

STUDENT NOTE

FERC WAIVER OF THE FILED RATE DOCTRINE: SOME SUGGESTED PRINCIPLES

I. INTRODUCTION

On April 22, 1988 the D.C. Circuit, on rehearing, affirmed that the Federal Energy Regulatory Commission (FERC)¹ is free to consider whether it has the authority to waive the "filed rate doctrine."² This determination was the result of a suit brought by Columbia Gas Transmission Corporation (Columbia), a gas purchaser, after the FERC authorized five pipelines to collect a surcharge over and above the rates which were filed with the Commission at the time of sale.³ The FERC maintained that it has implied authority to waive the filed rate doctrine⁴ under the Natural Gas Act (NGA)⁵ and that its authority was upheld in *City of Piqua v. FERC*.⁶ Although the court overruled the Commission's decision in *Columbia Gas*⁷ because the affected parties were not on notice as to the increase in rates caused by the waiver,⁸ it opened the door to the possibility of allowing the FERC to establish guidelines regarding the circumstances in which it could waive the filed rate doctrine in the

1. On Oct. 1, 1977 the Federal Energy Regulatory Commission (FERC) became the successor to the Federal Power Commission (FPC) and assumed all powers of authority of that regulatory body. See 10 C.F.R. § 1000.1(d) (1980). The term "Commission" in this article refers too the FPC when referring to action taken prior to that date and to the FERC when referring to action taken after that date.

2. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *clarified on rehearing*, *Columbia Gas Transmission Corp. v. FERC*, 844 F.2d 879 (D.C. Cir. 1988). On petition for rehearing the court decided to let its prior remand order stand and stated that the FERC is free to consider the issue of waiver of the filed rate doctrine. The filed rate doctrine is the legal principle that a regulated supplier may not charge any rate other than that which has been properly filed and accepted by the Commission. Natural Gas Act (NGA), 15 U.S.C. §§ 717c(c), 717d(a) (1982).

3. *Transcontinental Gas Pipeline Corp.*, 32 F.E.R.C. ¶ 61,230, *reh'g denied*, 33 F.E.R.C. ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 F.E.R.C. ¶ 61,493, *reh'g denied*, 33 F.E.R.C. ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032, *reh'g denied*, 33 F.E.R.C. ¶ 61,359 (1985); *Panhandle Eastern Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,231 (1986); and *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,021 (1986).

4. *Columbia Gas*, 831 F.2d at 1139. The Commission defended its approval of the direct billing procedure on the basis of its equitable results, as it would require purchasers to pay the actual cost of the gas they have purchased. See also *Columbia Gas*, 844 F.2d at 880. The FERC asserted that the FERC has the implied authority under section 4(d) to waive the filed rate doctrine. 15 U.S.C. § 717c(d) (1982). This section states "[t]he Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for"

5. 15 U.S.C. § 717c(d) (1982); see *supra* note 4.

6. *City of Piqua v. FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979).

7. *Columbia Gas*, 831 F.2d 1135.

8. *Id.* at 1140. The court stated that "because . . . [Order Nos. 94 and 94-A] were addressed exclusively to first sales of natural gas, they cannot be deemed to have placed downstream purchasers on notice that they in turn would be expected to absorb those costs through a system of surcharges collected after the fact." *Id.*

future.⁹ If the FERC is to retain authority to waive the doctrine when it determines that such a waiver is required in order to carry out its statutory mandate that rates and charges be just and reasonable,¹⁰ it must establish criteria consistent with the principle that the FERC is prohibited from retroactive rate-making.¹¹ This article focuses on the issue of the FERC's authority to waive the filed rate doctrine by permitting rate changes to be made effective retroactively and recent judicial interpretations of the doctrine which the FERC will be required to consider in establishing its guidelines.

II. THE FILED RATE DOCTRINE

The "filed rate doctrine" requires that a regulated supplier not charge any rate other than that filed with the proper regulatory body.¹² No change in rates may take effect except upon thirty days' notice to the Commission and to the public.¹³ A change in rates may be accomplished by filing a revised schedule with the Commission.¹⁴ For all sales or transportation of natural gas subject to Commission regulation, the pipeline is required to file with the Commission schedules of all rates and charges along with other applicable terms and conditions which relate to the filed rates.¹⁵ The Commission is required to use this data to determine if the rates are just and reasonable. Any rate or charge found not to meet this standard is unlawful.¹⁶ Where the Commission finds a rate to be improper the NGA empowers the Commission to determine a just and reasonable rate and, by its own order, fix that rate subject to the following conditions: the Commission may order a decrease in the rate if it finds the filed rate to be excessive but it may not order an increase in the rate unless the higher rate conforms with a new schedule to be filed by the regulated company.¹⁷

Generally, pipelines are permitted to modify their rates only prospectively since the NGA requires all rates to be filed with the Commission at least thirty days before taking effect.¹⁸ However, the same paragraph of the NGA frees the Commission to allow changes to take effect without thirty days'

9. *Columbia Gas*, 844 F.2d at 880. The court stated that "[the] FERC is free to consider the waiver [of the filed rate doctrine] issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinion in this case." *Id.*; see also *Columbia Gas*, 831 F.2d at 1142 (stating that "[t]he five orders on review violate the NGA's prohibition against retroactive rate making.").

10. 15 U.S.C. § 717c(a) (1982).

11. *Columbia Gas*, 844 F.2d at 880; see also *Columbia Gas*, 831 F.2d at 1140 ("downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA.").

12. 15 U.S.C. § 717c(d) (1982). This reference is directed to that portion of the NGA which requires rates for the sale of natural gas in interstate commerce to be filed with the Commission at least 30 days prior to taking effect.

13. *Id.*

14. *Id.*

15. 15 U.S.C. § 717c(c) (1982).

16. 15 U.S.C. § 717c(a) (1982).

17. 15 U.S.C. § 717d(a) (1982).

18. 15 U.S.C. § 717c(d) (1982).

notice if "good cause" is shown.¹⁹ The circumstances in which the thirty days notice can be waived so as to permit changes in rates to take effect retroactively is the central issue of the litigation discussed in this note.²⁰ Specifically, in what circumstances can the FERC waive the notice requirement in the NGA so as to give rate changes retroactive application and thereby effectively waive the filed rate doctrine? The answer to this question is not completely answered by the language of the NGA²¹ and has now been remanded by the court to the FERC for further consideration.²²

III. CITY OF PIQUA

The case often cited as precedent for allowing a rate to take effect prior to the date of filing with the Commission is *City of Piqua v. FERC*.²³ On September 21, 1979 the D.C. Circuit held that the FERC was within its statutory authority in allowing the enforcement of a new contract for electrical service between Dayton Power and Light (DP&L)²⁴ and the City of Piqua, Ohio,²⁵ despite the fact that it became effective prior to being filed with the Commission.²⁶ The contract was an extension of an existing agreement intended by the parties to take effect upon the expiration of the old agreement on May 9, 1977.²⁷ The term of the contract was from May 10, 1977 to March 10, 1978, however, DP&L could not file the contract until after the City Commission approved it on July 18, 1977.²⁸ DP&L filed the new contract with the FERC on August 5, 1977 and requested that the thirty days' notice requirement under section 205(d) of the Federal Power Act (FPA) be waived so as to permit a retroactive effective date.²⁹ The Commission found authority for waiving the notice provision under that portion of section 205(d) of the FPA, and section 35.11 of the Commission regulations, which allow such a waiver when good cause is shown for doing so.³⁰

Following the Commission's issuance of the order waiving the notice

19. *Id.*

20. *Columbia Gas*, 844 F.2d 879, 880 (1988).

21. 15 U.S.C. § 717c(d) (1982). Congress left the Commission some discretion to allow changes in filed rates without the 30 days notice if good cause is shown. There is no clarifying language in the NGA itself as to the parameters of the terms "good cause" or "without 30 days notice." This seems to have been left to the Commission, and subsequently, to the courts to decide.

22. *Columbia Gas*, 844 F.2d at 880. The court held that, on remand, the FERC was to consider whether it had implied authority to waive the filed rate doctrine in the circumstances presented. *Id.*

23. *City of Piqua v. FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979). The court held that the Commission has statutory authority to waive the 30 days notice requirement under section 205(d) of the FPA, 16 U.S.C. § 824d(d) (1976) and that substantial evidence supported the FERC's decision to grant a waiver in that case. *Id.*

24. DP&L is a regulated electric utility.

25. *City of Piqua*, 610 F.2d 950.

26. *Id.*

27. *City of Piqua*, 610 F.2d at 951.

28. *Id.*

29. See FPA, 16 U.S.C. at § 824d(d) (1976).

30. 18 C.F.R. § 35.11 (1978). Section 35.11 of the Commission's regulations provides: "Upon application and for good cause shown, the Commission may, by order, provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules." *Id.*

period and authorizing the prior effective date, the City of Piqua filed a request for rehearing, which the Commission denied.³¹ The City then sought to have the order reviewed by the court of appeals on the grounds that authorization of the prior effective date constituted retroactive rate-making which was unauthorized by statute,³² prohibited by the policy against retroactive rate making,³³ and not supported by substantial evidence.³⁴ The court of appeals held that the rate change, based upon a privately negotiated and signed contract, was not retroactive because it was prospective from the date of execution of the contract.³⁵ The court further held that a rate, which is otherwise just and reasonable,³⁶ is not unlawful on the grounds of retroactivity so long as good cause can be shown for waiving the notice provision in the FPA.³⁷ The court found that the intent of the Act's notice provision was not violated because the contract was freely negotiated and agreed upon, giving both sides actual notice of its contents.³⁸ The court also held that this resolution correctly upheld the validity of the parties' private contract.³⁹ The court noted the fact that it was the petitioner's own approval process which prevented DP&L from timely filing the rate with the Commission⁴⁰ as evidence justifying the Commission's finding of good cause for the waiver. In so doing, the court strongly affirmed the Commission's broader statutory authority to waive the notice requirement

31. Dayton Power and Light Co., 3 F.E.R.C. ¶ 61,004 (1978).

32. *City of Piqua*, 610 F.2d at 953. The City of Piqua relied upon section 205(d) of the FPA, 16 U.S.C. § 824d(d) (1976), which requires, in part, that any public utility may not change rates or charges on less than 30 days' notice.

33. *City of Piqua*, 610 F.2d at 953. The City of Piqua argued that the language of section 205(d) of the FPA prohibits the Commission from authorizing a rate change which is retroactive. The City cited numerous cases, including *Nader v. FCC*, 520 F.2d 182 (1975), and *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (1979), *cert. denied*, 444 U.S. 990 (1979).

34. *City of Piqua*, 610 F.2d at 952. The provision in the FPA for waiving the 30 days' notice requirement for good cause shown requires substantial evidence to establish the good cause. 16 U.S.C. § 824d(d) (1976).

35. *City of Piqua*, 610 F.2d at 953-54. The court rejected the City's argument for a narrow interpretation of the NGA and instead interpreted the NGA as giving the Commission the discretionary power to set the effective date of the rate change prior to the date of filing. The court cited the *City of Kaukauna v. FERC*, 581 F.2d 993 (1978), which held that section 205 of the NGA does not specify when increases in rates can be authorized, but rather that they cannot be operative until there is compliance with statutory procedures. The intent of the NGA is to provide the purchaser with notice of the new rate. Thus, the court reasoned that the NGA provides the Commission with latitude to approve the effective date of the new rate so long as the City was on notice of the effective date of the new rate, which it had freely negotiated and approved. *Id.*

36. See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944). The court cited section 4(a) of the NGA, stating that the rates must be just and reasonable. However, the court noted that Congress provided no formula for such a determination. The court held that a determination of what is just and reasonable involves a balancing of various interests. It then reasoned that since the Commission's decisions are the product of expert judgment and carry the assumption of validity, the party attempting to upset a Commission order bears a heavy burden to make a convincing showing that the order is not valid under the FPA. *Id.*

37. *City of Piqua*, 610 F.2d at 955.

38. *Id.* at 954-55.

39. *City of Piqua*, 610 F.2d at 954. The court discussed the opinion of the U.S. Supreme Court in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338 (1956), in which it was held that the drafters of the FPA did not intend to abrogate private contracts.

40. *City of Piqua*, 610 F.2d at 955.

in any case where good cause is shown.⁴¹

IV. ARKANSAS LOUISIANA

Subsequent to the decision in *City of Piqua*, the United States Supreme Court in *Arkansas Louisiana Gas Co. v. Hall*, addressed the legal effect of the filed rate doctrine in the context of a claimant's request in state court for contract damages that, if awarded, would have had substantially the same effect as a retroactive rate increase.⁴² The Arkansas Louisiana Gas Co. (Arkla) contracted to purchase natural gas from a field from which gas was sold under contracts with other parties. The producer, Hall, had negotiated a "favored nations clause" in the contract which provided that if Arkla purchased gas from the same field from any other producer at a higher rate than it was paying Hall, then Hall would be entitled to receive the same higher price for his gas sales to Arkla.⁴³ The contract was filed by Arkla and approved by the FERC. Subsequently, Arkla entered into another contract with a producer of gas from the same field at a higher rate but did not inform Hall and did not take any action to increase the rate pursuant to the "favored nations clause." Upon learning of Arkla's other contract, Hall brought action in state courts in Louisiana to recover damages in the amount of the difference between what Arkla actually paid and what it would have paid under the clause had Arkla notified Hall of the higher rate. The issues argued in *Arkla* were first, that an award of damages presumed that the higher rate would have been approved by the FERC had the rate been filed with the Commission; and second, that to award damages based upon Hall's contract right to increased rates would be a violation of the filed rate doctrine because the new rate would first have to be filed with the Commission before it could take effect and thus, if both arguments were valid, a rate change could not indirectly be awarded retroactively via the award of damages.⁴⁴ The Louisiana Supreme Court disagreed⁴⁵ and awarded damages for the period in which Arkla was paying the higher rate to the other producers in the field without paying the same rate to Hall.⁴⁶ Arkla appealed the decision to the United States Supreme Court, which reversed the Louisiana decision by holding that the damages sought by Hall would amount to a retroactive rate increase and would authorize a rate not previously filed

41. The court stated, "this purpose [the need to insure that regulated companies charge only those rates of which the agency has been made cognizant] is unaffected by the Commission's waiver of the notice requirement upon good cause, thus allowing rate changes, found by the Commission to be just and reasonable, to become effective on the date agreed by the parties." *Id.*

42. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

43. *Id.* at 573.

44. *Id.* at 575-76.

45. *Id.* at 575. The Supreme Court of Louisiana, held that Arkla was liable for damages to the gas producers for failure to notify them of the higher rates it was paying to other producers in breach of the favored nations clause. The court reasoned that had the producers known that they had the right to file for rate increases, they would have done so and the Commission would have approved the new rates consistent with the contract. *Arkansas Louisiana Gas Co. v. Hall*, 368 So. 2d 984, 991 (La. 1979).

46. *Arkla*, 453 U.S. at 576. The period at issue was from 1961, when Arkla purchased leases in the same field, until 1972, the time when the producer was under the jurisdiction of the Commission.

and approved by the FERC, thus violating the filed rate doctrine.⁴⁷ The Court held that a regulated seller of gas may not impose a rate different than the one filed with the Commission under the NGA, and that the Commission and the courts are prohibited from retroactively imposing a higher rate for gas already sold whether in the form of damages for breach of contract or otherwise.⁴⁸

Two aspects of the Court's opinion in *Arkla* must be weighed in future decisions, given the absence of a clear judicial trend regarding the waiver issue:⁴⁹ (1) private contracts versus public policy,⁵⁰ and (2) the equities associated with waiving the filed rate doctrine.⁵¹ In addressing these issues, it could be inferred that the Court may have indirectly disagreed with the D.C. Circuit's broad holding in *City of Piqua*. On the subject of enforcing the intent of private contracts, the D.C. Circuit was inclined to apply the Act in a broad manner in order to honor the parties' intent and to apply equitable principles.⁵² But in *Arkla*, the Supreme Court made a stronger statement in support of strict interpretation of the Act, pointing out that when faced with a discrepancy between the contract and the filed rate, the Commission was obligated to enforce the filed rate.⁵³ In response to Hall's appeal for equitable considerations, the Supreme Court could find no basis for applying equity in the absence of what it called "affirmative misconduct."⁵⁴ This statement could be read to indicate an inclination by the Supreme Court to place a strict construction of the language of the NGA over the argument for an equitable result.

The *Arkla* decision also can be distinguished from other cases concerning the filed rate doctrine because it overturned the Louisiana Supreme Court decision to award damages on the basis of what that court assumed the Commission would decide, had the new rate been filed.⁵⁵ In its decision, the U.S.

47. *Id.* at 576.

48. *Id.* at 578.

49. As in *Arkla*, 453 U.S. 571, many earlier decisions consistently ruled against any rate approval by the Commission which predated the filing date. However, in some cases, such as *City of Piqua*, 610 F.2d 950, and *Columbia Gas*, 844 F.2d 879, the courts have indicated a willingness to allow the FERC more flexibility in approving effective dates for new rates prior to the filing date.

50. As discussed in the preceding section of this article, the issue of balancing the rights of private contracts with the public policy of giving rate increase notices to customers of regulated companies was one of the central issues in *City of Piqua*, 610 F.2d 950.

51. Although the Supreme Court in *Arkla* discusses the equity of its result, the court in the *City of Piqua* case refrained from deciding on the equity issue, stating in footnote 15 that it would not consider the issue as argued by Piqua. *City of Piqua*, 610 F.2d at 955.

52. *City of Piqua*, 610 F.2d at 954. The D.C. Circuit cited as authority *United Gas Pipe Line v. Mobile Serv. Corp.*, 350 U.S. 332, 338 (1956), wherein the Supreme Court said "we should bear in mind that [the NGA] evinces no purpose to abrogate private contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the NGA expressly recognizes that rates to particular customers may be set by individual contracts." *City of Piqua*, 610 F.2d at 954.

53. *Arkla*, 453 U.S. at 582. The Court cited its own decisions in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) and *Texas & Pacific R. Co. v. Mugg*, 202 U.S. 242, 245 (1906). In *Louisville*, the Court stated that under the Interstate Commerce Act, the filed rate was the only lawful charge and that deviation from it was not permitted under any pretext. *Louisville*, 237 U.S. at 97.

54. *Arkla*, 453 U.S. at 583 n.13 (the Court conceded that had *Arkla* intentionally failed to inform the producers with the intent to defraud them, it might have applied the equitable doctrine of estoppel. However, the Court stated that since there was no evidence of fraudulent intent, the question of estoppel need not be considered).

55. *Arkla*, 453 U.S. 571.

Supreme Court held that the filed rate doctrine prohibited the award of damages based on rates other than those on file with the Commission during the time period in question.⁵⁶ On the other hand, *Arkla* has been cited as a broader precedent for enforcing regulatory policy against retroactive rate-making. For example, in *Dorchester Gas Producing Co. v. FERC*⁵⁷ the Fifth Circuit cited *Arkla* in upholding a Commission decision not to apply a rate-making decision retroactively.⁵⁸

V. COLUMBIA GAS TRANSMISSION CORP.⁵⁹

The *Columbia Gas* case affords the potential to clarify the issue of waiver of the filed rate doctrine in light of *City of Piqua* and *Arkla*. In 1978 Congress passed the Natural Gas Policy Act (NGPA)⁶⁰ in which ceiling prices⁶¹ were established for various categories of gas sales⁶² by producers to purchasers, characterized in the NGPA as "first sales".⁶³ Ceiling prices could only be exceeded⁶⁴ by adding certain of the seller's costs of processing and transporting⁶⁵ the gas beyond the wellhead.⁶⁶ Following the enactment of the NGPA, the Commission immediately began a rulemaking proceeding which culminated in the issuance of *Interim Regulations Implementing the Natural*

56. *Arkla*, 453 U.S. at 584.

57. *Dorchester Gas Producing Co. v. FERC*, 848 F.2d 634 (5th Cir. 1988). The gas producing company sought a retroactive application of the Commission's order that the company's gathering operations were not subject to the Commission's jurisdiction, thus allowing the amended rates to be charged retroactively as well. The court rejected the argument on the basis that the company had filed a rate with the Commission which brought it under the Commission's authority until the decision was rendered. Therefore, the company's filed rates were subject to the filed rate doctrine until the Commission determined otherwise, even if the Commission did take seven years to decide the issue. *Id.*

58. *Arkla* was not the only authority for the decision in *Dorchester*. The court also relied on a three prong test for retroactive changes which considers (1) whether a past decision is being supervised, (2) whether retroactive application would further or retard the purpose for the decision, and (3) whether applying a decision retroactively would cause inequities to either party. *Dorchester*, 848 F.2d at 637.

59. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987).

60. 15 U.S.C. §§ 3301-3432 (1982 & Supp. 1988).

61. *Id.*; see generally *Ceiling price for sales of natural gas dedicated to interstate commerce*, 15 U.S.C. § 3314 (1982).

62. *Id.*

63. 15 U.S.C. § 3301(21)(A) (1982).

64. 15 U.S.C. § 3314(b)(2) (1982). This section provided the Commission with the authority to prescribe a maximum ceiling price which is higher than the maximum lawful price if such price is "just and reasonable within the meaning of the Natural Gas Act." *Id.*

65. NGPA, Subchapter VI—*Coordination with Natural Gas Act; Miscellaneous Provisions*, 15 U.S.C. § 3431 (1982). Congress authorized the Commission to approve any sale by a pipeline so long as the Commission found the price just and reasonable under the terms of the Act. Section (c), entitled "Guaranteed passthrough," provided for a recovery by the pipelines of any amount it is required to pay in acquiring the gas, so long as that price is just and reasonable. *Id.*

66. The NGPA, 15 U.S.C. § 3320(a), (a)(2), says in part: [T]he first sale of natural gas shall not be considered to exceed the maximum lawful price . . . if such first sale price exceeds the maximum lawful price to the extent necessary to recover . . . (2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for . . . by the Commission." *Id.*

Gas Policy Act of 1978.⁶⁷ These regulations were amended in 1980 by the FERC Order No. 94, which clarified how a seller could recover certain costs in excess of the statutory ceiling.⁶⁸ However, the Commission announced in its Order that it would not accept applications at that time for recovery of compression and gathering costs due to the complexity of that category of costs and the absence of an industry standard for determining those costs.⁶⁹ First sellers were assured that, as soon as the Commission determined a reliable method for calculating the costs, it would provide a collection procedure for gas sold after the effective date of the initial rulemaking,⁷⁰ provided such costs were contractually agreed upon.⁷¹

Finally, in Order Nos. 94-A⁷² and 94-B⁷³ the FERC issued regulations for recovery from first purchasers of the costs incurred by producers for delivery and compression of gas sold after July 25, 1980,⁷⁴ or the date on which a recovery application was filed by the producer with the Commission, whichever was earlier; but, the regulation only covered gas delivered to the pipeline before March 7, 1983. Several first purchaser pipeline companies petitioned the Commission for approval to pass these costs on to their customers through a direct billing of the surcharge for the appropriate period.⁷⁵ The Commission issued approvals to five pipelines under this regulation.⁷⁶ Columbia Gas, a customer of one of these pipelines,⁷⁷ filed suit claiming that by making the orders applicable to gas sold prior to the effective date of the final orders, the FERC had authorized a retroactive rate increase.⁷⁸ Columbia also claimed that the direct billing method, which the FERC approved for Transcontinental Gas Pipeline Corp. (Transco), was inconsistent with the FERC's policy of authorizing rate increases only through the procedures of a rate increase filing or the filing of a purchased gas adjustment (PGA) clause, both of which are

67. *Interim Regulations Implementing the Natural Gas Policy Act of 1978* §§ 271.101-271.1106, 5 F.E.R.C. 61, 114 (1978).

68. Order No. 94; *Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*. 12 F.E.R.C. 61,079 (August 11, 1980).

69. *Id.*

70. *Id.*

71. *Id.*

72. Order No. 94-A; *Regulations Implementary Section 110, the Natural Gas Policy Act 1978 and Establishing Policy Under the Natural Gas Act*. 22 F.E.R.C. 61,055 (1983).

73. Order No. 94-B; *Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*. 22 F.E.R.C. 61,053 (1983).

74. But, only for gas delivered to the pipeline before March 7, 1983, the effective date of Order No. 94.

75. *Columbia Gas*, 831 F.2d at 1139. The period would run from, either the date on which Order No. 94 became effective (July 25, 1980) or the date on which the producer filed the reimbursement application, whichever came earlier, through the effective date of Order Nos. 94-A and 94-B (March 7, 1983). No reimbursement authorization was made for gas delivered prior to Order 94 since that Order could not be retroactive. The *Columbia Gas* case does not address a reimbursement for gas sold after March 7, 1983 since such a charge would not be retroactive.

76. *See supra* note 3.

77. *Columbia Gas*, 831 F.2d at 1139. Columbia was joined in the suit by the Municipal Defense Group, which represented several distribution companies that purchased gas from various pipeline companies.

78. *Id.*

prospective.⁷⁹ Since the rates authorized by the Orders had not been filed with the Commission as of the effective date of the surcharge, the petitioners asserted that the FERC was prohibited from such retroactive rate-making by the NGA.⁸⁰

The Court of Appeals ruled that the Commission's order allowing the charges to be passed along for gas already sold amounted to a retroactive rate increase, which was prohibited by the NGA.⁸¹ The court rejected the Commission's argument that Columbia was on notice of the surcharge as of the date the Commission issued the interim Order No. 94 in 1980, because that order concerned only first sales between producers and the purchasers, and did not put subsequent purchasers on notice that a passthrough was being permitted.⁸² The Court suggested that the FERC's regulations provided the pipelines with a prospective means of recovering the costs at issue.⁸³ The court held that the Commission was prohibited under the filed rate doctrine from allowing retroactive rate increases and consequently remanded the issue to the Commission for further proceedings consistent with the filed rate doctrine.⁸⁴ Subsequently, the FERC and various intervenor pipelines⁸⁵ petitioned the court for rehearing, which petitions were denied.⁸⁶ However, in issuing its decision the court confirmed that the "FERC is free to consider the waiver issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinions of this case."⁸⁷ This statement returned the waiver issue to the FERC, allowing it the opportunity to create new guidelines in deciding the waiver issue in this and future cases.

VI. CONCLUSION

The *Arkla* and *Columbia* decisions uphold the sanctity of the filed rate doctrine. However, pipelines that desire to pass along unanticipated cost increases are not entirely without recourse.⁸⁸ Congress clearly provided the

79. *Id.*

80. *Id.*

81. *Id.* at 1140 (citing *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968)).

82. *Columbia Gas*, 831 F.2d at 1141.

83. *Id.* at 1138. The court referred to the Commission's regulations authorizing a PGA clause for recovering additional estimated costs of gathering and processing. *Id.* A PGA clause must be a part of the gas purchase contract which is filed with the Commission. Upon approval of the filing by the Commission, the seller may passthrough these costs to the purchaser, not to exceed the amount estimated in the filing. See 18 C.F.R. § 154.38(d)(4) (1987).

84. *Columbia Gas*, 831 F.2d at 1142.

85. *Columbia Gas*, 844 F.2d 879. The intervenors of record were Panhandle Eastern Pipe Line Co., Trunkline Gas Co., Transcontinental Gas Pipe Line Corp. and Texas Gas Transmission Corp.

86. *Id.*

87. *Id.* at 880.

88. *Columbia Gas*, 831 F.2d at 1141. The court suggested, but did not rule on two hypothetical alternatives for recouping the pipeline's costs: first, it suggested that the Commission might have permitted the pipelines to pass the costs on to their customers over a three year period in proportion to each customer's take; and second, the court suggested that the Commission might have allowed the pipelines to begin collecting appropriate cost surcharges upon issuing Order No. 94, in order to avoid unjust enrichment. *Id.* The Congress also authorized the Commission to allow pipelines to pass along certain cost increases under the Purchased Gas Adjustment (PGA) provisions. Although arguably inconsistent with the

Commission with some latitude by authorizing the Commission to waive the thirty days' notice provision for good cause.⁸⁹ The question which remains is "what are the circumstances in which the doctrine against retroactive rate changes can be waived?" A review of a number of cases which have considered this issue reveals six interrelated elements which have been used to decide whether the filed rate doctrine should be waived.

The first element is "good cause," which is the statutory standard in the NGA.⁹⁰ In *City of Piqua*, the City's own procedures contributed to the delay in filing, which the court held to be substantial evidence of "good cause."⁹¹ In *Arkla* the court noted that the Commission found that good cause did not exist for a waiver.⁹² This element was not discussed explicitly in the *Columbia Gas* decision although implicit in the decision was the inference that the FERC failed to establish that it had good cause to waive the thirty days' notice requirement.⁹³ In reviewing the *Columbia Gas* decision the FERC may address the good cause element in support of orders 94-A and 94-B.

The second element is "notice." In *City of Piqua*, the court found that notice was provided through the negotiation and execution of the renewal contract, in spite of the fact that the filed rate doctrine was technically violated because the contract was not filed with the Commission for several months thereafter. Most recently, the D.C. Circuit, in deciding *Columbia Gas*, held that notice was not given to the second purchaser and therefore no surcharge could be levied against the purchaser which predated the requisite filing under the NGA.⁹⁴

The third element involves "the validity of private contracts." The D.C. Circuit in *City of Piqua* weighed the private intent of the parties in their contract heavily in granting a retroactive waiver and cited the Supreme Court's decision in *United v. Mobile*, to the effect that the Federal Power Act was not intended to abrogate private contractual arrangements. On the other hand, in *Arkla* the Supreme Court stated "when there is a conflict between the filed rate and the contract rate, the filed rate controls."⁹⁵ This statement by the Supreme Court must be reconciled with the intent of Congress when it provided authority for waiving the notice requirement. It may be that Congress intended that the waiver of notice permitted under the Act would not extend beyond the filing date, and this may be the central question in reconciling *Arkla* and *City of Piqua*.

The fourth and fifth related elements are "reliance" and "equity." The

filed rate doctrine, Congress considered such provisions necessary to protect the well-being of suppliers. 18 C.F.R. § 154.38(d)(4) (1988).

89. 15 U.S.C. § 717c(d) (1982).

90. *Id.*

91. *City of Piqua v. FERC*, 610 F.2d 950, 955 (1979).

92. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 8 (1981).

93. *Columbia Gas*, 831 F.2d 1135.

94. *Id.* at 1141. In *Columbia Gas*, the court relied heavily on the Commission's own regulations, quoting from Order No. 94-A: "A basic principle of administrative procedure is that rules should operate prospectively only." The Court found that *Columbia* had no notice of a departure from these procedures. *Id.*

95. *Arkla*, 453 U.S. at 582.

principle of reliance could be applied to estop one party from denying the existence of the new rate where the other party has rightfully relied on a contract. "Reliance" was recently considered by the Fifth Circuit in *Dorchester*,⁹⁶ where the court held that the Commission properly refused to apply a new rate retroactively because both parties relied on and benefitted from the filed rate.⁹⁷ Another aspect of reliance and equity is the possibility of fraudulent conduct by one party. While reaffirming the strict rule against applying any rate other than the filed rate, the Court in *Arkla* admittedly "save[d] for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct."⁹⁸

The sixth, and final, element is the consideration of public policy,⁹⁹ which must be balanced against the preceding five elements in order to allow the Commission to meet the Congressional mandate that all rates be just and reasonable in light of prevailing conditions. Congress has specified its intent in establishing policy for the sale of natural gas,¹⁰⁰ which should override the first five elements should they be in clear conflict.

In denying the Commission's petition for rehearing of the *Columbia* decision, the court held that the FERC was free to consider new orders under which the filed rate doctrine could be waived,¹⁰¹ which now leaves the issue to the Commission to establish a clear and consistent policy. Whatever policy is adopted by the FERC, the issue is one of great interest within the industry and will likely be reviewed by the Courts. It is in the public interest that the Commission promulgate some specific principles governing the circumstances in which the filed rate doctrine may be waived. The natural gas industry would be aided by clear and consistent regulations in making long term economic decisions. Further delays caused by litigation do not serve the industry or the public interest.

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96. *Dorchester Gas Producing Co. v. FERC*, 848 F.2d 634 (5th Cir. 1988).

97. *Id.* at 637.

98. *Arkla*, 453 U.S. at 592 n.13.

99. The consideration of public policy must be flexible in order to change as the gas markets change. Gas policy is tied to both domestic and international events in economics and politics. It is important that our regulators, including the FERC, never fail to consider changing conditions in implementing the nation's energy policy.

100. See Natural Gas Act, 15 U.S.C. §§ 717-717z (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982).

101. *Columbia Gas Transmission Corp. v. FERC*, 844 F.2d 879, 880 (1988). The FERC's petition for rehearing was based on what the Commission believed was new information. Authority was cited indicating that precedent existed for the court to rehear the case, but the court held that the interests of judicial orderliness and efficiency were best served by leaving the remand in place. *Id.*

