

Report of the Committee on Natural Gas Rate and Accounting Regulations

The Committee's report highlights the important natural gas rate and accounting developments at the Federal Energy Regulatory Commission (FERC or Commission) and in the courts for 1987.

I. COMMISSION ACTION ON PIPELINE ISSUES

A. Abandonment

On May 7, 1987, the Commission issued a notice of proposed rulemaking to permit generic abandonment of natural gas sales and purchases under expired or terminated contracts.¹ As proposed, the rule applied to first sales under the Natural Gas Policy Act and to pipeline purchases from producers or other pipelines. Comments were specifically sought on whether blanket abandonment authorization should be conditioned on the transportation of the gas.

B. Capital Structure

On March 13, 1987, the Commission issued a decision in *Alabama-Tennessee Natural Gas Co.*,² granting an exception to its general policy of using actual rather than hypothetical capital structures.³ Alabama-Tennessee possessed a 95.79% equity capital structure, which the Commission found would require approximately a 10% return on equity. Instead, the Commission imputed a capital structure of 45% equity and 55% debt, which was the average equity ratio for classes A and B pipeline companies from 1970-80. In light of its imputation of capital structure, the Commission adopted a 14.5% return on equity, which the Commission found to be "at the upper end of the zone of reasonableness."⁴

C. Cash Working Capital

In *ANR Pipeline Co.*,⁵ the Commission on rehearing reversed its prior order rejecting the Company's inclusion of a cash working capital allowance in its rate filing. While the Commission noted that it had rejected the filing for the Company's failure to file a lead-lag study, as required by section 154.63⁶ of the Commission's regulations, the Commission agreed with the pipeline that it was exempt from the requirement by the terms of a previous rate case settlement. That settlement effectively established a presumption of reasonableness

1. Notice of Proposed Rulemaking, *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, [1982-1987 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,441, 52 Fed. Reg. 18,703 (1987).

2. *Alabama-Tenn. Natural Gas Co.*, 38 F.E.R.C. ¶ 61,251 (1987).

3. *Arkansas La. Gas Co.*, 31 F.E.R.C. ¶ 61,318 (1985).

4. *Alabama-Tenn. Natural Gas Co.*, 38 F.E.R.C. ¶ 61,251, at 61,851 (1987).

5. *ANR Pipeline Co.*, 40 F.E.R.C. ¶ 61,076 (1987).

6. 18 C.F.R. § 154.63 (1987).

supporting the amount filed by the Company. Nevertheless, the Commission instituted hearings to examine the reasonableness of the Company's filing.

D. Cost Allocation and Rate Design

On February 20, 1987, in Opinion No. 265, *Panhandle Eastern Pipe Line Co.*,⁷ the Commission decided issues of cost classification, cost allocation and rate design on the Panhandle system. Renomination of daily contract demand was rejected.⁸ This treatment was subsequently justified on the basis that annual entitlement levels do not limit the pipeline's obligation to provide firm service, although annual deliveries in excess of such levels would be subject to a 100% load factor overrun charge.⁹ The Commission allocated costs between jurisdictional and nonjurisdictional customers on a full thermal basis. The Commission also held that proponents of changes in the existing zone and seasonal rate differentials had not met their burden of proof.

In *Columbia Gas Transmission Corp.*,¹⁰ the Commission on July 15, 1987, rejected the argument that the cost of additional facilities to be employed in rendering new sales and transportation service should be assessed incrementally to the new customers. The Commission found no subsidization would occur following rolled-in rate treatment, since non-gas revenues for the service exceeded the cost of service. Additionally, the Commission noted that Columbia had previously rolled into rates the cost of expanding its system in instances that benefited existing customers.

E. Discounted Sales Rates

On May 22, 1987, the Commission approved Northern Natural Gas Company's request for flexible rate authority for off system sales for a limited term subject to three conditions: (1) that Northern's minimum rate must equal its actual weighted average cost of gas purchased for the month in which the gas is delivered plus all variable costs incurred to provide the service; (2) that Northern must credit all revenues received from the off system sales to a sub-account of Account No. 191; and (3) that rate flexibility is permitted only as long as Northern remains an open-access transporter.¹¹

F. Fees

On May 29, 1987, the Commission issued Order No. 472, amending its regulations to establish annual charges to recover from oil pipelines, electric utilities and interstate pipelines, all costs of the Commission's regulatory programs not already recovered through filing fees and other charges.¹² The annual charges are based on the volumes of energy transported and sold each

7. *Panhandle E. Pipe Line Co.*, 38 F.E.R.C. ¶ 61,164, *reh'g denied*, 40 F.E.R.C. ¶ 61,189 (1987), *appeal pending sub nom.* *Panhandle E. Pipe Line Co. v. FERC*, No. 87-1431 (D.C. Cir. Aug. 26, 1987).

8. *See also* *Panhandle E. Pipe Line Co.*, 40 F.E.R.C. ¶ 61,189, at 61,596-97 (1987).

9. *Panhandle E. Pipe Line Co.*, 41 F.E.R.C. ¶ 61,125 (1987).

10. *Columbia Gas Transmission Corp.*, 40 F.E.R.C. ¶ 61,029 (1987).

11. *Northern Natural Gas Co.*, 39 F.E.R.C. ¶ 61,203 (1987).

12. Order No. 472, *Annual Charges Under the Omnibus Budget Reconciliation Act of 1986*, III F.E.R.C. Stats. & Regs. ¶ 30,746, 52 Fed. Reg. 21,263 (1987).

year. The Commission also authorized an annual charges adjustment clause, which allows a pipeline to collect from its customers a surcharge for each sales and transportation unit.

On September 16, 1987, the Commission granted rehearing of Order No. 472. The rehearing order excludes certain categories of energy from the computation of annual charges and sets forth the requirements of pipeline tariffs for the passthrough of annual charges to customers.¹³

G. Gas Inventory Charge

On September 4, 1987, in *El Paso Natural Gas Co.*,¹⁴ the Commission rejected a gas inventory charge proposed by El Paso Natural Gas Company to recover costs of maintaining future gas supplies to meet the firm sales requirements of its jurisdictional customers. The Commission reasoned that El Paso's proposal did not meet two of the four principles which it had set forth in Order No. 500¹⁵ and, therefore, the gas inventory charge would not produce a just and reasonable result. Specifically, the Commission determined that the proposal failed to assure a firm price over a definite period. In addition, the Commission disapproved of El Paso's proposed thirty percent cap on the conversion of sales entitlements in combination with a termination fee.

On October 30, 1987, the Commission accepted for filing the "inventory holding charge" (IHC) proposed by Natural Gas Pipeline Company of America and then suspended the filing and set it for hearing.¹⁶ In setting the IHC for hearing, the Commission asked the parties to examine whether the IHC can be found just and reasonable with a "reduced" level of traditional cost justification. Instead of traditional review, the Commission wished to be informed whether Natural's markets are "competitive" and whether market forces can therefore be relied upon to keep the inventory holding charge within the zone of reasonableness. The Commission established an expedited trial schedule.

On December 28, 1987, the Commission issued an order¹⁷ finding that Natural's above-described proposal represents a change in service that should be handled in a certificate proceeding under section 7(c) of the NGA.¹⁸ The Commission redocketed the proceeding as No. CP87-561-000 and required that the administrative law judge (ALJ) continue to expedite the proceedings such that the case is before the Commission by May 31, 1988. The Commission further determined that it is not appropriate that the proposed changes become effective until after any appropriate certificate amendment is issued.

13. Order No. 472-B, III F.E.R.C. Stats. & Regs. ¶ 30,767, 52 Fed. Reg. 36,013 (1987).

14. *El Paso Natural Gas Co.*, 40 F.E.R.C. ¶ 61,212 (1987).

15. See Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. Stats. & Regs. ¶ 30,761, 52 Fed. Reg. 30,334 (1987) (to be codified at 18 C.F.R. pt. 284).

16. *Natural Gas Pipe Line Co. of Am.*, 41 F.E.R.C. ¶ 61,119 (1987).

17. *Natural Gas Pipe Line Co. of Am.*, 41 F.E.R.C. ¶ 61,358 (1987).

18. See 15 U.S.C. § 717f(c) (1982).

H. Gathering Rates

On March 26, 1987, in Opinion No. 270,¹⁹ the Commission concluded that Northwest Pipeline Corporation's gathering rates and facilities were subject to Commission jurisdiction and that such rates should reflect Northwest's actual gathering cost-of-service. Opinion No. 270 affirmed the ALJ's Initial Decision,²⁰ which rejected Northwest's argument that the Commission lacks jurisdiction over the rates for the gathering services provided to Natural Gas Corporation of California (NGC) by Northwest pursuant to section 1(b) of the NGA.

I. Incremental Pricing

On July 27, 1987, following the repeal of NGPA Title II, the Commission issued Order No. 478²¹ repealing its incremental pricing regulations, with the exception of those provisions enabling the flowthrough of charges incurred before the repeal of Title II.

J. Marketing Affiliates

On June 2, 1987, the Commission issued a proposed rule establishing tariff and non-tariff requirements for marketing affiliates.²² With respect to tariff issues, the proposed rule requires pipelines to implement all provisions uniformly, to enforce conditions for all parties, to avoid providing affiliates with higher scheduling or curtailment priority, to specify what constitutes a valid transportation request, and to process all pending requests within a specific time period. With respect to non-tariff issues, the proposed rule prohibits pipelines from placing an affiliate's transportation request before other pending requests, revealing confidential data provided by non-affiliates exclusively to affiliates, disclosing data from carriage requests solely to affiliates, or forcing producers to use the service of the pipeline or its affiliates as a condition for releasing gas. In addition, pipelines must keep logs showing carriage requests, records of parties receiving transportation, volume, and receipt and delivery points. Pipelines must also develop written procedures to show how any prohibited practices have been eliminated. The proposed rule identifies several remedies for unlawful practices, including refunds or civil penalties of up to \$5,000 per day. The FERC stated that it is prepared to issue an order or issue a federal court injunction to make a pipeline transport in accordance with its authorization. The Commission also noted that present or future transportation may be conditioned on the loss of priority for some or all transportation for affiliates, the limitation or elimination of the pipeline's authority to move an affiliate's gas, the restructuring of the pipeline and affiliate, the regulation of the affiliate as part of the pipeline, and the divestiture of the affiliate.

19. Northwest Pipeline Corp., 38 F.E.R.C. ¶ 61,302 (1987).

20. Northwest Pipeline Corp., 32 F.E.R.C. ¶ 63,069 (1985).

21. Order No. 478, *Repeal of Incremental Pricing Regulations and Termination of Pending Incremental Pricing Dockets*, III F.E.R.C. Stats. & Regs. ¶ 30,757, 52 Fed. Reg. 28,464 (1987).

22. Notice of Proposed Rulemaking, *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, [1982-1987 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,445, 52 Fed. Reg. 21,578 (1987).

On August 19, 1987, the Commission ordered a \$130,000 fine against Panhandle Eastern Pipe Line Company as a result of a complaint brought by Independent Petroleum Association of Mountain States, claiming that Panhandle had improperly discriminated in favor of its marketing affiliate, Panhandle Trading Company (PTC).²³ The Commission, in Opinion No. 275,²⁴ held that Panhandle gave advance notice to PTC of its intent to implement interim open access transportation in violation of section 284.9 of the Commission's regulations. Although the Commission stopped short of requiring corporate divorce, it stated that Panhandle and PTC may not share personnel and that Panhandle must submit certain information to the Commission including a complete list of facilities shared with PTC, information concerning transportation requests, procedures used to resolve shipper complaints, procedures for informing affiliates and non-affiliates of the availability and price of service and capacity, and tariff provisions to put those conditions in place. If Panhandle is forced to curtail transportation service, it must do so on a pro rata basis for all shippers who made valid transportation requests before May 21, 1986. Requests received after May 21, 1986, must be considered on a first-come, first-served basis and must be subject to a last-on, first-off curtailment procedure.

K. Minimum Bills

In Opinion No. 265,²⁵ the Commission held unjust and unreasonable the minimum commodity bills of Panhandle Eastern Pipe Line Company. Rejecting arguments that the bills were compatible with modified fixed-variable rate design and that elimination would produce unfair cost shifts among customers, the Commission agreed with the ALJ that the bills were anticompetitive and produced market distortions.

On February 27, 1987, in Opinion No. 258-A, *ANR Pipeline Co.*,²⁶ the Commission denied rehearing of its determination that ANR's minimum commodity bills were unjust and unreasonable. The Commission rejected three proposed justifications: (1) assurance of pipeline fixed cost recovery; (2) prevention of cost shifting from partial to full requirements customers; and (3) avoidance of take-or-pay costs.

In Opinion No. 282-A, *East Tennessee Natural Gas Co.*,²⁷ the Commission denied rehearing of Opinion No. 282,²⁸ which eliminated East Tennessee's minimum bill. The Commission found that East Tennessee's minimum bill was anticompetitive and unduly discriminatory against its CD Rate Schedule customers. The Commission also found that East Tennessee had not satisfied the *Atlantic Seaboard* criteria for retaining its minimum bill.

23. Panhandle E. Pipe Line Co., 40 F.E.R.C. ¶ 61,187 (1987).

24. Panhandle E. Pipe Line Co., 39 F.E.R.C. ¶ 61,274 (1987).

25. Panhandle E. Pipe Line Co., 38 F.E.R.C. ¶ 61,164 (1987).

26. ANR Pipeline Co., 38 F.E.R.C. ¶ 61,221 (1987), *appeal pending sub nom.* ANR Pipeline Co. v. FERC, No. 87-1182 (D.C. Cir. filed Apr. 24, 1987).

27. East Tenn. Natural Gas Co., 41 F.E.R.C. ¶ 61,271 (1987).

28. East Tenn. Natural Gas Co., 40 F.E.R.C. ¶ 61,201 (1987).

L. NGPA Section 110 Production-Related Costs

On February 3, 1987, in No. RM84-14-025, the Commission issued an order, clarifying that its regulations do not authorize or limit "the amount parties may allocate for production-related costs in a contract for the sale of deregulated gas."²⁹ This action was in response to a petition filed by FMF Oil & Gas Properties, Inc., requesting that the Commission clarify language contained in Order No. 406. The Commission stated that it had no intent to prohibit the inclusion of a separate pricing provision for production-related costs in a freely negotiated contract. Thus, "to the extent the parties disagreed on the effect of such terms, their remedy lay with a court of competent jurisdiction rather than with this Commission."³⁰

In Order No. 473,³¹ issued June 3, 1987, the Commission amended its regulations implementing NGPA section 110 in order to (1) allow first sellers to retroactively recover fuel or power costs incurred to drive compressors constructed before enactment of the NGPA; and (2) establish a protest procedure permitting any affected person to rebut the Order No. 94-A presumption that a contract area rate clause was intended to allow the collection of delivery allowances for sales of gas in interstate commerce. As cost limits, the FERC set generic allowances for delivery, gathering and compression services and, for other production-related services such as natural gas treating and conditioning, provided for the determination of unit amounts based on annual cost of service calculations. As evidence of contractual authorization, the FERC said that the contract must either contain a provision describing a payment for a production-related service or contain an area rate type of clause. The protest procedure established by Order No. 473 is similar to that prescribed in Order No. 23-B for protesting claims of contractual authority under area rate clauses to collect NGPA maximum lawful prices. On December 29, 1987, the Commission granted rehearing of Order No. 473 "to provide protest procedures for all sellers to obtain compression allowances and to provide several clarifications of the final rule."³²

M. New Sales Authority

On February 24, 1987, in *K N Energy, Inc. (KNEI)*,³³ the Commission authorized new firm sales service to the Public Service Company of Colorado (PSCo) and construction of the related facilities. A competing supplier had protested the application, alleging capability to serve PSCo through existing facilities at comparable prices. The Commission held that it was unnecessary

29. Order No. 406-C, 38 F.E.R.C. ¶ 61,128 (1987).

30. *Id.* at 61,328. Subsequent to the issuance of this clarification order, on appellate review, Order No. 406 was affirmed in part, reversed in part, and remanded to the Commission. *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (10th Cir.), *cert. granted*, 108 S. Ct. 449 (1987). However, the court's action does not appear to affect the subject matter addressed in the Commission's clarifying order.

31. Order No. 473, *Compression Allowances and Protest Procedures Under NGPA Sec. 110*, III F.E.R.C. Stats. & Regs. ¶ 30,747, 52 Fed. Reg. 21,660 (1987).

32. Order No. 473-A, *Compression Allowances and Protest Procedures Under NGPA Sec. 110*, III F.E.R.C. Stats. & Regs. ¶ 61,359, 53 Fed. Reg. 15 (1987).

33. *K N Energy, Inc.*, 38 F.E.R.C. ¶ 61,181 (1987).

for it to review the merits of PSCo's supply decisions, and that the material inquiry was whether KNEn's ability to serve existing customers would be adversely affected by adding the new service. Finding KNEn's existing and projected gas supplies to be sufficient through 1995, the Commission issued the certificate.

N. Order No. 380-F

On August 19, 1987, in Order No. 380-F,³⁴ the Commission reaffirmed its requirement that a "downstream pipeline" must pass through "upstream pipeline" minimum commodity bill charges in the downstream pipeline's PGA. It reiterated that such upstream commodity charges are variable costs of gas that are barred from minimum commodity bills by section 154.111 of the Commission's regulations.

O. Order No. 436 Pipeline Decisions

On February 13, 1987, in *Consolidated Gas Transmission Corp.*,³⁵ the Commission approved with several modifications, a settlement proposed by the pipeline to resolve issues pending from a general rate filing and to establish terms and conditions for implementing open access transportation under Order No. 436. The approved settlement departed from the Order No. 436 requirements by, among other things, delaying for three years firm sales customers' rights to reduce or convert contract demand to transportation, save for limited conversion rights prior to that time. The Commission also declined to approve a provision requiring firm sales customers to execute new service agreements after the pipeline accepts a blanket transportation certificate, but did indicate that customers not executing new service agreements would not necessarily be entitled to receive the same benefits available to those who did. The Commission also rejected two provisions allowing the pipeline to recover from customers take-or-pay and minimum bill costs directly assigned to the pipeline by its pipeline suppliers.

On February 20, 1987, the Commission issued separate orders³⁶ approving, with several modifications, a contested settlement offer of Transcontinental Gas Pipe Line Corporation (Transco) proposing mechanisms for recovery of take-or-pay costs, restructuring of sales service and conditions for implementing open access transportation and granting a blanket certificate for non-discriminatory, self-implementing transportation pursuant to Order No. 436. The Commission largely approved two major provisions: (1) recovery by Transco from customers of fifty percent of costs incurred for take-or-pay buyouts and buydowns (although through demand surcharges rather than directly billed surcharges as proposed); and (2) establishment of a sales service option which CD conversion/reduction rights were substantially different than provided in Order No. 436. Transco's proposed mechanism to recover future take-or-pay costs was deferred for further consideration in the com-

34. Order No. 380-F, *Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 40 F.E.R.C. ¶ 61,190 (1987).

35. *Consolidated Gas Transmission Corp.*, 38 F.E.R.C. ¶ 61,150 (1987).

36. *Transcontinental Gas Pipe Line Corp.*, 38 F.E.R.C. ¶¶ 61,165, 61,166 (1987).

pany's latest rate proceeding. Transco subsequently notified the Commission of its rejection of the modified settlement.

On April 15, 1987, the Commission voted on a number of Order No. 436 settlement proposals. MIGC, Inc.'s proposed settlement was accepted subject to modifications.³⁷ The settlement proposal of Colorado Interstate Gas Co. and the interim settlement of ANR Pipeline Co. were rejected for numerous reasons.³⁸ In the case of Colorado Interstate, the Commission noted the following problems, among others: (1) limited CD conversion/reduction rights; (2) discriminating rates for shippers based on their previous status as customers; and (3) attempted use of a take-or-pay tracker. ANR's settlement proposal was rejected for the following reasons: (1) inclusion of only a one-time fifteen percent CD reduction right; (2) discretion for ANR to determine capacity and to determine whether a given transaction displaces sales; (3) inclusion of language that approval of the settlement would constitute a determination that the proposed rates comply with the NGA and the NGPA; (4) inclusion of a provision that would have extended a previous take-or-pay tracker; and (5) ANR's insistence that it not be considered an Order No. 436 transporter for Order No. 451 purposes.

The open access transportation applications of Northern Border Pipeline Co., Ozark Gas Transmission System, and Trailblazer Pipeline Co. were accepted, subject to modifications.³⁹ In accepting the certificate applications, the Commission granted requests for waiver of the Order No. 436 requirement that transportation rates be designed on the basis of projected units of service. The Commission found that the requirements of 18 C.F.R. § 284.7 were not appropriate or necessary for project-financed pipelines.

In May 1987, the Commission acted on three contested offers of settlement governing the terms and conditions under which various pipelines would implement open access transportation service under Order No. 436. In *Northwest Pipeline Corp.*,⁴⁰ the Commission rejected an extension of a ten percent cap on the amount of transported gas for Northwest's sales customers and also rejected the pipeline's direct billing plan for take-or-pay costs. On May 8, 1987, the Commission conditionally granted blanket certificate applications by United Gas Pipe Line Company and Natural Gas Pipeline Company of America.⁴¹ In each case, the Commission approved a contested provision of the pipeline's settlement offer which would allow the pipeline to interrupt service to a shipper paying a discount rate in order to serve another shipper willing to pay a higher rate, if the parties so agreed by contract.

In *Trunkline Gas Co.*,⁴² issued July 1, 1987, the Commission insisted on modification of the pipeline's compliance filing in order to eliminate the prior-

37. MIGC, Inc., 39 F.E.R.C. ¶ 61,030 (1987).

38. Colorado Interstate Gas Co., 39 F.E.R.C. ¶ 61,227 (1987); ANR Pipeline Co., 39 F.E.R.C. ¶ 61,029 (1987).

39. Northern Border Pipeline Co., 39 F.E.R.C. ¶ 61,104 (1987); Ozark Gas Transmission Sys., 39 F.E.R.C. ¶ 61,105 (1987); Trailblazer Pipeline Co., 39 F.E.R.C. ¶ 61,103 (1987).

40. Northwest Pipeline Corp., 39 F.E.R.C. ¶ 61,109 (1987).

41. United Gas Pipe Line Co., 39 F.E.R.C. ¶ 61,152 (1987); Natural Gas Pipeline Co. of Am., 39 F.E.R.C. ¶ 61,153 (1987).

42. Trunkline Gas Co., 40 F.E.R.C. ¶ 61,015 (1987).

ity given firm transportation customers paying maximum rates over firm customers paying less. In the Commission's view, Trunkline's proposed format would impermissibly convert firm transportation service into interruptible service. The Commission also required modification of the pipeline's imbalance provisions to ensure that customers are provided forty-five days to correct imbalances, consistent with previous orders. The Commission further approved the pipeline's \$1.00/dt imbalance penalty.

In *Mid Louisiana Gas Co.*,⁴³ the Commission removed from the pipeline's Order No. 436 settlement a provision contractually obliging customers to purchase their daily nominations, finding that the provision amounted to an impermissible minimum take requirement. The Commission also required the deletion of tariff language providing a preference to firm transportation by converting sales customers.

In an order issued July 2, 1987, considering Algonquin Gas Transmission Corporation's Order No. 436 filing, the Commission rejected as discriminatory Algonquin's proposal to offer converted service only to those customers with a minimum term of service of ten years.⁴⁴ The Commission further reiterated previous holdings refusing to require the offering of standby sales service. Also noteworthy was the Commission's decision rejecting Algonquin's tariff giving preferential access to capacity to customers seeking additional firm sales service over firm transportation customers.

On August 21, 1987, the Commission issued an order in *Pacific Gas Transmission Co.*,⁴⁵ which granted Pacific Gas a permanent blanket certificate to transport gas under the Order No. 436 program, and approved the use of a lottery system rather than the first-come, first-served system for allocating capacity rights for all shippers whose requests for service were received within ten days of the date Pacific Gas filed its application. The Commission indicated that a lottery is an appropriate tool to establish the initial queue.

On August 21, 1987, the Commission issued an order in *Tennessee Gas Pipeline Co.*,⁴⁶ approving with modifications the rate schedules and operating terms and conditions proposed by Tennessee for transportation service under the Commission's Order No. 436. The Commission also set for hearing the complaint of Citizens Energy Corporation that the capacity scheduling provisions proposed by Tennessee would unfairly discriminate in favor of Tennessee's marketing affiliate. On December 15, 1987, the Commission issued its Order Granting in Part and Denying in Part Requests for Rehearing and Clarification and Approving Settlement,⁴⁷ in which several changes were made to the August 21, 1987 order including the finding that with the appropriate tariff provisions, Tennessee may terminate transportation service for non-payment by a shipper.

On October 15, 1987, the Commission issued its order in *Texas Eastern*

43. *Mid La. Gas Co.*, 40 F.E.R.C. ¶ 61,085 (1987).

44. *Algonquin Gas Transmission Co.*, 40 F.E.R.C. ¶ 61,019 (1987).

45. *Pacific Gas Transmission Co.*, 40 F.E.R.C. ¶ 61,193 (1987).

46. *Tennessee Gas Pipeline Co.*, 40 F.E.R.C. ¶ 61,194 (1987).

47. *Tennessee Gas Pipeline Co.*, 41 F.E.R.C. ¶ 61,000 (1987).

Transmission Corp.,⁴⁸ granting rehearing in part of previous orders approving, subject to conditions, a contested offer of settlement⁴⁹ and a blanket certificate of public convenience and necessity⁵⁰ which provided for the implementation of a program to perform open transportation under Order No. 436. The Commission found that the information furnished by Texas Eastern adequately supports the settlement rates. The order on rehearing essentially reaffirms the previous orders disapproving a direct billing mechanism for take-or-pay carrying costs and approving such items as stand-by sales service and the 100% load factors interruptible transportation rates. The Commission's order further found that the transportation rates reflect "material variations in the cost of providing service" even though they do not include separate seasonal and off peak rates.⁵¹

On November 9, 1987, in *Northern Natural Gas Co.*,⁵² the Commission issued its order granting in part and denying in part rehearing of its order issued December 22, 1986,⁵³ in which it approved with modifications a settlement which included open access provisions pursuant to Order No. 436. The Commission's order reinstated a settlement provision which allows Northern to adjust its sales demand charges and transportation reservation fees to compensate for the first year CD reductions elected by its customers. The Commission reserved for further consideration the issues of agency, title and capacity brokering.

P. Order No. 451

On June 3, 1987, the Commission issued Order No. 451-B,⁵⁴ explaining the effect of contract assignments on the good faith negotiation procedure prescribed by Order No. 451. Under Order No. 451, a purchaser may seek renegotiation of any contract containing old gas only after the producer first activates the good faith negotiation process. In Order No. 451-B, the FERC stated that the actions of a third party cannot force a producer into renegotiations and that, therefore, gas purchasers may seek to renegotiate contracts only with the seller that initiated the process. With respect to assignments made before June 3, 1987, a purchaser-assignee cannot renegotiate unassigned contracts, and a purchaser-assignor cannot renegotiate the assigned contracts. With respect to assignments of contracts made after June 3, 1987, a producer cannot initiate good-faith negotiation for any gas that is sold to the purchaser unless that purchaser can renegotiate all the gas that would have been subject to renegotiation in the absence of the assignment.

Acting on another request for clarification or rehearing of Order No. 451-A, the FERC refused to allow purchasers to seek lower prices for all new gas

48. *Texas E. Transmission Corp.*, 41 F.E.R.C. ¶ 61,015 (1987).

49. *Texas E. Transmission Corp.*, 37 F.E.R.C. ¶ 61,260 (1986).

50. *Texas E. Transmission Corp.*, 37 F.E.R.C. ¶ 61,266 (1986).

51. *Id.*

52. *Northern Natural Gas Co.*, 41 F.E.R.C. ¶ 61,158 (1987).

53. *Northern Natural Gas Co.*, 37 F.E.R.C. ¶ 61,272 (1986).

54. Order No. 451-B, *Ceiling Prices; Old Gas Pricing Structure*, III F.E.R.C. Stats. & Regs. ¶ 30,748,

52 Fed. Reg. 21,669 (1987) (to be codified at 18 C.F.R. pts. 270, 284).

volumes. In addition, the FERC stated that the buyer and seller may agree to reduce the sixty day notice required by Order No. 451 before purchases may be terminated or abandoned. Finally, the FERC authorized intrastate pipelines that either purchased or provided upstream transportation for released gas to move the gas on behalf of interstate pipelines or local distribution companies served by interstate pipelines.

On September 30, 1987, the Commission in *Northern Natural Gas Co.*,⁵⁵ issued a declaratory order determining that "good faith negotiations" under Order Nos. 451 and 451-A may not be initiated until the favored nations clause is triggered by actual payment of a higher price to another party. The case arose in a dispute between Northern and Phillips Petroleum Company. The Commission determined that either area rate clauses or favored nations clauses may be the contractual basis for initiating "good faith negotiations" under Order Nos. 451 and 451-A. The Commission held, however, that the language of the favored nations clause governs the issue and that the particular favored nations clause in the Phillips contract is not triggered until Northern actually pays a higher price to a third party. Since Northern had not done so, no triggering event which would permit the initiation of "good faith negotiations" had occurred.

Q. Order No. 500

On August 7, 1987, the Commission issued Order No. 500,⁵⁶ an "interim" rule responding to the remand of Order No. 436. Order No. 500, which became effective on September 25, 1987, made four major modifications to Order No. 436: (1) a pipeline is allowed to refuse transportation services for producer-owned gas unless the producer offers to the pipeline Mcf-for-Mcf credits against existing take-or-pay liabilities of the pipeline; (2) take-or-pay buyout/buydown costs may be recovered through one of two methods (a) between 25% and 50% of these costs can be recovered through a fixed charge to customers provided, however, that the pipeline absorbs an equal percentage of these costs; or (b) remaining buyout/buydown costs may be recovered through a commodity surcharge on total throughput; (3) certain principles were established affecting design of future rates for "gas inventory holding charges" associated with pipelines maintaining a gas inventory related to customer nominations; and (4) contract demand reductions are no longer required while CD conversions to firm transportation entitlements are continued.

Order No. 500 also inaugurated a major data collection effort by the Commission to establish the extent and magnitude of take-or-pay problems among jurisdictional pipelines. The data requests were formally issued on August 26, 1987.

On August 7, 1987, in *Texas Eastern Transmission Corp.*,⁵⁷ the Commission terminated existing waivers of 18 C.F.R. § 284.10 CD conversion require-

55. *Northern Natural Gas Co.*, 40 F.E.R.C. ¶ 61,329 (1987).

56. Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. Stats. & Regs. ¶ 30,761, 52 Fed. Reg. 30,334 (1987) (to be codified at pts. 2, 284).

57. *Texas E. Transmission Corp.*, 40 F.E.R.C. ¶ 61,173 (1987).

ments thereby placing all pipelines on an equal footing under Order No. 500. CD conversions would automatically be allowed commencing on the first day of the second month following the issuance of Order No. 500. Thus pipelines transporting pursuant to section 311 of the NGA would be deemed to agree to accept CD conversions if they continue transporting beyond the specified date.

On October 16, 1987, the Commission issued Order No. 500-B,⁵⁸ which stayed until January 1, 1988, the crediting mechanisms and the contract conversions provisions of Order No. 500. In Order No. 500-B, the Commission partly revised the crediting mechanism. First, an "affidavit" or binding offer of credits would be sufficient to require the pipeline to transport all volumes tendered if signed by the producers or working interest owners who own eighty-five percent of the volumes to be transported. Second, the Commission made clear that its condition that all producers offering credits under the rules must abide by Commission interpretations of those rules in no way limits those producers' legal rights, including the right to challenge Order No. 500. Furthermore, the Commission removed any implied attestation requirement associated with the term "affidavit," noting that an offer sufficient to create a contract was what was intended.

Also on October 16, 1987, the Commission issued an "Explanation of Order No. 500 Crediting Provisions and Instructions for Submitting Order No. 500 Offers of Credits" to help producers and pipelines comply with the rule.⁵⁹

On December 23, 1987, the Commission issued Order No. 500-C, which: alters temporarily the treatment, under the Order No. 500 crediting mechanism, of: (1) [c]asinghead gas, (2) gas purchased by processing plants under percentage-of-proceeds operating agreements, (3) gas released from intrastate system supply, and (4) permanently alters the treatment of certain new gas. Order No. 500-C also permits persons other than the working interest owner[s] to offer to act as guarantor[s] for the working interest owner.⁶⁰

In addition, the Commission denied requests that it stay beyond January 1, 1988, implementation of the Order No. 500 crediting mechanism.

R. Pipeline Purchasing Practices

On May 21, 1987, in *Northern Natural Gas Co.*,⁶¹ the Commission issued its order approving the ALJ's Initial Decision which concluded that the contesting parties had failed to prove that fraud or abuse under the NGPA or imprudence under the NGA had occurred with regard to Northern's gas acquisition practices. The Commission then approved a previous settlement as reasonable with respect to both the contesting and non-contesting participants.

58. Order No. 500-B, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. Stats. & Regs. ¶ 30,772 52 Fed. Reg. 39,630 (1987) (to be codified at 18 C.F.R. pt. 284).

59. Order Explaining Crediting Provisions of Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 41 F.E.R.C. ¶ 61,025 (1987).

60. Order No. 500-C, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 52 Fed. Reg. 48,986 (1987) (to be codified at 18 C.F.R. pt. 284).

61. *Northern Natural Gas Co.*, 39 F.E.R.C. ¶ 61,200 (1987).

On September 15, 1987, the Commission issued an order in *Transcontinental Gas Pipe Line Corp.*,⁶² remanding to the ALJ the issue of whether certain "transition costs" relating to Transco's efforts to deal with its excess deliverability could be amortized over a five-year period through direct billings to customers. The Commission remanded the issue because of failure to develop a record on Transco's purchasing practices. The Commission appears to believe that the propriety of any direct billings of deferred gas costs must be considered in conjunction with whether purchasing practices of the pipeline were prudent.

S. PGAs

On May 27, 1987, the Commission issued Opinion No. 256-A,⁶³ reaffirming and clarifying Opinion No. 256, which had established that, for ratemaking purposes, costs related to imported gas will be treated in the same manner as costs related to domestic gas. In affirming its earlier decision requiring Natural Gas Pipeline Company of America to modify its demand charge to exclude all fixed costs associated with return on equity and related taxes, the Commission specifically stated that it was not requiring any adjustment to the composition of charges by Canadian pipelines, but was only concerned with the composition of the charges by domestic pipelines to their customers.

In another order issued on the same day as Opinion No. 256-A the Commission applied its new policy concerning as-billed flow through of imported gas costs in a proceeding involving Northwest Pipeline Corp.⁶⁴ The Commission also ruled that it was precluded from considering the prudence of Northwest's contracts with its Canadian suppliers because a finding of prudence was subsumed within the Economic Regulatory Administration's (ERA) finding that the import was not inconsistent with the public interest under section 3 of the Natural Gas Act. Hence, the Commission concluded that any finding by it on the prudence issue would be beyond the Commission's jurisdiction as a collateral attack on the ERA's import authorization.

On September 29, 1987, the Commission in *El Paso Natural Gas Co.*,⁶⁵ approved a plan by El Paso to cease tracking through its PGA revenues attributable to net liquid revenue deficiencies. El Paso was granted permission to eliminate a PGA surcharge for net liquid revenue deficiencies and to direct bill its larger jurisdictional customers and continue to surcharge smaller one-part rate customers. El Paso was also allowed to cap the amount of net liquid revenue deficiencies and amortize the collection thereof over a thirty-six month period.

On November 10, 1987, the Commission issued a final rule amending its regulations governing the procedures by which a natural gas pipeline passes through the cost of purchased gas to its jurisdictional customers.⁶⁶ The final

62. *Transcontinental Gas Pipe Line Corp.*, 40 F.E.R.C. ¶ 61,232 (1987).

63. *Natural Gas Pipeline Co. of Am.*, 39 F.E.R.C. ¶ 61,218 (1987).

64. *Northwest Pipeline Corp.*, 39 F.E.R.C. ¶ 61,215 (1987).

65. *El Paso Natural Gas Co.*, 40 F.E.R.C. ¶ 61,362 (1987).

66. Order No. 483, *Revisions to the Purchased Gas Adjustment Regulations*, III F.E.R.C. Stats. & Regs. ¶ 30,778, 52 Fed. Reg. 43,854 (1987) (to be codified at 18 C.F.R. pts. 154, 270, 273, 375 & 381).

rule modifies the mechanism by which a company can bill its purchased gas costs by requiring a company to file a comprehensive annual PGA filing instead of two semi-annual filings and updating the annual filing with three additional quarterly filings.

In *Boundary Gas, Inc.*,⁶⁷ issued July 20, 1987, the Commission carved out an exception to the policy set out in Opinion Nos. 256 and 256-A, *supra*, generally requiring the reclassification of Canadian gas costs to ensure that production and gathering costs are classified to the commodity component, while transmission costs are included in demand charges on a modified fixed-variable basis. For Boundary, the Commission authorized as-billed treatment for the Canadian costs, reasoning that since Boundary is a shell entity created merely as a purchasing conduit by its shareholders, the Commission's rate design concerns would best be addressed in connection with the rates charged by the shareholders.

On December 11, 1987, the Commission terminated a show cause proceeding in *Great Lakes Gas Transmission Co.*⁶⁸ The Commission allowed Great Lakes to retain a PGA where purchased gas costs were "segregated" by customer and determined that Great Lakes should not be required to comply with the principles concerning flow through of charges by Canadian suppliers established in Opinion Nos. 256 and 256-A. The Commission's decision was based on conclusions that Great Lakes' customers essentially negotiated their gas purchase contracts directly with Canadian gas suppliers and that Great Lakes is, in substance, a transporter of natural gas.

In the Commission's order denying rehearing in *Williston Gas Interstate Pipeline Co.*,⁶⁹ issued December 22, 1987, it applied the recent decision in *Columbia Gas Transmission Corp.*,⁷⁰ and held that any expense incurred by Williston for modification of gas purchase contract liability may not be passed through Williston's PGA. In *Columbia*, the Commission disallowed certain contract reformation costs that were included in Columbia's PGA accounts because these costs did not qualify as purchased gas costs.

T. Rates

On May 6, 1987, the Commission issued an order in *Ozark Gas Transmission System*,⁷¹ in which it adopted an eighty-seven percent throughput level, in order to place the risk of underutilization of the Ozark system on its shareholders, and reversed the ALJ's decision to exclude interest on long-term and short-term debt from the calculation of the cash working capital allowance, specifically stating that its earlier decisions in *Florida Gas Transmission Co.*⁷² and *Louisiana Power & Light Co.*,⁷³ are no longer applicable.

67. *Boundary Gas, Inc.*, 40 F.E.R.C. ¶ 61,047 (1987).

68. *Great Lakes Gas Transmission Co.*, 41 F.E.R.C. ¶ 61,292 (1987); *Great Lakes Gas Transmission Co.*, 41 F.E.R.C. ¶ 61,294 (1987).

69. *Williston Basin Interstate Pipeline Co.*, 41 F.E.R.C. ¶ 63,035 (1987).

70. *Columbia Gas Transmission Corp.*, 38 F.E.R.C. ¶ 61,319 (1987), *reh'g denied*, 39 F.E.R.C. ¶ 61,264 (1987).

71. *Ozark Gas Transmission Sys.*, 39 F.E.R.C. ¶ 61,142 (1987).

72. *Florida Gas Transmission Co.*, 47 F.P.C. 341 (1972).

73. *Louisiana Power & Light Co.*, 14 F.E.R.C. ¶ 61,075 (1981).

On October 21, 1987, the Commission issued an order denying rehearing in *Transcontinental Gas Pipe Line Corp.*,⁷⁴ which reaffirmed previous orders requiring Transco to file revised tariff sheets reflecting the implementation of a modified fixed variable rate design with D-1 and D-2 components with acceptance of the filing conditioned upon Transco's acceptance of customer nominations of D-2 volumes. The Commission had previously determined that the costs in Transco's demand component should be divided on a fifty-fifty basis and classified to D-1 and D-2 components.⁷⁵ The Commission further determined that the fixed costs in the D-1 component should be allocated on the basis of peak demand entitlement and the fixed costs in the D-2 components on the basis of the annual right to demand service. The Commission found no inconsistency in allowing customers to nominate annual D-2 volumes as distinguished from the pipeline's obligation to continue to serve at certificated levels.

On November 18, 1987, the Commission issued Opinion No. 290 in *Colorado Interstate Gas Co.*,⁷⁶ in which it affirmed in part and reversed in part the Initial Decision in the general rate case proceeding. The order approves a rate of return on equity (RORE) of 12.65% and the inclusion of storage costs in transportation rates. The Commission rejected the staff's proposal to impute a higher level of throughput volumes. The order further rejects certain arguments that CIG acted imprudently in the purchase of tight sands gas from an affiliate. The order also eliminates the fixed cost minimum bill in CIG's Rate Schedules F-1 and H-1 for service to Natural Gas Pipeline Company of America.

U. Sole Supplier Provisions

In Opinion No. 265,⁷⁷ the Commission decided the 1982 complaint case brought against Panhandle Eastern Pipe Line Company by Central Illinois Light Company. The Commission held that the provision in Panhandle's G Rate Schedule requiring customers thereunder to purchase gas exclusively from Panhandle was unjust and unreasonable.

V. Summary Rejection of Tariff Changes

In its order denying rehearing issued December 17, 1987, in *Southern Natural Gas Co.*,⁷⁸ the Commission addressed rehearing of its April 30, 1986 suspension order challenging the Commission's rejection of certain tariff sheets. The Commission stated its summary rejection authority as limited "to circumstances in which there are no material facts in dispute and the filing contravenes valid and explicit Commission policy or regulations."⁷⁹ The Commission applied this standard and affirmed its prior rejection of South-

74. *Transcontinental Gas Pipe Line Corp.*, 41 F.E.R.C. ¶ 61,048 (1987).

75. *Transcontinental Gas Pipe Line Corp.*, 40 F.E.R.C. ¶ 61,188, at 61,584 (1987).

76. *Colorado Interstate Gas Co.*, 41 F.E.R.C. ¶ 61,179 (1987).

77. *Panhandle E. Pipe Line Co.*, 38 F.E.R.C. ¶ 61,164, *reh'g denied*, 40 F.E.R.C. ¶ 61,189 (1987), *appeal pending sub nom.* *Panhandle E. Pipe Line Co. v. FERC*, No. 87-1431 (D.C. Cir. Aug. 26, 1987).

78. *Southern Natural Gas Co.*, 41 F.E.R.C. ¶ 61,331 (1987).

79. *Id.* at 61,900.

ern's minimum commodity bill. The Commission also affirmed prior rejection of incentive rate tariffs which the Commission believed established a new service and, therefore, required certificate authorization.

W. Take-or-Pay Costs

In a proposed policy statement issued on March 5, 1987,⁸⁰ the Commission announced its intention to consider implementing a generic policy to resolve the take-or-pay problems of the natural gas industry. The Commission announced two primary goals: (1) to encourage pipelines and customers to bring gas purchase obligations of the pipelines in line with future sales obligations; and (2) to provide for a portion of the costs associated with extinguishing accrued take-or-pay obligations and reforming contracts on a forward-looking basis, and to establish means for apportioning the "prudently-incurred costs associated with such actions in a fair and equitable manner."⁸¹ The Commission proposed to allow demand charge recovery to pipelines which have agreed to an "equitable sharing" of take-or-pay costs. The Commission also proposed basing the pass through of such demand surcharges to customers upon customers' cumulative purchase deficiencies in recent years based upon a representative base period. The Commission envisioned that the proposed mechanism would be implemented by a non-PGA rate filing under section 4(e) of the Natural Gas Act, which could either involve a one-time charge based upon estimated liabilities or a provision for periodic additional filings to resolve outstanding contract problems.

X. Tax Issues

On December 16, 1987, in *El Paso Natural Gas Co.*,⁸² the Commission required compliance with the Tax Reform Act of 1986. The Commission allowed El Paso to recognize an environmental (superfund) tax and the eighty percent limitation on deductions for business meals and entertainment expenses as offsets against the reduction in jurisdictional rates resulting from the corporate federal income tax rate of thirty-four percent which was effective July 1, 1987. The Commission, however, rejected El Paso's proposal to use a blended forty percent tax rate for the entire year. The Commission also rejected proposed adjustments to recognize the tax impacts of the elimination of the investment tax credit and the effect of the modified accelerated cost recovery system on deferred tax reserves. The Commission ordered El Paso to reconcile book and tax depreciation as of June 30, 1987, and to submit a plan for refunding excess deferred tax reserves (including tax-on-tax effects).

80. Notice of Issuance of Proposed Policy Statement, *Recovery of Take-or-Pay Buy-Out and Buy-Down Costs by Interstate Natural Gas Pipelines*, 38 F.E.R.C. ¶ 61,230 (1987).

81. *Id.* at 61,726.

82. *El Paso Natural Gas Co.*, 41 F.E.R.C. ¶ 61,322 (1987).

II. COURT ACTION ON PIPELINE ISSUES

A. Abandonment

In *Consolidated Edison Co. v. FERC*,⁸³ the D.C. Circuit failed to uphold the Commission's new abandonment policy, which permitted abandonment if the benefits to the overall marketplace outweighed the detriment to the current purchasers or the purchasers' customers.⁸⁴ The court rejected the new abandonment policy because the Commission had failed to address how it would alleviate the pipelines' take-or-pay problems. The court reiterated that the sole criterion for abandonment is a determination by the Commission that the present or future public convenience and necessity permitted the abandonment. Within that scope, the FERC is free to change its policy as long as the policy is based upon articulated permissible reasons that are consistent with the law.

B. Area Rate Clauses

In *Associated Gas Distributors v. FERC*,⁸⁵ consumers and distributors of natural gas sought review of a Commission order dismissing their protests against the Commission's treatment of certain price escalator clauses (area rate clauses) in gas sales contracts between producers and pipelines. Petitioners alleged that the area rate clauses in question did not allow producers to raise gas prices to the ceilings set by the NGPA. Rejecting their arguments, the D.C. Circuit affirmed the Commission order on grounds that the extrinsic evidence offered by petitioners failed to meet their burden of specifically contradicting the asserted intent of the contracting parties governing the area rate clauses in question. The generality of the petitioners' evidence rendered it an impermissible collateral attack on, rather than a rebuttal of, the Commission's presumption as to the accuracy of the contracting parties' interpretation.

C. Curtailment

In *United Gas Pipe Line Co. v. FERC*,⁸⁶ the Fifth Circuit generally affirmed Commission orders holding that United was not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan, unless it caused the curtailment through negligence, bad faith, fault or wilful misconduct. In so doing, the court held that the FERC's natural gas curtailment scheme would be frustrated and of little effect unless it preempted customers' contract rights. The court also held that the FERC's refusal to make findings about United's culpability in causing the shortage of natural gas for purposes of determining United's liability for curtailment was not arbitrary and capricious.

83. *Consolidated Edison Co. v. FERC*, 823 F.2d 630 (D.C. Cir. 1987).

84. This policy was first announced in *Felmont Oil Co.*, 33 F.E.R.C. ¶ 61,333 (1985).

85. *Associated Gas Distribs. v. FERC*, 810 F.2d 226 (D.C. Cir. 1987).

86. *United Gas Pipeline Co. v. FERC*, 824 F.2d 417 (5th Cir. 1987).

D. Deferred Taxes

On May 1, 1987, the D.C. Circuit remanded to the Commission for further consideration and explanation an order concerning the proper disposition of deferred tax reserves following El Paso Natural Gas Company's change from cost of service ratemaking to NGPA pricing for company-owned production.⁸⁷ The court stated that in the decision to award the deferred reserves to El Paso, the Commission failed to adequately consider and address other recommendations which included the proposal that El Paso reduce its rates in the future by amounts equal to those drawn down from the account to pay the previously deferred tax liability and that, until the reserves were depleted, the balance in the account be deducted from El Paso's rate base.

E. Jurisdiction

In the *NARUC* case,⁸⁸ the Tenth Circuit upheld the Commission's ruling that it had jurisdiction over gas reserves owned by a local distribution company even though the gas from the reserves was not subject to a sale-for-resale contract in interstate commerce. Mountain Fuel Supply Company owns extensive reserves which have been transported across state lines by itself (prior to 1984) and by others for direct sale to its retail customers. Because there is no sale-for-resale in interstate commerce, *NARUC* and the State of Utah challenged the Commission jurisdiction over the company's own production and the associated properties. The court reasoned that the producing reserves were an essential factor in the determination of whether the facilities served the public convenience and necessity. Once service to the public from jurisdictional pipeline facilities commenced, the FERC's continuing legal control over the continuation of service became a fundamental component of the regulatory scheme. As service is not limited to sales, but includes all movement of gas in interstate commerce, the FERC's jurisdiction reasonably extends to the initiation, curtailment, quality, quantity and termination of the delivery of gas from those reserves.

F. Minimum Bills

On June 11, 1987, the D.C. Circuit remanded, for clarification, a Commission order issued October 30, 1984, which denied a request by Distrigas Corporation and Distrigas of Massachusetts Corporation for a waiver of the Order No. 380 minimum bill rule regarding sales of Algerian LNG purchased from Sonatrach.⁸⁹ The court stated that the Commission must provide a more detailed and coherent explanation for this denial, given its prior action approving a waiver of the minimum bill ban for Trunkline LNG Company, another purchaser of LNG from Sonatrach.

In *Transwestern Pipeline Co. v. FERC*,⁹⁰ the Fifth Circuit affirmed the

87. *Public Utils. Comm'n v. FERC*, 817 F.2d 858 (D.C. Cir. 1987).

88. *National Assoc. of Regulatory Util. Comm'rs v. FERC*, 823 F.2d 1377 (10th Cir. 1987).

89. *Distrigas of Mass. Corp. v. FERC*, 819 F.2d 318 (D.C. Cir. 1987).

90. *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 696 (1988).

Commission's elimination of Transwestern's fixed-cost minimum bills on the basis that the bills were unjust and unreasonable and constituted an unreasonable restraint of trade. The court found that there was substantial evidence that Transwestern's fixed-cost minimum bills forced its customers to purchase gas even though alternative, lower-cost supplies were available.

G. No-Fee Exchanges

In *Tennessee Gas Pipeline Co. v. FERC*,⁹¹ the Fifth Circuit partly reversed, partly vacated, and partly remanded various Commission orders that held that certain transportation performed by Tennessee Gas and East Tennessee Natural Gas Company, on behalf of one another, did not constitute a "no-fee exchange" as claimed by the two pipelines. Each pipeline performed backhaul services for the other. The Commission had held that because the pipelines failed to receive comparable values in a reciprocal relationship, their respective services constituted transportation for which a charge should be imposed. The court first found that because pipelines incur no costs in performing backhaul transportation, neither pipeline incurs more costs than the other. Second, the court rejected the Commission's conclusion that reciprocity necessary for an exchange was lacking because East Tennessee never directly received payment for its services from the ultimate off-system buyers of its gas, and hence failed to receive fully compensatory rates for these purchases.

H. Order No. 436

On June 23, 1987, the D.C. Circuit affirmed in part, and reversed and remanded in part, Order No. 436.⁹² The court affirmed the open-access condition imposed by the Commission on self-implementing transportation under NGA section 7 blanket certificates and section 311 of the NGPA. Among other things, the court dismissed contentions that the open-access requirement was tantamount to a common carriage duty, the imposition of which would exceed the FERC's statutory authority under the NGA and the NGPA. The court found that neither the NGA's statutory silence regarding common carriage nor its legislative history precluded the Commission from imposing the equivalent of a common carrier duty in view of its explicit authority under the NGA sections 4 and 5 to eradicate undue discrimination. The court also affirmed Order No. 436's rate conditions, including the selective rate discount provisions and the optional expedited certificate procedure.

The court, however, reversed and remanded the contract demand reduction-conversion option for firm sales customers of pipelines choosing Order No. 436 transportation. Generally, the court found that the FERC's conditioning powers in the NGA section 7(e) did not give the FERC the authority to apply CD adjustment conditions to blanket certificates issued under section 7. The court distinguished between CD reductions and CD conversions, holding that the FERC had adequately supported the conversion option as neces-

91. *Tennessee Gas Pipeline Co. v. FERC*, 809 F.2d 1138 (5th Cir. 1987).

92. *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987).

sary to provide LDCs with access to competitively priced gas, but had not adequately explained the need for CD reductions as an industry-wide solution.

Significantly, the court reversed and remanded the FERC's refusal to take any direct action to resolve problems posed by pipelines' high take-or-pay contracts. The court found that this refusal to address the take-or-pay problems did not satisfy the standards of "reasoned decision making." In the course of its discussion, however, the court implied that conditioning producer access to Order No. 436 transportation on take-or-pay relief to pipelines—a proposal rejected by the FERC—might be a reasonable solution to the take-or-pay problem.

Finally, the court remanded the FERC's "grandfathering" treatment of certain transportation transactions existing as of October 9, 1985, citing a lack of "reasoned decision making." Although the court affirmed most aspects of Order No. 436, it vacated Order No. 436 in its entirety because of the interdependency of its parts and remanded for further proceedings.

I. Pipeline-Owned Production

In *National Fuel Gas Supply Corp. v. FERC*,⁹³ the D.C. Circuit affirmed Commission orders denying retroactive rate recovery of NGPA prices for pipeline-owned production. With respect to the first retroactive period at issue, the court agreed with the Commission that National Fuel could have but did not claim NGPA prices in an adjudicated proceeding that decided all rate issues. Failure to raise the claim at that time barred a subsequent claim for retroactive recovery. The second retroactive period at issue had been the subject of a settlement agreement. The court held that it was bound to give deference to the Commission's reading of the settlement, and found reasonable the conclusion that a settlement which resolved "all issues" encompassed a possible future claim to retroactive recovery of NGPA prices.

J. Rates for Incremental Facilities

In *Tennessee Gas Pipeline Co. v. FERC*,⁹⁴ the D.C. Circuit upheld the Commission's use of systemwide average rates for service using newly constructed, incremental facilities. Tennessee had requested rates based on the incremental facilities. Tennessee challenged the imposition of the average pricing, arguing that the systemwide rates provided no assurance that Tennessee would recover its costs if the pipeline were underused. The court held that nothing in the NGA suggests that section 7 should be used to make midcourse corrections of general rates established under sections 4 and 5 of the NGA, nor was the Commission obliged to make such a correction.

The D.C. Circuit rejected the Commission's adoption of firm service levels that were substantially lower than those that the transporters and shippers had contractually agreed to. Such lower levels result in lower demand charges to be paid by shippers, thus shifting the contracted-for risk-sharing

93. *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 108 S. Ct. 200 (1987).

94. *Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78 (D.C. Cir. 1987).

away from the shipper to the pipeline.⁹⁵

K. Retroactive Penalties

In *Office of Consumers' Counsel v. FERC*,⁹⁶ the D.C. Circuit held that the prospective nature of section 5 of the NGA means simply that the Commission has no power to order reparation for illegal rates or practices that existed prior to the Commission's finding of illegality. In this case, the Commission found in January 1984 that Columbia Gas Transmission Corporation's take-or-pay clauses violated section 5. On appeal, the court, among other things, found that the Commission had failed to impose a remedy for that violation. The Commission concluded, on remand, that before it could determine a remedy, it would first have to hold a hearing to determine whether the violation continued at the present time. If it did not, the Commission would impose no remedy. The court disagreed, and held that while the Commission was correct that section 5 remedies can be prospective only, it erred in its interpretation of prospective. A remedy imposed as of the date of the Commission's opinion (January 1984), said the court, would be a prospective remedy within the meaning of section 5.

L. Retroactive Ratemaking

In *Columbia Gas Transmission Corp. v. FERC*,⁹⁷ the D.C. Circuit reversed and remanded five FERC orders⁹⁸ which approved proposals by five pipeline companies to directly bill, through a surcharge, the amounts the Commission determined the pipelines were required to pay producers for certain production-related costs incurred but not paid during the period 1980-1983. The court concluded that the effect of the Commission's orders was to allow a retroactive rate increase which is prohibited by the NGA. The court suggested that the prohibition might be overridden through adequate notice, but concluded that the Commission's production-related cost rulemaking orders did not constitute such notice because they were addressed exclusively to "first sales."

M. Revenue Crediting

In *Northern Natural Gas Co. v. FERC*,⁹⁹ the court of appeals, in a grant of rehearing en banc, held that the FERC exceeded its statutory conditioning authority when it imposed on a section 7 certificate issued to Northern a requirement that Northern credit fixed cost-related revenues from its proposed discount resale service to the customers of its existing non-discount resale service. Such a condition, the court found, would have the effect of lowering the amount paid by customers for the existing service thus circumventing section

95. *Id.* at 82.

96. *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136 (D.C. Cir. 1987).

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

98. *Transcontinental Gas Pipe Line Corp.*, 32 F.E.R.C. ¶ 61,230 (1985); *Texas E. Transmission Corp.*, 32 F.E.R.C. ¶ 61,493 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032 (1985); *Panhandle E. Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985); *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985).

99. *Northern Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987).

5's requirements that there be a hearing and specific findings as to the justness and reasonableness of existing rates.

N. Treatment of Expenditures in Abandoned Liquefied Natural Gas Project

On January 13, 1987, the First Circuit rendered a decision in *Algonquin Gas Transmission Co. v. FERC*,¹⁰⁰ affirming the Commission's refusal to permit Algonquin to include in its cost of service certain costs associated with the unsuccessful Eascogas Liquefield Natural Gas import project. Relying on the Commission's longstanding policy concerning unsuccessful gas supply projects recently reiterated in *Natural Gas Pipeline Co.*,¹⁰¹ the court concluded that the Eascogas project never advanced beyond the preliminary stage before abandonment and therefore never benefited Algonquin's ratepayers. Consequently, the project was not subject to the more liberal "prudence" test established in the *Natural* case for projects that advance beyond a preliminary stage.

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Donald C. Shepler
Alan C. Wolf
J. Craig Youngblood

100. *Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136 (1st Cir. 1987).

101. *Natural Gas Pipeline Co. of Am.*, 27 F.E.R.C. ¶ 61,201, *reh'g denied*, Opinion No. 218-A, 28 F.E.R.C. ¶ 61,020 (1984), *aff'd sub nom. Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).