Report of the Committee on Judicial Review

I. Introduction

As in the past, in calendar year 1990 the courts have been active on energy issues. This report of 1990 court action is divided into two parts. The first part covers key energy policy issues including the Federal Energy Regulatory Commission's (FERC or Commission) Order No. 500, and the Natural Gas Policy Act (NGPA) section 311, gathering and bypass. The second part of this report discusses court cases on procedural issues relevant to energy regulatory law, including deference, standing, ripeness, and preemption.

II. Energy Policy Issues

A. *Order No. 500*

Court review of certain aspects of the FERC's Order No. 500 continued with the denial of certiorari by the U.S. Supreme Court of the decision by the U.S. Court of Appeals for the D.C. Circuit in *Associated Gas Distributors v. FERC* (*AGD II*)[1] and with the D.C. Circuit decision in *American Gas Association v. FERC* (*AGA II*).[2]

In *AGA II*, the court upheld most aspects of the Commission's Order Nos. 500-H and 500-I, which were the Commission's most recent attempts to solve problems previously identified by the courts on review of Order No. 500. The court in *AGA II* remanded only two minor issues for additional consideration. Previously the D.C. Circuit had approved the open access transportation provided by Order No. 436 (predecessor to Order No. 500) in *Associated Gas Distributors v. FERC* (*AGD I*),[3] but remanded the FERC's refusal to modify uneconomic take-or-pay liabilities in pipelines' contracts with producers for further consideration. In *American Gas Association v. FERC* (*AGA I*),[4] the court rejected the FERC's subsequent attempt to address the problem in Order No. 500. With Order Nos. 500-H and 500-I, the FERC finally addressed take-or-pay liabilities in a manner that, for the most part, satisfied the court.

The court in *AGA II* sustained the FERC's decision not to modify the take-or-pay contracts under Natural Gas Act (NGA) section 5(a).[5] The FERC correctly concluded that under NGA section 1(b), the NGPA, and *Phillips Petroleum Co. v. Wisconsin*,[6] it lacked authority to modify any terms of nonjurisdictional contracts, even price terms. The court approved the FERC's rejection of intervenors' proposals to make generic or case-by-case

1. 893 F.2d 349 (D.C. Cir. 1989), *cert. denied sub nom.* Berkshire Gas Co. v. Associated Gas Distrib., 111 S. Ct. 277 (1990).
2. 912 F.2d 1496 (D.C. Cir. 1990).
3. 824 F.2d 981 (D.C. Cir. 1987).
4. 888 F.2d 136 (D.C. Cir. 1989), *as amended* 912 F.2d 1496 (D.C. Cir. 1990).
5. The court reviewed this decision not to take action using a deferential standard of "ensur[ing] that the Commission has considered all the relevant factors." 912 F.2d at 1505 (citation omitted).
6. 347 U.S. 672 (1954).

findings that certain take-or-pay percentages would be unreasonable, and noted that individual settlement negotiations were successfully resolving most take-or-pay problems.

The court in *AGA II* rejected legal challenges to the crediting mechanism by which pipelines with blanket certificates could deny producers open-access, unless the producers credited transported gas against outstanding take-or-pay obligations. The court held that the FERC did not abuse its power to condition grants of the authority, did not violate the Outer Continental Shelf Lands Act, and did not err in eliminating an exception to the crediting mechanism for shut-in casinghead gas. The court directed the FERC to consider and respond to producers' complaints that when one pipeline transports gas which another pipeline had purchased from the producer, the producer could be forced to grant double credits for transported gas.

The court further remanded, for more reasoned decisionmaking, the FERC's policy of providing pre-granted abandonment authority when pipelines accept blanket certificates.[7] The court directed the FERC to address the local distribution companies' (LDCs) complaint that allowing pipelines to terminate transportation service upon the expiration of contracts would endanger the LDCs' ability to guarantee a steady supply of gas. The court held that the arrangement failed to protect consumers from pipeline monopoly power, and rejected the FERC's assertions that the benefits of transportation outweighed the reduced security of supplies. However, the court rejected the argument that pre-granted abandonment constitutes an illegal delegation of power to pipelines.

Finally, the court in *AGA II* rejected a variety of other challenges. It sustained the FERC's case-by-case approach to permitting LDCs to reduce their contract demand for gas from open-access pipelines. The court held that issues involving take-or-pay cost passthroughs were not ripe for review based on the court's decision in *AGD II*.

In *AGD II*, the D.C. Circuit vacated and remanded certain Commission orders which authorized recovery by pipelines from their customers of take-or-pay buyout costs, buydown costs, and prepayments under the procedure formulated in Order No. 500. Specifically in *AGD II*, the court found that a direct charge, and the Commission's proposed "purchase deficiency" cost allocation mechanism, both proposed by Tennessee Gas Pipeline Company, violated the filed rate doctrine because they were based on past purchasing decisions.

The court relied on its own precedent in *Columbia Gas Transmission Corp. v. FERC (Columbia Gas)*,[8] in which a direct bill was reversed on retroactive ratemaking grounds because "downstream purchasers [were] expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased."[9] Similarly, the mechanism at issue in *AGD II*

7. The court rejected the FERC's argument that this challenge constituted an impermissible collateral attack on Order No. 436, on which the time limit for challenges had expired, because the FERC had implicitly reopened the pre-granted abandonment issue in Order No. 500-H.

8. 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988).

9. *Columbia Gas*, 831 F.2d at 1140, quoted in *AGD II*, 893 F.2d at 355-56.

"force[d] past customers who no longer purchase *any* gas from Tennessee to pay their share of the take-or-pay liability, [while] "current customers who did not buy gas from Tennessee until after 1986 would not have to pay any part of the take-or-pay liability."[10]

Another issue in *AGD II* pertaining to the purchase deficiency mechanism was whether the Commission should have taken into account the Commission-approved take-or-pay settlement agreements between Tennessee and two of its customers, Columbia Gas Transmission Corporation and Equitable Gas Company. Those customers had entered into their respective agreements separately from Tennessee's other customers. The court found that the Commission did not give an adequate, reasoned basis for its treatment of those agreements under the purchase deficiency allocation, and vacated, then remanded the orders for further Commission action on this point.

Finally in *AGD II*, the court upheld the Commission's determination that the "maximum lawful price" (MLP) provisions of the NGPA did not prohibit pipelines from recovering nonrecoupable prepayments for gas not taken, and take-or-pay buyout and buydown costs. Petitioners argued that the Commission had impermissibly created two loopholes to the MLP: (1) its 1985 policy statement, *Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations*,[11] in which the Commission indicated that take-or-pay buyout and buydown costs would not be considered part of a pipeline's payments for gas; and (2) *ANR Pipeline Co. v. Wagner & Brown*,[12] in which the Commission held that nonrecoupable prepayments are not part of the consideration paid for gas.

In response, the court stated:

> The amount paid under a contract (for gas taken and for gas not taken, which includes nonrecoupable prepayments as well as buyouts and buydowns), divided by the units of gas actually taken, may indeed yield a figure that is in excess of NGPA ceiling prices. Such a circumstance alone, however does not violate Title I [of the NGPA]. . . . We will not impute to Congress an intent to preclude all sales at or below the lawful ceiling price that are coupled with other contractual obligations so as to yield an average price in excess of the MLP. Such a construction of Title I is what petitioners' analysis requires.[13]

Another concept proposed in Order No. 500 was the Gas Inventory Charge (GIC). In *Tejas Power Corp. v. FERC*,[14] the court remanded the FERC's orders approving a contested GIC settlement submitted jointly by Texas Eastern Transmission Company and all of its wholesale sales customers. The court in *Tejas* stated that, regardless of unanimous support from wholesale sales customers, "the Commission's approval of this settlement cannot be upheld if only because the agency failed expressly to determine whether the GIC serves the public interest."[15] The court also criticized the FERC for its

10. *AGD II*, 893 F.2d at 355 (emphasis in original, citation omitted).

11. [Reg. Preambles 1982-1985] F.E.R.C. ¶ 39,637 (1985), 50 Fed. Reg. 16,076 (1985) (codified at 18 C.F.R. pt. 2).

12. 44 F.E.R.C. ¶ 61,057, at 61,155 (1988), *reh'g denied*, 49 F.E.R.C. ¶ 61,101 (1989).

13. *AGD II*, 893 F.2d at 359.

14. 908 F.2d 998 (D.C. Cir. 1990).

15. *Id.* at 1003.

failure to consider whether LDCs' and end users' interests were congruent. In *Transwestern Pipeline Co. v. FERC*,[16] the court also reviewed a GIC, although many of the issues in that case were rendered moot because the pipeline's customers stopped purchasing gas.

Several other cases involving case-specific applications of policies and regulations under Order No. 500 were considered by the courts in 1990. In *Ozark Gas Transmission System v. FERC*,[17] the court remanded a Commission conditional blanket certificate for a more reasoned decision with respect to the economic burden that arose from the terms and conditions that the Commission had attached to the certificate. The court in *Tennessee Gas Pipeline Co. v. FERC*[18] found that a company holding a blanket certificate was not entitled to receive a case-specific certificate under NGA section 7.

B. NGPA Section 311

In another *AGD* case, *Associated Gas Distributors v. FERC*, (*AGD III*),[19] the court reversed and remanded the FERC orders interpreting NGPA section 311. Generally, section 311 permits the Commission to authorize transportation (1) by interstate pipelines "on behalf of" intrastate pipelines or LDCs, and (2) by intrastate pipelines, "on behalf of" interstate pipelines and LDCs served by interstate pipelines. Following enactment of the NGPA, the Commission adopted regulations authorizing self-implementing transportation under section 311 but those regulations did not define the phrase "on behalf of" (leaving it for case-by-case development). In a declaratory order issued on July 22, 1988, in response to a petition filed by Hadson Gas Systems, Inc. (a marketer), the Commission stated that the "on behalf of" test was met, qualifying the transportation for section 311 treatment if "some economic benefit" accrued to the "on behalf of" entity. In *AGD III*, the court found that the Commission's broad interpretation did not satisfy the requirements of the NGPA.

The court held that the Commission's interpretation of section 311 was entitled to deference under the Supreme Court's *Chevron* decision. Nevertheless, the court held that the Commission's interpretation of section 311 exceeded the congressional intent of that provision, for it had the potential wholly to undermine the requirements of NGA section 7. The court found that, under the Commission's interpretation, interstate pipelines could transport gas ostensibly acting under section 311 authority, when the transportation was "on behalf of" an LDC or an intrastate pipeline that had no involvement in the transaction aside from the receipt of money. The court concluded that Congress meant to create a distinction between section 311 transactions and transportation under NGA section 7, by requiring the section 311 transportation be "on behalf of" an LDC or an intrastate pipeline. The court rejected AGD's argument that the Commission was necessarily limited to authorizing interstate pipeline transportation under section 311 to circum-

16. 897 F.2d 570 (D.C. Cir. 1990).
17. 897 F.2d 548 (D.C. Cir. 1990).
18. 898 F.2d 801 (D.C. Cir. 1990).
19. 899 F.2d 1250 (D.C. Cir. 1990).

stances in which the LDC or intrastate pipeline took physical title to or transported the gas, and left the "new" definition of the "on behalf of" requirement to the FERC on remand.

C. *Gathering Exemption*

The Commission's test for nonjurisdictional gathering facilities under NGA section 1(b) has consistently been evolving. In *Northwest Pipeline Corp. v. FERC*,[20] the court reversed and remanded Commission orders asserting jurisdiction over Northwest's gathering facilities. The court held that the Commission had improperly applied its own "primary function" test for determining when facilities are nonjurisdictional as gathering facilities. The court explained that the Commission had not examined and weighed each factor, but had "trumped nonjurisdictional factors with jurisdictional factors."[21] In particular, the court found that "Northwest's status in interstate transportation cannot alone transform the character of these particular facilities."[22] The court reaffirmed the limits on Commission jurisdiction under NGA section 1(b), rejecting the Commission's "regulatory gap" argument and stating that the gathering exemption under section 1(b) "cannot be recast or obscured in the agency's attempt to formulate policy to protect the public interest and burner-tip consumer."[23] The court stated that, pending Commission action on remand with respect to the Commission's alternate argument, NGA sections 4 and 5 "provide another mechanism for asserting jurisdiction to review the rates charged" for the proposed Northwest service.[24]

D. *Bypass*

The courts addressed the issue of bypass of LDCs in several decisions in 1990. In the final appeal of the bypass of Michigan Consolidated Gas Company by Panhandle Eastern Pipe Line Company, the U.S. Supreme Court denied a petition for writ of certiorari to review the D.C. Circuit's decision in *Michigan Consolidated Gas Co. v. FERC*.[25]

In three other cases, the D.C. Circuit issued decisions on bypass and related issues. Although Oklahoma Natural Gas Company lost its argument that the FERC should not authorize bypass of an LDC's monopoly franchise, it succeeded in raising questions about the FERC's assertion of jurisdiction over the facility used to bypass the LDC. Accordingly, the D.C. Circuit remanded the case in *Oklahoma Natural Gas Co. v. FERC*[26] to the FERC for further explanation of its basis for asserting jurisdiction. The court in *Oklahoma Natural Gas* was troubled by the fact that the FERC took jurisdiction over a transaction in which the gas sold to the end user was produced, transported, and consumed within one state. In a related case, *Williams Natu-*

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20. 905 F.2d 1403 (10th Cir. 1990).
21. 905 F.2d at 1410.
22. *Id.*
23. *Id.* at 1407 (footnote omitted).
24. *Id.* at 1411 n.23.
25. 883 F.2d 117 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1807 (1990).
26. 906 F.2d 708 (D.C. Cir. 1990).

ral Gas Co. v. City of Oklahoma City,[27] federal preemption was raised and it was determined, *inter alia*, that the FERC had acted validly.

III. Procedural Issues

A. *Standing and Ripeness*

On June 21, 1990, in *Kansas and Missouri v. Utilicorp United, Inc.*,[28] the U.S. Supreme Court issued a decision finding that when suppliers violate antitrust laws by overcharging a public utility for natural gas and the utility passes on the overcharge to its customers, the direct purchaser rule permits only the utility to sue for illegal overcharges under section 4 of the Clayton Act.

Utilicorp United, among other utilities and gas purchasers, had filed suit against a pipeline company and five gas producers alleging that the defendants had unlawfully conspired to inflate the price of gas supplied to the utilities. Acting as parens patriae, the Petitioner-States had filed separate section 4 Clayton Act actions asserting claims against the same defendants on behalf of all resident persons who had purchased gas from the utilities at an inflated price. The district court consolidated the actions and granted partial summary judgment to the utilities with respect to the defendants' defense that, since the utilities had passed through all of the overcharges, they lacked standing because they had suffered no antitrust injury. Relying on the *Hanover Shoe*[29] direct purchaser rule, the district court also dismissed the States' parens patriae claims.[30] The Court of Appeals affirmed the dismissals of the States' claims.

Before the Supreme Court Petitioners argued, *inter alia*, that none of the rationale underlying the direct purchaser rule exist in cases involving regulated utilities. Further, Petitioners sought an exception to the rule for actions based on cost-plus contracts. The Supreme Court disagreed, finding that ample justification for the direct purchase rule exists even when a regulated utility is the direct purchaser. The Supreme Court further indicated that it would not carve out exceptions to the rule for particular types of markets.

Standing was also an issue in *AGD III*.[31] In *AGD III* the D.C. Circuit found that AGD had standing to challenge the FERC's interpretation of NGPA section 311 and that the issue was ripe for judicial review. AGD sought review of the Commission's interpretation of the "on behalf of" language of section 311. Several intervenors challenged AGD's standing to petition for review.

Citing established authority, the court held that as an association, AGD generally would have standing to challenge the Commission's interpretation if: (1) its members would otherwise have standing to sue in their own right;

27. 890 F.2d 255 (10th Cir. 1989), *cert. denied sub nom.* City of Oklahoma City v. Williams Natural Gas Co., 110 S. Ct. 3236 (1990).

28. 110 S. Ct. 2807 (1990).

29. Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

30. The *Hanover Shoe* rule, affirmed in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), prevents anyone but direct purchasers from asserting antitrust damage claims.

31. 899 F.2d 1250 (D.C. Cir. 1990).

(2) the interests AGD sought to protect were germane to its purpose; and (3) neither the claim nor the requested relief required the participation of individual members in the lawsuit. The court held that the second and third prongs of the test were clearly satisfied, and the only question was whether AGD's members would have standing to sue in their own right.

The court found that the petitioners had sufficiently established their constitutional standing by demonstrating that the challenged FERC rules authorized transactions (transportation for allegedly unauthorized parties) which had the clear and immediate potential to compete with the petitioners' own sales. The AGD's members do not need to wait for specific allegedly illegal transactions to harm them competitively. Further, if the FERC's interpretation of section 311 were to prevail, the first-come, first-served rule would force pipelines to accept requests for illegal transportation, therefore leaving less pipeline capacity for the petitioners. Petitioners demonstrated the requisite injury. Finally, petitioners were arguably within the zone of interests sought to be protected by NGA section 7.

In *AGD III* the court also dismissed challenges on the grounds of lack of ripeness. The FERC's interpretation of section 311 determined the rights of parties to demand transportation services from pipelines and had the present effect of allowing transportation transactions to bypass LDCs. The court found the interpretation of section 311 thus had a "direct effect on the day-to-day business" of pipelines and LDCs.

On July 26, the Court of Appeals for the Ninth Circuit in *California Energy Commission v. Bonneville Power Administration*,[32] issued a decision finding that the Direct Service Industrial Customers (DSI) and the Western Public Agencies Group (WPAG) had standing to challenge the Bonneville Power Administration's (BPA) policy allocating access to the regional intertie system of high voltage lines transmitting federal and nonfederal power. The BPA had challenged DSI's and WPAG's standing to challenge the BPA's decision on the grounds that any harm to them from potential future rate increase was speculative. Having suffered no injury, they had no standing to challenge the policy. The court found that DSI's and WPAG's claims were not speculative in that they had alleged that current rates were higher under the BPA access policy than they would be if BPA complied with statutory requirements. Thus, DSI and WPAG had alleged an immediate economic injury.

Applying the standard adopted in *Aluminum Co. of America v. Bonneville Power Association*,[33] the court also found that, besides demonstrating injury, DSI and WPAG must show that the injury is within the zone of interests to be protected by the statutes that were allegedly violated, and that the relief sought could cure the injury. As consumers of BPA power, DSI and WPAG were within the zone of interests protected by the Pacific Northwest Electric Power Planning and Conservation Act. Finally, since the alleged injury could be remedied by the court directing the BPA to change its allocation policy, the

32. 909 F.2d 1298 (9th Cir. 1990).

33. 891 F.2d 748 (9th Cir. 1989).

court found that DSI and WPAG satisfied the third and final requirement for standing.

In another case on standing on May 23, 1990 (modified on August 22, 1990), *Wabash Valley Power Association v. Rural Electrification Administration*,[34] the Court of Appeals for the Seventh Circuit issued a decision holding that the Wabash Valley Power Association, Inc. had, albeit barely, established injury in fact sufficient to satisfy the Article III standing requirements in challenging a Rural Electrification Administration (REA) decision directing it to raise its rates.

In the *Wabash* case, Wabash had run into financial difficulties and was in bankruptcy proceedings operating as a debtor in possession. The REA, the senior secured lender, directed Wabash to increase its rates to enable it to pay its debts. Wabash opposed the rate increase, claiming that state regulators might require it to disgorge the proceeds of the higher rates and pay penalties. Second, Wabash asserted that increasing rates might put it in violation of contracts which required its members to purchase electricity from Wabash. If freed from their contractual commitments, Wabash argued these members might find it economically beneficial to purchase electricity from other sources.

The court considered both of these potential outcomes speculative, in that it was unclear what state penalties might be applied, or whether it would be profitable to collect revenues now and rebate with penalties later. Further, there was no indication that members could obtain wholesale power at costs less than the REA's proposed rates. In any event, if Wabash were injured as a result of the REA order, REA (as the residual claimant) would bear the entire loss. Nonetheless, the court found that Wabash had established a sufficient causal claim between the REA decision and the potential injury to Wabash, and that Wabash had standing to bring suit.

B. Deference and Reasoned Decisionmaking

The issue of court deference to Commission decisionmaking arose in several cases during the year. Insofar as judicial review of administrative agency decisions is concerned, courts in 1990 were not inclined to either limit or expand the application of the deference rule enunciated by the Supreme Court in *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*[35]

In *National Fuel Gas Supply v. FERC*,[36] the court rejected a challenge to the FERC's finding that it could exercise its authority to suspend rates thirty days after the filing of the tariff by a pipeline. The court stated that language specifying that pipelines must give thirty days notice of a proposed increase does not prevent the FERC's exercise of its power to suspend a proposed increase.

In *AGD III* (discussed *supra*) the court concluded that deference to a Commission decision was not required. The court sustained a challenge to the

34. 903 F.2d 445 (7th Cir. 1990).
35. 467 U.S. 837 (1984).
36. 899 F.2d 1244 (D.C. Cir. 1990).

FERC's construction of the "on behalf of" language under NGPA section 311 and found that Congress had vested the FERC with the discretion to interpret the phrase but the FERC's interpretation was neither reasonable nor consistent with the purpose of the statute.

More recently, in *National Fuel Gas Supply v. FERC*,[37] the court upheld the Commission's construction of the term "excessive" under section 601(c)(2) of the NGPA. The court found that: (1) Congress had delegated the task of defining the term to the FERC; and (2) the FERC's interpretation of the term was reasonable. Accordingly, the court deferred to the FERC's construction.

Over the past year the courts have also found the Commission decisions lacked reasoned decisionmaking or failed to address the issues presented. In *Orange and Rockland Utilities, Inc. v. FERC*[38] the court was unable to "detect reasoned decisionmaking" on the issue of a higher commodity rate for a special class of gas transportation. In *Panhandle Eastern Pipe Line Co. v. FERC*[39] the court found no basis for the Commission's approval of a retroactive abandonment. Shortly thereafter, in *Transcontinental Gas Pipe Line Corp. v. FERC*[40] the court again found that the Commission had failed to state a reasonable basis for its decision. In this case the issue was the elimination of the pipeline's minimum bill provision where record evidence apparently satisfied the Commission's prior standards. In *Moraine Pipeline Co. v. FERC*[41] the court found that the Commission failed to address adequately the petitioners' argument on throughput in setting a rate under the optional expedited certificate (OEC) procedures.

In contrast, in *San Diego Gas & Electric Co. v. FERC*[42] the court rejected petitioners' argument that the Commission had not used reasoned decisionmaking on review of an electric supply contract. Further, in *National Wildlife Federation v. FERC*[43] the court found that the Commission's interpretation of several statutes, including the Federal Power Act, was "permissible" and thus deferred to the Commission.

C. *Preemption*

The Supreme Court, in *California v. FERC*,[44] unanimously held the FERC regulation of water flow from a hydroelectric power project preempts state regulation. The Court held that section 27 of the Federal Power Act (FPA)[45] does not preserve states' ability to regulate water flows, and upheld the FERC declaratory order setting a minimum flow rate lower than that set by the state Water Resources Control Board.

The Court conceded that under modern legal principles, California might

37. 900 F.2d 340 (D.C. Cir. 1990).
38. 905 F.2d 425 (D.C. Cir. 1990).
39. 907 F.2d 185 (D.C. Cir. 1990).
40. 907 F.2d 1211 (D.C. Cir. 1990).
41. 906 F.2d 5 (D.C. Cir. 1990).
42. 904 F.2d 727 (D.C. Cir. 1990).
43. 912 F.2d 1471 (D.C. Cir. 1990).
44. 110 S. Ct. 2024 (1990).
45. 16 U.S.C. § 821 (1988).

have a strong argument that its regulatory power is preserved by a statutory provision stating that nothing contained in the relevant statute should be construed as affecting the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation for municipal or other uses. The Court, however, relied upon its forty-four year old precedent, *First Iowa Hydro-Electric Cooperative v. FPC*,[46] which held that FPA section 27 referred primarily to state law determinations of proprietary rights to water use.

The Court declined to disturb stare decisis where it would result in "restructur[ing] a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process."[47] Instead, the Court emphasized "the deference this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes."[48] The Court rejected California's arguments that the construction of FPA section 27 in *First Iowa* was mere dictum and that its reading of the legislative history was erroneous.[49]

Further in 1990, the D.C. Circuit, in *Public Utility Commission of California v. FERC (PUCC)*,[50] upheld the FERC's grant of an OEC to the Wyoming-California Pipeline Co. to serve the Bakersfield area enhanced oil recovery market. The court sustained the FERC's decision on all issues, rebuffing challenges by the California PUC and by disappointed proponents of competing pipelines.

First, the court rejected the California PUC's assertion that it had concurrent jurisdiction over the transportation with the FERC. The court held, consistent with the holdings in *FPC v. East Ohio Gas Co.*,[51] and *FPC v. Transcontinental Gas Pipe Line Corp.*,[52] that the reservation of authority of local distribution to the states in NGA section 1(b) did not encompass all deliveries to end users. The FERC has jurisdiction over all interstate transportation of natural gas, including those that end in delivery at high pressure to end users.

Second, the court in *PUCC* held that the FERC's procedures in considering competing applications were fair, contrary to the assertions of the two disappointed competitors, Kern River Gas Transmission Company and Mojave Pipeline Company. Both Kern River and Mojave claimed the FERC had violated the spirit of *Ashbacker Radio Corp. v. FCC*[53] through the accelerated processing of WyCal's OEC application. In *Ashbacker*, the Supreme Court held that before an agency grants a license, it must grant a full compar-

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46. 328 U.S. 152 (1946).

47. 110 S. Ct. at 2030.

48. *Id.* at 2029.

49. The Court also rejected the argument that *First Iowa* was inconsistent with California v. United States, 438 U.S. 645 (1978), a Supreme Court decision construing a similar statute, § 8 of the Reclamation Act of 1902, due to the difference between the statutes.

50. 900 F.2d 269 (D.C. Cir. 1990).

51. 338 U.S. 464 (1950).

52. 365 U.S. 1 (1961).

53. 326 U.S. 327 (1945).

ative hearing to each applicant that has filed for a mutually exclusive permit or license.

Because WyCal applied for an OEC under the FERC's Order No. 436 rules, while Kern River and Mojave applied for conventional NGA section 7 certificates, they were not "similarly situated persons" seeking the same license and entitled to the same procedures under *Ashbacker*. The court held that the FERC's OEC rules, requiring applicants to recover fixed costs from firm transportation customers using a Modified Fixed Variable rate design, were reasonable. The court also rejected the California PUC's argument that the streamlined OEC procedures failed to consider environmental costs and benefits as required under the National Environmental Policy Act (NEPA),[54] and held that the FERC did not violate NEPA in issuing a conditional OEC before the environmental hearing was completed.

Finally, the court sustained the FERC's rejection of Kern River's and Mojave's claims that WyCal misappropriated their routes and the data collected in their engineering and environmental studies. The Court held that the FERC had no duty to consider the challengers' antitrust and copyright charges, "questions under numerous statutes on which it had no expertise."[55]

IV. Miscellaneous

In two instances the court reaffirmed that raising an issue on rehearing to the Commission is a prerequisite to judicial review. In *The Process Gas Consumers Group. v. FERC*[56] the court found that the lack of participation by an intervenor in the court case in the proceedings before the Commission precluded the intervenor from assuming the role of petitioner in judicial review, when the petitioners before the court voluntarily moved to dismiss their petitions. Further, in *Town of Norwood, Massachusetts v. FERC*[57] the court dismissed a petition for review of a Commission order denying refunds of overpayments to a utility, based upon the failure of petitioner before the court to raise the refund issue on rehearing with the Commission.

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54. 42 U.S.C. §§ 4321-4370 (1988).
55. 900 F.2d at 281.
56. 912 F.2d 511 (D.C. Cir. 1990).
57. 906 F.2d 772 (D.C. Cir. 1990).