

This case involves the discovery of neither a new form of business conduct nor familiar conduct in the context of new circumstances. Compare *FTC v. Sperry and Hutchinson, supra*, at 240-44. Even more importantly, the majority's rule is not based on independent evidence or other facts indicating that director interlocks between companies that compete to any extent are likely to cause consumer injury. Rather, the majority's interpretation of section 5 relies heavily upon the policies underlying section 8 of the Clayton Act. One difficulty with that approach is that the Congress which enacted this provision apparently did not regard these policies as absolute, as it did not include within the coverage of section 8 the class of interlock that this case represents.

Another difficulty with the majority's decision to establish a rule of per se illegality is that this approach ignores the recent teaching of *Continental TV, Inc. v. GTE Sylvania, Inc.*, U.S. (June 23, 1977):

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials, see *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Topco Associates*, 405 U.S. 596, 609-10 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law. — U.S. at — n. 16.

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" (*Northern Pac. R. Co. v. United States*, *supra*, p. 5) and therefore should be classified as per se violations of the Sherman Act. [Quoting from *White Motor Co. v. U.S.*, 372 U.S. 253 (1963).]

It seems to me that these admonitions directed at courts in Sherman Act cases are no less salient when applied to the Commission in cases arising under section 5. Certainly the Commission's authority to ignore this counsel is not a reason to do so.

It is, of course, arguable that the Commission enjoys a relative advantage over Federal courts in fashioning per se rules. Our more frequent exposure to antitrust issues and varying factual situations, as well as our reservoir of economic analysts, equip us well to consider the adoption of such rules. Our authority to conduct broad investigations into business practices³ and to initiate rule-making proceedings⁴ certainly complement

this potential for enlightened lawmaking in the public interest.⁵

With regard to the class of transactions covered by the per se rule of this case, however, we can claim none of these advantages. Our prior experience with director interlocks has been acquired in the per se context of section 8. We therefore know little of the effects of these arrangements and even less of their consequences when employed by financial institutions. At most, we have gained some experience in framing remedial orders.⁶

In the absence of a factual foundation for inferring public injury and in cases such as this one that are outside the terms of a statutory per se rule, I would turn for policy guidance to the controlling standard of section 7 of the Clayton Act. In my view, arrangements such as the one before us should be declared unlawful if their effects "may be substantially to lessen competition . . . in any line of commerce in any section of the country . . ." While the antitrust laws are not without anomalies,⁷ I would not employ our discretion to proliferate new ones. And it is at least anomalous to me that a showing of competitive injury should be required for illegality when two corporations become one but not when they share a director. That this result is commanded in situations covered by § 8 is no reason to extend the anomaly to situations that are not.

While it might be argued in response that the social cost of limiting the supply of eligible directors is less than that of prohibiting mergers that cannot be expected to cause discernible injury to competition, I know of no basis for such a conclusion.⁸ Moreover, there is every reason to suppose that the presence of an interlocked director poses less threat to competition than does a permanent and complete union of the firms.

Because anticompetitive effects were neither alleged or proved in this case, I would

³ 15 U.S.C. § 45.

⁴ See, e.g., our recent orders in *Addressograph-Multigraph*, Docket No. 9084; *Kane-Miller Corp.*, et al., Docket No. 9034; *International Business Machines Corp.*, Docket No. C-2864; and *Kraftco Corp.*, Docket No. 9035.

⁵ For recent examples, see the diverse treatment of price and non-price vertical restrictions in the majority's opinion in *GTE Sylvania, supra*, n. 17 and accompanying text, as well as Justice White's comment on this distinction, n. 10 and accompanying text. See also the Third Circuit's decision in *U.S. v. U.S. Gypsum Co.*, 550 F.2d 115, 120-127 (1977), cert. granted, October 3, 1977, No. 76-1560, allowing, as a defense to a horizontal price-fixing allegation, the argument that communications concerning prices were necessary to avoid violations of the Robinson-Patman Act. See generally R. Bork & W. Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 Colum. L. Rev. 363 (1965). Compare R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L. J. 775, 830 (1965).

⁶ One might, however, infer the low costs of regulating directorships from both the relatively modest compensation of directors and from the readiness with which corporate respondents have usually been prepared to settle section 8 cases.

amend the complaint and remand the case for further proceedings.

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[6740-02]

Title 18—Conservation of Power and Water Resources

CHAPTER I—FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY

[Docket No. RM75-25]

PART 2—GENERAL POLICY AND INTERPRETATIONS

Amendments to Policy Regarding Certification of Pipeline Transportation Agreements

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: On June 24, 1977, the Federal Power Commission¹ issued a notice of its intent to review the policy set forth in Order No. 533 and 533-A (10 CFR 2.79) with respect to the transportation by jurisdictional pipelines of natural gas from the onshore domain and the offshore non-Federal domain to non-resale industrial and commercial customers for high priority uses. The purpose of the policy was to provide high priority users with a means to mitigate the effects of curtailments by purchasing supplemental gas supplies directly from producers.

At its inception, that policy was regarded as experimental in nature and as requiring a subsequent review based on experience with the program to determine if it should be continued. The June 24 notice therefore requested comments on whether the policy should be continued and on whether it should be modified in certain respects.

Upon review of the comments, staff reports and experience with the program, the Federal Energy Regulatory Commission has determined that the policy set forth in Order No. 533 and 533-A has been of assistance to high priority users, and that since the conditions which led to its adoption persist, it should be continued. The Commission has also adopted a number of minor modifications to the policy as explained in detail below.

EFFECTIVE DATE: February 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Frederick Cornelius, Office of Producer and Pipeline Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, D.C. 20426, 202-275-4496.

¹ On October 1, 1977, jurisdiction over this proceeding was transferred to the Federal Energy Regulatory Commission pursuant to the Department of Energy Organization Act, Pub. L. 95-91.

³ 15 U.S.C. § 46.

⁴ *National Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672 (1973), cert. denied, 415 U.S. 951 (1974).

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I. PROCEDURAL BACKGROUND

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565 (August 4, 1977) the Executive Order No. 12009, 42 FR 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a) (1) or (2) of the DOE Act.

The joint regulation adopted on October 1, 1977, by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC", 10 CFR —: *Provided*, That this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

By notice issued June 24, 1977, and published at 42 FR 34521, July 6, 1977, the Federal Power Commission stated its intent to review the policy statement of Order Nos. 533 and 533-A. At its inception, the policy statement was viewed as experimental in nature, and recognizing that requests for renewal of previously issued authorizations under Order No. 533 would be filed this winter, the Commission concluded that it was appropriate to consider whether the policy should be continued, and if so, on what basis. Although the Commission set forth issues which it considered to be of primary importance, it also invited any interested person to raise any issue or suggestions believed to be helpful to its inquiry.

In Order No. 533, the Commission adopted as § 2.79 of its General Policy and Interpretations, 18 CFR Part 2, a statement of policy with respect to the transportation by jurisdictional pipelines of natural gas sold by certain

producers from the onshore domain and the offshore non-Federal domain to non-resale industrial and commercial customers for high priority uses. Due to the steady increase in curtailment levels on interstate pipelines which resulted in production cutbacks, plant closing, employee layoffs, and shortages of various products and services, the Commission found it appropriate to issue the statement of policy with regard to specific pipeline transportation arrangements so that industrial customers requiring gas for high priority use could obtain an independent source of gas for their operations. The policy was viewed as a vehicle for obtaining required gas supplies for high priority use due to the anticipated severe curtailment on the interstate pipelines during the 1975-1976 winter.

The Commission projected that this policy would increase the amount of gas available to the interstate market, thereby resulting in utilization of idle pipeline capacity with attendant cost benefits to pipelines and their customers. There was also perceived a potential for increased producer revenues, which would then promote increased exploration and development of gas supplies. In adopting this policy statement, the Commission stated:

The policy is admittedly experimental and requires empirical evidence on its merits in specific applications and trial before we can determine whether the public convenience and necessity demand that the policy be made permanent. (Citations omitted.) If, upon review, it appears that the policy has not resulted in the attraction of incremental gas supplies to meet the demand of the interstate market and to avert an imminent crisis in the winter of 1975-1976, we will revise or abandon the experiment.²

In response to the notice of intent to review the program, an overwhelming majority of the parties filed comments in support of the policy's continuation asserting that the gas transported under Order No. 533 represented a crucial part of the energy supply for many industrial users requiring gaseous fuel for process, plant protection and other direct-fired applications in their manufacturing facilities. The parties supporting the program also maintained that it has reduced the adverse impact of the severe natural gas shortage on the United States' economy. Many comments detail the benefits to specific commercial and industrial establishments which otherwise could not have continued production or maintained their labor forces.

In its initial comments, the Commission Staff described the operation of the policy. As the 1975-1976 winter was considerably warmer than normal, only 28 arrangements were filed with the Commission during the heating season. As of May 1976, only 365,183 Mcf had been transported under the

²Order No. 533, Docket No. RM75-25, 54 FPC—, mimeo p. 28 (1975).

program, or an average seasonal daily volume of slightly more than 2,000 Mcf. From May 1, 1976, through December 31, 1976, 35 arrangements were filed; however, with the onset of the severe winter, a dramatic increase in applications occurred.

As of June 1977, a total of 106 separate arrangements have been filed pursuant to this program.³ For the period of August 1975 through March 1977, a total of 7,969,587 Mcf had been delivered of which 1,857,708 Mcf was delivered in the month of March 1977. The consumers served by eleven pipelines have purchased gas directly under this program,⁴ however direct and indirect customers of Columbia Gas Transmission Corp., Transcontinental Gas Pipe Line Corp. and Texas Gas Transmission Corp. have purchased more than 75 percent of the total supply transported under this program and more than 60 percent of the March volumes thereof.⁵ Of the applications filed from August 1975 to June 1977, 40 percent were filed during the emergency period.

II. POLICY CONSIDERATIONS

In its notice, the Commission set forth issues that interested parties should address. In light of the two years of actual experience with the experimental 533 program, the first question was whether the program should be continued. We have independently reviewed past transactions under Order No. 533 to ascertain the effects of this program.

A. CONTINUATION OF THE POLICY

Of the parties that filed comments, the majority were strongly in favor of continuing the 533 policy. The level of anticipated economic disruption that has been forestalled for the past two years through utilization of the 533 procedures is predicted to continue and therefore, the need for these supplemental supplies also will continue.

It is evident from our review that the program has become an important means of maintaining plant operations in facilities which use natural gas and are subject to curtailment. As of November 30, 1977, 113 certificates had been issued under this program,⁶ and

³Each arrangement may involve a group of purchasers, multiple delivery points and/or a number of transporters so that the actual number of certificate applications filed with the Commission is greater.

⁴This figure represents the primary pipelines who were directly responsible for the particular end-uses of supply.

⁵See Appendix I, "Notice of Proposed Rulemaking to Review Policy Statement of Order Nos. 533 and 533-A," Docket No. RM75-25, — FPC — (June 24, 1977).

⁶Twenty-two are currently being reviewed. One hundred and thirty five applications have been filed. See Appendix A which sets forth the number of applications certificated and the volumes delivered and consumed at plant facilities.

approximately 16 million Mcf of gas had been transported. The deliveries under this program were a critical element last winter in maintaining the operating capacity of many industries in the eastern United States. Approximately 40 percent of the certificates issued and 38 percent of the 533 deliveries occurred during last year's emergency period, from November 1, 1976, to March 31, 1977. Over 6 million Mcf of gas was delivered during the winter emergency period.⁷

These supplies were used primarily by customers in industrial states. The major states receiving the largest quantities of 533 supplies were Pennsylvania, North Carolina, and Ohio. Over 85 percent of the gas involved in these transactions was produced in the states of Louisiana, Ohio, and Texas where many marginal sources of supply are available. The following indicates the number of purchases which occurred in the consuming states:

Pennsylvania.....	27
South Carolina.....	24
Ohio.....	19
Tennessee.....	14
Indiana.....	13
Virginia.....	12
North Carolina.....	10
Kentucky.....	9
West Virginia.....	8
Maryland.....	3
New York.....	3
Alabama.....	2
Illinois.....	2
Iowa.....	2
Mississippi.....	2
New Jersey.....	1

The following table sets forth the number of applications for transportation and percentage of such which involved 533 gas from the eight producing states. Nine applications to transport industrial owned gas are not included.

		Percent
Louisiana.....	70	56.0
Ohio.....	26	21.0
Texas.....	13	10.0
Oklahoma.....	7	5.0
West Virginia.....	6	5.0
Mississippi.....	2	2.0
Michigan.....	1	0.5
New Mexico.....	1	0.5
Total.....	126	100

The February 4, 1977, report of the Natural Gas Action Group of the Department of Commerce stated that 1.2 million workers were unemployed as a direct result of gas curtailments. The

⁷During the winter of 1976-77, a total of 6,065,969 Mcf was delivered. The monthly deliveries were as follows:

November 1976.....	666,344
December 1976.....	654,110
January 1977.....	1,444,039
February 1977.....	1,443,763
March 1977.....	1,857,708
Total.....	6,065,969

533 supplies offset curtailment into Priority 2 which was being experienced on many major interstate systems forestalling plant shut-downs and work stoppages. Of the 92 applications filed through March 31, 1976, the 533 transactions allowed more than 215,000 workers to continue their employment. Without this program, the number of unemployed workers could have been larger.

Through this policy, many natural gas consumers, including factories, schools and hospitals, have been able to remain in operation when gas curtailments otherwise would have forced them to shut down for extended periods of time. In addition to hospitals and public schools, over 100 industrial facilities in at least 16 states have remained in operation during periods of severe gas curtailment as a result of gas obtained under Order No. 533. Without these supplies, the economic repercussions would probably have been significant. Many of the products produced by these industrial consumers are essential and any shortage resulting from plant closings could have caused a ripple effect throughout both regional economies and the nation, as a whole. The applications indicating the end uses to which the gas has been utilized are as follows:⁸

General usage	Number of facilities
Metals.....	58
Glass.....	34
Textiles.....	32
General plant usage.....	18
Chemicals and synthetics.....	17
Commercial.....	17
Food processing.....	11
Brick.....	5
Paper.....	2
Oil production.....	2
Agriculture.....	1
Coal gas.....	1

The 533 program in conjunction with Emergency Natural Gas Act of 1977 proved to be critical programs as they provided means of securing necessary gas supplies for facilities without alternate fuel capability and allowed industrial production and the employment of workers to continue.

In summary, the effects of the policy have been positive as economic dislocation and unemployment were minimized. Pipeline curtailments are continuing and will certainly continue for the next several years. High priority industrial users must have access to additional gas supplies or the severe economic disruptions that were prevented in the past by the 533 policy will occur.

One of the arguments that has been proffered in opposition to the 533 policy is that it may divert gas from the interstate market. Most of the parties that filed comments dispute this

⁸Above total end use applications will exceed total of filed applications because a few applications were filed on behalf of a number of small industries.

contention. They view these limited gas supplies as being produced from marginal reserves that otherwise would not have been developed at the national ceiling prices or would have been sold to the intrastate market for boiler fuel or other low priority use.

Several of the interstate pipelines oppose the continuation of this policy. They argue that they are placed at a competitive disadvantage in securing additional supplies.⁹ While stating that deregulation is necessary, these pipelines maintain that Order No. 533 provides a method whereby a producer of new reserves may obtain a price above the national rate. They claim that the result of Order No. 533 is not to enable a prospective high priority customer to purchase gas actively sought by the intrastate market, but to allow industrial customers to obtain the same gas supplies sought by the interstate pipelines at the national rate for its system supply.

The American Public Gas Association (APGA)¹⁰ opposes Commission consideration of the continuation of the policy on two grounds. APGA argues that the Commission should wait for the issuance of a decision by the U.S. Court of Appeals for the District of Columbia Circuit as to the legality of Order Nos. 533 and 533-A.¹¹ APGA also excepts to this program on the basis that since certain interstate pipelines were curtailed into Priority 1 last winter, supplies might have been available to the interstate resale market to offset curtailment absent the alternative offered producers by Order No. 533.

After examining the certificate applications and reports filed pursuant to Order Nos. 533 and 533-A, the Bureau of Natural Gas, as part of the staff comments, concluded that there was no evidence of diversion. In its comments, Staff recommended that the current reporting requirements be expanded to elicit additional information from future applicants so as to better assess potential diversion. Staff suggested that the following factors be considered in reviewing future proposals: Location of the sale, proximity and availability to the interstate market, and the relative value of the gas. We adopt herein additional reporting requirements to obtain this information.¹²

⁹These pipelines are Florida Gas Transmission Co., Mid-Louisiana Gas Co., Southern Natural Gas Co., Arkansas-Louisiana Gas Co., Northern Natural Gas Co., and Cities Service Gas Co.

¹⁰Although the Consumers Federation of America is named in the instant petition, only counsel for APGA signed the filing.

¹¹"APGA v. FPC", No. 75-2105 (D.C.).

¹²The Commission has determined that in certain instances the information should be

The assertion that the implementation of the 533 program diverts gas from pipeline supply is the most serious challenge to the 533 program. The stated purpose of the policy was to supplement available pipeline supply by making what would otherwise be intrastate gas accessible to curtailed interstate customers through direct purchase.

While a bifurcated pricing system exists (intrastate versus interstate), gas will continue to be sold intrastate for prices in excess of the Commission's national rate. The Commission recognizes that most 533 sales were made at rates in excess of the nationwide rate as shown in Appendix B.¹² It is also apparent that interstate pipelines can not compete for these supplies at that price, however, we have found no evidence that the 533 program has resulted in either an increase in intrastate prices or a deterrent to interstate dedications. So long as the intrastate market demand is greater than the supply, the prices unregulated, and the uses unrestricted, parity of access will not be restricted by Commission action; but it will be restricted instead by the dynamics of the marketplace.

In reviewing these transactions to determine whether this policy resulted in the diversion of gas from the intrastate pipeline systems, we assessed the nature of the producing properties. Staff experience indicated that most of the wells involved produced small amounts of gas. The volumes transported under those arrangements substantiated this finding. In addition, a further measure of the marginal nature of these producing properties was considered to be the number of amended applications filed. Amended applications were submitted by the transporting pipelines to allow the delivery of previously certificated volumes of gas from new sources of supply. The need for such amendments arises when the initial producing property did not deliver as projected. In the past 6 months, six applications were filed, about 15 percent of all applications filed during that period, which indicates the marginal nature of the 533 supply sources.

The Commission attempted to avoid any possibility of diversion by requiring the sellers of 533 gas to certify that the gas was otherwise not avail-

provided where "available". Availability is defined for the purpose of these requirements as that information which the non-resale industrial or commercial consumer has obtained as a result of a good faith effort. All participants in Section 2.79 transactions are reminded that the Commission must base its findings on substantial evidence.

¹²See Appendix II of the June Notice, *Supra*, note 4.

able to the interstate market. Nevertheless, in order to further ensure that diversion does not occur, we will adopt the requirements suggested by Staff to assist in our continuing monitoring program.

Each applicant is required to submit data in support of the proposed price. In reviewing the proposed rate, the Commission will assess data available in Form 45, other publicly available sources and information supplied by the Applicant. Consideration will also be given to the intrastate price levels in determining whether a certificate should be issued. The Commission has sought to avoid approving applications that include a purchase price¹³ which would create upward pressure on gas prices in the area of production. Our review process is intended to ensure that the level of prices in the intrastate market will be unaffected by this program. It will be the intention of the Commission to review applications with regard to price following the policy stated above.

In response to APGA's argument that a Commission determination in the 533 review should be deferred pending a decision of the appellate court as to the legality of this program, it should be sufficient to refer to our discussion herein of the exigencies of the winter period, the deepening curtailment of most pipelines and the need to avoid severe economic disruption through extensive industrial shut-down.

Upon review, we have concluded that the program should be continued. Last winter many direct industrial consumers were able to maintain plant operations solely due to the availability of these 533 supplies. In the absence of this program, severe economic disruption caused by shut-down of many industrial plants would have occurred. This conclusion is substantiated by the number of authorizations which were issued by the FPC during the first three months of 1977.

The continued need for this program has been established in the recent omnibus pipeline hearings conducted to ascertain the magnitude and potential impact projected curtailments during the 1977-78 winter heating season. By

¹³The Commission has rejected certain applications where it found the rate to be excessive or has conditioned certificate authorization by limiting the term, volumes or price in order to limit the rate to an appropriate level. Transcontinental Gas Pipe Line Corp., et al., Docket Nos. CP77-427, et al., issued August 29, 1977; Natural Gas Pipeline Co. of America, et al., Docket Nos. CP77-242, et al., issued July 14, 1977; Texas Gas Transmission Corp., et al., Docket Nos. CP77-206, et al., issued May 31, 1977; Transcontinental Gas Pipe Line Corp. et al., Docket Nos. CP77-452, et al., and United Gas Pipeline Co., Docket No. CP77-428, issued January 6, 1978.

Order issued May 11, 1977,¹⁴ the FPC instituted proceedings to review the supply situation on 29 major interstate pipelines and to provide an overview of potential curtailment impact for the forthcoming winter on both a normal and 10 percent colder than normal basis.

As a result of these hearings, the Commission concluded that if the actual weather were 10 percent colder than normal, 23 pipelines would experience no significant economic dislocations; however, six pipelines anticipated severe industrial curtailments, which would undoubtedly result in plant closings. By Order issued September 14, 1977,¹⁵ the Commission reopened these proceedings to more thoroughly evaluate the curtailment impact on these six pipelines. In so doing, the Commission elicited information as to what self-help measures, such as implementation of Order No. 533 procedures, were under consideration. The results of these proceedings were set forth in Staff reports,¹⁶ which we incorporate into the record herein, detailing the projected impact of the 1977-78 winter curtailment on these pipelines which clearly establish that Order No. 533 procedures should be available this winter in order to provide a means of mitigating potentially severe industrial curtailment.

B. TERM OF THE CERTIFICATE

In Order No. 533, the certificates were limited to 2 years. The 533 program is an emergency type of measure designed to assist currently curtailed high priority users to secure supplemental gas supplies while they arrange to convert to more plentiful alternate fuels. It is not intended to be a permanent solution to these industries' energy needs. That answer is conversion to alternate and more abundant fuels, such as coal and other fuels. Legislation to effectuate such conversions and to encourage more efficient use of natural gas is presently before Congress.

This Commission will not, through its policy pronouncements, elevate an essentially stop-gap measure to the level of a permanent palliative to the natural gas shortage for the relatively small group of industrial concerns that are in a position to take advantage of this program. We recognize, however, that conversion to alternate

¹⁴Alabama-Tennessee Natural Gas Company, et al., Docket Nos. RP77-65, et al.

¹⁵East Tennessee Natural Gas Company, et al., Docket No. RP77-72, et al.

¹⁶El Paso Natural Gas Co., Docket No. RP77-74; East Tennessee Natural Gas Co., Docket No. RP77-72; Tennessee Gas Pipeline Co., Docket No. RP77-86; Tennessee Natural Gas Lines, Inc., Docket No. RP77-87; Transcontinental Gas Pipe Line Corp., Docket No. RP77-89; United Gas Pipeline Co., Docket No. RP77-92 and Reports were issued October 14, 1977.

sources of energy is expensive, difficult, often slow and sometimes infeasible depending on the state of the technology for any particular use. We do not want to unduly disrupt industrial processes by prematurely terminating the 533 policy, a result which would defeat the very purpose for which the program was begun. Therefore, we find that the certificates should be limited to no more than a two year period to avert critical economic dislocations and maintain the Commission's flexibility to review and respond to the changing national gas supply situation.¹⁷

We will grant a buyer of 533 gas an extension of the existing authorization for 2 years if all qualifications are met. Any additional extension, however, will be granted only if substantial evidence establishes that conversion to an alternate fuel was infeasible during the term of the sale. In reviewing these requests on a case-by-case basis, the Commission will determine whether the industrial consumer has made a good faith effort to inquire into alternate fuel capability and conversion potential and further, that there is an insufficient period of time to develop such capability during the period of proposed use of 533 supplies. The reasons for the consumer's inability to implement alternate fuel capability should be clearly set forth in order to present adequate substantive evidence.

C. DIVERSION OF 533 GAS TO PRIORITY 1 CUSTOMERS

In its notice, the FPC requested the parties to comment on whether the Commission should condition transportation authorization for 533 supplies upon diversion to the transporting interstate pipeline when there is a threat of actual curtailment. Under such a condition, if the pipeline supply were inadequate to meet the requirements of residential, small commercial and human needs consumers in Priority 1, the pipelines would have an alternate method of coping with emergencies of limited duration.

Staff endorsed the proposed condition with certain limitations. Staff argued that if any gas were to be diverted, only those volumes over and above the amount necessary for plant protection should be made available, adequate notice should be provided in order to prevent damage to the equipment and materials being processed by the industrial consumer; and explicit assurance should be provided that the Commission will not assert jurisdiction upon the supplying producer. In addition, Staff advocated that the pipe-

lines be required to pay back the gas diverted from industrial customers; however, in the event the customer were unable to utilize the volumes in accordance with the provisions of the policy, an exception should be created whereby the customer could take the volumes for lower priority use during the term of the authorization.

Many of the parties disagreed sharply with Staff's proposal, stating that such a condition would violate the Natural Gas Act as producers would be selling gas to be resold in interstate commerce at rates in excess of those permitted under the Act without a certificate of public convenience and necessity authorizing such sales. Noting that some producers now require that the gas purchase contract covering the sale of 533 supplies contain a clause providing for its automatic cancellation if the gas is resold, they argued that the proposed amendment to the policy would result in the automatic termination of many 533 contracts. Many parties also cited the Emergency Natural Gas Act of 1977 as support for their contention of the inadvisability of requiring this limited diversion.¹⁸

Others argued that "Priority 1 curtailment" at the pipeline level does not necessarily mean that there is actual curtailment of Priority 1 uses because the distributor customer may have supplemental supply sources in addition to pipeline supply. In order to mitigate these effects, some suggested that the emergency condition protecting Priority 1 customers adopted in Opinion No. 778¹⁹ should be incorporated if the Commission finds that a protective condition is in the public interest.

Alternate means of protecting Priority 1 essential uses are available without Federal regulation. The distributors may defer delivery of gas to the 533 purchaser during an emergency, although the purchaser would continue to request gas at the wellhead making a supply available to the interstate pipeline. After the crisis passes, the distributor would deliver to the 533 purchaser an amount equal to that obtained during the emergency. This procedure is viewed as superior as there would be no unlawful passage of title of the 533 gas to a third party. Its viability depends upon the voluntary cooperation of the industrial consumer, distributor, pipeline. This commission cannot mandate such transactions; however, they appear desirable.

We find the arguments against our imposition of a diversion condition to

be persuasive and therefore reject the Staff's suggestion. Order No. 533 sales are exempt from Commission jurisdiction because they are direct sales and not sales for resale. If the Staff proposal were adopted, diversion of the gas to resale markets would result and the character of the transportation would be legally changed since title would change and the gas would be unlawfully sold to a third party for resale. We conclude that at the present time the policy need not be modified to incorporate the proposed condition. During the severe emergency last winter, the pipelines were able to provide natural gas to essential human uses through voluntary cooperative efforts.

D. PERMITTING PRIORITY ONE CONSUMERS TO PARTICIPATE

In the initial rulemaking proceeding, the FPC rejected arguments to expand the policy to include direct sales to Priority One consumers. In Order No. 533, the Commission found that due to the "exceedingly large number of residential and small commercial customers that might try to take advantage of such a policy",²⁰ further study was necessary. The majority of the parties, including Staff, oppose the proposed expansion for a variety of reasons. They argue that these loads are temperature-sensitive and therefore do not require a relatively consistent gas supply. Moreover, the administrative and regulatory aspects of the proposed modification would create an unwarranted burden on the pipeline. It would be impractical for an individual household or a small commercial consumer to enter into such contracts. These arguments were previously considered during the initial rulemaking whereupon the Commission concluded that Priority One consumers should not be allowed to participate in this program. No new arguments have been raised which would form a basis for modification of that determination.

A related question is whether Order No. 533 should be modified to allow the transportation of gas purchased or developed by distribution companies. Northern Illinois Gas Co. (NI-Gas), Citizens Gas and Coke Utility (Citizens) and Michigan Gas Utilities Co. (Michigan Gas) argue that such a modification is necessary and in the public interest as it would encourage domestic drilling activity and production of additional gas supplies for consumers located outside gas producing States. Maintaining that many local distribution companies are experienced in finding gas, parties favoring this view state that these companies should be allowed to compete with in-

¹⁷ It is implicit that this Commission may initiate review of this policy at any time. It may be appropriate for us to take such action after the enactment of the National Energy Act.

¹⁸ By legislation, Congress created the authority to reallocate natural gas supplies under certain emergency situations; however, it specifically excluded Order No. 533 gas from such reallocation.

¹⁹ Transcontinental Gas Pipe Line Corp., Docket No. RP72-99.

²⁰ Supra, note 1 at Mimeo p. 22.

trastate purchasers and thereby divert additional gas from the intrastate market. Since some distributors operate large storage reservoirs and therefore can purchase gas which non-resale purchasers cannot economically purchase, these companies assert that they should be allowed to participate in an expanded 533 program.

These arguments are similar to those previously raised during the initial rulemaking proceedings. Upon review, the FPC determined that the proposed modification would be inadvisable since distributors would resell the supply which would be a jurisdictional activity and subject to the just and reasonable standard of sections 4 and 5 of the Natural Gas Act. For this reason, we find no basis upon which to amend the previous findings.

In a related matter, NI-Gas proposed that purchases by industrial and commercial users under this program not preempt pipeline capacity that would otherwise be available to local distributors and that all certificates issued under § 2.79 be conditioned to contain a provision subjecting that transportation to interruption where necessary to allow the pipeline capacity to be used in an emergency situation by local distributors acting under §§ 2.68 and 157.22 of the Commission's regulations. NI-Gas did not cite a single instance where the pipeline capacity on any interstate system has been preempted. In addition, one of the necessary findings in the approval of the 533 application is that there is available pipeline capacity. A concerned distributor could therefore address this issue in a specific proceeding when the proposed transportation is under consideration; however, since this problem does not appear to have actually happened, there is no basis at the present time for a general pronouncement on this point. Should the need for a condition as suggested by NI-Gas arise, the Commission will reexamine the question.

E. NEW CUSTOMERS

In the initial rulemaking, the FPC considered and rejected the application of § 2.79 to others than "existing customers" of interstate pipelines who are subject to curtailment. In its June notice, the FPC raised this point for discussion again and set forth three proposed categories for possible inclusion: (1) The transportation of direct sale gas to new customers, (2) customers not served by the interstate pipeline, and/or (3) volumes in excess of those presently being received by existing customers through jurisdictional pipeline suppliers.

Many parties favored the expansion of the policy beyond the current category of "existing customers", arguing that there is no basis to deny these customers the use of gas which would

not otherwise be available to the interstate market. The Commission's Office of Policy and Analysis (now Office of Regulatory Analysis) concurred with these arguments, stating that supplies to new customers represent an addition to the flow of interstate gas which would not have been forthcoming in the absence of these customers' efforts and further that there are economic benefits from permitting the transportation. Moreover, it concluded that the gas contracted for by such customers is no more likely to be diverted from potential interstate supplies than any other gas under Order No. 533.

In their comments, the Commission's Office of the General Counsel and the Bureau of Natural Gas (now Office of Pipeline and Producer Regulation) opposed the expansion of the present policy to allow the transportation of direct sales gas under the three proposed categories. Allowing the transportation of 533 gas to new customers, such as a new fertilizer plant constructed in 1977, was seen as creating an unwarranted dependence on supplies which are authorized for a limited term. The use of 533 gas would allow users to postpone development of a reliable energy supply for two years and could require the incurrence of an unjustifiable expense in subsequent conversion of plant facilities to utilize alternate energy sources. The Office of the General Counsel and Bureau of Natural Gas believe that a better energy policy would be for such customers to utilize alternate fuels from the inception rather than requiring the conversion to such after a limited term.

We concur with this recommendation for the reasons advanced. The underlying purpose of the 533 policy is temporarily to assist existing customers mitigate the effects of curtailment pending conversion to alternate fuels. Adding new customers would be contrary to that intent. The application of the current 533 policy should not be extended to customers not presently served by the interstate pipeline as that would also be contrary to the purpose of Order No. 533. Due to the unregulated price of gas supplies in the intrastate market, customers of an intrastate pipeline are in a better position to obtain needed gas supplies than the customers of an interstate pipeline. To allow this expansion of the policy could diminish the limited potential supplies available to ultimate existing users by permitting additional competition.

In a related matter, United Gas Pipeline Co. (United) proposed that the Commission expand its policy statement to include two new classes of industrial customers: (1) Small industrial customers with requirements under 300 Mcf per day; and, (2) large

industrial customers converting to alternate fuel but still lacking total alternate fuel capability. United maintained that the continued operation of these plants is essential to avoid the same type of economic dislocation with which Priority 2 and 3 consumers qualifying under the current policy statement are threatened.

As to the first category, United proposed that the small industrial with requirements of less than 300 Mcf per day should be included in the highest curtailment category available to industrial gas. United further argues that there is an apparent inconsistency in Commission policies in that these industrial requirements are often placed in the highest industrial category under Order No. 467-B type plans but remain ineligible for Order No. 533 consideration as they do not fall within the definition of plant protection, feedstock or process use. Because of economies-of-scale considerations discouraging their conversion to alternate fuels and the *de minimus* volumes involved, United asserts that there is adequate justification for expanding the policy.

Section 2.78(b) of the Commission's regulations provides for proceedings for extraordinary relief from curtailment and is the appropriate vehicle for seeking relief in the aforementioned situation. Order No. 533 would provide an alternate means to meet the projected curtailment of industrial customers, however, further consideration appears necessary prior to our adoption of the proposed modification. As to United's proposal to expand the policy to include large industrial consumers who are in the process of converting to alternate fuel, we find that it could have an adverse impact in minimizing the urgency of completing the necessary conversion. Moreover, there would be extreme difficulties administratively in distinguishing which plants made a good faith effort to effectuate such conversion on a prompt and expeditious basis resulting in an exemption to the current policy standards.

F. TRANSPORTATION OF USER OWNED GAS

In its initial policy statement, the FPC did not include the transportation of gas produced or owned by the industrial consumer; however, it did indicate that any filing requesting such authorization would be considered. In its recent notice, the Commission proposed to review the advisability of including this type of arrangement in the 533 program. Most parties, as well as the Office of Policy Analysis, supported the proposed expansion of the policy, arguing that the development of reserves in remote locations would be encouraged and supply of available gas for Priority 2 and Priority 3 uses would be augmented.

ed. It is asserted that marginal on-shore reserves will not be developed unless industrial consumers are willing to make the substantial effort and investment necessary and, therefore, the expansion of the policy in this manner would not create any additional risks of diversion from the interstate market.

The supporting parties stated that continuation of the two-year limitation on the transportation certificate would effectively preclude the development of such reserves despite modification of the policy to include consumer-owned gas or reserves-in-place because the industrial consumer (investor) would not be assured of an adequate opportunity to recover the substantial investment necessary to acquire a long-term gas supply. Consequently, long-term certificates for these projects were requested by these parties.

OGC and BNG contended that development of consumer-owned supplies or the purchase of reserves-in-place are not short-term ventures and the nature of these transactions places them outside the intent of Order Nos. 533 and 533-A. Staff argued that they should be subject to a case-by-case scrutiny under section 7(c) of the Natural Gas Act.

We concur that the requested modification of the policy does not fall within the intent of Order No. 533 as it would allow much more than short-term emergency measures to maintain high priority use. The considerations implicit in such proposals should be reviewed in the context of section 7(c) as they do not conform to the criteria of Order No. 533. The transportation of consumer-owned gas or reserves-in-place for a period not exceeding two years can be construed as falling within the scope of the policy.

G. INTERMEDIARIES (BROKERS)

In its notice, the FPC sought comments referring to the role of intermediaries (brokers) that attempt to bridge the gap between the industrial consumers seeking to purchase and the producers wanting to sell natural gas supplies. These intermediaries have acted in the role of "agents" in locating supplies of 533 gas for industrial and commercial buyers and arranging transportation from the point of production to consumption. They charge a fee for the various types of services performed, such as, planning, purchasing, contracting for gathering systems, negotiating transportation agreements, and fulfilling administrative requirements. They act solely for the industrial consumer from whom they receive all their compensation. In some instances, the brokers charge their industrial customer a fee based upon the number of Mcf's of gas delivered to the facility.

The Commission is not opposed to brokering activities and we do not want to discourage the use of these important services, but the Commission is concerned about the amount of any brokerage fee and any impact it may have on the price paid by the industrial customer. Although the Commission has no direct jurisdiction over the producer price in a direct sale, in reviewing the transportation certificate application the Commission is required to examine the effect of the price paid on market forces in the area of the purchase.²¹ The Commission has examined several transactions in which brokers participated²² and has concluded that the total cost of the gas delivered to the industrial must be reviewed in determining whether the proposed transportation is in the public interest. When brokers participate, the application for certification of the transportation must include a statement as to the total fee charged, how it is computed, and any affiliation between the broker and the seller, buyer, or pipeline applicant.

H. COST OF GATHERING FACILITIES

Some of the 533 applications recently received have included a provision whereby the buyer paid for the cost of installing gathering lines between the pipeline and the source of the gas, but the producer retained title to these facilities. The inclusion of these costs increases the total price of the gas to the industrial consumer. The Commission is not opposed to the consumer paying for such facilities provided that the total cost of the delivered 533 supplies remain consistent with the market price in the producing area.²³ Accordingly, we will amend our filing requirements to ensure that the information necessary to make an informed judgment on this matter is before the Commission. Under such arrangements, the filing made with the Commission should itemize these costs incurred by the customer, ownership, date of construction and the terms of payment.

I. USE OF INTRASTATE PIPELINES

After reviewing past transactions under the existing policy statement,

²¹ *Transcontinental Gas Pipe Line Corp. v. FPC*, 365 U.S. 1 (1961).

²² *Transcontinental Gas Pipe Line Corporation*, Docket No. CP77-542, issued November 8, 1977; *Transcontinental Gas Pipe Line Corporation*, Docket No. CP76-423, issued November 5, 1976; and *Transcontinental Gas Pipe Line Corporation*, Docket No. CP77-240, issued October 26, 1977.

²³ See *Consolidated Gas Supply Corp. (Westinghouse)* Docket No. CP77-211 (April 22, 1977) where the FPC analyzed a connection cost charged on an Mcf basis and conditioned the certificate by limiting the industrial payment to the actual cost of the facilities.

the Commission is aware that the transportation costs may be a major factor in the industrial consumer's consideration of the total costs of purchasing a particular supply. Under some arrangements that have been approved by the Commission the transportation of the supply from the producer to the consumer has required the participation of two or more interstate pipelines when intrastate pipelines might have transported the supply more efficiently and economically.

A hypothetical example is illustrative of the value of an intrastate pipeline participation in the transportation of 533 supplies. Assume a producer in the vicinity of Ward County, Tex., which is near Midland, has marginal supplies available and a high priority industrial consumer, which is a customer of Transcontinental Gas Pipe Line Corp., (Transco), needs these supplies to offset curtailment. For purposes of the hypothetical, it is assumed that the redelivery point to Transco will be at a point near Houston, Tex., where a potential intrastate pipeline company has facilities. In order to transport the available gas to the Transco system through solely interstate pipelines, the gas would go through three interstate systems prior to arrival at Transco's system at a point near Houston, Tex. The gas would be picked up by Northern Natural Gas Co. in Texas and be transported approximately 460 miles to Kansas where it would be transferred to Panhandle Eastern Pipeline Co. (Panhandle). The gas would travel 610 miles on this system where there would be a point of inter-connection with Trunkline Gas Co. which would exchange the gas with Transco by displacement in Texas. The total cost of this transportation would be approximately 35.4 cents per Mcf.²⁴

If an intrastate facility in Texas with available capacity were willing to transport the gas approximately 600 miles to a point near Houston for delivery to Transco, the total cost of the transportation would be 18.0 cents.²⁵ The cost savings are significant. This example focuses only on transportation costs; however, the reluctance of intrastate entities to participate in 533 transactions could result also in construction of unnecessary facilities, or the abandonment of potential arrangements.

Participation by an intrastate pipeline in a 533 transaction involves it in

²⁴ Northern 460/100×14.5 cents/Mcf=20.70 cents, Panhandle 610/100×2.41 cents/Mcf=14.70 cents; Total=35.40 cents/Mcf.

²⁵ Intrastate 600/100×3.0 cents/Mcf=18.00 cents/Mcf.

interstate transportation which is a jurisdictional activity. In order to encourage intrastate pipelines to participate in 533 arrangements, the Commission will assert only a limited claim of jurisdiction over participating intrastate pipelines. Commission jurisdiction will be restricted to the 533 service performed and will not serve as a basis for the assertion of authority over other activities of the intrastate pipeline nor its facilities. Should an intrastate entity choose to participate, the Commission will issue a certificate providing pregranted abandonment authorization to discontinue service upon expiration of the term.

We also find it appropriate to limit the filing requirements and waive most reporting requirements. We therefore will adopt Staff's proposals which provide two options for the intrastate entity. The intrastate pipeline may file a joint application with the interstate pipeline setting forth the proposed transportation fee and the cost basis thereof. Under this procedure, the intrastate pipeline would have the primary obligation of preparing the application; however, it would incorporate the required information relating to the intrastate transaction. Both applicants would receive the appropriate certificates. In the event that the intrastate pipeline chooses not to file a joint application, the second option allows the intrastate pipeline to file an abbreviated certificate application²⁶ that would subject it to only limited jurisdiction arising only from the transportation transactions, with waiver of most of Section 157 filing requirements. These are procedural alternatives; the certificate issued to the intrastate pipeline would be identical under either method.

As part of this certification procedure the Commission must approve the proposed intrastate pipeline transportation rate as just and reasonable.²⁷ In contrast to interstate pipelines, the Commission does not have tariffs on file which establish the appropriate transportation rate, although Section 5(b) of the Natural Gas Act provides a vehicle for obtaining such information.²⁸ In the event an intrastate pipeline takes advantage of our invitation to participate on a limited jurisdictional basis, it will be incumbent upon the applicant to demonstrate that the proposed rate is just and reasonable by the submission of appropriate data. Proposed transportation rates derived

from rates approved by state regulatory commissions will be considered, and given some evidentiary weight when the intrastate transporter submits a statement of the proposed rates and the supporting data provided the state regulatory body.

J. TAKE OR PAY PROVISIONS

In its notice, the Commission characterized the [take-or-pay] provision, coupled with the limitations on the purpose for which the gas may be used, (as) possibly the most problematic issue resulting from the implementation of this program.²⁹

Most of the parties agreed with the Commission's assessment and suggested that the Commission should modify the policy to allow for additional flexibility. The comments highlighted the conflict with the policy statement in that there is an attempt to attract intrastate gas to the interstate market while imposing strict limitations on its end use. We recognize that the fluctuations in an industrial customer's use of natural gas may not be conducive to the full realization of both of these objectives.

The problem arises because the producer desires a guarantee that as long as certain volumes are available for sale, the supplies will either be sold or paid for, even if not actually purchased. If the latter occurs, the price of each unit of gas obtained by the user increases. This is of concern to the Commission because of the price impact and the loss to the interstate market of supplies that have been purchased but not delivered. This situation arises because the level of curtailment fluctuates such that during the summer season many industrial users are not being curtailed and cannot use 533 gas. Also, if the winter curtailment is not deep enough to make up the difference, gas will be paid for but not taken. Consequently, some parties filing comments proposed extending the term of the certificate to permit make-up and/or easing the priority restrictions on the use of 533 gas.

One method of dealing with this problem was suggested by the Staff, which proposed that the policy should be amended to establish a general rule that the underlying sales contract should not include a take-or-pay provision that exceeds 80 percent on an annual basis. In the event that the take-or-pay provision is 100 percent, a limit of 75 percent should be established for the period April through October of the calendar year. The

foregoing was proposed as a means of reducing the "inflated cost" of gas actually taken when the inability to take all of the gas which has been purchased exists. In conjunction with this, Staff proposed that a purchaser should be permitted to receive make-up gas for six months after the expiration of the original transportation authorizations.

Upon review we find that it would be inappropriate to approve any form of percentage limitations upon the take-or-pay provision in sales contracts. Such action could establish both the upper and lower limits of such provisions and would be disadvantageous to the parties and the public interest. Individual applications shall be analyzed with regard to this provision. We do find, however, that additional flexibility should be provided to allow the industrial consumer an opportunity to take the gas for which it has paid and we will therefore adopt Staff's proposal to grant a six month extension for receipt of these volumes upon compliance with certain reporting requirements.

Accordingly, contracts of sale that contain a take-or-pay provision must include a provision permitting the extension provided for herein. Furthermore, when an extension is needed, the certificated pipeline shall file a request for extension with the Commission stating the volumes that need to be made up and the estimated time necessary. Extension for the full six month term will be deemed approved upon receipt by the pipeline of a letter from the Secretary of the Commission acknowledging the filing.

Many parties proposed modifications to current end-use restrictions imposed by Order No. 533 in order to allow the industrial customer greater flexibility in receiving the supply. United proposed that § 2.79 (e) and (f) be amended to allow a customer to take up to 50 percent of his authorized MDQ under his direct purchase contract in addition to his entitlement under his supplier's curtailment plan, prior to being obligated to reduce curtailment entitlements. Others suggest that the Commission should require that the pipeline system supply be the "first through the meter" whereby 533 supplies would be backed off. In other words, the 533 deliveries could be "banked" by the pipeline for future delivery to the industrial customers. The Ohio Commission requires the "first through the meter" option in all the contracts that it approves under its self-help program. It reported that there have been no objections by the participating pipelines to this provision.

Some of the parties suggested that the Commission should provide for an automatic one-year extension of the certificate's original term or such

²⁶ The intrastate pipelines may file an abbreviated application as provided for in § 157.7 of the regulations of the Natural Gas Act. The application will be deemed sufficient if it includes a general description of the facilities and location (or a map of the same), a statement concerning the proposed rates, and the cost-of-service used to develop such rates.

²⁷ Natural Gas Act, Section 4(a), 15 U.S.C. Section 717c(a); FPC v. Texaco Inc., 417 U.S. 380, 394 (1974).

²⁸ 15 U.S.C. Section 717d.

²⁹ Supra, note 4, p. 6.

shorter period as is necessary for transportation of all make-up volumes outstanding under take-or-pay provisions of gas purchase contracts. Staff recommended that the end-use limitations be relaxed during the summer months to meet the dilemma that is particularly acute during this period. Under its proposal, the industrial consumer would be permitted to accept that volume of the 533 supply which would represent the difference between the actual pipeline supply and the total volume to which it is entitled under the pipeline's curtailment plan, regardless of the priority of service. An industrial consumer would be able to accept not only its pipeline supply, but a portion of its 533 pipeline supply limited by the total volumes to which it is entitled for all priorities of service. In the event that 533 volumes are still available, the Staff recommended that they be available to the industrial consumer for additional or new requirements.

We find that the priority restrictions on the use of 533 gas should not be changed. The 533 program was promulgated for the benefit of curtailed high priority users. If we were to implement the suggestions discussed above, gas supplies that were intended for these uses would be consumed for lower priority purposes, a result inconsistent with Commission policy. There is, however, the possibility that users could contract for storage service to store 533 gas during periods when it could not be used by the industrial for later delivery or arrange for an exchange of gas, and the Commission will entertain such applications.

A necessary factor of our decision to extend this policy is the promulgation of stricter reporting requirements with regard to alternate fuel capability. Order Nos. 533 and 533-A limited its application to situations "where gas is purchased for high priority uses that otherwise would be curtailed and without an alternate fuel capability." We intend to examine whether the industrial consumer has made a conscientious effort to develop and utilize alternate fuel capability. There are a number of industrial customers that do not have the ability to convert to more abundant fuels due to the present level of combustion technology. Nevertheless, there are many industrial processes which are classified as "process use" in most pipeline curtailment plans and are now using 533 supplies for which alternate fuel could easily be substituted. Certain information should be provided by the industrial customers in order for the Commission to have an opportunity to attempt to make this distinction. To accomplish this and meet the more stringent standard, the industrial consumer will have the burden of presenting substantial evidence that it has in-

quired into alternate fuel capability and conversion technology. The feasibility of implementing alternate fuel capability will be a primary consideration in our determinations of whether further extensions of existing authorizations should be granted subsequent to the first "rollover."

K. MISCELLANEOUS MATTERS

National Gypsum Co. supported the proposal that the Commission reexamine the criteria it has used in identifying high priority industrial uses. In determining which industrial uses are properly included in Priority 2 National Gypsum states the terms "feedstock" and "plant protection" have caused relatively little problems; however, "process gas" has been subject to multiple interpretations. In order to eliminate the uncertainty, it proposed an amendment to the language. Although the proposed definition may be preferable, staff and many of the parties do not support this amendment. We concur because this policy statement is not the appropriate vehicle to redefine what constitutes "process gas." A redefinition of this term should occur in the context of a reevaluation of Order Nos. 467, et seq., and 493-A.²⁰

During the past two years, the Commission has followed the practice of issuing temporary certificates, when warranted, to applicants for permanent 533 certificates. All parties to the proceeding supporting continuation of the policy also support the issuance of temporary certificates. Staff concurs in the continuation of the administrative practice, but emphasize that all necessary information must accompany the application if the Commission is to review the application on an expeditious basis. We will continue the administrative practice of issuing temporary certificates where the necessary requirements have been met.

Several parties suggested that certain of the reporting requirements established under Order No. 533 should be modified. For example, it was suggested that the intermediary pipelines which transport the supplies between the producer and the pipeline providing service to the industrial customer should not be required to file monthly reports but that the primary transporting pipeline should provide all necessary information. It has also been urged that the monthly reporting requirements should be changed to provide a quarterly reporting. Upon our reassessment of the reporting requirements, we find that only the delivering pipeline need file a monthly report. Monthly information from in-

²⁰FERC authority to take such action may be proscribed by section 402(a)(1)(E) of the DOE Act.

termediary transporting pipelines is unnecessary. However, we shall continue the requirement of monthly rather than quarterly reports from delivering pipelines in order to assist our assessment on the supply situation on major interstate pipelines during the winter.

III. CONCLUSION

Order No. 533 program was promulgated in 1975 as a statement of policy to clarify the circumstances under which the FPC would permit an interstate pipeline to transport certain supplies of gas not owned by the pipeline. Specifically, the FPC was responding to the ever-deepening curtailment situation on most jurisdictional pipelines by providing a method by which high priority industrial users could obtain supplemental supplies through direct purchase from producers. The criteria adopted for judging whether the proposed transportation of the purchased volumes was within the public convenience and necessity reflected judicial opinion²¹ as well as a review of the comments filed in response to the FPC's notice of proposed rulemaking.

When the FPC issued Order No. 533, it defined the program as "experimental" and requiring "empirical evidence of its merits" if the policy were to be continued. To that end, the FPC published a notice of proposed rulemaking to review the policy statement and numerous comments were filed. After careful review and consideration of these submissions, this Commission has determined to continue the 533 policy.

The evidence in the record, comprised of the historical experience of the past two years, the comments filed by the parties, and the Staff reports to the Commission in the omnibus pipeline proceedings, demonstrate that the 533 policy has been a success. The program has provided high priority users with a method whereby they can mitigate the effects of curtailment by purchasing supplemental supplies directly from producers for the express purpose of decreasing the likelihood that curtailment will cause industrial plant shut-downs, which could produce a severe economic disruption in the communities affected. The gas transported under 533 and the overwhelming support of the program, as displayed in the comments, demonstrate the efficacy of the program. Since the conditions that required the 533 policy in the past persist today and are anticipated to continue in the near future, this Commission considers it prudent to maintain the policy in operation, as modified herein.

²¹FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961); Arizona Public Service Co. v. FPC, 483 F. 2d 1275 (D.C. Cir. 1973).

²²Order No. 533, mimeo p. 28.

The Commission finds. (1) The notice and opportunity to participate in this proceeding with respect to the matters presently before the Commission through the submission, in writing, of data, views, comments and suggestions in the manner as described above are consistent and in accordance with all procedural requirements therefor as prescribed in section 553, Title 5 of the United States Code. Since the amendment prescribed here does not prescribe an added duty or restriction, compliance with the effective date requirements of 5 U.S.C. 553(d) is unnecessary.

(2) The amendment of Part 2, General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations, § 2.79, Policy With Respect To Pipeline Transportation Agreements, as herein prescribed, is necessary and appropriate for the administration of the Natural Gas Act.

(3) Since the modifications to § 2.79 prescribed herein which were not included in the notice of this proceeding are of a minor nature, and are consistent with the prime purpose of the proposed rulemaking, further notice thereof is unnecessary.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly sections 7, 15 and 16 thereof (52 Stat. 824, 825, 829, 930; 56 Stat. 83, 84; 61 Stat. 459; 15 U.S.C. 717f, 717n, and 717o) orders:

(A) Part 2, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended as set forth below, effective immediately:

§ 2.79 [Amended]

1. Section 2.79 is amended in paragraph (e) by deleting the "and" and inserting in lieu thereof a phrase to read as follows:

(e) ***
; Provided further, That the gas may be used during an authorized six month extension of the transportation authorization.

2. Section 2.79 is amended in paragraph (g) by inserting a new subdivision (viii) in subparagraph (1), by inserting new subdivisions (vii)-(xiii) in subparagraph (2), by revising subparagraph (1) in the introductory language, by revising subparagraph (2) (v) and (vi), and by revising subparagraph (3) to read as follows:

(g) ***
(1) Interstate pipelines transporting gas pursuant to this policy must file

the information set forth in subdivisions (i) through (vii) of this subparagraph. Intrastate pipelines transporting gas pursuant to this policy may file either a joint application with the interstate pipeline or an abbreviated application as provided in § 157.7, including the information set forth in subdivision (viii) of this subparagraph.

(viii) Provide a general description of the facilities and specify their location or include a map thereof; provide a statement concerning their proposed rates and Schedules L, M and N of § 154.63. For purposes of this subdivision (viii), there is no requirement that omission of other filing requirements be justified. For purposes of this subdivision (viii), the following provisions are waived:

(A) 18 CFR Part 154—Rate Schedules and Tariffs;

(B) 18 CFR 157.13—Form of exhibits to be attached to applications;

(C) 18 CFR 157.14—Exhibits;

(D) 18 CFR Part 159—Fees and annual charges under the Natural Gas Act;

(E) 18 CFR Part 201—Uniform system of accounts for natural gas companies; and

(F) 18 CFR Part 260—Statements and reports (schedules).

(2) ***

(v) Provide a copy of the gas purchase contract with the producer underlying the proposed transportation, including the Btu content of the gas supply;

(vi) Provide a detailed description of the nature of the emergency necessitating the authorization of the proposed transportation including but not limited to the curtailment anticipated with respect to each priority of end use at the plant;

(vii) Provide a sworn statement by the consumer, supported by substantial evidence, that it has made a good faith effort to inquire into alternate fuel capability and conversion potential and further that it cannot develop such capability during the proposed use of 533 supplies;

(viii) Provide a complete description of the end use application and the facility in which the gas will be utilized, e.g., size and type of burner(s);

(ix) Provide a map showing the location of the wells and description of the acreage involved, along with the location of the nearest interstate and intrastate transportation facility;

(x) Indicate whether or not gas has previously been sold from the acreage and, if so, to whom, through what facilities and at what prices;

(xi) Provide available information as to:

(A) The ownership of adjoining acreage, and if productive, information as to whom the gas is being sold, and at what price;

(B) The current price, terms, and conditions of intrastate purchases for comparable gas produced within the immediate vicinity;

(C) Negotiations for the sale of the supply to any other purchaser (intrastate or interstate) and the suggested price;

(xii) If an intermediary participates in the transaction between the industrial customer and the producer and charges a fee, indicate the amount of the fee and terms of payment and the intermediary's affiliation, if any, with the producer and/or pipeline;

(xiii) If either the producer or the industrial customer assumes the cost of the construction of any gathering facilities in order to consummate the purchase, provide the cost, terms of payment, ownership and date of construction of the facilities.

(3) The information required by paragraph (g) (2) (i)-(xiii) of this section may be supplied by the applicant for a transportation certificate through submission of an appropriate affidavit from the non-resale industrial and commercial consumer whose gas is transported pursuant to this policy.

3. Section 2.79 is amended in paragraph (h) by revising subparagraph (1), and is amended by redesignating paragraph (j) as paragraph (k) and by inserting a new paragraph (j) to read as follows:

(h) ***

(1) For each certificated transportation arrangement the delivering natural gas companies shall submit a monthly report to the Commission indicating the name of the producer, the volumes transported, the point of delivery to the distributor and/or non-resale industrial or commercial consumer, the name of the distributor and/or ultimate non-resale industrial or commercial consumer. An original and four copies of each such report shall be filed within 20 days after the end of each month included in the term of the transportation certificate. The delivering natural gas company shall submit a monthly report for any month during which gas was not transported.

(j) If an industrial consumer is unable to receive gas supplies for which it has paid under the take-or-pay provision in the underlying sales contract, the transporting pipelines

may file a request for a six-month extension of the certificate authorization. The request shall include a statement of the undelivered volumes and the time necessary to complete delivery thereof. Upon receipt of a letter from the Secretary of the Commission acknowledging the filing, the request-

ed extension shall be deemed approved.

(B) The Secretary shall cause prompt publication hereof in the FEDERAL REGISTER.

By the Commission.

KENNETH F. PLUMB,
Secretary.

APPENDIX A.—Certificated applications—

	Prior to Nov. 1, 1975	Nov. 1, 1975 to Mar. 31, 1976	Apr. 1, 1976 to Oct. 31, 1976	Nov. 1, 1976 to Mar. 31, 1977	Apr. 1, 1977 to Dec. 1, 1977	Total volumes through Nov. 30, 1977
Applications	6	14	28	44	21	113
Volumes/Mcf delivered.....	0	177,556	1,641,023	6,065,969	7,992,814	15,877,362

¹ 22 applications are currently under staff analysis.

APPENDIX B.—Range of initial producer prices

	Prior to Nov. 1, 1975	Nov. 1, 1975 to Mar. 31, 1976	Apr. 1, 1976 to Oct. 31, 1976	Nov. 1, 1976 to Mar. 31, 1977	Apr. 1, 1977 to Dec. 1, 1977 ¹
Less than \$1.....		1			
\$1 to \$1.24.....		3	1	1	
\$1.25 to \$1.49.....	1	8	12	4	2
\$1.50 to \$1.74.....	3	2	12	15	6
\$1.75 to \$1.99.....	2		1	10	15
\$2 and above.....				12	15

¹ (Not included in above are 9 applications involving industry owned gas). Includes applications under staff analysis.

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[1505-01]

Title 32—National Defense

CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE

SUBCHAPTER M—MISCELLANEOUS

[DOD Directive 4120.18]

PART 209—USE OF THE METRIC SYSTEM OF MEASUREMENT

Correction

In FR Doc. 78-2571, appearing on page 4009 in the issue for Tuesday, January 31, 1978, in the first line of the address under "FOR FURTHER INFORMATION CONTACT:", the word "Mate" should read "Material".

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 831-2]

PART 142—NATIONAL INTERIM PRIMARY DRINKING WATER REGULATION IMPLEMENTATION

Assessment of Penalties for Violation; Interim, Final Rule

AGENCY: Environmental Protection Agency.

ACTION: Interim final rule.

SUMMARY: The section giving the State authority to assess penalties for violations is amended to clarify the intent of EPA that the State is to have authority to assess penalties for violation to both the State primary drinking water regulations and the State public notification regulations.

Second, the section requiring States to report to the EPA Administrator by January 1, of each year, a summary of inventory corrections, violations, enforcement actions, and status of variances and exemptions for the preceding fiscal year is amended to allow supplies serving fewer than 25,000 population to delay reporting of violations only for FY 1977 until June 1, 1978. All other reporting requirements under this section will be submitted on January 1, 1978, for FY 1977, and for subsequent fiscal years, all reporting requirements under this section will be submitted on January 1. This change is necessitated by the delay in implementation of the automated data processing system which is designed to handle the reporting data requirements.

EFFECTIVE DATE: February 8, 1978, comments on or before March 10, 1978.

ADDRESS: Drinking Water Regulations Implementation Branch, Office of Water Supply, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:

James F. Manwaring, P.E., Chief, Drinking Water Regulations Implementation Branch, 401 M Street SW., Washington, D.C. 20460, 202-426-3983.

SUPPLEMENTARY INFORMATION:

40 CFR 142.15 requires each State with primacy to report by January 1 of each year the inventory corrections and the violations and enforcement actions taken during the preceding fiscal year. The States must also report on the current status of variances and exemptions.

The National Interim Primary Drinking Water Regulations (NIPDWR) went into effect June 24, 1977. Therefore, the report due on January 1, 1978, will contain information only for a 3-month period. It is unlikely that there will be many variances or exemptions granted in this period and there will be a very limited number of enforcement actions. Thus, for the most part, the January 1978 report will only have to deal with inventory and violation data. The delay in implementing an automated data handling system, the Model State Information System (MSIS), has made the reporting of this data much more difficult than previously expected. The purpose of this amendment is to minimize, as much as possible, problems involved with State reports due January 1, 1978.

Without MSIS it will not be easy to determine and report on all the violations which occurred between June 24, 1977 and September 30, 1977. The best approach to alleviate the problems caused by the delay in MSIS is to allow a delay in the reporting date for some of the community public water systems. However, it is necessary to get violation data from some public water systems in all States on January 1, 1978, in order to fulfill EPA reporting needs to Congress. The data on each violation to the NIPDWR is important because it provides our first complete assessment of water quality in community public water systems.

Since the larger public water supplies protect most of the population and are likely to have fewer violations, we would modify the regulations to require the annual summary of violations for FY 1977 to be submitted in

two parts. Violations in supplies serving more than 25,000 population would have to be submitted by January 1, 1978. Violations in supplies serving 25,000 or fewer people would be due June 1, 1978. This would allow the States an additional six months to get MSIS installed and get the FY 1977 data onto MSIS before most of the violations would be reported. There would be no deviation in the requirements for FY 1978 data which would be due on January 1, 1979. Since there will be very few variances and exemptions or enforcement actions, no change in the requirements of § 142.15 pertaining to these reports is warranted.

Dated: January 31, 1978.

DOUGLAS M. COSTLE,
Administrator.

40 CFR Part 142 is amended as follows:

1. Section 142.10(b)(6)(vi) is amended to read:

§ 142.10 Requirements for a determination of primary enforcement responsibility.

* * *

(b) ***

(6) ***

(vi) Authority to assess civil or criminal penalties for violation of the State's primary drinking water regulations and public notification requirements, including the authority to assess daily penalties or multiple penalties when a violation continues.

* * *

2. Section 142.15(b)(1) is amended to read:

§ 142.15 Reports by States.

* * *

(b) ***

(1) Summary of violations by public water systems in the State of primary drinking water regulations, except public water systems serving fewer than 25,000 population which will have until June 1, 1978, to report the FY 1977 violations only, and of enforcement actions taken by the State;

* * *

[FR Doc. 78-3362 Filed 2-7-78; 8:45 am]

[6820-24]

Title 41—Public Contracts and Property
Management Regulations

CHAPTER 101—FEDERAL PROPERTY
MANAGEMENT REGULATIONS

[FPMR Temp. Regs. A-12, G-34, G-35]

CENTRALIZED HOUSEHOLD GOODS TRAFFIC
MANAGEMENT, CHANGES IN REQUIRE-
MENTS FOR REPORTING MOTOR VEHICLE
DATA, AND INVESTIGATION REPORT OF
MOTOR VEHICLE ACCIDENT

Temporary Regulations

CROSS REFERENCE: For the text of three General Services Administration temporary regulations on the subjects of: centralized household goods traffic management, changes in requirements for reporting motor vehicle data, and completing Standard Form 91-A, Investigation Report of Motor Vehicle Accident, see FR Docs. 78-3411, 78-3412, and 78-3413 appearing in the Notices section of this issue under the heading "General Services Administration".

[4110-35]

Title 42—Public Health

CHAPTER IV—HEALTH CARE FINANCING AD-
MINISTRATION, DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

PART 481—CERTIFICATION OF CERTAIN
HEALTH FACILITIES

Rural Health Clinics: Conditions for
Certification

AGENCY: Health Care Financing Administration (HCFA), HEW

ACTION: Final rule.

SUMMARY: These regulations establish the conditions that rural health clinics must meet in order to be certified as suppliers of services under Medicare and Medicaid. They implement some of the provisions of the Rural Health Clinic Services Act of 1977 (Pub. L. 95-210) which is effective on March 1, 1978, for Medicare, and on July 1, 1978, for Medicaid. The intent is to increase the availability of medical care and services to residents of rural areas that have a shortage of health manpower.

EFFECTIVE DATE: February 8, 1978. Although notice of proposed rulemaking has been waived, we will welcome written comments, suggestions, or objections received by (45 days) with a view to revising these regulations. Please refer to HSQ-47-RC. Agencies and organizations are requested to submit comments in duplicate.

ADDRESSES: Address comments to: Administrator, Health Care Financing Administration, P.O. Box 2382, Washington, D.C. 20013. Comments will be

available for public inspection, beginning approximately 2 weeks after publication, in room 5225 of the Department's offices at 330 C Street SW., Washington, D.C., on Monday through Friday of each week from 8:30 a.m. to 5 p.m. 202-245-0950.

FOR FURTHER INFORMATION
CONTACT:

Lorraine Kytte, Health Standards and Quality Bureau, HCFA, Rm. 349, 6401 Security Boulevard, Baltimore, Md. 21235, 301-594-9748.

SUPPLEMENTARY INFORMATION: Many isolated rural communities have not been able to attract or retain physicians and residents of these areas needing medical care must rely on clinics that cannot follow the traditional model of physician delivery of medical services. These clinics are, in many instances, staffed by nurse practitioners and physician assistants who are specially trained to provide medical care traditionally furnished by physicians. Although there is physician supervision, it is often indirect rather than "over-the-shoulder."

The Rural Health Clinic Services Act of 1977 (Pub. L. 95-210, December 13, 1977) extends Medicare and Medicaid coverage for medical services, furnished by a rural health clinic that meets the terms and conditions of the Act, which would otherwise be covered if furnished by a physician or incident to a physician's services.

The regulation sets forth the requirements which a clinic must meet in order to be certified for participation in Medicare or Medicaid. The Department will soon be issuing two more regulations to implement Pub. L. 95-210. One will govern coverage and reimbursement under Medicare, and will become effective for services furnished by a certified rural health clinic beginning March 1, 1978. The other will govern coverage and reimbursement under Medicaid, for which certified rural health clinics become eligible beginning July 1, 1978.

A rural health clinic interested in becoming certified under this regulation can obtain further information and application forms from the State agency responsible generally for certifying providers and suppliers of medical services for participation in Medicare and Medicaid. Typically, this is the State Health Department.

In drafting these regulations, the Department has tried to heed the clear legislative intent that the requirements for these clinics take into account their unique circumstances and be more flexible and less complex than requirements applicable to hospitals and other large institutions. (See House Report 95-548, Part II, p. 10.) The Department intends to implement these regulations in the same spirit.

MAJOR PROVISIONS

1. Location of the clinic. In order to be certified, a clinic must be located in

an area that has been designated by the U.S. Bureau of the Census as rural and has been designated by the Secretary of HEW as having a shortage of personal health services or primary medical care manpower. For convenience, the criteria for such designations are summarized in section 481.5 of the regulation, but the governing requirements are not reproduced in their entirety. A rural area is any area not designated as an urbanized area. Anyone who wishes to determine whether an area in question falls within the Bureau of Census criteria could inquire at the nearest public library.

Determinations of shortage areas are made by the Secretary under two alternative provisions. One is section 1302(7) of the Public Health Services Act, for which the responsibility within HEW has been given to the Bureau of Community Health Services, Health Services Administration. The most recent listing of shortage areas under this section was published on October 15, 1976 in volume 41 of the *FEDERAL REGISTER*, page 45718.

The other provision for designating shortage areas is section 332(a)(1)(A) of the Public Health Services Act, for which responsibility lies with the Bureau of Health Manpower, Health Resources Administration. Designations under this section are set forth at volume 42, page 1586 of the *FEDERAL REGISTER* (January 10, 1978).

The statute sets forth two "grandfather" provisions, under which a clinic may obtain or retain certification, even if the conditions for being in a rural, shortage area are not met. First, if a facility qualifies as a rural health clinic but the area in which it is located subsequently loses its designation as rural or as a shortage area, the clinic will remain qualified. Second, a private, nonprofit clinic that was operating on July 1, 1977 in a rural area which is not designated as a shortage area, but which the Secretary determines to have an insufficient supply of physicians, can qualify for certification. These two provisions are spelled out in section 481.5 of the regulation.

2. **Staffing requirements.** The major innovation accomplished by P.L. 95-210 is to provide Medicare and Medicaid coverage for medical services furnished by a qualified physician assistant or nurse practitioner. Although a clinic must still have one or more physicians available to provide medical direction and carry out other specified responsibilities, the clinic's services may be furnished by a nurse practitioner or physician assistant, as those terms are defined in the regulation. Moreover, every clinic must have at least one nurse practitioner or physician assistant on the staff, irrespective of how many hours a physician, in fact, is present at the clinic. (This is a

statutory requirement and means that rural health clinics can be certified only if the State permits—that is, does not explicitly prohibit—the delivery of primary health care by a nurse practitioner or a physician assistant.) The clinic staff may also include other health professionals, such as nurse midwives and other nurse practitioners who specialize in a particular range of services.

The respective responsibilities of physicians and the physician assistants or nurse practitioners are specified in section 481.8. In brief, a physician must provide medical supervision and guidance for the physician assistants and nurse practitioners, prepare medical orders, and review periodically the services furnished by the clinic. A physician must be present at the clinic for sufficient periods of time to fulfill these responsibilities and must be available at all other times, by direct means of communication, for advice and assistance on patient referrals and medical emergencies. In order to assure the presence of a physician on a regular, but only minimally necessary basis, the regulation requires that a physician be present at the clinic at least once in every two week period, subject to extraordinary circumstances. A clinic operated by a nurse practitioner or physician assistant may satisfy these requirements through agreements with one or more physicians.

In addition to furnishing clinic services, the nurse practitioners and physician assistants participate in developing and administering the clinic's patient care policies, assure proper maintenance of patient records, and arrange for patients to receive necessary services not furnished by the clinic.

In accordance with the statutory authorization to establish training, education and experience requirements for nurse practitioners and physician assistants, this regulation sets forth alternative, minimum credentials in the definition of those terms. We are aware that there are graduates of special education programs, that are not accredited or certified by the major accrediting body, who have been providing medical services in settings comparable to rural health clinics. The regulation, therefore, includes in the definition of these terms people who have graduated from such programs and have been providing primary medical care services for at least 12 months (not necessarily consecutive) during the 18 months immediately preceding the effective date of this regulation.

3. **Services provided.** The purpose of the Rural Health Clinic Services Act is primarily to make available outpatient or ambulatory care of the nature typically provided in a physician's office, or outpatient clinic, or emergency room and the like. The regulation, at

section 481.9, specifies the services which must be made available by the clinic, including specified types of diagnostic examinations, laboratory tests, and emergency treatments. In addition, the clinic must have made arrangements with other providers or suppliers of services, who are participating in Medicare or Medicaid, to make sure that its patients will receive other services not provided by the clinic, including other diagnostic examinations, physician services and inpatient hospital care.

It should be noted that a rural health clinic may also provide part-time or intermittent nursing care to home-bound patients, if it is located in an area in which there is a shortage of home health agencies. The terms and conditions for providing such services are not set forth in this regulation, but will be treated in the other regulations implementing P.L. 95-210, referred to above.

4. **Physical facilities.** Although clinic services may be furnished in the patient's home, in a nearby hospital or nursing home, or at any other location needed by the patient, the clinic must also have a facility at which the patient can receive services. This may be one or more buildings or structures or it may be a mobile unit. If services are provided at more than one permanent unit and the locations are widely dispersed, each such unit must be separately surveyed and certified under the regulation, even if all are treated as a single unit for purposes of reimbursement under Medicare or Medicaid.

The clinic facilities must meet minimum standards for the safety of patients, including measures to assure the safety of patients in case of a non-medical emergency.

5. **Certification procedures.** A rural health clinic will be certified for participation in Medicare in accordance with the normal certification process set forth in Subpart S of the Medicare regulations, 42 CFR Part 405. This means that, in most states, certification will be done by the State health department, pursuant to an agreement with HEW. The normal Medicaid certification will also be used and a clinic certified under Medicare will be deemed to meet the standards for certification under Medicaid.

In this regard, it should be noted that if a State permits the provision of primary medical care by a nurse practitioner or physician assistant, the State Medicaid plan must include rural health clinic services in accordance with section 1902(a)(13) and 1905(a)(2) of the Social Security Act (42 U.S.C. 1396a(a)(13), 1396d(a)(2)).

6. **Other requirements.** The regulation contains several other provisions relating to the organizational structure of the clinic, the development of

written patient care policies, the maintenance and confidentiality of patient records, and an annual evaluation of the clinic. Of particular note is the requirement that a clinic be assisted in the development of its patient care policies by a group of health professionals composed of one or more physicians and one or more nurse practitioners or physician assistants. At least one member of the group must be a health professional who is not a member of the clinic staff.

WAIVER OF PROPOSED RULEMAKING

As noted above, under the terms of Pub. L. 95-210 (which was enacted on December 13, 1977) rural health clinics become eligible for reimbursement under Medicare on March 1, 1978 and under Medicaid on July 1, 1978. In view of these severe time constraints, and the desire to have rural health clinic services available to Medicare and Medicaid patients as soon as possible, the Secretary has determined that there is good cause to waive Notice of Proposed Rulemaking and opportunity for public comment prior to issuing this regulation.

Although rulemaking has been waived, public comments and recommendations on the regulation are invited and will be evaluated with a view towards possible revision.

42 CFR Chapter IV is amended by adding a new Part 481 to read as follows:

Subpart A—Rural Health Clinics: Conditions for Certification

- Sec.
- 481.1 Purpose and scope.
 - 481.2 Definitions.
 - 481.3 Certification procedures.
 - 481.4 Compliance with Federal, State and local laws.
 - 481.5 Location of clinic.
 - 481.6 Physical plant and environment.
 - 481.7 Organizational structure.
 - 481.8 Staffing and staff responsibilities.
 - 481.9 Provision of services.
 - 481.10 Patient health records.
 - 481.11 Program evaluation.

AUTHORITY: Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302).

§ 481.1 Purpose and scope.

This subpart sets forth the conditions that rural health clinics must meet in order to qualify for reimbursement under Medicare (Title XVIII of the Social Security Act) and Medicaid (Title XIX of the Act).

§ 481.2 Definitions.

As used in this subpart, unless the context indicates otherwise:

- (a) "Direct services" means services provided by the clinic's staff.
- (b) "Nurse practitioner" means a registered professional nurse who is currently licensed to practice in the State, who meets the State's requirements governing the qualifications of

nurse practitioners, and who meets one of the following conditions:

(1) Is currently certified as a primary care Nurse Practitioner by the American Nurses' Association or by the National Board of Pediatric Nurse Practitioners and Associates; or

(2) Has satisfactorily completed a formal 1 academic year educational program that:

(i) prepares registered nurses to perform an expanded role in the delivery of primary care;

(ii) includes at least 4 months (in the aggregate) of classroom instruction and a component of supervised clinical practice; and

(iii) awards a degree, diploma, or certificate to persons who successfully complete the program; or

(3) Has successfully completed a formal educational program that does not meet the requirements of paragraph (b)(2) of this section, and has been performing an expanded role in the delivery of primary care for a total of 12 months during the 18-month period immediately preceding the effective date of this subpart.

(c) "Physician" means a doctor of medicine or osteopathy legally authorized to practice medicine or surgery in the State.

(d) "Physician assistant" means a person who meets the applicable State requirements governing the qualifications for assistants to primary care physicians, and who meets at least one of the following conditions: (1) Is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(2) Has satisfactorily completed a program for preparing physician's assistants that:

(i) Was at least 1 academic year in length;

(ii) Consisted of supervised clinical practice and at least 4 months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(iii) Was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(3) Has satisfactorily completed a formal educational program that does not meet the requirements of paragraph (d)(2) of this section and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding the effective date of this subpart.

(e) "Rural area" means an area that is not delineated as an urbanized area by the Bureau of the Census.

(f) "Rural health clinic" or "clinic" means a clinic that is located in a rural area designated as a shortage area, is not a rehabilitation agency or a facility primarily for the care and treatment of mental diseases, and meets all other requirements of this subpart.

(g) "Shortage area" means a defined geographic area designated by the Department as having either a shortage of personal health services (under section 1302(7) of the Public Health Service Act) or a shortage of primary medical care manpower (under Section 332 of that Act).

(h) "Secretary" means the Secretary of Health, Education, and Welfare, or any official to whom he has delegated the pertinent authority.

§ 481.3 Certification procedures.

A rural health clinic will be certified for participation in Medicare in accordance with Subpart S of 42 CFR Part 405. The Secretary will notify the State Medicaid agency whenever he has certified or denied certification under Medicare for a prospective rural health clinic in that State. A clinic certified under Medicare will be deemed to meet the standards for certification under Medicaid.

§ 481.4 Compliance with Federal, State and local laws.

The rural health clinic and its staff are in compliance with applicable Federal, State and local laws and regulations.

(a) *Licensure of clinic.* The clinic is licensed pursuant to applicable State and local law.

(b) *Licensure, certification or registration of personnel.* Staff of the clinic are licensed, certified or registered in accordance with applicable State and local laws.

§ 481.5 Location of clinic.

(a) *Basic requirement.* The clinic is located in a rural area that is designated as a shortage area, and may be a permanent or a mobile unit.

(1) *Permanent unit.* The objects, equipment and supplies necessary for the provision of the services furnished directly by the clinic are housed in a permanent structure.

(2) *Mobile unit.* The objects, equipment, and supplies necessary for the provision of the services furnished directly by the clinic are housed in a mobile structure which has fixed, scheduled location(s).

Under this requirement, if clinic services are furnished at permanent units in more than one location, each unit will be independently considered for certification as a rural health clinic.

(b) *Exceptions.* (1) A facility certified under this subpart will not be disqualified if the area in which it is located subsequently fails to meet the definition of rural, shortage area.

(2) A private, nonprofit facility that meets all other conditions of this subpart except for location in a shortage area will be certified if, on July 1, 1977, it was operating in a rural area that is determined by the Secretary (on the basis of the ratio of primary

care physicians to the general population) to have an insufficient supply of physicians to meet the needs of the area served.

(3) Determinations on these exceptions will be made by the Secretary upon application by the facility.

(c) *Criteria for designation of rural areas.* (1) Rural areas are areas not delineated as urbanized areas in the last census conducted by the Census Bureau.

(2) Excluded from the rural area classification are:

(i) central cities of 50,000 inhabitants or more;

(ii) cities with at least 25,000 inhabitants which, together with contiguous areas having stipulated population density, have combined populations of 50,000 and constitute, for general economic and social purposes, single communities;

(iii) closely settled territories surrounding cities and specifically designated by the Census Bureau as urban.

(3) Included in the rural area classification are those portions of extended cities that the Census Bureau has determined to be rural.

(d) *Criteria for designation of shortage areas.* (1) The criteria for determination of shortage of personal health services (under section 1302(7) of the Public Health Services Act), are:

(i) The ratio of primary care physicians practicing within the area to the resident population;

(ii) The infant mortality rate;

(iii) The percent of the population 65 years of age or older; and

(iv) The percent of the population with a family income below the poverty level.

(See 42 CFR 110.203(g) and 41 FR 45718, October 15, 1976.)

(2) The criteria for determination of shortage of primary medical care manpower (under section 332(a)(1)(A) of the Public Health Services Act) are:

(i) The area served is a rational area for the delivery of primary medical care services;

(ii) The ratio of primary care physicians practicing within the area to the resident population; and

(iii) The primary medical care manpower in contiguous areas is overutilized, excessively distant, or inaccessible to the population in this area.

(See 42 CFR Part 5; 42 FR 1586, January 10, 1978.)

§ 481.6 Physical plant and environment.

(a) *Construction.* The clinic is constructed, arranged, and maintained to insure access to and safety of patients, and provides adequate space for the provision of direct services.

(b) *Maintenance.* The clinic has a preventive maintenance program to ensure that:

(1) All essential mechanical, electrical and patient-care equipment is

maintained in safe operating condition;

(2) Drugs and biologicals are appropriately stored; and

(3) The premises are clean and orderly.

(c) *Emergency procedures.* The clinic assures the safety of patients in case of non-medical emergencies by:

(1) Training staff in handling emergencies;

(2) Placing exit signs in appropriate locations; and

(3) Taking other appropriate measures that are consistent with the particular conditions of the area in which the clinic is located.

§ 481.7 Organizational structure.

(a) *Basic requirements.* (1) The clinic is under the medical direction of a physician, and has a health care staff that meets the requirements of § 481.8.

(2) The organization's policies and its lines of authority and responsibilities are clearly set forth in writing.

(b) *Disclosure.* The clinic discloses the names and addresses of:

(1) Its owners, in accordance with Section 1124 of the Social Security Act (42 USC 132 A-3);

(2) The person principally responsible for directing the operation of the clinic; and

(3) The person responsible for medical direction.

§ 481.8 Staffing and staff responsibilities.

(a) *Staffing.* (1) The clinic has a health care staff that includes one or more physicians and one or more physician's assistants or nurse practitioners.

(2) The physician member of the staff may be the owner of the clinic, an employee of the clinic, or under agreement with the clinic to carry out the responsibilities required under this section.

(3) The physician's assistant or nurse practitioner member of the staff may be the owner of the clinic or an employee of the clinic.

(4) The staff may also include ancillary personnel who are supervised by the professional staff.

(5) The staff is sufficient to provide the services essential to the operation of the clinic.

(b) *Physician responsibilities.* (1) The physician:

(i) Provides medical direction for the clinic's health care activities and consultation for, and medical supervision of, the health care staff.

(ii) In conjunction with the physician's assistant and/or nurse practitioner member(s), participates in developing, executing, and periodically reviewing the clinic's written policies and the services provided to Federal program patients; and

(iii) Periodically reviews the clinic's patient records, provides medical

orders, and provides medical care services to the patients of the clinic.

(2) A physician is present for sufficient periods of time, at least once in every 2 week period (except in extraordinary circumstances), to provide the medical direction, medical care services, consultation and supervision described in paragraph (b)(1) of this section, and is available through direct telecommunication for consultation, assistance with medical emergencies, or patient referral. The extraordinary circumstances are documented in the records of the clinic.

(c) *Physician assistant and nurse practitioner responsibilities.* (1) The physician assistant and the nurse practitioner members of the clinic's staff:

(i) Participate in the development, execution and periodic review of the written policies governing the services the clinic furnishes;

(ii) Participate with a physician in a periodic review of the patients' health records.

(2) The physician assistant or nurse practitioner performs the following functions, to the extent they are not being performed by a physician:

(i) Provides services in accordance with the clinic's policies;

(ii) Arranges for, or refers patients to, needed services that cannot be provided at the clinic; and

(iii) Assures that adequate patient health records are maintained and transferred as required when patients are referred.

§ 481.9 Provision of services.

(a) *Basic requirements.* The clinic is primarily engaged in providing outpatient health services to persons of all ages and meets all other conditions of this subpart.

(b) *Patient care policies.* (1) The clinic's health care services are furnished in accordance with appropriate written policies which are consistent with applicable State law.

(2) The policies are developed with the advice of a group of professional personnel that includes one or more physicians and one or more physician assistants or nurse practitioners. At least one member is not a member of the clinic staff.

(3) The policies include:

(i) A description of the services the clinic furnishes directly and those furnished through agreement or arrangement;

(ii) Guidelines for the medical management of health problems which include the conditions requiring medical consultation and/or patient referral, the maintenance of health care records, and procedures for the periodic review and evaluation of the services furnished by the clinic.

(iii) Rules for the storage, handling, and administration of drugs and biologicals.

(4) These policies are reviewed at least annually by the group of professional personnel required under paragraph (b)(2) of this section, and reviewed as necessary by the clinic.

(c) *Direct services.*—(1) *General.* The clinic staff furnishes those diagnostic and therapeutic services and supplies that are commonly furnished in a physician's office or at the entry point into the health care delivery system. These include medical history, physical examination, assessment of health status, and treatment for a variety of medical conditions.

(2) *Laboratory.* The clinic provides basic laboratory services essential to the immediate diagnosis and treatment of the patient, including:

- (i) Chemical examinations of urine by stick or tablet methods or both (including urine ketones);
- (ii) Microscopic examinations of urine sediment;
- (iii) Hemoglobin or hematocrit;
- (iv) Blood sugar (stick or tablet method acceptable);
- (v) Gram stain;
- (vi) Examination of stool specimens for occult blood or pinworm;
- (vii) Pregnancy tests; and
- (viii) Primary culturing for transmittal to a certified laboratory.

(3) *Emergency.* The clinic provides medical emergency procedures as a first response to common life-threatening injuries and acute illness, and has available the drugs and biologicals commonly used in life saving procedures, such as analgesics, anesthetics (local), antibiotics, anticonvulsants, antidotes and emetics, serums and toxoids.

(d) *Services provided through agreements or arrangements.* (1) The clinic has agreements or arrangements with one or more providers or suppliers participating under Medicare or Medicaid to furnish other services to its patients, including:

- (i) Inpatient hospital care;
- (ii) Physician(s) services (whether furnished in the hospital, the office, the patient's home, a skilled nursing facility, or elsewhere); and
- (iii) Additional and specialized diagnostic and laboratory services that are not available at the clinic.

(2) If the agreements are not in writing, there is evidence that patients referred by the clinic are being accepted and treated.

§ 481.10 Patient health records.

(a) *Records system.* (1) The clinic maintains a clinical record system in accordance with written policies and procedures.

(2) A designated member of the professional staff is responsible for maintaining the records and for ensuring that they are completely and accurately documented, readily accessible, and systematically organized.

(3) For each patient receiving health care services, the clinic maintains a record that includes, as applicable:

- (i) Identification and social data, evidence of consent forms, pertinent medical history, assessment of the health status and health care needs of the patient, and a discharge summary;
- (ii) Reports of physical examinations, diagnostic and laboratory test results, and consultative findings;
- (iii) All physician's orders, reports of treatments and medications and other pertinent information necessary to monitor the patient's progress;
- (iv) Signatures of the physician or other health care professional.

(b) *Protection of record information.*

(1) The clinic maintains the confidentiality of record information and provides safeguards against loss, destruction or unauthorized use.

(2) Written policies and procedures govern the use and removal of records from the clinic and the conditions for release of information.

(3) The patient's written consent is required for release of information not authorized by law.

(c) *Retention of records.* The records are retained for at least 5 years from date of last entry, and longer if required by State statute.

§ 481.11 Program evaluation.

(a) The clinic carries out, or arranges for, an annual evaluation of its total program.

(b) The evaluation includes review of:

(1) The utilization of clinic services, including at least the number of patients served and the volume of services;

(2) A representative sample of both active and closed clinical records; and

(3) The clinic's health care policies.

(c) The purpose of the evaluation is to determine whether:

(1) The utilization of services was appropriate;

(2) The established policies were followed; and

(3) Any changes are needed.

(d) The clinic staff considers the findings of the evaluation and takes corrective action if necessary.

(Catalog of Federal Domestic Assistance Program No. 13.714, Medical Assistance Program; 13.800, Medicare-Hospital Insurance, 13.801 Medicare-Supplementary Medical Insurance.)

Dated: January 23, 1978.

ROBERT A. DERZON,
Administrator, Health,
Care Financing Administration.

Approved: February 2, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary.

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[6712-01]

Title 47—Telecommunication

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 20617; RM-2359; FCC 78-511]

PART 81—STATIONS ON LAND IN THE MARITIME SERVICES AND ALASKA-PUBLIC FIXED STATIONS

Canada/United States Channeling Arrangements

AGENCY: Federal Communications Commission.

ACTION: Report and order amending the rules.

SUMMARY: Part 81 of the rules is amended to implement channeling arrangements between Canada and the United States for allocating VHF public coast station frequencies on the West Coast, Great Lakes and East Coast. These amendments are made in order to incorporate the arrangements, already final, in the rules.

EFFECTIVE DATE: March 11, 1978.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Adopted: January 25, 1978.

Released: February 1, 1978.

By the Commission. Commissioner Washburn absent.

In the matter of proposed Canada/United States channeling arrangements for the West Coast, Great Lakes and St. Lawrence Seaway, and the East Coast for Appendix 18 maritime mobile correspondence frequencies, Docket No. 20617, RM 2359.

REPORT AND ORDER—PROCEEDING TERMINATED

1. On October 28, 1975, we released a Notice of Inquiry in the above captioned matter. All comments received favored adoption of the proposed arrangements. We subsequently finalized the arrangements with Canada by a letter to Canada signed by the Chairman of the Commission on December 15, 1976. On August 3, 1977, we released a Notice of Proposed Rule Making the purpose of which is to incorporate these arrangements into the Commission's rules (FCC 77-525). The Notice was published in the FEDERAL REGISTER on August 10, 1977 (42 FR 40455). No comments were received in reply to the Notice. The time for filing comments has now passed.

2. Accordingly, the rules will be amended as proposed in the Notice. In