent detriment to the public interest. In such instances the matter shall be referred to FERC by the ALJ. The rules also state that, unless FERC acts upon referrals within 30 days, such appeals shall be deemed denied.

In the 11 cases we examined, there were 7 interlocutory appeals to FERC. Three were denied, 2 were granted, and 1 was still pending as of October 1, 1978. The case records we examined did not indicate the action taken on the remaining appeal. Four appeals were requested by intervenors, two by applicants, and one by the FERC staff.

From the documents we examined, we were unable to determine if interlocutory appeals resulted in additional time in the hearing process. However, one ALJ told us that the two interlocutory appeals on the case he presided over collectively added 6 months to the proceedings.

Also, in an appeal on which FERC action is still pending, FERC's action departs from the Commission's Rules of Practice and Procedures (18 C.F.R. 1.28 (c)), which states that unless FERC acts upon an appeal within 30 days such appeal shall be deemed denied. This appeal was certified to the Commission by the ALJ on September 15, 1977. The Commission issued a Notice of Intent to Act on September 23, 1977, which stated that the ALJ's certification should not be deemed denied pursuant to 18 C.F.R. 1.28 (c). As of September 7, 1978, FERC had not acted upon the appeal. We do not know if this appeal has resulted in any unjustified time consumed during the proceedings. Meanwhile, the presiding ALJ on the case decided to continue the hearing on those issues in the case not under appeal and issued his initial decision on these severable issues rather than postpone the proceeding while awaiting Commission action on the appealed portion of the case.

Replacement of presiding ALJ

There are occasions when a presiding ALJ is replaced by another ALJ. However, it was not possible to determine from the records we examined how much time was consumed as a result of this change, although time would be required for the new ALJ to become familiar with the case. According to the Chief ALJ and others, this is a rare occurrence. However, of the 22 cases we examined in which ALJ initial decisions were issued in the last half of fiscal year 1978, 8 cases involved ALJ replacements. One of these eight cases had three different ALJs.

Three replacements occurred because ALJs retired, two were made because ALJs had calendar conflicts, and the reasons for ALJ replacements on the other cases were not determinable from the records we examined.

In one of the eight cases, an ALJ working on an energy critical case for 3 years was transferred to another energy critical case before issuing the initial decision because of calendar conflict. Another ALJ issued the decision 6 months after taking over the case. How much time delay could be attributed to this replacement, however, could not be determined.

Several ALJs and attorneys also told us that temporary substitutions of ALJs at hearings are rare. If temporary substitution occurs it would be merely to record evidence

or testimony from parties involved after which the ALJ would turn the information over to the presiding ALJ when he returned. We found no evidence in the files reviewed that any temporary substitutions have taken place.

Replacement of staff attorneys
assigned to ongoing cases

Normally only one FERC staff attorney is assigned to a case, although FERC's Chief Trial Counsel stated that recent efforts have been made to try to assign more than one, and the attorneys rarely temporarily substitute for one another. However, the permanent replacement of the staff attorney on a case appears to be a frequent occurrence, particularly on longer cases.

Of the 22 cases reviewed, attorneys had been replaced on 7 of them. The official files we examined, however, did not reflect the reason for attorney replacements. FERC officials told us that there are two reasons attorneys are replaced on cases. One reason is personnel transfers within the Commission, and the other is that the attorney leaves the Commission.

An ALJ told us that one of his cases had four different attorneys assigned at different times. The first attorney was transferred to a Commissioner's office. His replacement was transferred to FERC's Office of Opinions and Reviews, and the third attorney left FERC. Although the transfer of attorneys may have added to the length of hearings we could not determine the amount of time consumed. However, it could be significant because the new attorney would need time to become familiar with the case.

Settlements

According to FERC Rules of Practice and Procedures conferences between the parties to a proceeding and FERC staff for the purpose of settlement may be held at any time prior to or during hearings before the Commission (18 C.F.R. 1.18). At the hearing stage, the ALJ assigned may, with or without a request by the parties to the proceeding, direct that a settlement conference be held to resolve either all matters of dispute or any severable issues. The ALJ then takes no further part until these negotiations succeed or fail. During this time, hearings are normally

suspended. However, if the parties have reached settlement on only part of the case, hearings may continue on the unresolved portion of the case.

If the settlement negotiations fail, the hearing process resumes. The amount of time taken by unsuccessful negotiations varies. Some of the ALJs we contacted said that these suspension periods can occasionally be lengthy. However, in the case filings we examined, there were seven instances when hearings were suspended for settlement discussions and the suspensions ranged from only 2 to 23 days.

Settlement negotiations are often successful. Of the 113 cases in hearing completed between January 1, 1978, and November 1, 1978, the parties reached a settlement agreement on over 50 percent of the cases. Also, according to a recent study by the Administrative Conference of the United States, on the average, many settlements are reached during the first 50 days from the first day of hearing. When parties do reach a settlement agreement, the ALJ refers it to the Commission for approval. The ALJ may add his comments on whether he thinks a fair settlement has been reached; however, he is not required to do so and ALJs rarely do. The Commission has the responsibility to review settlements for fairness as well as to determine whether a settlement is in the public interest. According to the Chief ALJ, this review is performed by FERC's Office of Opinions and Review, and other FERC staff.

The ALJs we interviewed said that FERC has had notable success in reducing the overall processing time for cases that are settled. This agrees with a study made for the Administrative Conference of the United States published in 1978. In the study's sample of 81 FERC electric and gas rate cases, settlement reduced average total case processing time, from filing date through the hearing process to final Commission order, as shown in the following table:

Time Savings in Days Resulting From Settlements

| <u>Type of case</u> | <u>Average hearing processing days without settlement</u> | | <u>Average hearing processing days with settlement</u> | |
|---------------------|---|-------------------|--|-------------------|
| | <u>No. of cases sampled</u> | <u>Total days</u> | <u>No. of cases sampled</u> | <u>Total days</u> |
| Electric rate | 18 | 799 | 30 | 521 |
| Gas pipeline | 19 | 864 | 14 | 588 |

Despite the obvious success FERC has had with settlements, we found that much of the time saved is frequently lost by the Commission's taking lengthy time periods to approve these settlements. Based on our examination of FERC records of settlements pending Commission approval as of October 17, 1978, settlements may wait up to 2 to 3 years for Commission approval. It is also significant to point out that in a recent response to recommendations made in a GAO report 1/ to the Congress FERC maintained that it was prioritizing uncontested settlements; however, although several ALJs told us they have always encouraged settlements, the Commission has not yet taken action to reduce the amount of time it takes to review settlements. We found that, as of October 17, 1978, 44 settlements were pending Commission action. Twelve of these 44 cases had been waiting over 1 year, another 5 over 2 years, and 1 other case over 3 years. In the meantime, further hearing action in these cases was not being taken pending a Commission decision on these settlements. The only explanations given for time consumption in processing these settlements were their complexity and possible political impact.

FERC officials commented that a rulemaking was proposed calling for numerous changes in settlement procedures, which could reduce the total amount of time taken for settlements. However, the Commission has not yet passed the new rule.

1/"Administrative Law Process: Better Management Is Needed," FPCD-78-25, May 15, 1978.

FERC ACTIONS TO IMPROVE
THE HEARING PROCESS

During the course of our review, we have examined both ongoing and planned efforts by FERC to streamline its regulatory process and reduce regulatory delay. We found that a number of actions were taken by FERC over the past year to increase the efficiency of its operations. However, few of these actions are expected by FERC to have any near term positive impact and even fewer are aimed at improving the hearing process. To date, actions to improve the hearing process include the recent delegation of authority to ALJs to rule on interventions, the addition of three new ALJs, and the addition of 8 new law clerks. Other actions to improve the hearings process are still in the proposal stage. According to one FERC official, much of FERC's existing manpower and resources are being committed to implementing the additional responsibilities that were recently conferred upon FERC under the National Energy Act of 1978.

FERC also identified other actions which may reduce the amount of time spent in the hearing process, including the addition of more technical and legal staff and a Chief Trial Counsel to supervise the handling of cases by staff attorneys.