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B-180224, December 15, 1978

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B-180224, DECEMBER 15, 1978

DIGEST: 1. UPON EXAMINATION OF DEPARTMENT OF ENERGY ORGANIZATION ACT AND APPLICATION OF CRITERIA ESTABLISHED BY GAO AND OMB, WE CONCLUDE THAT FEDERAL ENERGY REGULATORY COMMISSION (FERC) IS AN INDEPENDENT REGULATORY AGENCY SUBJECT TO GAO CLEARANCE JURISDICTION UNDER FEDERAL REPORTS ACT. INFORMATION-GATHERING BY FERC PURSUANT TO FUNCTIONS FORMERLY VESTED IN THE FEDERAL POWER COMMISSION AND INTERSTATE COMMERCE COMMISSION, OR TO PERFORM OTHER INDEPENDENT REGULATORY FUNCTIONS VESTED IN IT, IS SUBJECT TO GAO CLEARANCE, WHETHER ACTUALLY PERFORMED BY FERC OR UNDER ITS SPONSORSHIP. PUB. L. NO. 95-91, SEC. 401; 44 U.S.C. 3512(SUPP. V 1975); B-180224, FEBRUARY 8, 1974. 2. GAO FINDS NO BASIS FOR RELINQUISHING OUR CLEARANCE JURISDICTION SOLELY BECAUSE FERC WILL REPORTEDLY CONDUCT MUCH OF ITS INFORMATION GATHERING THROUGH THE ENERGY INFORMATION ADMINISTRATION (EIA). SECTION 205 OF THE DEPARTMENT OF ENERGY ORGANIZATION ACT GIVES EIA POWER TO PERFORM FUNCTIONS VESTED IN THE SECRETARY OF ENERGY RELATING TO GATHERING, ANALYSIS, AND DISSEMINATION OF ENERGY INFORMATION, BUT DOES NOT APPEAR TO REQUIRE FERC TO RELY SOLELY ON EIA TO COLLECT INFORMATION FOR IT. USE OF EIA BY FERC, PURSUANT TO ITS INDEPENDENT REGULATORY FUNCTIONS, WOULD BE UNDER THE SPONSORSHIP OF FERC AND WOULD STILL BE SUBJECT TO GAO CLEARANCE AUTHORITY. 44 U.S.C. 3512(C)(SUPP V 1975). 3. SINCE CLEARANCE OF THE SAME FORMS UNDER THE FEDERAL REPORTS ACT BY BOTH GAO AND OMB MIGHT FRUSTRATE THE INTENT OF THE ACT (44 U.S.C. 3512) BY POSSIBLE DELAYING CLEARANCE OF FERC FORMS, AND THE INTENT OF THE DEPARTMENT OF ENERGY ORGANIZATION ACT BY DISCOURAGING CONSOLIDATION OF ENERGY INFORMATION COLLECTION ACTIVITIES IN EIA, FERC MAY CHOOSE WHETHER TO SUBMIT REPORTS IT SPONSORS, WHICH ARE COLLECTED BY EIA, TO GAO OR OMB.

FEDERAL REPORTS ACT JURISDICTION OVER FEDERAL ENERGY REGULATORY COMMISSION:

THIS DECISION IS IN RESPONSE TO A REQUEST FROM THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET (OMB) OF MAY 31, 1978, THAT WE RECONSIDER THE POSITION TAKEN IN A MEMORANDUM BY OUR GENERAL COUNSEL OF JANUARY 31, 1978, CONCLUDING THAT THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) IS AN INDEPENDENT REGULATORY COMMISSION SUBJECT TO FEDERAL REPORTS ACT CLEARANCE BY THE GENERAL ACCOUNTING OFFICE (GAO). THE MEMORANDUM WAS SUBMITTED TO OMB AND FERC FOR COMMENTS. FERC HAS NOT RESPONDED BUT, ACCORDING TO OMB, BOTH FERC AND THE ENERGY INFORMATION ADMINISTRATION (EIA) WHICH COLLECTS INFORMATION FOR FERC, AGREE WITH OMB THAT "ADDING GAO CLEARANCE COULD SUBSTANTIALLY DISRUPT THEIR EFFECTIVE COLLECTION OF INFORMATION."

THE ISSUE ARISES BECAUSE FERC HAS SUCCEEDED TO AT LEAST SOME OF THE FUNCTIONS AND POWERS OF THE FEDERAL POWER COMMISSION (FPC) AND THE FPC HAS BEEN TERMINATED. UNDER THE FEDERAL REPORTS ACT AS AMENDED, FPC WAS AN INDEPENDENT REGULATORY AGENCY AND THEREFORE WAS REQUIRED TO OBTAIN CLEARANCE FROM THIS

OFFICE FOR EFFORTS TO COLLECT IDENTICAL INFORMATION FROM 10 OR MORE RESPONDENTS. FEDERAL AGENCIES OTHER THAN INDEPENDENT REGULATORY AGENCIES MUST OBTAIN SUCH CLEARANCE FROM OMB. 44 U.S.C. 3501- 3512 (1970 & SUPP V 1975). FERC IS EXPECTED TO CONDUCT MUCH OF ITS INFORMATION-GATHERING THROUGH THE DEPARTMENT OF ENERGY (DOE) AND OMB BELIEVES THAT THERE IS NO RATIONAL BASIS FOR SPLITTING REVIEW RESPONSIBILITY FOR FERC FROM THE REST OF THE DEPARTMENT, WHICH IS SUBJECT TO OMB CLEARANCE AND REVIEW.

IN THE MEMORANDUM WHICH OMB CITES, WE POINTED OUT THAT FERC HAS BEEN GIVEN MANY ATTRIBUTES COMMONLY IDENTIFIED WITH INDEPENDENT REGULATORY AGENCIES AND IS IDENTIFIED BY THE STATUTE AS SUCH. SECTION 401(A) OF PUB. L. NO. 95-91 STATES:

"THERE IS HEREBY ESTABLISHED WITHIN THE DEPARTMENT (OF ENERGY) AN INDEPENDENT REGULATORY COMMISSION TO BE KNOWN AS THE FEDERAL ENERGY REGULATORY COMMISSION."

WE ALSO SHOWED THAT FERC MEETS THE CRITERIA WHICH WE AND OMB AGREED UPON TO DETERMINE WHICH AGENCIES ARE SUBJECT TO GAO REVIEW. WE CONCLUDED THAT THE MERE FACT THAT FERC IS "WITHIN" THE DEPARTMENT DOES NOT DEFEAT OUR JURISDICTION. ALSO, WE CONCLUDED THAT THE DEPARTMENT OF ENERGY ORGANIZATION ACT (PUB. L. NO. 95-91, 92 STAT. 565, AUGUST 4, 1977), IN SECTION 707, ASSURES THAT THE TRANSFER OF FPC (AND CERTAIN INTERSTATE COMMERCE COMMISSION (ICC) FUNCTIONS TO FERC DOES NOT DEFEAT THE INTENTION OF THE FEDERAL REPORTS ACT, AS AMENDED BY SECTION 409 OF PUB. L. NO. 93-153, THAT INFORMATION-GATHERING RELATED TO THE TRANSFERRED FUNCTIONS BE SUBJECT TO GAO CLEARANCE.

OMB EVIDENTLY DOES NOT NOW DISPUTE THAT FERC IS AN INDEPENDENT REGULATORY AGENCY. HOWEVER, OMB BELIEVES THAT CONGRESS, IN ENACTING THE DEPARTMENT OF ENERGY ORGANIZATION ACT, CONSOLIDATED ALL INFORMATION COLLECTION FUNCTIONS OF DOE AND FERC INTO THE ENERGY INFORMATION ADMINISTRATION (EIA). IT IS ARGUED THAT SINCE ALL FUNCTIONS NOT TRANSFERRED FROM FPC TO FERC WERE TRANSFERRED TO THE SECRETARY OF ENERGY, AND SINCE EIA, AND NOT FERC, WAS GIVEN THE RESPONSIBILITY TO COLLECT INFORMATION, OMB WOULD HAVE THE RESPONSIBILITY FOR CLEARANCE OF FERC REPORTING REQUIREMENTS CARRIED OUT BY EIA.

WE FIND NO BASIS FOR RELINQUISHING OUR JURISDICTION SOLELY BECAUSE FERC REPORTEDLY CONDUCTS INFORMATION-GATHERING THROUGH DOE. WHILE SECTION 205(C) OF THE DOE ORGANIZATION ACT GIVES EIA POWER TO PERFORM CERTAIN FUNCTIONS VESTED IN THE SECRETARY BY LAW RELATING TO GATHERING, ANALYSIS, AND DISSEMINATION OF ENERGY INFORMATION, THOSE FUNCTIONS DO NOT INCLUDE FUNCTIONS FORMERLY VESTED IN THE FPC AND ICC. HENCE, SECTION 205 DOES NOT APPEAR TO REQUIRED FERC TO RELY SOLELY ON EIA TO COLLECT INFORMATION FOR IT.

WE DO NOT AGREE WITH OMB THAT THE CONGRESS, IN THE DOE ORGANIZATION ACT, "CONSOLIDATED ALL INFORMATION COLLECTING FUNCTIONS OF THE DEPARTMENT OF ENERGY (DOE) AND FERC" INTO EIA, OR THAT "FERC WAS NOT GIVEN THE RESPONSIBILITY TO COLLECT INFORMATION." SEE SECTION 401(G) OF THE ACT, PROVIDING THAT FERC MAY "BY ONE OR MORE OF ITS MEMBERS OF BY SUCH AGENTS AS IT MAY DESIGNATE, CONDUCT ANY HEARING OR OTHER INQUIRY NECESSARY OR APPROPRIATE TO ITS FUNCTIONS * * * ."

EIA HAS CONSIDERABLE INDEPENDENCE WITHIN DOE. THE ADMINISTRATOR OF ENERGY INFORMATION IS APPOINTED NOT BY THE SECRETARY BUT BY THE PRESIDENT, SUBJECT TO SENATE CONFIRMATION. SECTION 205(A)(1). HE IS NOT REQUIRED TO OBTAIN THE APPROVAL OF ANY OFFICER OR EMPLOYEE OF DOE IN CONNECTION WITH COLLECTION OF ANY INFORMATION. SECTION 205(D). THE ADMINISTRATOR OPERATES UNDER HIS OWN STATUTORY INFORMATION COLLECTION CHARTER, ON BEHALF OF FERC. WE ARE RELUCTANT TO ASSUME,

WITHOUT MORE EVIDENCE, THAT THE CONGRESS INTENDED TO MAKE FERC'S ABILITY TO GATHER INFORMATION NEEDED TO PERFORM ITS FUNCTIONS DEPENDENT ON EIA'S WILLINGNESS TO ASSIST IT OR, EVEN IF EIA WERE WILLING, ON THE AVAILABILITY OF EIA RESOURCES FOR THAT PURPOSE.

OF COURSE, THERE MAY BE CASED WHERE INFORMATION COLLECTED BY EIA FOR ITS OWN PURPOSES WOULD BE USEFUL TO FERC. THE DOE ORGANIZATION ACT REQUIRES THE ADMINISTRATOR OF ENERGY INFORMATION TO PROVIDE ANY INFORMATION IN HIS POSSESSION TO FERC UPON REQUEST. SECTION 205(F). MOREOVER, THERE IS NO OBJECTION TO THE PROCEDURE WHICH OMB TELLS US HAS BEEN ADOPTED BY DOE, EIA, AND FERC, WHEREBY FERC USES EIA FORMS "TO CONDUCT STATISTICAL SURVEYS AND ESTABLISH RATES OR PROMULGATE OTHER REGULATIONS."

WHERE FERC USES EIA TO COLLECT INFORMATION IN FURTHERANCE OF ITS INDEPENDENT REGULATORY FUNCTIONS, SUCH COLLECTION WOULD BE UNDER THE SPONSORSHIP OF FERC AND WOULD STILL BE SUBJECT TO GAO CLEARANCE AUTHORITY. 44 U.S.C. 3512(C) STATES THAT AN INDEPENDENT REGULATORY AGENCY "SHALL NOT CONDUCT OR SPONSOR THE COLLECTION OF INFORMATION UPON AN IDENTICAL ITEM FROM 10 OR MORE PERSONS * * * " WITHOUT THE ADVANCE SUBMISSION OF PLANS OR FORMS TO BE USED TO THE COMPTROLLER GENERAL.

WHILE FERC IS AN INDEPENDENT REGULATORY AGENCY SUBJECT TO GAO REVIEW UNDER THE FEDERAL REPORTS ACT, ITS CIRCUMSTANCES ARE, IN CERTAIN RESPECTS UNIQUE. FIRST, IT IS, ORGANIZATIONALLY, WITHIN AN EXECUTIVE AGENCY. SECOND, THERE EXISTS WITHIN THE SAME AGENCY AN ORGANIZATION, EIA, WHICH COLLECTS INFORMATION FOR ITS PURPOSES AND FOR DOE PURPOSES ON SUBJECTS AND IN A FORM EQUALLY USABLE BY FERC. THUS, OMB SAYS THAT "INDIVIDUAL DATA ELEMENTS IN THE SAME FORMS PROVIDE INFORMATION SERVING POLICY, STATISTICAL AND REGULATORY NEEDS."

IN THOSE CIRCUMSTANCES IN WHICH EIA COLLECTS INFORMATION, WHETHER OR NOT FOR USE BY FERC, OMB BELIEVES THAT THE LAW MAKES THE COLLECTION SUBJECT TO OMB CLEARANCE. OMB'S MANDATE IS PROVIDED BY 44 U.S.C. 3509(1970), WHICH IS ANALOGOUS TO THE AUTHORITY GIVEN GAO OVER INDEPENDENT REGULATORY AGENCIES BY 44 U.S.C. 3512(C), SUPRA, AND WHICH REQUIRES OMB CLEARANCE OF COLLECTION "CONDUCTED" BY A FEDERAL AGENCY.

TO REQUIRE FERC TO SUBMIT INFORMATION COLLECTION REQUIREMENTS WHICH IT SPONSORS TO GAO AND AT THE SAME TIME, TO REQUIRE EIA, AS THE COLLECTING AGENCY, TO SUBMIT THE SAME REQUIREMENTS TO OMB WOULD, IN OMB'S VIEW, CREATE THE "DUPLICATION AND OVERLAP CONGRESS SPECIFICALLY SOUGHT TO AVOID," AND WOULD BE "CONTRARY TO COMMON SENSE AND PRACTICAL MANAGEMENT PRACTICES."

WE AGREE THAT THIS DOUBLE CLEARANCE RESULT WOULD CONFLICT WITH CONGRESS' INTENT, UNDER THE FEDERAL REPORTS ACT, TO REDUCE DELAYS IN COLLECTION OF INFORMATION NEEDED BY INDEPENDENT REGULATORY AGENCIES. MOREOVER, IT COULD POSSIBLY DETER FERC FROM USING EIA AS ITS COLLECTING AGENCY. ALTHOUGH FERC IS NOT REQUIRED TO DO SO, WE RECOGNIZE THAT THERE MAY BE CONSIDERABLE PRACTICAL ADVANTAGE FOR IT IN USING EIA, WHERE EIA HAS UNIQUE EXPERTISE AND RESOURCES. ADDITIONALLY, IF FERC COLLECTS INFORMATION ITSELF WHILE EIA COLLECTS THE SAME INFORMATION, THE RESULT IS BURDENSOME TO RESPONDENTS, A RESULT THE CONGRESS WANTED TO AVOID.

WE CANNOT ABDICATE OUR RESPONSIBILITIES UNDER 44 U.S.C. 3512(C) TO CLEAR REPORTS SPONSORED BY INDEPENDENT REGULATORY AGENCIES MERELY BECAUSE AN EXECUTIVE AGENCY, SUBJECT TO OMB REVIEW, IS THE COLLECTING AGENCY. CONGRESS INTENDED THAT INDEPENDENT REGULATORY AGENCIES SHOULD HAVE AVAILABLE TO THEM CLEARANCE REVIEW BY GAO WHICH, UNLIKE OMB, IS REQUIRED TO COMPLETE ITS REVIEW WITHIN 45 DAYS AND

CANNOT MAKE ANY DETERMINATION AS TO THE NECESSITY FOR THE INFORMATION. 44 U.S.C. 3512(D)(SUPP. V 1975). HOWEVER, CONGRESS ALSO INTENDED BOTH THAT THE REPORTS ACT LESSEN THE BURDEN ON RESPONDENTS, NOT INCREASE IT AND, BY PUTTING FERC WITHIN DOE, THAT EFFICIENCY WOULD BE ENHANCED BY, FOR EXAMPLE, COMBINING FERC INFORMATION NEEDS WITH IDENTICAL EIA NEEDS. IN THE UNIQUE CIRCUMSTANCES PRESENT HERE, WHERE EIA IS TO COLLECT THE INFORMATION AND THIS WOULD RESULT IN DUAL REVIEW, TO REQUIRE OUR REVIEW COULD FRUSTRATE THESE POLICIES. WE WILL THEREFORE NOT REQUIRE FERC TO SUBMIT INFORMATION COLLECTION REQUIREMENTS TO US FOR CLEARANCE IF FERC CHOOSES TO RELY ON EIA FOR PERFORMING THE COLLECTION AND EIA SUBMITS THOSE REQUIREMENTS TO OMB FOR REVIEW.

WHEN FERC RELIES ON EIA FOR INFORMATION COLLECTION, FERC MAY CHOOSE WHETHER TO SUBMIT ITS INFORMATION COLLECTION REQUIREMENTS TO GAO OR TO LEAVE THIS RESPONSIBILITY TO OMB, THROUGH EIA. THE CONGRESSIONAL REQUIREMENT FOR SPONSORS OF INFORMATION COLLECTION, AS WELL AS THE COLLECTORS, TO RECEIVE CLEARANCE WOULD BE MET, SINCE EIA WOULD BE REQUIRED TO SUBMIT FORMS OR PLANS TO OMB PRIOR TO UNDERTAKING A COLLECTION.

HOWEVER, SINCE FERC IS AN INDEPENDENT REGULATORY AGENCY UNDER GAO CLEARANCE JURISDICTION, IT MUST SUBMIT ANY REPORTS OR OTHER INFORMATION COLLECTION REQUIREMENTS TO GAO FOR REVIEW WHEN IT IS COLLECTING THE INFORMATION ITSELF OR IS SPONSORING THE COLLECTION BY ANY AGENCY OR CONTRACTOR OTHER THAN EIA. ALSO, IN ORDER TO SATISFY THE PURPOSE OF VESTING REVIEW OF INFORMATION COLLECTION BY INDEPENDENT REGULATORY AGENCIES IN GAO-- THAT THE EXECUTIVE NOT BE IN A POSITION TO FRUSTRATE NEEDS OF THOSE AGENCIES FOR INFORMATION, FOR REASONS OTHER THAN PREVENTING DUPLICATION OR BURDEN-- FERC MAY AT ANY TIME CHOOSE TO CONDUCT ITS OWN INFORMATION-COLLECTION, TO SPONSOR COLLECTION, BY AN ENTITY OTHER THAN EIA, OR TO REQUEST THAT WE CLEAR INFORMATION COLLECTION BY EIA FOR FERC. WE WOULD REVIEW COLLECTIONS MADE BY EIA FOR FERC, UNLESS FERC AGREES TO SUBMIT TO REVIEW BY OMB ONLY.

OMB STATED THAT OUR PRIOR POSITION REQUIRING GAO CLEARANCE OF FERC SPONSORED AS WELL AS FERC-COLLECTED INFORMATION

"COULD RENDER POTENTIALLY ILLEGAL THE VARIOUS FORMS ALREADY ISSUED BY EIA AND FERC WHICH HAVE OMB BUT NOT GAO CLEARANCE AND LEAD TO DISRUPTIVE LITIGATION THAT COULD SUBSTANTIALLY DELAY COLLECTION OF NEEDED INFORMATION."

SINCE WE NOW HOLD THAT EIA-COLLECTED INFORMATION NEED NOT BE SUBMITTED FOR GAO REVIEW IF FERC AGREES, THERE IS LITTLE BASIS FOR LITIGATION. FORMS OR PLANS ARE CLEARED BY OMB BASED ON THE SAME CRITERIA-- BURDEN AND DUPLICATION-- WHICH WE WOULD APPLY. MOREOVER, DURING THAT CLEARANCE PROCESS, A FORUM IS AVAILABLE FOR RESPONDENTS TO EXPRESS TO OMB THEIR OBJECTIONS TO THE FORM OR PLAN.

THE REPORTS ACT IS INTENDED TO PREVENT BURDEN AND DUPLICATION, WHETHER CLEARANCE IS PERFORMED BY GAO OR OMB. LITIGATION IN THIS AREA HAS ARISEN WHERE FORMS WHICH PLAINTIFFS THINK SHOULD HAVE BEEN CLEARED WERE NOT WHERE PLAINTIFFS THINK CLEARANCE SHOULD NOT HAVE BEEN GRANTED, BUT WE SEE NO BASIS FOR OBJECTIONS BY A RESPONDENT, MERELY BECAUSE THE CLEARANCE WAS PERFORMED BY OMB RATHER THAN GAO, WHEN THE FORMS HAVE IN FACT BEEN SUBJECT TO THE CLEARANCE PROCESS AND HE HAS BEEN GIVEN THE OPPORTUNITY TO COMMENT.

OF COURSE, IF IT WERE ALLEGED THAT FOR SUBSTANTIVE REASONS OMB'S CLEARANCE SHOULD NOT HAVE BEEN GRANTED (FOR EXAMPLE, BECAUSE THE FORM IS UNDULY BURDENSOME), THERE COULD BE A BASIS FOR LITIGATION. SUCH LITIGATION COULD NOT BE

SAID TO BE THE RESULT OF OUR POSITION THAT FERC INFORMATION-GATHERING IS SUBJECT TO GAO CLEARANCE, HOWEVER. IT WOULD NOT BE BASED ON THE PROCEDURAL DEFECT THAT THE FORM WAS CLEARED BY OMB INSTEAD OF GAO BUT RATHER ON THE SUBSTANTIVE DEFECT THAT THE FORM IS IN FACT UNDULY BURDENSOME.