STUDENT NOTE

TAKE-OR-PAY THWARTS THE NEW *FELMONT* POLICY AND TEST FOR ABANDONMENT: *CONSOLIDATED EDISON v. FERC*

Section 7(b) of the Natural Gas Act (NGA)[1] provides that dedicated[2] services[3] or facilities may be abandoned[4] upon a finding that either the natural gas supply is depleted or that present or future public convenience or necessity permits abandonment.[5] The traditional tests for public convenience or necessity developed over periods of limited gas supplies and shortages on the interstate market. Those tests do not anticipate the national market and oversupplied gas economy which have developed subsequent to the passage of the National Gas Policy Act (NGPA).[6] As a result, the Federal Energy Regulatory Commission (FERC or Commission) altered its policy and test for

1. 15 U.S.C. §§ 717-717z (1982). Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Id. § 717f(b).

2. Dedication is the requirement of continued performance between certification and abandonment under the NGA. Conine & Niebrugge, *Dedication Under the Natural Gas Act: Extent and Escape*, 30 OKLA. L. REV. 735, 736 (1977) [hereinafter Conine & Niebrugge].

3. For purposes of the NGA, services include both sales and services. Sunray Mid-Continental Oil Co. v. FPC, 364 U.S. 137, 149 (1960). More particularly, services can encompass the taking and transportation of gas by a purchaser from a particular source. United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 86-87 (1966).

4. Abandonment occurs whenever a natural gas company "permanently reduces a significant portion of its particular service." Reynolds Metal Co. v. FPC, 534 F.2d 379, 384 (D.C. Cir. 1976). Such a reduction may occur after expiration of the gas purchase contract. Mississippi River Transmission Corp., 39 F.E.R.C. ¶ 61,113, at 61,426 (1987). More generally, any action not previously approved under section 7(b) of the NGA, rendering the facilities dormant for an indefinite period, constitutes abandonment. *United Gas*, 385 U.S. at 88. Abandonment also includes the sale, lease or transfer of pipeline facilities to another company, a subsidiary or a reorganized company. Conine & Niebrugge, *supra* note 2, at 787. For an introduction to abandonment, see H. WILLIAMS & C. MEYERS, MANUAL OF OIL AND GAS TERMS 4 (6th ed. 1984) [hereinafter WILLIAMS & MEYERS].

5. The criterion of public convenience or necessity often appears in the literature as public convenience and necessity. *See, e.g.*, Michigan Consol. Gas Co. v. FPC, 283 F.2d 204, 214 (D.C. Cir.), *cert. denied*, 364 U.S. 913 (1960); West Va. Pub. Serv. Comm'n v. United States Dep't of Energy, 681 F.2d 847, 856 (D.C. Cir. 1982). The FERC considers public convenience or necessity as substantially equivalent to the public interest standard. *See id.* (citing Distrigas Corp. v. FPC, 495 F.2d 1057, 1065 (D.C. Cir. 1974)).

6. 15 U.S.C. §§ 3301-3432 (1982). For discussions of the NGPA, see Morgan & Patterson, *The Natural Gas Policy Act of 1978: Four Years of Practice and Two Years to Make Perfect*, 71 KY. L.J. 105 (1982); Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983); Ringleb, *Natural Gas Producer Price Regulation Under the NGPA: Regulatory Failure, Alternatives, and Reform*, 20 HOUS. L. REV. 709 (1983).

abandonment in *Felmont Oil Corp. and Essex Offshore, Inc.* (*Felmont Oil*).[7] That decision was remanded in *Consolidated Edison of New York, Inc. v. FERC* (*Consolidated Edison*)[8] for a lack of reasoned decisionmaking evidenced by potentially aggravating treatment of the take-or-pay problem[9] plaguing the natural gas industry.[10] Despite the court's stringent review of the Commission's decision, the language and circumstances of *Consolidated Edison* suggest that the court may have delayed, but not killed, the FERC's new abandonment policy and test from *Felmont Oil*.

I. PUBLIC CONVENIENCE AND NECESSITY PRIOR TO *FELMONT OIL*

Natural gas first became a commercially attractive fuel when it became transportable in the late 1920s.[11] Supplying natural gas under near monopoly conditions, some gas companies allegedly began to deny their customers reasonable utility service.[12] To remedy the problem, the Congress enacted the

7. Felmont Oil Corp. and Essex Offshore, Inc., 32 F.E.R.C. ¶ 63,071 (1985) [hereinafter Initial Decision], *modified*, Order No. 245, 33 F.E.R.C. ¶ 61,333 (1985) [hereinafter Commission Decision], *clarified*, Order No. 245-A, 34 F.E.R.C. ¶ 61,296 (1986) [hereinafter Clarification], *rev'd and remanded*, Consolidated Edison Co. v. FERC, 823 F.2d 630 (D.C. Cir. 1987).

8. *Consolidated Edison*, 823 F.2d 630.

9. A take-or-pay clause in a gas purchase contract requires the purchaser to take, or failing to take, to pay for the minimum annual contract volume of gas which the producer has available for delivery. WILLIAMS & MEYERS, *supra* note 4, at 882. Most gas purchase contracts drafted between 1960 and 1982 contained a take-or-pay clause. Medina, McKenzie & Daniel, *Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185, 187 (1986) [hereinafter Medina]. During the 1970s, the minimum contracted volume typically was 70-80%. Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 78 (1982). Because gas purchase contracts often spanned more than 20 years, the contracting parties shifted to the pipeline companies the risk of a deteriorating market for extended periods. *See* Note, *Deregulation and Natural Gas Purchase Contracts: Examination Through Neoclassical and Relational Contract Theories*, 25 WASHBURN L.J. 43, 46 n.29 (1985).

Beginning in 1981, the deliverability of natural gas increased substantially because of increased drilling in known reserves and new discoveries of large deep reserves. Almost immediately, due to a number of factors, the demand for natural gas decreased sharply. *See* Legg, *Natural Gas Contract Litigation in Oklahoma*, 11 OKLA. CITY U.L. REV. 63, 65 (1986). Because of take-or-pay clauses, pipelines were locked into paying high prices for a product that had declined sharply in demand. However, minimum bill provisions allowed high prices to be passed on to customers. In addition, producers who could sell less expensive gas could not fully participate in the market because of the already existing chain of long-term contractual relations. Comment, *Take-or-Pay Provisions: Major Problems for the Natural Gas Industry*, 18 ST. MARY'S L.J. 251, 263 (1986) [hereinafter *Take-or-Pay Provisions*]. If buyers did not "take" the gas, producers generally shut in the wells and used them for storage reservoirs. *See* Johnson, *Natural Gas Contracts*, 34 INST. ON OIL & GAS L. & TAX'N 83, 109 (1983).

Between 1981 and 1985, actual industrywide payments made pursuant to take-or-pay clauses totaled $2.7 billion. Foster Natural Gas Report (Foster Associates) No. 1567, at 21 (May 9, 1986). At the end of May 1985, the Energy Information Administration estimated that pipelines' outstanding take-or-pay liability totaled $5.7 billion. *Id.*

10. *Consolidated Edison*, 823 F.2d at 641.

11. Tannenbaum, *Commercial Impracticability Under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts?*, 20 HOUS. L. REV. 771, 771 (1983); *Take-or-Pay Provisions*, *supra* note 9.

12. Report of the FTC to the U.S. Senate, S. DOC. No. 92, 70th Cong., 1st Sess., pt. 84-A, at 588-91 (1928).

NGA.[13] Charged by Congress with guaranteeing customers an adequate supply of natural gas at reasonable prices,[14] the Federal Power Commission (FPC) and later the FERC[15] regulated the gas industry in order to protect consumers, not the gas companies.[16] Among the regulations, the two agencies required that, absent a legal abandonment, a producer and a pipeline must continue operating pursuant to an expired contractual purchase agreement in order to insure continuous service to customers.[17]

Beginning in the late 1960s, as the pipeline system expanded and the interstate gas supply dwindled, applications for abandonments more frequently reflected competition between consumer groups for a limited commodity rather than gas companies' exclusive attempts at economic gain.[18] To resolve the conflicts arising from local shortages, the court established in *Michigan Consolidated Gas Co. v. FERC* (*Michigan Consolidated*) that the comparative needs test is the primary index for determining whether an abandonment is permitted by public convenience or necessity.[19] The test required that the applicant carry the burden of proof against the agency's rebuttable presumption against granting an abandonment.[20] An abandonment could be granted only after the needs of the servicing pipeline and its customers for the natural gas were evaluated against the needs for the gas of the alternate pipeline and its customers.[21] The pipeline and customers with the greater need must prevail.[22] Both the public benefits and the public losses from the proposed action must be weighed.[23] Later cases held that the agency must consider the interests of all who would directly or indirectly,[24] in the present or in the future,[25] be deprived of a supply of gas. The interests of private parties not participating in the proceeding must also be considered.[26] In addition, future

13. 15 U.S.C. §§ 717-717z (1982). *See* Note, *Legislative History of the Natural Gas Act*, 44 GEO. L.J. 695 (1956).

14. FPC v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944).

15. The Department of Energy Organization Act provides that as of October 1, 1977, the FPC ceases to exist and that its functions and regulatory responsibilities are transferred to the FERC, an independent agency within the Department of Energy. 42 U.S.C. § 7107 (1982).

16. *E.g.*, Cincinnati Gas & Elec. Co. v. FERC, 389 F.2d 272, 276 (6th Cir.), *cert. denied*, 393 U.S. 826 (1968).

17. Sunray Mid-Continental Oil Co. v. FPC, 364 U.S. 137, 153-54 (1960).

18. Ringleb, *supra* note 6, at 715-16.

19. Michigan Consol. Gas Co. v. FPC, 283 F.2d 204, 216 (D.C. Cir.), *cert. denied*, 364 U.S. 913 (1960).

20. *Id.* at 214.

21. *Id.* at 214-16.

22. Transcontinental Gas Pipe Line v. FPC, 488 F.2d 1325, 1328 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

23. *Michigan Consolidated*, 283 F.2d at 217 (citation omitted). Exactly how the needs are to be compared is a matter within the expertise of the Commission. *Transcontinental Gas*, 488 F.2d at 1330. The FPC staff proposed 11 criteria for comparing the needs of the two pipeline systems in that case. *Id.* at 1330 n.13. Neither that list nor similar criteria have been formally adopted by the Commission. Conine & Niebrugge, *supra* note 2, at 783.

24. *Transcontinental Gas*, 488 F.2d at 1328.

25. *Id.*; City of Pittsburgh v. FPC, 237 F.2d 741, 745 (D.C. Cir. 1956). *But see* FPC v. Moss, 424 U.S. 494, 503 (1976).

26. *See Sunray Mid-Continental Oil Co.*, 364 U.S. at 153; *City of Pittsburgh*, 237 F.2d at 745.

public interest might be determined at the time of certification rather than at the time the application is proposed.[27]

As gas shortages became more widespread in the 1970s, the court determined that the comparative needs index is only part of a multifactor test for granting abandonments for public convenience or necessity. In 1973, in *Transcontinental Gas Pipe Line Corp. v. FERC (Transcontinental Gas)*,[28] the court held that during the foreseeable era of nationwide fuel shortages the agency must consider:

> *all factors* relevant to determining the over-all public interest in this abandonment proceeding. . . . *Primary importance* must be given to a broadly conceived comparison of the needs of the two natural gas systems and the public markets they serve. *Additionally*, the Commission should consider the environmental effects of its decision, the economic effect on the pipelines and their customers, the presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate natural gas supplies.[29]

In 1978, in *Gulf Oil Corp. v. FERC*, the court emphasized that some public interest considerations extend beyond a strict comparative needs analysis.[30] Thus, in deciding whether to grant an abandonment during the era of gas shortages, the agency both applied the comparative needs index and considered all other factors relevant to determining the over-all public interest in the abandonment.

By the mid-1980s, significant segments of the natural gas production industry had been deregulated pursuant to the NGPA, but oversupplied conditions and increasing take-or-pay obligations haunted the industry.[31] To foster the development of the interstate gas commodity market, the FERC authorized special marketing programs (SMPs) and limited-term abandonments (LTAs).[32] Although the FERC recognized that it must revise additional regulations governing the release of gas in order to accommodate the

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27. *Moss*, 424 U.S. at 503.

28. *Transcontinental Gas*, 488 F.2d 1325.

29. *Id.* at 1329-30 (emphasis added, footnotes and citation omitted).

30. Gulf Oil Corp. v. FERC, 575 F.2d 67, 70 (3d Cir. 1978). The court noted that the Commission found public interest considerations in the net loss of natural gas being made available to the interstate market and in the increased cost to the customers of the current pipeline who were forced to replace the released gas. *Id.*

31. *See* Medina, *supra* note 9, at 185-87; Notice of Proposed Rulemaking, *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, 52 Fed. Reg. 18,703, 18,705 (1987) [hereinafter *Abandonment of Sales and Purchases*].

32. *Abandonment of Sales and Purchases, supra* note 31, at 18,705-06. The FERC first authorized SMPs in a series of letter orders for Transcontinental Gas Pipe Line Corp. 23 F.E.R.C. ¶ 61,199; 23 F.E.R.C. ¶ 61,221; 23 F.E.R.C. ¶ 61,460, *amended by*, 25 F.E.R.C. ¶ 61,219 (1983), *modified*, 26 F.E.R.C. ¶ 61,029 (1984). In an SMP, a pipeline and its producers enter into an agreement to "amend the high-price gas purchase contracts entered into between them in earlier years, so as to permit the producers to sell the committed gas elsewhere (at current market price), crediting the volume of such sales against the pipeline's high-priced [take-or-pay] obligations." Maryland People's Counsel v. FERC, 761 F.2d 768 (D.C. Cir. 1985). The D.C. Circuit eventually invalidated SMPs as discriminatory against captive users, who were excluded from the program. *Id.*

LTAs were issued in basket orders covering numerous applications. *See* Tenneco Oil Co., 33 F.E.R.C. ¶ 61,134 (1985), *reh'g denied and clarification granted*, 34 F.E.R.C. ¶ 61,145 (1986). LTAs, with Commission-granted sales certificates, permitted the continuation of the sale of the gas that had been sold under various SMPs that expired on October 31, 1985. The LTAs, ultimately extended beyond the initial changed regulatory and economic climate,[33] the FERC had not yet liberalized its abandonment policy or test by mid-1985. As a result, the administrative law judge (ALJ) used the regulatory- and shortage-era test from *Transcontinental Gas* to deny the application for abandonment in *Felmont Oil.*

II. The *Felmont Oil* Decision

A. Facts and Initial Decision

In 1959, Felmont Oil Corporation (Felmont), Essex Offshore, Inc. (Essex) and a third producer, Coastal Oil and Gas Company, received an FPC certificate of necessity authorizing the sale to Transcontinental Gas Pipe Line Corporation (Transco) of natural gas produced from Block 86, Vermillion Parish, Offshore Louisiana (Block 86).[34] In 1981, shortly before the contract expired, the parties signed an interim gas purchase agreement for a one-month term followed by day-to-day terms.[35] Shortly afterward, Transco reduced its purchases substantially below the deliverability of the block.[36] As a result, the producers shut in two of four development wells on Block 86.[37]

Early in October 1983, Felmont and Essex notified Transco that they elected to cancel the agreement as of October 31, 1983.[38] Simultaneously Felmont and Essex applied to the FERC for an abandonment of their sales to Transco from Block 86 on the grounds of public convenience or necessity.[39] Transco opposed the abandonment. The Commission allowed intervenors on both sides of the dispute.[40]

The producers supported their application for abandonment with four arguments.[41] First, Transco should not be permitted to tie up gas to which it had no contractual right. Second, maximizing cash flow from the Block 86 reserves would serve the public interest by providing additional funds for new gas exploration and development. Third, production of price-controlled gas at

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duration of the program, were granted routinely under the *Felmont Oil* policy and test for abandonment before that case was remanded. *See Abandonment of Sales and Purchases, supra* note 31, at 18,705-06.

33. *Abandonment of Sales and Purchases, supra* note 31, at 18,705.

34. Union Texas Petroleum, 30 F.P.C. 550 (1963).

35. Commission Decision, *supra* note 7, at 61,651.

36. *Id.* at 61,652. Transco stated that it faced systemwide excess deliverability. As a result, it implemented a gas purchase program designed to allocate production from all its producers in as fair and reasonable a manner as possible. *Id.* In 1983, Transco purchased approximately 55% of the deliverability of the combined interests of Felmont and Essex, in 1984, 41% of that amount and in March, 1985, 20%. Foster Natural Gas Report (Foster Associates) No. 1546, at 3 (Dec. 5, 1985).

37. Commission Decision, *supra* note 7, at 61,653. Approximately 95% of the shut-in gas is "old" gas classified under the NGPA as either section 106(a) interstate rollover gas or section 104 gas, both subject to the FERC's jurisdiction even after industry deregulation. The remainder is classified as section 102(d) "new" gas. Foster Natural Gas Report (Foster Associates) No. 1518, at 5 (May 23, 1985).

38. Commission Decision, *supra* note 7, at 61,652.

39. *Id.*

40. Throughout the proceeding, Intervenor Shell Western E&P, Inc. (SWEPI) generally supported the arguments and settlement proposal of Felmont and Essex. Transco's positions generally were supported by the FERC staff and by intervenors Consolidated Edison Co. of N.Y., Inc. (Consolidated Edison), Philadelphia Electric Co. (PECO) and the Public Service Commission of the State of N.Y. (Public Serv. Comm'n). Commission Decision, *supra* note 7, at 61,652.

41. Foster Natural Gas Report (Foster Associates) No. 1529, at 32 (Aug. 8, 1985).

an efficient rate could reduce the economic distortions which may arise following deregulation of substantial amounts of natural gas in January, 1985. Finally, the applicants noted that Transco proposed to abandon a gas purchase from another party upon expiration of the underlying contract.

Following the test provided by *Transcontinental Gas*, the ALJ at the formal hearing used the comparative needs test as the principle factor for denying the abandonment for public convenience or necessity.[42] The ALJ noted that Felmont and Essex had failed to identify an alternate purchaser.[43] In so failing, the needs of the alternate purchaser and its customers could not be determined and compared with the needs of Transco and its customers for the same gas.[44] Without results from the comparative needs test, the Commission's presumption against granting the abandonment controlled on this key factor.[45]

Continuing with the test from *Transcontinental Gas*, the ALJ also considered the economic effect of the decision on the pipelines and their customers. The ALJ noted that the applicants did not claim any particular harm would accrue to them if the abandonment were denied.[46] Their arguments for "economic efficiency," particularly their promise of increased exploration and development from funds gained from an abandonment and subsequent immediate cash for higher takes, were "insufficient," "vague" and without precedent.[47] Furthermore, the FERC might soon act to implement industrywide a block-billing program which would eliminate the concerns of all producers over reduced purchaser takes.[48]

The ALJ found that Transco on the other hand had demonstrated that the proposed abandonment, if granted, would cause concrete harm to the company's system. The limited reserves of low-cost gas now dedicated to Transco's customers would be decreased or depleted.[49] This loss would be augmented as other producers selling gas to Transco on expired contracts would argue for a similar release as authorized by a new precedent.[50] The ALJ also noted that in the extremely price-sensitive market, an increase of any size in Transco's weighted average cost of gas (WACOG) from an abandonment could cause Transco to lose customers to a competitor.[51] More cer-

42. Initial Decision, *supra* note 7, at 65,209.

43. *Id.*

44. *Id.* at 65,209-10.

45. *See id.* at 65,210.

46. *Id.*

47. *Id.*

48. *Id.* at 65,211.

49. *Id.* at 65,210. Transco reported that its reserves-to-deliverability ratio declined from 10.6 in 1970 to 4.9 at the end of 1984. *Id.* at 65,211. In addition, Transco estimated it held 416 Bcf of remaining recoverable reserves of NGPA sections 104 and 106(a) "old" gas under contracts that have expired or will expire within the next five years. Another 904 Bcf of reserves covered by contracts are due to expire during the years 1990-1996. The dedicated reserves from Felmont and Essex constitute about 22.4% of Transco's existing reserves. The remaining recoverable reserves underlying Block 86 were estimated at 36.5 Bcf as of January 1, 1985. Foster Natural Gas Report (Foster Associates) No. 1529, at 32-34 (Aug. 8, 1985).

50. Initial Decision, *supra* note 7, at 65,210.

51. *Id.* At the time of the application for abandonment, Transco's existing WACOG was $3.01/ MMBtu. Foster Natural Gas Report (Foster Associates) No. 1529, at 32-34 (Aug. 8, 1985). Felmont and Essex noted that if the abandonment is granted the increase in Transco's WACOG is likely to be between

tainly, any increased cost in Transco's price would be passed through to Transco's customers and thus harm them.[52] In considering the entire record, the ALJ ruled that the Commission's policy against granting abandonments controlled to deny both the proposed abandonment and the parties' settlement offers.[53]

Felmont and Essex excepted the decision.[54] Fortuitously for the applicants, less than two months later the FERC announced a major restructuring of the natural gas industry in Order No. 436.[55] Although it did not detail a new abandonment policy in the Order, the FERC announced that it believed that the release of gas currently shut-in on expired contracts could benefit the industry.[56] The FERC ordered that applications for abandonment be expedited.[57] Notably, the Order did not include direct relief for the take-or-pay problem.[58]

B. *Final Decision of* Felmont Oil

Four months after Order No. 436 was promulgated, the FERC issued the Commission decision on the application submitted by Felmont and Essex.[59] The FERC used this case to describe its new policy and test for abandonment for public convenience or necessity. In applying the new rules to *Felmont Oil,* the Commission modified the initial decision and granted a limited-term abandonment.

The FERC noted that it was revising its abandonment policy because both the NGPA anticipates such a change and the current economic market could benefit from a new policy on abandonment.[60] Intending that the industry rely increasingly on open market forces to establish prices and allocate supplies of natural gas, the Congress designed the NGPA to foster a national market and to provide incentives for the increased exploration and production

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0.7¢ and 0.9¢/MMBtu. Transco estimated the increase to be between 2.5¢ and 3.0¢/MMBtu. Initial Decision, *supra* note 7, at 65,209-10.

52. *Id.* at 65,210.

53. *Id.* at 65,213. In their settlement proposal, Felmont and Essex outlined a three-year program whereby Transco would provide the producers with an estimate of its needs for Block 86 gas for the ensuing six-month period. Transco would make a new estimate 60 days in advance of each subsequent six-month period. Upon approval of the settlement by the FERC, Felmont and Essex could sell to other purchasers any Block 86 gas not nominated by Transco. The gas would be transported subject to the Commission's regulations under section 7 of the NGA and section 311 of the NGPA.

Transco's settlement proposal differed from the above in requiring a 30-day nomination period, a 30-day notice period and a right of first refusal for Transco's existing customers for the released volumes of gas. In addition, Transco requested a specific finding that it could not be found guilty of fraud, abuse or similar offenses under section 601 of the NGPA, due to the loss of the section 106(a) gas supplies. Felmont and Essex noted that they were not withdrawing their settlement offer but that they would be willing to accept Transco's offer as a compromise to resolve the dispute. *Id.* at 65,211.

54. Commission Decision, *supra* note 7, at 61,652.

55. Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* [1982-1985 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,665, 50 Fed. Reg. 42,408 (1985).

56. *Id.* at 42,465.

57. *Id.*

58. *Id.* at 42,462.

59. *See* Commission Decision, *supra* note 7, at 61,657.

60. *Id.* at 61,655.

of natural gas.[61] Additionally, with falling wellhead prices, the Commission reasoned that the public interest could best be served by allowing open market forces to more fully operate in the indusry.[62] As a result, the FERC's new abandonment policy for public convenience or necessity is designed to free low-priced gas to enter the open market, especially when the supplies are currently shut-in or subject to reduced takes.[63]

To implement this policy, the FERC outlined a new test for abandonment for public convenience or necessity to supercede the test from *Michigan Consolidated*.[64] The new test involves a two-pronged analysis. First, the Commission must determine if "in a particular instance [the abandonment] would have beneficial effects on the market overall, such as increasing competition and causing gas prices to respond to that competition."[65] All factors relevant to furthering the open market must be considered in assessing that issue.[66] Second, the Commission must determine if "the benefits of the abandonment outweigh any adverse effect to the purchaser to whom the gas is presently dedicated, or that purchaser's customers."[67] If the benefits do not outweigh the adverse effect, the FERC might grant conditional abandonments when necessary in individual cases to mitigate any such losses.[68]

The FERC identified four "salutory effects"[69] from its new abandonment policy. First, the new policy generally will allow purchasers to lower their gas costs by displacing high-cost gas or other fuels with this cheap gas. Second, producers will reduce their prices of natural gas in order to avoid being shut-in. Third, pipelines will buy the increased volumes of low-priced gas made available by the producers. Otherwise, pipelines would risk losing the gas forever. Finally, both producers and pipelines will have an incentive to voluntarily renegotiate their gas contracts, particularly the take-or-pay clauses. This step will result from the parties' realization of the mutual benefits of the increased availability of low-cost gas. The Commission believed that these benefits will inure to the public at large.[70]

Mindful of these effects, the FERC reconsidered the arguments previously heard by the ALJ. The FERC accepted the ALJ's finding that, whatever its magnitude, the inevitable increase in Transco's WACOG resulting from an abandonment will harm the pipeline's customers.[71] However, the FERC rejected most of the ALJ's other findings. First, the Commission found that the applicants' failure to identify a specific purchaser did not warrant denial of an abandonment. The FERC reasoned that an abandonment could be structured to provide Transco and its customers with what amounts to a

61. *Id.*
62. *Id.* at 61,655-56.
63. *Id.* at 61,656.
64. *Id.* at 61,657.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 61,656.
70. *Id.* at 61,657.
71. *Id.*

first call on the Block 86 gas. By the Commission's approach, the identity and needs of the prospective purchaser, therefore, were irrelevant.[72] Second, neither Transco's WACOG nor its reserves-to-deliverability ratio would be affected by a limited-term abandonment. With such an abandonment, the pipeline could continue to take gas at the contracted low price.[73] Third, Transco's purchased volumes from Block 86 were not likely to increase after a block-billing proceeding because the FERC had postponed action on that program.[74] Finally, a limited-term abandonment would have positive effects on the market as a whole. The FERC anticipated that Felmont and Essex could sell Block 86 reserves to a higher-take purchaser than Transco, produce Block 86 gas at an economically efficient rate, increase their cash flow, and expand their exploration and development efforts to discover additional gas. Transco and its customers would continue to have the right to purchase Block 86 gas to the full extent of its deliverability, with the excess volume to be sold on the spot market to increase competition among producers for consumer sales. The increased activity on the spot market could mitigate the price distortions in the natural gas industry that had resulted from take-or-pay requirements.[75]

Although finding that an abandonment would benefit the overall market, the FERC granted only a limited-term abandonment in order to mitigate any resulting increase in Transco's WACOG.[76] During the next three years, Transco must submit to Felmont and Essex a thirty-day notice of its estimated takes for each successive six-month period.[77] Transco's nominations must be based on total Block 86 production.[78] In a right of first refusal, Transco's firm customers may purchase any gas not nominated by Transco.[79] Felmont and Essex then may sell all remaining gas to any purchaser.[80] Throughout the limited-term abandonment, Transco's actions constitute purchasing practices reviewable in its rate proceeding.[81] At the end of the three-year period, normal dedication will resume.[82]

Consolidated Edison appealed the Commission's decision. The appeal was joined with others and judicially reviewed as a consolidated suit.[83]

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72. *Id.* at 61,658.

73. *Id.*

74. *Id.*

75. *Id.* at 61,658-59.

76. *Id.* at 61,657.

77. *Id.*

78. Clarification, *supra* note 7, at 61,535.

79. Commission Decision, *supra* note 7, at 61,657.

80. *Id.*

81. *Id.*

82. *Id.*

83. The judicial review included four suits involving the original litigants and intervenors to the case. Litigants in the first suit were Public Serv. Comm'n v. FERC, SWEPI, Associated Gas Distributors (AGD), PECO, Felmont and Essex. Litigants in the second suit were Transco v. FERC, Felmont, Essex, PECO and SWEPI. In the third suit, the litigants were Consolidated Edison v. FERC. In the fourth suit, the litigants were Consolidated Edison v. FERC, SWEPI, AGD, PECO, Felmont and Essex. Consolidated Edison Co. v. FERC, 823 F.2d 630 (D.C. Cir. 1987).

III. THE COURT'S OPINION: *CONSOLIDATED EDISON*

Approximately one and one-half years after Order No. 436 and the Commission decision in *Felmont Oil* were promulgated, the D.C. Circuit Court of Appeals remanded Order No. 436 in *Associated Gas Distributors v. FERC* (*Associated Gas*).[84] One month later, on similar grounds, the court in *Consolidated Edison* remanded the FERC's final decision in *Felmont Oil*. In rejecting *Felmont Oil*, the court concluded that the FERC had failed to adequately address the take-or-pay issue by offering abandonments that could exacerbate rather than mitigate that problem.[85] The Commission's new policy and test could not be approved due to a lack of "reasoned decisionmaking" by the FERC.[86]

The court began its analysis in *Consolidated Edison* by upholding the FERC's decision to change its policy and test for granting abandonments for public convenience or necessity.[87] In examining the broad language of section 7 of the NGA, the court found that the FERC has both the authority[88] and the responsibility[89] to develop a test appropriate to the regulatory climate. The court agreed with the FERC's observations that because both the gas market is oversupplied and the NGPA has "reshaped the landscape of natural gas regulation," the comparative needs test from the era of interstate gas shortages is no longer suitable.[90] Noting that the new policy and test were not objectionable in themselves, the court indicated that it could uphold both rules if the Commission properly revised its rationale for them.[91]

Although criticizing the FERC's unstated premise that most users can buy from the spot market,[92] the court centered its criticism on the FERC's belief that a liberalized abandonment policy would encourage producers and pipelines to renegotiate their take-or-pay provisions.[93] The court reasoned from the concept of take-or-pay itself that because they could get the same benefit whether or not the contracted gas actually leaves the ground, producers would have no incentive to renegotiate the provisions.[94] Pipelines, on the other hand, have strong motivation to renegotiate in order to remain competitive with the low gas prices available on the spot market.[95] Although it would release additional low-cost gas to that market, the abandonment policy would effectively position pipelines as the "fall guys" in the take-or-pay crisis.[96] By the *Felmont Oil* policy, the pipelines would continue to be forced to either buy overpriced gas and sell it at a loss or decline to buy such gas and thereby incur

84. Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987).
85. *Consolidated Edison*, 823 F.2d at 642.
86. *Id.* at 640.
87. *Id.* at 636.
88. *Id.*
89. *Id.* at 633.
90. *See id.* at 636.
91. *Id.* at 641.
92. *Id.* at 637-38.
93. *Id.* at 638-40.
94. *Id.* at 639-40.
95. *Id.* at 641.
96. *See id.*

take-or-pay liability.[97] Using a "counterintuitive" analysis,[98] the FERC covertly appointed the pipelines as bearers of the multi-billion dollar losses from the continuing take-or-pay problem.[99]

The court in *Consolidated Edison* also reviewed the FERC's inadequate reasoning on the take-or-pay issue in Order No. 436. In its Notice of Proposed Rulemaking anticipating the Order, the FERC acknowledged that the pipelines face grave financial liabilities from their take-or-pay obligations.[100] To ease their crisis, the FERC proposed a "safe harbor" presumption to extinguish all minimum payment or purchase obligations in certain qualifying contracts.[101] The FERC also considered a number of alternate proposals for dealing with the problem.[102] However, in the final order, the FERC declined to issue new rules for take-or-pay liability for fear of aggravating the problem.[103] The court in *Consolidated Edison* concluded that granting expedited abandonments, the "affirmative advantage" for pipelines offered in Order No. 436,[104] was simply "wish[ing] away the problem."[105] Above market-clearing prices for natural gas can be attacked only when the FERC directly addresses the combination of high prices and take-or-pay clauses.[106]

The court referred to the take-or-pay problem again in addressing the first of three secondary issues in *Consolidated Edison*. The court ruled that the FERC committed procedural error in failing to consider Felmont and Essex's meritorious settlement proposal that the abandonment be conditioned on the producers' agreement to renegotiate the parties' take-or-pay provision.[107] Citing *Michigan Consolidated*, the court noted that the Commission must address every reasonable proposal entered into the record, even one submitted as late as the petition for a rehearing of the case.[108] On the issue of whether Transco's firm customers were illegally denied the gas sold to alternate purchaser Brooklyn Union, the court noted that the Commission is not required to use the comparative needs test to determine whether Transco's firm customers have a greater need for the gas than the alternate purchaser or its customers.[109] In so ruling, the court rejected Transco's arguments that the Commission erred against Transco's firm customers by not requiring a pro rata release of the abandoned gas to all interested Transco Block 86 customers.[110] The court also noted that abandoned gas lies outside the FERC's jurisdiction and thus cannot be included in the block-billing system as argued by

97. *See Associated Gas*, 824 F.2d at 1021.
98. *Consolidated Edison*, 823 F.2d at 639.
99. *See id.* at 641; *see also Associated Gas*, 824 F.2d at 1021.
100. Notice of Proposed Rulemaking, *Regulatory Treatment of the Payments Made in Lieu of Take-or-Pay Obligations*, 50 Fed. Reg. 16,076 (1985) [hereinafter *Regulatory Treatment*].
101. *Id.*
102. *Associated Gas*, 824 F.2d at 1022.
103. Order No. 436, *supra* note 55, at 42,462.
104. *Associated Gas*, 824 F.2d at 1025.
105. *Consolidated Edison*, 823 F.2d at 641.
106. *Associated Gas*, 824 F.2d at 1021.
107. *Consolidated Edison*, 823 F.2d at 642.
108. *Id.*
109. *Id.* at 643.
110. *Id.*

Transco.[111] In the final issue of the case, the court found the question moot whether customers who bid successfully for some or all of the abandoned gas have a right of transportation of that gas by the former pipeline-middleman.[112]

IV. ANALYSIS

A. *Judicial Review and the Take-or-Pay Problem*

The court in *Consolidated Edison*, following its recent decision in *Associated Gas*, confirmed that the FERC, not the courts, must resolve the take-or-pay issue, particularly the implicated questions of distributional equity.[113] Prior to *Associated Gas*, the court had not clearly resolved whether take-or-pay conflicts fall within the primary jurisdiction of the FERC.[114] Some commentators have urged Commission solutions to the problem, including further regulation of the producer-pipeline relationship or the alteration of unreasonable contracts.[115] Other commentators have suggested that contract defenses or contract reform in the judicial forum is the better solution.[116] The FERC itself believed that the courts were better suited to resolve the problem.[117] By clearly identifying the party responsible for take-or-pay resolution, the *Associated Gas* and *Consolidated Edison* decisions may increase the possibility of take-or-pay relief on an industrywide basis.[118]

Although it was uncertain whether the FERC understands the economic principles of take-or-pay, the court in both decisions ruled that the Commission must resolve the take-or-pay problem by directly addressing it. The court implied that the problem cannot be ameliorated by secondary effects from programs for abandonments or unbundled transportation and merchant roles.[119] While it has demonstrated a long-term awareness and continuing analysis of the problem,[120] the FERC must now begin to do more than affirm earlier poli-

111. *Id.*

112. *Id.* If the abandonment policy is ultimately rejected, the issue is moot. Alternatively, if the policy is approved, Brooklyn Union already owns the gas.

113. *Id.* at 633; *see Associated Gas*, 824 F.2d at 1023.

114. Moody, *The Natural Gas Industry After Partial Deregulation*, 36 INST. ON OIL & GAS L. & TAX'N, § 6.06(4) (1985). *See* Danden Petroleum, Inc. v. Northern Natural Gas Co., 615 F. Supp. 1093 (N.D. Tex. 1985) (doctrine of primary jurisdiction does not require referral to the FERC of all the issues related to natural gas take-or-pay clauses). *See generally* Pierce, *Issues in Gas Contract Litigation*, 35 INST. ON OIL & GAS L. & TAX'N, 61, 66-81 (1984).

115. *Cf. Take-or-Pay Provisions, supra* note 9, at 273-76.

116. *Cf. id.* at 262-73, 277-78.

117. *See id.* at 276 n.141.

118. *Cf. id.* at 275-76.

119. *See Consolidated Gas*, 823 F.2d at 641; *Associated Gas*, 824 F.2d at 1021.

120. The FERC repeatedly has addressed the take-or-pay issue. *See* Griggs, *Restructuring the Natural Gas Industry: Order No. 436 and Other Regulatory Initiatives*, 7 ENERGY L.J. 71, 75-81 (1986). Beginning in the late 1960s, the FPC and the FERC have required an annual report from each pipeline company including information on its take-or-pay obligations. *See* Order No. 168, *Interstate Pipelines' Annual Report of Gas Supply: Form No. 15*, 46 Fed Reg. 42,261 (1981). The FPC attempted to soften the impact of take-or-pay clauses by requiring that in contracts executed after February 1, 1967, pipelines must be allowed up to five years to use gas paid for under their take-or-pay obligations but not actually taken. Order No. 334, 37 F.P.C. 110 (1967) (codified at 18 C.F.R. § 154.103 (1987)). In addition, the FPC considered take-or-pay balances as evidence of the "need" of a pipeline company when deciding whether to issue a certificate of

cies of inaction in order to demonstrate reasoned decisionmaking in its regulatory programs.

Arguably the court in *Consolidated Edison* used the "hard look" doctrine[121] to substitute for the FERC's policy its own judgment of the best solution to the take-or-pay problem. The courts generally refrain from reformulating agency policy even when the Congress provides that all decisions by the agency are reviewable by the judiciary.[122] By demanding affirmative regulatory action in place of the FERC's policy of conscious inaction, the

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necessity to a producer. FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968). The FPC considered limiting the minimum take provision to a specific amount. However, because the limitation might reduce the flexibility of contract negotiations between producers and pipelines and thus reduce gas supplies to the interstate market, the FPC decided against the proposed rule. Order Terminating Proposed Rulemaking, *Limitation on Provisions in Natural Gas Rate Schedules Relating to Minimum Take Provisions Docket No. R-400*, 45 F.P.C. 543 (1971). In a take-or-pay policy statement, the FERC indicated its growing concern that high take-or-pay liabilities act to shield the price of deregulated gas from market forces, thus decreasing the pipelines' flexibility to respond to a changed market. As a result, the FPC announced it would apply a rebuttable presumption to pipeline rate cases involving future contracts. Future take-or-pay payments would not be given rate base treatment if both the contract was made or amended on or after December 23, 1982, and the payments exceeded 75% of annual deliverability. 18 C.F.R. § 2.103 (1987). The FERC also adopted a rule that precludes the collection of any variable costs, including take-or-pay costs, through a minimum bill provision. Order No. 380, *Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, [1982-1985 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,571, 49 Fed. Reg. 22,778 (1984). Later the FERC noted that prudently incurred take-or-pay costs can be recovered by pipelines through some mechanism other than a minimum bill. The exact mechanism for recovery should be resolved on a case-by-case basis. "The purpose of the Rule is not to reduce or eliminate take-or-pay obligations . . . ; it is to encourage pipelines (and, inevitably, their producer-suppliers) to institute market-responsive *pricing* of natural gas." Order No. 380-A, 49 Fed. Reg. 31,259, 31,265 (1984) (emphasis in original). However, the Commission noted that it did not necessarily support high take-or-pay levels in producer-pipeline contracts. *Id.* The Commission also ruled that payments may no longer be passed on automatically through the purchased gas adjustment clause. Take-or-pay payments made by a pipeline must be recovered only in a general rate increase proceeding under section 4 of the NGA where recovery of the amounts is subject to challenge on grounds of imprudence. *Regulatory Treatment, supra* note 100.

The FERC also issued a policy statement allowing it to review the propriety of take-or-pay liability on a case-by-case basis. 18 C.F.R. § 2.76 (1985). In a subsequent adjudication, the Commission found unjust, unreasonable and unduly discriminatory effects of take-or-pay provisions. Columbia Gas Transmission Corp., 26 F.E.R.C. ¶ 61,034 (1985). The Commission ordered Columbia to renegotiate its contracts or invoke *force majeure* to avoid take-or-pay obligations. *Id.* at 61,126. In a second major case, the FERC noted that a minimum bill could be used to assess take-or-pay costs on those customers who caused the pipeline to incur take-or-pay liabilities. Transwestern Pipeline Co., 32 F.E.R.C. ¶ 61,009 (1985). Finally, in a Notice of Proposed Rulemaking, the FERC proposed a "safe harbor" presumption which was not included in the final Order No. 436. The Commission reasoned that such a proposal would interfere with parties resolving their problems by negotiation. 50 Fed. Reg. 24,130, 24,147 (1985). However, the Commission did allow expedited applications for abandonments. *See supra* notes 55 and 56 and accompanying text. The FERC also stressed in Order No. 436-A that Order No. 436 does not abrogate contract rights or preclude renegotiation of contract rights. Order No. 436-A, [1982-1985 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,675, 50 Fed. Reg. 52,217 (1985). Order No. 436 was later vacated.

121. The "hard look" doctrine was first announced in Greater Boston Television Co. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). It "is used most frequently today when the issue resolved by the agency is of great importance, and when an agency has used unproven theoretical methodology to predict a future fact." The doctrine represents an increased scrutiny of an agency's reasoning. R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 386-87 (1985).

122. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 36 (1983). According to 15 U.S.C. § 3412, the NGPA follows most of the procedures outlined in the Federal Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982).

court may have impinged on the regulatory experience and discretion of the FERC.

Although the Commission did not indicate clearly whether the "salutory effects" were post hoc benefits or, alternatively, part of the primary motivation for changing its abandonment policy, the court stringently analyzed the effects that the FERC anticipated from the new rules for granting abandonments. The court approached the review with a more rigorous standard than it developed from its narrow interpretation of the rule from *SEC v. Chenery*.[123] In that case, the Supreme Court noted that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[124] In applying that rule in *American Federation of Government Employees v. FLRA*,[125] the D.C. Circuit held that when an agency justifies an action based on flawed premises, the court can uphold the case only if it is certain that the agency unquestionably would have decided the case the same way had the premises been unflawed.[126]

If it had applied the narrow *FLRA* standard to *Felmont Oil*, the court may well have upheld the FERC's decision to revise the Commission's abandonment policy and test. In *Consolidated Edison*, the court identified two flawed premises for the new abandoment policy: the significant power of switchable fuel users to increase the demand for low-cost gas and the incentive for both producers and pipelines to renegotiate take-or-pay clauses.[127] Although the court criticized both rationales,[128] it accepted the first[129] but rejected the second.[130] More importantly, the court ignored the FERC's detailed recital of the regulatory and market motivations for its new policy. Rather then sustain the abandonment policy on the FERC's statement of primary motivation or on the one flawed premise accepted by the court, the D.C. Circuit remanded the final Commission order on the grounds of unreasoned decisionmaking.[131] In *Consolidated Edison*, the court apparently exceeded the judicial rigor it has professed for other reviews of agency action.

B. The Felmont Oil *Policy and Test for Abandonment*

The Commission's decision in *Felmont Oil* helps translate to the deregulated era the NGA mandate of providing a reliable supply of natural gas at reasonable prices. Working from the Congress' plan in the NGPA, the FERC has continued to foster the development of the open market for natural gas. Specifically, the FERC will now readily grant at least limited-term abandonments when they result in the release of low-cost shut-in gas. In its new test

123. SEC v. Chenery, 332 U.S. 194 (1947).
124. *Id.* at 204.
125. American Fed'n of Gov't Employees v. FLRA, 778 F.2d 850 (D.C. Cir. 1985).
126. *Id.* at 860 n.19.
127. *Consolidated Edison*, 823 F.2d at 641.
128. *Id.* at 638-40.
129. *Id.* at 641.
130. *Id.*
131. *Id.* at 641-42.

for abandonment for public convenience or necessity, the FERC has shifted the identification of the public interest from specified customers, as in the *Michigan Consolidated* and *Transcontinental Gas* tests, to the interest of the market as a whole. Under the classic supply-demand model, gas customers buying on an open market may drive up low costs, but a continued supply of low-cost gas in the current oversupplied market still dominated by captive customers probably precludes any immediate, significant price increases in natural gas.

Other actions by the FERC suggest that the new policy and test for abandonments eventually may be superceded by a suite of new regulatory measures. In Order No. 436, the Commission indicated that its abandonment policy would evolve in a series of cases.[132] The FERC already has granted abandonments more liberally than in the "careful and modest application"[133] of its new policy in *Felmont Oil*.[134] Citing the successful extension of its new policy, the Commission now is considering granting generic abandonments.[135] In the post-*Felmont Oil* era, the Commission in effect may be slowly relinquishing the certification requirement established in section 7(b) of the NGA.[136]

C. *The FERC's Response to* Consolidated Edison

Particularly in resolving the secondary issues of the case, the court in *Consolidated Edison* effectively has suggested to the FERC three possible means of revising the Commission's final decision. The easiest suggested method for passing judicial review involves revising the rationale for the new abandonment policy, directly addressing the take-or-pay problem in another order and then implementing the *Felmont Oil* policy and test unchanged.[137] Alternatively, the FERC could modify its announced procedure for granting an abandonment in one of two ways. First, the FERC could apply the new test and then require that the contracting parties renegotiate their take-or-pay provisions before an abandonment could be granted.[138] Second, the FERC could convene an NGA section 5 ratemaking proceeding in order to exercise its conditioning power under section 7 to adjust rates. The FERC then might grant an abandonment if the producer agreed to provide take-or-pay relief.[139] All three of these possibilities allow the FERC to maintain its policy encouraging abandonments.

Although it has not yet responded to *Consolidated Edison*, the FERC has

132. Order No. 436, *supra* note 55, at 41,465.

133. Clarification, *supra* note 7, at 61,333.

134. The FERC has granted LTAs for applications filed by pipelines on behalf of their producer-suppliers. *See, e.g.*, ANR Pipeline Co., 38 F.E.R.C. ¶ 61,046 (1987).

135. *Abandonment of Sales and Purchases*, *supra* note 31, at 18,703.

136. *Id.* at 18,706; *see also* Note, *Federal Regulation of the Dedication and Abandonment of Natural Gas in Interstate Commerce*, 24 LOY. L. REV. 678 (1978).

137. *Consolidated Edison*, 823 F.2d at 641.

138. *Id.* at 642.

139. *Id.* at 642-43. The relevant portions of sections 5 and 7 of the NGA are codified at 15 U.S.C. §§ 717d and 717f(e) (1982), respectively.

issued an interim rule in response to *Associated Gas*. In Order No. 500,[140] the FERC addresses the court's criticism of its reasoning on take-or-pay by readopting the regulations of Order No. 436 with significant modifications to grant relief to pipeline companies. After it receives the court's response to Order No. 500, the FERC is likely to proceed with a revision of its final decision in *Felmont Oil*. The take-or-pay relief anticipated in that revision could complement the provisions of Order No. 500.

VI. CONCLUSION

In *Consolidated Edison*, the court has again directed the FERC to formulate regulations to directly ease the take-or-pay problem. At stake are the interests of the pipelines, producers and consumers, and because of the court's stringent review of *Felmont Oil*, also the future of the FERC's new liberalized policy and test for granting abandonments for public convenience or necessity. If the FERC's anticipated revision of *Felmont Oil* gains court approval, abandonments of low-cost gas shut-in on expired contracts will again be granted under a broadened public interest standard.

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140. Order No. 500, Interim Rule and Statement of Policy (FERC Issued Aug. 7, 1987).