

*Report of The Committee
On Natural Gas Rate and
Accounting Regulations*

Our Committee report seeks to highlight important natural gas pipeline rate and accounting developments at the Federal Energy Regulatory Commission and in the courts during calendar year 1984.

I. COMMISSION ACTION ON PIPELINE ISSUES

A. *Abandoned Gas Supply Projects (Cost Amortization)*

On May 7, 1984, the Commission issued Opinion No. 218, *Natural Gas Pipeline Company of America*, 27 FERC ¶ 61,201 (1984); *reh'g denied*, Opinion No. 218-A 28 FERC ¶ 61,020 (1984). Natural sought to amortize over a five-year period approximately \$13 million for three unsuccessful gas supply projects, a coal gasification facility, a LNG project and an Arctic gas transportation project. Although the Commission disallowed the expenses, it did not foreclose reconsideration in future cases where projects are carried beyond the stage of preliminary survey and investigation and where the pipeline's investments are proportionately greater. The Commission stressed that a company seeking to amortize such costs must be prepared to present evidence showing that it, rather than a corporate parent or affiliate, was the source of the funds expended and that the project, if successful, would have benefited the customers, as well as evidence concerning factors that resulted in the abandonment or failure of the project and actions taken to avoid or mitigate resulting losses.

B. *Area Rate Clauses Authorizing Natural Gas Policy Act of 1978 ("NGPA") Ceiling Prices*

On May 7, 1984, the Commission issued three opinions involving third party protests under the procedures established in the Order No. 23 series (44 *Fed. Reg.* 16895 (1979)) as to whether area rate clauses in contracts between gas producers and interstate pipelines authorized collection of certain NGPA ceiling prices. First, Opinion No. 215, *Transcontinental Gas Pipe Line Corp.*, 27 FERC ¶ 61,180 (1984), *reh'g denied*, Opinion No. 215-A, 28 FERC ¶ 61,018 (1984), dismissed protests involving some 27 pipelines. Second, Opinion No. 216, *Texas Gas Transmission Corp.*, 27 FERC ¶ 61,181 (1984), *reh'g denied*, Opinion No. 216-A, 28 FERC ¶ 61,019 (1984), set a hearing on one pipeline's contracts. Third, Opinion No. 217 *Michigan-Wisconsin Pipe Line Co.*, 27 FERC ¶ 61,178 (1984), *order requiring refunds*, 28 FERC ¶ 61,057 (1984), dealt with various issues for Florida Gas, Michigan-Wisconsin, Transco and United.

C. *Cost Allocation and Rate Design*

On February 10, 1984, the Commission concluded that a reversal on appeal to the District of Columbia Circuit of earlier Commission orders prescribing rolled-in, systemwide cost allocation for Texas Eastern did not change the voluntary nature of that pipeline's later Natural Gas Act ("NGA") Section 4 filing, which contained the allocation method that had been reversed earlier. *Texas Eastern Transmission Corp.*, 26 FERC ¶ 61,173 (1984), *order accepting compliance filing*, 27 FERC ¶ 61,441 (1984). The

Commission emphasized that the Court had indicated that Texas Eastern was not precluded from using the rolled-in, systemwide method in a new rate schedule voluntarily-filed under NGA Section 4. The Commission also held that a subsequent District of Columbia Circuit order of August 8, 1983, required restatement through refunds and surchargers, with interest, of the zone gate method to allocate production costs for a one-year period prior to the effectiveness of Texas Eastern's Section 4 filing.

On April 5, 1984, the Commission issued Opinion No. 213, *Northwest Pipeline Corp.*, 27 FERC ¶ 61,012 (1984), on three issues: (1) Northwest's use of two-tier rates to reflect its domestic and Canadian gas costs in lieu of its existing rolled-in rates (disposition: rejected in favor of rolled-in rates); (2) Northwest's design for its mainline transportation rates (disposition: remanded to a Presiding Administrative Law Judge for further proceedings) and (3) Northwest's assignment of the cost of debt capital to its tariff for its portion of certain interstate delivery facilities (disposition: rejected a rolled-in allocation in favor of an incremental allocation of the actual cost of debt associated with the construction of the facilities). On June 1, 1984, the Commission denied applications for rehearing in Opinion No. 213-A, 27 FERC ¶ 61,339 (1984); *see also clarifying order*, 29 FERC ¶ 61,286 (1984).

On June 28, 1984, the Commission issued Opinion No. 224, *Southern Natural Gas Co.*, 27 FERC ¶ 61,476 (1984), affirming in part and reversing in part a Presiding Administrative Law Judge's Initial Decision, 19 FERC ¶ 63,060 (1982). The Commission approved Southern's as-filed, mileage-sensitive method to allocate its transmission function costs among its customers by means of three geographical rate zones. In May 1979 Southern had allocated such costs without a mileage-weighting due to the receipt of Algerian LNG at the easternmost end of its over 1,000 mile, west-to-east pipeline system. After the LNG supply abruptly was cut off in April 1980, Southern decided to return to the mileage-based allocation it otherwise had employed over many decades. The Commission agreed that a return to zoned rates was warranted because of the termination of LNG as a supply source. The Commission reversed the Initial Decision on two points by holding: (1) that certain transmission and compression of gas by others costs and certain administrative and general costs should not be mileage and (2) that the difference between Southern's transportation-of-gas-for-hire service and its transmission-of-its-own-gas-for-resale service justified, for an earlier 14-month period, a mileage treatment for the former service, but a non-mileage treatment for the latter service. Opinion No. 224-A, 28 FERC ¶ 61,238 (1984), denied all requests for rehearing of Opinion No. 224.

On December 17, 1984, the Commission issued Opinion No. 227, *Sea Robin Pipeline Co.*, 29 FERC ¶ 61,283 (1984). The issue was whether Sea Robin's past and current method of crediting revenues to its cost of service in Account No. 489 (Revenues from transportation of gas of others) from a transportation service it provides for Gulf Oil Corporation was fair to Sea Robin's other customers. The Commission found merit in its staff's position that the Gulf transportation volumes had increased so dramatically over the years that other customers were forced to subsidize that service. However, because the Commission also found the record inadequate, it remanded the case to the Presiding Administrative Law Judge for development of an adequate record and an expeditious initial decision.

D. Experimental Market Retention Programs (Special Marketing Programs)

On January 16, 1984, the Commission issued three orders modifying, clarifying and denying rehearing of its earlier orders authorizing special marketing programs for Columbia, Tenneco and Transco. *Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,031 (1984); *Tenneco Oil Co.*, 26 FERC ¶ 61,030 (1984), *reh'g denied*, 26 FERC ¶ 61,337 (1984); *Transcontinental Gas Pipe Line Corp.*, 26 FERC ¶ 61,029 (1984), *as amended*, 27 FERC ¶ 61,492 (1984). The Commission expanded the programs to permit competition with markets served by interruptible rate schedules, refused to expand the programs to include firm markets (although the Commission simultaneously issued a Notice of Inquiry inviting public comments on that issue in *Impact Of Special Marketing Programs On Natural Gas Companies And Consumers*, 49 *Fed. Reg.* 3193 (1984), and addressed, among other things, the need for an evidentiary hearing, treatment of minimum bill credits in conjunction with transportation revenue credits, the weighted average cost of gas ("WACOG") standard for released gas, priority of transportation arrangements and various monthly monitoring and reporting requirements.*

On March 23, 1984, the Commission clarified and amended the reporting requirements in various special marketing programs in *Tenneco Oil Co.*, 26 FERC ¶ 61,398 (1984), *order on reh'g*, 27 FERC ¶ 61,489 (1984). The Commission described its goals, in permitting these experiments, as increasing gas consumption while also providing demonstrable benefits to the pipeline's system supply customers. The Commission stated its intention to verify that those goals are realized and, to that end, expanded the reporting requirements of the various special marketing programs to include, on a monthly basis, data on take-or-pay relief afforded by the programs and data that would enable the Staff to track the distribution of gas to ultimate end-users in eligible markets.

On April 19, 1984, in *Consolidated Gas Supply Corp.*, 27 FERC ¶ 61,123 (1984), *see* letter order issued September 17, 1984, 28 FERC ¶ 61,409 (1984), the Commission issued Consolidated a temporary certificate for up to six months to sell gas at a discount to distribution customers whose end-users have alternate fuel capability. The Commission cautioned that it would only approve a final discount rate benefiting all of Consolidated's customers in both the short term and the long term.

On May 31, 1984, the Commission issued an order in *United Gas Pipe Line Co.*, 27 FERC ¶ 61,349 (1984), that approved United's proposed Special Discount Rate Schedule ("SDR"). Under the proposal, United's distributor and pipeline customers purchasing volumes in excess of certain specified threshold levels were granted a 15¢ per Mcf discount for all such volumes. On November 21, 1984, United applied to amend the SDR: (1) to extend it to December 31, 1985; (2) to provide for different

*The Commission also acted on the following other pipeline and producer special marketing programs during 1984: *PanMark Gas Co.*, 26 FERC ¶ 61,341 (1984); *order on reh'g*, 27 FERC ¶ 61,490 (1984); *Tennessee Gas Pipeline Co.*, 26 FERC ¶ 61,381 (1984), *see also* 28 FERC ¶ 61,025 (1984) and 28 FERC ¶ 61,316 (1984); *Cities Service Oil & Gas Corp.*, 27 ¶ 61,493 (1984), *order on reh'g*, 28 FERC ¶ 61,296 (1984); *Texas Eastern Transmission Corp.*, 27 FERC ¶ 61,491 (1984), *order on reh'g* 28 FERC ¶ 61,295 (1984); *Amoco Production Co.*, 28 FERC ¶ 61,224 (1984); *ARCO Oil & Gas Co.*, 29 FERC ¶ 61,042 (1984); *Sun Exploration & Production Co.*, 29 FERC ¶ 61,043 (1984); *Shell Offshore Inc.*, 29 FERC ¶ 61,209 (1984); *ANR Production Co.*, 29 FERC ¶ 61,328 (1984); *Cenergy Exploration Co.*, 29 FERC ¶ 61,329 (1984); *Champlin Petroleum Co.*, 29 FERC ¶ 61,325 (1984).

monthly rate charges; (3) to require its pipeline customers to designate discount volumes prior to the first working day of each month; (4) to exempt United from NGPA incremental pricing surcharges as to certain sales and (5) where United has less than full requirements supply contracts, to allow the monthly threshold volume to equal the total volume of the customer's actual specified requirements to the corresponding month of 1983 multiplied by the percentage that United had contracted to supply. On December 21, 1984, the Commission approved all of the amendments except for the exemption from the incremental pricing surcharge, which was dismissed without prejudice to United's refiling with supporting data. 29 FERC ¶ 61,331 (1984).

On July 23, 1984, the Commission issued *Columbia Gas Transmission Corp.*, 28 FERC ¶ 61,089 (1984), *order on requests for clarification and reh'g*, 28 FERC ¶ 61,221 (1984), authorizing a new incentive sales rate schedule that provided a discounted rate to Columbia's jurisdictional customers for system supply volumes exceeding the customers' projected requirements. The Commission concluded that the proposal was another initiative aimed at reversing a trend of declining gas sales by offering pipeline customers an economic incentive to increase their purchases. After modifying the service so that it could be implemented on a non-discriminatory basis, the Commission certificated it through October 1984.

On July 24, 1984, the Commission issued *TXP Operating Co.*, 28 FERC ¶ 61,189 (1984), authorizing a special marketing program. The Commission noted its satisfaction that the limitations imposed in the order would be sufficient to prevent severe erosion to various pipeline's core markets, while stimulating marginal market sales — thus benefiting all participants' customers through lower prices, increased contributions to fixed costs (through transportation revenues and load retention) and reduction of participants' take-or-pay liabilities attributable to current surplus deliverability.

On August 24, 1984, the Commission issued an order in *El Paso Natural Gas Co.*, 28 FERC ¶ 61,284 (1984), authorizing a special marketing program intended to offer El Paso's producer-suppliers the opportunity to negotiate directly with potential customers, including El Paso's existing customers, to supply them with gas that El Paso would release from existing contracts and then transport. As filed, El Paso anticipated that the program would: (1) assist renegotiation of purchase contracts with more flexible and market-oriented pricing terms; (2) reduce El Paso's potential take-or-pay exposure; (3) increase the amount of natural gas that El Paso's producer-suppliers are able to sell (and thus improve those producer's cash flows); (4) provide incentives for producer-suppliers to develop additional supplies of gas for the long term; (5) use El Paso's excess transmission capacity and generate transportation revenues for crediting to Account No. 191 and (6) reduce potential minimum bill charges to certain of El Paso's customers.

On September 18, 1984, the Commission issued an order in *Texas Gas Transmission Corp.*, 28 FERC ¶ 61,372 (1984), approving a settlement and thereby reversing an earlier order, 28 FERC ¶ 61,118 (1984). The proceeding began in August 1983 as a Texas Gas certificate application to serve an industrial customer via a special marketing program and was expanded in January 1984 to encompass a systemwide marketing program. The settlement had been filed in May 1984 to bring about a new marketing program through a change in the rate mechanism

under which Texas Gas performs certain transportation services. The settlement — outside the context of a normal NGA Section 4 rate case — assumed that \$4.5 million was representative of Texas Gas' revenues from the proposed transportation services and provided for a credit in that amount to customers, with Texas Gas retaining revenues from the hauls performed.

On September 26, 1984, the Commission issued a multi-docket order in *Tenneco Oil Co., et al.*, 28 FERC ¶ 61,383 (1984), that extended and revised a large number of previously-authorized special marketing programs. The Commission extended the programs through October 31, 1985, and expanded customer eligibility to permit firm sales customers to nominate up to 10% of such entitlement to be purchased for system supply. Distributors can only purchase special marketing program gas for "system supply", so that the resale of the gas to the distributor's customers is regulated by the relevant state utility regulatory body as to rates and curtailments. Such system supply purchases are without prejudice to the ability to purchase special marketing program gas for individual end-users or to act as agents or transporters for particular end-users. In view of the expansion of eligibility to firm customers, the Commission eliminated the WACOG standard but retained the requirement that no gas be released into a special marketing program unless the price was greater than the NGPA Section 109 maximum lawful price. The Commission did not change its general, fully-allocated-cost-of-service requirements concerning special marketing program transportation rates, but provided exceptions for where the pipeline can show: (1) that certain costs are not incurred in performing special marketing program transportation; (2) that some adjustment in the pipeline rate is necessary to make the gas marketable or (3) that the pipeline is willing to charge a rate based on less than fully-allocated costs, foregoing recovery of the difference. The Commission modified its reporting requirements and reduced the number of required status conferences from monthly to quarterly. The Commission also eliminated the condition that the pipeline treat gas transported on behalf of a distribution company, or an end-user served by a distribution company, as satisfying the minimum commodity obligations of that customer, since the Commission had addressed that concern (by eliminating variable costs from future minimum bills) in its Order Nos. 380, *et al.* series on minimum bills, discussed below. Finally, the Commission ordered all special marketing program certificate holders to file testimony demonstrating why their particular program was required by the public convenience and necessity, with the Staff and others permitted to file answering testimony. The Commission indicated its intent to use the information so developed to decide whether a particular program adversely affected any customers or suppliers.

On December 21, 1984, the Commission granted in part, and denied in part, rehearing of its multi-docket order. 29 FERC ¶ 61,334 (1984). The Commission clarified the subject of customer eligibility in part as follows: (1) that a distributor can purchase both for system supply and for qualifying end-users at the same time; (2) that the 10% rule, which is limited to the volume of gas released by the customer's pipeline, and which is to be computed under the pipeline's existing procedure for determining firm entitlements (whether monthly or annually) but which does not allow customers to defer contract entitlement volumes to peak months, remains unchanged and, under that rule, all classes of end-users stand to benefit from the

opportunity to purchase gas at market-clearing prices, thus expanding the range of alternatives available to pipeline customers and (3) that releasing pipelines providing transportation of special marketing program gas are required to provide firm transportation of nominations by their firm customers to the extent such service is requested and supply is available. The Commission reconfirmed its elimination of the WACOG standard and its continuation of the requirement that transporting pipelines charge rates based on a fully allocated cost of service. Finally, the Commission concluded that volumes sold up to 10% of a distributor's firm contract entitlements should be applied to satisfy the fixed cost portion of any minimum bill owed to the releasing pipeline. The Commission also concluded that a pipeline transporting such gas need not credit the special marketing program revenues to Account No. 191, but instead is entitled to retain such transportation revenues if its rates reflect representative levels of special marketing program transportation volumes (if they do not, the revenues must be credited to Account No. 191). The Commission pointed out that such special marketing program transactions displace only firm sales and therefore can be assumed already to have been included in the billing determinants used to design sales rates. By contrast, such transactions for interruptible end-users cannot be assumed to displace sales services.

On November 14, 1984, the Commission used an order in *Columbia Gas Transmission Corp.*, 29 FERC ¶ 61,168 (1984), authorizing a discount rate for Columbia's system supply as an adjunct to its incentive transportation program for off-system gas supplies. The discount rate for a segment of Columbia's gas was made available to all jurisdictional customers on a proportional basis. The Commission rejected Columbia's proposal to assign gas purchase costs directly to purchasing customers and instead required Columbia to account for the gas purchases on a rolled-in basis through its PGA.

E. Filing Fees

On August 31, 1984, the Commission issued its Order No. 395, *Fees Applicable to General Activities*, 49 *Red. Reg.* 35348 (1984). This final rule established fees for, among other things, requests for interpretations from the Office of the Chief Accountant, noting that such fees are authorized by the Independent Offices Appropriation Act of 1952 in order to make agencies self-sustaining to the extent possible.

On November 21, 1984, the Commission in its omnibus order in *Alabama-Tennessee Natural Gas Co., et al.*, 29 FERC ¶ 61,396 (1984), among other things interpreted its Order No. 361 on fees applicable to natural gas pipeline rate matters 49 *Fed. Reg.* 5083 (1984), *reh'g denied*, 27 FERC ¶ 61,113 (1984), which established a fee structure for various tariff filings and rate changes, to be applied to individual tariff filings, including sub-dockets. The Commission rejected a proposed interpretation of Order No. 361 limiting the application of fees to whole proceedings, rather than to the smaller sub-dockets of such proceedings. The Commission also emphasized that filings submitted without the fee will be considered deficient and will not be processed until a fee has been paid, absent severe economic hardship that is both alleged and proved.

F. Gas Research Institute

On September 28, 1984, the Commission issued Opinion No. 226, *Gas Research Institute*, 28 FERC ¶ 61,386 (1984), involving the application of the Gas Research Institute for advance approval of its 1985 research and development program and related five-year plan for 1985-89. The Commission approved: (1) a 1985 outlay budget of \$132,729,000; (2) a funding unit, as requested, of 12.5 mills (\$.0125) per Mcf (to be collected by jurisdictional pipeline members of the Gas Research Institute in 1985 without regard to purchased gas adjustment clause effective dates) and (3) a 1985-89 research and development plan.

G. "Hinshaw" Exemption from NGA Pipeline Regulation

On August 20, 1984, the Commission issued an order revoking a gas reseller's exemption under NGA Section 1(c) (the "Hinshaw" Amendment) from NGA regulation in *Commonwealth Gas Pipeline Corp.*, 28 FERC ¶ 61,223 (1984). Due to allegations by one of the reseller's customers that a regulatory gap existed as to the regulation of Commonwealth's sales, and because the state commission concerned had determined that it was precluded by state law from setting rates for Commonwealth's gas sold for resale, the Commission concluded that Commonwealth was no longer entitled to an exemption from NGA regulation. The Commission revoked Commonwealth's "Hinshaw" exemption, without prejudice to future restoration of such exempt status in the event Commonwealth's rates and service to its customers become subject to the regulatory jurisdiction of the state commission, and then directed Commonwealth to file an application under NGA Section 7(c) for certificate authority to continue its current jurisdictional operations. The Commission later granted rehearing and a stay of its August 20th order, except for the requirement that Commonwealth make the NGA Section 7(c) filing. 29 FERC ¶ 61,054 (1984).

H. Minimum Bills

On February 1, 1984, the Commission rejected a proposed settlement in *Transwestern Pipeline Co.*, 26 FERC ¶ 61,112 (1984), *reh'g denied*, 27 FERC ¶ 61,087 (1984). In the Commission's view, Transwestern and its customer, Northwest Central Pipeline Corporation had agreed to settle the minimum bill issue between them by enabling Northwest Central to avoid the total monthly commodity charge so long as it paid the fixed cost component of that charge and temporarily financed Transwestern's take-or-pay payments to producers. Because the settlement, by its terms, did not apply to a similarly situated customer, the Commission found it counterproductive to resolve the minimum bill issue and rejected the settlement.

On April 18, 1984, the Commission issued Opinion No. 202-A, *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,089 (1984), reversing Opinion No. 202, 25 FERC ¶ 61,460 (1983). In Opinion No. 202, the Commission decided that the Columbia and Consolidated Gas Supply Corporation LNG affiliates had complied with their tariffs in deferring invocation of their minimum bills for eight months after the 1980 Algerian LNG embargo, based on the finding that the "unable to deliver gas"

language in the minimum bill was unambiguous. On reconsideration, the Commission found sufficient ambiguity to allow consideration of extrinsic evidence. Noting that the risk of an Algerian supply interruption was paramount during the earlier LNG certificate proceedings before the Federal Power Commission, the Commission found that the minimum bill language was intended to be triggered by such an interruption and that the customers and ratepayers should not pay the full Cove Point, Maryland LNG terminal cost of service after June 30, 1980. Refunds were ordered for the difference, plus interest, between the amounts actually collected from July 1, 1980, to December 11, 1980 (when minimum billing had commenced), and the lesser amounts that would have been collected had the minimum bills been invoked earlier, on June 30, 1980. On July 12, 1984, the Commission issued Opinion No. 202-B, 28 FERC ¶ 61,053 (1984), and moved the date that the minimum bills should have been invoked further back to May 31, 1980, and ordered refunds accordingly, because base load LNG deliveries within the broad range of historic deliveries were not being made from the terminal during the April-June 1980 period.

On May 25, 1984, the Commission issued its Order No. 380, *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 49 Fed. Reg. 22778 (1984), eliminating variable costs from the minimum commodity charge portion of pipeline sales tariffs. See also 5 *Energy L.J.* at 224-25. The Commission found that the use of minimum commodity bills to recover variable costs was anticompetitive and could result in unjust and unreasonable rates and charges. The rule, effective July 31, 1984: (1) provided that currently-existing sales tariffs shall be inoperative to the extent they provide for recovery of purchased gas costs for gas not taken by the buyer; (2) stipulated that no tariffs filed in the future may provide for recovery of any variable costs associated with gas not taken by the buyer and (3) required purchased gas costs to be stated separately on pipeline sales tariff sheets. The Commission noted that the rule allowed certain gas distribution companies to pick and choose among their pipeline suppliers without incurring charges for gas they did not take. On July 30, 1984, the Commission issued Order No. 380-A, 49 Fed. Reg. 31259 (1984), clarifying that the pipeline tariff provisions to which the rule applies include minimum physical take provisions and staying the rule's effect with respect to such provisions until November 1, 1984. On October 24, 1984, the Commission issued both Order No. 380-B, 49 Fed. Reg. 43635 (1984), which dealt with several requests for rehearing of Order No. 380-A, and Order No. 380-C, 49 Fed. Reg. 43625 (1984), which, among other things, reaffirmed the applicability of the rule to minimum physical take provisions in pipeline rate schedules or tariffs. On December 21, 1984, the Commission issued Order 380-D, 29 FERC ¶ 61,332 (1984), denying requests for rehearing and stay of Order No. 380-C. The Commission again reaffirmed its decision to apply the minimum commodity bill ruling in Order No. 380-A to minimum physical take provisions. However, the Commission did clarify an incorrect statement made in Order No. 380-C regarding recovery of fixed costs associated with minimum take provisions in a general NGA Section 4 rate filing. The Commission pointed out that its prior orders only prohibited the recovery of variable costs under a pipeline's minimum take provisions and that the fixed cost component included in a selling pipeline's commodity rate still may be recovered by that seller for the number of units of gas specified in the minimum take provision.

On May 25, 1984, the Commission issued an order in *Colorado Interstate Gas Co.*, 27 FERC ¶ 61,315 (1984), *reh'g denied*, 28 FERC ¶ 61,083 (1984), involving a minimum commodity bill provision in Colorado Interstate's tariff for its sales to Natural Gas Pipeline Company of America. The minimum bill provided that Natural must pay the full commodity charge on a minimum of 90% of its contract quantity, regardless of the gas actually taken, with no makeup rights. Natural was the only customer subject to a minimum commodity bill and the Commission, finding the bill unjust and unreasonable as it stood, modified it (retroactively to the effective date of the rates in the docket) to recover the pipeline's fixed costs only.

On May 30, 1984, the Commission issued Opinion No. 222, *Southern Natural Gas Co.*, 27 FERC ¶ 61,322 (1984), which involved a dispute over the correct date for implementing the minimum bill provision in Southern Energy Company's (an affiliate of Southern Natural) tariff governing deliveries to Southern Natural of regasified Algerian LNG that had been delivered to Southern Energy's import facilities at Elba Island, Georgia. The tariff provided that the bill would be invoked whenever the LNG affiliate (Southern Energy) was unable to deliver gas to Southern Natural during any period exceeding one day. Consistent with the previous interpretation of identical language in the tariffs of Columbia LNG Corporation and Consolidated System LNG Company, discussed above, the Commission held that Southern's tariff was ambiguous and should be interpreted so that gas deliveries by the LNG affiliate to the pipeline at about the levels certificated by the Commission, and historically delivered (and not lesser levels), were required to forestall invocation of the minimum bill. The Commission concluded that Southern Energy should have invoked its minimum bill at Elba Island as of June 30, 1980. On August 22, 1984, the Commission clarified and modified its analysis by issuing Opinion No. 222-A, 28 FERC ¶ 61,240 (1984), in order, under the rationale of Opinion No. 202-B (*see above discussion*), to move the date that the minimum bill should have been invoked back still earlier, to June 10, 1980, with refunds accordingly.

On November 19, 1984, the Commission modified and approved a settlement waiving Tennessee's minimum bill provisions for 1982-83 in *Columbia Gas Transmission Corp. v. Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,203 (1984). The Commission removed from the settlement provisions providing for the flowed-through recovery by Tennessee's customers in their PGA filings of one-time, non-recoupable Tennessee take-or-pay obligations to producers. The Commission took that action because such payments might violate the NGPA maximum lawful price ceilings, an issue that the Commission noted it was reviewing elsewhere.

II. OFF-SYSTEM SALES

On February 28, 1984, the Commission issued Opinion No. 208, *Tennessee Gas Pipeline Co.*, 26 FERC ¶ 61,255 (1984), *reh'g denied*, 27 FERC ¶ 61,165 (1984), concerning two off-system sales by East Tennessee Natural Gas Company to Houston Lighting and Power and to Trans-Louisiana Gas Company. At issue was whether Tennessee and its affiliate, East Tennessee, performed an exchange or whether two separate services were involved. If two separate transportation services were involved, both pipelines would be obligated to charge their normal tariffs, with

the resulting revenues credited to their customers under Account No. 191. If classified as a no-fee exchange, however, the pipelines' customers would not receive such credits and the savings would be used to reduce the amounts paid by Houston Lighting and by Trans-Louisiana. The Commission concluded that the transaction was not an exchange, noting that central to the exchange concept are mutual benefits to the pipelines involved and that neither of these two affiliated systems appeared to receive a benefit.

On April 6, 1984, the Commission issued *Texas Gas Transmission Corp.*, 27 FERC ¶ 61,034 (1984), addressing Texas Gas' request to make some 15 Bcf annually of short-term, off-system direct sales in the market area of Cincinnati Gas & Electric Company. As to the claim that such Texas Gas sales would displace sales by Cincinnati Gas, the Commission conditioned the certificate to limit Texas Gas' sales to the amounts necessary to meet only those energy requirements that would otherwise use fuel oil. Rejecting Texas Gas' request to retain all revenue from these sales, the Commission required revenues in excess of one cent per Mcf (as representative of out-of-pocket costs) to be credited to Texas Gas' Account No. 191 for its customers' benefit. The Commission also rejected Texas Gas' request for an added incentive charge of up to 5¢ per Mcf, noting that such AIC authority is limited to transportation services and does not reach off-system sales.

On May 11, 1984, the Commission affirmed an earlier initial decision and authorized Natural to make off-system sales at a price equal to the commodity portion of the pipeline's DMQ-1 rate schedule, plus the applicable Gas Research Institute surcharge for a 365-day period. *Natural Gas Pipeline Company of America*, 27 FERC ¶ 61,235 (1984). Although the rate was contrary to the *Statement Of Policy For Off-System Sales*, 23 FERC ¶ 61,140 (1983) (*see 5 Energy L.J.* at 227), which required the use of the higher of the selling pipeline's system average load factor rate or its average NGPA Section 102 gas acquisition cost. The Commission nevertheless was persuaded that Natural had demonstrated a net benefit of existing customers by advancing a compensatory and non-discriminatory scheme. On rehearing, 28 FERC ¶ 61,174 (1984), the Commission: (1) denied Natural's objection to crediting its off-system sales revenues to Account No. 191; (2) removed the requirement that Natural collect a 1.25¢ per Mcf Gas Research Institute surcharge from two pipelines that already collected it themselves; (3) confirmed a net economic benefit to Natural's on-system customers for the one-year period for which the sales were authorized and (4) disagreed that unfair competitive impacts would occur as a result of Natural's off-system sales.

J. Pipeline Purchasing Practices (NGA)

On February 17, 1984, the Commission issued Order No. 349-B, 26 FERC ¶ 61,216 (1984), revising the standard format PGA filing set out in its previous order, to adopt separate reported subcategories of NGPA Section 107 gas and a shorter list of separate reported subcategories of NGPA Section 102 gas. Also, the number of separate reported subcategories of NGPA Section 104 gas was reduced.

On February 23, 1984, in *KN Energy, Inc.*, 26 FERC ¶ 61,232 (1984), the Commission allowed a pipeline to pass through to its customers amounts in Account No. 191 related to revalued company-owned production over a 31-month

amortization period in order to reduce the cost of gas to the pipeline's customers, but required that carrying charges collected by the pipeline be computed as though the entire amount were amortized over a 12-month (and not a 31-month) period.

On June 1, 1984, the Commission issued Opinion No. 223, *Panhandle Eastern Pipe Line Co.*, 27 FERC ¶ 61,345 (1984), concerning the issue of the extent of carrying charges Panhandle should be allowed to recover on the deferred account balance in its Account No. 191 for unrecovered purchased gas costs if the Commission allowed Panhandle to amortize the balance over 39 months. Because the record showed that the carrying charges were not properly incurred, the Commission concluded that Panhandle had no legal authority to recover all the carrying charges for the full 39-month period and therefore affirmed an earlier initial decision that adequately balanced the interests of consumers against those of the company's shareholders by allowing Panhandle to collect the carrying charges only for the first 12 months of the 39-month period.

K. *Rate of Return*

On February 1, 1984, the Commission issued Opinion No. 190-A, *Tennessee Gas Pipeline Corp.*, 26 FERC ¶ 61,109 (1984), affirming Opinion No. 190, 25 FERC ¶ 61,020 (1983); which had granted the pipeline a 15.95% equity return. On rehearing, the Commission stated that its discounted cash flow analysis had shown that Tennessee had lower risk than its parent, Tenneco, Inc., and affirmed the 15.95% equity return to be allowed Tennessee as providing a premium over both the average yield on U.S. Treasury bonds and the average yield on Tenneco's debentures and notes during the rate period involved (November 1980-May 1982).

In Opinion No. 210, the Commission determined a pipeline's equity return for the August 1981-March 1984 period. *Distrigas of Massachusetts Corp.*, 26 FERC ¶ 61,256 (1984). The Commission concluded, based on the operating experience of other LNG import projects, that Distrigas' increased business risk since the start of its operations was offset both by a decrease in its capital market costs of debt and by a cost of equity that decreased with the cost of all money. The Commission therefore selected Distrigas' last allowed rate of return of 16.50% (*see* 5 Energy L.J. at 227-28).

In Opinion No. 196-A, *Alabama-Tennessee Natural Gas Co.*, 27 FERC ¶ 61,006 (1984), modifying in part its Opinion No. 196, 25 FERC ¶ 61,151 (1984) (*see* 5 Energy L.J. at 228), the Commission accepted certain tariff sheets and corrected its own ministerial error as to the extent of the locked-in period covered by the Opinion No. 196 rates, which had set an 11.00% equity return for an April 1980-May 1983 38-month period (the correct period was the 36 months from April 1980 through March 1983). The Commission also noted that a reduction in the restated base tariff rate was necessary in the next rate case for the two months by which the locked-in period had been reduced, with appropriate funds. On June 22, 1984, the Commission issued Opinion No. 196-B, 27 FERC ¶ 61,452 (1984), noting that such a restated base tariff rate, filed under the Commission's PGA regulations, does not involve a request for an increased rate level under NGA Section 4. The Commission denied the pipeline's request for a surcharge to collect any amount above the base tariff rate for that two-month period in that next rate case.

In Opinion No. 214, the Commission affirmed a 14.00% equity return for the June 1982-June 1984 period. *Mountain Fuel Resources, Inc.* 27 FERC ¶ 61,171 (1984),

reh'g denied, 28 FERC ¶ 61,195 (1984). The Commission refused to adopt the rate of return recommendations of either the Staff or Mountain Fuel, noting that the appropriate information was not in the record and that the analyses employed by the participants were not adequate. The Commission stated that its refusal was consistent with its general practice to retain currently-approved rates of return unless a participant successfully had justified a different rate of return.

L. Take-or-Pay-Provisions

On April 17, 1984, the Commission approved a four-year settlement in *Northern Natural Gas Co.*, 27 FERC ¶ 61,085 (1984), between Northern and an affiliated Canadian supplier that reduced Northern's take-or-pay obligations and waived about \$226 million (Canadian) in potential take-or-pay liabilities in return for a \$29 million (U.S.) payment. The Commission approved Northern's payment as an acceptable short-term solution to Northern's marketing difficulties, recognizing that Canadian gas may represent a significant future supply. The Commission denied rehearing on the issue of according PGA treatment to Northern's settlement payments, agreeing with Northern that the payments are a present, cheaper substitute for what otherwise would be a much higher cost of purchasing Canadian gas. 28 FERC ¶ 61,024 (1984).

In *Northwest Central Pipeline Corp.*, 27 FERC ¶ 61,124 (1984), the Commission considered Northwest Central's proposal to suspend its semi-annual PGA filings for 18 months and use a portion of the credit balances accrued in its Account No. 191 to finance its take-or-pay obligations to producers. The Commission noted that the proposal, for an 18-month period, effectively would add carrying costs on take-or-pay payments to amounts that may be tracked, dollar for dollar, as purchased gas costs. Customers argued that the pipeline's incentive to reduce its take-or-pay liabilities with its producer-suppliers would be reduced. The Commission rejected Northwest Central's proposal due to its general belief that pipelines should bear the risk of recovering carrying charges associated with take-or-pay payments and that the PGA clause is not the appropriate mechanism for recovery of such costs.

M. Taxes/Depreciation

In Opinion No. 190-A, *Tennessee Gas Pipeline Corp.*, 26 FERC ¶ 61,109 (1984), the Commission increased the offshore depreciation rate from 7.50% to 8.30% in one of the dockets involved in light of the expressed Congressional intent in NGA Section 9 (granting the Commission authority to examine depreciation rates) that pipeline depreciation rates be adequate and the Commission's view that uncertainty of future long-term gas supplies should be reflected primarily in depreciation rates, rather than in rate of return. The Commission also noted that NGA Section 9 does not preclude or limit Commission review of depreciation rates under its general NGA Section 4 authority.

N. Transportation for Non-Owner Shippers

On December 24, 1984, the Commission issued a Notice of Inquiry in *Interstate Transportation of Gas for Others*, Docket No. RM85-1-000 (Phase I), 50 Fed. Reg. 114

(1985), that focuses on its regulation of the transportation of natural gas in interstate commerce on behalf of non-owner shippers (that is, shippers seeking transportation on a pipeline system in which they do not have an ownership interest). The Commission requested proposals for a cohesive regulatory scheme, suitable to the needs of a more competitive gas industry, to govern all interstate transportation of gas and also sought reviews of all aspects of the Commission's present programs under which interstate pipeline carriage is provided for non-owner shippers. The Commission broke down the latter request into four broad areas: (1) reassessment of eligibility criteria for the programs; (2) appropriate rate treatment for transportation actions and revenues; (3) review of Commission policies towards "core market" competition and protection (including the basic tensions between those who benefit from being able to obtain lower prices and greater flexibility and those who fear that they will face mounting unit fixed costs) and (4) review of issues relating to mandated carriage of gas for non-owner shippers. The Commission also stated that this transportation inquiry was but one of three inquiries to be conducted in 1985. The other two inquiries, which issued together on January 18, 1985, in *Natural Gas Pipeline Ratemaking, Risk, And Financial Implications After Partial Wellhead Decontrol*, Docket No. RM85-1-000 (Phase's II and III), 50 *Fed. Reg.* 3801 (1985), deal with rate structures and design and with the financial implications for regulated pipelines (for example, business risks and rates of return) of the transition towards competitive wellhead pricing.

O. Uniform Systems of Accounts

On August 3, 1984, the Commission issued Order No. 390, 49 *Fed. Reg.* 32496 (1984), reorganizing the Uniform Systems of Accounts to eliminate separate accounting systems for large and small regulated companies and to change the nomenclature for referring to regulated companies from "Class A and Class B" and from "Class C and Class D" to major and to nonmajor, respectively. The Commission also amended its Uniform Systems to recognize recent changes in the application to regulated companies of Generally Accepted Accounting Principles, established by the Financial Accounting Standards Board, noting that the Uniform Systems generally only differ from the standards announced by the FASB in order to reflect special ratemaking considerations.

P. Unpaid Accruals in PGA Filings

On January 23, 1984, the Commission issued an order to show cause and setting matters for hearing in *United Gas Pipe Line Co.*, 26 FERC ¶ 61,083 (1984). The Commission noted that its Office of the Chief Accountant and its Office of Pipeline and Producer Regulation had concluded in 1980 that United had included unpaid or unpayable amounts in its PGA filings and that such inclusions may have violated the NGA, Commission rules, regulations and orders issued thereunder and United's PGA tariff. The Commission defined unpaid accruals as including, but not limited to, estimated or anticipated unpaid amounts and estimated or anticipated unpayable amounts that may never be paid by the pipeline or that may be due at some unspecified future time or, finally, known and measurable amounts that are

not paid for some reason. After an investigation by its Division of Enforcement, the Commission, while specifically taking no position and neither making findings of fact nor reaching conclusions of law, declared that it appeared that by the inclusion of unpaid accruals in its PGA calculations, filings and rates, United may have violated NGA Sections 4 and 8, related Commission rules, regulations and orders and United's PGA tariff. The Commission then set a consolidated hearing to examine the subject in all of United's PGA filings from 1972 to the present.

Q. Use of Estimates

On February 28, 1984, the Commission determined, pursuant to Section 154.63(f), Statement E, of the Commission's regulations, that the allowance in a rate filing for prepayments under take-or-pay clauses in a pipeline's contracts with producers must be based on the average of 13 monthly balances for a 13-month period ending no later than the end of the nine-month adjustment period. *Northwest Central Pipeline Corp.*, 26 FERC ¶ 61,247 (1984). Northwest Central had asserted the appropriateness of its filed tariff sheets reflecting such prepayments based upon an end-of-test-period, estimated approach. Citing other authorities, the Commission declared its consistent requirement to the contrary that rates being collected subject to refund, pending a hearing, reflect only the average test period prepayment balances.

In *Northern Natural Gas Co.*, 27 FERC ¶ 61,031 (1984), the Commission affirmed Northern's use of a PGA sales estimate for 1982 that assumed no off-system sales. Northern later had recorded substantial off-system sales and certain state commissions had argued that a more appropriate estimate of such sales be reflected in the PGA. The Commission rejected the argument, stating that the reasonableness of a sales estimate is to be determined at the time the estimate is made. On rehearing, although the Commission acknowledged that the record might be updated where a gross inequity otherwise would result, it concluded that an underestimate of only 12 Bcf of off-system sales, given the unavoidable imprecision in a case of this type, could not be said to cause such inequitable results. 28 FERC ¶ 61,011 (1984).

III. COURT ACTION ON PIPELINE ISSUES

A. Authority To Suspend Initial Rates

In *Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984), the Court, noting the similarity between the pertinent provisions of the Federal Power Act and the NGA, held that the Commission lacks authority under the Federal Power Act to suspend electric utility initial rate schedules for the sale of electricity. The Commission, in Order No. 303, 23 FERC ¶ 61,278 (1983), reversing its prior policy, had interpreted its suspension power under Federal Power Act Section 205 and NGA Section 4 to apply to initial rate filings as well as to changes in rates. *See 5 Energy L.J.* at 227. The Court emphasized that its holding was confined to that portion of the Commission's Order No. 303 interpreting the Federal Power Act. The Court expressed no opinion as to Order No. 303's interpretation of the Commission's

Natural Gas Act suspension power. The Court also noted that on June 1, 1984, the same panel had dismissed the petition for review in *Tennessee Gas Pipeline Co. v. FERC*, 736 F.2d 747 (D.C. Cir. 1984), because the application of the Commission's NGA Interpretation rule remained hypothetical as to Tennessee, and hence was nonreviewable.

B. Civil Penalties Assessed By The Commission

In *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (10th Cir. 1984), the Court reversed a Commission order seeking to impose liability on Southern Union by requiring it to pay higher emergency rates retroactively to two producers for certain extra gas sold to it by the producers without prior Commission approval and in violation of the NGA. The Commission referred the matter to the U.S. Attorney General for possible criminal action (the Attorney General did not act on the matter). The Court found that the NGA provided no other authority to the Commission to assess civil penalties or remedies and, thus, the Commission's orders were set aside.

C. Curtailment Plan Compensation Schemes

In *Fort Pierce Utility Authority v. FERC*, 724 F.2d 1167 (5th Cir. 1984), the Court remanded to the Commission the issue of whether certain Florida Gas Transmission Company customers, which had received less gas than they would have received absent a Commission award of extraordinary relief to certain other customers, were entitled to compensation. Rejecting the position that either the NGA or the NGPA requires compensation to avoid undue discrimination, the Court nevertheless held that the Commission should determine whether compensation was necessary to insure the justness and reasonableness of a particular curtailment plan once the Commission's end-use objectives had been achieved. In the Court's view, absent proof that a compensation plan would impede significantly the desired end-use of gas by financially burdening high-priority users, the Commission could not reject compensation as inconsistent with end-use curtailment as a matter of policy. Noting the Commission's longstanding reluctance to consider compensation plans, the Court remanded the case, directing the Commission to consider, on the merits, whether compensation should be awarded to certain customers to remedy any financial inequity resulting from the emergency relief to others. On July 16, 1984, the Court denied rehearing 736 F.2d 214 (5th Cir. 1984), declaring that its requirement of proof that compensation significantly would impede the desired end-use of natural gas requires no more than a Commission articulation of some specific inconsistency between compensation and end-use curtailment before denying compensation. The Court also noted that its remand was neither a directive to the Commission to order compensation in this case nor an impingement on the Commission's discretion.

In *Mississippi Power & Light Co. v. FERC*, 724 F.2d 1197 (5th Cir. 1984), the Court, relying on its holding in *Fort Pierce*, discussed above, remanded the issue of whether and how a compensation provision should be included in a permanent settlement curtailment plan for United Gas Pipe Line Company. The Court

declared erroneous the Commission's view that compensation schemes thwart the policies of end-use curtailments, citing *Fort Pierce*. The Court also determined that the Commission's conclusion that compensation was unnecessary given the current gas surplus was specious and could not justify a Commission refusal to consider compensation as part of a curtailment plan. Finally, the Court emphasized that it did not imply that a compensation scheme was required either in United's, or in any pipeline's curtailment plan.

In *North Carolina v. FERC*, 730 F.2d 790 (D.C. Cir. 1984), the Court denied the State of North Carolina's petition for review of a Commission order approving a settlement compensating pipeline customers that had been curtailed under various Transcontinental Gas Pipe Line Company curtailment plans. The Commission's order had denied two of three proposed compensation schemes. North Carolina challenged those denials, but not the Commission's action as to the third compensation scheme. The Court denied North Carolina's challenge, reasoning that the Commission's order was a unitary one and not to be severed in that fashion.

D. NGA Rate Case Settlement Procedures

In *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984), the Court affirmed Commission orders approving a United Gas Pipe Line Company rate case settlement. The Commission had approved the settlement as to all parties but one customer, which had objected that the settlement be conditioned on the severance and reservation of one issue (as to the treatment of United's corporate income tax). The Commission then had remanded the settlement for a full administrative hearing as to all aspects of United's rates for that one customer. On appeal, the customer challenged the legality of the Commission's action both under the NGA and for pressuring pipeline customers to drop objections to settlement by threatening to require them to undergo expensive, full-blown rate proceedings. Rejecting the challenge, the Court approved the Commission's action as consistent with its broad authority under Commission settlement regulations. Affirming the Commission's orders, the Court found the Commission's action to be consistent with judicial precedent and to serve policies encouraging settlements and enabling dissenting parties to preserve their objections.

E. Offsystem Sales

In *Peoples Gas Light 9 Coke Co. v. FERC*, 742 F.2d 1109 (7th Cir. 1984), the Court vacated the Commission's setting of a rate for certain emergency sales by Natural Gas Pipeline Company of America. Natural had no rate on file that related to such sales and the Commission had prescribed the use of Natural's lowest filed rate. The Court held that, while the use of such a rate may be proper, the Commission had not articulated the critical facts upon which it had relied in requiring the rate to be used. Thus the Court remanded the case for further Commission proceedings.

F. PGA Restatements

In *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984), the Court affirmed the Commission's determination that certain refunds to Florida Gas' sales

and transportation customers, due as a result of a restated base tariff rate, would be made. The Commission had found that the 36-month rate review requirement under its PGA regulations was designed to assure an overall balance among all the pipeline's costs, including costs associated with transportation rates. Thus the transportation customers, as well as the sales customers, were entitled to refunds for collections made in excess of such costs.

G. Rate Base

In *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), the Court refused to permit the Commission to reduce Distrigas' rate base by the amount of the firm's deferred tax liabilities (\$4.6 million) and ordered the Commission to reconsider its decision that Distrigas share with its customers revenues it obtained from providing cool-down services to LNG tankers. The Court also upheld the Commission as to: (1) the deduction of sums from Distrigas' balance sheet that represented loans to Distrigas' parent company in exchange for demand notes; (2) allowing Distrigas a working capital allowance based on only five days', rather than 45 days', worth of adjusted annual expenses; (3) the exclusion of prepaid insurance premiums in the calculation of the need for working capital and (4) the use of later, actual sales figures instead of earlier, lower sales estimates.

H. Refund Obligation

In *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), the Court held unlawful the Commission's refund calculation for Distrigas under NGA Section 4. Noting that the refund was supposed to represent the amount by which Distrigas had overcharged its eleven distributor customers between July 1979 and August 1981, the Court agreed with Distrigas that the Commission had acted arbitrarily in carving-up the 25-month locked-in period into three separate sub-periods and calculating refunds separately for each (while ignoring the fact that in the first sub-period the new rates brought Distrigas fewer revenues than the old rates would have done). In vacating and remanding the case to the Commission, the Court referred both: (1) to its reasoning in *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208, treated above, that a pipeline's pre-existing, lawful rate provides a refund floor in an NGA Section 4 proceeding and (2) to the fact that the Commission had not justified any departure from that same rule as stated by the U.S. Supreme Court in *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

I. Retroactive Refunds and PGA Clauses

In *Arkansas Louisiana Gas Co. v. FERC*, 737 F.2d 1206 (D.C. Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3405 (U.S. November 5, 1984) (No. 84-716), the Court, without opinion, denied a petition for review of Commission orders requiring Arkla to refund excess rate charges to its customers. An unreported memorandum accompanying the Court's decision (which may not be cited in briefs or memoranda of counsel as precedent under the Court's Local Rule 8(f)), found no fault either

with the Commission's conclusion that Arkla's rates were unreasonable or with its order that refunds should be made retroactive to certain baseline 1977 filed rates, rather than to those rates as adjusted by Arkla's subsequent PGA filings. The Court agreed with the Commission that the interim, streamlined, post-1977 PGA filings did not establish a new base rate below which refunds might not be ordered, because PGA rates are not subject to full Commission review until the pipeline's triennial filing under the Commission's PGA regulations. The Court also noted that in promulgating the PGA clause the Commission gave up none of its authority to review the entire rate structure of a pipeline every three years and that while purchased gas costs may go up, other costs may go down.

J. Revenue Crediting

In *Midwestern Gas Transmission Co. v. FERC*, 734 F.2d 828 (D.C. Cir. 1984), the Court affirmed two Commission orders that required Midwestern to credit to its customers through Account No. 191 certain revenues received for performing self-implementing, pipeline-for-pipeline, short term transportation under Commission Order No. 60, 44 *Fed. Reg.* 68819 (1979). The Court held that Midwestern had waived any right to argue for retention of such revenues because it had accepted, without objection, the blanket Order No. 60 certificate that contained the crediting condition. The Court also upheld as appropriate the Commission's distinction between sales and transportation revenues, rejecting Midwestern's argument that, since its sales volumes fell below representative levels used in billing determinants for establishing rates, it was entitled to retain the transportation revenues.

K. Rolled-in Pricing

In *Laclede Gas Co. v. FERC*, 722 F.2d 272 (5th Cir. 1984), the Court affirmed the Commission's earlier approval of United's rolled-in pricing methodology to distribute the costs of certain NGPA Sections 311-12 gas among its customers. *See* 5 *Energy L.J.* at 235. The Court noted that the Commission traditionally has endorsed the practice of rolled-in pricing unless it would lead to an unfair result.

IV. COMMISSION ACTION ON NGPA ISSUES

A. Btu Measurement

On January 19, 1984, the Commission, implementing the decision in *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983, *cert denied*, 104 S. Ct. 1616 (1984); *see* 5 *Energy L.J.* at 237), issued its Order No. 356, *Interpretative Rule For Btu Measurement Standard Under The Natural Gas Policy Act of 1978*, 49 *Fed. Reg.* 29946 (1984), concerning the quantity of heat energy involved in an NGPA first sale. The rule provided that the Btu content of gas under standard test conditions (that is, saturated with water vapor at 60 degrees Fahrenheit, at a pressure of 14.73 p.s.i.a., and regardless of the actual delivery conditions) was the measure to be used for NGPA first sale pricing purposes. Also on January 19, 1984, the Commission issued

a notice of inquiry to obtain public comments on procedures for monitoring and passing through producer refunds of pipeline overpayments for Btu content. *Refunds Resulting From Btu Measurement Adjustments*, 49 *Fed. Reg.* 3198 (1984). On May 3, 1984, the Commission issued an interim rule, 49 *Fed. Reg.* 19293 (1984), requiring gas producers to refund to pipelines the overcharges resulting from Btu measurement adjustments within six months (or within one year for small producers). Producers and pipelines might choose either a lump-sum cash payment or billing adjustments over the refund period. Interstate pipelines, however, because the refund liability accrued over a five-year period and the refund amounts are very large, in turn must pass the refunds through to those customers actually overcharged after December 1, 1978, in a lump-sum cash payment. On September 20, 1984, the Commission issued its Order 399, 49 *Fed. Reg.* 37735 (1984), generally following its interim rule, prohibiting offsets of the producer-to-pipeline refunds (due on November 5, 1984, and, for small producers, on May 3, 1985) with production-related costs permitted under NGPA Section 110 (see discussion below) and requiring, subject to Office of Management and Budget clearance, refund reports from interstate and intrastate pipelines describing those refunds received and those still outstanding. On November 20, 1984, with Order No. 399-A, 49 *Fed. Reg.* 49284 (1984), the Commission on rehearing required the offsetting of the Btu refunds with NGPA Section 110 production-related costs and allowed first sellers to request a waiver of a portion of the refund corpus in certain circumstances.

B. Deregulation of Certain Well-Head Prices

On November 16, 1984, the Commission issued Order No. 406, 49 *Fed. Reg.* 46874 (1984), approving a final rule amending its regulations governing deregulation of certain NGPA well-head prices on January 1, 1985. With respect to gas qualifying both for a maximum lawful ceiling price and for deregulation, the Commission determined that such gas shall be deregulated under NGPA Section 121. The Commission also ruled that producers must file for well-category determinations with the jurisdictional agencies in order to qualify for deregulated pricing of NGPA Sections 102 and 103 gas after January 1, 1985. On December 21, 1984, the Commission granted in part and denied in part various applications for rehearing of Order No. 406. 49 *Fed. Reg.* 50637 (1984). The Commission denied rehearing on the dual qualification gas issue. The Commission also amended its regulations to make plain that, while under NGPA Section 121(a)(3) all intrastate gas subject to existing, successor and rollover contracts is deregulated if the price on December 31, 1984, was over \$1.00 per MMBtu, the operation of indefinite price escalation clauses in contracts governing such deregulated, NGPA Section 105 intrastate gas is subject to the limitation imposed by NPA Section 121(e): that is, the operation of indefinite price escalator clauses in an existing, or in a successor to an existing, intrastate contract is limited by the NGPA Section 105(b)(3)(A) pricing cap.

C. NGPA Section 110 Production-Related Costs

On June 22, 1984, the Commission treated the narrow issue of whether the seller in an NGPA first sale may charge an NGPA Section 110(a)(2)

production-related cost allowance in addition to the minimum rate established by the Commission's rules under NGPA Section 104, notwithstanding the seller's lack of contractual authority to charge a total price greater than the minimum rate. *Dorchester Gas Producing Co. v. Natural Gas Pipeline Co. of America*, 27 FERC ¶ 61,455 (1984). The Commission held that production-related cost allowances may not be added to such minimum rates, absent a specific finding under the U.S. Supreme Court's *Mobile-Sierra* doctrine, (350 U.S. 332 & 348 (1950)) that such rates are so low as not to be in the public interest.

On November 1, 1984, the Commission in *Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,142 (1984), and in *Texas Eastern Transmission Corp.*, 29 FERC ¶ 61,143 (1984), dismissed various motions in those PGA dockets seeking denial of flow-through of NGPA Section 110 production-related costs on the ground that such costs are not incurred for the purchase of gas and, thus, are not to be flowed-through automatically in PGA proceedings under NGPA Section 601(c)(2). The Commission held to the contrary that those production-related costs are components of first sale prices and, therefore, are entitled to flow-through treatment.

On December 19, 1984, the Commission issued Order No. 407, *Collection of NGPA Section 110 Allowances After January 1, 1985*, 49 Fed. Reg. 49623 (1984), amending its NGPA Section 110 regulations that allow a first seller to recover certain costs for production-related activities. The Commission updated the years that govern cost-of-service data employed to compute the amounts to be recovered. The Commission had provided in Order No. 94-A, 48 Fed. Reg. 51521 (1983), that company-specific allowances for certain production-related activities (treatment, purification, liquefaction and conditioning services) be based on unit amounts developed from annual cost of service calculations for 1983-84 and that those annual costs would be applied until January 1, 1985, or until otherwise changed by the Commission. See 5 Energy L.J. at 232. Order No. 407, effective January 1, 1985, adopted in its entirety an earlier proposed rule updating the cost of service approach by permitting use of each seller's current cost data and replacing references to the 1983-84 years with the year 1985 and each calendar year thereafter.

D. Pipeline-Owned Production

In *El Paso Natural Gas Co.*, 26 FERC ¶ 61,016 (1984), *reh'g denied*, 26 FERC ¶ 61,326 (1984), the Commission ruled that El Paso, absent any explicit reservation to reprice, was precluded from retroactively repricing any company-owned production for certain past periods by operation of the terms of Commission-approved settlements in various NGA Section 4 rate cases. The Commission rejected El Paso's contention that a settlement agreement's description of the then effective pipeline production rule, standing alone, demonstrated an intent to allow El Paso to surcharge for the full NGPA price, irrespective of the settlement's pricing formula.

In *National Fuel Gas Supply Corp.*, 26 FERC ¶ 61,105 (1984), the Commission denied a request to collect retroactive surcharges for the November 1978-May 1982 period to reprice up to NGPA prices National Fuel's company-owned production from wells that had not qualified for NGPA prices under Part 273 of the regulations.

National Fuel had requested waiver of Part 273 because it asserted that it had no reason to believe filings were required under earlier regulations. On rehearing, the Commission concluded that National Fuel had not preserved its right to reprice its pipeline production from a cost-of-service basis to an NGPA basis for the period involved. 27 FERC ¶ 61,111 (1984); *reh'g denied*, 28 FERC ¶ 61,012 (1984).

Order No. 363, *Rule Required Under Section 202 of the Natural Gas Policy Act*, 49 Fed. Reg. 12207 (1984), revoked the Phase II incremental pricing regulations. In substituting the new rule the Commission effectively limited the scope of the Phase II incremental pricing program to boiler fuel uses already covered by Phase I and not to any other industrial uses of natural gas.

Order No. 391, *Production Under Section 2(21) of the Natural Gas Policy Act of 1978*, 49 Fed. Reg. 33849 (1984), implemented the U.S. Supreme Court's decision in *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983); *see 5 Energy L.J.* at 236. The Commission included within the definition of a NGPA Section 2(21) first sale the intracompany transfer of gas, produced by a pipeline's production divisional unit, to the pipeline's transmission divisional unit, defining that transfer as one that occurs at the wellhead. The rule became effective September 26, 1984.

E. Pipeline Purchasing Practices (NGPA)

In *Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,036 (1984), the Commission concluded that the merits of both the fraud and abuse and the prudence issues in a given PGA case should, in general, be considered therein (that is, the prudence issue should not be reserved for a NGA Section 4 or 5 case), with the exception that PGA proceedings, focused on the propriety of pipeline purchased gas costs, should not be expanded to consider remedies involving rate design. In Opinion No. 204-A, *Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,334 (1984), noting that no party had challenged its definition of "fraud" or "similar grounds" and reaffirming the "abuse" standard set forth in Opinion No. 204, *see 5 Energy L.J.* at 219-20, which was that a pipeline's conduct is abusive where such conduct: (1) evidences reckless disregard for the fundamental duty to provide service at the lowest reasonable rate consistent with the maintenance of adequate service and (2) has a significant, adverse effect on customers or consumers. *See also* Statement of Commissioner Hughes to Opinion No. 204-A, 27 FERC ¶ 61,475 (1984).

F. Refunds

On August 23, 1984, the Commission issued a notice of proposed rulemaking and a request for comments on a policy statement in *Obligations Of Sellers And Purchasers Of First-Sale Natural Gas For Refunds Owed For Collections In Excess Of Maximum Lawful Prices Under The Natural Gas Policy Act Of 1978*, 49 Fed. Reg. 34233 (1984). The Commission was concerned that gas purchasers under the NGPA should make diligent and prudent efforts to insure the passthrough to consumers of refunds related to collections in excess of NGPA maximum lawful prices. The Commission also proposed to amend its regulations on interim collection refunds to allow purchasers to make billing adjustments to effect such required interim collection and to require interstate pipelines to file reports with their PGA filings identifying billing adjustments they have made to recover refunds owed by sellers.

In *Amoco Production Co.*, 28 FERC § 61,322 (1984), the Commission denied Amoco's request for an order stating that the interest rate on refunds established by Commission Order No. 47 involving the use of the prime interest rate did not apply to certain producer refunds under the NGPA. The Commission did permit Amoco, however, to apply for adjustment relief under NGPA Section 502(c) to the extent it could show that the use of an interest rate other than the prime rate was necessary to prevent special hardship, inequity or unfair distribution of burdens.

G. System Supply Test

On May 9, 1984, the Commission issued orders in *East Tennessee Natural Gas Co.*, 27 FERC ¶ 61,229 (1984), and in *Texaco, Inc.*, 27 FERC ¶ 61,247 (1984), respecting the requirement that, in certain NGPA transportations by both interstate and intrastate pipelines, the gas be delivered for the recipient's system supply for resale. The Commission rejected its previous view that the system supply test required that the purchaser have more than one customer. Instead it reaffirmed the system supply test articulated in *Natural Gas Pipe Line Company of America*, 20 FERC ¶ 61,128 (1982), and clarified that pipeline purchasers in an off-system sale can meet the test even if they have only one resale customer. The Commission stated that the more-than-one-customer rule was inconsistent with its recent policies directed at current market conditions of oversupply, in which curtailments are unlikely.

V. COURT ACTIONS ON NGPA ISSUES

A. Commission Authority Over Producer Refunds

In *FERC v. Triton Oil & Gas Corp.*, 750 F.2d 113 (D.C. Cir. 1984), the Court affirmed a U.S. District Court judgment that the appropriate interest rate to be applied to certain refund obligations incurred by Triton under the refund requirements of FPC Opinion No. 598, 46 F.P.C. 86 (1971), was a 7% interest rate and not the Commission's general, higher fluctuating prime rate of interest set subsequent to Opinion No. 598 (and currently set forth at Section 154.102(c)(2) of the regulations). The Court had decided in 1983 that Triton was subject to the Opinion No. 598 refund obligations for the October 1968 to January 1971 period. *FERC v. Triton Oil & Gas Corp.*, 712 F.2d 1450 (D.C. Cir. 1983); see 5 *Energy L.J.* at 237-38. The case was remanded to the District Court to give Triton the opportunity to present any further defenses. Triton waived that opportunity and proposed to make refunds at the 7% rate, but the Commission objected. The District Court then ordered the 7% rate, noting that the Commission's updating of interest rates for refunds for years since Opinion No. 598 expressly had excepted those cases where there was a final, non-appealable Commission order directing the disbursement of refunds under Opinion No. 598 (which was the case for Triton). Rejecting the Commission's argument that its equitable powers and refund discretion allowed it to prescribe the current, higher interest rate, the Court of Appeals declared that the Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case and confirmed that Triton was required to make refunds at the 7% simple interest rate specified in Opinion No. 598.

B. Jurisdictional Effects of NGPA Section 311(a) Transportation

In *Transwestern Pipeline Co. v. FERC*, 747 F.2d 781 (D.C. Cir. 1984), the Court dismissed the petition for review for the lack of an aggrieved party. The Court nevertheless interpreted the Commission order under review as holding that NGPA Section 311(a) does not limit interstate transportation of gas on behalf of intrastate pipelines to only intrastate transport (that is, within a single state's borders). Instead, the Commission had concluded that Intratex Gas Company's (a Texas intrastate pipeline) purchase of gas in New Mexico and receipt of such gas in Texas via a NGPA Section 311(a) transport arrangement with Transwestern (an interstate pipeline) would not subject Intratex to NGA jurisdiction. Neither the Commission nor the Court reached the related question of whether the ultimate sale for resale by Intratex would have NGA jurisdictional consequences.

C. NGPA First Sale Pricing of Pipeline Production

In *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281 (4th Cir. 1984), the Court affirmed two Commission orders on the pipeline's right to reprice certain company-owned production up to NGPA levels as a result of the U.S. Supreme Court's *Mid-Louisiana* decision (*see* 5 Energy L.J. at 236). The Court held that the Commission properly had permitted Consolidated to reprice for those periods governed by NGA Section 4(e) rate case settlements in which the pipeline expressly had reserved the right to reprice. For a discrete period governed by one settlement, however, the Court affirmed the Commission's determination that Consolidated had not reserved such right.

D. NGPA Pricing – State Regulation

In *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd.*, 457 So.2d 1298 (Miss. 1984), *petition for cert. filed*, 53 U.S.L.W. 3541 (U.S. January 2, 1985) (No. 84-1076), the Supreme Court of Mississippi ruled that the NGPA did not preempt state law on ratable take requirements for deregulated gas. The Mississippi Oil and Gas Board had promulgated a rule on takes from a common pool in order to regulate drainage problems. The Court, citing both the NGPA's Section 601(a)(1) and its legislative history, concluded that the Commission's jurisdiction never had extended to deregulated gas and thus disposed of the Federal law preemption issue. As to the Board's attempt to regulate the price paid for gas from a common pool, the Court held that such regulation was in excess of the Board's authority and reversed that part of the Board's order.

J. Michel Marcoux, *Chairman*
Herbert J. Martin, *Vice Chairman*

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