RECENT NATURAL GAS REGULATION DEVELOPMENTS

OUTLINE UPDATE
2 January 1990

by

David E. Pierce
Associate Professor of Law
Washburn University School of Law
Topeka, Kansas

I. NATURAL GAS WELLHEAD DECONTROL ACT OF 1989

A. NGA and NGPA Decontrol

1. NGA - eliminates, in phases, abandonment, certificate, service, and other NGA regulation which would otherwise attach to the first sale of gas that was committed or dedicated to interstate commerce as of July 25, 1989.

2. NGPA - eliminates, in phases, the NGPA price ceilings on the first sale of gas.

B. Phased Decontrol

1. Phase One - Gas decontrolled <u>prior to</u> January 1, 1993: (contract status decontrol)

   a. Gas not subject to a contract on July 26, 1989. Gas sold under contracts entered into on or after July 26, 1989 is decontrolled.

   b. Gas subject to a contract on July 26, 1989, but the contract subsequently "ceases to apply." When the contract expires or terminates the gas then becomes decontrolled.

   c. Gas subject to a contract on July 26, 1989, but the parties renegotiate their contract after March 23, 1989 [the date this decontrol legislation was proposed] and "expressly agree in writing" that gas sold under the contract would be decontrolled prior to January 1, 1993.

2. Phase Two - Gas decontrolled prior to January 1, 1993, but not before May 15, 1991: (well vintage decontrol)

a. Even though the gas is still subject to a contract which was in existence on July 26,1989, gas sold from wells spudded <u>after</u> July 26, 1989 is decontrolled for all gas deliveries on or after May 15, 1991.

b. NOTE: If a Phase One decontrol event occurs prior to May 15, 1991, the gas may be decontrolled sooner, and regardless of when the well was spudded.

3. Phase Three - All gas not decontrolled under Phase One or Phase Two is decontrolled as of January 1, 1993.

C. Gas Contract Provisions Determine Impact of Decontrol

1. Although the Decontrol Act eliminates NGPA-price and NGA-service limitations, the impact of decontrol on existing contracts depends upon the express contract terms.

2. As noted in House Report 101-29:

"[N]o provision of this bill (by itself or through direction of any agency or court) invalidates, rewrites, or otherwise abrogates any wellhead sales contract. In these last two cases [new drilling and final decontrol], the 'first sale' in [sic] decontrolled, but the pricing, volume, and other provisions of the parties' contract continue to apply according to their terms."

II. STATUS OF FERC ORDERS 451 AND 451-A

A. <u>Mobil Oil</u> <u>v.</u> <u>F.E.R.C.</u>, 885 F.2d 209 (5th Cir. 1989)

1. Order 451 (as modified by Order 451-A) consists of four interdependent elements:

a. Authorization to collect a higher price for all NGPA § 104 and § 106(a) ["old"] gas.

b. Blanket NGA authorization to abandon sales and enter into new sales of gas released pursuant to Order 451.

c. A process to force purchasers to either agree to pay a higher price for old gas or release the gas from the existing contract.

d. Requirement that a nonopen-access pipeline releasing Order 451 gas offer transportation to move the gas to new purchasers.

2. The 5th Circuit, in the Mobil Oil case, strikes down each of these four basic elements of Order 451.

B. Price Increase for § 104 and § 106(a) Gas

1. FERC's statutory basis for increasing prices:

a. NGPA § 104(b)(2) states:

"Ceiling prices may be increased if just and reasonable. The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas . . . if such price is--

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act."

b. A substantially similar provision is found at NGPA § 106(c).

2. The court in Mobil holds that the old gas pricing scheme was a major component of the NGPA and suggests that § 104(b)(2) and § 106(c) would permit FERC to increase the ceilings only "as special relief measures to be utilized in the event that existing congressional ceiling prices become confiscatory." Mobil, 885 F.2f at 220, n.24.

3. The court in Mobil concludes: "[T]he Commission has exceeded the scope of its authority under the NGPA."

4. Judge Brown, dissenting: "Congress granted the Commission the express authority to raise ceiling prices for vintage gas sales." Mobil, 885 F.2d at 230.

a. The only restriction is that the new, increased rate, be "just and reasonable."

b. The rate must: "[R]easonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." Mobil, 885 F.2d at 230.

c. FERC can use its power to increase old gas prices on either a case-by-case or generic basis.

d. FERC's Order 451 rates are just and reasonable because they are designed to "assure that there is 'an adequate and reliable supply of gas at reasonable prices.'" Mobil, 885 F.2d at 231.

e. FERC need not use historical cost-of-service pricing to set rates. Instead, FERC properly used replacement-cost pricing which Judge Brown finds is consistent with the NGPA's regime of market-based wellhead pricing.

C. Abandonment Authorization for Order 451 Released Gas

1. The court in Mobil holds that the abandonment provisions of Order 451 "allow a producer . . . to control abandonment through the largely one sided GFN procedure." Mobil, 885 F.2d at 222.

2. The court holds FERC "abdicated its responsibility under Section 7(b) of the NGA by providing for an across the board, preauthorized abandonment provision." Mobil, 885 F.2d at 223.

3. The court suggests that FERC must provide for some sort of "factual inquiry into the circumstances of an abandonment . . . ." The court also distinguishes the Felmont decision noting that case involved a limited term abandonment of shut-in gas after a case specific evidentiary hearing. Mobil, 885 F.2d at 223, n.30.

4. Judge Brown, dissenting: Each element of Order 451 is interconnected. Commenting on the abandonment and mandatory transportation provisions of Order 451, Judge Brown states:

"Order No. 451 would be a meaningless exercise if, despite the Commission's finding that the vintage pricing system was unjust and unreasonable, pipelines with dominant market power could nevertheless effectively nullify GFN and shut in the gas or otherwise prevent increased supplies from reaching the market at a competitive price." Mobil, 885 F.2d at 232.

D. Mandatory Transportation Requirement

1. The court in Mobil holds that FERC exceeded its authority by forcing nonopen-access pipelines to transport released Order 451 gas. The court finds that Order 451 imposes common carrier status on pipelines that have not voluntarily agreed to become open-access carriers under Orders 436/500. Mobil, 885 F.2d at 226.

2. Judge Brown, dissenting: "The Commission imposed no new 'mandatory' transportation obligation at all. Rather, the Commission required only 'a continuation of the pipeline's existing service obligation to move gas to market.'. . . The critical fact is that the essential transportation service for the same gas to the interstate market remains exactly the same." Mobil, 885 F.2d at 234.

E. Failure to Address Take-Or-Pay Problems

1. Noting "the prospect for exacerbating the take or pay problem runs rampant throughout the provisions of Order No. 451," FERC's decision to let the market take care of the take-or-pay problem "is based on a rationale which is arbitrary and unsupportable." Mobil, 885 F.2d at 224.

2. Judge Brown, dissenting: It is "startling" to think that FERC must address, and then "solve," the take-or-pay problem before it can address increased prices for old gas. FERC need not address all problems simultaneously--"'the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" Mobil, 885 F.2d at 235.

F. General Conclusions

1. FERC lacked statutory authority to promulgate Orders 451 and 451-A.

2. "Congress alone has the power to do--or authorize the Commission to do--what the Commission has done in Order Nos. 451 and 451-A. We must therefore vacate Order Nos. 451 and 451-A in their entirety . . . ." Mobil, 885 F.2d at 226.

3. Judge Brown, dissenting: The court substitutes its judgment for that of FERC on matters which have been expressly delegated to FERC's administrative expertise. Mobil, 885 F.2d at 226 and 235.

G. Procedural Status

On December 15, 1989, the 5th Circuit denied rehearing. FERC has applied for a 90-day stay to permit it to seek review in the U.S. Supreme Court.

III. STATUS OF FERC ORDER 500

A. American Gas Ass'n v. F.E.R.C., 888 F.2d 136 (D.C. Cir. 1989) ["AGA"]

1. In Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987) ["AGD"], the court remanded FERC Order 436 so FERC could address certain defects identified by the court. FERC responded by issuing an interim order, Order No. 500, to govern until FERC obtained the necessary data to issue a final order. The court holds FERC "disregarded the underlying mandate of AGD regarding the issuance and the content of a final rule." AGA, 888 F.2d at 147.

2. The court retained jurisdiction over the matter and remanded the record for FERC to respond to its concerns, by issuing a final rule, by December 15, 1989. FERC responded, on December 13, 1989, by issuing Order No. 500-H as a final rule. FERC Order No. 500-H, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Docket No. RM87-34-000, Final Rule (Issued December 13, 1989).

In the following numbered paragraphs, I address the problems identified by the court and FERC's Order 500-H response:

3. Failure to evaluate NGA § 5 authority over take-or-pay contracts:

a. Court in AGD required FERC to "'reassess its refusal to act [against uneconomic contracts] under § 5,' and to explain 'its reasons for inaction . . . clearly enough for us to determine the legality of its analysis.'" AGA, 888 F.2d at 147.

b. Court finds FERC failed to evaluate its § 5 authority; FERC must address the issue and provide a reasoned basis for its ultimate decision on § 5.

c. Order 500-H Response: Commission concludes that section 5 action would be "ineffective or inequitable or both." Order 500-H at 4, 105-106.

4. Source of authority to impose the crediting mechanism:

a. Commission must identify the basis for its authority to condition access to transportation under contracts governed by the NGA. On appeal, counsel asserted FERC was relying upon its conditioning authority under NGA § 7; court notes FERC never identified its source of authority in Order No. 500.

b. FERC adequately explained the source of its authority to condition access for transactions governed by NGPA § 311. § 311 (c) provides: "Any authorization granted under this section shall be under such terms and conditions as the Commission may prescribe."

c. FERC failed to support its authority to condition access for transactions governed by the Outer Continental Shelf Lands Act.

d. Order 500-H Response: FERC argues it has the requisite authority.

5. The crediting exemption for casinghead gas:

a. FERC must state its justification for this exemption or, if it cannot, withdraw it.

b. Order 500-H Response: FERC states its reasoning but decides to eliminate, prospectively, the crediting exemption for casinghead gas. In its place, a pipeline is required to release casinghead gas it fails to take so it can be marketed to another purchaser.

6. Court, at this juncture, refuses to hold "whether the [crediting] mechanism as a whole, given its exceptions and limitations, adequately responds to

the mandate of AGD." AGA, 888 F.2d at 150.

a. Order 500-H Response: Crediting will cease on the earlier of December 31, 1990 or the date on which a pipeline accepts a gas inventory charge certificate (GIC).

b. Refuses to alter the June 23, 1987 date for evaluating ownership for crediting purposes. Order 500-H at 188-190.

7. FERC's refusal to apply its withdrawal of the CD reduction rule retroactively:

a. In AGD the court vacated FERC's CD reduction and transfer provisions. FERC decided to abandon its CD reduction provisions contained in Order 436. However, FERC refused to apply its decision to CD reductions that took place prior to the AGD decision.

b. Court notes there is a presumption its vacatur of the CD reduction should be applied retroactively. Since the Commission did not address the issues necessary to overcome the presumption, FERC must do so on remand.

c. Order 500-H Response: FERC will collect data from the affected parties to evaluate whether it must apply the vacatur retroactively.

8. The Order 500 take-or-pay cost-recovery mechanism:

a. To obtain beneficial treatment of take-or-pay settlement costs, pipelines had until March 31, 1989 to either settle their disputes of have them in litigation.

b. Court finds that the only basis for this "sunset" provision was to force rapid settlements of take-or-pay liabilities. However, imposing a sunset date, prior to issuance of a final rule, is arbitrary and capricious.

c. "[W]e hold that the Commission may not impose any deadline upon applications for the cost passthrough mechanism at least until there has been judicial review of the explanation it issues in response to this decision." AGA, 888 F.2d at 151.

d. The court finds the actual terms of the cost recovery mechanism, other than the sunset provision, are not ripe for review.

e. Order 500-H Response: Extends the sunset deadline until December 31, 1990. If judicial review of the Rule has not been completed by December 31, 1990, then the sunset deadline will be 30 days after the date a final judicial mandate is issued.

No litigation exception to the December 31, 1990 deadline. After December 31, 1990, only contracts in litigation as of March 31, 1989 will be eligible for subsequent passthrough.

9. FERC's gas inventory charge ("GIC") policy:

Since FERC is addressing GIC issues on a case-by-case basis, court refuses to review FERC's policy "[u]ntil such time as the GIC policy precipitates a concrete case on a settled record . . . ." AGA, 888 F.2d at 152.

B. Associated Gas Distributors v. F.E.R.C., Case No. 88-1385 (D.C. Cir. Dec. 28, 1989) [AGD II]

1. Court reviews orders implementing FERC take-or-pay cost passthrough mechanism. Under FERC's Order 500 passthrough policy, under the "equitable sharing mechanism," FERC attempts to spread take-or-pay costs between the pipeline and its customers.

a. If the pipeline agrees to absorb between 25% and 50% of its take-or-pay buyout and buydown costs, the pipeline can recover an equivalent amount through a fixed charge against its customers.

b. All remaining costs can be recovered through a volumetric surcharge on its sales and transportation services.

c. If the pipeline absorbs between 25% and 50% of the costs, the pipeline enjoys a rebuttable presumption the remaining costs were prudently incurred.

d. A pipeline customer can challenge whether the costs were prudently incurred, but it runs the risk of having to pay its pro rata share of 100% of the prudently incurred costs.

2. The take-or-pay costs are allocated among the pipeline customers by comparing their base period gas purchases (1981-82) with their deficiency period purchases (1983-86).

3. The court holds the use of past purchasing practices to establish the take-or-pay charge violates the "filed rate doctrine."

   a. Rate regulation is prospective. "The focus of ratemaking is on whether proposed rates are just and reasonable prospectively, and not on accounting for mistakes in past rates." L. Schwartz, J. Flynn, H. First, Government Regulation at 327 (6th Ed. 1985).

   b. "[N]o regulated seller of natural gas may collect a rate other than one filed with the Commission. . . .

      "Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it 'shall determine the just and reasonable rate . . . to be <u>thereafter</u> observed and in force.'

      "This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'"

      <u>Arkansas Louisiana Gas Co.</u> <u>v.</u> <u>Hall</u>, 453 U.S. 571, 576-78 (1981).

   c. The Court in <u>AGD II</u> holds FERC's passthrough formula means: "'downstream purchasers . . . are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased.'" <u>AGD II</u>, Slip Opinion at 14.

   d. This violates the basic purpose of the filed rate doctrine: predictability which permits a customer to purchase a service only after it knows what it costs. See generally <u>AGD II</u>, Slip Opinion at 10 and 15.

4. A second major issue addressed by the court is whether the additional charges for take-or-pay buyouts and buydowns violate the maximum lawful price ceilings established by the Natural Gas Policy Act of 1978.

a. The court in AGD II holds:

"The amount paid under a contract (for gas taken and for gas not taken, which includes nonrecoupable prepayments as well as buyouts and buydowns), divided by the units of gas actually taken, may indeed yield a figure that is in excess of NGPA ceiling prices. Such a circumstance alone, however, does not violate Title I [the NGPA price ceilings]. For purposes of Section 504(a) of Title V of the NGPA, 15 U.S.C. § 3414(a), we agree with the Tenth Circuit's conclusion in Kaiser-Francis that prepayments are not payments for gas to the extent that the gas is not taken. We will not impute to Congress an intent to preclude all sales at or below the lawful ceiling price that are coupled with other contractual obligations so as to yield an average price in excess of the MLP."

AGD II, Slip Opinion at 22-23.

b. NOTE: The court refers to Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563 (10th Cir. 1989) (interpreting a gas contract applying Oklahoma law) where the 10th Circuit cites the Diamond Shamrock Exploration Co. v. Hodel, 853 F.2d 1159 (5th Cir. 1988) case for the proposition that: "take-or-pay payments are not payments for the sale of gas." The court also accepts the coencept that: "The value to the producer of take-or-pay payments forfeited by the purchaser is . . . not treated as part of the price of gas purchased currently." Kaiser-Francis, 870 F.2d at 570.

IV. BYPASS

A. Panhandle Eastern Bypass of Michigan Consolidated Gas -- The National Steel Cases

1. Background

a. Until March 1985 National Steel Corporation purchased all its gas needs from MichCon, a local distribution company (LDC). In 1985 National began to purchase gas from third parties but used MichCon's facilities to transport it to the National plant. MichCon, as an intrastate LDC, provided tranportation service to National at rates set by the Michigan Public Service Commission.

b. Panhandle's interstate pipeline runs across National's property. Panhandle and National agreed to add a connection to Panhandle's pipeline so National could receive gas transportation services from Panhandle. National's plan was to purchase gas in Oklahoma and then have it transported to its plant by Panhandle. This would eliminate the need for MichCon's transportation services. MichCon's facilities would be "bypassed" by using the new Panhandle pipeline connection.

c. National had been served by MichCon for over 50 years. National was MichCon's second largest customer. National agreed to reimburse Panhandle for the $188,000 cost to make the new connection. National stated its annual energy cost savings by making the bypass would be $10 million.

d. It appears National could transport gas from Oklahoma to its plant with a Panhandle transportation rate of $.41/Mcf. MichCon charged National $.80/Mcf to transport the gas five miles on its distribution system.

2. To make the new connection, and to provide the transportation services, Panhandle must obtain a certificate of public convenience and necessity from FERC. Panhandle applied, under NGA § 7(c), for the necessary certificate to transport up to 67,000 Mcf/d for National, which was granted by FERC. FERC's decision was appealed to the D.C. Circuit resulting in Michigan Consol. Gas Co. v. F.E.R.C., 883 F.2d 117 (D.C. Cir. 1989).

3. Before the § 7(c) certificate was issued, MichCon filed a complaint with the Michigan PSC. After the certificate was issued, National and Panhandle filed suit in a Michigan federal court for declaratory relief that the Michigan PSC could not interfere with the FERC-certificated activity. MichCon filed suit in state court to enjoin the bypass until the Michigan PSC approved the action. The state court action was removed to federal court and consolidated with the suit filed by National and Panhandle. The federal district court judge held State action concerning the bypass was preempted by the Natural Gas Act. This decision was appealed to the 6th Circuit, resulting in Michigan Consol. Gas v. Panhandle East. Pipe Line, 887 F.2d 1295 (6th Cir. 1989).

B. FERC's Issuance of the Certificate: Michigan Consol. Gas Co. v. F.E.R.C., 883 F.2d 117 (D.C. Cir. 1989) [MichCon I]

1. Commission Jurisdiction

a. MichCon argues the bypass activity of Panhandle and National is "local distribtuion" of natural gas under § 1(b) of the NGA and therefore FERC lacks jurisdiction to address the matter. Only the Michigan PSC has jurisdiction over the transaction.

b. The court holds: "The arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction." MichCon I, 883 F.2d at 121.

The court continues, stating:

"The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" MichCon I, 883 F.2d at 121.

"While the sale in the present case is retail rather than wholesale, the sale of gas in Oklahoma is not the subject matter of the transportation arrangement between Panhandle and National approved by the Commission." MichCon I, 883 F.2d at 122.

2. FERC's Evaluation of the Merits

a. MichCon asserts FERC departed from its long-standing policy of favoring local distribution over interstate bypass -- without providing a reasoned explanation for the change in policy.

b. The Commission adopted the administrative law judge's findings that National's poor competitive position with foreign steel manufacturers would dictate that National pursue some alternative to gas service from MichCon. Noting the facility employs 5,500 people, the ALJ found that the local distributor preference had been overcome by National's situation.

c. The court also notes FERC's long-standing policy favoring competition. The court states:

"FERC argues that a competitive gas market has developed at the wellhead (producer's end of the pipeline) due to deregulation. That competitive market, however, has not been passed through to the consumer because of intervening state regulation. Until prices are reduced at the consuming end and consumers are permitted to purchase more gas, the surplus at the producing end could depress the domestic drilling industry." MichCon I, 883 F.2d at 123.

d. However, the court expresses no opinion concerning FERC's competing policies, instead, the court holds, under the facts found by the ALJ and adopted by FERC, FERC's decision was supported by substantial evidence and was neither arbitrary nor capricious.

C. State Jurisdiction Over Bypass: Michigan Consol. Gas v. Panhandle East. Pipe Line, 887 F.2d 1295 (6th Cir. 1989)

1. NGA § 1(b) Analysis

a. MichCon argues the Michigan PSC has jurisdiction over the bypass because it concerns the "local distribtuion of natural gas" under § 1(b) of the NGA.

b. The court rejects this argument and holds, as did the D.C. Circuit, the bypass "'involves merely interstate transportation of natural gas.'" MichCon II, 887 F.2d at 1300.

2. Preemption of State Authority Over Bypass Issues

a. The court notes:

"[I]t is clear to us that this case involves the imminent possibility of a 'collision' between state and federal regulatory power that would disrupt this comprehensive scheme [of natural gas regulation]. Indeed, it appears that one collision occurred in September 1987, when the MPSC ordered Panhandle to suspend its bypass plans after the FERC had approved them." MichCon II, 887 F.2d at 1301.

b. The court holds:

"[T]he purpose of the Act was to provide for federal regulation of the interstate transportation of gas, which was outside of state regulatory reach when the Act was enacted. Thus, we believe that in establishing a comprehensive regulatory network, Congress intended to occupy a field which the states could not reach."

D. Bypass and the 10th Circuit: Williams Natural Gas Co. and Smith Cogeneration, Inc. v. City of Oklahoma City and Oklahoma Natural Gas Co., Case No. 89-6209 (Nov. 11, 1989)

1. Background

a. The PowerSmith cogeneration plant near Oklahoma City wanted to purchase gas produced in Oklahoma, from an independent producer, and have it transported by Williams to the plant (approximately 27,400 Mcf/d). To do this Williams would have to construct a 12-mile pipeline which would pass under streets in Oklahoma City. However, Oklahoma Natural Gas, the LDC serving Oklahoma City, held an exclusive franchise from the City.

b. Williams applied to FERC for a certificate of public convenience and necessity to construct the line, make the connection, and provide the transportation service to PowerSmith. Prior to issuance of the certificate, ONG obtained a state court ruling that ONG's franchise with the city protects it against competition from nonfranchisees. The certificate was subsequently issued by FERC and Williams filed suit in federal court under NGA § 7(h) to condemn the rights-of-way across city streets to build the certificated pipeline. The state court then enjoined Williams from constructing the line because it lacked a franchise from the city. The federal court refused to stay the state injunction; this was the action appealed to the 10th Circuit in Williams Natural Gas Co. v. City of Oklahoma City

2. The 10th Circuit declines to address the preemption issue but reverses the federal district court's refusal to stay the state court's injunction order. The court notes the issues were being reviewed by the D.C. Circuit through an appeal of FERC's issuance of the certificate to Williams [Oklahoma Natural Gas Co. v. FERC, D.C. Cir., No. 89-1376].

3. Once FERC issues a certificate, judicial review under NGA § 19(b) is exclusively in the federal courts of appeals. The state court action constitutes an impermissible collateral attack on the FERC order issuing the certificate.

E. FERC's Emerging Bypass Policy

1. FERC notes the policy issues that will guide its bypass decisions in addressing the following bypass cases:

   a. Northern Natural Gas Company, 48 FERC #61,232 (Aug. 16, 1989).

   b. Panhandle Eastern Pipe Line Company, 48 FERC #61,233 (Aug. 16, 1989).

   c. Cascade Natural Gas Corp. v. Northwest Pipeline Corp., 48 FERC #61,234 (Aug. 16, 1989).

2. FERC summarizes its current bypass policy as follows:

   "Although we have indicated a preference for local distribution service in the past, in more recent decisions our primary focus has been to consider whether the bypass is the product of a fairly competitive market or the result of unfair competition or undue discrimination. The purpose of our current policy is to encourage access between willing buyers and willing sellers of natural gas through fair competition in order to benefit from the competitive wellhead market created by the Natural Gas Policy Act of 1978. To further this objective, the distributors are not sheltered from competition but rather, are encouraged to lower their retail prices by purchasing gas from a variety of competitively priced sources."

Panhandle Eastern Pipe Line Company, 48 FERC #61,233, at 61,836 (Aug. 16, 1989) (emphasis added).

3. Concerning the need for a hearing, FERC's position is as follows:

"Our review of bypass complaints continues to be done on a case-by-case basis, with the prime concern whether or not fair or unfair competition is involved in the particular proceeding. We do not believe formal hearings are appropriately required by the Commission to analyze, as does a state commission, the cost of services performed by local distribution companines . . . .

"Limiting the availability of formal hearings to situations where facts, not speculative 'allegations of possible future harm,' are presented indicating material issues relative to unafir competition in bypass cases is clearly consistent with traditional notions of when a formal hearing is required to be held."

Northern Natural Gas Company, 48 FERC #61,232, at 61,832 and 61,833 (Aug. 16, 1989).

V. FERC ORDER 497-A, PIPELINE/MARKETING AFFILIATE RULE REHEARING ORDER

A. Transaction Reporting Requirements

1. Extended to December 31, 1990.

2. Some scope modifications.

B. Disclosure Requirements

1. "Operating Personnel" (any "employee or officer" of the pipeline and its marketing affiliate) must disclose to other interested parties any shared

information that might give an affiliate marketer an unfair competitive advantage.

2. "Thus, any gas sales, marketing or transportation information such an employee may receive in his or her capacity as a pipeline employee will be considered information provided to an affiliate," thereby requiring disclosure to all potential shippers on the same day.

C. Marketing Activities

Includes any first sale of gas or a sale for resale -- unless the transaction relates to a producer, gatherer, or processor that sell gas "solely from their own production, gathering or processing facilities."

D. Discounting

If a pipeline discounts transportation rates for an affiliate, it must offer similar discounts to "similarly situated non-affiliated shippers."