
SUBMITTED COMMITTEE REPORT

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REPORT OF THE NATURAL GAS COMMITTEE ENERGY BAR ASSOCIATION 1999

I. MAJOR FEDERAL RULEMAKING ORDERS AND ORDERS REGARDING BROAD REGULATORY POLICIES

A. Order No. 587-JA

On January 28, 1999, the Federal Energy Regulatory Commission (FERC or Commission) issued Order No. 587-J which granted rehearing and clarification concerning the incorporation of new services with interactive websites and EDI file transfers.¹ The Commission eliminated the section 4 filing requirement announced in Order 587-I, and replaced it with the requirement that pipelines make an “informational filing” on the day the new service is implemented.² The informational filing must describe the efforts that the pipeline has made to make the new service available via file transfer and must also state the advance notice the pipeline provided to the Gas Industry Standards Board (GISB) regarding the new service and its availability via file transfer.³ The Commission also required that the pipeline post the electronic transfer method on its website.⁴

B. The FERC Issues New Policy Statement on Pricing for New Capacity

On September 15, 1999, the Commission issued a “Statement of Policy” in *Certification of New Interstate Natural Gas Pipeline Facilities*, Docket No. PL99-3-000 (Policy Statement).⁵ The Commission issued its new policy in light of information received in its deliberations on the pricing and certification of new pipelines in Docket Nos. RM98-10-000 and RM98-13-000, its consideration of demand for new capacity into the Northeast in Docket No. PL99-2-000, and individual pipeline certificate proceedings. The new policy considered a number of competing policy considerations, including the necessity to strike a balance between the need for enhancing competitive transportation alternatives and the possibility of overbuilding. After reviewing comments from the parties and its current certification policies, the Commission noted several drawbacks to its current policies. These drawbacks included the difficulty of using fixed benchmarks of firm ten year contracts to demonstrate market need and the danger of sending incorrect market signals through rolled-in pricing. The Commission set out the new policy, which would require two analytic

1. Order No. 587-J, *Standards for Business Practices of Interstate Natural Gas Pipelines*, 86 F.E.R.C. ¶ 61,068 (1999) [hereinafter Order No. 587-J].

2. *Id.* at 61,263.

3. Order No. 587-J, *supra* note 1, at 61,263-64.

4. *Id.* at 61,263.

5. Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999) [hereinafter Statement of Policy].

steps. As a threshold test or "a first indicator of public benefit," the pipeline must be prepared to support the project without relying upon subsidies from other customers.⁶ The Commission explicitly recognized that this approach "changes the current pricing policy which has a presumption in favor of rolled-in pricing."⁷ However, the Commission found that eliminating the subsidization usually inherent in rolled-in rates recognizes that a policy of incrementally pricing facilities sends the proper price signals to the market. With a policy of incremental pricing, the market will then decide whether a project is financially viable.⁸

The Commission noted that projects designed to replace existing capacity, improve reliability, or improve flexibility will serve existing customers and thus will not be considered as subsidies. This course, the Commission found, would serve all of the interests harmed by the current policy, including: existing customers, landowners, and other pipelines serving the markets.

The Commission further noted two instances where rolling-in project costs might be appropriate. The first instance would be where inexpensive expansion was made possible by more costly construction paid for by existing customers. The second instance would be on a pipeline with vintaged pricing, charging different shippers different prices for the same service. When the customers use their rights of first refusal to renew contract rights, and when incremental capacity is fully subscribed and the original capacity is subject to competing bids, the original customer might be required to bid up to an incremental rate or "rolled-up" rate in which expansion costs are accumulated to yield an average expansion rate.

The Commission found that this policy would obviate the need for the "at risk" conditions, because the pipeline would bear the risk of the project from the beginning, on a basis that might be shared with the new customers, but not with existing customers. For this reason, the Commission stated that pipelines should not rely upon "Memphis" clauses to apportion the costs of new service, but instead reach agreement with shippers before construction as to the risk of underutilization, cost overruns, and the rate treatment for cheap expansibility.

The second step in the decisional process will encompass an evaluation of whether the applicant has minimized the adverse economic, competitive, and environmental impacts of the project. Then the decision process will encompass an evaluation of whether the residual adverse impacts are outweighed by the public benefits of the pipeline. Adversely affected interests to be weighed include those of the existing customers of the pipeline applicant, existing pipelines serving the market and their captive customers, landowners, and surrounding communities. The public benefits of the project would include, *inter alia*, meeting unserved demand, eliminating bottlenecks, creating access to new supplies, providing lower

6. *Id.* at 61,747.

7. Statement of Policy, *supra* note 5, at 61,747.

8. *Id.* at 61,746.

costs to consumers, improving the interstate grid through new interconnects, providing competitive alternatives, improving electric reliability, or advancing clean air objectives. The Commission acknowledged that this approach changed its existing focus on one test—capacity subject to contract—to establish need. In evaluating need for the project, the Commission will consider “all relevant factors,” including: precedent agreements, demand projections, potential cost savings to consumers, and comparisons of potential market demand to capacity currently serving the market. The Commission noted that this approach diminished the importance of whether the pipeline’s contracts were with affiliates.

The Commission suggested, in effect, a “proportional” or sliding scale approach in which greater adverse impacts would require a greater showing of benefits. The Commission discussed how the policy might be applied, emphasizing that pipelines serving new markets by proposing incremental rates and minimizing a resort to eminent domain would more readily demonstrate an adequate balancing of interests.⁹ Thus, pipelines were encouraged to submit applications avoiding or minimizing adverse effects, although the Commission also stated that protection of incumbent pipelines and captive customers would not be given undue weight in the balancing process.

In closing, the Commission stated that the policy would not be applied retroactively. Commissioners Hoecker, Breathitt, and Hebert issued a concurrence stating their intention to apply the policy to certificate applications filed after July 29, 1998, when the NOI was issued. Commissioner Bailey dissented, in part because of the extent to which the new policy departed from the current policy in the absence of an industry consensus.

C. The FERC Issues Rules as Part of Effort to Streamline the Certificate Process.

1. Order No. 603

On April 29, 1999, the Commission issued Order No. 603, which amended its regulations governing the filing of applications for certificates of public convenience and necessity, which authorizes a service provider to construct, operate, or abandon facilities or service under section 7 of the Natural Gas Act (NGA). The Commission also amended the blanket certificate under subpart F of Part 157.¹⁰ In order to reflect the current regulatory environment of unbundled pipeline sales and open-access transportation of natural gas, the Commission determined that portions of its regulations needed to be revised and/or eliminated. The revisions are intended to: (1) bring the existing regulations up-to-date to match current policies; (2) eliminate ambiguities and obsolete language; (3) make the

9. Statement of Policy, *supra* note 5, at 61,749.

10. Order No. 603, *Revision Of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act*, III F.E.R.C. STATS. & REGS. ¶ 31,073, 30,778 (1999).

regulations more germane and less cumbersome; and (4) reduce the existing reporting burden by a total of 8,284 hours.

The Commission also consolidated and clarified its current practice concerning the reporting requirements needed for its environmental review of pipeline construction projects under the National Environmental Policy Act of 1969. The new regulations will provide better guidance to the regulated industry concerning what particular information the Commission needs to conduct a timely environmental analysis.

On rehearing, the Commission clarified and further explained several aspects of Order No. 603, and denied requests to review its bypass and contract demand reduction policies.¹¹

2. Order No. 609.

On April 28, 1999, the Commission issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM98-17-000, proposing to amend its regulations under the Natural Gas Act by adding certain early landowner notification requirements in order to ensure that landowners who may be affected by a pipeline's proposal to construct natural gas pipeline facilities have sufficient notice and opportunity to participate in the Commission's certificate process.¹² The NOPR also set forth proposals designed to provide pipelines with greater flexibility and further expedite the certificate process, including: (1) expanding the list of activities categorically excluded from the requirement for an environmental assessment in section 380.4 of the Commission's regulations; (2) expanding the types of events that allow pipelines to rearrange facilities under their blanket construction certificate; and (3) allowing pipelines to drill observation wells under their blanket construction certificate.

On October 13, 1999, the Commission issued its Final Rule in this docket, Order No. 609,¹³ which adopted the rules proposed in the NOPR with minor modifications. In addition, the Final Rule adopted a number of changes proposed by commenters, including: (1) clarifying that pipelines are expected to use a good faith effort to notify all affected landowners; (2) requiring publication of pipeline applications in local newspapers, in addition to notification of all affected landowners; (3) permitting hand delivery of landowner notification; (4) excepting notices of sale or abandonment; (5) providing for notification of landowners whose property abuts the right of way; (6) expanding the geographic scope of notice requirements for compressors and certain other structures; (7) expanding the "property rights" affected; (8) explaining that the Commission's explanatory pam-

11. Order No. 603-A, *Revision Of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act*, III F.E.R.C. STATS. & REGS. ¶ 31,082, 64 Fed. Reg. 57,374 (1999).

12. Notice of Proposed Rulemaking, *Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements*, IV F.E.R.C. STATS. & REGS. ¶ 32,540, 64 Fed. Reg. 27,717 (1999).

13. Order 609, *Landowner Notification, Extended Categorical Exclusions, and Other Environmental Filing Requirements*, III F.E.R.C. STATS. & REGS. ¶ 31,082, 64 Fed. Reg. 57,374 (1999).

phlet will be updated; (9) adding notice obligations; (10) deleting notice for activities under section 2.55; and (11) creating exemptions for certain blanket certificate authorizations.

3. Order No. 608

In September 1999, the Commission issued a Final Rule instituting pre-filing procedures giving prospective applicants seeking to construct, operate, or abandon natural gas facilities or services the option, in appropriate circumstances and prior to filing an application, of designing a collaborative process that includes environmental analysis and issue resolution.¹⁴ The regulations adopted in Order No. 608, which do not delete or replace any existing regulations, are similar in scope with the procedures the Commission adopted two years ago with respect to applications for hydroelectric licenses, amendments, and exemptions.

D. The FERC Proposes New Rules for Regulating OCS Pipelines

In June, exercising its authority under the Outer Continental Shelf Lands Act (OCSLA),¹⁵ the Commission issued a NOPR in Docket No. RM99-5-000 designed to ensure that natural gas is transported on an open and nondiscriminatory basis through pipeline facilities located on the Outer Continental Shelf (OCS).¹⁶ Through the NOPR, the Commission is considering requiring OCS gas transportation service providers to make available information regarding their affiliations and the conditions under which service is rendered. The purpose of the proposed rule is to assist the Commission and interested persons in determining whether OCS gas transportation services comply with the open access and nondiscrimination mandates of the OCSLA. The Commission states in the NOPR that it believes the proposed regulatory regime is a key step to developing a uniformly-applied, light-handed regulatory standard equally applicable to all OCS gas service providers. Commissioners Bailey and Hebert dissented from the NOPR, indicating concerns over the potential for creating a dual scheme of regulation for certain pipelines on the OCS and their certainty that the NOPR will invite substantial legal challenges.

E. The FERC Examines Its Standard for Calculating Rate of Return

In *Williston Basin Interstate Pipeline Co.*,¹⁷ the Commission issued its decision on remand from *Williston Basin Interstate Pipeline Co. v. FERC*,¹⁸ in which the Court had remanded, with two other issues, the appropriate

14. Order No. 608, *Collaborative Procedures for Energy Facility Applications*, III F.E.R.C. STATS. & REGS. ¶ 31,080, 64 Fed. Reg. 51,209 (1999).

15. 43 U.S.C. §§ 1301-56 (1988).

16. Notice of Proposed Rulemaking, *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, IV F.E.R.C. ¶ 32,543, 64 Fed. Reg. 42,307 (1999).

17. *Williston Basin Interstate Pipeline Co.*, 87 F.E.R.C. ¶ 61,265 (1999).

18. *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54 (D.C. Cir. 1999).

data to be used in assessing return on common equity. The key issue involved the now long-running question of the relative weight to be given to the long-term and short-term growth factors in a DCF analysis. The Court had upheld certain aspects of the Commission's methodology, including its two-step method of projecting dividend growth and its decision to base the long-term growth projection on the long-term growth of the GDP. The Court remanded the issue of what weight to accord the long-term growth projection, in light of later Commission orders giving short-term growth projections two-thirds weight, rather than the one-half weight used by the Commission in Williston's case. On remand, the Commission found that, consistent with Opinion No. 414-A,¹⁹ Williston should recalculate its DCF by giving the short-term growth projections a two-thirds weight and the long-term growth projections a one-third weight, to implement the policy shift in Opinion No. 414-A. Consistent with its decision in Opinion No. 396-B,²⁰ which recognized that more than one GDP growth estimate might be appropriate, the calculation of the GDP was remanded to an Administrative Law Judge (ALJ).

The Commission further clarified its Return on Equity (ROE) policy in *Northwest Pipeline Corp.*,²¹ holding that: (1) short-term growth estimates are to be determined by reference to IBES data alone; and (2) consistent with Opinion No. 414-A, long-term growth estimates are to reflect GDP projections and are to be weighted one-third to a two-thirds weight given to short-term growth projections.²² In addition, the Commission applied Opinion No. 414-A on the pipeline's placement in the range of returns in the proxy group. The Commission also affirmed the ALJ's finding that its lower-than-average business risk arose from its own efficiencies and, therefore, its return should be placed at the midpoint of the proxy range.²³

F. The FERC Establishes Pilot Electronic Filing Program

On September 15, 1999, the Commission notified the public that beginning October 1, 1999, a pilot program would commence under which selected persons would submit documents to the Commission electronically.²⁴ The purpose of the pilot was to test the Commission's system for receiving electronic filings in preparation for implementing electronic filing as the principal means of filing documents in its proceedings. Eventually, the Commission's staff expects to recommend that all filings by regulated entities, with limited exceptions, be filed electronically. The prototype electronic filing would utilize the Internet, and would be limited to motions and notices to intervene, protests, comments, and related filings. The Commission attached a Summary of the Staff Pilot Project to the Notice.

19. *Transcontinental Gas Pipe Line Corp.*, 84 F.E.R.C. ¶ 61,084 (1998).

20. *Northwest Pipeline Corp.*, 79 F.E.R.C. ¶ 61,309 (1997).

21. *Northwest Pipeline Corp.*, 87 F.E.R.C. ¶ 61,266 (1999).

22. *Id.* at 62,059-62.

23. 87 F.E.R.C. ¶ 61,266, at 62,067-68.

24. *Public Access To Information and Electronic Filing*, No. PL98-1-000.

II. MAJOR PIPELINE RATE DECISIONS INVOLVING CERTIFICATE, OPEN ACCESS, AND RATE ISSUES

A. Initial and Rolled-In Incremental Rate Issues

As is discussed in detail above, in September 1999, the Commission established a new policy regarding the pricing of new capacity.²⁵ In earlier cases, the Commission applied its previous policies.

On April 15, 1999, in *Transcontinental Gas Pipe Line Corp.*, the Commission applied its 5% test to groups of historical expansion projects.²⁶ At issue was whether a number of Transco's nine Leidy Line and three Southern expansion rates, historically priced on an incremental basis, should be rolled-in as Transco proposed in a pro forma rate filing. The ALJ had denied rolled-in rates. On review, the Commission reversed those findings and found that the rates should be priced on a rolled-in basis. A major threshold issue concerned the burden of proof. The Commission found that the pipeline made the rolled-in proposal, even if in pro forma sheets. Therefore, the pipeline only carried the burden of proof under section 4 of the NGA, rather than the dual burden of section 5. Moreover, the Commission found that the expansion facilities in question were such that either rolled-in or incremental rates could have been found just and reasonable. Hence, the pipeline's proposal would be accepted if it was reasonable.²⁷ In applying the 5% impact test, the Commission found that the rate impact of the individual projects should not be considered in the aggregate (as did the ALJ), but rather in seven groupings of related projects. Under this standard, none of the project groups exceeded the 5% threshold.²⁸ The Commission also found that the projects met the "system benefits" requirement because they provided reliability and flexibility to all customers equally with the rest of the system.²⁹ A number of other allocation issues, not addressed by the ALJ, were remanded in light of the Commission's roll-in determination.³⁰

On May 28, 1999, the Commission issued a certificate order in *Northwest Pipeline Corp.*,³¹ addressing an unusual incremental proposal. The pipeline proposed to increase compression to serve new shippers, who would sign a series of segmented service agreements. In addition to the existing firm transportation rate, the shippers on the new capacity would pay a "facility charge," which the Commission stated, "equates to an incremental-plus rate design, which requires a shipper to pay both the base rate as any other shipper, plus an incremental rate to recover incremental

25. Statement of Policy, *supra* note 5.

26. *Transcontinental Gas Pipe Line Corp.*, 87 F.E.R.C. ¶ 61,087 (1999).

27. *Id.* at 61,386-88.

28. 87 F.E.R.C. ¶ 61,087, at 61,388-94 (1999).

29. *Id.* at 61,394-96.

30. 87 F.E.R.C. ¶ 61,087, at 61,396-99 (1999).

31. *Northwest Pipeline Corp.*, 87 F.E.R.C. ¶ 61,227 (1999).

costs, for service over an integrated set of facilities.”³² However, the base-rate portion of the incremental charge would be credited to the releasing new shipper when replacement shippers are found, while allowing the pipeline to recover the cost of the facilities through the facility charge. The Commission cautioned that this arrangement raised concerns, because unlike “roll-up” proposals in which existing and incremental rates converge over time, the facilities charge and base rates do not converge. In addition, the Commission expressed concern that the very willingness of shippers to pay the base rate and Facilities Charge suggested that Northwest’s current (postage stamp) rate design might be sending inappropriate pricing signals. Therefore, the Commission held that the rates would be subject to review in the pipeline’s next section 4 rate case.³³

On April 28, 1999, the Commission issued a certificate order in *Transcontinental Gas Pipe Line Co.*,³⁴ addressing the question of when a pipeline will be “at risk” for recovery of its costs. The project was an offshore “crossover” pipeline segment that was under subscribed (commitments of only 15% of the capacity and less than 13% of the revenue requirement existed). Although the project would further its goal of continuing development of the OCS, the Commission found that Transco would remain at risk to ensure that the costs of the project were not shifted to non-expansion shippers.³⁵

On November 29, 1999, in *Transcontinental Gas Pipe Line Corp.*, the Commission issued an order on remand from the United States Court of Appeals for the D.C. Circuit.³⁶ The issue in the appellate case had been the Commission’s decision to suspend all of the rate schedules involved in a general rate increase filing by a pipeline. However, two of the rate schedules reflected rate decreases, and the court had faulted the Commission’s reasoning in support of its decision to suspend the rates for the maximum period, thus denying the shippers the benefit of the rate decrease. In the order on remand, the Commission concluded that it should have accepted the decreased rate schedules to become effective immediately and that the pipeline should pay refunds for the difference in rates during the suspension period to correct its error.

B. The FERC Reaffirms Ruling on Pipeline Market Power

On October 18, the Commission issued an order denying rehearing in *Koch Gateway Pipeline Co.*³⁷ The original order held that on numerous grounds, Koch did not meet its burden of proof to demonstrate that it lacked significant market power over firm and interruptible transportation

32. *Id.* at 61,918.

33. 87 F.E.R.C. ¶ 61,227, at 61,918-19 (1999).

34. *Transcontinental Gas Pipe Line Co.*, 87 F.E.R.C. ¶ 61,113 (1999).

35. *Id.* at 61,463-64.

36. *Transcontinental Gas Pipe Line Corp.*, 89 F.E.R.C. ¶ 61,249 (1999).

37. *Koch Gateway Pipeline Co.*, 89 F.E.R.C. ¶ 61,046 (1999).

rates for which it had requested market-based ratemaking authority.³⁸ Koch filed comprehensive rehearing requests and argued that the earlier finding should be reversed. On rehearing, the Commission reaffirmed the propriety of applying the policy statement on alternative rates, including its requirements for a successful market power showing.³⁹ The Commission reaffirmed each element of its earlier decision and rejected Koch's argument that its order had been inconsistent with the analysis used in the "Buffalo Wallow" decision regarding a market-based rate proposal of another interstate pipeline.⁴⁰

C. The FERC Addresses Issues Relating to Capacity Release and Capacity Allocation

On July 29, 1999, the Commission issued its order on rehearing and compliance filing in *El Paso Natural Gas Co.*⁴¹ At issue was a negotiated rate tariff filing of El Paso awarding 1.3 Bcf/day in mainline capacity to Natural Gas Clearinghouse (subsequently Dynegy). In the original order, the Commission had rejected challenges to the transaction. Although the Commission had imposed limited conditions, it found that the tariff award was not unduly discriminatory despite its size, a special credit mechanism, and the potential impact on competition in the California market.⁴² Subsequently, rehearing requests, compliance filings and related protests, comments in other proceedings, and independent additional filings were all filed. In affirming its basic decision to approve the transaction, the Commission noted the context for the deal, including low prices for transportation on El Paso to California engendered by low demand and high capacity. Given that El Paso could not raise prices above cost-based rates, the Commission did not find El Paso's agreement to take some steps to withhold capacity, as a means of reducing the level of revenue losses during a period of weak demand, unduly anticompetitive. Moreover, although the Commission found that Dynegy and El Paso may have attempted to withhold capacity from the secondary market, the pricing evidence showed that prices have nonetheless remained below the maximum tariff levels. Balancing those effects against El Paso's need to recover costs, the Commission found that the transaction was in the public interest. The Commission generally upheld various aspects of the release mechanism involved in the deal and rejected arguments that the transaction violated the goals of Order No. 636.

Consistent with earlier rulings, the Commission approved pipeline filings providing the right to reserve uncontracted capacity in order to permit aggregation of capacity for future expansion.⁴³

38. *Koch Gateway Pipeline Co.*, 85 F.E.R.C. ¶ 61,013 (1998).

39. 89 F.E.R.C. ¶ 61,046, at 61,128-30.

40. *Id.* at 61,130-36.

41. *El Paso Natural Gas Co.*, 88 F.E.R.C. ¶ 61,139 (1999).

42. *El Paso Natural Gas Co.*, 83 F.E.R.C. ¶ 61,286 (1998).

43. *Natural Gas Pipeline Co. of Am.*, 88 F.E.R.C. ¶ 61,205 (1999).

On August 31, 1999, the Commission accepted a filing that proposed a limited-scope, interactive, Internet-based auction for interstate capacity.⁴⁴ The pipeline proposed this step only for the Right of First Refusal (ROFR) applicable to its market-based storage service. The Commission stated that Koch was to be "commended for its initiative in developing a process that recognizes the growing availability and use of electronic media as a new way of conducting business."⁴⁵ As well as allowing the parties to comment, the Commission accepted the proposal and the requirement that Koch file a report by May 1, 2000 on the outcomes of the process.⁴⁶

The Commission also approved a request for waivers, limited in scope and length, of the "shipper must have title" rule in *Baltimore Gas & Electric Co.*⁴⁷ The waiver request related to the Local Distribution Company's (LDC) concern that their retail customer choice program required a limited waiver of the rule as to certain storage rights it held on certain interstate pipelines, to allow it to address marketer imbalances using upstream storage. The Commission granted the twelve-month waiver in light of its transitional nature and urged discussions with the pipelines to modify the restrictions that prompted the waiver request.

In a related order, the Commission approved a partial extension of a waiver of the "shipper must have title" requirement previously granted in *Atlanta Gas Light Co.*⁴⁸ In this order, the Commission granted a seventeen month extension of the previously granted waiver (less than the three-year waiver sought by the applicant), again as part of the applicant's state-mandated unbundling effort. The Commission also instituted technical conferences to identify the issues preventing Atlanta from converting its Part 157 rights and to assess the impact of waivers on the interstate market. The Commission expressed concern over the impact of such waivers from the open access rules on competition in the interstate market and whether they would affect the movement of gas across the interstate grid.⁴⁹

On October 19, 1999, the Commission issued an order on rehearing and clarification of its earlier approval of the negotiated rate transaction between El Paso Natural Gas Company and Dynegy Marketing and Trade (Dynegy). In *El Paso Natural Gas Co.*,⁵⁰ the Commission clarified its order, finding that the negotiated rate at issue was not an unlawful practice or contract under the NGA, "even though certain elements of the transaction could arguably operate in an anticompetitive manner in different circumstances."⁵¹ The Commission denied rehearing requests challenging the findings in the earlier order and specifically declined to modify rights of

44. *Koch Gateway Pipeline Co.*, 88 F.E.R.C. ¶ 61,204 (1999).

45. *Id.* at 61,692.

46. 88 F.E.R.C. ¶ 61,204, at 61,693 (1999).

47. *Baltimore Gas & Electric Co.*, 88 F.E.R.C. ¶ 61,133 (1999).

48. *Atlanta Gas Light Co.*, 88 F.E.R.C. ¶ 61,150 (1999).

49. *Id.* at 61,510-11.

50. *El Paso Natural Gas Co.*, 89 F.E.R.C. ¶ 61,073 (1999).

51. *Id.* at 61,226.

recall under the agreement. The Commission emphasized that its approval of the transaction, "on balance," stemmed from specific factors in the case. Those factors included: the turnback of "an unusually large amount of firm capacity on the El Paso system," the limited demand for such capacity, the absence of mandatory discounting, and its finding of no adverse impact on the California market. The Commission cautioned that its conclusions in future circumstances might be different.⁵²

The Commission continued to apply its policy of permitting pipelines to limit releases so that total nominations by releasing and replacement shippers would not exceed the total contract demand for the segment. This policy was first approved in *Tennessee Gas Pipeline Co.*⁵³ and *Texas Gas Transmission Corp.*⁵⁴

On November 4, 1999, the Commission issued its "Order on Complaint" in *Indicated Shippers v. Natural Gas Pipeline Corp. of America*.⁵⁵ The complainants had challenged the pipeline as having conducted an unlawful auction, in violation of the tariff auction requirements established by the Commission's earlier orders, and violating the other Commission precedents. In particular, the complainants alleged that the pipeline imposed a number of discriminatory restrictions, including restrictions harming recourse rate bids and shippers, and requiring bids to include non-contiguous capacity rights. The Commission granted the complaint in part. The Commission faulted the pipeline's bidding standards that required recourse rate form bids to exceed by a large margin the prearranged bids submitted under negotiated rate bids. The Commission found that this practice failed to award capacity to those who valued it most and allowed the pipeline to extract excessive sums from recourse rate form bidders. Consequently, the Commission required appropriate prospective changes to the procedures.⁵⁶ The Commission found that the pipeline could properly post packages for bidding, albeit pursuant to the reformed bidding procedures.⁵⁷ The Commission also faulted the pipeline's differing treatment of surcharges when evaluating negotiated and recourse form rate bids. Prospectively, the Commission required that the pipeline post both the base rate bid and a listing of applicable surcharges separately, "in order to ensure that the bidding process maintains its transparency."⁵⁸

D. The FERC Clarifies Right of First Refusal (ROFR) Regulations.

On September 17, 1999, the Commission issued an "Order Granting Complaint" in *North American Energy Conservation, Inc. v. CNG Trans-*

52. 89 F.E.R.C. ¶ 61,073, at 61,227.

53. *El Paso Natural Gas Co.*, 85 F.E.R.C. ¶ 61,052 (1998), *clarified and reh'g denied*, 86 F.E.R.C. ¶ 61,290 (1999).

54. *Texas Gas Transmission Corp.*, 89 F.E.R.C. ¶ 61,096 (1999).

55. *Indicated Shippers v. Natural Gas Pipeline Corp. of America*, 89 F.E.R.C. ¶ 61,142 (1999).

56. *Id.* at 61,415-16.

57. 89 F.E.R.C. ¶ 61,142, at 61,416-17.

58. *Id.* at 61,418-19.

*mission Corp.*⁵⁹ The pipeline had found that the shipper, who had a contract for fifteen months, did not have the Right of First Refusal (ROFR) because the contract involved two, non-continuous service periods that each lasted less than one year. The Commission construed its regulations to require that the shipper be given the ROFR because the contract was for a period greater than one year, even though divided into two seasonal components. The Commission further found that the shipper was entitled to the ROFR rights under its contract and requested additional information regarding the pipeline's practice of allowing shippers to acquire "options" on capacity.

E. The FERC Continues to Address Requests for Parking, Lending, and Related Services.

The Commission continued to approve pipeline proposals for parking, lending services, and related services that generally resembled those previously approved.⁶⁰ In *Colorado Interstate Gas Co. (CIG)*,⁶¹ the Commission granted rehearing about its initial order regarding the pipeline's "swing service." Initially, the Commission had found that the service was not new, but rather a "variant" of the pipeline's existing balancing and cash-out process, and therefore had required that revenues be credited to firm customers as was required under the cash-out provision.⁶² Although the pipeline argued that the Swing Service was a truly "new" service requiring new contracts and the use of existing facilities, the Commission reiterated on rehearing that the service was not a new service, but rather a new rate for deferred gas balancing. The Commission characterized it as, "more a rate innovation than a service innovation, as CIG argues."⁶³ Therefore, the Commission found that the economic balance struck in the existing rate structure should not be changed. However, consistent with that finding, the Commission did limit the crediting requirement to parallel the crediting pattern of the pre-existing cash-out process (limited to excess penalty revenues).

The Commission approved in *Transwestern Pipeline Co.*,⁶⁴ an arrangement under which the applicant would purchase market center services from another company in order to expand and enhance its "park-n-ride" service. The service, previously provided only by means of the applicant's line pack, would remain solely a service and contract offered by the applicant. The applicant would, however, purchase transportation service from a public gas and electric in order to offer the service more exten-

59. *North Am. Energy Conservation, Inc. v. CNG Transmission Corp.*, 88 F.E.R.C. ¶ 61,255, reh'g, 89 F.E.R.C. ¶ 61,122 (1999).

60. See generally *Tennessee Gas Pipeline Co.*, 87 F.E.R.C. ¶ 61,375 (1999) (approving Rate Schedule PAL, allowing customers to borrow gas on an interruptible basis at the lowest priority on the system).

61. *Colorado Interstate Gas Co.*, 88 F.E.R.C. ¶ 61,031, 61,067 (1999).

62. *Colorado Interstate Gas Co.*, 86 F.E.R.C. ¶ 61,186 (1999).

63. 88 F.E.R.C. ¶ 61,031, at 61,067.

64. *Transwestern Pipeline Co.*, 89 F.E.R.C. ¶ 61,038 (1999).

sively. Consistent with its case-by-case policy established in the *Texas Eastern Transmission Corp.* proceeding, the Commission reviewed the proposal and found that it met the requirements for acquisition of service by one pipeline from another.⁶⁵

F. The FERC Approves New Pipeline Firm Service Rate Schedules, Chiefly Aimed at Electric Generators

In 1999, the Commission received several proposals for new transportation services aimed primarily at the special needs of the growing market for electric power generation.

On June 16, the Commission issued an order in *Reliant Energy Gas Transmission*,⁶⁶ approving with conditions Reliant's Rate Schedule hourly firm transportation service (HFT). The proposal was intended to allow the pipeline to provide an hourly firm transportation service designed to serve the peaking needs of electric generation customers and other shippers with similar requirements by allowing them to purchase capacity on an hourly basis. Without this service, Reliant's customers could not reserve capacity on less than a daily basis. Reliant submitted that the service would help achieve a greater use of natural gas, and its transportation in the generation and trading of electricity. The service would involve contracting via the Internet, physical points would have to be equipped with real-time gas measurement equipment, the maximum term of service would be ninety days, and service agreements could not be entered into more than thirty days before their effective dates. In other respects, HFT shippers would have similar open access transportation rights to those of other firm shippers, HFT could bump Interruptible Transportation (IT) on as little as one hour's notice, and HFT shippers would face more stringent imbalance provisions than other shippers (including the use of daily spot prices for cash-out purposes). To accommodate HFT, various changes were required to Reliant's "general terms and conditions."⁶⁷ Interveners raised various concerns, prompting technical conferences. The Commission generally approved the proposal and supported the pipeline's goal of serving the new electric generation market, but did impose minor changes to the tariff sheets, particularly regarding: the imbalance mechanisms, cash-out mechanism, and Gas Industry Standards Board compliance.⁶⁸

Other specially-targeted new rate proposals followed. On August 31, 1999, the Commission approved with conditions a very different proposal, the limited firm transportation service (LFT) in *Transwestern Pipeline Co.*⁶⁹ In contrast to the hourly service, the LFT was aimed at shippers able to accommodate periodic interruptions in service, although they generally required firm service. Under LFT, once scheduled for a day, the shipper

65. *Id.* at 61,114-15.

66. *Reliant Energy Gas Transmission*, 87 F.E.R.C. ¶ 61,298 (1999).

67. *Id.* at 62,189-90.

68. 87 F.E.R.C. ¶ 61,298, at 62,193-95.

69. *Transwestern Pipeline Co.*, 88 F.E.R.C. ¶ 61,206 (1999).

would have the same priority as other firm shippers, but the shipper could be subject to the pipeline's right not to schedule the service for all or part of a day for up to ten days per month (limited days). The Commission approved the proposal, citing an earlier LFT-type of service,⁷⁰ the under subscription of the pipeline, and the pipeline's assurances that it would not "oversell or double book the sale of capacity on its system in order to provide LFT service."⁷¹

On March 31, 1999, the Commission accepted a new flexible transportation service proposal for offshore transportation, in *High Island Offshore System (HIOS)*.⁷² The pipeline modeled the proposal after a similar rate previously approved.⁷³ In effect, the proposal created a firm rate whose term would be the life of reserves dedicated under the agreement. Eligible shippers, or shippers aggregating together, were required to dedicate leases with at least 40 Bcf of proven, recoverable reserves for transportation, subject to certain minimum throughput levels. In return, the shippers would be charged a volumetric rate, even though the transportation would be treated as "essentially" equivalent to Firm Transportation (FT) service. Shippers' maximum daily quantities would be changed at least annually and as frequently as quarterly. The Commission accepted the filing subject to a technical conference, noting that the proposal, though similar to an earlier approved offshore service, raised new concerns as well.⁷⁴ Following the technical conference, the Commission required numerous specific changes to the tariff, but accepted the service as modified.⁷⁵

On June 16, 1999, the Commission approved a certificate application in *Algonquin LNG, Inc.*,⁷⁶ under which the interstate LNG company would provide a service where its storage and vaporization service would be bundled with the displacement service of the LDC, Providence Gas Company. This unusual arrangement stemmed in large part from the fact that the interstate LNG company did not have a direct connection to the interstate pipeline grid, but instead was only connected to the facilities of the LDC. Under the proposal, the LNG company's firm and interruptible open access customers would be able to obtain gas by means of a single nomination to the LNG company, rather than separately arranging for the LNG service and a displacement service with the LDC. The Commission found that under the circumstances, the proposal was in the "public convenience and necessity," despite the general policy in Order No. 636 of unbundling services.⁷⁷

70. *Trunkline Gas Co.*, 77 F.E.R.C. ¶ 61,169 (1996), *order on reh'g*, 78 F.E.R.C. ¶ 61,025 (1997).

71. 88 F.E.R.C. ¶ 61,209, at 61,704.

72. *High Island Offshore Sys.*, 86 F.E.R.C. ¶ 61,321 (1999).

73. *Sea Robin Pipeline Co.*, 80 F.E.R.C. ¶ 61,133, *order on reh'g*, 81 F.E.R.C. ¶ 61,169 (1997).

74. *Id.* at 61,339-441.

75. *High Island Offshore Pipeline Sys.*, 88 F.E.R.C. ¶ 61,266 (1999).

76. *Algonquin LNG, Inc.*, 87 F.E.R.C. ¶ 61,296 (1999).

77. *Id.* at 62,176.

During the fall, the Commission addressed a number of pipeline proposals to provide new services geared to meet the needs of the electric generator market. On November 23, 1999, the Commission issued an order accepting and suspending new rate schedules on ANR Pipeline Company that would provide firm and interruptible shippers with variable hourly flow rights, short notice commencement and shut-down of service, and flexibility to manage variations between receipts and deliveries.⁷⁸ The service was to serve a new market with new flexibility needs—the electric generation market. The Commission sought additional information on the rates, subject to additional comments.

On December 16, 1999, in *CNG Transmission Corp.*, the Commission issued an order regarding a title transfer tracking service.⁷⁹ Under the service, CNG would provide buyers and sellers of gas with accounting locations for the nomination of title transfers. The service would, CNG maintained, facilitate the buying and selling of gas and the development of market centers. The Commission found that the service was proposed to benefit the development of the grid and facilitate development of market centers. The Commission conditionally accepted the tariff sheets, but rejected the proposed rates as being unsupported.

On December 30, 1999, the Commission issued an “Order Rejecting Tariff Sheets” in *Natural Gas Pipeline Co. of America*.⁸⁰ The pipeline had proposed an “Interruptible Balancing Service” (IBS) to meet electric generator and industrial needs, and to address the swings and daily imbalances of such facilities. Numerous protests were filed. The Commission noted that such an innovative service responded to customer needs, but that it failed in a number of respects to define the priorities, including among other shortcomings, nature and cost justification for the service. The pipeline was free to refile with those deficiencies remedied. Commissioners Bailey and Hebert dissented.

G. The FERC Addresses Jurisdictional Issues

The Commission addressed jurisdictional issues in successive orders issued in *Tristate Pipeline, LLC*⁸¹ on May 27, 1999, and on a rehearing order on September 30, 1999.⁸² In these orders, the Commission addressed a projected new pipeline that would consist of both newly constructed pipeline facilities and looping facilities on its affiliates’ systems (one interstate pipeline and one Hinshaw pipeline). Tristate would lease the new capacity to the Hinshaw affiliate as the operator. The Hinshaw affiliate would, the sponsors maintained, not lose its Hinshaw status because it would provide “on behalf of” transportation, pursuant to a limited jurisdiction certificate issued under Order No. 63. After considering protests and the results of a

78. *ANR Pipeline Co.*, 89 F.E.R.C. ¶ 61,210 (1999).

79. *CNG Transmission Corp.*, 89 F.E.R.C. ¶ 61,278 (1999).

80. *Natural Gas Pipeline Co. of Am.*, 89 F.E.R.C. ¶ 61,340 (1999).

81. *Tristate Pipeline, L.L.C.*, 87 F.E.R.C. ¶ 61,226 (1999) [hereinafter Initial Order].

82. *Tristate Pipeline, L.L.C.*, 88 F.E.R.C. ¶ 61,328 (1999).

technical conference, the Commission in its Initial Order found that the role of the Hinshaw affiliate would be jurisdictional and not within the Hinshaw exemption or Order No. 63 certificate. The Commission noted its general policy against authorizing "dual-jurisdiction" facilities. The Commission also expressed concern over whether the arrangement would grant a preference in use of the facilities to the operating affiliate when not in use by Tristate, raising concerns under the open access rules. The Commission had viewed the goal of the project—providing service at lower costs and environmental impacts as valid but suggested alternatives that would mitigate the jurisdictional and open access problems. On rehearing and following the technical conference, the Commission made a preliminary determination that the proposed project was in the public convenience and necessity. The proposed project was therefore subject to environmental review. In particular, the Commission found that the proposal met the goals set out in the September 15 policy statement regarding new construction.⁸³

On March 1, 1999, the Commission issued an order finding that a jurisdictional, interstate natural gas facility had been constructed without appropriate authorization. The Commission required the company (Cotton Valley Compression, L.L.C.) to apply for a limited certificate under section 7(c) of the NGA.⁸⁴ This order followed a "show cause" order issued in 1997. The order addressed certain tap and appurtenant facilities for deliveries to a purported intrastate pipeline under the Natural Gas Power Act (NGPA) section 311. After reviewing the pleadings and the results of a technical conference, the Commission found that Cotton Valley's facilities would connect two interstate pipeline facilities and would provide the only viable source of compression to permit the gas to move from the lower-pressure interstate segment to the higher-pressure interstate segment.

H. The FERC Addresses a Major Certificate Application

On December 17, 1999, the Commission issued its "Interim Order" in *Independence Pipeline Co.*⁸⁵ The Independence project had been proposed in March 1997 as a new transportation option for gas supplies from the Chicago area to reach the Northeast. In addition to substantial new pipeline construction, the project included related additional capacity on ANR Pipeline Company (SupplyLink) and Transcontinental Gas Pipe Line Corporation (MarketLink). The proposal attracted substantial opposition from competing pipelines, landowners, environmental and local government organizations, and many individuals.⁸⁶ Although it denied requests

83. 88 F.E.R.C. ¶ 61,328, at 62,003-04.

84. *Williams Natural Gas Co.*, 86 F.E.R.C. ¶ 61,213 (1999).

85. *Independence Pipeline Co.*, 89 F.E.R.C. ¶ 61,283 (1999).

86. The Commission received so many letters from individuals that were not served on the parties that it deemed them exempt from the *ex parte* rules and directed the Secretary to place all such letters in the public file. *Id.* at 61,829. The volume of pleadings and number of parties also required

for a hearing, the Commission did hold a technical conference on the market need for the projects. In the Interim Order, the Commission applied the certificate standards as they existed prior to the policy statement issued in September 1999 on new construction. Under that standard, the Commission found that a market need had been demonstrated for the Market-Link project based on contractual commitments, but that inadequate support had been shown for Independence and SupplyLink. The Commission required that those two projects provide executed contracts with non-affiliated shippers for at least thirty-five percent of their respective capacities.⁸⁷ In effect, the Commission found that if Independence and ANR provided the additional contract support, the applications would meet the public convenience and necessity to permit certification and abandonment. The Commission declined to accept the claims of various competitors that existing capacity on other pipelines would be an appropriate alternative. Instead, the Commissioner addressed a number of issues relating to rates for the proposed services. In addition to the market support requirement, the Commission imposed extensive environmental compliance requirements. Commissioner Bailey dissented on the grounds that the support of contract commitments by non-affiliated shippers should not have been required and she criticized the delays in issuing the order.⁸⁸

I. The FERC Applies Its Policies on Negotiated Rates

As has been recounted in recent Committee reports, the Commission continued to approve (often with minor conditions) numerous pipeline requests for authority to enter into negotiated rates under the Alternative Rates Policy Statement⁸⁹ or to modify such programs.⁹⁰ In an order issued June 9, 1999, the Commission permitted a pipeline to file a service agreement reflecting a negotiated rate as a non-conforming service agreement. However, because the pipeline had not received any general authority to enter into negotiated rates, the Commission held that the pipeline could not enter into future negotiations for negotiated rate agreements until it had received such authority through a tariff filing in compliance with the Alternative Rate Policy Statement.⁹¹

On July 28, 1999, the Commission issued an order in which it held that under the OCSLA,⁹² the pipeline could offer selective discounts to parties

the Commission to establish a heavily restricted service list. *Id.* at 61,832.

87. 89 F.E.R.C. ¶ 61,283, at 61,838-45.

88. *Id.* at 61,885-86.

89. *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 F.E.R.C. ¶ 61,076 (1996).

90. See generally *Great Lakes Gas Transmission, L.P.*, 86 F.E.R.C. ¶ 61,234 (1999); *South Georgia Natural Gas Co.*, 86 F.E.R.C. ¶ 61,328 (1999); *Southern Natural Gas Co.*, 86 F.E.R.C. ¶ 61,317 (1999); *Texas Eastern Transmission Corp.*, 87 F.E.R.C. ¶ 61,362 (1999); *ANR Pipeline Co.*, 87 F.E.R.C. ¶ 61,241 (1999); *CNG Transmission Corp.*, 88 F.E.R.C. ¶ 61,191 (1999); and *Northwest Pipeline Corp.*, 88 F.E.R.C. ¶ 61,310 (1999).

91. *Kern River Gas Transmission*, 87 F.E.R.C. ¶ 61,284 (1999).

92. 43 U.S.C. § 1333 (1999).

using the same receipt and delivery points, as proposed in the pipeline's discounted, negotiated rate filing.⁹³ The Commission found that broad questions regarding the nature of OCSLA's non-discrimination provision should more properly be addressed in the ongoing rulemaking regarding regulation on the OCS.

J. The FERC Addresses Blanket Construction Certificate Violation

On July 28, 1999, the Commission issued an order in *Destin Pipeline Co., L.L.C.*,⁹⁴ denying a requested waiver of the blanket certificate cost limitations for new construction. The Commission required the pipeline to show cause why its blanket certificate should not be suspended. Destin Pipeline Company (Destin) had sought authority to construct certain off-shore lateral pipeline facilities under its blanket construction certificate, at estimated costs below the \$19.6 million limit over which case-specific construction authority would be required. The Commission approved the request, over the objections of a competitor pipeline. Subsequently, the actual construction costs incurred by Destin exceeded \$35 million—almost double the original \$15 million estimate under which Destin had obtained blanket certificate authority to construct. Citing unforeseen construction cost and environmentally related cost increases, Destin subsequently sought a waiver of the blanket certificate maximum cost requirement. In light of earlier analyses of the need for the project, the Commission approved a case-specific section 7(c) certificate. However, the Commission criticized Destin's failure to apprise it of the cost overruns as they arose. More seriously, the Commission found that “[w]hat is of more serious concern to us here, however, is the fact that it appears that Destin knew that its project would not be eligible for blanket certificate in advance of its beginning construction.”⁹⁵ Citing the “crucial” nature of pipelines’ good faith approach to the blanket certificate program, the Commission also found that the pipeline’s assurances of future compliance were not adequate. The Commission directed the pipeline to show cause why its part 157 certificate should not be suspended for six months.⁹⁶

III. JUDICIAL DECISIONS

In *Southern California Edison Co. v. FERC*,⁹⁷ the D.C. Circuit vacated the Commission’s dismissal of Southern California Edison Co.’s (Edison) complaint alleging that Southern California Gas Company (SoCal) had abused its market power in the “secondary release” market for gas pipeline capacity.⁹⁸ The Commission had dismissed the complaint on the

93. *Sea Robin Pipeline Co.*, 88 F.E.R.C. ¶ 61,120 (1999).

94. *Destin Pipeline Co., L.L.C.*, 88 F.E.R.C. ¶ 61,119 (1999).

95. *Id.* at 61,311.

96. 88 F.E.R.C. ¶ 61,119, at 61,311.

97. *Southern California Edison Co. v. FERC*, 172 F.3d 74 (D.C. Cir. 1999).

98. *Southern California Edison Co. v. Southern California Gas Co.*, 79 F.E.R.C. ¶ 61,157, *reh'g denied*, 80 F.E.R.C. ¶ 61,390 (1997).

grounds that SoCal was in full compliance with its capacity release regulations, because it did not exceed the established maximum rate for released capacity. The Court, however, held that SoCal's ability under California's regulatory regime to recover, through an interstate transportation cost surcharge (ITCS), the difference between the cost of the capacity to it and anything SoCal might recover by releases in the secondary market, enabled SoCal to charge its affiliates artificially low prices. Thereby, abusing its market power in the secondary market. The court's determination that the Commission failed to take into account the ITCS in its evaluation of Edison's complaint led to its dismissal of the complaint on grounds that it was arbitrary and capricious. The Court raised the issue that subsequent changes in Edison's and SoCal's operations may implicate standing issues, but left those questions for the Commission to consider on remand.

On March 26, the D.C. Circuit rejected a petition filed by the Municipal Defense Group (MDG) requesting review of a Commission order⁹⁹ approving tariff revisions filed by Texas Eastern Transmission Corporation (Tetco). The Commission order implemented a change in the way Tetco allocates its available forward-haul firm capacity.¹⁰⁰ Tetco proposed to switch its allocation method from a first-come, first-served basis to a method by which the customer whose request would generate the greatest net present value (NPV) to Tetco would receive the capacity. MDG, a group of local gas distribution companies, argued that the NPV method unduly discriminates against small customers. The D.C. Circuit held that the scheme was not discriminatory. The court held that small customers like the members of MDG would not be barred from obtaining available capacity, they would just be required to compete for it on an equal footing with other customers on Tetco's system.

On April 13, the D.C. Circuit vacated and remanded the Commission's denial¹⁰¹ of Iroquois Gas Transmission System's (Iroquois) request that it be allowed, under a certificate granted by the Commission, to construct a new compressor station on its pipeline in order to discount rates for new shippers below those charged to already existing shippers.¹⁰² The Commission argued that Iroquois was not an "aggrieved" party under the NGA because, while the appeal was pending, Iroquois accepted the certificate and the FERC issued a rate order reducing the maximum tariff rate that was below the rejected discount rates Iroquois originally wanted to offer. The Court disagreed, holding that Iroquois' acceptance of the conditioned certificate only served to mitigate not having a certificate at all and did not alleviate Iroquois' injury suffered through rejection of the original discounted rates it sought to offer new shippers. The Court ultimately va-

99. See also *Texas Eastern Transmission Corp.*, 79 F.E.R.C. ¶ 61,258 (1997); *Texas Eastern Transmission Corp.*, 80 F.E.R.C. ¶ 61,270 (1997).

100. *Municipal Defense Group v. FERC*, 170 F.3d 197 (D.C. Cir. 1999).

101. *Iroquois Gas Transmission Sys., L.P.*, 79 F.E.R.C. ¶ 61,394 (1997), *reh'g denied*, 82 F.E.R.C. ¶ 61,086 (1998).

102. *Iroquois Gas Transmission Sys., v. FERC*, 172 F.3d 84 (D.C. Cir. 1999).

cated and remanded to the Commission on the grounds that the Commission's grounds for rejecting Iroquois' request were not revealed clearly enough for judicial review to be meaningful.

In *Process Gas Consumers Group v. FERC*,¹⁰³ the D.C. Circuit granted review of the Commission's approval of Tennessee Gas Pipeline Company's (Tennessee) proposal to move from "first-come, first-served" capacity allocation to the NPV method,¹⁰⁴ and the Commission's subsequent acceptance of Tennessee's proposal to put a twenty year right-of-first-refusal cap on bids evaluated under the NPV method.¹⁰⁵ The Court held that the Commission had failed to adequately explain why it relied on ten and fifteen year precedent agreements as support for the twenty-year cap. Furthermore, the Court held that the Commission failed to explain its choice of a data set in response to an objection to the cap. As to Tennessee's proposal to apply NPV to meter amendments, the Court again held that the Commission failed to adequately address countervailing concerns. The Court granted the petition and ordered the Commission to better explain or modify its approval of the twenty year cap and Tennessee's use of the NPV method of allocating pipeline capacity.

In June, the Tenth Circuit reversed and remanded orders¹⁰⁶ in which the Commission asserted jurisdiction over a new natural gas line and related facilities proposed by K N Wattenberg Limited Liability Company (KNW).¹⁰⁷ The underlying Commission orders had held that the KNW's proposed facilities were neither local distribution facilities nor Hinshaw Amendment facilities. Instead, the Commission ruled that because the new facilities are integrated with KNW's existing interstate system, the Hinshaw Amendment did not apply. The Court of Appeals reversed and remanded, holding that the only integration between the certificated facilities and KNW's interstate system was that they were owned by the same company. The Court found that the Commission's interpretation of the Hinshaw application in this case was a departure from Commission precedent and that the Commission had failed to adequately explain that departure.

In *Northern Municipal Distributors Group v. FERC*,¹⁰⁸ the Court affirmed a series of Commission orders aimed at providing adequate supplies of gas at Carlton, Minnesota on the Northern Natural Gas Pipeline (Northern). Pursuant to a settlement agreement, certain shippers were required to supply gas at Carlton, while other shippers were required to pay a surcharge to compensate the shippers who supplied Carlton. Northern appealed the Commission's decision to limit its ability to discount the sur-

103. *Process Gas Consumers Group v. FERC*, 177 F.3d 995 (D.C. Cir. 1999).

104. *Tennessee Gas Pipeline Co.*, 76 F.E.R.C. ¶ 61,101 (1996).

105. *Tennessee Gas Pipeline Co.*, 79 F.E.R.C. ¶ 61,297 (1997), *reh'g denied*, 82 F.E.R.C. ¶ 61,008 (1998).

106. *K N Wattenberg Transmission Ltd.*, 81 F.E.R.C. ¶ 61,167 (1997), *reh'g denied*, 83 F.E.R.C. ¶ 61,006 (1998).

107. *City of Fort Morgan v. FERC*, 181 F.3d 1155 (10th Cir. 1999).

108. *Northern Municipal Distributors Group v. FERC*, 165 F.3d 935 (D.C. Cir. 1999).

charge. The Court affirmed the Commission's decision on grounds that the Carlton situation was a unique problem that justified a solution which deviated from the Commission's past decisions allowing pipelines to discount non-transition costs. In addition to the pipeline's appeal, the Northern Municipal Distributors Group (NMDG) petitioned for review of the Commission's decision denying NMDG an exemption from the surcharge. NMDG argued that the global settlement concerning Northern's restructuring and Commission policy exempted small customers from receipt point capacity allocations. The Court disagreed noting that resolution of the Carlton problem was separate and distinct from Northern's general restructuring. Consequently, the global settlement and the Commission's policy in those proceedings did not establish a small customer exemption for purposes of the Carlton surcharge.

In *Panhandle Eastern Pipe Line Co. v. FERC*,¹⁰⁹ the D.C. Circuit vacated and remanded a Commission order¹¹⁰ striking various tariff provisions filed by Panhandle Eastern Pipeline Company (Panhandle) regarding Panhandle's willingness to construct pipeline interconnects to permit access to its system. The challenged FERC orders had required Panhandle's tariff to adopt modified tariff language that stated that Panhandle would construct an interconnect for "any party willing to pay the reasonable costs and expenses of the construction and who meets other conditions of Panhandle's interconnect construction policy as modified by the Commission. . . ."¹¹¹ Panhandle successfully argued that the order represented a departure from prior Commission policy, which had been to "require a pipeline to build interconnects on a case-by-case basis if, but only if, the Commission found that the pipeline had previously built them for similarly situated parties."¹¹² The D.C. Circuit held that, although the modified tariff language "did not require Panhandle to build any interconnects immediately,"¹¹³ the language, nevertheless, bound Panhandle to construct an interconnect for any requestor that met the modified criteria, "even if the requestor were not similarly situated to any party for whom Panhandle had previously built an interconnect."¹¹⁴ The D.C. Circuit held that the Commission had departed from its prior policy without either acknowledging the departure or providing an explanation for its rationale¹¹⁵ and, therefore, remanded the case to the Commission for an explanation of its reasoning.

On December 14, 1999, the D.C. Circuit denied a petition filed by Panhandle seeking review of a Commission decision related to a Panhandle section 4 rate proceeding.¹¹⁶ The Commission had refused to vacate

109. *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273 (D.C. Cir. 1999).

110. *Panhandle Eastern Pipe Line Co.*, 79 F.E.R.C. ¶ 61,016 (1997), *reh'g denied*, 81 F.E.R.C. ¶ 61,295 (1997).

111. 79 F.E.R.C. ¶ 61,016, at 61,077.

112. *Panhandle*, 196 F.3d at 1274.

113. *Id.* at 1275.

114. *Panhandle*, 196 F. 3d at 1275.

115. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

116. *Panhandle Eastern Pipeline Co.*, 83 F.E.R.C. ¶ 61,008 (1998), *reh'g denied*, 83 F.E.R.C. ¶

two earlier opinions¹¹⁷ that Panhandle argued had been rendered moot by a subsequent settlement agreement.¹¹⁸ The settlement was filed and approved before rehearing requests of those orders could be addressed by the Commission. The D.C. Circuit held that because the Commission had “never issued final judgments disposing of Panhandle’s rate filings . . . there was no ‘order issued by the Commission’ from which Panhandle could obtain judicial review.”¹¹⁹ Because the two prior opinions were “non-binding policy statements” with no precedential value, the D.C. Circuit held that Panhandle was not an “aggrieved” party under the NGA, could not assert an injury-in-fact and, therefore, lacked standing.¹²⁰

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61,353 (1998).

117. *Panhandle*, 71 F.E.R.C. ¶ 61,228 (1995) (Opinion No. 395) and *Panhandle*, 74 F.E.R.C. ¶ 61,109 (1996) (Opinion No. 404).

118. The settlement agreement was approved by the Commission in 77 F.E.R.C. ¶ 61,284 (1996).

119. *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 268-69 (D.C. Cir. 1999).

120. *Id.* at 270.

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