

Report of the Committee on Natural Gas Certificate and Authorization Regulations

I. "AT RISK" CONDITION

On January 17, 1991, the Federal Energy Regulatory Commission (Commission or FERC) began conditioning certain Natural Gas Act (NGA) section 7(c) construction certificates¹ in such a way that pipeline companies would bear the risk of recovering project costs.² Before the advent of open access transportation, a pipeline seeking a certificate to expand its mainline generally had executed long-term sales contracts matched by long-term gas supply agreements. Accordingly, there was no question as to the new facility's usefulness. The certificate assured the pipeline of rate base inclusion of the project's costs in its next general NGA section 4 rate case.

With the on-set of open access transportation, some projects have been built without the pipeline's having in hand firm, long-term contracts (covering 100% of the new capacity). This might be because the pipeline anticipated a demand for interruptible transportation or a future demand for firm transportation from a developing gas supply area. In certain 1991 orders³, the Commission issued the requested certificate, but included language such as the following to impose an "at risk" condition:

[W]e do not intend to abandon our responsibility to ensure that present and future customers do not make inappropriate contributions to the costs associated with the involved facilities. This we intend to accomplish by placing Arkla at risk for the costs associated with the involved facilities in the event all of Line AC's capacity is not subscribed under firm contracts at the time Arkla files to include the costs in its rate.[*]

This can be accomplished in various ways. For example, the Commission could limit a pipeline's cost recovery to only the capacity for which it has firm contracts for service to satisfy the at-risk condition. The Commission also could determine that it would set rates based on 100 percent of the capacity of the involved facilities irrespective of the subscribed volumes. These and other approaches would allow the Commission to ensure that ratepayers do not pay for unused capacity. However, it is not necessary at this time to conclude that one approach would be appropriate in all instances. The Commission will continue to look at this issue and will address it further in the ongoing rulemaking proceeding in Docket No. RM90-1-000. But to provide certainty here to Arkla, when the pipeline seeks to recover the costs of the facility we will place it at risk by allowing it to recover only the costs associated with the capacity for which it has executed firm contracts. However, the pipeline may seek to satisfy the at-risk condition in a section 4 rate case seeking to include in rate base the costs of the facilities.

[*] The duration of these contracts would have to be at least equal to the term required to meet the Commission's contract standards in traditional 7(c) certifi-

1. As well as certificates for facilities originally built solely for Natural Gas Policy Act (NGPA) section 311 transportation service.

2. See *Natural Gas Pipeline Co.*, 54 F.E.R.C. ¶ 61,030 (1991); *Transwestern Pipeline Co.*, 54 F.E.R.C. ¶ 61,031 (1991); *ANR Pipeline Co.*, 54 F.E.R.C. ¶ 61,032 (1991); *Arkla Energy Resources*, 54 F.E.R.C. ¶ 61,033 (1991).

3. See cases cited *supra* note 2.

cases. We note that most construction is supported by contracts with terms of 10 years or more.⁴

Similar language appeared in subsequent certificate orders imposing an "at risk" condition.⁵ Applications for rehearing of such language have been filed with the Commission. Some were still pending, along with at least four court of appeals cases,⁶ as of the end of 1992.

The Commission considered the "at risk" condition further in Docket No. RM90-1-000, in which Order No. 555 was issued on September 20, 1991.⁷ The final rule was scheduled to take effect on November 19, 1991, but on November 13, 1991 the Commission postponed the effective date of the rule until 30 days after publication in the *Federal Register* of an order on rehearing.⁸ As of the end of 1992, rehearing of Order No. 555 was still pending.

In 1992, the Commission also issued orders putting pipelines at risk without using the language from the January 17, 1991 orders⁹ or incorporating by reference the provisions of Order No. 555.

In an October 20, 1992 order issuing a certificate for the Mobile Bay Pipeline, previously constructed solely for NGPA section 311 transportation service, the Commission stated:

[W]hile the likelihood of a fully utilized pipeline is a reasonable possibility, we have no assurance that the pipeline's capacity will be fully contracted on a firm and long-term basis. Therefore, Transco will be placed at risk for the recovery of the costs of the Mobile Bay Pipeline facilities. The allocation of costs and risk of the Mobile Bay Pipeline facilities will be considered in Transco's pending restructuring proceeding in Docket No. RS92-86-000. . . . Under these circumstances, certification of the pipeline will not prejudice Transco's ratepayers since the issue of appropriate treatment of Mobile Bay Pipeline costs will be subject to the restructuring proceeding.¹⁰

4. 54 F.E.R.C. ¶ 61,033, at 61,136-37.

5. See *Colorado Interstate Gas Co.*, 54 F.E.R.C. ¶ 61,195 (1991); *El Paso Natural Gas Co.*, 55 F.E.R.C. ¶ 61,180 (1991); *Midwest Gas Storage, Inc.*, 55 F.E.R.C. ¶ 61,140 (1991); *Northwest Pipeline Corp.*, 55 F.E.R.C. ¶ 61,439 (1991); *Southern Natural Gas Co.*, 55 F.E.R.C. ¶ 61,212 (1991); *Tennessee Gas Pipeline Co.*, 55 F.E.R.C. ¶ 61,484 (1991); *ANR Pipeline Co.*, 56 F.E.R.C. ¶ 61,110 (1991).

6. *Natural Gas Pipeline Co. v. FERC*, D.C. Cir. No. 91-1384, and *ANR Pipeline Co. v. FERC*, D.C. Cir. No. 91-1375, both were being held in abeyance because of the continuing pendency of rehearing of Order No. 555 issued in Docket No. RM90-1-000 on September 20, 1991. *Colorado Interstate Gas Co. v. FERC*, D.C. Cir. No. 92-1322, was filed on July 30, 1992, but the FERC's motion to dismiss on procedural grounds was pending at year end. *Arkla Energy Resources v. FERC*, D.C. Cir. No. 92-1611, was filed on November 24, 1992. Separately, the standard "at risk" condition was referred to in *Great Lakes Gas Transmission Ltd. Partnership v. FERC*, D.C. Cir. 91-1394, but not challenged. This was because in a foreign gas supply situation the FERC found even 15-year firm contracts covering 100% of capacity to be insufficient. The pipeline argued that the standard 10-year term should apply to foreign as well as domestic supply situations. Following briefing and oral argument, the court's decision was pending at the end of 1992.

7. Order No. 555, *Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities*, III F.E.R.C. STATS. & REGS. ¶ 30,928, 56 Fed. Reg. 52,330 (1991)(to be codified at C.F.R. pts. 2, 154, 157, 284, 375, 380)[hereinafter Order No. 555].

8. III F.E.R.C. STATS. & REGS. ¶ 30,928A, 56 Fed. Reg. 58,844 (1991).

9. See cases cited *supra* note 2.

10. *Transcontinental Gas Pipe Line Corp.*, 61 F.E.R.C. ¶ 61,073, at 61,296 (1992). For similar language and result, see *Superior Offshore Pipeline Co.*, 61 F.E.R.C. ¶ 61,077 (1992) (also issued on October 20, 1992).

On December 3, 1992, the Commission issued an "Order on Rehearing of Deferred Issue," in which it denied Natural's request for removal of the at risk condition. The Commission stated:

[W]e find that Natural should remain at risk for the recovery of the costs of the facilities. We have no assurance that the pipeline's capacity will be fully contracted on a firm long term basis. Therefore, the allocation of the costs and risk of these facilities will be considered, when the issue of cost recovery for these facilities is actually before us in a section 4 rate proceeding.¹¹

II. THE "CONSTRUCTION RULE," ORDER NO. 555

Order No. 555 also addresses construction and environmental matters which were the original focus of the rulemaking. The issue of timely authorization (and thus, construction) of jurisdictional facilities is not new. For some years, there has been a trend toward allowing construction of facilities on a self-implementing basis. For example, each pipeline company is able to obtain and use a blanket *facilities* certificate.¹² This is the umbrella NGA section 7(c) authority under which both the "automatic authorization" and "prior notice" construction procedures exist.¹³

Order No. 555 (issued September 20, 1991, but not effective as of the end of 1992) would build on this by increasing the number and types of NGA jurisdictional facilities that could be constructed without requiring a specific section 7(c) certificate to be issued by the FERC. With a few exceptions, any facility costing less than \$10 million could be built under "automatic authorization" and those costing more (no matter how expensive) could be built following the completion of the "prior notice" procedure.

The quid pro quo would be possible in "at risk" rate treatment and generic environmental compliance. Order No. 555 found this necessary to protect both the ratepayer and the environment in the absence of specific, pre-construction regulatory review of each project.

Under Order No. 555, even main line pipe and compression could be built without a FERC certificate. The defined term "eligible facility"¹⁴ would include almost any NGA jurisdictional facility, such as: a gas supply facility; an interconnection with another open access pipeline; a new main line; an extension of a main line; and an expansion of a main line.

Expressly excluded from the definition (for safety reasons), were facilities involving storage and the receipt of SNG and LNG. Delivery taps also were excluded. However, subpart F provided for use of the "prior notice" procedure for delivery taps to LDCs and end-users.

Facilities used "solely for" transportation under NGPA section 311

11. *Natural Gas Pipeline Co.*, 61 F.E.R.C. ¶ 61,297, at 62,121 (1992). See also *Superior Offshore Pipeline Co.*, 61 F.E.R.C. ¶ 61,077 (1992); *Transcontinental Gas Pipe Line Corp.*, 61 F.E.R.C. ¶ 61,073 (1992).

12. Issued pursuant to part 157, subpart F of the FERC regulations, and not to be confused with the blanket *transportation* certificate available to each open access pipeline under part 284, subpart G of the FERC regulations.

13. See, e.g., 18 C.F.R. § 157.203.

14. Applying to both "automatic authorization" and "prior notice" projects.

receive different treatment. Under Order No. 555, any facility built "solely for" section 311 transportation does not require an NGA section 7(c) certificate regardless of the size or cost of the facility. Although such facilities are not subject to FERC jurisdiction, the services they perform (and rates charged for such services) are within the NGPA authority of the FERC.¹⁵ As a practical matter, many section 311 facilities are eventually certificated under section 7(c) so their use will not be limited just to section 311 transportation service.

Order No. 555 would require that the same environmental report be filed on each project, without regard to the regulatory authority under which the project is to be constructed. For a "prior notice" project the report would have to be submitted with the "prior notice" filing.¹⁶ For an NGPA section 311 project, the environmental report would have to be submitted with the 30-day notice of intent to start construction. However, for "automatic authorization" projects the environmental reports could be submitted to the FERC after the fact, in semi-annual filings covering six-month periods. For a traditional NGA section 7(c) application project, the report would be filed with the application itself.

The generic environmental requirements in Order No. 555 were intended to cover all project types. It follows that an individual project might not be able to comply with all the generic requirements. Order No. 555 attempted to provide for the necessary adjustment by creating a reconciliation procedure under which the Director of the FERC's Office of Pipeline and Producer Regulation would have the delegated authority to allow the project to proceed, perhaps on the basis of additional mitigation measures agreed to by the project sponsor.

Order No. 555 also would require newspaper publication of a project notice in each county where construction would occur. Publication would be required six weeks before "automatic authorization" construction was scheduled to start and four weeks before compliance reports were to be filed for "prior notice" and "NGPA section 311" projects.

Following the FERC's decision to postpone the effectiveness of Order No. 555 until after rehearing had been completed, a technical conference was held on November 12, 1991. Interested parties voiced their concerns to senior FERC staff, primarily about the environmental aspects of Order No. 555. On December 11, 1991 the FERC issued a document entitled, *Questions Arising From Technical Conference And Request For Comments*, which dealt with "the environmental portions of the rule." As of the end of 1992, rehearing of Order No. 555 was still pending, and the rule had not been made effective.

III. LDC BYPASS

Recent cases reflect the Commission's policy to permit LDC bypass as a

15. It is as a condition of such service authority that the FERC imposes environmental conditions on the construction of § 311 facilities. 18 C.F.R. § 284.11 (1992).

16. The "prior notice" would be published in the *Federal Register*. If no one protested the project within 30 days of the publication, the project would be deemed to be certificated and construction could commence.

means to increase competition for natural gas. The Commission now routinely approves the construction of bypass facilities under a pipeline's blanket facilities certificate, rather than requiring individual section 7(c) certificate proceedings.¹⁷

In *Kansas Power & Light Co. v. FERC*¹⁸, the court upheld the Commission's bypass policy, but required the Commission to establish standards for the granting or denial of certificate authority for bypasses. Since that order, the Commission has considered two primary factors: (1) whether the bypass facilities would be "wasteful duplication of facilities" causing "unnecessary costs" to be passed on to consumers,¹⁹ and (2) whether the proposed bypass is consistent with its goals of advancing competitive natural gas service.²⁰

The Commission has explained that unfair competition could consist of a pipeline's discriminatory refusal to provide the sales or transportation services to the LDC necessary for the LDC to serve the end-user competitively.²¹ The Commission also rejected requests for relief from the effects of bypass, including a reduction in the D-1 billing determinants and reduction in take-or-pay costs.²²

IV. CAPACITY BROKERING

On April 8, 1992, the Commission issued its Final Rule in RM91-11-000 (Order No. 636)²³ and its companion order in *Algonquin Gas Transmission Co.*²⁴ Order No. 636 terminated all certificated capacity brokering programs and required instead that pipelines administer a capacity release program. Generally, an LDC or other firm shipper holding capacity under part 284 of the Commission's regulations would release its excess capacity to the pipeline for reassignment to another shipper bidding the "best offer" for the capacity. The capacity available for release would be posted on the pipeline's electronic bulletin board, together with all terms and conditions the releasing shipper wishes to place on the release.

Additionally, firm shippers have the right to pre-arrange deals for released capacity. Unless a pre-arranged deal is at the maximum rate and meets all other terms and conditions of the releasor, a prearranged deal must

17. See, e.g., *Northwest Pipeline Corp.*, 56 F.E.R.C. ¶ 62,137 (1991).

18. 891 F.2d 939, 942 (D.C. Cir. 1989).

19. See *Northwest Pipeline Corp.*, 52 F.E.R.C. ¶ 61,053 (1990), *reh'g denied* 54 F.E.R.C. ¶ 61,191 (1991).

20. See *id.*; *Northern Natural Gas Co.*, 60 F.E.R.C. ¶ 61,098 (1992); *Peoples Natural Gas Co. v. Natural Gas Pipeline Co.*, 60 F.E.R.C. ¶ 61,277 (1992); *Peoples Natural Gas Co. v. Williams Natural Gas Co.*, 59 F.E.R.C. ¶ 61,121 (1992).

21. See, e.g., *Northern Natural Gas Co.*, 60 F.E.R.C. ¶ 61,098 (1992) (rejecting a price squeeze argument).

22. See *Northern Illinois Gas Co. v. Natural Gas Co.*, 56 F.E.R.C. ¶ 61,215 (1991).

23. Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. STATS. & REGS. ¶ 30,939, 57 Fed. Reg. 13,267 (1992)[hereinafter Order No. 636], *order on reh'g*, Order No. 636-A, III F.E.R.C. STATS. & REGS. ¶ 30,950, 57 Fed. Reg. 36,128 (1992); *order denying reh'g*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272, 57 Fed. Reg. 57,911 (1992).

24. 59 F.E.R.C. ¶ 61,032 (1992), *reh'g denied*, 60 F.E.R.C. 61,113 (1992).

be posted by the pipeline on its electronic bulletin board. Other potential shippers can then bid on the capacity, and if no better offer is received, the pipeline must accept the pre-arranged deal. However, if a better offer is received the designated shipper under the pre-arranged deal will have a right of first refusal to match the terms of the better offer. The Commission refused to define what it would consider a "best offer," preferring to leave the issue for resolution in the individual Order No. 636 restructuring proceedings.

In the *Algonquin Gas Transmission Co.* order, the Commission modified all existing brokering and assignment programs to conform to the generic capacity release and reassignment programs to be implemented under Order No. 636. As its rationale for the capacity release program, the Commission stated that the new program would allow it to better monitor assignments and enforce its rules against discriminatory assignments. The new program is to achieve that goal by mandating that all assignments must be achieved through the pipelines' electronic bulletin boards, which will allow all potential shippers the choice to bid on the capacity. The program also is designed to create uniformity among different pipelines serving the same market. Order No. 636 does permit the grandfathering of pre-existing assignments and of assignments made under existing programs before the effective implementation of the new release and reassignment program.

V. INTERRUPTIBLE SALES SERVICES

A. Order Nos. 636 and 547

In 1992, the Commission issued Order No. 636, as amended and clarified by Order Nos. 636-A and 636-B²⁵ and Order No. 547²⁶ which together effectively rendered Interruptible Sales Service (ISS) certificates moot. Generally, Order No. 636 calls upon the natural gas industry to restructure the services provided by natural gas pipelines so that all natural gas merchants, including pipelines, will be able to compete on a more equal basis in a national gas market.

Order No. 636 requires that pipelines "unbundle" transportation and sales services so that the firm transportation service available to non-pipeline competitors is equal in quality to the firm transportation services available to pipelines. Under subpart J of the part 284 regulations promulgated by Order No. 636, pipelines offering transportation services under subparts B or G of part 284 have been granted blanket certificates authorizing them to make unbundled firm or interruptible gas sales.

Similarly, Order No. 547 has issued blanket certificates of public convenience and necessity to all persons who are not interstate pipelines. Under these certificates any person may engage in transactions that involve the sale of natural gas in interstate commerce without seeking specific Commission authorization, and without subjecting themselves generally to regulation as natural gas companies under the NGA. As a result of Orders No. 636 and

25. See Order No. 636, *supra* note 23.

26. Order No. 547, *Regulations Governing Blanket Marketer Sales Certificates*, III F.E.R.C. STATS & REGS. ¶ 30,957, 57 Fed. Reg. 57,952 (1992).

547, gas merchants will no longer need to obtain ISS certificates in order to make sales for resale of natural gas.

B. Arkla Energy Resources, Inc.

The Commission stated in Order No. 636 that the issues relating to ISS that were considered during the May 2, 1990 Technical Conference in *Arkla Energy Resources, Inc.*²⁷ are moot.²⁸ Accordingly, in *Arkla Energy Resources, Inc.*, the Commission dismissed all ISS certificate applications pending before the Commission and terminated all existing pipeline ISS certificates, such termination being effective upon a pipeline's completion of its subpart J requirements.

VI. OPTIONAL CERTIFICATES

The Commission's optional certificate policy was intended to promote competition among pipelines with non-exclusive certificates for new service. In exchange for the pipeline assuming the risk of underutilization of the proposed facilities and services, there was offered a streamlined certificate procedure, flexible receipt and delivery points and a rebuttable presumption that the proposal was in the public convenience and necessity.²⁹ During 1991 and 1992, the optional certificate regulations went through a roller coaster of proposed changes, only to end the period unchanged, but effectively superseded by the issuance of case-by-case orders.

In Order No. 555, the Commission would rescind the optional certificate regulations at part 157, subpart E. The rationale would be that certain aspects of traditional and optional certificates had merged, and thus new construction and services were better dealt with through a single procedure.³⁰ However, on November 13, 1991, the Commission issued an Order Granting Rehearing for Further Consideration and postponing the effect of Order No. 555 until 30 days after an order on rehearing.³¹ As noted previously, as of the end of 1992, no order on rehearing had been issued. Therefore, the optional certificate program has not been removed from the Commission's regulations.

Prior to Order No. 555, the Commission had granted several optional certificates. In *Altamont Gas Transmission Co.*,³² the Commission issued Altamont an optional certificate to construct 620 miles of pipeline and six compressor stations to transport 700 MMcf per day from the Canadian border to Wyoming.³³ In *Kern River Gas Transmission Co.*,³⁴ the Commission issued Kern River an optional certificate to construct lateral pipeline facilities to interconnect several gas processing facilities in Southern Wyoming at a cost

27. *Arkla Energy Resources, Inc.*, 59 F.E.R.C. ¶ 61,173 (1992).

28. Order No. 636, *supra* note 23, at 30,441.

29. See 18 C.F.R. § 157.100-106 (1992).

30. Order No. 555, *supra* note 7, at 30,228.

31. Order No. 555, *Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities*, III F.E.R.C. STATS. & REG. ¶ 30,928A, 56 Fed. Reg. 58,844 (1991).

32. 54 F.E.R.C. ¶ 61,028 (1991); 56 F.E.R.C. ¶ 61,199 (1991).

33. 56 F.E.R.C. ¶ 61,199, at 61,778 (1991).

34. 56 F.E.R.C. ¶ 61,194 (1991).

of \$22 million.³⁵ The Commission also indirectly imposed "mainline" throughput requirements on the optionally certificated facility because Kern River proposed to use existing mainline part 284 transportation rates for service on the new facility.³⁶

Also, the Commission issued an optional certificate for new, transportation-only facilities in *Cornerstone Pipeline Co.*³⁷ The facilities interconnected ANR Pipeline Company and Arkla Resources, Inc. with various other interstate and intrastate pipeline facilities in Louisiana and Mississippi.³⁸

However, not all optional certificate applications were successful. In *El Paso Natural Gas Co.*,³⁹ the required element of "new service" proved to be a stumbling block. The Commission converted El Paso's application for an optional certificate into a traditional section 7(c) authorization to expand its San Juan Triangle system.⁴⁰ The Commission explained that El Paso's proposal was for pipeline looping which did not meet the "solely to provide a new service" requirement of the optional certificate program.⁴¹

After the stay of Order No. 555, no new optional certificates were granted. Instead the Commission has applied an "at-risk" analysis on a case-by-case basis which is similar to the policy Order No. 555 would codify. For example, in *Northern Border Pipeline Co.*,⁴² the Commission issued Northern Border a certificate, subject to an at-risk condition, to construct four compressor stations, a meter station and operate a side valve, which would increase Northern Border's system capacity by 312.75 MMcf per day.⁴³ Similarly, in *Blue Lake Gas Storage Co.*,⁴⁴ the Commission granted a certificate to construct and operate a storage field and related facilities, subject to Blue Lake bearing the risk of underutilized facilities.⁴⁵ This decision was based on the fact that ANR Pipeline, to whom Blue Lake proposed to provide storage service, had failed to demonstrate that it had markets to ensure full utilization of Blue Lake's storage capacity.⁴⁶

VII. STORAGE CERTIFICATES

Prior to Order No. 636, the Commission had been granting individual, self-implementing, open access certificates for system storage with pre-granted abandonment. For example, in *Questar Pipeline Co.*,⁴⁷ the Commission issued Questar a blanket certificate authorizing storage services on a self-implementing basis at its Clay Basin Storage Field in Utah. Also, in *Northwest Pipeline*

35. 56 F.E.R.C. ¶ 61,194, at 61,739.

36. 56 F.E.R.C. ¶ 61,194, at 61,741.

37. 55 F.E.R.C. ¶ 61,023 (1991).

38. 55 F.E.R.C. ¶ 61,023, at 61,059.

39. 55 F.E.R.C. ¶ 61,180 (1991).

40. 55 F.E.R.C. ¶ 61,180, at 61,588.

41. *Id.*

42. 58 F.E.R.C. ¶ 61,085 (1992).

43. 59 F.E.R.C. ¶ 61,085, at 61,310.

44. 59 F.E.R.C. ¶ 61,118 (1992).

45. 59 F.E.R.C. ¶ 61,118, at 61,460.

46. 59 F.E.R.C. ¶ 61,118, at 61,458.

47. 55 F.E.R.C. ¶ 61,226 (1991).

Corp.,⁴⁸ the Commission granted Northwest a blanket certificate with pregranted abandonment to provide additional open access system storage using its share of the existing and expanded storage capacity at the Jackson Prairie Storage Project in Washington.

However, in Order No. 636 the Commission amended part 284 of its regulations to include "storage" within the definition of "transportation."⁴⁹ This has the effect of requiring the pipeline to offer firm and interruptible contract storage on the same open access, non-discriminatory basis as other transportation services under part 284.

Contract storage services will be authorized through a part 284 blanket certificate for transportation services. Priority of unbundled storage service will be awarded to those customers which formerly received bundled service and needed storage to maintain their level of maximum daily entitlement. All remaining available capacity will be posted on the pipeline's electronic bulletin board. Open access storage may not be tied or linked to other pipeline services (e.g., sales service).

System storage will be limited to storage necessary for the pipeline to maintain system reliability (e.g., load balancing) and for no-notice transportation service. In addition, the pipeline may retain some storage capacity for its own sales service. Since issuing Order No. 636, but prior to pipeline implementation of Order No. 636, the Commission granted "transitional" part 284 blanket certificates for new storage services and imposed the Order No. 636 requirements of open access system and contract storage.⁵⁰

In light of Order No. 636, the Commission announced its intention in *ANR Pipeline Co.*⁵¹ to terminate as "duplicative and redundant" those individual storage certificates which authorized firm and interruptible system service by interstate pipelines.⁵² The Commission indicated that these certificates would be terminated effective when the pipeline fully complies with Order No. 636; however, all storage arrangements in existence prior to full compliance will be "grandfathered" until their contractual term expires.⁵³ The Commission felt this was necessary to allow affected parties to make whatever arrangements were necessary for the transition to the amended part 284 provisions.⁵⁴

Since the announcement of the Commission's intentions in *ANR Pipeline Co.*⁵⁵ the Commission has proceeded to terminate individual system storage certificates. In *ANR Storage Co.*,⁵⁶ the Commission ordered ANR Storage to show cause why its non-part 284 blanket storage certificate should not be terminated and replaced by a part 284 blanket certificate.⁵⁷ The Commission

48. 54 F.E.R.C. ¶ 61,325 (1991).

49. 18 C.F.R. § 284.1 (1992).

50. See *Blue Lake Storage Co.*, 59 F.E.R.C. ¶ 61,118 (1992); *Colorado Interstate Gas Co.*, 59 F.E.R.C. ¶ 61,393 (1992); *Richfield Gas Storage Sys.*, 59 F.E.R.C. ¶ 61,316 (1992).

51. 59 F.E.R.C. ¶ 61,205 (1992).

52. 59 F.E.R.C. ¶ 61,205, at 61,724.

53. *Id.*

54. *Id.*

55. *Id.*

56. 60 F.E.R.C. ¶ 61,263 (1992).

57. 60 F.E.R.C. ¶ 61,263, at 61,883.

reasoned that allowing ANR Storage to operate on a self-implementing basis under a non-part 284 certificate would frustrate the goals of Order No. 636, particularly the capacity allocation provisions.⁵⁸

Similarly, in *Equitrans, Inc.*,⁵⁹ the FERC dismissed an application to increase contract storage to three existing customers and to initiate contract storage to a new customer. The FERC dismissed the application as redundant, stating that Equitrans should instead offer the services pursuant to Order No. 636 authority.⁶⁰

In *ANR Pipeline Co.*,⁶¹ the Commission further clarified its policy regarding termination of non-part 284 storage certificates. The Commission stated that the Order Nos. 636 and 636-A storage requirements apply only to open access storage, and thus, do not affect or convert NGA section 7(c) certificated contract storage.⁶²

VIII. THE "ON BEHALF OF" REQUIREMENT OF NGPA SECTION 311

On September 20, 1991, the Commission issued Order No. 537⁶³ which was its final rule revising the regulations governing transportation by interstate and intrastate pipelines under NGPA section 311.⁶⁴ Order No. 537 declared that a transportation arrangement is authorized under section 311 if the "on behalf of" entity (1) has physical custody of and transports the gas at some point, or (2) holds title to the gas at some point for a purpose related to its identity as an intrastate pipeline, interstate pipeline, or an LDC. Further, an interstate pipeline's transportation service will qualify for section 311 authorization if the shipper is located in an LDC's service area or is physically capable of receiving gas supplies directly from an intrastate pipeline provided that LDC or intrastate pipeline certifies that the interstate pipeline's transportation service is on its behalf.

The final rule also adopted a new section 284.227 of the FERC regulations to provide limited-jurisdiction, blanket certificate authority under NGA section 7(c) authorizing intrastate pipelines to deliver directly to end users in their own states gas received by the intrastate pipelines from gatherers that gathered the gas in adjacent Federal waters or onshore or offshore in an adjacent state. Intrastate pipelines operating under this new authority must, with the exception of the "on behalf of" standard, comply with all conditions of subpart C of part 284, which regulates intrastate pipelines performing services under NGPA section 311.

58. 60 F.E.R.C. ¶ 61,263, at 61,881.

59. 61 F.E.R.C. ¶ 61,085 (1992).

60. 61 F.E.R.C. ¶ 61,345 (1992).

61. 61 F.E.R.C. ¶ 61,250 (1992).

62. 61 F.E.R.C. ¶ 61,250, at 61,921.

63. Order No. 537, *Revisions to Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates*, III F.E.R.C. STATS. & REGS. ¶ 30,927, 56 Fed. Reg. 50,235 (1991)[hereinafter Order No. 537].

64. On August 2, 1990, the Commission had issued an interim rule, Order No. 526, and a notice of proposed rulemaking (Docket No. RM90-7-001), both which contained an "on behalf of" test substantially the same as that in Order No. 537.

The blanket certificate transportation regulations which apply to interstate pipelines (at subpart G of part 284) were also revised in the final rule to operate similarly to the regulations in subpart B of part 284 governing section 311 transportation services performed by interstate pipelines. The result of these revisions is that if any party files a complaint regarding an interstate pipeline's commencement of service, the interstate pipeline is able to continue service without interruption until the Commission issues an order requiring that the transportation service cease. These notification requirements applying to interstate pipelines performing service under blanket certificates were also revised to mirror those governing section 311 transportation services. The revised regulations provide that a pipeline that would provide service to a customer located in an LDC's service area is required to give prior written notice only to the LDC and its regulatory agency.

Order No. 537-A,⁶⁵ issued September 21, 1992, did not change the final rule on rehearing. The final rule, however, did not provide a time period in which interstate pipelines were required to obtain the necessary authorization to operate relevant facilities under NGA section 7(c). In Order No. 537-A, the Commission clarified that pipelines which had not filed for appropriate NGA certificate authority would have three months from the date Order No. 537-A was issued in which to apply. It said to the extent such authority had not been obtained within the three-month period, it would consider extensions of time on a case-by-case basis for pipelines with pending applications or prior notice filings.

IX. CONSTRUCTION OF SECTION 311 FACILITIES AND SUBSEQUENT CONVERSION TO SECTION 7(C) STATUS

The NGPA authorizes certain transportation services, but it does not refer to facilities. The FERC regulations state: "[T]he Natural Gas Act shall not apply to facilities utilized solely for the transportation authorized by section 311(a) of the NGPA."⁶⁶ Such language contains no limitations, and pipeline companies have constructed all manner of facilities (from taps and meters to major pipeline projects) for the purpose of providing NGPA section 311 transportation only, without needing any prior approval of the FERC. The only requirement (at 18 C.F.R. section 284.11(a)) is that such construction conform to the environmental requirements of 18 C.F.R. section 157.206(d).

In this regard, FERC Order No. 544,⁶⁷ issued September 21, 1992, among other things, requires any pipeline intending to construct a section 311 facility to notify the Commission of such intent at least 30 days before starting work, if the project's cost will exceed the limit specified in Column 1 of Table I of 18 C.F.R. section 157.208(d). Such advance notice is intended, primarily, to give the Commission opportunity to satisfy itself that the "other agency" authorizations required by section 156.206(d) have been obtained by the pipe-

65. Order No. 537-A, III F.E.R.C. Stats. & Regs. ¶ 30,952, 57 Fed. Reg. 46,496 (1992).

66. 18 C.F.R. § 284.3(c) (1992).

67. Order No. 544, *Revisions to Regulations Governing NGPA Section 311 Construction and the Replacement of Facilities*, III F.E.R.C. Stats. & Regs. ¶ 30,951, 57 Fed. Reg. 46,487 (1992).

line with respect to a presumptively major section 311 project.⁶⁸

The benefit of timeliness in constructing a section 311 only project can be substantial, and several large projects have been built in this manner. Their use, however, is limited to section 311 transportation service for others. That is, the pipeline's own system supply can not flow through such a facility, and it can not be used to transport for others under NGA section 7(c) transportation authority, including part 284, subpart G blanket certificate authority.

For this reason, many section 311 only projects have subsequently been certificated under NGA section 7(c), thereby becoming able to be used for all manner of pipeline activities. For its part, the FERC has voiced no objection to this two-step procedure. One such case involved Arkla Energy Resources' Line AC. The Commission stated:

[W]e observe generally that Commission regulations clearly allow Arkla to construct facilities and provide NGPA section 311 service without prior Commission authorization. [footnote: 18 C.F.R. 284.3(c) (1990); see also *North Penn Gas Co.*, 41 FERC ¶ 61,307, at p. 61,802 (1987).] Additionally, section 311 construction is permissible even where the pipeline contemplates in advance seeking section 7 authorization. [footnote containing *North Penn* citation omitted]⁶⁹

Also, in an order certifying a Natural Gas Pipeline Co. line, the Commission stated:

The proposed conversion of the Arkoma Lateral to NGA operation presents no legal or policy conflicts. As Natural points out, the Commission "has not adopted any regulation or policy to prevent or discourage a pipeline from constructing facilities with the intention of providing only NGPA section 311 service initially; and later seeking to provide jurisdictional services." [footnote containing *North Penn* citation omitted]⁷⁰

This was the Commission's consistent position through 1991 and 1992 with respect to projects originally constructed solely for NGPA section 311 transportation service, whose owners subsequently sought NGA section 7(c) certificate authority for such projects.

COMMITTEE ON NATURAL GAS CERTIFICATE
AND AUTHORIZATION REGULATIONS

Philip R. Telleen, Chair

Roberta Lee Halladay, Vice Chair

Kenneth M. Albert
James F. Bowe, Jr.
James M. Costan
Jeffrey G. DiSciullo
Fredric J. George
Joel L. Greene
Merek E. Lipson

Richard A. Oliver
Demetrios G. Pulas, Jr.
Robert F. Riley
Steven M. Sherman
Carol A. Smoots
Roderick D. Strickland
Anita R. Wilson

68. Order No. 544 is largely a re-promulgation of FERC Order No. 525, an interim rule issued in Docket No. RM90-14-000 on August 2, 1990, which was vacated on procedural grounds by the U.S. Court of Appeals for the D.C. Circuit in *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141 (D.C. Cir. 1992).

69. 54 F.E.R.C. ¶ 61,033, at 61,136 (1991).

70. 57 F.E.R.C. ¶ 61,021, at 61,082 (1991).