Report of The Committee On Natural Gas Curtailments

LAST YEAR'S COMMITTEE report devoted considerable attention to legislative and rulemaking developments concerning curtailment-related provisions of the Natural Gas Policy Act ("NGPA"). During the past year, a number of developments have occurred with respect to these rulemakings and their progeny, including related litigation. This report will summarize such developments. At the outset, however, it should be pointed out that the past year was notable for the general improvement in gas supplies deliverable to interstate consumers and the consequent easing of curtailments on most interstate pipeline systems, at least for the near term.

I. RULEMAKING DEVELOPMENTS

A. Rulemaking Developments Under Title IV of NGPA

Last year's report covered the development of rulemakings under Title IV of the NGPA through the adoption of Order No. 29 on May 2, 1979 in Docket No. RM79-15. That Order and subsequent orders clarifying the rule together with the associated rules issued by the Department of Agricultural and the Department of Energy were appealed to the United States Court of Appeals for the District of Columbia Circuit in *Process Gas Consumers Group, et al.* v. *U.S. Department of Agriculture, et al.*, Nos. 79-1336, *et al.* The appeals involve multiple petitioners and multiple issues concerning the curtailment priorities and agency implementations thereof. One of the principal issues concerns growth in natural gas requirements for agricultural users.

Related and subsequent developments have occurred with respect to the Commission's proposed rule on alternative fuel capability for essential agricultural uses in Docket No. RM79-40. Order No. 55, issued October 26, 1979, prescribed an interim rule to be effective for the 1979-1980 winter heating season. The rule provides that an agricultural establishment is considered to have an alternative fuel which is economically practical and reasonably available if in the past it used coal or residual fuel as an alternative fuel and if its requirements exceeded 300 Mcf per day. Order No. 55 was appealed in *Great Western Sugar Company* v. *FERC*, D.C. Cir. No. 79-2472, prior to the Commission's issuance of Order No. 55-A which denied rehearing on February 19, 1980. The proceedings on the final rule are still pending before the Commission.

The U.S. Department of Agriculture issued a proposed rule on December 31, 1979 (44 Fed. Reg. 77187, December 31, 1979) by which it proposes to define the term "process fuel" as set forth in § 401(f)(1) of the NGPA to include boiler fuel necessary for agricultural production.[1] One of the main

[1]The Commission issued on February 21, 1980 in Docket No. RM80-18, a request for comments on whether a rulemaking proceeding should be established to determine whether boiler fuel necessary for agricultural production should be included in the definition of "process fuel" for purposes of exempting those applications from incremental pricing regulations.

issues is whether the Secretary of Agriculture has been delegated by Congress the duty to define process fuel for this purpose or whether that authority rests with the Commission. The Secretary of Agriculture has, in a final rule issued on September 28, 1979 (C.F.R. Parts 2900 and 2901), also prescribed the manner in which adjustments to the curtailment rules can be obtained by agricultural entities.

In another related matter, which arose out of Northern Natural Gas Company's curtailment settlement proceedings,[2] the Commission has formally sent to the Economic Regulatory Administration a request that ERA consider the issue of whether a special curtailment priority should be given to cogeneration facilities.

B. Fuel Oil Displacement Program, Docket No. RM79-34

The FERC issued Order No. 30 on May 17, 1979, as amended by Order No. 30-A, issued September 12, 1979, pursuant to a March 19, 1979 proposal by the Department of Energy (DOE) requesting the adoption of a rule that would facilitate the transportation of natural gas to displace certain fuel oils. The DOE proposal was based on a projected temporary gas surplus and the desire to decrease dependence on foreign supplies and improve the level of distillates which at that time were in a critical supply position. The Commission's rule authorizes transportation of natural gas by interstate pipelines to direct purchasers for purposes of reducing the requirements for imported fuel oil and the use of middle distillates. Order No. 30 transportation is self-implementing under either Section 7 of the Natural Gas Act or Section 311(a)(1) of the NGPA except in certain circumstances such as: (1) sales by interstate pipelines; and (2) sales by local distributors or intrastate pipelines which are objected to by the seller's State Commission. Oil displacement gas sold by intrastate pipelines must not exceed that price which is established under Section 311(b) of the NGPA and, although the sale is exempt from certificate requirements, it must be reported to the Commission. Fuel oil displacement gas volumes will not be considered a supply or market for purposes of future curtailments.

The Economic Regulatory Administration adopted two rules which were designed to further facilitiate the fuel oil displacement program. ERA provided for a certificate of eligible use which, if granted, would assure the FERC that gas transported under Order No. 30 would in fact displace oil at specified plants. 18 C.F.R. Part 595. ERA also adopted a rule by which the prohibitions against the use of natural gas by certain industrials prescribed in the Powerplant and Industrial Fuel Use Act of 1978 would be temporarily lifted. 10 C.F.R. Part 508.

The program is scheduled to end June 1, 1980 unless the Commission takes action to extend that date pursuant to activities presently pending

[2]On November 30, 1979, the Commission approved settlement proposals involving curtailments on four pipeline systems: Northern, Montana-Dakota Utilities, South Georgia Natural Gas, and Transwestern Pipeline. Each of the settlement proposals included variations from the requirements of Order No. 29.

before it.[3] It should be noted that Order No. 30 has been appealed to the United States Court of Appeals for the District of Columbia Circuit in *Process Gas Consumers Group, et al.*, v. *FERC*, No. 79-2336, and is in the process of being briefed to the Court.

The Commission's public files reveal that approximately 20 transactions have been effected pursuant to the program. This does not include those transactions under Order No. 52, issued October 4, 1979, by which the Commission has extended the effect of Order No. 30 to industrial uses otherwise restricted by the Commission's Order Nos. 533 (which allowed transportation of direct purchase gas for "high priority" industrial uses only).

C. Proposed Revision of Form 16 Report, Docket No. RM80-20

On January 18, 1980, the Commission issued a notice of proposed rulemaking proposing to revise Form 16 (Report of Gas Supply and Requirements). The Commission proposes to reduce the number of schedules, revise certain definitions, and clarify and expand the instructions. The Commission also proposes certain format changes with a view toward easing the preparation of the form and facilitating public and regulatory use of the information. Acting on the suggestion of a number of commenters, the Commission has changed the proposed date for implementing the revisions from April 30, 1980 to September 30, 1980.

D. ERA Inquiry Into Curtailment Policy, Docket No. ERA R-79-10

On March 13, 1979, the ERA, in furtherance of its duties under the DOE Act, issued a notice of a broad inquiry into numerous questions relating to curtailment practices under the NGA and NGPA. Numerous comments were filed with the ERA in response to the Notice. Most of the comments cautioned against any major restructuring of existing policies. ERA is currently developing a rulemaking proposal which it expects to notice within the next two months.

E. Curtailment Compensation

After the U.S. Court of Appeals for the Fifth Circuit held that the Commission has the power to consider compensation as part of a curtailment plan,[4] the Commission determined that the best way to resolve the issue would be through a generic rulemaking. Preliminary Notice of Proposed Rulemaking issued November 30, 1977 in Docket No. RM78-4. In early October, 1979, however, the Commission voted at its open meeting to terminate its generic rulemaking on the issue of curtailment compensation in favor of a case-by-case approach. The Commission has not yet issued the order terminating the proceedings. The compensation issue is presently

[3]The Chairman of the Commission has announced in Docket No. GP80-76 a public conference on April 2, 1980 to explore the natural gas supply situation in the context of a possible extension of the fuel oil displacement program.

[4]*Mississippi Public Service Commission* v. *FPC*, 522 F.2d 1345 (5th Cir. 1975). *See also Elizabethtown Gas Company* v. *FERC*, 575 F.2d 885 (D.C. Cir. 1978).

before the Commission with respect to five pipelines: Columbia Gas, El Paso, Northwest, Texas Eastern, and Transco.

II. Court and Commission Proceedings

A. Columbia Gas Transmission Corporation

On September 28, 1979, the Commission approved a settlement offer filed by Columbia. The proposal, among other things, would delete seasonal curtailment provisions and maximum monthly volume limitations from Columbia's tariff since no further curtailments are projected on its system. The settlement provides for an indefinite continuation of Columbia's currently effective daily curtailment procedures and the establishment of mechanisms to determine whether seasonal curtailment procedures should be placed in effect in the future.

B. Florida Gas Transmission Company

On March 20, 1979, the U.S. Court of Appeals for the Fifth Circuit affirmed FPC Opinion No. 807. *Sebring Utilities Commission* v. *FERC*, 591 F.2d 1003 (5th Cir. 1979). In Opinion No. 807, the Commission found that Florida Gas' existing curtailment plan was unreasonable and unduly discriminatory because of the preference accorded to indirect vis-a-vis direct interruptible customers with similar end uses. The Commission had also directed Florida Gas to file a new end-use curtailment plan providing equal treatment for similar use by direct and indirect customers. The Court also affirmed a Commission order which dismissed a petition and complaint by a number of Florida cities requesting that the Commission order curtailment of transportation gas on Florida's system and to condition continued transportation by requiring *pro rata* curtailment of transportation contract volumes along with volumes to which direct preferred interruptible customers would otherwise be entitled.

On October 1, 1979, the Supreme Court denied a petition for a writ of certiorari to review the Fifth Circuit's decision.

C. Natural Gas Pipeline Company of America

On October 24, 1979, the U.S. Court of Appeals for the D.C. Circuit dismissed a petition by General Motors for review of a Commission order dismissing, without hearings, a GM complaint against the curtailment practices of Natural. GM's complaint before the Commission alleged that Natural's curtailment plan was not based on end use, lacked effective volumetric limitations, did not employ a fixed historical base period, and provided incentive for expansion of high priority markets by Natural's customers. The Commission had dismissed GM's complaint because there were insufficient facts alleged to warrant a lengthy investigation into the lawfulness of Natural's curtailment plan.

The Court held that the Commission's action was not reviewable because, in general, the initiation of an investigation is a matter within the discretion of an administrative agency. The Court further stated that even

if the Commission's order were reviewable, it should not be reversed. GM's basic complaint was that its supply might be endangered if Natural's customers could attach new loads. However, since the plan allocates gas supplies among major customers on the basis of a fixed annual quantity, which may not be increased on the basis of new attachments, Natural's large distributor customers would be required to rely solely upon self-help measures in order to expand high priority markets and the Court reasoned that, therefore, the plan would not affect GM's supply.[5]

E. Transcontinental Gas Pipe Line Corporation

1. D.C. Circuit Remand to Commission for Investigation into Shortages on Transco System

On February 13, 1979, the Commission, in response to the order of the D.C. Circuit in *Transcontinental Gas Pipe Line Corporation* v. *FPC*, 563 F.2d 664 (D.C. Cir. 1976), commenced in Docket No. TC79-6 an investigation into the supply shortages on Transco's system. The Court ordered such investigation because "without substantial information regarding the duration, shape and causation of the alleged shortage on the Transco system," it would not be able to pass on the validity of the compensation provisions which had been included in Transco's settlement curtailment plan for 1974-75. The matter was set for formal hearing. The ALJ, in his "Report to the Commission" issued August 16, 1979, found that there was no evidence of any withholding of gas from Transco's system and that the "existence of a gas supply shortage on Transco's system has in fact been a real one." Report at 21. The matter is now pending before the Commission on exceptions.[6]

2. Settlement of Transco's Court-Remanded Curtailment Plan

On January 19, 1979, the Commission approved Transco's offer of settlement which resolved all issues remanded by the Court in *State of North Carolina* v. ***FERC***, 584 F.2d 1003 (D.C. Cir. 1978) except for the compensation issue. Rehearing of the Commission's order was denied on August 2, 1979. The Commission's order denying rehearing was not appealed.

Transco's settlement provides for the allocation of its supply among its customers based upon volumetric entitlements rather than end-use categories. The settlement further provides that if Transco projects an annual volume lower than 636,400 Mdt, it will request a conference of the parties to discuss an appropriate curtailment plan. The Commission also exempted Transco from the requirements of Order No. 29 because it found that the settlement agreement adequately provided for essential agricultural uses.

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[5]On October 11, 1979, the U.S. Court of Appeals for the Tenth Circuit dismissed a petition by GM for review of Commission orders in the Cities Service Gas Co. curtailment proceeding with respect to load growth. One of the challenged orders provided that any restrictions on load growth imposed in future hearings would be applied prospectively only. The Court held that the Commission orders did not constitute final agency action since they did not decide the load growth restriction issue.

[6]On October 27, 1979, in Docket No. RP75-51, the Commission terminated an earlier investigation into Transco's supply shortage. In so doing, the Commission approved the findings of the ALJ that Transco's curtailment was necessary because of insufficient supplies and that no remedial measures were warranted. The matter is now on appeal before the U.S. Court of Appeals for the D.C. Circuit in *North Carolina Utilities Commission* v. *FERC*, No. 80-1219.

3. Transco's Request for an Investigation Into the Circumstances Resulting in a Shortage on Its System

On February 28, 1979, Transco petitioned the Commission to institute a proceeding to inquire into the circumstances resulting in the gas shortage on Transco's system, the effect of its service agreements and of the Commission's orders, and the effect of an award for damages against it for curtailment of service upon the Commission's ability to carry out its responsibilities under the Natural Gas Act. Transco noted that in a civil damage suite brought by an industrial customer of one of Transco's distribution customers, a District Court had assessed damages against Transco based, in part, upon a finding that Transco was negligent in acquiring gas supplies.[7] Transco asserted that the Commission alone has the jurisdiction and special competence and expertise to make factual determinations concerning the shortage and related issues. Transco also sought a declaratory order finding that its curtailment actions have been prudent.

On August 17, 1979, the Commission granted in part and denied in part Transco's request. Applications for Rehearing of the Commission's order are pending.

On January 8, 1980, the U.S. Court of Appeals for the Fourth Circuit referred to the Commission certain questions which arose in the above-referenced civil damage suit against Transco in the District Court. These questions encompass the questions the Commission agreed to investigate in Docket No. TC79-8, and also include questions regarding the facts and circumstances that resulted in the shortage of gas on Transco's system. The Commission has not yet responded to the Court's referral order.

E. United Gas Pipe Line Company

1. Proposed Settlement in Phase II of United's Curtailment Proceeding

On August 31, 1979, United filed a settlement offer regarding curtailment procedures to be in effect on United's system over the four-year period beginning November 1, 1979. The proposed settlement, which is generally supported by the Commission staff and most of United's direct market and pipeline customers, is intended to effectuate a compromise between United's direct market customers and its pipeline customers. United's direct market customers had generally favored United's April 1979 plan which took into account their greater dependence on United for gas supplies than United's pipeline customers. United's pipeline customers, on the other hand, supported a parity plan based solely on end-use profiles without regard to their relative dependence upon United. This latter type of plan was recommended by the ALJ in his Initial Decision issued June 17, 1977.

Under the proposed settlement, the curtailment applicable to United's direct market and pipeline customers (and their resulting aggregate curtailment allocations) would be determined on the basis of a 50-50 split between

[7] The judgment of the District Court is pending on appeal to the U.S. Court of Appeals for the Fourth Circuit.

the curtailment which would obtain at given category supply levels under (1) United's proposed plan of April 1, 1976 and (2) a stipulated version of the permanent plan recommended by the ALJ noted above.

The curtailments allocated in aggregate to United's direct market customers as a result of these procedures would be apportioned within that market in accordance with certain described curtailment categories. The curtailments allocated in aggregate to United's pipeline customers would be apportioned among the pipelines such that their existing base requirements are curtailed in stages (and on a *pro rata* basis within each stage) in the volumetric increments set forth in the proposed agreement.

In its motion for approval of the settlement, United explains that the proposed settlement agreement is intended to be consistent with the D.C. Circuit's decision in *State of North Carolina* v. *FERC*, 584 F.2d 1003 (D.C. Cir. 1978) in that it effectively protects high priority requirements on all parts of United's system and takes into account the actual end-use impact of the proposed curtailments. It also is stated by United that its high priority direct market and high priority requirements will be protected because of United's current supply projections. United's settlement proposal is pending before the ALJ.

2. Phase III of United's Curtailment Proceeding

On November 20, 1979, the Commission clarified its August 9, 1978 order with respect to the intended scope of the proceeding in Phase III of United's curtailment proceeding which deals with issues related to United's potential liability for curtailments. The Commission stated that a general inquiry into the damage issue is unnecessary since the question of United's ultimate liability is one for the courts to decide. The Commission stated, however, that "it is appropriate to receive evidence concerning the extent and nature of the . . . private claims for damages which are pending against United, to discern the theory of these claims, and the amount being claimed as damages. The 'potential' liability of United for damages may be relevant to the resolution of [the issues in this proceeding]."

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