Report of the Committee on Legislation and Regulatory Reform

I. Congressional Matters

A. *Summary of the Clean Air Act Amendments of 1990*

The following is a brief description, by Title, of the provisions of the new Clean Air Act Amendments (Amendments) of 1990[1] which are of significance to independent power developers. It is premature to speculate about the long-term implications of the Amendments for the viability of the independent generating sector. It is likely that the new requirements will require ingenuity and strategic planning, but they should not be an insurmountable obstacle to continued responsible independent power development.

1. Title I—Nonattainment Areas

This Title applies stringent new requirements for nitrogen oxides (NO_x) in ozone nonattainment areas[2] and ozone transport areas.[3] The current requirements for volatile organic compound (VOC) sources are extended to NO_x sources, including requirements for Reasonably Available Control Technology (RACT) to be retrofitted to existing units and for Lowest Achievable Emission Rate (LAER) technologies for new sources. In addition, offsets of up to 1.5-to-1 ratio are required for new NO_x sources in nonattainment areas. These requirements apply to facilities that emit greater than ten tons per year in "extreme" areas (Los Angeles Basin only), greater than twenty-five tons per year in "severe" areas, greater than fifty tons per year in "serious" areas, and in all other areas, greater than one hundred tons per year.

Areas which fail to meet the new compliance deadlines will, at the discretion of the Administrator, face either a reduction in contributions from the federal highway trust fund or a requirement that new sources offset emissions at a 2-to-1 ratio.

The Environmental Protection Agency (EPA) has the authority and discretion to waive these requirements if it determines that excess NO_x reductions would be achieved by full implementation of this section. In addition, developers will have the opportunity to demonstrate that NO_x reductions would be achieved by full implementation of this section. In addition, developers will have the opportunity to demonstrate that NO_x control required by this section would not contribute to ozone attainment in the relevant air basin.

2. Title IV—Acid Deposition

Title IV, which establishes a trading program in sulphur dioxide (SO_2) allowances, is the title with the most significant immediate impact on

1. Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990).
2. An ozone nonattainment area is one which fails to meet the national ambient air quality standard.
3. An ozone transport area is an area in one state which has been designated as contributing significantly to a violation of national ambient air quality standards in one or more states.

independent power developers. The allowance trading program is the centerpiece of the Administration's attempt to employ market-based mechanisms to compel environmental compliance. Voluntary compliance is encouraged by companion civil and criminal penalties which are significantly tougher than those found in any other environmental law (see Titles V and VII). Although touted as a move from EPA's traditional "command and control" regulatory regime, it is important to bear in mind that none of the preexisting "command and control" regulations have been voided. The SO_2 allowance requirement supplements other measures such as new source review and new source performance standards (i.e., PSD offsets, best available control technology (BACT), and permit emission limitations).

a. The Program

All utility units, including independent power facilities (both qualifying facilities (QFs) and independant power program (IPPs) that are not grandfathered from the program are required to hold one allowance for each ton of SO_2 emitted from the unit in each calendar year, beginning in the year 2001.[4] Industrial units are exempt from the program. Since independent developers are unlikely to be able to create allowances from their existing units, they must acquire the needed allowances from the franchised utilities or industrials which have already created them by controlling SO_2 emissions below the required level.

b. The Grandfather Provision

The most important provision for independent developers in Title IV was the inclusion of a "grandfather" provision which exempts existing QF and IPP projects from the program. Many QFs and IPPs were not operating during the 1985, 1986, and 1987 "base line" period necessary to be issued allowances. Consequently, EPA did not allocate any allowances to independent power developers. However, in order to avoid the inequity which would result by the imposition of potentially large costs on units which are operating under a fixed-price contract and unable to pass those unforeseen costs to its customers, these units were exempted from the allowance program. Grandfathered units will not be issued allowances unless they elect to participate in the program.

The provision "grandfathers" all operating QFs and IPPs and all QFs and IPPs which have secured a power sales agreement, or which can demonstrate by any of the enumerated means that its revenue stream was fixed prior to the date of enactment, November 15, 1990. There is no requirement for EPA to promulgate regulations prior to implementation of this provision.

4. Phase I utility units require allowances beginning in 1995. However, since no QFs or IPPs are Phase I units, I have omitted a discussion of Phase I requirements. Phase II of the allowance program begins January 1, 2000. All allowances described in this article are Phase II allowances.

c. Industrial Boiler Conversion

Industrial units which opt into the program are not entitled to keep allowances created by the retirement of a boiler unless the boiler retirement is part of a program to replace the retired boiler with a cogeneration unit. Industrial allowances may be created by fuel switching or installation of pollution control equipment. The industrial must opt into this program before the boiler is replaced with a cogeneration unit. The allowances are lost if the conversion occurs in a two-step process or if the conversion occurs prior to opting into the program.

d. NO_x

The Administrator is required to set standards which will achieve a 2 million ton reduction in NO_x emissions (measured from 1990 emissions) by the year 2000.

There should be no effect on projects such as QFs and IPPs built under the Best Available Control Technology (BACT) regime, and no new BACT requirements should result from this provision. The required reduction will in all probability come from existing units which do not currently control the NO_x.

e. Contingency Guarantee/Fixed Price Reserve

Congress attempted to provide a "last resort" pot of allowances for independent power developers unable to purchase allowances in the market in the event that the anticipated vigorous market failed to materialize in the early years. Beginning in 1993, the Administrator is authorized to offer to sell 50,000 tons of allowances per year at the price of $1500 per ton. Anyone—utilities, independents, brokers, banks—can purchase allowances from the Administrator. However, independent power producers (as defined above) will receive priority, or an option for such allowances, if the producer has received a written guarantee from the Administrator for the allowances before the auctions commence in 1993. The IPP must demonstrate that:

> —it has made a good faith and fruitless effort to purchase the needed allowances elsewhere, and continues to search;
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> —it will apply for financing after January 1, 1990, and before the first auction (required in 1993, see *Auctions*, below); and
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> —the project is sufficiently developed to estimate the number of allowances it will require to operate.

EPA may interpret this priority simply as a right of first refusal or as an option which can be exercised in the year 2000. Because the statutory language is not self-explanatory, EPA's regulations implementing this provision will be extremely important in determining whether this provision provides any benefit to IPPs. The price of $1500 per ton was derived from EPA's analysis which indicates that the cost to create "marginal" allowances will be approximately $750 per ton. The $750 per ton estimate was doubled to $1500 per ton to discourage applications to EPA and encourage reliance on the market.

f. Auctions

Commencing in 1993 and in each year thereafter, the Administrator will auction 100,000 tons per year of allowances and 250,000 tons per year after the year 2000, not including "spot" allowances.[5] This program is intended to "jumpstart" the allowance market and to assure continued liquidity. Participation is open to any interested party. It is intended that this auction function in a manner similar to Treasury's bond and T-Bill auctions.

3. Permits

Under the Act, EPA is required to reissue, within one year of enactment, its regulations regarding the permit program as revised by the Amendments. The regulations must establish a maximum term of five years, and a minimum term of one year, for any air permit issued pursuant to the Act. In addition, EPA's authority to review, and if necessary, object to any permit issued by a state authority that violates the Act is codified. States are granted 90 days to revise permits to meet any EPA objection.

Fees for permit applications must be no less than $25 per ton of each regulated pollutant, or such other amount as the Administrator may determine, so that they adequately reflect the reasonable costs of the permit program, adjusted by the Consumer Price Index (CPI). EPA's regulations must include:

(1) requirements for permit applications, including a standard application for and criteria for determining in a timely fashion the completeness of applications;

(2) the requirement that the permitting authority, in the case of permits with a term of three or more years, shall require revisions to the permit to incorporate within eighteen months applicable standards and regulations promulgated under the Act after the issuance of such permit. (No revision is required if the effective date of the new regulation occurs after the expiration of the permit term. Any permit revision pursuant to this provision shall be considered to be a permit renewal.);

(3) operating changes do not require permit amendments if the changes are not "modifications" and do not result in emissions in excess of those allowable under the permit;

(4) adequate, streamlined, and reasonable procedures for processing applications, for public notice, including the opportunity for public comment and hearing, and for judicial review in state court of the final permit action by the applicant, by any person who participated in the public comment process and by any other person who could obtain judicial review of that action under applicable law;

(5) provisions which treat the failure of the permitting agency to act on

5. Spot allowances are those put up for bid at an annual auction by persons holding such allowances.

a permit application within the time specified as a final permit action solely for purposes of obtaining judicial review to mandate appropriate action without additional delay.

The Administrator has forty-five days to review the proposed permit. If the Administrator makes no objection within the forty-five day period, within sixty days, any person may petition the Administrator to take such review action. The petition may include only the objections to the permit that were raised during the comment period. The Administrator shall grant or deny such petition within sixty days after the petition is filed.

4. Enforcement

Title VII increases the range and severity of civil and criminal penalties available for violations of the Clean Air Act. The Administrator's authority to assess civil penalties has been increased to a maximum of $25,000 per day for each violation. For penalties in excess of $200,000 and criminal prosecutions, the Administrator must refer the matter to the Attorney General.

Criminal fines and penalties are available for negligent or knowing endangerment (under the Air Toxics provisions), knowing violations of the permit and reporting requirements, and falsification of data including monitoring results. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.

While adding criminal sanctions for recordkeeping, filing, and other omissions, these provisions are not intended to penalize inadvertent errors. For criminal sanctions to apply, a source owner or operator must be on notice of the requirements in question. The Statement of Managers states:

> The criminal penalties available . . . should not be applied in a situation where a person, acting in good faith, promptly reports the results of an aduit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or while attempting to correct any deficiencies identified in the audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.

In addition, the new law permits citizens to file, beginning in 1992, "private attorney general" lawsuits against sources which are in violation of the law. They may also seek to enforce the terms and conditions of permits or require sources to obtain permits.

B. Global Warming Bills Introduced By Senator Wirth in 1989

1. Introduction

Senator Timothy Wirth (D.-CO.), introduced two bills on global warming in 1989. On February 2, 1989, Senator Wirth introduced the National Energy Policy Act of 1989.[6] On March 16, 1989, Senator Wirth introduced a new resolution.[7] Both bills had significant bipartisan support as evidenced by

6. S. 324, 101st Cong., 1st Sess., 135 CONG. REC. 1024 (1989).
7. S.J. Res. 88, 101st Cong., 1st Sess., 135 CONG. REC. S3034 (1989).

their numerous cosponsors.

The overall purpose of the National Energy Policy Act of 1989[8] was to establish a national energy policy that would reduce the generation of carbon dioxide and trace gases as quickly as possible in order to slow the pace and degree of atmospheric warming and global change. The bill focused on:

- energy efficiency, fuel switching, and conservation;
- use of nuclear, innovative clean coal and renewable energy technologies;
- reforestation and natural resource management policies; and
- international development and population practices to promote national and international growth and development, achieve a secure energy supply, and protect the global environment.

Like the National Energy Policy Act of 1989, the National Energy Policy Act of 1990[9] sought to identify an appropriate mix of policies to stabilize the generation of carbon dioxide and other greenhouse gases. The 1990 legislation sought to foster a better understanding of the causes, magnitude, and regional variations in global climate change and to identify the feasibility and implications of proposed policies to abate or mitigate global climate change. The 1990 bill focused on:

- the formulation of a national energy strategy which included least-cost planning as a component;
- energy efficiency initiatives;
- energy research and development initiatives including innovative clean-coal and renewable energy technologies;
- the use of natural gas and alternative fuels;
- restoration and natural resource management policies; and
- international energy technology transfer.

Unlike the original bill, however, the National Energy Policy Act of 1990 recognized that many scientific uncertainties as to the causes and effects of global climate change which must be addressed. The 1990 bill also recognized that a number of the policy initiatives should nevertheless be pursued because they merit attention on national energy policy grounds.[10] This legislation was passed by the Senate and sent to the House. The House then referred it to the House Committee on Energy and Commerce and the House Committee on Science, Space and Technology, where it remained.

8. S. 324, 101st Cong., 1st Sess., 135 CONG. REC. S1024 (1989). It should be noted that substantially similar legislation was also introduced by Senator Wirth in 1988. S. 2667, 100th Cong., 2d Sess., 134 CONG. REC. S10281 (1988) (a bill to establish a national energy policy to reduce global warming, and for other purposes), was introduced by Senator Wirth on July 28, 1988. Referred to as the National Energy Policy Act of 1988, this legislation represented an effort to address the problem of global climate changes, *i.e.*, warming. The legislation of 1988 focused on initiatives to:

- increase energy efficiency in all sectors of the U.S. economy;
- expand research and development of non-fossil fuel sources such as solar energy;
- encourage technologies to reduce carbon dioxide emissions from coal-fired powerplants and other sources;
- develop policies to stop tropical deforestation; and
- research the greenhouse effect, its causes, and the steps needed to cope with it.

S. 2667 100th Cong., 2d Sess., 134 CONG. REC. S10281 (July 28, 1988) (statement of Mr. Bingaman). This bill was referred to the Senate Committee on Energy and Natural Resources where it remained.

9. S. 324, 101st Cong., 2d Sess., 136 CONG. REC. S1034 (1990).

10. S. 324, 101st Cong., 2d Sess., 136 CONG. REC. S12512 (1990) (statement of Mr. McClure).

On October 26, 1990, Senator Wirth offered sections of the Senate bill as an amendment to the House bill.[11] These sections pertained to the development and demonstration of electric vehicle technology. Although the Senate agreed to these amendments, the bill failed to make it back to the House for approval.[12]

C. *Extension of Section 29 Tax Credits for Non-Conventional Fuel Sources*

On November 5, 1990, the President signed into law, the Omnibus Budget Reconciliation Act of 1990 (Act).[13] Included in this bill is the extension of both the qualification and sunset dates pertaining to the non-conventional fuels tax credit, section 29(c)(2)(A) of the Internal Revenue Code. The extension was approved in the House in the early hours of October 28, 1990, and later approved by the Senate on November 3, 1990.

The Act includes a $2.5 billion package of energy incentives, included in which is the section 29 extension. Section 29 awards tax credits to companies that produce gas from non-conventional sources, such as coal seams and tight sands. The Act extends the credit by two years for wells drilled prior to 1993 and for gas that is sold by December 31, 2003.

II. FEDERAL ENERGY REGULATORY COMMISSION MATTERS

A. *Notice of Proposed Rulemaking and Interim Rule Concerning Natural Gas Act Section 7 Construction Certificates*

On August 2, 1990, in response to Commissioner Moler's task force review of problems associated with the procedures governing optional expedited certificates, blanket certificates, and NGPA section 311 construction, the Federal Energy Regulatory Commission (the Commission) issued a notice of proposed rulemaking (NOPR) and an interim rule proposing a comprehensive revision of the Commission's regulations governing natural gas pipeline construction certificates.[14]

1. Proposals to Update Optional Expedited Certificate Application Procedures

Optional expedited certificates (OECs) were introduced five years ago as part of the open access transmission regulatory reforms in Order No. 436.[15] The Commission's NOPR seeks comments on ways to conform OEC proce-

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11. H.R. 4521, 101st Cong., 2d Sess., 136 CONG. REC. S17062 (1990).

12. S. 324 was reintroduced on Thursday, January 31, 1991. The language of this bill is substantially similar to that considered on August 4, 1990.

13. Pub. L. No. 101-508, 104 Stat. 1388 (1990).

14. Notice of Proposed Rulemaking, *Revisions to Regulations Governing Certificates for Construction*, Docket No. RM90-1-000, 55 Fed. Reg. 33,027 (1990); Order No. 525, *Interim Revisions to Regulations Governing Construction of Facilities Pursuant to NGPA Section 311 and Replacement of Facilities*, Docket No. RM90-14-000, 55 Fed. Reg. 33,011 (1990).

15. Order No. 436, F.E.R.C. Stats. & Regs. [Regulations Preambles] ¶ 30,665 (1985), *vacated and remanded on other grounds sub nom.* Associated Gas Distribs. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied., sub nom.* Interstate Natural Gas Ass'n of America v. FERC, 485 U.S. 1006 (1988).

dures implemented in Order No. 436 to the Commission's policies and practice currently implemented on a case-specific basis.

The Commission proposes to codify risk allocation and acceptable reservation fees criteria for firm transportation service on certificated OEC facilities. The Commission would approve reservation fees with sufficient risk deemed to be on the pipeline and not on the customer if the reservation fees result from arm's-length negotiations between pipelines and customers, and if the fees are not greater than what the modified fixed-variable demand charge would be for a pipeline's sales. The Commission would require pipelines to make the lowest reservation fee negotiated with any shipper available to all shippers on a nondiscriminatory basis. However, pipelines would not be required to build facilities if negotiated aggregate reservation fees are insufficient to support project construction. Pipelines would then be free to renegotiate the fees with individual customers. Individual customers could agree to pay a higher reservation fee along with a correspondingly lower usage fee to induce pipelines to construct projects or to secure a higher priority in the initial queue for firm transportation service. Once facilities are operational, the Commission would require pipelines to make all remaining firm transportation capacity available at the lowest negotiated reservation fee, and the pipelines' initial queue for firm transportation service would become "locked in."

Additionally, pipelines would be required to include in OEC applications a proposed methodology for allocating initial firm transportation capacity in a nondiscriminatory manner using one of three proposed methodologies: (1) first-come, first-served; (2) present value of the reservation charge per Mcf, determined by a specified formula; or (3) any other nondiscriminatory method approved by the Commission on a case-by-case basis. The proposed regulations would establish criteria to ensure that firm transportation capacity is allocated in a nondiscriminatory manner. The proposed regulations also would require OEC pipelines initially allocating firm transportation capacity to conduct an open season, for a minimum of thirty days, with sufficient public notice of the open season's starting and closing dates.

The Commission proposes to eliminate the requirement that an OEC pipeline's constructed facilities comply with the environmental compliance criteria in section 157.206(d). Currently, the Commission conducts an environmental review of any certificate application that has a significant adverse environmental effect and adopts appropriate mitigative conditions to ameliorate any facility's impact. Under the proposed regulations, the Commission would issue OECs as it currently authorizes some traditional NGA section 7(c) certificates without the need for pipelines to seek a waiver of environmental compliance criteria.

The Commission proposes to codify current case-specific precedent on conditions applicable to an OEC pipeline's sales service to parallel the regulations applicable to an OEC pipeline's transportation service. The proposed regulations would apply only if an OEC pipeline voluntarily offers sales service. The Commission would require pipelines to provide an open season for firm sales service similar to that required for firm transportation service, the firm and interruptible sales capacity allocated in a nondiscriminatory manner.

In the alternative, the Commission is considering whether to eliminate authorization to OEC pipelines to provide sales service.

The Commission will also consider whether OEC pipelines should provide customers with a capacity assignment program as a condition to gain certificate authorization. In the NOPR, the Commission noted that although capacity assignment programs have been required on only a few occasions, reassignment of rights might enhance facilities operation by OEC pipelines by creating additional incentives for OEC pipelines to optimally size facilities in response to potential competition from their own customers.

Finally, the Commission would preclude pipelines from filing duplicative certificate applications for substantially the same project when only one certificate authorization is required for the project. Under the proposed regulations, when a pipeline files duplicative certificate applications, the initial certificate application would be deemed withdrawn and dismissed as superseded by the subsequent certificate application.

2. Proposal to Expand and Consolidate Generic Construction Certificate Authorization

Recognizing that there may be an environmental impact when pipelines replace facilities, the Commission proposes to expand the definition of facilities requiring Natural Gas Act (NGA) section 7(c) certificate authorization to include replacement facilities. Pipelines could seek certificate authorization for replacement facilities costing less than $10 million pursuant to the automatic certificate authorization procedures in section 157.208(a). Pipelines could seek certificate authorization for replacement facilities costing more than $10 million pursuant to (1) the prior notice certificate procedures in sections 157.208(b) and (c), (2) the new accelerated certificate procedures in proposed section 157.219, (3) the optional expedited certificate procedures in part 157, subpart E, or (4) the traditional certificate procedures in part 157, subpart A.

The Commission would also expand new construction of facilities under the prior notice certificate authorization procedures in part 157, subpart F. The Commission could review unopposed pipeline construction proposals under the prior notice procedures much more quickly than under the traditional part 157, subpart A, certificate application procedures. Pipelines proposing to construct facilities under the prior notice certificate procedures would be required to have a blanket construction and operation certificate issued pursuant to part 157, subpart F, as well as a blanket transportation certificate issued pursuant to part 284. The Commission would provide notice of the proposed construction project in the *Federal Register*. The project must be unopposed, and the Commission must, in its environmental assessment, find that the project has no significant environmental impact. Finally, pipelines would be required to charge their existing part 284 transportation rates for service on the new facilities. Pipelines would be required to provide sufficient information in applications to establish that proposed facilities will meet these conditions. If a pipeline with a competitive project protests and files a notice of intent to file a competitive proposal, the Commission would review the competing applications under the traditional certificate application procedures in part 157, subpart A.

The Commission also proposes to reduce the number of pipeline construction certificate applications by increasing the dollar ceilings on projects authorized under the Commission's blanket certificate regulations. The Commission would increase project cost limits to $10 million for facilities certificated under the automatic certificate authorization procedures in section 157.203(b) and section 157.208(a), and to $25 million for facilities certificated under the prior notice certificate authorization procedures in section 157.203(c) and section 157.208(b). Pipelines would not be permitted to use the automatic certificate authorization procedures for any construction, regardless of size or cost, involving the removal of existing facilities, or construction of facilities in urban or residential areas. The Commission would require pipelines to publish notice of the proposed construction once in a daily or weekly newspaper of general circulation in each county in which the project will be located. The notice must be published at least six weeks prior to the beginning of the construction activity. The pipelines must certify that publication has occurred.

The Commission is also expanding filing requirements for sales taps in section 157.211, for changes in delivery points in section 157.212, and for abandonment of gas supply facilities in section 157.216, such that pipelines must file such limited additional information as the Commission staff requests. The proposed regulations would require pipelines to include in their construction certificate applications a statement identifying all affiliates involved in the construction, operation, or use of the proposed facilities. The Commission proposes to shorten the protest period for most prior notice filings under part 157, subpart F from forty-five days to twenty-five days.

The Commission proposes to expand the Office of Pipeline and Producer Regulation Director's delegated authority to review and approve uncontested pipeline proposals to construct, acquire, or operate facilities from $5 million to $25 million. The Commission would also authorize the Director to act on all uncontested pipeline and producer applications for abandonment of service or facilities.

3. Proposals to Evaluate NGPA Section 311 Construction

Under the Commission's current regulations, projects constructed pursuant to Natural Gas Policy Act (NGPA) section 311 are subject to the environmental conditions in section 157.206(d) and not to the more extensive environmental assessment review or impact statement required in part 380. In Order No. 436, the Commission anticipated that pipelines would construct only certain limited, minor facilities, i.e., taps and interconnections, to implement NGPA section 311 transportation service. The Commission believed that NGPA section 311 transactions would utilize existing interstate pipeline facilities and, therefore, pipelines would not need to seek additional NGA section 7 construction certificate authority.

Since Order No. 436 was issued, the number of NGPA section 311 transactions have grown and multiplied as interstate pipelines use this authority to construct extensive facilities. The Commission is considering whether current NGPA section 311 construction procedures are adequate for extensive pipeline projects, and whether pre-construction case-specific environmental review may be necessary.

Specifically, the Commission is reviewing several options to provide an increased measure of oversight of NGPA section 311 construction such as: (1) rescinding NGPA section 311's automatic construction authority; (2) requiring notification to the Commission prior to commencement of NGPA section 311 construction; or (3) patterning NGPA section 311 authorization after the blanket construction authorization so as to set project cost limits or limits on the types of construction that could be done.

Under consideration also is the balance between allowing certain pipeline transactions in interstate commerce to occur outside of NGA jurisdiction and providing the environmental protection mandated under the various environmental statutes. The proposed regulations would require intrastate pipelines as well as interstate pipelines to provide notice and evidence to the Commission of compliance with the environmental compliance criteria in section 157.206(d) for proposed construction of facilities used for NGPA section 311 transactions before beginning construction. The Commission emphasized in the NOPR that intrastate pipelines would not become subject to the full panoply of the Commission's jurisdiction merely by virtue of filing the information required by section 284.11(b) or as a result of having their proposed construction reviewed by the Commission for compliance with section 157.206(d).

4. Proposals to Expand Categorical Exclusions from Environmental Assessment, Codify Mandatory Environmental Requirements, and Incorporate Generic Erosion Control and Stream and Wetland Procedures

The Commission proposes to include the following pipeline activities in the list of categorical exclusions from environmental assessment in part 380: (1) natural gas storage service where no facility construction is involved; (2) abandonment of natural gas facilities by sale where natural gas service would be continued; (3) Presidential Permits to operate facilities at the United States national border that do not involve construction of new facilities; (4) complaints that do not raise environmental issues; (5) declaratory orders disclaiming jurisdiction; (6) abandonment of any natural gas service (such as transportation, sale or storage) that does not involve abandonment of natural gas facilities; and (7) acquisition of facilities.

The Commission also proposed to replace the advisory environmental guidelines in part 380, appendix A, with a list of mandatory environmental reports in a new section 380.12. The proposed environmental reports would update and codify the Commission's current informal environmental review procedures and ensure that a construction certificate application's environmental report is tailored to the facility's potential for environmental impact.

Finally, the Commission proposes to require pipelines to incorporate minimum standards for constructed facilities that undergo no certificate review or accelerated certificate review to reduce those facilities' impact on soil erosion and to mitigate the impact on streams and wetlands.

5. Proposed Policies and Phasing the Certificate Process, Incomplete Applications, and Competitive Proposals

The Commission announced its intention in the NOPR to separate the environmental and nonenvironmental aspects of NGA section 7 construction certificate applications and review these issues in phrases. The Commission proposes to issue an initial order granting construction authority and containing preliminary findings on all nonenvironmental issues and, after completion of the environmental analysis, a final order resolving all aspects of a certificate application. Both the initial and final order would be subject to rehearing.

The Commission also emphasized its policy that filed certificate applications must be complete to be accepted for consideration. The Commission announced its intention in the future to reject any incomplete certificate applications.

Finally, the Commission invited comments on implementation of the *Ashbacker*[16] doctrine in the Commission's certificate regulations. The Commission seeks to reconcile the *Ashbacker* mandate Commission's goal to streamline and expedite construction certificate applications. Under *Ashbacker*, when naturally exclusive bona fide construction certificate applications are filed, the grant of one without a comparative hearing deprives the loser of the opportunity for a hearing on the competing application. The Commission has sought comments on procedures currently applied on a case-by-case basis, i.e., establishment of regulatory cutoff dates and reinterpretation of the economic standards used to determine what constitutes mutually exclusive applications.

6. Interim Rule Requiring Notification to the Commission of NGPA Section 311 Facilities Construction and of Pipeline Facilities Replacement

In conjunction with the NOPR proposing to streamline Commission approval of construction certificate applications and review of NGPA section 311 construction, the Commission issued Order No. 525, an interim rule effective immediately, which requires pipelines to notify the Commission at least thirty days prior to commencement of construction of any NGPA section 311 facility or of any replacement of facilities. The notification will give the Commission an opportunity to ascertain whether case-specific action is warranted for these projects while the Commission reviews the NOPR's comments.

Depending on whether it is a replacement facility or an NGPA section 311 facility, pipelines must include some or all of the following information in the notification: (1) a brief description of the facilities to be constructed or replaced (including pipeline size and length, compression horsepower, design capacity, and cost of construction); (2) evidence of compliance with the environmental terms and conditions in section 157.206(d); (3) the U.S. Geological

16. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

Survey 7.5-minute-series topographic maps showing the location of the facilities; and (4) a description of the procedures to be used for erosion control, revegetation and maintenance, and stream and wetland crossings.

B. Notice of Proposed Rulemaking and Interim Rule Revising Regulations Governing Transportation Under NGPA Section 311 and Blanket Transportation Certificates

On August 2, 1990, the Commission issued a NOPR and an interim rule proposing a revised interpretation of the "on behalf of" language in NGPA section 311 for transportation services by interstate pipelines.[17] The Commission was responding to a decision by the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*.[18] The court held that the Commission's interpretation of "on behalf of," as implemented in several specific cases issued subsequent to Order No. 436, was inconsistent with the NGPA and unreasonably broad. The court concluded that the Commission's interpretation would permit virtually any gas transportation arrangement to be structured so as to take place outside the Commission's NGA section 7 certificate jurisdiction.

The Commission proposes that, in an NGPA section 311 transportation transaction, the "on behalf of" entity either (1) have physical custody and transport the gas at some point during the transaction, or (2) hold title to the gas at some point during the for a purpose related to its identity as a local distribution company, intrastate pipeline, or interstate pipeline (title or transport test). The Commission has sought comments on whether this interpretation of "on behalf of" should be promulgated as a final rule. The Commission has also sought comments on whether the interpretation should be expanded to authorize additional transportation transactions under NGPA section 311.

The Commission is also proposing the following additional amendments to its rules to encourage interstate pipelines to make use of their blanket certificate transportation authority. The Commission proposes to eliminate (1) the 120-day limitation on blanket transportation services commenced under the automatic provisions in section 284.223(a) of the regulations; (2) the *Federal Register* prior notice requirement for blanket transportation services; and (3) the necessity for Commission action by a date certain in order to prevent protests from interrupting blanket transportation services required by the public convenience and necessity.

The Commission implemented the NOPR's proposed interpretation of "on behalf of" in Order No. 526, an interim rule issued concurrently with the NOPR and effective immediately. Order No. 526, however, applies the "on behalf of" interpretation only to NGPA section 311 transportation services by

17. Notice of Proposed Rulemaking, *Revisions to Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates*, (to be codified at 18 C.F.R. pts. 157 and 284) (proposed Aug. 2, 1990); Order No. 526, *Interim Revisions and Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates*, 55 Fed. Reg. 33,002 (1990) (to be codified at 18 C.F.R. pt. 284) (proposed Aug. 2, 1990).

18. 899 F.2d 1250 (D.C. Cir. 1990).

interstate pipelines, whereas the final rule's interpretation will apply equally to transactions in which intrastate pipelines are transporting gas in interstate commerce under NGPA section 311.

The interim rule allows interstate pipelines a one-time conversion for current NGPA section 311 transportation that cannot qualify under the proposed "title or transport" definition to the pipelines' part 284 blanket transportation certificates without customers losing their place in the pipelines' transportation queues. As of August 2, 1990, intrastate pipelines may not commence any new NGPA section 311 transportation service that does not satisfy the "title or transport" definition. If a transaction does not qualify, it must have been terminated by November 1, 1990, unless the transaction was converted to part 284 blanket certificate authorization by that date. The Commission adopted procedures in the interim rule to allow interstate pipelines to convert existing nonqualifying NGPA section 311 transportation services to transportation services under the pipelines' Part 284 blanket certificates.

C. *The Commission's Case-by-Case Adoption of Rules Governing Transmission Access And Market-Based Pricing*

1. Introduction

With the demise of the three NOPRs issued by the Commission in 1988 to implement a policy of encouraging greater competiting in electricity markets,[19] the Commission began a practice of accomplishing the same objective on a case-by-case basis. After several years and nearly twenty such cases, a series of guidelines has emerged from the Commission's published opinions. This section articulates those guidelines.

Many entities have asked the Commission to forego traditional cost-based regulation in favor of pricing set by arms-length negotiation. The Commission has been willing to grant such requests only upon a showing that the seller is not exhibiting market power over the buyer, and in the case of affiliates, a showing that the transaction does not have the potential to be unduly discriminatory. In cases where market power is evident, the Commission has made clear that approval of the market-based rate depends upon whether the buyer has access to the transmission system of the seller.

2. General Rule

As a general rule, the Commission will not allow market based pricing unless the seller can demonstrate that it lacks market power over the buyer and that it is not engaged in self-dealing or reciprocal dealing. To establish that the rate is just and reasonable under section 205(a), the Commission requires the applicant to demonstrate a lack of market power over the buyer.

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19. Notice of Proposed Rulemaking, *Regulations Governing Bidding Programs*, 53 Fed. Reg. 9324 (1988) (to be codified at 18 C.F.R. pts. 35 and 293) (proposed March 16, 1988); Notice of Proposed Rulemaking, *Regulations Governing Independent Power Producers*, 53 Fed. Reg. 9327 (1988) (to be codified at 18 C.F.R. pts. 38 and 382) (proposed March 16, 1988); Notice of Proposed Rulemaking, *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 53 Fed. Reg. 9331 (1988) (to be codified at 18 C.F.R. pt. 292) (proposed March 16, 1988).

The Commission has defined "market power" as the ability to significantly influence the price in the market by withholding service and excluding competitors for a significant period of time. Market power also exists when a seller can hold a price constant and offer an inferior service while excluding competitors.[20] The Commission looks at three factors in determining whether market power exists: (i) whether the seller is dominant in the sale of generation services in the relevant market; (ii) whether the seller owns or controls transmission facilities which could be used by the buyer in reaching alternative generation suppliers or has adequately mitigated its ability to block the buyer in reaching such alternative suppliers; and (iii) whether the seller is able to erect or otherwise control any other barrier to entry.[21]

In many cases, particularly those involving utility affiliates, the applicant must also demonstrate that the terms of the sale are not unduly preferential under section 205(b). The Commission applies this standard rigorously in the case of affiliate transactions by requiring the applicant to demonstrate a lack of potential or incentive to engage in self-dealing or other preferential practices.

3. Independent Power Producer and Marketer Transactions

When reviewing market-based rate filings from independent power producers or marketers, the Commission looks to the circumstances surrounding the potential exertion of market power by the buyer. In competitive bidding, the number of alternative suppliers, whether the buyer has obtained all or a portion of its requirements from the seller, and whether the agreement contains favorable terms for the buyer are some of the factors the Commission weighs in assessing the seller's market dominance in generation. The Commission also considers the effect of power sales to the buyer by affiliates of the seller as additional evidence of market dominance. For marketers, generation market power is ordinarily not an issue. However, the Commission requires marketers to report the acquisition of generation assets which might require the Commission to reevaluate the marketer's market power.

The Commission also considers the transmission resources available to the seller and whether these resources are used to thwart access to alternative suppliers. Transmission market power is almost never a concern for independent power producers and marketers because they rarely own or control transmission assets. Where transmission market power is present, however, sellers are ordinarily required to mitigate its effects through open access conditions.

The Commission also evaluates whether the seller, or its affiliates, own or control other resources that could provide a barrier to other suppliers. For example, a seller may control key inputs to electricity production or the transportation of those inputs.[22]

Finally, the Commission examines the seller's relationship with its own affiliates and the buyer. The Commission denies market-based pricing

20. Doswell Ltd. Partnership, 50 F.E.R.C. ¶ 61,251, at 61,757 n.12 (1990).

21. *Id.* at 61,757 and 61,758.

22. Enron Power Enters. Corp., 52 F.E.R.C. ¶ 61,193 (1990).

requests when evidence exists that an affiliate had provided the seller with a price advantage over other suppliers or the seller has a reciprocal dealing arrangement with the buyer.[23]

4. Affiliate Transactions

As stated earlier, the Commission carefully scrutinizes transactions involving utility affiliates because of the potential for self-dealing. The typical transaction occurs when a traditional utility sells services to an affiliate at a low price, which the affiliate, in turn, sells to a third party at a higher price.[24]

The Commission will allow the applicant to make the required showing by establishing the existence of a "market test."[25] If the applicant can demonstrate that the sale to the affiliate was in response to a competitive bid open to other suppliers, or that the utility offered the same service to others at the same price, then the market test will have been met. In order to avail itself of the market test, the applicant must also show that it has not artificially narrowed the market in order to validate a low price.[26]

5. Pure Utility Transactions

The Commission applies the general rule to utility market-based rate filings as well. Initially, a utility's present and future generation market power is assessed. If viable alternative supply options exist, the Commission considers transmission market power.

Transmission market power is evaluated by the Commission because the utility generally maintains a retail service franchise territory. For such utilities, the Commission orders some form of open access conditions to accompany the rate filing. Such conditions may require the utility to provide firm and non-firm transmission service and to construct new transmission facilities.[27] Concern over affiliate transactions is eliminated when a utility's market-based rate filing excludes affiliates as eligible customers.

D. The Commission Amends Process of Reviewing Staff Action

In Order No. 530,[28] the Commission amended section 385.1902 of its regulations to streamline the two-stage internal review procedure of actions of the Commission's staff into a single stage of review. By statute, persons desiring judicial review of an order of the Commission must make a request for

23. *Id.*

24. Portland Gen. Exch., Inc., 51 F.E.R.C. ¶ 61,108, at 61,248, *clarification granted*, 51 F.E.R.C. ¶ 61,379, at 62,322, *order accepting rates sub nom.*, Portland Gen. Elec. Co., 53 F.E.R.C. ¶ 61,216 (1990).

25. TECO Power Servs. Corp., 52 F.E.R.C. ¶ 61,191 at 61,699, *reh'g denied*, 53 F.E.R.C. ¶ 61,202, at 61,809, (1990).

26. *Id.*

27. Public Serv. Co. of Ind., 51 F.E.R.C. ¶ 61,367, at 62,184, *clarification granted and order modified sub nom.*, PSI Energy, Inc., 53 F.E.R.C. ¶ 61,131, at 61,450, (1990).

28. Order No. 530, Streamlining Commission Procedures For Review of Staff Action, III F.E.R.C. Stats. & Regs. ¶ 30,906, 55 Fed. Reg. 50,677, (1990) [hereinafter Order No. 530] (to be codified at 18 C.F.R. § 385).

rehearing not later than thirty days following the issuance of the order.[29] Before seeking judicial review of a staff order under the prior procedure, a person aggrieved by a staff decision would first appeal to the Commission and then request rehearing of the Commission's order on appeal. In the Notice of Proposed Rulemaking[30] that culminated in Order No. 530, the Commission explained that parties generally made the same arguments on rehearing that had been raised on appeal, and that requests for rehearing rarely resulted in a modification or reversal of the Commission order. Thus leading the Commission to conclude that the "rehearing process therefore constitutes, in most cases, an additional procedural step with minimal value to the proceeding . . . ."[31] In Order No. 530, the Commission amended section 385.1902 to eliminate appeals and condense internal review of staff action into a single-stage of review consisting of requests for rehearing.

The amended section 385.1902 provides that staff action, taken pursuant to authority delegated by the Commission, is final agency action subject to request for rehearing. To preserve for the parties the opportunity to demonstrate error in the Commission's order, Order No. 530 provides that a party may file a motion for reconsideration with the Commission that the Commission would consider on an expeditious basis. Such consideration is entirely discretionary and does not toll the sixty-day period to seek judicial review.[32] Recognizing that a number of appeals were pending, the Commission deemed all pending appeals to be requests for rehearing, and gave all persons who had filed a timely appeal of staff action thirty days to supplement their pleadings. The Order also provided that notices of intent to act on an appeal of staff action issued before the revise[d section 385.1902 was promulgated would be deemed to be orders granting rehearing of final agency action for the sole purpose of further consideration.[33] The revised section 385.1902 contains two exceptions: (i) preserves the exception for decisions and rulings of presiding officers made in proceedings set for hearing under subpart E of the Commission's regulations; and (ii) excepts orders issued by the Oil Pipeline Board pursuant to authority delegated in section 385.306, which are subject to the requirements of section 17 of the Interstate Commerce Act.[34]

Although some commentators supported the rulemaking, others opposed the revised section and raised a number of concerns. The central objection was that the Commission lacked authority to delegate to staff the authority to take final action beyond routine, ministerial tasks. The Commission rejected this argument stating that, although the Federal Power Act (FPA), and the Department of Energy Organization Act were silent regarding delegation, agencies had broad authority to delegate to their staff.[35] Several commentors

29. *See* Federal Power Act § 313, 16 U.S.C. § 8251 (1988); Natural Gas Act § 19, 15 U.S.C. § 717r (1988).

30. Notice of Proposed Rulemaking, *Streamlining Commission Procedures for Review of Staff Action*, IV F.E.R.C. Stats. & Regs. ¶ 32,474, 55 Fed. Reg. 32,445 (1990).

31. *Id.* at 32,446.

32. Order No. 530, *supra* note 29, at 50,680-81.

33. *Id.* at 50,681.

34. *Id.*

35. *Id.* at 50,678-679.

contended that the FPA required the Commission to rehear its own orders, not those of its staff. The Commission answered that actions of its staff were actions of the Commission.[36] The opposing commentors also asserted that orders of the staff often do not fully disclose the reasoning and record evidence relied upon in reaching the decision, and that the Commission's orders on appeal provide, for the first time, such information. These commentors maintained that by eliminating appeals, such information may not emerge until the Commission issues an order on rehearing. The Commission rejected this argument, but encouraged the staff to disclose fully the record evidence and reasoning upon which a staff decision is based.[37]

The opposing commentors asserted that the rulemaking would impose an unreasonable thirty-day deadline to obtain and digest a staff decision, determine whether to request rehearing, and prepare a request for rehearing. The commentors explained that streamlining internal review of staff decisions into a single-stage rehearing would eliminate flexibility due to the statutory thirty-day deadline for filing a request for rehearing. Further, the commentors noted that under existing Commission regulations, parties do not have the right to answer requests for rehearing. Thus, under new section 385.1902, a party would have no right to respond to an opponent's contentions during the only opportunity for Commission review of a staff decision. The Commission recognized the difficulties associated with the inflexible deadline and the inability to submit answers to requests for rehearing. However, the Commission found that such concerns did not justify a rejection of the proposal.[38]

Finding that Order No. 530 was an improper delegation of the Commission's responsibilities, Commissioner Moler dissented in part.[39] She explained that, by giving staff authority to take final agency action in decisions of first impression and non-routine matters, the rulemaking went too far in delegating the Commission's policymaking and decisionmaking responsibilities. Further, Commissioner Molder found that the rehearing requirement of the FPA, the NGA, and the NGPA were intended to apply to rehearings of Commission orders, not those of staff.

E. Staggered Five-Year Terms for FERC Commissioners

President Bush signed into law the Federal Energy Regulatory Commission Member Term Act of 1990[40] on April 11, 1990. The law provides for five-year staggered terms for members of the Commission. The new law, which amends section 401(b) of the Department of Energy Organization Act, establishes a schedule whereby only one Commissioner's term will expire on any year. According to Congressman Phil Sharp (D-Ind.), this will avoid the possibility that because of delays in the appointment process the Commission may have an insufficient quorum of members to conduct business.

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36. *Id.* at 50,679.
37. Order No. 530, *supra* note 29.
38. *Id.* at 50,679-80.
39. *Id.* at 50,684. (Moler, Commissioner, dissenting in part). Commissioner Molder noted that she agreed with the parts of Order No. 530 which addressed orders of the Oil Pipeline Board. *Id.*, n.1.
40. Pub. L. No. 101-271, 104 Stat. 135 (1990).

The transition, from partially staggered four-year terms to fully staggered five-year terms, will be made over a period of years. The terms of Commissioners Moler and Terzic expires in October, 1991. Under the new law, the term of the successor to one of these members will expire June 30, 1994, while the term of the successor to the other member will expire June 30, 1995, as designated by the President at the time of appointment. In addition, one of the successors to the two terms which expire in October, 1992, (Commissioners Langdon and Trabandt) will serve until December 31, 1996, while the other will serve until December 31, 1997. The term of the successor to Chairman Allday (whose term expires in October 1993) will end June 30, 1998. All terms will be five-year staggered terms after that.

The new law also provides that a Commissioner may continue to serve after expiration of his or her term until a successor has been appointed and confirmed, but not beyond the end of the season of Congress in which such term expires.

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