MARYLAND PEOPLE'S COUNSEL: WILL IT SPUR CHANGES IN FERC'S REGULATION OF THE NATURAL GAS INDUSTRY?†

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I. INTRODUCTION

The manner in which natural gas sales are transacted and regulated in the interstate market is in a state of transition. The traditional chain of interstate sales of natural gas — first from producers to pipelines, then from pipelines to other pipelines or local distribution companies (LDCs), and finally from LDCs to end users — has recently been augmented by new sales relationships of various forms.[1] These new sales relationships developed, in significant part, through programs regulated by the Federal Energy Regulatory Commission (FERC or the Commission). These include the Commission's "blanket certification" programs[2] and numerous "special marketing programs" (SMPs).[3] On May 10, 1985, however, a panel of the United States Court of Appeals for the District of Columbia Circuit issued unanimous opinions overturning a special marketing program and the

†Portions of this article appeared in Nowak & Leitch, *Rulings Hasten Evolution of Natural Gas Markets,* Legal Times of Washington, July 22, 1985, at 11.

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[1]These new forms of natural gas sales are different from the traditional form in a legal sense, as a result of new contractual relationships and new regulations of the sales. There has, of course, been no change in the physical manner in which the gas is sold and transported from the producer to the end user. *See* Means & Angyal, *The Regulation and Future Role of Direct Producer Sales,* 5 ENERGY L.J. 1, 2 (1984).

[2]18 C.F.R. §§ 157.201-.218 (1984).

[3]SMPs are programs developed by pipelines, producers, and newly created marketing companies to sell additional natural gas outside of the traditional sales relationships. They are subject to the uniform conditions established in Tenneco Oil Co., 29 F.E.R.C. ¶ 61,334 (1984) (modifying 28 F.E.R.C. ¶ 61,383 (1984)). These SMPs include Tenneco Oil Co., 26 F.E.R.C. ¶ 61,030 (1984) (modifying 25 F.E.R.C. ¶ 61,234 (1983)); Transcontinental Gas Pipe Line Corp., 26 F.E.R.C. ¶ 61,029 (1984)) (modifying 25 F.E.R.C. ¶ 61,219 (1983)); Columbia Gas Transmission Co., 26 F.E.R.C. ¶ 61,031 (1984), modifying 25 F.E.R.C. ¶ 61,220 (1983); Tennessee Gas Pipeline Co., 25 F.E.R.C. ¶ 61,398 (1983), *modified on rehearing* 26 F.E.R.C. ¶ 61,381 (1984), *clarified,* 26 F.E.R.C. ¶ 61,398 (1984); PanMark Gas Co., 26 F.E.R.C. ¶ 61,341 (1984), *clarified,* 26 F.E.R.C. ¶ 61,398 (1984), *modified on rehearing,* 26 F.E.R.C. ¶ 63,054 (1984); Texas Eastern Transmission Corp., 27 F.E.R.C. ¶ 61,491 (1984); Cities Service Oil & Gas Corp., 27 F.E.R.C. ¶ 61,493 (1984); TXP Operating Co., 28 F.E.R.C. ¶ 61,189 (1984); Amoco Production Co., 28 F.E.R.C. ¶ 61,224 (1984); El Paso Natural Gas Co., 28 F.E.R.C. ¶ 61,284 (1984); Sun Exploration & Production Co., 30 F.E.R.C. ¶ 61,006 (1985); Union Texas Petroleum Co., 30 F.E.R.C. ¶ 61,090 (1985); Exxon Corp., 30 F.E.R.C. ¶ 61,065 (1985); ANR Production Co., 29 F.E.R.C. ¶ 61,328 (1984); Cenergy Exploration Co., 29 F.E.R.C. ¶ 61,329 (1984); Mesa Petroleum Co., 30 F.E.R.C. ¶ 61,066 (1985); Champlin Petroleum Co., 29 F.E.R.C. ¶ 61,325 (1984); ARCO Oil and Gas Co., 29 F.E.R.C. ¶ 61,042 (1984); Shell Offshore Inc., 29 F.E.R.C. ¶ 61,209 (1984); Odeco Oil and Gas Co., 30 F.E.R.C. ¶ 61,005 (1985); American Pétrofina Co., 30 F.E.R.C. ¶ 61,088 (1985); Diamond Shamrock

Commission's blanket certification programs in companion cases brought by the Maryland People's Counsel (MPC).[4]

In MPC I,[5] the court found that the Commission had failed to articulate a sufficient justification for excluding certain customers from an SMP. The SMP enabled the pipeline's customers who had access to a readily available alternative source of fuel or who would shut down operations rather than purchase gas available from the pipeline at its standard rates, to purchase gas directly from producers at rates substantially below those available to the pipeline's "captive" customers — that is, those customers who did not have such alternatives.

Although the SMP under review had expired, the court ordered the Commission to show cause why orders establishing similar SMPs on appeal should not be vacated and remanded.[6] After considering the responses to the show cause order, the court found that the orders establishing the similar SMPs were likewise "infected by a failure to come to grips with highly relevant considerations urged by petitioners."[7] The court, however, noted that vacating the orders might do more harm than good to the captive customers, and thus permitted the SMPs to "die a natural death," as scheduled on October 31, 1985.[8]

In *MPC II*, the court vacated, in part, blanket certification orders issued by the Commission which effectively streamlined the regulatory process for a pipeline to obtain certification of natural gas transportation. The orders facilitated direct sales from producers to end users. The court invalidated these orders "to the extent that they allow transportation of direct-sale gas to fuel-switchable, non-'high-priority' end users without requiring pipelines to furnish the same service to LDCs and captive consumers on nondiscriminatory terms."[9] The court granted, however, FERC's petition for a stay of the mandate, permitting the blanket certification programs to continue until October 31, 1985.[10]

This article begins with a brief description of the market forces motivating the current changes in natural gas marketing and regulation.[11] It then discusses the

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Exploration Co., 30 F.E.R.C. ¶ 61,089 (1985); Union Texas Petroleum Co., 30 F.E.R.C. ¶ 61,090 (1985); Conoco Inc., 30 F.E.R.C. ¶ 61,173, (1985); Yankee Resources, 30 F.E.R.C. ¶ 61,201 (1985); Chevron U.S.A. Inc., 31 F.E.R.C. ¶ 61,027 (1985); Marathon Oil Co., 30 F.E.R.C. ¶ 61,313 (1985); Kerr-McGee Corp., 30 F.E.R.C. ¶ 61,314 (1985); Samson Resources Company, 31 F.E.R.C. ¶ 61,028 (1985); Arkoma Production Co., 31 F.E.R.C. ¶ 61,029 (1985). The Commission has also responded to the changing conditions in the natural gas market by issuing a Statement of Policy regarding off-systems sales, 23 F.E.R.C. ¶ 61,140 (1983), and by promulgating regulations implementing the Section 311 transportation program, 18 C.F.R. §§ 284.101-.107 (1984).

[4]The two cited opinions, decided on May 10, 1985, are entitled Maryland People's Counsel v. FERC: MPC I addresses the special marketing program, while MPC II discusses the blanket certification programs. Maryland People's Counsel v. FERC, 761 F.2d 768 (D.C. Cir. 1985). Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985).

[5]761 F.2d at 779.

[6]*Id.*

[7]Maryland People's Counsel v. FERC, 768 F.2d 450, 452 (D.C. Cir. 1985).

[8]*Id.* at 455.

[9]761 F.2d at 789.

[10]Maryland People's Counsel v. FERC, 768 F.2d (D.C. Cir. 1985) (order granting stay of mandate).

[11]A thorough description and analysis of the development of the regulatory aspects of these changes in natural gas regulation is set forth in other recent articles. Means & Angyal, *The Regulation and Future Form of Direct Producer Sales*, 5 ENERGY L.J. 1 (1984); Tiano & Bonnifield, *The Impact On Gas Distribution Companies of Federally Approved Special Marketing Programs*, 5 ENERGY L.J. 287 (1984); *see also* W. MOGEL, TRANSPORTATION AND MARKETING OF NATURAL GAS (1985). A similar description and analysis is, therefore, not included in this article.

Court of Appeal's holdings in *MPC I* and *MPC II*. Finally, the article discusses the significance of these holdings and their potential impact on further Commission action.

II. Evolution of Current Market Forces

During the early and middle 1970s, end users faced, at times, serious shortages of natural gas in the interstate market.[12] These shortages existed because the regulated prices at which gas could be sold did not provide producers with sufficient incentives to supply the quantity of gas that was in demand at the low regulated prices. Gas purchasers at that time were therefore primarily concerned with assurance of an adequate supply of gas. Pipelines and local distribution companies sought long-term contracts, under which they would buy a large portion, or all, of the gas deliverable from a well, thereby obtaining the greatest security of system supply.[13]

With the enactment of the Natural Gas Policy Act (NGPA), however, the price of some gas was deregulated, and the regulated ceiling price for certain other gas was permitted to increase significantly.[14] Producers thus had sufficient price incentives to supply more gas than the interstate market demanded, resulting in the natural gas surplus of 1981.[15] The surplus has continued since that time, and there is substantial disagreement among forecasters as to when the surplus will end.

This surplus has given many gas purchasers a new perspective. They now have little or no concern that they will be unable to obtain all the gas that they demand, at least in the short run. The price of gas, rather than security of supply, has become the predominant concern of many purchasers.[16]

An additional outgrowth of the natural gas surplus has been a new abundance of potential sellers in the marketplace, including producers, pipelines, local distribution companies, and newly created marketing companies. Many gas sellers must now compete aggressively for sales.

A significant hindrance to the development of a competitive market for sales of natural gas, however, has been the regulatory framework in the industry. For example, if a producer wanted to sell gas directly to an end user, and have the gas transported by an interstate pipeline, the entire arrangement would require

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[12]*See Natural Gas Price Increases: A Preliminary Analysis*, Report of the United States General Accounting Office, December 1982), at 27-30; *Understanding Natural Gas Price Decontrol*, Report of the United States Congressional Budget Office, April 1983, at 5; H.REP. No. 814, 98th Cong., 2d Sess. 20-21 (1984); S. REP. No. 205, 98th Cong., 1st Sess. 4-5 (1983). The shortage did not exist in most intrastate markets because producers were able to sell the gas at higher prices than those permissible in the interstate market. Thus, to the extent gas was available it would, where possible, be sold in intrastate rather than interstate markets.

[13]*See* Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345, 354 (1983).

[14]Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432 (1982)).

[15]*See* NATURAL GAS PRICE INCREASES: A PRELIMINARY ANALYSIS, Report of the United States General Accounting Office, December 1982, at 27-28.

[16]Some might argue, however, that notwithstanding a present surplus of natural gas, long term supply arrangements will continue to serve a valuable function in the natural gas industry. *See* Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345, 353-55 (1983).

Commission approval. The administrative process could be time-consuming, and the results of this process would be unpredictable. Short-term or "spot market" sales were therefore infeasible, and even attempting to enter into longer term arrangements could be of questionable value. Therefore, and at the insistence of various entities in the industry, the Commission became involved in the development of, *inter alia,* the blanket certification programs and the various SMPs. These programs were intended to facilitate the new forms of natural gas sales that market forces were making seem so attractive.

III. MPC I — Special Marketing Programs

MPC I involved a challenge to an SMP implemented by Columbia Gas Transmission Corporation (Columbia), a natural gas pipeline company.[17] Columbia, like most other pipelines, had entered into long-term gas purchase contracts in the late 1970s that resulted, in the 1980s, in contractual obligations to purchase more gas than it needed to satisfy system demand. Under the "take-or-pay" provisions of these purchase contracts, Columbia had agreed to pay for a minimum level of gas even if it did not actually accept delivery of such gas until some later date.[18]

In 1983, Columbia attempted to invoke the force majeure provisions of its gas purchasing contracts to escape its take-or-pay liability. To partially resolve the dispute, Columbia's largest supplier, Exxon Corporation, agreed to release Columbia from take-or-pay liability to the extent that Columbia would permit Exxon to sell to other purchasers the gas not taken by Columbia. Under the agreement, the gas would be transported on Columbia's system to entities purchasing the gas directly from Exxon.

In order to implement this program, Columbia was required, under section 7 of the Natural Gas Act,[19] to apply to FERC for various certificates of public convenience and necessity.[20] At the same time, other companies were requesting Commission certification of programs similar to that of Columbia.[21]

The agreements, from the perspectives of producers and pipelines, reflected a reasonable compromise of a difficult problem. Producers would relinquish contractual rights to take-or-pay claims — rights which were generally difficult to enforce and which were rendered somewhat uncertain by pending litigation and

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[17]Columbia's SMP was initially authorized by the Commission in 1983 in Columbia Gas Transmission Co., 25 F.E.R.C. ¶ 61,220 (1983). It was amended, modified, and clarified pursuant to numerous Commission orders, however, and existed, at the time *MPC I* was decided, in accordance with the Commission's order establishing uniform conditions for all SMPs. Tenneco Oil Co., 29 F.E.R.C. ¶ 61,334 (1984).

[18]Under typical take-or-pay provisions, a pipeline may take delivery of the prepaid gas at a later date, subject to certain limitations. Some pipelines, however, including Columbia, overestimated their demand requirements to the extent that they may be unable to take delivery of some portion of the prepaid gas within the period permitted by their contracts.

[19]15 U.S.C. § 717(f) (1982).

[20]To implement such a program a pipeline would need certificates of public convenience and necessity permitting it to abandon certificated sales and to transport and sell the gas. 15 U.S.C. § 717(f) (1982).

[21]*See supra* note 3 (SMP's authorized by Commission as of May 17, 1985).

pending legislative proposals[22] — in exchange for the certainty of selling more gas, albeit at a lower price. Pipelines would agree to transport the gas, thereby benefitting from a reduction of their take-or-pay liability to the extent it was uncertain that take-or-pay costs could be passed through to ratepayers. By limiting the program to users who would otherwise not purchase the gas, the producers did not relinquish profits on gas that would have been sold at higher prices irrespective of the program. This limitation did not have an adverse effect on pipelines, as they were able to pass through to ratepayers the full cost of purchased gas.[23]

Various entities objected to the pipelines' proposals. MPC argued that the programs were discriminatory and would increase gas costs to users who were ineligible to participate.[24] MPC argued that the programs permitted pipelines to use their monopoly powers to extract excessive profits from their captive customers, while charging lower prices to entities that had alternative power sources or could decide to cease gas purchases. Without the discriminatory eligibility provisions, the critics argued, pipelines and producers might well be forced by economic pressures to lower rates to all customers.

The Commission held an informal conference addressing the proposals. It rejected, however, a request for an evidentiary hearing and granted a modified version of the SMPs requested by the pipelines, including Columbia.[25] The Commission ordered that Columbia's program, which had been limited to sales of gas by Exxon, be made available to all producers selling certain gas to Columbia.[26] The list of eligible participants was also expanded somewhat beyond those requested by Columbia. Captive customers, however, were excluded from the SMP. MPC appealed the order.

The issue to be decided on appeal, as defined by the court in *MPC I,* was whether it was within the Commission's power "to permit exclusion, from the category of authorized purchasers of released gas under such an SMP, of the pipeline's captive customers . . . *i.e.,* those customers who have no readily available alternative source of fuel."[27] The court addressed each of the Commission's purported justifications for the restrictions.

First, the Commission argued that the SMP would benefit captive customers by causing additional volumes of gas to be sold, thereby spreading the pipeline's fixed costs over a wider pool of customers. The court, however, found that this benefit would occur with or without the eligibility restriction.[28]

Second, the Commission argued that the SMP would reduce the pipeline's take-or-pay liabilities, which liabilities would otherwise be passed through to its

[22]*See, e.g.,* S. 1715, S. 1408, S. 1119, S. 1049, S. 1017, S. 996, S. 823, S. 740, 98th Cong., 1st Sess. (1983); H.R. 4277, H.R. 2565, H.R. 2508, H.R. 2499, H.R. 2182, H.R. 2164, H.R. 2154, H.R. 2054, H.R. 2012, H.R. 1760, H.R. 1759, H.R. 1752, H.R. 1686, H.R. 1685, H.R. 1441, H.R. 1422, H.R. 1359, H.R. 910, H.R. 909, H.R. 873, H.R. 827, H.R. 796, H.R. 705, H.R. 619, H.R. 583, H.R. 482, H.R. 232, H.R. 131, H.R. 20, H.R. 4, 98th Cong., 1st Sess. (1983).

[23]Of course, the limitation may have had some adverse effect on producers and pipelines to the extent that even captive customers would consume less gas at higher prices than at lower prices.

[24]*See, e.g.,* Columbia Gas Transmission Co., 25 F.E.R.C. ¶ 61,220 (1983) (setting forth MPC's principal initial objections to the Columbia SMP).

[25]*See* Tenneco Oil Co., 31 F.E.R.C. ¶ 61,171, at 61,329 (1985).

[26]Columbia Gas Transmission Co., 25 F.E.R.C. ¶ 61,220 (1983).

[27]761 F.2d at 774.

[28]*Id.* at 775.

captive customers. The court noted that it was unclear that the take-or-pay liabilities could necessarily be passed through to captive customers, but found that, like the "cost-spreading" justification, the pipeline's take-or-pay liabilities would be reduced under the SMP whether or not the program's eligibility was restricted to incremental users.[29]

Although the Commission had not raised the argument, the court also addressed the potential justification that the restriction was necessary because the producers and pipeline would not agree to the SMP if it were available to all customers. A producer, in particular, would have little incentive to agree to the program if the effect would be to sell gas at a lower price than it would receive for gas that would be sold even if the program were not in effect. The court found, however, that the Commission had failed to address the extent to which the cost to the captive purchasers resulting from the pipeline's allegedly monopolistic pricing practices under the program would outweigh the indirect benefits such purchasers would derive from the program in which they were unable to participate directly.[30]

Third, the Commission argued that the restriction on eligibility was necessary because competition betwen pipelines for captive customers might not be in the public interest. Such competition could result in "winner" pipelines and "loser" pipelines, to the detriment of the "loser" pipelines' remaining captive customers. As the court noted, however, this concern could have been satisfied by simply limiting captive purchasers' eligibility to that of the SMP of the pipeline that served such customers prior to the implementation of the SMP.[31]

Fourth, the Commission argued that MPC's objections to the SMP would be fully considered in subsequent proceedings regarding the Columbia SMP and in other dockets. The court noted, however, that the Commission had not in fact addressed these issues in more than one year from the issuance of the initial SMP orders. More importantly, while noting that in some circumstances deferral of an issue by an administrative agency would be appropriate, the court ruled that MPC's objection to the SMP went "to the heart of the public interest determination" to be made and was therefore not the sort of objection that was appropriate for deferral.[32]

Finally, the Commission argued that the program was justified because it was only an experiment, and "a month of experience [may] be worth a year of hearings."[33] The court responded, however, that there may be both "reasonable experiments and arbitrary experiments" and held that in structuring such experiments the law requires "an articulation, in response to serious objections, of the Commission's reasons for believing that more good than harm will come of its action."[34]

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[29] *Id.*

[30] *Id.* at 775-77.

[31] *Id.* at 777.

[32] *Id.* at 778.

[33] American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966). The District of Columbia Circuit had on at least one other occasion deferred to the Commission's use of an "experimental" approach to address problems related to direct sales of natural gas. *See* American Public Gas Ass'n v. FERC, 587 F.2d 1089, (D.C. Cir. 1978) "[T]he Commission must have leeway to experiment in devising the optimal remedy." *Id.* at 1098.

[34] 761 F.2d at 779.

The court then concluded:

> It would be an exaggeration to say that this petition for review has required us to evaluate whether the Commission had, if not the better side, at least a reasonable side, of the argument with MPC over the effects of these orders. On a number of obviously significant points that MPC raised, there is simply no argument to evaluate: the Commission proceeded on its course with no comment, or with comment that was patently unresponsive. As far as we can tell from the record before us, the Commission's decision was not "based on consideration of the relevant factors," . . . and was therefore invalid.[35]

The Columbia SMP had expired prior to the court's decision. The court ordered, however, that FERC show cause why similar orders, also on appeal, should not be vacated and remanded.

In its response to the show cause order, the Commission argued that the SMPs then in effect were significantly different from the SMP the court considered in *MPC I*. The revised SMPs permitted captive customers to purchase ten percent of their contractual entitlements through the SMP.[36] Because such customers generally do not purchase their full entitlement of gas, more than ten percent of the gas they actually purchase could be obtained through the SMPs.[37] The Commission argued that the ten percent figure "was the product of reasoned decisionmaking supported by substantial evidence" and that the percentage would be subject to further review by the Commission.[38] It argued that if the modified SMP orders were vacated, captive customers would be deprived of the benefits they were then receiving under the programs.

The Commission further argued that SMPs were "only one part of a comprehensive and still evolving approach" to natural gas problems.[39] The effect of all of the programs taken as a whole, according to the agency, was to provide every segment of the market with access to gas at competitive rates. The Commission concluded: "[T]he program, is a sensible interim one, and should be allowed to continue through to its termination date of October 31, 1985."[40] It is unclear whether the Commission, in making this statement, conceded that it would not extend the SMPs past the October 31, 1985 termination dates, even if permitted to do so by the Court.

The court rejected the Commission's arguments, finding that the new SMPs "may be marginally less discriminatory than their predecessors, but they continue to entail identical lapses of logic and evidence."[41] The court noted, however, that vacating the orders could do more harm than good to the captive customers since many were plainly benefiting, at least to a limited extent, from the SMPs. Thus, the

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[35]*Id.* at 779, quoting Motor Vehicle Mfrs. Ass'n, Ins. v. State Farm Mutual Auto. Inc. Co., 463 U.S. 29 (1983).

[36]*See* Tenneco Oil Co., 29 F.E.R.C. ¶ 61,334 (1984).

[37]For example, a customer might be contractually entitled to purchase 100 units of gas, yet may actually purchase only 70 units. Ten of these units could be purchased through the SMP, representing more than 14 percent of the customer's 70 units of demand.

[38]Response of the FERC To Order To Show Cause at 4, Maryland People's Counsel v. FERC, 768 F.2d 450 (D.C. Cir. 1985).

[39]*Id.* at 8.

[40]*Id.* at 21.

[41]Maryland People's Counsel v. FERC, 768 F.2d 450, 455 (D.C. Cir. 1985).

court permitted the SMP orders to terminate at their expiration on October 31, 1985 stating: "If the Commission wishes to retain discriminatory SMPs in some form after October 31, we trust that it will do so only if it can demonstrate that the petitioners' concerns are unfounded or are outweighed by other relevant considerations."[42]

The Commission requested rehearing of the decision in *MPC I*. Such request, however, was denied by the court.

IV. MPC II — Blanket Certification Program

MPC II involved the Commission's "blanket certification program." This program streamlined the procedural mechanisms pursuant to which pipelines may transport gas from producers to end users under direct sales contracts. MPC challenged the program because it permitted — by its silence or its failure to prohibit — pipelines to exclude their captive customers from the program.

MPC argued that, like the SMP orders, the Commission's blanket certification orders permitted pipelines to engage in price discrimination — charging competitive prices to entities capable of switching to an alternative source of fuel or alterative supplier, but charging higher prices to those entities that were "captives" of the pipeline.[43] The Commission attempted to defend the orders on the ground that they actually provided that all end users were eligible. It was the filings by individual pipelines made pursuant to the orders, rather than any provision of such orders, that contained the restrictions on eligibility. The Commission argued that the question of whether the restrictions imposed by pipelines were anticompetitive was a matter for a separate FERC proceeding or an antitrust suit adddressing a particular pipeline's filing. Restrictions imposed by pipelines, it argued, should not constitute grounds for invalidation of the nonrestrictive Commission orders.[44]

The court, however, rejected this argument. It quoted from *Gulf States Utilities Co. v. FPC*,[45] in which the Supreme Court said that "[c]onsideration of antitrust and anticompetitive issues by the Commission . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings."[46] The court held that the Commission had the duty to consider possible anticompetitive practices under the blanket certification program before the orders were promulgated, notwithstanding the fact that the orders did not in any way require that such anticompetitive practices be implemented. Then, after addressing the Commission's other rationalizations of the blanket certification orders (which were essentially the same as the rationalizations for the order in *MPC I* discussed above), the court concluded: "The enlargement of transportation authority may well do some good for the gas market, but the crucial

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[42] *Id.*

[43] *E.g.*, Brief of Petitioner, Maryland People's Counsl v. FERC, 768 F.2d 1354 (D.C. Cir. 1985) at 27-29.

[44] *E.g.*, Brief of FERC, Maryland People's Counsel v. FERC, 768 F.2d 1354 (D.C. Cir. 1985) at 39-45.

[45] 411 U.S. 747, 760 (1973).

[46] 761 F.2d at 787 (quoting Gulf States Utilities Co. v. FPC, 411 U.S. 747, 760 (1973)).

question — one the Commission left unaddressed — is whether the program FERC approved will do "more good than harm."[47]

The Commission subsequently sought and received a stay of the mandate in *MPC II*, thus permitting the blanket certification program to continue in its then-existing form until the earlier of October 31, 1985, or the date the Commission put into effect a subsequent proposal to restructure its regulation of sales of natural gas.[48]

V. Impact of Decisions

The decisions in *MPC I* and *MPC II* are significant in at least three respects.

First, the cases reiterate — quite forcefully — a fundamental principle of administrative law of which all administrative agencies occasionally need to be reminded. Courts frequently accord administraive agencies great deference, particularly where the issues are factually complex and within the agency's area of expertise as was the case in *MPC I* and *II*.[49] When, however, a nonfrivolous argument can be made that an agency action is contrary to the basic purpose for which the agency was commissioned (in this case MPC argued that by excluding captive customers from the programs the Commission failed to protect natural gas consumers),[50] the agency must articulate sound reasons for its action, or run a significant risk of reversal on appeal.

The Commission, in addressing these natural gas marketing issues, faced problems of immense size and complexity.[51] The industry was undergoing a transformation of a fundamental nature brought on by powerful conflicting economic, contractual, and regulatory forces. The Commission was being sharply criticized by some members of Congress for not taking action to address the

[47] *Id.* at 789 (quoting MPC I, 761 F.2d at 779). While focusing on the captive customer's exclusion from the blanket certification programs as the basis for overturning the order, the court failed to address the argument that LDCs (the primary captive customers) could effectively obtain transportation under the Commission's Section 311 transportation program under terms even more favorable than those available to incremental customers under the blanket certification programs. *E.g.*, Brief of FERC, Maryland People's Counsel v. FERC, 768 F.2d 1354 (D.C. Cir. 1985) at 40 n.71. *Compare* 18 C.F.R. §§ 284.101-.107 (1984) *with* 18 C.F.R. §§ 157.201-.207.

[48] Shortly after the court's initial decisions in *MPC I* and *MPC II*, the Commission issued a Notice of Proposed Rulemaking that could fundamentally alter the regulation of the natural gas industry. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 24,130 (1985). A final order in this docket was issued on October 9, 1985. Order 436, 50 Fed. Reg. 42408 (1985).

[49] *See MPC I*, 761 F.2d 768 (D.C. Cir. 1985); *MPC II*, 761 F.2d 780 (D.C. Cir. 1985). Knebel, Secretary of Agriculture v. Hein, 429 U.S. 288, 294 n.14 (1977); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371-72 (1973); Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981), *rev'd on other grounds*, 463 U.S. 680 (1983).

[50] The Supreme Court has held that "[t]he primary aim of [the NGA] was to protect consumers against exploitation at the hands of natural gas companies." FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[51] Indeed, the court noted the Commission's "arduous task." 761 F.2d at 789. *Cf.* Pennsylvania v. West Virginia, 262 U.S. 553, 621 (1923) (Brandeis, J., dissenting) ("In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry . . .").

problems.[52] At the same time, it was clear that any significant error in promulgating regulations to solve the problems could have a devastating impact in the marketplace.

The Commission implemented a series of programs that were innovative, yet conservative. From most indications these programs, although not panacean, were reasonably successful, whether from the perspective of producers, pipelines, local distribution companies, or consumers. Yet because the Commission failed to adhere to this fundamental principle of administrative law, these basically successful programs which had enjoyed broad, although not universal, support did not survive appeal.

Second, MPC II represents a reaffirmance, and possible expansion, of FERC's duties to actively promote antitrust policies in the context of its decisions. This precedent may be useful to litigants in cases stretching beyond the Commission's experiments in natural gas marketing. The Commission has long had a duty to consider antitrust implications in the context of its decisionmaking.[53]

The court in *MPC II*, however, may have expanded this duty by holding that it is not enough that a Commission action be, in itself, neutral. If there are objections to a proposed Commission action on the ground that it would potentially permit anticompetitive behavior — even if only by not expressly prohibiting it — *MPC II* suggests that the Commission must expressly prohibit such anticompetitive behavior or articulate sound reasons for failing to do so.

Finally, and perhaps most importantly, the decisions have had, and may continue to have, an effect on further development of the Commission's regulation of the natural gas industry. In response to the decisions, the Commission has recently issued Order 436 which provides for a dramatic substantive amendment and addition to its regulations governing natural gas sales and transmission, and which would permit the types of transactions that occurred under the SMP and blanket certification programs.[54] While a description and analysis of the provisions of Order 436 is beyond the scope of this article, it should be noted that a pipeline must, in order to avail itself of the benefits of Order 436, provide non-discriminatory service to all of its customers, including captive customers.[55] It seems likely that such a provision would not have been part of Order 436 if the Commission, rather than MPC, had prevailed in *MCP I* and *MPC II*.

In addition to the condition of non-discrimination, other aspects of Order 436 reflect significant departures from the traditional manner in which pipelines have provided, and charged for, their services. The extent to which nontraditional forms of natural gas sales will continue to prosper under the new conditions imposed by Order 436 to the same extent that they flourished under the SMPs and old blanket certification programs is thus somewhat uncertain. One might expect, however, that the same market forces that caused the nontraditional sales relationships to develop initially will provide a strong incentive for such sales relationships to continue under Order 436.

[52] *See, e.g.*, S. Res. 515, 97th Cong., 2d Sess., 128 Cong. Rec. S14716-14721 (Dec. 14, 1982); 129 Cong. Rec. S2017 (March 2, 1983) (statement of Sen. Cranston); 128 Cong. Rec. E5212 (Dec. 15, 1982) (statement of Rep. Bereuter).

[53] *E.g.*, Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973); Northern Natural Gas Co. v. F.P.C., 399 F.2d 953, 958 (D.C. Cir. 1968).

[54] Order 436, 50 Fed. Reg. 42408 (1985).

[55] *Id.* at 42424-25.