

**BEFORE THE  
UNITED STATES DEPARTMENT OF INTERIOR  
MINERALS MANAGEMENT SERVICE**

**Open and Non-Discriminatory Movement )  
of Oil and Gas as Required by the ) RIN 1010 (AD17)  
Outer Continental Shelf Lands Act )**

**INITIAL COMMENTS  
OF THE PRODUCER COALITION**

The Producer Coalition submits these Initial Comments regarding the Proposed Rule issued by the Minerals Management Service ("MMS") on April 6, 2007 on Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act ("Proposed Rule"). 72 Fed. Reg. 17,047 (April 6, 2007).

**I.**

**SUMMARY OF POSITION**

We support the thrust of the MMS' effort to provide a mechanism for the administrative enforcement of the open and non-discriminatory access provisions of Sections 5(e) and 5(f) of the Outer Continental Shelf Lands Act ("OCSLA"). To fulfill the minimum criteria for an effective scheme of light-handed regulation of oil and natural gas pipelines on the Outer Continental Shelf ("OCS"), however, we believe that the Proposed Rule should be modified as follows:

- Provisions should be added requiring OCS pipelines to file periodic reports on rates and other key commercial terms of service so that discriminatory behavior forbidden by the statute can be detected and prosecuted;
- The proposed complaint procedures should be streamlined to facilitate speedy and effective relief by (i) shortening the period for filing an answer to a complaint to 30 days, rather than 60 days as set forth in the Proposed Rule; (ii) allowing intervention by other interested parties; (iii) allowing the parties to complaint proceedings to gain access to information through

discovery; (iv) providing for evidentiary hearings with right of cross-examination in cases where there are disputed issues of material fact; and (v) requiring decisions of the Office of Policy and Management Improvement ("PMI") to be effective upon issuance and subject to stay only if a stay is granted by the Interior Board of Land Appeals ("IBLA");

- Relief for denial of open and non-discriminatory access on pipelines should include monetary relief so that the complainant can be made whole for losses sustained as a result of a pipeline's unlawful behavior;
- Expedited relief should be allowed in appropriate cases, where the complainant can demonstrate imminent, irreparable injury; and
- The required filing fee for complaints should be eliminated, since the prosecution of such complaints aids MMS in the discharge of its core responsibility to enforce the open and non-discriminatory access requirements of Sections 5(e) and 5(f) of the OCSLA.

## II.

### **CORRESPONDENCE AND COMMUNICATIONS**

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## III.

### **NATURE OF INTEREST**

The Producer Coalition is an *ad hoc* group of companies engaged in exploring for, developing, and marketing crude oil and natural gas on the OCS in the Gulf of Mexico and in other producing basins. For purposes of this proceeding, the Producer Coalition consists of Newfield Exploration Company and Hydro Gulf of Mexico, LLC. These

companies have significant investment in oil and natural gas production projects on the OCS and are shippers of oil and gas on numerous OCS pipelines.

We have actively supported open and non-discriminatory access on OCS pipelines under Sections 5(e) and 5(f) since 1997, and have consistently advocated reporting requirements and complaint procedures applicable to the movement of oil and gas across OCS pipelines.

#### IV.

#### **MMS' PROPOSED RULE**

The Proposed Rule is intended to provide an administrative means to assure open and non-discriminatory access to OCS oil and gas pipelines. It fills the void left by the decision of the U.S. Court of Appeals for the DC Circuit in *Williams Companies v. FERC*, 345 F.3<sup>rd</sup> 910 (D.C. Cir. 2003) ("*Williams*"), which held that the Federal Energy Regulatory Commission ("FERC") does not have general authority to implement and enforce the open and non-discriminatory access requirements in Sections 5(e) and 5(f) of the OCSLA. Prior to issuance of the Proposed Rule, MMS collected information through an Advanced Notice of Proposed Rulemaking ("ANPRM") issued in early 2004. We actively participated in the ANPRM proceeding and filed extensive written comments with the MMS on June 14, 2004, supporting a scheme of light-handed regulation under Sections 5(e) and 5(f).

The intent of the Proposed Rule is to establish both formal and informal complaint procedures to dispose of claims of denial of open and non-discriminatory access to OCS pipelines. Unlike FERC Order No. 639, supported by MMS but struck down by the D.C. Circuit in *Williams*, MMS' Proposed Rule does not contain any

reporting requirements for OCS pipelines on rates and other material commercial terms of service.

Formal complaints can be initiated with the filing of a complaint before PMI. A \$7,500.00 filing fee must accompany the initial submission of the complaint. The respondent is given 60 days to file an answer. MMS will then decide the merits of the complaint and, in so doing, may request additional information from the parties or from non-parties. As currently written, the complaint procedures contain no explicit provision for evidentiary hearings in cases where there are disputed issues of material fact. Nor are there explicit discovery procedures in the Proposed Rule, although MMS may request additional information. (Proposed Section 291.110.)

On the basis of the record compiled, MMS will make a determination whether there has been a violation of Section 5(e) or 5(f) of the OCSLA. If a violation is found, the MMS may order the pipeline to provide open and non-discriminatory access or pay civil penalties of up to \$10,000 per day for failure to do so. Penalties begin to accrue 60 days after the pipeline receives an order directing it to provide open and non-discriminatory access. MMS also may ask the Attorney General to pursue an action in U.S. District Court to enforce the open and non-discriminatory access provisions. As currently written, there is no provision in the Proposed Rule for granting monetary relief to a shipper for the past failure by the pipeline to provide access.

A pipeline may appeal an adverse decision by MMS to the IBLA. An appeal to IBLA has the effect of suspending MMS' decision until the appeal is decided. Such an appeal is required to exhaust administrative remedies, unless the MMS Director makes its

decision effective upon issuance. Unless a decision is made effective immediately, it will not become effective until the 60-day period allowed for an appeal to IBLA has expired.

In addition to formal complaint procedures, the Proposed Rule also proposes to establish an MMS Hotline to provide an informal mechanism to dispose of claims of improper activity under Sections 5(e) and 5(f) of the OCSLA, much like the FERC's Enforcement Hotline. The MMS employees manning the Hotline will investigate claims of wrongful conduct and seek needed additional information from the parties in an effort to assist the parties in reaching a negotiated resolution, including voluntary resort to alternative dispute resolution ("ADR") procedures. Parties may seek ADR (with or without use of the Hotline) through a contractual ADR provider or the use of the Department of Interior's ("DOI") Office of Collaborative Action and Dispute Resolution. MMS will be entitled to reimbursement of its costs for providing ADR facilitators.

MMS states that it will apply a "reasonableness" standard in interpreting the meaning of open and non-discriminatory access under the statute. MMS also states that it does not consider production handling services, such as the conditioning or treating of oil or gas on a platform, to be a part of "transportation of oil or gas by pipeline." In MMS' view, such services take place prior to transportation.<sup>1</sup>

## V.

### INITIAL COMMENTS

We support MMS' efforts to adopt both formal and informal complaint procedures for the enforcement of the open and non-discriminatory access requirements of

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<sup>1</sup> The issue whether production handling services fall within the ambit of "transportation by pipeline" of oil or gas across the OCS for purposes of Section 5(f)(1)(A) of the OCSLA has been hotly contested since it was first raised before the FERC in Order Nos. 539 and 539-A. For purposes of these comments, we take no position on the correctness of MMS' interpretation of Section 5(f)(1)(A) in the Proposed Rule.

Sections 5(e) and 5(f) of the OCSLA. As MMS notes in the Proposed Rule, it clearly has the authority to promulgate rules and regulations in this area. Our comments below first review the history of pipeline regulation under the OCSLA (Parts V(A) and V(B)), and then identify ways in which MMS can improve its Proposed Rule to assure meaningful and cost-effective enforcement of Sections 5(e) and 5(f) of the OCSLA (Parts V(C)-(G)).

**A. Congress Has Long Recognized the Importance of OCS Pipelines and the Need to Curb Their Market Power.**

Pipelines are essential to oil and gas production on the OCS. All natural gas production and most oil production from the OCS depends on pipelines for transfer from OCS platforms to shore. Because it is costly and inefficient to construct multiple pipeline connections to OCS production platforms, producers are typically captive to a single pipeline to move their production to shore. Thus, OCS pipelines are natural monopolies in a position to exercise market power over shipments of OCS oil and gas production.

Recognizing both the importance and the power of such pipelines, Congress in drafting the original OCSLA required OCS pipelines to purchase or transport oil or gas in the vicinity of such pipelines “without discrimination.”<sup>2</sup> Later, as oil and gas development on the OCS advanced, Congress added Section 5(f) to the statute in the

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<sup>2</sup> Section 5(c), as originally enacted in 1953, provided in pertinent part:

(c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevent of waste. . . .

Outer Continental Shelf Lands Act, Pub. L. No. 83-212, ch. 345, § 5(c), 1953 U.S.C.C.A.N. (67 Stat. 464) 506, 508.

1978 Amendments as a “reaffirmation and strengthening of [former Section 5(c)].”<sup>3</sup> Section 5(f)(1)(A) requires OCS oil and gas pipelines to “provide open and nondiscriminatory access to both owner and nonowner shippers.”<sup>4</sup> It was intended to “prevent ‘bottleneck monopolies’ and other anticompetitive situations involving OCS pipelines.”<sup>5</sup>

Thus, Section 5(f)(1)(A) advances several Congressional objectives. It helps maximize the efficient development of OCS resources by assuring open access, it helps avoid the economic distortions and environmental harm attendant to unnecessary duplication of pipeline facilities, and it provides a competitive structure for the offering of OCS pipeline services.

In addition, Congress highlighted the critical role played by OCS pipelines in defining “production” in Section 2(m) of the 1978 OCSLA Amendments to include the removal of minerals (*i.e.*, oil or gas) *and* the “transfer of minerals to shore,” thus emphasizing the reality of OCS operations that without access to transportation by pipelines, there can be little or no removal of oil and gas from the OCS.

**B. Section 5(f)(1)(A) Guarantees Both “Open” and “Nondiscriminatory” Access.**

**1. “Open” access means both physical access *and* access on reasonable economic terms.**

The open access and non-discriminatory commands of Section 5(f)(1)(A) operate independently and complement each other in assuring a competitive climate for OCS

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<sup>3</sup> H.R. CONF. REP. NO. 95-1474, at 87, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686

<sup>4</sup> 43 USC § 1334 (2002).

<sup>5</sup> H.R. CONF. REP. NO. 95-1474, at 87, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686. Antitrust principles require that the owners of “bottleneck” or “essential facility” monopolies, such as pipelines, provide access on fair terms. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78 (1973); *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

pipeline services. As MMS recognizes in the Proposed Rule, the statutory grant of open and non-discriminatory access confers on shippers two independent rights of access to OCS pipeline services: open access and non-discriminatory access. (Proposed Rule at 17,050.)

"Open" access guarantees shippers not only *physical access* to pipeline capacity,<sup>6</sup> but also *access on reasonable economic terms*.<sup>7</sup> Access that is provided only at prohibitively high rates is tantamount to no effective access at all. Even uniform rates and conditions of service can result in the denial of reasonable economic access, particularly if shippers lack meaningful transportation alternatives.<sup>8</sup> Accordingly, although the OCSLA does not purport to regulate rates directly – unlike the Natural Gas Act ("NGA") and the Interstate Commerce Act ("ICA"), which require just and reasonable rates for the interstate transportation of natural gas and crude oil – Section 5(f)(1)(A)'s open access requirement *does* reach rates that effectively deny reasonable economic access.

**2. "Nondiscriminatory" access means equal treatment of similarly-situated shippers and no division of markets.**

"Non-discriminatory" access assures that similarly-situated shippers are treated the same. Thus, it protects shippers against division of markets by monopoly service providers who, absent restraint, might divide their markets, offering favorable economic terms to shippers with economic leverage, by extracting monopoly rents (effectively

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<sup>6</sup> See, e.g., *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1196 (D.C. Cir. 1995) (upholding claim of denial of physical access to pipeline capacity under Section 5(f)(1)(A) of the OCSLA); *Bonito Pipe Line Co.*, 61 FERC ¶ 61,050, at 61,221 (1992).

<sup>7</sup> *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,177 at P. 38 (2003) (holding that denial of reasonable economic access amounts to violation of Section 5(f)(1)(A) of the OCSLA), *vacated on other grounds, Williams Gas Processing – Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006).

<sup>8</sup> *Id.*

subsidizing the well-positioned shippers) from captive shippers that lack significant bargaining power. The ban on discrimination is intended to level the playing field, requiring the monopoly service provider to offer all shippers the same terms or, alternatively, to provide legitimate justification for any differences in treatment.

**C. The Proposed Rule Should Include Reporting Requirements in Order to Provide Needed Transparency to Aid in Identifying Unlawful Discrimination by Pipelines.**

MMS should include reporting requirements in the final regulations in order to give meaning to the statutory guarantee of non-discriminatory access to pipelines. While an OCS shipper generally will know whether it is being denied physical access to a pipeline or access on reasonable economic terms, in most cases, shippers will not know whether access is being provided on a non-discriminatory basis. Information on pipelines' rates and terms of service is not readily available to shippers. In most cases, pipelines insist on contractual confidentiality provisions that prohibit shippers from exchanging information with other shippers regarding contract terms for transportation service. As a result, there is no practical way of enforcing the statute's guaranty of non-discriminatory access. Without information on pipelines' rates and terms of service, shippers are in no position to make a claim. For this reason, MMS supported the FERC's proposed reporting requirements in Order Nos. 639 and 639-A as the "minimum" regulation necessary to implement Section 5(f)(1)(A) of the OCSLA. (See copy of MMS Comments dated August 26, 1999, attached hereto as Appendix A.)

MMS' apparent change in position in the Proposed Rule appears arbitrary and capricious. It certainly cannot be justified on the basis of the explanation given:

MMS is not proposing to include reporting requirements because, if a shipper alleges discrimination in a complaint

against a pipeline, it will need to provide documentation supporting that allegation.

(Proposed Rule at 17,504.) To require that discrimination *be documented*, when shippers are not granted access to information to prove discrimination, makes the prosecution of discrimination claims under OCSLA Section 5(f) a fool's errand.<sup>9</sup>

Without reporting requirements, shippers will have no effective way of knowing whether they have been the victims of unlawful discrimination. Indeed, the absence of reporting will provide added incentive for pipelines to continue and even expand the practice of requiring confidential treatment of contract terms of service. The statutory guarantee of non-discriminatory access to pipeline capacity assumes that information on pipeline rates and terms of service will be available. As the principal enforcer of the statute, MMS should require that such information be supplied.

The details of the reports that should be required for OCS pipelines are set forth in our comments dated June 14, 2004 that were submitted in response to the ANPRM. The transparency we seek will not only reveal possible violations but also will have the prophylactic effect of fostering compliance in the first instance; companies that are required to report information will be deterred from engaging in discriminatory practices or denying access. That will help to avoid future incidents of discrimination, and limit the number of discrimination complaints.

The FERC's Order No. 639, supported by MMS, described the benefits of transactional reporting as follows:

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<sup>9</sup> A similar Catch 22 occurs with regard to MMS stated requirement that shippers must set forth specific allegations of discrimination. (Proposed Rule at 17,050.) Without information on a pipeline's practices with regard to other shippers, which the pipeline is unlikely to supply voluntarily, shippers have no way of presenting the required allegations.

Making information regarding conditions of service available to OCS shippers will enable them to make informed and improved transportation arrangements; will enable OCS service providers to make better investment decisions; and will allow shippers, competitors, and the Commission to monitor the OCS for instances of discrimination and the exercise of market power. *These benefits are unavailable without the transactional transparency provided by the OCSLA reporting requirements . . . .* Making information publicly available that has heretofore been largely inaccessible should enhance competitive options for offshore producers and onshore purchasers . . . , promote a more efficient marketplace, and encourage the continued exploration and development of offshore resources.

Order No. 639, Regulations Preambles 1996-2000 FERC Stats. & Regs. ¶ 31,097 at 31,515 (emphasis added). MMS should make these same benefits available by including reporting requirements in the final rule in this case.

Absent reporting by OCS pipelines, which we view as the preferred approach to transparency, MMS could add transparency in OCS pipeline services by publishing the key commercial terms of all of its contracts for the movement of oil or gas in those instances where it takes its royalty share in kind. As one of the largest shippers on the OCS, the publication of MMS' contract terms would aid in providing transparency and help other shippers in identifying unlawful discrimination in pipeline services.

**D. The Proposed Complaint Procedure Should be Streamlined to Facilitate Speedy and Effective Relief.**

Although the complaint procedures in the Proposed Rule provide a framework for prosecuting complaints for denial of open and non-discriminatory access to OCS pipelines, several improvements are needed to close loopholes and assure speedy and effective relief from unlawful activity by pipelines.

**1. Shortened Answer Period.**

First, the time for filing an answer should be shortened to 30 days from the 60 days set forth in the Proposed Rule. The 30-day answer period is consistent with the complaint procedures used by the FERC, which call for answers within 20 days of filing the complaint and 30 days when confidential treatment is requested for information contained in the complaint,<sup>10</sup> and with the Federal Rules of Civil Procedure, which require that answers be filed within 20 days after service of the complaint.<sup>11</sup>

The 60-day period suggested in the Proposed Rule is unnecessary and would hinder effective and speedy relief. Rarely is a respondent unaware that a problem exists with the complainant or that a complaint might be forthcoming. Denial of access to OCS pipelines carries a huge cost to OCS producers. For example, the monthly loss of revenue from a new gas discovery of 10,000 MMBtu per day in a market of \$7.00 per MMBtu gas prices would exceed \$2.1 million. While there may be rare cases where the filing of an answer should be delayed up to 60 days, on a proper showing, such cases are the exception, not the rule. A 30-day interval for filing an answer provides ample time for a respondent to prepare and present its written case.

**2. Intervention by Interested Parties.**

MMS also should allow interested parties to intervene in complaint cases.

Participation by interested parties is contemplated by Section 555(b) of the

Administrative Procedure Act, 5 U.S.C. § 555(b) ("APA"), which provides:

So far as the orderly conduct of public business permits, an interested party may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an

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<sup>10</sup> 18 C.F.R. § 385.206(f).

<sup>11</sup> Fed. R. Civ. P. 12(a)(1)(A).

issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.

Some courts have construed APA Section 555(b) as granting an "interested party" a right to intervene so long as the "orderly conduct of public business permits." *American Communication Ass'n v. United States*, 298 F.2d 648, 650 (2<sup>nd</sup> Cir. 1962); see *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999).

Intervention by interested parties would aid in developing a proper administrative record in allowing parties who have an interest in the legal precedent that could be established by a complaint proceeding to submit their views and in resolving multiple, related claims in a single proceeding.

To prevent intervenors from sidetracking or delaying a proceeding, MMS should impose appropriate limits on timeliness, undue burden or delay associated with intervention. A template on intervention that the MMS could follow is found in Rules 206 and 214 of the FERC's Rules of Practice and Procedure, which are attached hereto as Appendix B.<sup>12</sup> As a general rule, the FERC requires interventions in complaint proceedings to be filed at the same time as the answer. 18 C.F.R. § 385.206(f).

### **3. Discovery by the Parties.**

The Proposed Rule should be modified to allow discovery of relevant and material information by the parties. As currently written, only the MMS is allowed to seek additional information from parties or from non-parties to a complaint proceeding. Ideally, MMS should adopt discovery procedures like those used by the FERC in connection with complaints to allow the parties to freely develop a proper administrative

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<sup>12</sup> Appendix B contains FERC's Rules of Practice and Procedure including, Complaints (Rule 206), Discovery (Rules 401-411), and Answers and Interventions (Rules 213 and 214).

record for hearing and disposition by the agency. The discovery rules used by the FERC are modeled after the Federal Rules of Civil Procedure, which are attached hereto as Appendix B. They permit discovery by written data requests, interrogatories, requests for production of documents, requests for admissions, depositions and subpoenas.

At a minimum, even if the MMS does not adopt the full panoply of discovery allowed by the FERC's Rules of Practice and Procedure, it should entertain suggestions from the parties on discovery to be undertaken by the MMS and should permit all parties to obtain the information that is furnished in response to requests for information propounded by the MMS. The sharing of such information is necessary for the proper development of an administrative record and for the effective presentation and disposition of the complainant's case.

Transparency and discovery are no doubt related: the greater the transparency on pricing and terms of service for OCS pipelines, the less the need for elaborate discovery procedures. If transparency were afforded through the reporting of pricing and key commercial terms of service, one of the main needs for discovery in complaint proceedings would be for testing the accuracy and credibility of a pipeline's defense to a charge of unlawful discrimination in access to service. Such discovery needs might very well be filled through data requests from the MMS Staff, so long as the information provided in response to such requests were made available to all parties.

To the extent that the MMS is concerned about the confidentiality of information furnished in response to discovery, those concerns could be addressed through protective orders, which are a common part of the administrative adjudication practice at the FERC and other federal agencies. Specific provisions are included in the FERC rules to

facilitate the discovery of sensitive commercial information through the use of protective orders to guard against inappropriate disclosure or use of such information. *See* 18 C.F.R. § 385.410 attached as part of Appendix B.

**4. Evidentiary Hearings**

Provisions should be included to allow for convening an evidentiary hearing in cases where a party requests such a hearing and demonstrates there are genuine issues of material fact in dispute. Such procedures are followed by the FERC and a number of other agencies, so as to afford trial-type hearings on essentially the same grounds as permitted under the Federal Rules of Civil Procedure. If there are no genuine issues of material fact in dispute, which will often be the case, the complaint can be disposed of summarily on the basis of the pleadings, responses to discovery and other materials filed into the record.

**5. Immediate Effectiveness of Decisions**

The Proposed Rule should be modified to provide that decisions of PMI on complaints will become effective immediately and will not be stayed on appeal to IBLA unless IBLA issues an order granting a stay on a proper showing by the party requesting such relief. MMS offers no explanation in the Proposed Rule why a decision by PMI on a complaint should be suspended for 60 days to allow an appeal to IBLA, and then stayed during the disposition of an appeal if review is sought by the losing party. It is worth noting, however, that other decisions by MMS involving Offshore Minerals Management are expressly made effective immediately and are not stayed during an appeal to IBLA, unless IBLA grants a stay. *See* 30 C.F.R. § 290.7 (providing that a decision of MMS is effective *upon issuance* unless IBLA grants a stay).

There is no reasonable basis to distinguish a decision by PMI on a complaint under Sections 5(e) and 5(f) of the OCSLA from other decisions of MMS regarding Offshore Minerals Management. Both types of orders relate to MMS' core responsibilities to administer and implement the OCSLA. By the same token, both types of orders warrant being made effective immediately upon issuance and not stayed pending an appeal to IBLA unless IBLA expressly grants a stay on a proper showing.

As noted above, denial of access to OCS pipelines can carry tremendous revenue consequences to producers. Relief from such unlawful activity should not be delayed absent compelling circumstances, which a pipeline would be permitted to show in an application for stay to the IBLA. To structure the procedure otherwise, as suggested in the Proposed Rule, would tend to create perverse incentives for pipelines to appeal decisions of PMI, so that they can continue unlawful conduct. For all of these reasons, MMS' final regulations should provide that decisions of PMI on complaints will be made effective immediately upon issuance, like other decisions of the MMS on Offshore Minerals Management, and will not be stayed pending appeal unless IBLA grants a stay.

**E. Relief from Denial of Open and Non-Discriminatory Access on OCS Pipelines Should Include Monetary Relief in Appropriate Cases.**

The Proposed Rule suggests that the only relief contemplated by MMS in a complaint case under Sections 5(e) and 5(f) of the OCSLA is a directive that the pipeline provide open and non-discriminatory access prospectively or pay civil penalties of up to \$10,000 per day for failure to do so. Penalties would begin to accrue 60 days after the pipeline receives an order requiring it to provide open and non-discriminatory access.

These remedies should be enlarged to include equitable monetary relief to make producers whole for denial of open and non-discriminatory access by OCS pipelines.

The Secretary of Interior and, in turn, MMS are delegated broad authority under Section 5(a) of the OCSLA to "prescribe such rules and regulations as may be necessary to carry out" Section 5 of the OCSLA. The courts have long recognized that an agency's discretion is "at [its] zenith" when exercised to fashion "policies, remedies and sanctions, including enforcement . . . to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *see also, e.g., Purepac Pharm. Co. v. Torpharm, Inc.*, 354 F.3d 877, 889 (D.C. Cir. 2004); *cf. ICC v. American Trucking Ass'n*, 467 U.S. 354, 367 (1984). Section 5(f) of the OCSLA, which is the principal substantive provision regarding pipeline access, was added to the statute as part of the 1978 amendments of the OCSLA with the clear remedial purpose of "strengthening and reaffirming" the guaranty of non-discriminatory access in Section 5(e), and to prevent bottleneck monopolies and other anti-competitive situations regarding services on OCS pipelines.<sup>13</sup>

The remedial purpose of Section 5(f) should be implemented by MMS' exercise of its full remedial power to correct abusive practices on OCS pipelines should they occur. In similar contexts, courts have upheld administrative remedial orders under an agency's inherent equitable power that required pipelines to pay back gas that was diverted from the interstate market in violation of Section 7 of the Natural Gas Act<sup>14</sup> or to provide monetary relief reflecting the unlawful profits that producers received from

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<sup>13</sup> H.R. CONF. REP. No. 95-1474, at 87 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686.

<sup>14</sup> *Cox v. FERC*, 581 F.2d 449, 451 (5<sup>th</sup> Cir. 1978) (upholding FERC order requiring payback of gas in kind as appropriate remedy to prevent unjust enrichment and place burden of increased gas prices on the party found to have violated the NGA, on the ground that "the payback in kind remedy is equitable, reasonable and within the authority of FERC").

selling gas dedicated to interstate commerce on the unregulated intrastate gas market.<sup>15</sup>

Similarly, courts have upheld the authority of the FERC to require wholesale sellers of electricity to disgorge excess revenues realized from engaging in fraudulent or manipulative practices in violation of the Federal Power Act or from selling electricity at unduly discriminatory rates.<sup>16</sup>

The same equitable principles that support relief in the above cases also support MMS in directing a pipeline operator to disgorge the discriminatory portion of charges for services on an OCS pipeline or to provide a producer with the time-value of revenue lost as a result of an unlawful denial of open access service to an OCS pipeline. Such remedies are necessary to "arrive at maximum effectuation of Congressional objectives" for open and non-discriminatory access to pipelines under Section 5(f) of the OCSLA.<sup>17</sup>

**F. Expedited Relief Should be Allowed Where the Complainant Can Demonstrate Imminent, Irreparable Injury.**

The Proposed Rule should be modified to provide for expedited relief in cases where the complainant can demonstrate imminent, irreparable injury as a result of the pipeline's unlawful conduct. Such relief is afforded under the FERC's complaint rules, 18 C.F.R. § 385.206(h), and would be appropriate for use by the MMS in cases involving pipeline access, particularly if the unlawful denial of access could result in waste or loss of potentially recoverable reserves. In such cases, on the request of the complainant, the MMS could shorten the time for the filing of an answer and then move expeditiously to

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<sup>15</sup> *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 186-87 (5th Cir. 1971) (finding that the NGA empowers the Commission, in determining a remedy for the unauthorized abandonment of service, to restore the status quo by ordering dollar refunds of any amounts collected in excess of reasonable prices).

<sup>16</sup> *See, e.g., PUC of California v. FERC*, 462 F.3d 1027, 1047 (9th Cir. 2006) (upholding FERC's remedial authority to require entities that engaged in market manipulation in violation of the Federal Power Act to disgorge profits gained as a result of unlawful activity).

<sup>17</sup> *Niagara Mohawk*, 379 F.2d at 159.

issue a decision on the merits once the answer has been filed. The availability of such expedited relief would simply match the timing of relief to the exigencies of denial of pipeline access.

In cases that do not involve the threat of waste or loss of potentially recoverable reserves, expedited relief would not be necessary and monetary relief through exercise of MMS' equitable powers would be sufficient to keep the complainant whole from losses sustained as a result of a pipeline's unlawful conduct.

**G. The Proposed Filing Fee for Complaints Should be Eliminated, Since Prosecution of Such Complaints Aids MMS in Enforcing Sections 5(e) and 5(f) of the OCSLA.**

The proposed filing fee of \$7,000 for complaints alleging violations of Sections 5(e) or 5(f) of the OCSLA should be eliminated, because it is not justified under the Independent Office Appropriations Act, 31 U.S.C. § 9701 ("IOAA"). Although MMS relies upon the decision of the D.C. Circuit in *Ayunda, Inc. v. Attorney General*, 848 F.2 1297 (DC Cir. 1988), as authority for levying the fee on the filing of a complaint, that case is not apposite.

As the *Ayunda* court noted, IOAA unquestionably "authorizes a reasonable charge to be made to 'each identifiable recipient for a measurable unit or amount of government service or property from which [the recipient] derives a special benefit.'"<sup>18</sup> By their very nature, however, complaint proceedings are distinguishable from the various requests for government licenses or services cited in *Ayunda*. Unlike the examples relied upon in *Ayunda*, a shipper complainant under Section 5(f) of the OCSLA will not be (i) seeking agency authorization to do business or certify an aspect of its business, or (ii) making any

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<sup>18</sup> 848 F.2 at 1299, quoting, *FPC v. New England Power Co.*, 415 U.S. 345, 349 (1974).

other filing or request directly attributable to the complainant itself. Rather, in filing and prosecuting a complaint, the complainant will be asking MMS to require a regulated pipeline under OCSLA Sections 5(e) and 5(f) to cease unlawful activity. In so doing, the complainant will be assisting MMS in the discharge of one of MMS' core statutory duties: to enforce the obligations Congress placed on OCS pipelines in Sections 5(e) and 5(f) of the OCSLA. Whatever "benefit" the complainant may receive is simply incidental to MMS' proper enforcement of the Act. For these reasons, the collection of the filing fee should be eliminated from the final regulations.

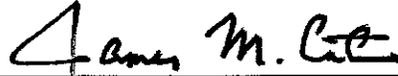
## **VI.**

### **CONCLUSION**

For the reasons stated above, MMS' Proposed Rule should be modified in the ways we have suggested so as to establish a meaningful and cost-effective program of light-handed regulation of OCS pipelines under Sections 5(e) and 5(f) of the OCSLA. To the extent MMS believes that its further consideration of a final rule would benefit from an informal workshop or other forum to allow presentation of views in person to the

MMS Staff, or through the submission of additional comments, we expressly note our interest in participating in such procedures to help in concluding the rulemaking process.

Respectfully submitted,



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Washington, DC 20036  
202-857-1700  
*Attorneys for the Producer Coalition*

June 5, 2007

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ORIGINAL

APPENDIX A



United States Department of the Interior

MINERALS MANAGEMENT SERVICE  
Washington, DC 20240

August 26, 1999



FEDERAL ENERGY  
REGULATORY  
COMMISSION

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FILED OF THE COURT

Office of the Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Re: Regulations under the Outer Continental Shelf (OCS) Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf; Notice of Proposed Rulemaking; Docket No. RM99-5-000

Gentlemen:

As the Federal agency responsible for management of the Nation's natural gas resources on the Federal OCS, the Mineral Management Service appreciates the opportunity to comment on the above proposed rulemaking. Any changes the Federal Energy Regulatory Commission may consider based upon its review of the comments filed in the above-referenced matter could impact MMS's current policies and procedures and planned changes to our program.

MMS offers the following in response to Docket No. RM99-5-000.

MMS concurs with the premise of the proposed rule. The minimum needed to enforce the OCSLA requirement of open and non-discriminatory access to pipelines transporting natural gas from the OCS is information on the rates charged to both affiliated and non-affiliated shippers. MMS agrees that the Commission has jurisdiction under the OCSLA even for pipelines for which it has no jurisdiction under the NGPA or NGA to require open access and non-discrimination. MMS believes that the approach taken by the Commission is a sensible minimal approach to assuring open access and nondiscrimination. MMS does not believe that the minimal information collection required of NGPA or NGA non-jurisdictional pipelines is too great in the context of encouraging full and open competition in the development, utilization and marketing of gas produced from the OCS. MMS believes that by having information in advance of making investments in new OCS production and transportation facilities or in advance of marketing decisions, producers and marketers of OCS production will be able to make more timely decisions. This in turn will help to meet the goal of OCSLA to make the OCS "available for expeditious and orderly development . . . in a manner consistent with the maintenance of competition and other national needs."

However, MMS does have some concerns regarding the details of the proposed regulation and offers the comments that follow.

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The MMS and FERC have different definitions of the same term – gathering. The MMS differentiates between the terms gathering and transportation. The purpose for this differentiation is that the costs of transportation are deductible from royalties whereas the costs of gathering are not. Lines characterized as gathering lines by FERC may be eligible for a transportation allowance under the MMS royalty gas valuation regulations.

Additionally, with the continuing development of the Gulf of Mexico OCS, with discoveries occurring in deeper water, and with more frequent use of new technologies, MMS, like FERC, recognizes the need for consistent and understandable guidelines. MMS believes that if the Commission is requiring the filing of all transportation rates in use for all gas pipelines on the OCS, then MMS will not be required to demand the same information from producers which are its lessees. To meet this goal, it will be necessary for the Commission and the MMS to use the same definitions, as we will explain in more detail below.

The MMS supports the FERC's new light-handed regulatory approach but believes that new proposed reporting requirements must apply to all pipelines in order to achieve open and non-discriminatory access. Requiring data to be reported for all pipelines could also benefit the MMS in verifying transportation deductions claimed under our current in-value regulations.

The FERC specifically asked for comments concerning certain circumstances under which the proposed regulations would not apply. The MMS (Department of the Interior) is a royalty interest owner in every OCS lease. As such, the MMS has the option of taking its royalty share in-kind or in-value. The MMS is currently conducting pilot projects to test methods for taking its royalty gas in-kind. The MMS will surely find itself seeking transportation on lines that would be excluded from the reporting requirements of the proposed regulations. MMS believes that its ability to choose to take gas as royalty-in-kind, under 43 U.S.C. 1353, Section 27 of the OCSLA, would be adversely affected if there were any pipelines through which the owner could discriminate against it or purchasers of its gas. For example, if the owner of a pipeline were to ship only its gas through that line, it could charge MMS or its purchasers any discriminatory rate, thus making MMS's choice to take its royalty-in-kind non-competitive. MMS does not believe that it is efficient to wait until we make a decision to take royalty-in-kind, and then attempt to ship gas through the pipeline for the pipeline owner to be required to post the "fees" it charges itself or its sole customer. That could lead to a long period before the rates were known and perhaps a longer period until they were required to be non-discriminatory. The United States would not be able to recover the full market value of the gas during whatever period the discriminatory rates were being charged. Therefore, MMS believes section 330.3 is unwarranted and should be eliminated when the regulation is published as a final rulemaking.

The information that the Commission is requesting would be beneficial to the MMS in assuring that reasonable rates are being charged for transportation, particularly in those instances where there are no alternative routes. The MMS offshore gas-in-kind team has identified several instances where shippers are being treated inequitably because of lack of access and discriminatory rates. The MMS requests that a final regulation specifically apply the reporting

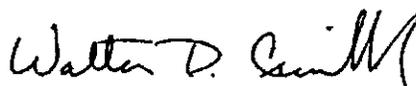
requirements whenever the Federal Government's royalty gas could be moved along with only one other producer's gas.

Generally, MMS does not believe that the filing by a Gas Service Provider (provider) of its contracts (Section 330.2(b)(1)) or "rules, regulations, and conditions of service" (Section 330.2(b)(2)) will necessarily give a complete picture of the circumstances under which gas is shipped through the provider's pipeline. MMS's specific concern is that a provider who is the only shipper (for example, through a lateral line from its platform to a main line pipeline) will have no contracts or written rules, regulations, and conditions of service to file. Indeed there may be many circumstances where no charge is made to shipments made by the provider or its affiliate. MMS would prefer that an additional requirement be made that the provider file a complete description of its costs, whenever that is the charge incurred by the provider or any affiliate that ships gas through the pipeline. If the Commission agrees, at least for pipelines with no contracts or written rules, etc., between the Gas Service Provider and itself or its affiliated producer, the rule should require the filing of a description of costs. MMS suggests that the most appropriate description of costs would be the costs MMS allows to be deducted as transportation expenses pursuant to the regulations at 30 C.F.R. section 206.157.

MMS believes that by adopting the MMS standard, the FERC will allow OCS lessees, and their affiliated providers, to maintain only one set of books of their OCS transportation costs and charges for all Federal regulatory purposes. This would indeed help to meet the goal of having this rule be a uniformly applied, light-handed regulatory standard equally applicable to all OCS gas service providers.

The MMS welcomes the opportunity to meet and discuss these and other issues that mutually affect the equitable treatment of the Federal share of oil and gas production from the OCS lands of the United States.

Sincerely,



Walter D. Cruickshank,  
Associate Director, Policy and  
Management Improvement

Federal Energy Regulatory Commission  
18 C.F.R. 385  
Selected Rules of Practice and Procedure

**COMPLAINTS (Rule 206)**

(a) General rule. Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) Contents. A complaint must:

- (1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;
- (2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;
- (3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;
- (4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;
- (5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;
- (6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;
- (7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;
- (8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;
- (9) State
  - (i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;
  - (ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;
  - (iii) What types of ADR procedures could be used; and
  - (iv) Any process that has been agreed on for resolving the complaint.
- (10) Include a form of notice suitable for publication in the Federal Register and submit a copy of the notice on a separate 3 1/2 inch diskette in ASCII format;
- (11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) Service. Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably

knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with Sec. 385.2010(f)(3), facsimile, express delivery, or messenger.

(d) Notice. Public notice of the complaint will be issued by the Commission.

(e) Privileged treatment.

(1) If a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit, with its complaint, a request for privileged treatment of documents and information under section 388.112 of this chapter and a proposed form of protective agreement. In the event the complainant requests privileged treatment under section 388.112 of this chapter, it must file the original and three copies of its complaint with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three copies must be clearly identified as containing information for which privileged treatment is sought.

(2) A complainant must provide a copy of its complaint without the privileged information and its proposed form of protective agreement to each entity that is to be served pursuant to section 385.206(c).

(3) The respondent and any interested person who has filed a motion to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective agreement and, for persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

4) A complainant must provide a copy of the complete complaint to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement.

f) Answers, interventions and comments. Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) Complaint resolution paths. One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with Secs. 385.604-385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with Sec. 385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) Fast Track processing.

(1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face "COMPLAINT REQUESTING FAST TRACK PROCESSING,"

and

explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) Simplified procedure for small controversies. A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) Satisfaction.

(1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied;

and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

## **DISCOVERY RULES (Rules 401-411)**

### *Applicability (Rule 401)*

(a) General rule. Except as provided in paragraph (b) of this section, this subpart applies to discovery in proceedings set for hearing under subpart E of this part, and to such other proceedings as the Commission may order.

(b) Exceptions. Unless otherwise ordered by the Commission, this subpart does not apply to:

(1) Requests for information under the Freedom of Information Act, 5 U.S.C. 552, governed by Part 388 of this chapter; or,

(2) Requests by the Commission or its staff who are not participants in a proceeding set for hearing under subpart E of this part to obtain information, reports, or data from persons subject to the Commission's regulatory jurisdiction; or

(3) Investigations conducted pursuant to Part 1b of this chapter. Sec. 385.402  
Scope of discovery (Rule 402).

### *Initiation of Hearing (Rule 402)*

(a) General. Unless otherwise provided under paragraphs (b) and (c) of this section or ordered by the presiding officer under Rule 410(c), participants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having any knowledge of any discoverable matter. It is not ground for objection that the

information sought will be inadmissible in the Commission proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Material prepared for litigation. A participant may not obtain discovery of material prepared in anticipation of litigation by another participant, unless that participant demonstrates a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship. In ordering any such

discovery, the presiding officer will prevent disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(c) Expert testimony. Unless otherwise restricted by the presiding officer under Rule 410(c), a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged. Such discovery will be permitted only if:

- (1) The expert is expected to be a witness at hearing; or
- (2) The expert is relied on by another expert who is expected to be a witness at hearing, and the participant seeking discovery shows a compelling need for the information and it cannot practicably be obtained by other means.

#### *Methods of Discovery; General Provisions (Rule 403)*

(a) Discovery methods. Participants may obtain discovery by data requests, written interrogatories, and requests for production of documents or things (Rule 406), depositions by oral examination (Rule 404), requests for inspection of documents and other property (Rule 407), and requests for admission (Rule 408).

(b) Discovery conferences.

(1) The presiding officer may direct the participants in a proceeding or their representatives to appear for one or more conferences, either separately or as part of any other prehearing conference in the proceeding under Rule 601(a), for the purpose of scheduling discovery, identifying discovery issues, and resolving discovery disputes. Except as provided in paragraph (b)(2) of this section, the presiding officer, upon the conclusion of a conference, will issue an order stating any and all decisions made and agreements reached during the conference.

(2) The Chief Administrative Law Judge may, upon a showing of extraordinary circumstances, waive the requirement to issue an order under paragraph (b)(1) of this section.

(c) Identification and certification of preparer. Each response to discovery under this subpart must:

(1) Identify the preparer or person under whose direct supervision the response was prepared; and

(2) Be under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

(d) Supplementation of responses.

(1) Except as otherwise provided by this paragraph, a participant that has responded to a request for discovery with a response that was complete when made is not under a continuing duty to supplement that response to include information later acquired.

- (2) A participant must make timely amendment to any prior response if the participant obtains information upon the basis of which the participant knows that the response was incorrect when made, or though correct when made is now incorrect in any material respect.
- (3) A participant may be required to supplement a response by order of the presiding officer or by agreement of all participants.
- (4) A participant may request supplementation of prior responses, if such request is permitted under the procedural schedule.

#### *Depositions During Proceedings (Rule 404)*

##### (a) In general.

- (1) A participant may obtain the attendance for a deposition by oral examination of any other participant, an employee or agent of that participant, or a person retained by that participant as a potential witness, by providing a notice of intent to depose.
- (2) Any participant may obtain the attendance of a nonparticipant for a deposition by oral examination by obtaining a subpoena, in accordance with Rule 409. For purposes of this rule, a Commission decisional employee, as defined in Rule 2201(a), is a nonparticipant.

##### (b) Notice.

- (1) A participant seeking to take a deposition under this section must provide to all other participants written notice reasonably in advance of the deposition. The notice must be filed with the Commission and served on all participants. An original must be served on each person whose deposition is sought.
- (2) A notice of intent under this section must:
  - (i) State the time and place at which the deposition will be taken, the name and address of each person to be examined, and the subject matter of the deposition; and
  - (ii) If known at the time that the deposition is noticed that its purpose is to preserve testimony, state that the deponent will be unable to testify at the hearing.
- (3)(i) A notice of intent under this section or a subpoena under Rule 409 may name as the deponent a public or private corporation or a partnership or association or a governmental agency, and describe with reasonable particularity the matters on which examination is requested. Such organization must, in response, designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and set forth, for each person designated, the matters on which that person will testify.
  - (ii) A subpoena must advise any organization that is named as a deponent but is not a participant that it has a duty to designate a person to testify. Any person designated under this section must testify on matters known by, or reasonably available to, the organization.

##### (c) Taking of deposition.

- (1) Each deponent must swear to or affirm the truth of the testimony given before any testimony is taken.
- (2) Any participant may examine and cross-examine a deponent.
- (3) Any objection made during the examination must be noted by the officer taking the deposition. After the objection is noted, the deponent must answer the question, unless a claim of privilege is asserted or the presiding officer rules otherwise.
- (4) The deposition must be transcribed verbatim.

(d) Nonstenographic means of recording; telephonic depositions. Testimony at a deposition may be recorded by means other than stenography if all participants so stipulate or if the presiding officer, upon motion, so orders. Such stipulation or order shall designate the person before whom the deposition will be taken, and the manner in which the deposition will be preserved, filed, and certified. Depositions may also be taken by telephone, if all participants so stipulate or the presiding officer, upon motion, orders.

(e) Officer taking deposition. Depositions must be taken before an officer authorized to administer oaths or affirmations by the laws of the United States or of the place where the deposition is held. A deposition may not be taken before an officer who is a relative or employee or attorney of any of the participants, or is financially or in any other way interested in the action.

(f) Submission to deponent.

(1) Unless examination is waived by the deponent, the transcription of the deposition must be submitted to the deponent for examination.

(2) If the deponent requests any changes in form or substance, the officer must enter the changes on the deposition transcript with a statement of the witness' reasons for the changes. The deponent must sign the deposition within 30 days after submittal to the deponent, unless the participants by stipulation waive the signing or the deponent cannot or will not sign. By signing the deposition the deponent certifies that the transcript is a true record of the testimony given.

(3) The officer who took the deposition must sign any deposition not signed by the deponent in accordance with this section and must state on the record that the signature is waived or that the deponent cannot or will not sign, accompanied by any reason given for a deponent's refusal to sign. If the officer complies with this paragraph, a deposition that is unsigned by the deponent may be used as though signed, unless the presiding officer rules otherwise.

(g) Certification and copies.

(1) The officer must certify on the transcript of the deposition that the deponent swore to or affirmed the truth of the testimony given and the deposition transcript is a true record of the testimony given by the deponent. The officer must provide the participant conducting the deposition with a copy of the transcription.

(2) Documents and things produced for inspection during the examination of the witness will, upon the request of a participant, be marked for identification and annexed to the deposition and the officer will certify the document or thing as the original offered during the deposition, or as a true and correct copy of the original offered.

(3) Copies of the transcript of a deposition may be purchased from the reporting service that made the transcription, subject to protections established by the presiding officer.

#### *Use of Depositions (Rule 405)*

(a) In general. During a hearing, the hearing of a motion, or an interlocutory proceeding under Rule 715, any part or all of a deposition taken pursuant to Rule 404, so far as admissible as though the witness were then present and testifying, may be used against any participant who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the provisions of this section.

(1) If the deponent is a witness at a hearing, any participant may use the deposition of that witness at the time of the witness' examination to contradict, impeach, or complete the testimony of that witness.

(2) The deposition of a participant or of any person who, at the time of taking the deposition, was an officer, director, or managing agent of a participant, or a person designated under Rule 404(b)(3) to testify on behalf of a participant may be used by another participant for any purpose.

(3) The deposition of any witness, whether or not a participant, may be used by a participant for any purpose, if the presiding officer finds that:

(i) The witness is dead;

(ii) The witness is unable to attend or testify because of age, illness, infirmity or imprisonment;

(iii) The participant offering the deposition is unable after the exercise of due diligence to procure the attendance of the witness by subpoena; or

(iv) Exceptional circumstances make it necessary in the interest of fairness with due regard to the importance of presenting the witness in open hearing, to allow use of the deposition.

(4) If only part of a deposition is offered in evidence by a participant, a participant may require the introduction of any other part which ought, in fairness, to be considered with the part introduced, and any adverse participant may introduce any other part.

(b) Objections to admissibility. No part of a deposition will constitute a part of the record in the proceeding, unless received in evidence by the Commission or presiding officer. Subject to paragraph (c) of this section, a participant may object to receiving into evidence all or part of any deposition for any reason that the evidence would be excluded if the deponent were present and testifying.

(c) Effect of errors and irregularities in depositions.

(1) Any objection to the taking of a deposition based on errors or irregularities in notice of the deposition is waived, unless written objection is promptly served on the participant giving the notice.

(2) Any objection to the taking of a deposition based on the disqualification of the officer before whom it is to be taken is waived, unless the objection is made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) Any objection to the competency of the witness or the competency, relevancy, or materiality of testimony is not waived by failure to make the objection before or during the taking of the deposition, unless the basis for the objection might have been removed

if the objection had been presented at the taking of the deposition.

(4) Any objection to errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions and answers, in the oath or affirmation, or in the conduct of participants, and errors of any kind that might be obviated, removed or cured if presented at the deposition, is waived unless objection is made at the taking of the deposition.

(5) Any objection based on errors or irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer is waived, unless the objection is made with reasonable promptness after the defect is, or with due diligence should have been, ascertained.

*Data Requests, Interrogatories, and Requests for Production of Documents or Things  
(Rule 406)*

(a) Availability. Any participant may serve upon any other participant a written request to supply information, such as responses to data requests and interrogatories, or copies of documents.

(b) Procedures.

(1) A request under this section must identify with specificity the information or material sought and will specify a reasonable time within which the matter sought must be furnished.

(2) Unless provided otherwise by the presiding officer, copies of any discovery request must be served upon the presiding officer and on all participants to the proceeding.

(3) Each discovery request must be answered separately and fully in writing.

(4) Responses to discovery requests are required to be served only on the participant requesting the information, Commission trial staff, and any other participant that specifically requests service. The presiding officer may direct that a copy of any responses be furnished to the presiding officer. Responses must be served within the time limit specified in the request or otherwise provided by the presiding officer.

(5) If the matter sought is not furnished, the responding participant must provide, in accordance with Rule 410, written explanation of the specific grounds for the failure to furnish it.

#### *Inspection of Documents and Other Property (Rule 407)*

(a) Availability. On request, the presiding officer may order any other participant to:

(1) Permit inspection and copying of any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, computer tapes or other compilations of data from which information can be obtained) that are not privileged and that are in the possession, custody, or control of the participant to whom the order is directed;

(2) Permit inspection, copying or photographing, testing, or sampling of any tangible thing that is not privileged and that is in the possession, custody, or control of the participant to whom the order is directed; and

(3) Permit entry upon or into designated land, buildings, or other property in the possession, custody, or control of the participant to whom the order is directed for the purpose of inspecting, measuring, surveying, or photographing the property or any activity or operation that is not privileged and that is conducted in or upon the property.

(b) Procedures. A request for inspection of documents or property under this section must describe with reasonable particularity the documents or other property to which access is sought. The request must also specify a reasonable time, place, and manner of making the inspection.

#### *Admissions (Rule 408)*

(a) General rule. A participant may serve upon any other participant a written request for admission of the genuineness of any document or the truth of any matter of fact. The request must be served upon all participants.

(b) Procedures.

(1) Any request for admission of the genuineness of a document must be accompanied by a legible copy of the document, unless it was previously furnished, is in the possession of the recipient of the request, or is readily available for inspection and copying.

(2) The truth of specified matters of fact or the genuineness of the documents described in a request are deemed admitted unless, within 20 days after service of the request or any longer period designated in the request, the participant that receives the request serves upon the requesting participant a written answer or objection addressed to the matters in the request.

(3) An answer must specifically admit or deny the truth of the matters in the request or set forth in detail the reasons why the answering participant cannot admit or deny the truth of each matter. A denial of the truthfulness of the requested admission must fairly discuss the substance of the requested admission and, when good faith requires that a participant qualify the answer or deny only a part of the matter of which an admission is requested, the participant must specify that which is true and qualify or deny the remainder. The answer must be served on all participants.

(c) Effect of admission. Any admission made by a participant under this section is for the purpose of the pending proceeding only, is not an admission for any other purpose, and may not be used against the participant in any other proceeding. Any matter admitted under this rule is conclusively established unless the presiding officer, on motion, permits withdrawal or amendment of the admission. The presiding officer may permit withdrawal or amendment of an admission, if the presiding officer finds that the presentation of the merits of the proceeding will be promoted and the participant who obtained the admission has failed to satisfy the presiding officer that withdrawal or amendment of the admission will prejudice that participant in maintaining his position in the proceeding.

#### *Subpoenas (Rule 409)*

(a) Issuance. On request, the presiding officer may issue a subpoena for the attendance of a witness at a deposition or hearing or for the production of documents. A request for a subpoena must be served on all participants.

(b) Service and return. A subpoena issued under this section must be served by personal service, substituted service, registered mail, or certified mail. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party or an employee of a party and is at least 18 years of age. If personal service is made by any person other than a United States marshal or deputy marshal, return of service must be accompanied by an affidavit to the Secretary or the presiding officer and must state the time and manner of service of the subpoena.

(c) Fees. Fees paid to subpoenaed persons will be in accordance with Rule 510(e).

(d) Objections. Objections to subpoenas must be made in accordance with Rule 410.

#### *Objections to Discovery, Motions to Quash or to Compel, and Protective Orders (Rule 410)*

(a) Objection to discovery—

(1) Notice of objections or motion to quash. A participant, or a recipient of a subpoena, who does not intend to comply with a discovery request must notify in writing the participant seeking discovery within a reasonable time in advance of the date on which a response or other action in conformance with the discovery request is due. A recipient of a subpoena may either provide a notice of objection or file a motion to quash.

(2) Objections to production of documents.

(i) Unless an objection to discovery under this section is based on the ground that production would impose an undue burden, the objecting participant must provide the participant seeking discovery with a schedule of items withheld and a statement of:

- (A) The character and specific subject matter of each item; and
- (B) The specific objection asserted for each item.

(ii) If an objection under this section is based on the ground that production of the requested material would impose an undue burden, the objecting participant must provide the participant seeking discovery with a description of the approximate number of documents that would have to be produced and a summary of the information contained in such documents.

(3) Objections to other discovery requests. If the discovery to which objection is made is not a request for documents, the objection must clearly state the grounds on which the participant bases its objection.

(4) Objections to compile or process information. The fact that information has not been compiled or processed in the form requested is not a basis for objection unless the objection presents grounds for limiting discovery under paragraph (c) of this section.

(b) Motions to compel. Any participant seeking discovery may file a motion to compel discovery, if:

(1) A participant to whom a data request is made or upon whom an interrogatory is served under Rule 406 fails or refuses to make a full, complete, and accurate response;

(2) A person named in a notice of intent to take a deposition or a subpoena fails or refuses to appear for the deposition;

(3) An organization named in a notice of intent to take a deposition fails or refuses to designate one or more persons to testify on its behalf under Rule 404(b)(3);

(4) A deponent fails or refuses to answer fully, completely, and accurately a question propounded or to sign the transcript of the testimony as required by Rule 404(f)(2);

(5) A participant upon whom a request for admissions is served fails or refuses to respond to the request in accordance with Rule 408(b); or

(6) A participant upon whom an order to produce or to permit inspection or entry is served under Rule 407 fails or refuses to comply with that order.

(c) Orders limiting discovery. A presiding officer may, by order, deny or limit discovery or restrict public disclosure of discoverable matter in order to:

(1) Protect a participant or other person from undue annoyance, burden, harassment or oppression;

(2) Prevent undue delay in the proceeding;

(3) Preserve a privilege of a participant, person, or governmental agency;

(4) Prevent a participant from requiring another participant to provide information which is readily available to the requesting participant from other sources with a reasonable expenditure of effort given the requesting participant's position and resources;

(5) Prevent unreasonably cumulative or duplicative discovery requests; or

(6) Provide a means by which confidential matters may be made available to participants so as to prevent public disclosure. Material submitted under a protective order may nevertheless be subject to Freedom of Information Act requests and review.

(d) Privilege—

(1) In general.

- (i) In the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities.
  - (ii) A presiding officer may not quash a subpoena or otherwise deny or limit discovery on the ground of privilege unless the presiding officer expressly finds that the privilege claimed is applicable. If a presiding officer finds that a qualified privilege has been established, the participant seeking discovery must make a showing sufficient to warrant discovery despite the qualified privilege.
  - (iii) A presiding officer may issue a protective order under Rule 410(c) to deny or limit discovery in order to preserve a privilege of a participant, person, or governmental agency.
- (2) Of the Commission.
- (i) If discovery under this subpart would require the production of Commission information, documents, or other matter that might fall within a privilege, the Commission trial staff must identify in writing the applicable privilege along with the matters claimed to be privileged or the individuals from whom privileged information is sought, to the presiding officer and the parties.
  - (ii) If the presiding officer determines that the privilege claimed for the Commission information, documents, or other matter may not be produced. If the presiding officer determines that no privilege is applicable, that a privilege is waived, or that a qualified privilege is overcome, the presiding officer will certify the matter to the Commission in accordance with Rule 714. Certification to the Commission under this paragraph must describe the material to be disclosed and the reasons which, in the presiding officer's view, justify disclosure. The information will not be disclosed unless the Commission affirmatively orders the material disclosed.

*Sanctions (Rule 411)*

- (a) Disobedience of order compelling discovery. If a participant or any other person fails to obey an order compelling discovery, the presiding officer may, after notice to the participant or person and an opportunity to be heard, take one or more of the following actions, but may not dismiss or otherwise terminate the proceeding:
- (1) Certify the matter to the Commission with a recommendation for dismissal or termination of the proceeding, termination of that participant's right to participate in the proceeding, institution of civil action, or any other sanction available to the Commission by law;
  - (2) Order that the matters to which the order compelling discovery relates are taken as established for the purposes of the proceeding in accordance with the position of the participant obtaining the order;
  - (3) Order that a participant be precluded from supporting or opposing such positions or introducing such matters in evidence as the presiding officer designates;
  - (4) Order that all or part of any pleading by a participant be struck or that the proceeding or a phase of the proceeding be stayed until the order compelling discovery is obeyed; and
  - (5) Recommend to the Commission that it take action under Rule 2102 against a representative of the participant if the presiding officer believes that the representative has engaged in unethical or improper professional conduct.

(b) Against representative of a participant. If the person disobeying an order compelling discovery is an agent, officer, employee, attorney, partner, or director of a participant, the presiding officer may take any of the actions described in paragraph (a) against that participant.

## **ANSWERS & INTERVENTIONS (Rules 213 & 214)**

### *Answers (Rule 213)*

(a) Required or permitted.

(1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) Written or oral answers. Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) Contents.

(1) An answer must contain a clear and concise statement of:

- (i) Any disputed factual allegations; and
- (ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

- (i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and
- (ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5)

(i) A respondent must submit with its answer any request for privileged treatment of documents and information under Sec. 388.112 of this chapter and a proposed form of protective agreement. In the event the respondent requests privileged treatment under Sec. 388.112 of this chapter, it must file the original and three copies of its answer with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three

copies must be clearly identified as containing information for which privileged treatment is sought.

(ii) A respondent must provide a copy of its answer without the privileged information and its proposed form of protective agreement to each entity that has either been served pursuant to Sec. 385.206 (c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(iii) The complainant and any interested person who has filed a motion to intervene may make a written request to the respondent for a copy of the complete answer. The request must include an executed copy of the protective agreement and, for persons other than the complainant, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

(iv) A respondent must provide a copy of the complete answer to the requesting person within 5 days after receipt of the written request and an executed copy of the protective agreement.

(d) Time limitations.

(1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, unless otherwise ordered.

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the Federal Register, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the Federal Register, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) Failure to answer.

(1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies

*Intervention (Rule 214)*

(a) Filing.

(1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, a State Commission must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person, other than the Secretary of Energy or a State Commission, seeking to become a party must file a motion to intervene.

(b) Contents of motion.

(1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

- (2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
- (i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
  - (ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
    - (A) Consumer,
    - (B) Customer,
    - (C) Competitor, or
    - (D) Security holder of a party; or
  - (iii) The movant's participation is in the public interest.
- (3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.
- (c) Grant of party status.
- (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.
  - (2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.
- (d) Grant of late intervention.
- (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:
    - (i) The movant had good cause for failing to file the motion within the time prescribed;
    - (ii) Any disruption of the proceeding might result from permitting intervention;
    - (iii) The movant's interest is not adequately represented by other parties in the proceeding;
    - (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and
    - (v) The motion conforms to the requirements of paragraph (b) of this section.
  - (2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.
  - (3)
    - (i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.
    - (ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.
  - (4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.