Trial Type Hearings

Context, Concept and Process

The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such (conditions/fishways). All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.

16 U.S.C. §§ 797(e), 811. (Energy Policy Act of 2005).

Department of Agriculture regulations:
7 C.F.R. Part 1

Department of the Interior regulations:
43 C.F.R. part 45

Department of Commerce Regulations:
50 C.F.R. part 221

Issued 70 F.R. 69804 (November 17, 2005).

In the Departments' experience, full administrative adjudications involving prehearing conferences, discovery, motions, one or more evidentiary hearings, briefing, and a decision often take over a year to complete, especially if the case involves multiple parties and complex technical issues. Shortening this process to 90 days will be a significant challenge for the parties and the ALJ, and will require adherence to fairly stringent procedural limits and deadlines. 70 F.R. 69804 (November 17, 2005).

TRIAL TYPE HEARINGS PROCESS TIMELINE

Step #	Increment Days	Total Cumulative Days	Hearing Cumulative Days	Process Step
1	--	--	--	Bureaus file preliminary conditions/prescriptions -- § 45.20
2	30 from #1	30	--	Non-agency parties file hearing requests -- § 45.21
3	10 from #2	40	--	Bureaus compare notes on hearing requests -- § 45.23(a)
4	15 from #2	45	--	Non-agency parties file responses/notices of intervention -- § 45.22
5	25 from #2	55	--	Bureaus decide on consolidation, designate lead agency -- § 45.23(b)
6	45 from #2	75	--	Bureaus file answers -- § 45.24
7	5 from #6	80	--	Agencies refer cases for hearing (starts 90-day clock) -- § 45.25
8	5 from #7	85	5	Lead agency sends docket notice, setting prehearing conference -- § 45.30
9	7 from #7	87	7	Parties file discovery motions -- § 45.41
10	2 before #11	90-93	10-13	Parties file objections to discover motions -- § 45.41
11	12-15 from #7	92-95	12-15	Prehearing conference held -- § 45.40
12	30 from #11	122-25	42-45	Parties complete discovery -- § 45.41
13	5 from #12	127-30	47-50	Parties file updated lists of witnesses and exhibits -- § 45.42
14	5 from #12	127-30	47-50	Parties submit written testimony -- § 45.52
15	15 from #12	137-40	57-60	Hearing begins -- § 45.50
16	5 from #15	142-45	62-65	Hearing ends, record closes -- § 45.58
17	10 from #16	152-55	72-75	Parties file briefs -- § 45.59
18	25 from #16	167-70	87-90	ALJ issues decision -- § 45.60

Are we done yet? NO!

16 U.S.C § 823d

(a)(1) Whenever any person applies for a license … and the Secretary of the department under whose supervision such reservation falls …deems a condition to such license to be necessary under the first proviso of section 797(e) of this title, the license applicant or any other party to the license proceeding may propose an alternative condition.

(b)(1)Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(a)(2) Notwithstanding the first proviso of section 797(e) of this title, the Secretary shall accept the proposed alternative condition referred to in paragraph (1), and the Commission shall include in the license such alternative condition, if the Secretary determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative condition—

(A) provides for the adequate protection and utilization of the reservation; and

(B) will either, as compared to the condition initially by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(b)(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(a)(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any condition under section 797(e) of this title or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary

(b) (4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary

The requirement for "equal consideration" has been construed under FPA section 4(e) to mean that each factor must be considered equally with the others, *i.e.*, given " 'full and genuine consideration * * *' “..."Equal consideration" is not the same as "equal treatment"; rather the agency "must balance the public interest in all of its stated dimensions, give equal consideration to conflicting interests, and reach a reasoned factual decision."

70 F.R. 69804 (November 17, 2005).

ALL DONE!

Except:
FERC NEPA
Final Order
Rehearing
Judicial Review

All of which depend on the administrative record:

All conditions (findings) must be supported by substantial evidence on the record (16 U.S.C. 825l)

THIS IS NOT AN APA CASE!
Utah Power and Light Co. v. FPC (339 F.2d 436 (10th Cir. 1964)

“WP&L also contends that substantial evidence is lacking to support the Secretary's prescription because the administrative record cites to studies that were not formally submitted to the Commission and in some instances were not specifically identified. This contention fails for two reasons: WP&L relies on a misunderstanding of the information on which the Secretary may properly rely and ignores the record addressing the prescriptions and establishing that the Secretary did not act arbitrarily or capriciously. **Firstly, the substantial evidence standards normally applicable to review of the Commission's orders apply to the findings of the Secretary.** Under our precedents, the Secretary could properly take official notice of matters of common knowledge, of evidence available to her from other proceedings, and of matters known to the agency through its cumulative experience and consequent expertise. Where a matter primarily involves a question of fact, **the Secretary may rely on her expertise, even where there is conflicting evidence**.. A footnote is enough. **The Secretary may rely on publicly available information so long as it is referenced, thereby enabling "meaningful adversarial comment and judicial review;" such material need not be directly introduced into the record**However, **the Secretary may not rely on data known only to the agency**. “

Wisconsin Power and Light Co. v. FERC. 363 F. 3d. 453 (D.C. Cir. 2004) (citations omitted).

“The substantial evidence standard is "only a specific application of [the more general arbitrary and capricious review], separately recited in the APA not to establish a more rigorous standard of *factual* support but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere.”

Bangor Hydro-Electric Co. v. FERC, 78 F.3d. 658, fn.3 (D.C. Cir. 1996)

Start early!

Pay very close attention to the studies in the early phases

Send everything to FERC that isn’t public. Err on the side of overinclusion

Pay attention to what other people enter.

Keep a list. It will become your index when you file.

But:

Record before the Court/FERC is **not** the record before the ALJ – who only sees *admitted evidence*

See 45 C.F.R.§§ 45.55, 45.57.

Agency must transfer any new information 45 C.F.R. §45.73(c).