MOD NB/M/1147 (up to Serial No. 2034), and BN-2A MK III Trislander Series (all serial numbers) airplanes certificated in any category.

Compliance: Required as indicated, unless already accomplished. To prevent failure of the upper engine mounting brackets, accomplish the following:

(a) Within 100 hours time-in-service for airplanes with more than 400 hours time-in-service but not more than 1,000 hours time-in-service since complying with AD 83-07-18, or at the next scheduled or unscheduled engine removal, and every 500 hours time-in-service thereafter.

(1) Visually inspect in accordance with paragraphs 1 through 6 of the "Inspection" section of the Pilatus Britten-Norman, Ltd. Service Bulletin No. BN-2/SB.61 Issue 5, dated December 9, 1981 (hereinafter referred to as the SB);

(i) The upper engine to wing mounting brackets for minimum lug bolt hole-to-edge distance (0.2625 inches), elongation of the bolt holes, distortion, delamination, cracks, flaking and corrosion.

(ii) The bolts for correct bearing length.

(iii) Loose and fretted bushings.

(2) Prior to further flight, correct defects in accordance with the following:

(i) If lug bolt hole-to-edge distance is less than the specified minimum, correct as prescribed in paragraph 3 of the "Rectification/Modification" section of the SB.

(ii) If the bolt holes are elongated, or if any bushings are loose or fretted:

(A) On Islander Series airplanes, modify and correct as described in paragraph 2 of the "Rectification/Modification" section of the SB.

(B) On Trislander Series airplanes, modify and correct as described in paragraph 4 of the "Rectification/Modification" section of the SB.

(iii) If any mounting bracket is cracked, modify both brackets on the same engine installation (left side engine or right side engine) concurrently (even if only one bracket is defective) as described in paragraph 1 of the "Rectification/Modification" section of the SB.

(iv) If any lug is distorted or delaminated, replace the deficient parts in accordance with paragraphs 1 and 2 of the "Rectification/Modification" section of the SB.

(v) If any inspected part is corroded or flaking, replace in accordance with paragraph 1 of the "Rectification/Modification" section of the SB.

(vi) If any of the bolts are of incorrect length or damaged, replace with new units of the correct length.

(b) The repetitive inspection interval for the Islander airplanes only, may be increased to 1,000 hours time-in-service when all four engine mounting brackets have been rectified to Pilatus Britten-Norman Modification NB/M/1147 in accordance with the "Rectification/Modification" section of the SB.

(c) The intervals between the repetitive inspections required by this AD may be adjusted up to 10 percent of the specified interval to allow accomplishing these inspections concurrent with other scheduled maintenance of the airplane.

(d) Aircraft may be flown in accordance with FAR 21.197 to a location where this Airworthiness Directive (AD) can be accomplished.

(e) An equivalent method of compliance with this AD, if used, must be approved by the Manager, Aircraft Certification Staff, AEU-100, Europe, Africa and Middle East Office, FAA, c/o American Embassy, 1000 Brussels, Belgium.

This AD supersedes AD 83-07-18, Amendment 39-4620.

(Secs. 313(a), 601 and 603 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1421 and 1423); 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); Sec. 11.89 of the Federal Aviation Regulations (14 CFR 11.89))

This amendment becomes effective on December 6, 1984.

Issued in Kansas City, Missouri, on October 22, 1984.

Murray E. Smith,

Director, Central Region.

[FR Doc. 84-28602 Filed 10-30-84; 8:45 am]

BILLING CODE 4910-13-M

CIVIL AERONAUTICS BOARD

14 CFR Part 250

[Economic Regs. Amdmnt. No. 22 to Part 250; ER-1394; Docket No. 42246]

Oversales; Interpretative Amendment

AGENCY: Civil Aeronautics Board.

ACTION: Interpretative amendment.

SUMMARY: The CAB issues an interpretative amendent to its Oversales (denied boarding compensation) rule to make it clear that bumped passengers must be paid by cash or an immediately negotiable check at the time of bumping. The action was initiated by a petition by People Express, and is taken to clarify the responsibilities of airlines and clear up any ambiguities in the rule.

DATES: Adopted: October 25, 1984. Effective: November 30, 1984.

FOR FURTHER INFORMATION CONTACT: Richard B. Dyson, Associate General Counsel, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428; (202) 673-5444.

SUPPLEMENTARY INFORMATION: In 1981 People Express Airlines (PE) received from the Civil Aeronautics Board partial exemptions from the Board's denied boarding compensation (14 CFR Part 250) and baggage liability (now 14 CFR Part 254) rules. (Order 81-6-41, June 6, 1981; affirmed by Order 82-11-49, November 10, 1982). With respect to denied boarding compensation, the only rule at issue here, these exemptions allowed PE to give to bumped passengers, instead of the immediate compensation required by the rule, tickets valid for transportation on its domestic system.

It should be noted that PE's plan was not a substitution of a different passenger benefit for an existing one. By Order 80-5-200, May 29, 1980, later codified as § 250.5(b), the Board had already granted all carriers the right to offer bumped passengers the *option* of accepting free or reduced-rate transportation in lieu of a cash-equivalent payment, on condition that the passengers be informed of what their payment rights were, and that the transportation offered have a value equal to or greater than the payment specified in the rule. Thus, what PE received by the exemption was simply the right *not* to offer passengers the option of immediate payment, which was otherwise required by the rule of all carriers using large aircraft.

By Orders 83-6-111, June 24, 1983, and (on reconsideration) 83-8-91, August 22, 1983, the Board revoked these exemptions. It had decided to retain the rules, which previously had been under reevaluation, and considered that basic considerations of evenhanded regulation required that all carriers within the class covered be treated alike. It rejected as insubstantial PE's arguments that it was somehow different from other airlines, by way of its ticketing practices and low cost structure, and therefore deserved different treatment.

In response to revocation of the exemption, but before its effective date, PE orally approached the Board's Acting General Counsel and other members of the Board staff for an opinion on a modification of its denied boarding procedure. PE proposed to give bumped passengers a voucher or a refundable ticket that could be either used for transportation on its domestic system or submitted for a refund. The Acting General Counsel expressed a tentative oral opinion that the system might satisfy the rule, but advised PE that it should submit a written request for an interpretation as to the validity of the scheme. PE did so by letter of September 19, 1983.

The PE letter relied mainly on the fact that the DBC rule used the word "draft" to describe the form of payment that a carrier must give immediately to a bumped passenger. It stated that the Board had not defined the word "draft," and asserted that "the clear intent of the rules is to require the tender of a document at the time and place of the denied boarding, but not to require that the document be subject to immediate conversion to cash." It also referred to the fact that in one of the orders (83-8-91) revoking the exemption, the Board had used the words "checks or scrip—if not cash" to describe the form of payment required. PE asserted that its vouchers could be considered "scrip."

By letter of March 21, 1984, the Board's General Counsel issued a responsive letter of interpretation, in which he concluded that the PE denied boarding compensation scheme did *not* satisfy the requirements of the rule. The letter reviewed the purpose and intent of the rule, as providing immediate compensation to bumped passengers. It noted that the rule emphasized this immediacy requirement by a limited exception, § 250.8(b), where alternative transporation for the passenger has been arranged before the "draft" can be prepared, allowing the airline to make the payment within 24 hours after the denied boarding occurs. Under the PE scheme, the voucher would have to be mailed to PE headquarters, from which checks would be issued once a week. Since this scheme would normally require a substantial amount of time for the passenger to receive a check, it would not satisfy the rule.

The letter noted the one instance in a related Board order where the vague work "scrip" had been used—the only time that it had been used as a synonym for "draft." The opinion letter stated, "that one erroneous usage in an order discussion cannot be held, however, to have changed the longstanding policy and effect of the rule." The letter concluded that for these purposes the Board intends "draft" to mean "a negotiable instrument—normally a check—that is redeemable for cash through the normal processes of the banking system." Because of the previous ambiguity, however, the letter stated that the Board would not take any retrospective enforcement action based on its opinion. It also advised of PE's right to seek Board review.

PE responded with a letter of March 29, 1984, in which it set forth more detailed arguments in defense of its plan. (These arguments are essentially repeated in the petition that is the immediate occasion of this issuance, and are discussed below). The General Counsel responded with a letter affirming his previous position and reiterating PE's right to petition the Board for a final ruling.

Petition and Responses

On May 31, 1984, PE petitioned the Board for "Interpretation or Clarification of, Amendment to, or Industry-Wide Exemption from, the Board's Denied Boarding Compensation Rules."

Answers in support were filed by Southwest and Continental, and answers in opposition by American, USAir, and Delta. PE submitted a reply to the answers upon request for leave to file an otherwise unauthorized document.

PE first reiterated the argument contained in its September 19, 1983, letter, described above, that its vouchers were "drafts" that satisfied the requirements of the rule. In addition to its previous citiations of Board language on the issue, it cited a 1975 interpretative amendment (ER-897, 40 FR 4409, January 30, 1975) that, in dealing with the question whether currency restrictions might make payment in other countries difficult, stated in the preamble that the DBC rule is "sufficiently flexible to allow a carrier to utilize foreign currency drafts or internal charge orders payable at one of its appropriate offices." It stated that its vouchers satisfied the description of "internal charge orders payable at one of its appropriate offices."

PE further argued that its system was well received by the public, in that only 14% of bumped passengers chose to redeem their vouchers for cash, and that the transportation offered instead of cash was often of "much greater value" than the cash. It argued that the purpose of the rule was not to provide immediate cash or cash-equivalent payment, but rather "compensation," and that the voucher system that it uses "in most instances, provides as prompt a means of monetary payment as the issuance of a check." It contested the position taken in the General Counsel's letter that a main purpose of the rule was to provide funds from which travelers could purchase transportation or ground accommodations, stating that a check given at an airport could not in most instances be used for that purpose. It stated that if the Board were "only concerned about passengers not having funds for alternate transportation," it would not have included in the rule exceptions for canceled flights or substituted aircraft. It also mentioned that in many cases the DBC payment would not be sufficient to purchase alternate transportation.

Finally, PE argued that the policy of the Airline Deregulation Act, to foster a variety of types of services, and to encourage low-priced services, justified its practices. It noted that its on-board ticketing was convenient for passengers, but also made it difficult for PE to comply with a rule requiring the writing of a check at the airport. It stated that to do so, its "entire accounting system and airport staffing structure will have to be revamped," at substantial cost.

American's answer stated that prompt compensation was certainly one of the main purposes of the rule, as illustrated by various Board statements and the rule itself. It stated that a "draft" had been defined [1] as "an open letter addressed by one person to a second, directing him, in effect, to pay absolutely and at all events, a certain sum of money therein named, to a third person or to any other to whom the third person may order to be paid; or it may be payable to bearer or to the drawer himself." American argued that the PE voucher was not such an instrument, since there was no place at which a passenger could immediately redeem the voucher for money, even at a PE facility. It stated that, contrary to PE's assertion, American would accept a check drawn on PE as payment for transportation, as long as it did not exceed the transportation cost by $25 and an American supervisor was available to supervise the transaction. American said that it had "no reason to believe that other carriers' acceptance policies differ substantially from American's."

American rejected PE's policy arguments, stating that "its real complaint is that it regards compliance with Part 250.8 as too costly." It questioned how costly it could be for PE to have an employee at an airport equipped with a checkbook. At any event, American argued, the Board had already considered the question of cost in terminating PE's exemption, and had determined that the cost to the airlines was outweighed by the benefit to the passengers of the rule. American also argued that PE's denied boarding practices were excessive.

Delta and USAir also argued that PE's practices did not satisfy the rule's requirement for prompt payment, and that no other airline had interpreted the rule to permit what PE was doing. They both emphasized the importance of clarifying the rule so that all carriers would be acting on the same interpretation.

Southwest and Continental's answers, supporting the PE petition, basically seconded PE's argument concerning the breadth of the term "draft," and cited the advantages to consumers of receiving transportation credits instead of cash.

In its reply, PE emphasized that it was not seeking special treatment but an interpretation of rule change applicable to all, and that it had sought advice of Board staff before proceeding. It disputed American's contention that its

[1] J. Brady, *Brady on Bank Checks*, section 1.1, n.3 (H. Bailey 5th ED. 1979.)

vouchers did not fit the meaning of "draft," that its practice did not satisfy that promptness requirement of the rule, and that its denied boarding practices were excessive relative to the rest of the industry.

Discussion

Some issues that were raised in the filings can be immediately disposed of. The Board agrees with PE that since revocation of its exemption, PE has not sought special treatment, but a reading of the denied boarding rule that would permit all airlines to use a voucher system as it does. Furthermore, with that being the case, the performance of PE or any other particular airline with respect to passenger bumping is irrelevant and will not be considered here. The Board finds no impropriety in PE's actions in seeking a favorable interpretation of Part 250.

The Board also finds irrelevant arguments put forth by PE concerning the value and the popularity of its free-transportation option. They are irrelevant because the option of offering bumped passengers free transportation, of equal or greater nominal value, is already permitted explicitly by the rule, 14 CFR 250.5(b), and is not affected at all by PE's requests or the Board's disposition of them. PE appeared to be arguing (Petition, pp. 8–9) that its system is an "enhancement" of passenger protection in that it allows the passenger to defer the decision to take cash or free transportation for up to a year. The premise of that argument is erroneous, however; there is nothing in § 250.5(b) that prohibits any carrier from keeping passengers' options open in that way. The question in a case such as this is not what carriers choose to do, or whether what they choose to do is laudable; it is what they are, as a minimum, required to do.

Thus, the only question actually raised by the PE petition is whether the rule allows, or should allow, PE to give to passengers at the time of bumping a voucher that must be mailed in to PE headquarters in order to receive by mail a check for the specified denied boarding compensation, rather than immediate cash or a check. The suggestion by PE that its system "in most instances, provides as prompt a means of monetary payment as the [immediate] issuance of a check" is plainly incorrect. Under PE's system, a check is received only after four discrete time periods have elapsed: the time for the passenger to arrange to mail the voucher; mail transit time to PE headquarters; handling time at PE headquarters; and mail transit time back to the passenger.

There was considerable discussion in the filings of the overall purpose of the denied boarding compensation rule. PE characterized as "erroneous" the General Counsel's "assumption that prompt *monetary* payment is the principal objective of the rule." (Emphasis in original). It cited a 1974 issuance (ER–880, 39 FR 38088, October 29, 1974) that mentioned three goals, "inter alia"; preventing unlawful discrimination in determining bumping priorities, providing "prompt, effective and adequate compensation" to bumped passengers, and encouraging improved carrier oversales performance.

The first goal mentioned, fairness in bumping priorities, is irrelevant here, since that goal was and is met by requirements that are separate from the question of payment to bumped passengers. While the third goal, deterring oversales, was considered important in 1974, its significance has faded since then. When the denied boarding rule was first being discussed and issued in the late sixties, overbooking was seen as a major problem in itself, and various "solutions" were considered, including requiring early notification of passengers, or requiring carriers to penalize "no-show" passengers who sought refunds without having canceled their reservations. At that time, with a tightly regulated system, dependability was considered a primary aim of government regulation. Since deregulation, the variety of price and service offerings has become more important. Most importantly, the denied boarding rule itself has become widely known and accepted by the public as a fair way to minimize hardship of bumped passengers.

Thus, compensation to bumped passengers has indeed become the main purpose of the rule. As the Board said succinctly in a 1982 amendment of the rule (ER–1306, 47 FR 52980, 52985, November 24, 1982): "The basic rationale is compensation of the passenger, not punishment of the airline."

The core issue remaining, then, is whether the rule itself, taken together with statements in the many issuances that have been made concerning it, can be said to permit the PE voucher system, and in either case whether it should be changed.

There is no doubt that in the dozens of pages of issuances the Board has made concerning this rule, a few ambiguous or inconsistent phrases have appeared. The one most favorable to PE's petition, on its face, is the Board statement in a 1975 amendment (ER–897, 40 FR 4409, January 30, 1975) that the rule was "sufficiently flexible to allow a carrier to utilize foreign currency drafts or internal charge orders payable at one of its appropriate offices." The context of that statement, however, was the specific problem that was cited of paying DBC in foreign countries that had restrictions on "foreign currency transactions." That problem has since been totally removed by limiting the application of the rule to bumping that takes place within United States territory. Furthermore, the statement in question does not address the main objection to the PE system, which is the long delay between bumping and receipt of a cash-convertible payment. There is no reason to assume, when the Board said "payable at one of its appropriate offices," that it meant anything other than *immediately* payable.

With respect to PE's argument concerning the single use in an order of the word "scrip," the General Counsel's letter discussed above correctly noted that it was an error—a usage not justified by the words of the rule.

PE's principal argument was that its vouchers satisfy the meaning of the word "draft," which the rule uses to describe the payment in the main requirement section, § 250.8. American disputed this contention, as noted above. "Draft" is a broad term that includes various types of instruments such as checks and bills of exchange. For the reasons set forth below in its resolution of the issues, the Board does not find it necessary to settle this rather obscure point of commercial law.

Resolution of Issues

It is self-evident that rules often do not specifically deal with every factual situations or issues that arise under them. Rule must be interpreted, and sometimes amended, to achieve the intended results. In this case the Board is of the opinion that the intended results of the DBC rule are clear, as evidenced by the fact that the airline industry has through the years given it the same universal meaning: that the passenger must be given a cash or cash-equivalent payment at the time of bumping (with the limited exception of the 24-hour relief in § 250.8(b)).

The main point in dispute is timing of the receipt of payment, as the term is commonly understood. PE's arguments concerning the ambiguity of the rule could have been raised just as well by the issuance of checks post-dated to one week after the time of bumping. The rule, in saying "draft" and "check or draft," does not expressly prohibit post-dating; but a post-dated check is not generally considered to be immediate payment. The Board considers the rule, taken as a whole, to be quite clear on the immediacy requirement. The statement required to be given to passengers by § 250.9 is perhaps the clearest statement of this intent:

The airline must give each passenger who qualifies for denied boarding compensation a payment by check or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The air carrier may offer free tickets in place of the cash payment. The passenger may, however, insist on the cash payment, or refuse all compensation and bring legal action.

The reference in the last two sentences to the requirement as a "cash payment" is revealing as to the Board's intent that the payment be cash or a cash equivalent. Similar references to "cash payment" are made in §§ 250.4 and 250.5(b). There would be little point to the insistence on immediate payment, with a limited 24-hour exception for passengers who are rushed off before a check can be drawn, if the document given could be either a post-dated check or any other document that merely entitled the recipient to convert it to cash at some point a week or more in the future.

The Board, therefore, considers the rule to have been clear in its intent and uniformly interpreted by the industry since its issuance in 1967.

Having considered the policies underlying the rule, the Board answers PE's requests in the negative, and with this issuance will make an interpretative amendment to align the language of the rule with the way it has been understood by both the Board and the industry.

While all the situations of individual travelers cannot be anticipated, prompt payment of DBC by cash or an immediately negotiable check unquestionably eases the hardship of bumping for many, and that is the central intent of the rule. The basic jusification for the rule has been amply discussed in previous issuances (*e.g.,* ER-1306, 47 FR 52980, November 24, 1982) and need not be repeated here. The rule has been well received by the public, and in the Board's judgment is a successful resolution of the bumping problem. The Board finds no sufficient reason in this proceeding to change it.

Interpretative Amendment

For the reasons set forth, the Board is hereby amending § 250.8 by deleting the word "drafts" from the title, so that the title reads, "Denied boarding compensation." In § 250.8(a), the words "a draft" are replaced by the words "cash or an immediately negotiable check." In § 250.8(b), the word "draft" is replaced by the word "payment." In the statement set forth in § 250.9, under the heading "Method of Payment," the words "check or draft" are changed to "cash or check."

Because this interpretative amendment merely clarifies a technical ambiguity in a rule, so that its language is consistent with the way it has generally been understood for many years, it is found for good cause that notice and opportunity for public comment thereon is unnecessary.

Regulatory Flexibility Statement

Pursuant to 5 U.S.C. 604, the Board finds that this interpretative amendment will not have a significant impact on a substantial number of small entities. The rule in question applies only to operators of large aircraft, which are not small entities within the meaning of the Regulatory Flexibility Act. Furthermore, the amendment evidently will make no change in the practice of any company other than People Express, which is not a small entity.

List of Subjects in 14 CFR Part 250

Air carriers, Consumer protection, Denied boarding compensation, Reporting and recordkeeping requirements.

Accordingly, the Civil Aeronautics Board amends 14 CFR Part 250, *Oversales*, as follows:

PART 250—[AMENDED]

1. The authority for Part 250 is:

Authority: Secs. 204, 401, 402, 403, 404, 407, 411, 416, 1002, Pub. L. 85-726, as amended, 72 Stat. 743, 757, 758, 760, 766, 769, 771, 788; 49 U.S.C. 1324, 1371, 1372, 1373, 1374, 1377, 1381, 1386, 1482.

2. Section 250.8 is revised to read:

§ 250.8 Denied boarding compensation.

(a) Every carrier shall tender to a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, except as provided in paragraph (b), cash or an immediately negotiable check for the appropriate amount of compensation provided in § 250.5.

(b) Where a carrier arranges, for the passenger's convenience, alternate means of transportation that departs before the payment can be prepared and given to the passenger, tender shall be made by mail or other means within 24 hours after the time the denied boarding occurs.

3. In § 250.9(b), in the required statement under the heading "Method of Payment," the first sentence is revised to read:

§ 250.9 Written explanation of denied boarding compensation and boarding priorities.

* * * * *

(b) * * *

Method of Payment

The airline must give each passenger who qualifies for denied boarding compensation a payment by cash or check for the amount specified above, on the day and place the involuntary denied boarding occurs.

* * * * *

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 84-28729 Filed 10-30-84; 8:45 am]

BILLING CODE 6320-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket No. RM83-71-001 through 030; Order No. 380-C]

Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions

Issued: October 24, 1984.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on rehearing reaffirming application of rule to minimum take provisions and denying requests for waiver.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this Order No. 380-C to reaffirm the application of the Final Rule, as promulgated, to minimum physical take provisions in pipeline rate schedules or tariffs and to deny requests for waiver. Order No. 380 amended the Commission's regulations by adding a new § 154.111 that requires the elimination from natural gas pipeline tariffs of any provisions that operate to recover variable costs for gas not taken by the buyer. Order No. 380-A, *inter alia*, affirmed that the pipeline tariff provisions to which § 154.111 applies include minimum physical take provisions but stayed the effect of the rule with respect to such provisions until November 1, 1984, in order to permit additional public comment on and Commission reconsideration of this issue.

This order reaffirms that the pipeline tariff provisions to which § 154.111 applies include minimum physical take provisions in pipeline rate schedules or tariffs. The order also denies several requests for waiver and directs MIGC to file an Interim Agreement dated December 20, 1983, as part of its FERC Gas Tariff.

In addition to the above, the Commission responds in this order to various legal arguments and to other requests for clarification from commenters regarding the application of the Rule to their own particular circumstances. The instant order rejects the arguments raised and responds to the requests for clarification with respect to the application of the Rule to minimum physical take provisions.

EFFECTIVE DATE: November 1, 1984.

FOR FURTHER INFORMATION CONTACT: Cynthia A. Govan, Pipeline Rates and Valuation Section, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (202) 357-9119.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is: (1) Reaffirming the application of the rule, as promulgated, to minimum physical take provisions in pipeline rate schedules or tariffs; (2) denying requests for waiver filed by Arkansas Louisiana Gas Company, and Pacific Gas Transmission Company; and (3) directing MIGC, Inc., to file an Interim Agreement, dated December 20, 1983, as part of its FERC Gas Tariff.[1]

II. Background

On June 1, 1984, the Commission issued Order No. 380 [2] which requires elimination from natural gas pipeline tariffs those provisions that operate to recover variable gas costs for gas not taken by the buyer. On July 30, 1984, the Commission issued Order No. 380-A,[3] which (1) grants a stay until November 1, 1984, with respect to the application of the final rule to minimum physical take provisions in pipeline rate schedules or tariffs; (2) clarifies that Order No. 380 does not apply to the stream of revenue approved by the Commission in authorizing the Alaska Natural Gas Transportation System; (3) grants a waiver of section 154.111 of the Commission's regulations, to the extent set forth in the body of the Order, with respect to Trunkline LNG Company; and (4) denies all other petitions for rehearing.

A number of petitioners filed requests for clarification and/or rehearing of Order No. 380 with respect to the application of the final rule to "minimum take" provisions in pipeline tariffs or in contracts with customers. Petitioners contended that since the application of the final rule to "minimum take" provisions was not expressly mentioned in the Notice of Proposed Rulemaking issued August 25, 1983,[4] application of the rule to minimum take provisions was outside the scope of the Notice. They also contended that there was insufficient record evidence to support the Commission's findings that minimum take provisions in pipeline tariffs are unjust and unreasonable. In order to accommodate the concerns raised by petitioners, the Commission stated that it would reconsider the question of applying the rule to minimum take provisions [5] and would issue a supplemental notice in this docket seeking further comment on the minimum take issue.

A Notice of Request for Further Comment was issued on August 10, 1984, providing for initial comments to be received on or before August 30, 1984, and reply comments to be received on or before September 13, 1984.[6]

This aspect of the rulemaking proceeding reconsiders whether the rule, as promulgated, should be applied to minimum take provisions in pipeline rate schedules or tariffs.[7] The Commission is considering whether the use of a minimum take provision which requires a customer to take and pay for a specific quantity of gas regardless of price results in pipelines charging customers a rate in excess of the lowest reasonable rate consistent with reliable, long-term supply. The Commission is also considering whether minimum take provisions share fully the market-distorting influences of variable costs in minimum commodity bills.

The presence of variable costs in a minimum commodity bill did two things which the Commission attempted to remedy. First, in cases where a customer was taking below its minimum commodity level, the minimum commodity bill operated to recover variable costs that were not actually incurred by the pipeline. Second, the minimum commodity bill served as a barrier to competition, thus inhibiting natural gas prices from responding to current market conditions.

The Commission is concerned that minimum take provisions do two things which must be remedied. First, the presence of minimum take provisions cause customers to take gas they would not otherwise take, thus resulting in charges to customers in excess of the lowest reasonable cost. Second, minimum take provisions, like minimum commodity bills, act as a restraint on competition because the pipelines and the producers remain artifically insulated from market risk.

III. Summary of Comments and Analysis

A. Overview

In response to the Notice requesting further comment, the Commission received sixteen initial comments reflecting the views of pipelines, distributors, a group of Canadian producers, a state regulatory commission and other entities. One commenter, the Independent Petroleum Association of Canada (IPAC), filed its initial comments five days late. While IPAC's comments are untimely, the Commission will accept the comments in view of the fact that no party has suffered a detriment as a result of the Commission's consideration of the late-

[1] The Commission issued, also on this date, companion Order No. 380-B.

[2] Order No. 380, Docket No. RM83-71-000, Final Rule, *Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 27 FERC ¶ 61,318 (1984), 49 FR 22778 (1984), FERC Stats. and Regs. ¶ 30,571 (1984).

[3] Order No. 380-A, Docket Nos. RM83-71-001 through 030, Order Denying Rehearing and Granting in Part Applications for Stay, 28 FERC ¶ 61, 175 (1984), 49 FR 31259 (1984), FERC Stats. and Regs. ¶ 30,584 (1984).

[4] Notice of Proposed Rulemaking, Docket No. RM83-71-000, 24 FERC ¶ 61,254 (1983), 48 FR 39238, (1983); FERC Stats. and Regs., Proposed Regulations ¶ 32,334 (1983).

[5] A minimum take provision, unlike a minimum commodity bill, requires the customer to physically take possession of the gas. The customer does not have an option to simply pay for gas and not take it. According to a number of commenters, refusal to take the gas constitutes a breach of the contract, absent a valid claim of *force majeure*. *See e.g.*, Transwestern Pipeline Company, Rate Schedule CDQ-1, FERC Gas Tariff, Second Revised Vol. No. 1, Original Sheet No. 8; Arkansas Louisiana Gas Company, Rate Schedule X-26, FERC Gas Tariff, Original Vol. No. 3, First Revised Sheet No. 180; Pacific Gas Transmission Company, FERC Gas Tariff, First Revised Vol. No. 1, First Revised Sheet No. 53. While minimum take provisions generally take this form, they may vary depending on the contractual arrangements agreed to by the parties. *See e.g.*, Reply Comments of Michigan consolidated Gas Company and Inter-City Gas Corporation, filed September 13, 1984.

[6] Notice of Request for Further Comment, Docket No. RM83-71-001 through 030, 28 FERC ¶ 61,210 (1984), 49 FR 32764 (1984) (cited hereinafter as "Notice").

[7] The rule does not apply to minimum take provisions in contracts between producers and pipelines. The rule only applies to the tariffs and rate schedules under which jurisdictional pipelines sell natural gas to their customers.

filed comment. Nine comments in reply were received. *See* Appendix A.

The Commission's Office of Regulatory Analysis, the natural gas distributors, several jurisdictional natural gas pipelines, and the state regulatory commission expressed overwhelming support for the application of the rule to minimum physical take provisions. According to these commenters, the minimum take provisions cause customers to take gas they would otherwise not take, thus resulting in excessive rates to the consumer. The commenters also contend that minimum take provisions have at least as harmful an effect on competition as do minimum commodity bills, and for the same reasons. One commenter suggests that they may well have an even more harmful effect on competition than minimum commodity bills. These commenters conclude that there exists no redeeming purpose served by minimum take provisions that would distinguish them from minimum commodity bills. These comments are discussed at length *infra*.

In contrast, five of the nine jurisdictional natural gas pipelines who filed comments, in addition to a group of Canadian producers, oppose the application of the rule to minimum take provisions. These commenters state that minimum take provisions are necessary to assure the revenue stream necessary to maintain a viable pipeline. They also state that minimum take provisions are necessary to ensure sales of associated gas or other gas volumes which must be taken due to operational constraints caused by reduced takes. They further contend that such provisions are necessary to avoid erratic demands on their system supply by partial requirements customers. These comments are also discussed at length *infra*.

Upon review of the comments filed, the Commission has concluded that the presence of minimum take provisions cause customers to purchase gas they would otherwise not purchase because of its impact on the cost of their operations. The record reflects that minimum take provisions operate to prevent purchasers from pursuing a least-cost purchasing strategy, thereby resulting in charges to customers in excess of the lowest reasonable rate consistent with reliable, long-term supply. The Commission has also concluded that minimum take provisions in pipeline tariffs and contracts share fully the market-distorting influences of the variable costs in minimum commodity bills. Minimum take provisions have at least as harmful an effect on the marketability of natural gas as minimum commodity bills, and for the same reasons. The reasons offered for their continued use do not outweigh these adverse effects. For these reasons, the Commission concludes that the rule, as promulgated, should remain applicable to minimum take provisions or any other provisions which provides for recovery of variable costs for gas not taken by the buyer.

The rule as applied to minimum take provisions, as with minimum commodity bills, does not affect the pipeline's ability to seek recovery of fixed costs incurred as a result of a customer's failure to meet its minimum daily or annual purchase obligations. The pipeline is free to seek recovery of such costs in a general section 4 rate filing.

B. Responses to Specific Questions

The Commission posed four questions in its Notice requesting further comment. Comments were submitted on each of these questions.

1. What were the reasons for including such provisions in pipeline tariffs and do those reasons still apply?

While the commenters note that it is difficult to generalize with respect to the reasons for including such provisions in pipeline tariffs, they have identified two primary purposes served by the inclusion of minimum take provisions in their tariffs. First, they provide the pipeline with an assurance that it would have a means of disposing of certain volumes of gas which, for practical or contractual reasons, it was required to take from its suppliers. Second, they provide the pipeline with an assurance that it would not be subject to sudden and large swings in demand on the part of the partial requirements customers.[8]

The pipeline's need for assurance that it would have a means of disposing of certain volumes of gas is based on the fact, assert these commenters, that the pipelines, in many cases, are contractually obligated to actually take-*and*-pay for specific quantities of gas from their suppliers/producers, an amount which is similar to the minimum take level contained in their tariffs. The commenters state that these contractual requirements are imposed by the producers because the producers need protection against the operational problems created by the failure to take casinghead gas and the failure to take from plants producing natural gas liquids. The commenters also state that, in many instances, low capacity wells must be produced to protect against water incursion and the total loss of production and recoverable reserves. In addition to operational constraints caused by reduced takes, producers may also be under a contractual obligation to produce gas in "paying quantities" in order to maintain the mineral leases after the expiration of the primary term of the lease. The commenters also state that the producers require minimum purchases in order to assure a revenue stream sufficient to enable them to make the investment necessary to produce and process the underlying gas stream.

According to Transwestern Pipeline Company (Transwestern) and Arkansas Louisiana Gas Company (Arkla), a pipeline's need to be protected against sudden and large swings in demand is due to the pipelines' limited storage capacity and its continued obligation to meet its customer's contract demand for gas. A number of commenters have expressed concern about the inequities of having to stand ready to meet a customer's full contract demand, while at the same time being exposed to that customer choosing to swing off the system at any time. In addition, they state that reduced swings provide the pipeline with the ability to plan their gas acquisition and manage their gas supply.

A number of these commenters contend that the original justifications for the inclusion of minimum take provisions in tariffs are even more valid today. First, pipelines are still, and will continue to be, contractually obligated to meet certain minimum take requirements on behalf of their suppliers. They also note that there has not been a change in the requirements of producers with respect to the need for an assured minimum physical level of production. Second, pipelines must still acquire firm supplies in order to meet certificate obligations and their limited storage capacity does not provide the pipeline with the ability to absorb large quantities of gas at unexpected times. Third, the pipelines' exposure to reduced takes is exacerbated by the Commission's rule eliminating recovery of the variable cost portion of minimum commodity bills. They contend that these reasons support retention of minimum take provisions in pipeline rate schedules or tariffs.

The Commission finds that the reasons for inclusion of the minimum take provisions do not justify their continued use. The concerns raised by the pipelines that they will be unable to meet their contractual obligations with

[8] *See* Initial Comments filed by Transwestern Pipeline Company (Transwestern), Arkansas Louisiana Gas Company (Arkla), Pacific Gas Transmission Company (PGT), Pacific Gas and Electric Company (PG&E), and Independent Petroleum Association of Canada (IPAC), Docket No. RM83-71-001 through 030, filed August 30, 1984.

their suppliers/producers are exactly that—concerns. The pipeline may be able to meet its contractual obligations with its suppliers/producers regardless of the implementation of the rule.

Even if a pipeline is unable to meet its contractual obligations with suppliers/producers, this would not justify the continued use of a minimum take provision. The Commission is charged with the responsibility of protecting customers from excessive rates and charges.[9] To allow the continued use of a provision which restricts a purchaser's ability to reduce its gas costs, in order to alleviate a pipeline's contractual liability resulting from reduced takes would run counter to the intent of the Natural Gas Act and the Commission's obligations thereunder. Moreover, there is no justification for penalizing all customers by restricting their ability to purchase lower-priced gas where it has not been demonstrated that there is a clear nexus between the pipeline's incurrence of contractual liability with its suppliers/producers and the pipeline customer's reduction in takes below minimum take levels. A pipeline may not actually incur contractual liability as a result of a particular customer's inability to meet its minimum take obligation because another customer may increase its takes above minimum take levels.

The Commission is aware of the concerns raised by the commenters in this regard, but concludes that there are less restrictive alternatives available. For instance, to the extent that a pipeline actually incurs liability as a result of failure to meet its contractual obligations with its suppliers/producers, the pipeline is free to file for recovery of those costs. At that time, the Commission will consider on a case-by-case basis whether such costs have been prudently incurred and should be allowed to be recovered by the pipeline.

In addition, the concerns raised by commenters regarding the need for assurance against operational constraints caused by reduced takes also do not justify the continued recovery of purchased gas costs for gas not taken by the buyer. None of the commenters opposing application of the rule to minimum take provisions have demonstrated that the application of the rule to minimum take provisions would render the pipelines unable to sell the amount of gas necessary to maintain, for example, casinghead or processing plant production and no domestic producers have filed comments reflecting this concern. In addition, if pipelines are unable to meet these minimum production levels it would reflect the fact that the gas was not priced competitively. The producers are not likely to maintain high prices at the cost of losing valuable reserves.[10] If a specific amount of gas must be sold to maintain a well, the gas will, no doubt, be priced accordingly to accomplish that objective.

Similarly, minimum take provisions are not justified by the concerns raised by the pipelines that they will be unable to meet their customers' contract demands due to the erratic demand on their system supply. In essence, these commenters are asserting that they incur legitimate, prudent fixed costs in "standing by" to provide certificated service. The claim that the only way they can recover these costs is by being assured that their gas will be taken. We disagree. There is no clear nexus between the pipeline's incurring these costs and the minimum take obligation imposed on its customers. To the extent actual costs are incurred as a result of the erratic swings on its system, the pipeline is free to make changes in its rate structure to reflect these costs. The pipeline's customers and our Staff will then have an opportunity, in appropriate proceedings, to review the costs claimed. This is the essence of regulation under section 4 of the Natural Gas Act.

As discussed below, minimum take provisions restrict a purchaser's ability to reduce its gas costs and act as a restraint on competition. The record does not demonstrate that the purposes served by the inclusion of these provisions outweigh these adverse effects.

2. Would allowing minimum take provisions cause customers to purchase gas they would otherwise not take because of its impact upon the cost of their operations?

A number of commenters contend that the presence of minimum take provisions in pipeline rate schedules or tariffs cause customers to purchase gas they would otherwise not purchase because failure to take gas at minimum take levels constitutes a breach of contract and could result in damages which exceed the price of the gas.[11] Transwestern's 80 percent minimum daily take requirement in its tariff, under which Pacific Lighting Gas Supply Company (PLGS) purchases gas, provides a clear example of the impact minimum take provisions have on a customer's purchasing decisions. According to the California Public Utilities Commission (CPUC) and San Diego Gas & Electric Company, Transwestern's minimum take provision has caused PLGS and, in turn, Southern California Gas Company (SoCal), who purchases gas from PLGS, to reject lower-priced gas available from El Paso Natural Gas Company (El Paso) that they would otherwise have purchased to minimize their gas costs.[12] PLGS confirmed this fact by stating that "[u]nder present purchasing policies and conditions any shift away from Transwestern will have the result of the purchase of more El Paso gas".[13]

No commenter disputes the fact that the presence of minimum take provisions affect customer's purchasing decisions. However, those favoring retention of the minimum take provision argue that, in certain circumstances, mandating a certain level of sales may result in the purchase of lower-priced gas supplies, rather than the purchase of higher-priced gas which the Commission is attempting to eliminate.

Transwestern was one such commenter advancing this argument. Transwestern explains that it sells gas to PLGS who, in turn, sells gas to SoCal for distribution in southern California. According to Transwestern, absent a minimum take requirement, PLGS and, in turn, SoCal would improperly favor their affiliates over Transwestern as a result of their unique brand of

[9] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[10] Under state law governing contracts, it is generally the duty of the party injured through a breach of contract to mitigate damages and thus minimize the loss resulting from the breach. *TCP Industries, Inc.* v. *Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981). Under the mitigation doctrine, the seller must use every reasonable effort within its power to minimize damages. In the case of natural gas, this might mean a reduction in price in order to sell gas and maintain production levels. Thus, a correct measure of damages might be the difference between the market price and the contract price at the time of the breach.

[11] *See* Initial Comments filed by California Public Utilities Comm'n (CPUC), Southwest Gas Corp., Arizona Public Service Co., Southern Union Gas Co., Gas Company of New Mexico, San Diego Gas & Electric Co. (San Diego) and Commission Staff, Docket No. RM83-71-001 through 030, filed August 30, 1984.

[12] *See* Initial Comments of CPUC and San Diego. Under the tariffs which became effective April 1, 1984, (Docket No. TA84-2-42), PLGS purchased gas from Transwestern under Rate Schedules CDQ-1 and LX which reflected a commodity rate of $3.8102 per dekatherm (dth) and 3.8416 per dth, respectively. At the same time, SoCal was purchasing gas from El Paso under Rate Schedule G at a commodity rate of $3.5670 per dth.

[13] *See* Reply Comments of PLGS and SoCal, Docket No. RM83-71-001, filed September 13, 1984, at 5. The Commission's decision is not altered by the fact that effective October 1, 1984, Transwestern's commodity rate under Rate Schedules CDQ-1 and LX is below that currently available from El Paso under Rate Schedule G. Our goal is to establish regulatory ground rules that will encourage the lowest reasonable rates consistent with reliable, long-term supply.

sequencing gas purchases. Transwestern explains that this would occur as a result of SoCal implementing its "avoidable cost" principle, whereby a decision to purchase gas is not based on price alone, but rather on its "avoidable cost".[14] According to Transwestern, at least in the case of southern California customers, retention of its minimum take provision might force the purchase of lower-priced gas supplies.[15]

The Commission finds Transwestern's argument for retention of minimum take provisions unpersuasive. The Commission has no jurisdiction over how SoCal chooses to "sequence" its takes of natural gas. However, the CPUC requires the California utilities to pursue a least-cost purchasing policy for both their near-term and long-term purchases of natural gas. The prudence of the purchasing practices of PLGS, SoCal and other distribution companies are reviewed by the CPUC semi-annually in gas cost adjustment proceedings. To the extent they pursue a practice which unjustly or unreasonably favors affiliated companies, or is otherwise imprudent, the state commission is empowered to take remedial action. We, in turn, must focus on regulating those companies which are subject to our jurisdiction. A jurisdictional pipeline will not be able to circumvent the purpose of the Natural Gas Act if it is free to chose an alternate source of gas supply, because its purchasing practices are similarly reviewed semi-annually in a purchased gas adjustment (PGA) proceeding.

The comments demonstrate that a purchaser is more inclined to take the higher-priced gas than expose themselves to damages resulting from a claim involving breach of contract.

3. Do minimum take provisions result in charges to customers in excess of the lowest reasonable cost?

A number of commenters state that minimum take provisions result in charges to customers in excess of the lowest reasonable cost because minimum take provisions hamper the customers' ability to purchase the least expensive gas available.[16]

Several commenters contend that allowing minimum take provisions would not result in charges to customers in excess of the lowest reasonable cost. Pacific Gas and Electric Company (PG&E) contends that it "observes a 'least-cost' gas purchasing policy designed to protect California customers by ensuring long-term reliable supplies of natural gas at the lowest reasonable cost".[17] According to PG&E the concept of "lowest reasonable cost" must encompass more than simply transitory pricing differences. Such an analysis must also include consideration of "long-term pricing effects, supply quantity and reliability, and long-term gas needs".[18] The Commission agrees that these factors should be considered in establishing a comprehensive purchasing policy, but also states that a purchaser should not be restricted from selecting an alternate source of gas supply in order to provide its customers with gas at the lowest reasonable cost consistent with reliable, long-term supply.

Transwestern contends that minimum take provisions do not result in charge to customers in excess of the lowest reasonable cost because regulation prohibits the pipeline from charging unjust and unreasonable rates regardless of whether their tariffs contain minimum take provisions. Where, as in the instant proceeding, the Commission finds that a tariff provision, by its very terms, restricts a purchaser's ability to reduce its gas costs, it is clearly within its authority to prescribe the practice to be thereafter observed. The Commission need not consider the effects of such a provision on a case-by-case basis, as Transwestern suggests.

Transwestern also asserts that the Commission cannot and should not disregard the fact that it is dealing with a regulated industry, and thus, should not "attempt to translate competitive concepts applicable to a non-regulated market willy-nilly into transactions regulated under the Natural Gas Act."[19] Contrary to Transwestern's assertions, the Commission is not applying competitive concepts without consideration of the role competition should play in a regulated industry. As the Commission stated in *City of Florence, Alabama* v. *Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,395 at 61,839 (1983), competition can should play an important role even in a regulated industry such as the natural gas industry. "If competition exists, incentives are created for innovation by the regulated companies. This, in turn, encourages lower prices and better service." This is precisely what the Commission is attempting to do by adapting our regulations to respond to evolving competitive forces.

The Commission has consistently encouraged regulated companies to pursue a least-cost purchasing policy in order to provide their customers with the lowest reasonable rate consistent with reliable, long-term supply. *See* Order No. 380, 27 FERC ¶ 61,318 (1984), mimeo at 22–23, Opinion No. 186, 24 FERC ¶ 61,299 at 61,638–40 (1983), and Order No. 298, 23 FERC ¶ 61,224 (1983), FERC Stats. and Regs. ¶ 30,455 (1983). The Commission has concluded that a provision which mandates a specific level of sales, regardless of price and marketability of gas supplies, limits the ability of that pipeline's customers to strictly adhere to a least-cost purchasing policy. A provision which unreasonably restricts a least-cost purchasing policy results in charges to customers in excess of the lowest reasonable cost.

4. What is the effect of minimum take provisions on the marketability of natural gas?

According to most commenters, minimum take provisions, like minimum commodity bills, have a substantial and debilitating effect on the marketability of natural gas.[20] One commenter stated that minimum take provisions are even more harmful to competition than minimum commodity bills because when the the unmarketable gas is actually taken by the pipeline the producers remain ignorant to the fact that it is unmarketable.[21] This commenter further notes that having sold this high-priced gas, the producer may be encouraged to explore for additional supplies to replace those sold, thereby perpetuating an already bad situation. In response to this argument, one commenter stated that producers are well aware of the marketing problems faced by their buyers and are conducting their exploration and development activities accordingly.[22]

If, as suggested, the producers are aware of the marketing problems associated with the sale of their high-priced gas and are already conducting their operations accordingly, they do not need to require the pipeline and, in turn, the pipeline's customers to purchase a specific quantity of gas. If the gas is competitively priced it will be sold.

Transwestern contends that its minimum take provision has "absolutely

[14] The "avoidable cost" principle used by PLGS and SoCal is discussed in its reply comments at 5, *citing* the testimony of Mark C. Pocino filed in Docket No. RP83-113, *et al.*

[15] *See* Initial Comments of Transwestern at 13.

[16] *See* Initial Comments of CPUC, San Diego, and Staff.

[17] *See* Initial Comments filed by PGT/PG&E at 5–6.

[18] *Id.*

[19] *See* Initial Comments filed by Transwestern at 17–18.

[20] *See* Initial Comments filed by Northern Indiana Public Service Comm'n, Process Gas Consumers Group, *et al.*, Southwest Gas Corp., *et al.*, CPUC, San Diego Gas & Electric Co., and Staff, Docket No. RM83-71-001 through 030, filed August 30, 1984.

[21] *See* Initial Comments of Staff at 3–6.

[22] *See* Reply Comments of Arkla at 4–5.

no effect on the marketability of the gas," because it provides for a *pro rata* reduction in take obligations under certain circumstances.[23] Transwestern's *pro rata* reduction in takes does not eliminate the adverse effects minimum take provisions have on a purchaser's ability to reject unmarketable gas, as discussed *infra*.

Pacific Gas Transmission/Pacific Gas and Electric Company (PGT/PG&RE), who filed joint comments, contend that minimum take provisions do not themselves affect marketability. They explain that it is only when high minimum take provisions are combined with excessive prices that there is a potential adverse effect on marketability.[24] According to PGT/PG&E, its minimum take provisions do not adversely effect marketability because at the time of filing these comments its minimum take level had been reduced to 40 percent of the daily contract quantity and 50 percent on an annual basis, and new Canadian natural gas policies were implemented which will allow negotiated prices and enable Canadian prices to be reduced. Subsequently, PGT filed, in Docket No. RP85-2-000, to completely eliminate PG&E's minimum physical take obligations, with respect to its purchase of Canadian gas imports, substitute an "equitable purchase" clause based on achieving and maintaining a competitive price for the Canadian supply, reduce the annual take-or-pay level from 60 percent to 50 percent of the daily contract quantity, and alter the make-up rights for proviously incurred take-or-pay, with such changes to be effective November 1, 1984, assuming receipt of necessary regulatory approvals.

The Commission finds, based upon a review of the record, that the minimum take provisions share fully the market-distorting influences of the variable cost portion of minimum commodity bills, and for the same reasons. Both minimum take provisions and minimum commodity bills provide substantial financial pressure on a pipeline's customers to not reduce takes below the level of the applicable minimum. Thus, both provisions represent artificial constraints on the purchaser's choice of how much gas to purchase and at what price. A customer faced with a requirement to take a specific quantity of gas regardless of price or breach a contract becomes essentially indifferent to price. The resulting effect is that the pipeline and, in turn, the producers become artificially insulated from true market conditions and no longer have an opportunity to increase sales by adjusting the price. As we stated in Order No. 380, sellers, in an unregulated market, who are willing to accept a price that is below the prevailing price are generally able to increase their sales volumes. This ability to exchange price concessions for increased sales volumes is essential to the efficient functioning of a price responsive market.

C. Other General Issues

In addition to responding to the specific questions raised by the Commission in its Notice, a number of commenters have raised other issues regarding the application of the rule to minimum take provisions, which are addressed below.

1. Effect On Terms And Conditions Under Which A Pipeline Renders A Certificated Service

Similar to the argument raised on rehearing of Order No. 380, several commenters state that the minimum take provision in their tariff is a central and integral part of the certificate approved by the Commission. As such, they assert, it cannot be significantly or substantially altered by the Commission absent an adjudicatory proceeding.[25]

One commenter contends that: "the minimum take provision is not a term or condition of service, rather it is 'the service'. ", the essence of the service which has been approved by the Commission, and which forms the basis of the design of the facilities utilized to effect the sale and receipt of volumes.[26] In short, the commenter contends that the minimum take provision is the heart of the agreement and cannot be altered without significantly altering the balance between the parties that resulted from negotiation of the contract and the service undertaken upon acceptance of the certificate.

A minimum take provision, like a minimum commodity bill, merely represents a term or condition of service as set forth in the pipeline's tariff. As such, it represents one of many tariff provisions taken into consideration by the Commission in granting a certificate.[27] As we stated in Order No. 380-A, the alteration of pipeline tariffs which will result from applying the rule is clearly within the Commission's authority as set forth in sections 4, 5 and 16 of the Natural Gas Act.[28] The Commission's authority in this regard is clearly set forth at pages 7-9 of Order No. 380-A and need not be repeated here.

In sum, section 5(a), when read in concert with the broad language of section 16, permits the Commission to alter and amend the terms and conditions under which a pipeline renders a certificated service when the Commission determines, as in the instant proceeding, that those terms or conditions result in unjust and unreasonable rates. Accordingly, this argument is rejected.

2. Requirement For An Adjudicatory Proceeding

Several commenters also argue that even if proceedings under section 5 are lawful, factual issues raised by the Commission's proposal would preclude Commission action without an adjudicatory hearing to resolve the material issues of fact raised by the proposal and to make the type of findings required by section 5.[29]

The Commission disagrees. If, as in the instant case, there is neither a dispute as to material facts, nor a need to discover the underlying facts to aid in policy determinations, the Commission is under no obligation to grant the party and adjudicatory hearing. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *Jersey Central Power & Light Co.* v. *F.E.R.C.*, 730 F.2d 816 (D.C. Cir. 1984); *Citizens for Allegan County, Inc.* v. *F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969). The Commission has considered the factual issues raised by the commenters in this phase of the proceeding and has concluded that no issues of fact raised by the commenters warrant the need for an adjudicatory proceeding. The factual issues raised by commenters are addressed *infra*.

The Commission has also concluded that the problems resulting from inclusion of minimum take provisions are so pervasive as to affect the industry as a whole, thus supporting the need to resolve this matter on a generic basis, as opposed to considering these issues on a pipeline-by-pipeline basis. The legal precedent for such an approach is clearly set forth at pages 45-49 of Order No. 380 and need not be repeated here.

3. Effect On Negotiated Contracts

Several commenters argue that when tariff provisions are a matter of private contract, the Commission may not make a finding that the provision is unjust and unreasonable absent "circumstances of

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[23] *See* Initial Comments of Transwestern at 17-18.

[24] *See* Initial Comments of PGT/PG&E at 7-8.

[25] *See* Initial Comments of Arkla and Transwestern.

[26] *See* Initial Comments of Arkla at 5.

[27] Pipelines are generally granted certificates on the basis of maximum throughput, not minimum takes.

[28] 15 U.S.C. 717-717w (1976).

[29] *See* Initial Comments of Arkla, Transwestern, PGT/PG&E.

unequivocal public necessity". *Citing United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (hereinafter referred to as "*Mobile-Sierra*" doctrine).[30] According to these commenters, the Commission has not attempted to find, and the record would not permit a finding, that retention of the minimum take provision would impair the pipeline's customers' financial ability to continue to render service to the public. One commenter also asserts that such a finding cannot be made on a generic basis in a rulemaking proceeding.[31] The commenters' contentions are without merit.

First, the *Mobile-Sierra* doctrine only applies to fixed-price contracts and none of the commenters who raise this argument have shown that they are operating under fixed-price contracts.

Second, even if the contracts affected by the rule are fixed-price contracts, the *Mobile-Sierra* doctrine does not impair "the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." 350 U.S. at 344. A similar argument was rejected by the Supreme Court in *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 646–47 (1972).

The *Mobile-Sierra* doctrine merely enables a purchaser of gas to enter into a fixed-price contract with the assurance that those rates will not change *absent* a Commission determination under section 5(a) that the filed rate is unjust or unreasonable. The instant proceeding involves a determination under section 5(a) that the presence of minimum take provisions prevent customers from purchasing lower-priced gas, thus resulting in charges to customers in excess of the lowest reasonable rate. Minimum take provisions have also been fouind to be anticompetitive. For these reasons, the Commission has concluded that minimum take provisions in pipeline rate schedules or tariffs are contrary to the public interest and should be modified accordingly.

4. Establishing An Appropriate Non-discriminatory Level For Minimum Takes

While there was overwhelming support for applying the rule to minimum bill provisions, several commenters stated that minimum take provisions at appropriately determined and non-discriminatory levels can serve a useful purpose.[32] One commenter noted that some reasonable level of minimum take can serve a public purpose in maintaining the viability of each of several suppliers to a common market, thus helping to insure the availability of reliable sources of gas supply at reasonable prices to consumers over the long-term.[33]

The only evidence submitted proposing the establishment of an appropriate level for minimum takes was provided by El Paso. Under the approach advanced by El Paso, the level of minimum takes would be set "to insure, at a minimum, that adequate and reliable supplies of gas are available over the longer term to those higher-priority consumers which constitute the purchaser's 'core market'".[34] Takes by the common purchaser from each supplier would be ratable up to an established threshold[35] in instances where, as today, gas supply exceeds demand.[36] Each pipeline, under this approach, would be assured of attaining a certain minimum level of sales since it would bear only its *pro rata* share of any downturn in the market below the minimum take level. Above the minimum level, takes would be permitted on a least cost basis. According to El Paso, such an approach would provide pipelines and their suppliers with at least some minimum assurance of a market for their gas if they are to remain viable.[37]

PGT/PG&E, who filed joint reply comments, oppose El Paso's approach arguing that such an approach would not foster price competition. According to PGT/PG&E, there is a need for flexibility in minimum take provisions and recognition that such a provision should reflect particular conditions of the system.[38]

The Commission finds, based on the evidence presented, that minimum take provisions *at any level* are anticompetitive and can result in unjust and unreasonable rates or charges to the extent they restrict a purchaser's ability to purchase gas at the lowest reasonable cost. While the Commission is concerned about the long-term availability of gas supplies, the Commission does not believe that minimum take provisions provide such an assurance. To the extent that special circumstances exist which support the pipeline's need to mandate a particular level of sales regardless of price, that pipeline is free to file a petition for waiver of the regulations under 18 CFR 385.207. The Commission reiterates that it will not be generally inclined to grant exceptions to the rule in light of the strong public interest considerations that it embodies.

5. Interstate versus Intrastate Pipelines

One commenter, Transwestern, asserts that the application of the rule to minimum take provisions would have the effect of severely disadvantaging interstate pipelines vis-a-vis their intrastate competitors. Transwestern also asserts that such action is contrary to the intent of Congress in enacting the Natural Gas Policy Act of 1978 (NGPA).[39] According to Transwestern, a critical Congressional policy embodied in the NGPA was to put interstate and intrastate pipelines on an equal footing in competing for gas supplies. Transwestern contends that because the Commission's rule would only reach jurisdictional interstate pipelines, it would place them at a significant disadvantage in competing for gas supplies against an intrastate pipeline who can guarantee a supplier/producer a certain percentage of sales, regardless of price.

Based upon a review of the record, the Commission finds that this argument has no more merit than when it was raised by Transwestern on rehearing of Order No. 380. In addition to our addressing this argument at pages 57–58 of Order No. 380–A, we note that no evidence has been presented which demonstrates that applying the rule to minimum take provisions would severely disadvantage interstate pipelines in their attempt to acquire natural gas supplies.[40]

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[30] *See* Initial Comments of Arkla and Transwestern.

[31] *See* Initial Comments of Transwestern at 22.

[32] *See* Initial Comments on Columbia Gas Transmission Corporation and El Paso, Docket No. RM83–71–001 through 030, filed August 30, 1984.

[33] *See* Initial Comments of El Paso at 4.

[34] *See* Initial Comments of El Paso at 4, *citing* the testimony of El Paso's witness C. R. Jack, Docket No. RP83–113, *et al.*, filed February 21, 1984.

[35] *Id.*, El Paso presented testimony in Pacific Gas Transmission Co., *el al.*, Docket No. RP83–113, *et al.*, recommending that the appropriate minimum take level for the southern California market should be set at 60 percent of the volumes available from all interstate suppliers to that market. *Id.*

[36] El Paso notes that exceptions might be allowed where the suppliers' sole supply of gas is casinghead or associated gas production. Initial Comments of El Paso at 4, n. 3.

[37] *See* Initial Comments of El Paso at 4–5.

[38] *See* Reply Comments of PGT/PG&E at 5.

[39] *See* Initial Comments of Transwestern at 22–24.

[40] Transwestern has not submitted data demonstrating to what extent intrastate pipeline contracts and tariffs contain minimum take provisions.

Transwestern was the only commenter which has raised this argument and Transwestern has neither alleged nor shown that it competes for gas supplies with any intrastate pipelines. Moreover, the fact that the Commission does not have jurisdiction over intrastate pipelines cannot be used as a basis for frustrating the Commission's regulation of interstate pipelines.

IV. Requests for Waivers and/or Clarification [41]

A. Arkansas Louisiana Gas Company (Arkla)

Arkla asserts (at 21) that the "unique factual circumstances" that exist on its customer's system (Northwest Central Pipeline Corporation), warrant waiver of any rule that would otherwise eliminate the minimum take provisions in the Arkla-Northwest Central contract. It bases this assertion on the following factual situation.

Arkla has a daily minimum purchase obligation in its Rate Schedule X–26 under which it sells gas to Northwest Central Pipeline Corporation (Northwest Central), the successor to Cities Service Gas Company, at Jane, Missouri. Arkla contends that if its minimum take provision in its X–26 rate schedule is eliminated, Northwest Central will not purchase Arkla's gas for the following reasons. First, Northwest Central has substantial take-or-pay obligations under its contracts with certain Wyoming producers. Under these contracts, Northwest Central is required to take-or-pay for a certain quantity of high-priced gas. Second, the Commission has imposed a minimum throughput condition in the certificate issued to Northwest Central authorizing the construction and operation of Northwest Central's Rawlins-Hesston line to Wyoming. Under that condition, Northwest Central is exposed to underrecovery of costs of that line to the extent throughput falls below a specific minimum level, specifically 43 Bcf per year.[42]

According to Arkla, because Northwest Central's shareholders will bear the brunt of any undercollection resulting from the Rawlins-Hesston line, Northwest Central has every incentive to maintain throughput on that line, regardless of the price of the gas purchased from the Wyoming producers. Consequently, if Arkla's minimum take provision is eliminated, Northwest Central would have a strong economic incentive to swing off its system in order to assure recovery of the fixed costs of the Rawlins-Hesston line.

In addition, Arkla notes that Northwest Central has the contractual right to take substantial volumes of lower-priced gas from the Hugoton producers in Kansas. Arkla contends that absent an obligation to take gas from Arkla, Northwest Central would increase its takes of this lower-priced gas to offset the effects of its increase in purchases of higher-priced gas from the Wyoming producers.

Assuming all the facts set forth by Arkla to be true, the Commission sees no reason to exempt the minimum take provision in the Arkla-Northwest Central contract from the rule. The throughput condition imposed on Nothwest Central "does not require Cities [now Northwest Central] to transport a minimum amount of gas through the Rawlins-Hesston line".[43] Rather, it is a ratemaking mechanism used for the purpose of placing an appropriate amount of risk on Northwest Central's shareholders. The condition does *not* relieve Northwest Central of its duty to provide gas at the lowest reasonable rate. As the Commission specifically stated:

> [T]he minimum throughput condition does not exempt any volumes purchased and transported through the Rawlins-Hesston line from the general inquiry into [Northwest Central's] prudence in its gas acquisition practices.[44]

Thus, Northwest Central's minimum throughput condition does not allow Northwest Central to engage in imprudent gas purchasing practices. What appears to be Arkla's concern, as one commenter noted,[45] is not the fact that Northwest Central will increase its takes of higher-priced gas from the Wyoming producers; rather, that Northwest Central will increase its takes from the Hugoton producers who are offering lower-priced gas.

Based upon the foregoing, the Commission finds that Arkla has failed to demonstrate that unique factual circumstances exist sufficient to grant waiver of the application of the rule to the Arkla-Northwest Central contract.

B. Pacific Gas Transmission Company (PGT)/Pacific Gas & Electric Company (PG&E)

PGT/PG&E filed comments stating that the minimum take provisions of the type set forth in the PGT/PG&E Service Agreement should not be governed by the rule. Subsequently, PGT filed to eliminate this minimum take provision with respect to PG&E's purchases of Canadian gas imports and substitute an "equitable purchase" clause, as discussed *supra*. Because Docket No. RP85–2–000 is pending Commission action and the minimum take provisions contained in the PGT/PG&E Service Agreement are still in effect, the Commission will address the arguments raised by PGT/PG&E in their comments filed in this proceeding.

According to PGT/PG&E, the characteristics of minimum take provisions described by the Notice as synonymous with "a minimum purchase requirement or a take-*and*-pay provision", are not characteristic of the PGT/PG&E Service Agreement. Among other differences, PGT/PG&E notes:

> [t]he minimum take definition set forth in the Notice assumes that the full commodity price is paid for gas not taken. The PGT/PG&E Service Agreement is not such a take-*and*-pay arrangement. If PG&E fails to take gas at the minimum levels, PG&E is *not* required to pay PGT in any event for the minimum volumes. Rather, a failure by PG&E to meet the minimum take obligation under the PGT tariff involves a breach of contract, absent a "force majeure" situation.[46]

The rule was intended to eliminate a pipeline's ability to recover purchased gas costs for gas not taken by the buyer. This includes the pipeline's attempt to recover damages for breach of contract where the damages represent the purchase gas costs for gas not taken by the buyer. Thus, as one commenter noted, the PGT/PG&E distinction is a distinction without a difference.

PGT/PG&E also argue that their minimum take provision differs from those contemplated by the Notice because there is a direct link between the minimum take provisions contained in the PGT/PG&E contract and the take-and-pay PGT has with its Canadian suppliers, Alberta and Southern. PGT/PG&E notes that the minimum volumes reflected in these contracts are based on volumes authorized by the National Energy Board (NEB) for export under the licenses held by Alberta and Southern, and the corresponding section 3 import authorizations held by PGT which are issued by and under the jurisdiction of the Economic Regulatory Administration

[41] A number of requests have been filed for waivers of the rule as applied to minimum commodity bills. *See* Great Lakes Gas Transmission Company, Docket Nos. RP84–10–1–000, et al.

[42] The condition was imposed by the Commission "to protect Northwest Central's ratepayers from bearing the full risks that the record had disclosed were involved in the proposed project." Northwest Central Pipeline Corp., 26 FERC ¶ 61,372 at 61,827 (1984).

[43] Cities Service Gas Co., Docket No. CP76–500–001, 23 FERC ¶ 61,193 at 61,410, n. 2 (1983).

[44] *Id.*, at 61,410.

[45] *See* Reply Comments of Staff at 13.

[46] Initial Comments of PGT/PG&E at 4–5.

(ERA).[47] PGT states that it has one pipeline sales customer, PG&E, and serves only one market. PGT further states that it is merely an arm of the distributor PG&E, created to serve as an interstate jurisdictional link between PG&E and the Alberta gas producers from whom Southern and Alberta purchases gas. As such, PGT contends that if its minimum take provision is modified or eliminated it will have a direct and significant adverse effect on the Canadian producers, who starting November 1, 1984, will have the freedom to negotiate prices with their customers.[48] Thus, PGT/PG&E asserts that to apply the rule to their minimum take provisions would be inconsistent with established governmental policy regarding Canadian imports.[49] They also assert that the Commission lacks authority to act on PGT's Canadian gas imports in the manner which may result from applying the rule to the PGT/PG&E minimum take provision.

The Commission rejects these arguments for the following reasons: First, as the Commission stated in Order No. 380–A, at pages 88–91, Order No. 380 is not inconsistent with the established government policy regarding Canadian imports as set forth in the *New Policy Guidelines And Delegation Orders On The Regulation Of Imported Natural Gas*, 49 FR 6684 (1984), issued recently by ERA.[50]

Second, the rule does not apply to minimum take provisions in any contracts between foreign and domestic companies. The rule only applies to the tariffs and rate schedules under which jurisdictional piplelines sell natural gas to their customers. The fact that the Commission's ruling *may* adversely impact on the terms or conditions of a contract beyond the Commission's jurisdiction, a fact which has not been deomonstrated by record evidence, cannot be relied upon to frustrate the Commission's authority to regulate interstate pipelines.

Third, the single market characteristic of the chain of contracts between PGT/PG&E and its supplier Alberta and Southern, and, in turn, the Alberta producers is not unique. The circumstances facing Canadian producers are analogous to those facing many pipeline suppliers and their producers. To exempt a pipeline from the rule because of the adverse affects on a Canadian producer, where domestic producers would be equally affected, would unfairly discriminate among pipelines and tend to perpetuate the very problems which the rule is intended to eliminate.

C. Great Lakes Gas Transmission Company (Great Lakes)

Great Lakes takes the position that the rule should not take effect under any circumstances. Great Lakes made a number of arguments in opposition to the application of the rule to minimum take provisions which have already been addressed above or in Order Nos. 380 and 380–A.

Several of Great Lakes' customers filed comments stating that Order Nos. 380 and 380–A should govern Great Lakes' minimum take provision because it is in actuality a minimum commodity bill.[51] The Commission need not decide whether the Great Lakes' provision is in actuality a minimum take or a minimum commodity bill because the rule is equally applicable to both.

In addition to arguments in opposition to the rule, Great Lakes requests clarification regarding how a pipeline, if it incurs take-and-pay liability with its supplier, can recover such costs. Great Lakes asserts that "[i]t is unreasonable and unjust to have a situation whereby Great Lakes makes take-and-pay payments to [its supplier], but cannot receive corresponding payments from those customers whose failure to comply with their recent contract amendments cause Great Lakes to incur take-and-pay liability with [its supplier]."[52] It is Great Lakes' position that the only just and reasonable solution is to allocate the costs to those customers who have caused the pipeline to incur take-and-pay liability with its suppliers.

The Commission need not reach the issue of how costs incurred by the pipeline for take-and-pay liability with its suppliers will be recovered, because the Commission is not presently confronted with that issue. Indeed, the issue may never arise. But to the extent that it does, the pipeline is free to file for recovery of such costs in its rate case and the issue will be decided on a case-by-case basis.

With respect to Great Lakes' contention that such liability, if incurred, should be directly assigned, the Commission reiterates that such questions of cost incurrence and cost responsibility may be addressed in appropriate rate proceedings.

D. Transwestern Pipeline Company (Transwestern)

Transwestern raises a number of arguments which have already been addressed above. In addition to the arguments addressed above, Transwestern contends that "the Rule carries the potential for denying the pipeline the opportunity to recover its costs".[53] Transwestern's argument is presented as follows. The Commission in Order No. 380 stated that due to the Commission's filing requirements and the five month suspension period ordered by the Commission in most rate cases, the pipeline could be required to carry for a period of approximately six months any increased costs resulting from load loss. Based on this statement, Transwestern concludes that "nonrecovery of at least six months' worth of the carrying costs of take-or-pay liability caused by the Commission's rule is automatic and could well be more that the pipeline could financially withstand". Transwestern contends that this would be so in its case.[54]

As we stated in Order No. 380–A at pages 59–60, the pipeline has some flexibility in managing its take-or-pay costs during a suspension period because, in most instances, take-or-pay liability is determined on an annual basis, based on the "contract year" of each contract. If the company does find itself in a severe financial condition as a result of take-or-pay carrying costs, the Commission can suspend the company's filing for only one day, where circumstances so warrant. Moreover, a pipeline has some control over the price of its "mix" of gas supply. For example, effective one day after the effective date of Order No. 380 and 380–A, Transwestern reduced the price it pays under "market out" type clauses from $4.00 to $2.95, thereby making possible a significant reduction in its purchased gas costs.[55] Decreased prices will mean increased takes which, in turn, translates into reduced take-or-pay liability.

E. Colorado Interstate Gas Company (CIG) and MIGC, Inc. (MIGC)

CIG urges the Commission to apply the rule to the minimum take provisions in pipeline tariffs, as well as to all contracts or agreements between jurisdictional pipelines and their resale customers which establish a physical minimum take level on the part of such

[47] *See* Order 380–A, mimeo at 83, n. 46.

[48] *See* Appendix A of Order No. 380–A.

[49] Joint Requests of PGT/PG&E for Clarification, Reconsideration and/or Rehearing, Docket No. RM83-71-001 through 030 filed June 25, 1984, at 39.

[50] *See* letter from Rayburn Hanzlik, Administrator, ERA, to Raymond J. O'Connor, Chairman, FERC, dated July 13, 1984.

[51] *See* Reply Comments of Michigan Consolidated Gas Co. and Inter-City Gas Corp., Docket No. RM83-71-001 through 030, filed September 13, 1984.

[52] See Initial Comments of Great Lakes at 7.

[53] Initial Comments of Transwestern at 24.

[54] *Id.*, at 25.

[55] *See* Transwestern Pipeline Co., Docket No. TA85-1-42-000 and 001 Schedule A-2.

customers.[56] CIG's principal concern regards the rule's applicability to an Interim Agreement [57] entered into between CIG and MIGC on December 20, 1983, which governs the terms and conditions of a sale for resale of natural gas in interstate commerce.

MIGC responded in its reply comments that CIG is requesting that the Commission improperly extend the rule to apply to a judgment entered by a Judge in the United States District Court for the District of Wyoming.[58] On July 26, 1983, MIGC instituted a proceeding in the United States District Court for the District of Wyoming, *MIGC, Inc.* v. *Colorado Interstate Gas Company*, No. C83-0299, in which MIGC brought action against CIG alleging certain tariff and contractual violations. On July 28, 1983, CIG filed with the Commission a complaint and request for an order to show cause in Docket No. RP83-116-000, alleging certain tariff and certificate violations with respect to MIGC's sales of gas to CIG. On October 11, 1983, CIG filed a petition for declaratory order assigned Docket No. RP84-7-000, which requested the Commission to state that CIG has no minimum bill obligation to MIGC for the 1983 contract year. On October 4, 1983, the Commission denied CIG's request for a show cause proceeding and ordered CIG to reopen its purchase valve.[59] On December 20, 1983, MIGC and CIG entered into an "Interim Agreement" which provides, *inter alia*, that CIG will accept up to 32,000 MMBtu of gas per day. The Interim Agreement is currently in effect and, by its terms, will remain in effect until the Commission issues a final non-appealable order in Docket No. RP84-7-000,[60] but in no event later than June 30, 1986. On December 22, 1983, the Judge in the United States District Court issued an order approving the settlement agreement (Interim Agreement) and dismissing the action without prejudice.

According to MIGC, the Interim Agreement was intended to establish a working relationship between MIGC and CIG pending a resolution of these issues in Docket No. RP84-7-000. MIGC contends that because the purpose of the Interim Agreement was to permit a working relationship to exist between MIGC and CIG pending litigation regarding MIGC's tariff, the Interim Agreement, by its terms does not operate or vary the terms or conditions of any contract or arrangement between the parties. MIGC also contends that CIG wrongfully urges the Commission to regard the Interim Agreement as though it were part of MIGC's tariff and, as such, to modify it. MIGC asserts that for the Commission to do this would "involve the Commission in a wrongful collateral attack on the District Court Order and would be contrary to both law and policy."[61]

The questions confronting the Commission in the instant proceeding concern: (1) Whether the Interim Agreement constitutes a contract governing the terms and conditions for the jurisdictional sale of natural gas in interstate commerce and, therefore, should be on file with the Commission; and (2) whether the District Court's approval of the Interim Agreement and dismissal of the complaint action takes the matter outside the purview of the Natural Gas Act.

MIGC is an interstate pipeline engaged in the transportation and sale for resale of natural gas in interstate commerce and thus is subject to this Commission's jurisdiction under the Natural Gas Act. 15 U.S.C. 717 *et seq.* Congress has provided in section 4(c) of that Act, that all natural gas companies subject to the Commission's jurisdiction shall file with the Commission "all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the charges, *together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*" (Emphasis added) 15 U.S.C. 717c(c). This provision has the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.[62]

Under the terms of the Interim Agreement, MIGC is obligated to deliver and CIG is obligated to accept and pay for the quantity of gas set forth in the Agreement, until a final, non-appealable order resolving Commission Docket No. RP84-7-000 is issued or June 30, 1986, whichever is earlier. While the Interim Agreement does not operate to alter or vary the underlying terms or conditions of any contract or agreement between the parties, it does constitute a contract affecting or relating to rates during the interim period. As such, it should have been filed by MIGC as part of its FERC Gas Tariff as required by the Natural Gas Act. Accordingly, MIGC is ordered to file the Interim Agreement as part of its FERC Tariff in accordance with the Act.

All contracts which are or should be on file with the Commission are under the exclusive jurisdiction of the Commission regarding a determination as to whether the rate or charge is "just and reasonable". 15 U.S.C. 717c(a). *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951). *See e.g., Maryland* v. *Louisiana*, 451 U.S. 725, 746-752 (1981); *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963). Thus, the Commission's authority to prescribe just and reasonable rates will extend to the Interim Agreement entered into between MIGC and CIG.

In sum, the Commission finds that the Interim Agreement governs the terms and conditions for the jurisdictional sale of natural gas in interstate commerce and, thus, should be on file with the Commission in accordance with section 4 of the NGA. All such contracts are subject to the Commission's exclusive jurisdiction to determine just and reasonable rates or charges. Therefore, the Commission's rule with respect to minimum take provisions applies to the Interim Agreement which should be on file with the Commission.

F. Pan Alberta Gas Ltd. and Foothills Pipe Lines (Yukon) Ltd. (Pan Alberta/Foothills)

Pan Alberta/Foothills requests that if the Commission reaffirms its decision to apply the rule broadly to minimum take provisions, that it continues to ensure that the tariffs underlying the minimum revenue stream established for the pre-built portions of the Alaska Natural Gas Transportation System project are exempted in accordance with the findings in Order No. 380-A.

The Commission hereby confirms that the rule as applied to minimum take provisions does not apply to the stream of revenue defined in the orders issued by the Commission [63] authorizing the construction and operation of the "pre-built" portions of the United States segment of the Alaska Natural Gas Transportation System, for the reasons

[56] *See* Initial Comments of Colorado Interstate Gas Co., Docket No. RM83-71-001 through 030, filed August 30, 1984, at 4.

[57] This "Interim Agreement" is not on file with the Commission regardless of the fact that CIG is currently purchasing gas from MIGC in accordance with its terms and conditions.

[58] *See* Reply Comments of MIGC, Inc., Docket No. RM-83-71-001 through 030, filed September 13, 1984, at 1.

[59] 25 FERC ¶ 61,000 (1983).

[60] CIG's petition for a declaratory order in Docket No. RP84-7-000 has been consolidated with MIGC's general rate case in Docket No. RP84-15-000, 25 FERC ¶ 61,309 (1983), and three of MIGC's PGA filings in Docket Nos. TA83-2-47-000, TA84-1-47-000, and TA84-2-47-001, 26 FERC ¶ 61,369 and 27 FERC ¶ 61,163 (1984).

[61] *Id.*, at 2.

[62] *See* Transwestern Pipeline Co., Docket No. RP-81-130-000, *et al.*, 27 FERC ¶ 61,255 at 61,481 (1984); Michigan Wisconsin Pipe Line Co., Opinion No. 471, 34 FPC 621, 626 (1965).

[63] *See* Order 380-A, at 96, n. 62.

stated in Order No. 380–A, which will not be repeated here.

G. Independent Petroleum Association of Canada (IPAC)

IPAC, a group which represents 200 Canadian producers, suggests (at 2) that minimum take provisions in existing contracts be allowed to stand until modified by the parties. According to IPAC, extending minimum take provisions beyond November 1, 1984, to a date appropriate in each case, will provide protection to consumers consistent with the intent of the Commission in issuing Order Nos. 380 and 380–A.

The Commission rejects this suggestion because the pipelines have been made aware of the Commission's inquiry into this matter for over a year. Thus, the pipelines have had sufficient time to begin renegotiating the terms of their contracts which would ultimately be affected by the implementation of this rule. The Commission rejects IPAC's suggestion and affirms that the rule as applied to minimum take provisions will become effective November 1, 1984.

H. Algonguin Gas Transmission Company (Algonguin)

In addition to the arguments raised in Algonguin's pleadings on rehearing, which are incorporated by reference and which have been addressed above, Algonguin requests that the Commission clarify that "the rule is not applicable to such physical take provisions where the service itself or service reliability may be threatened if the minimum take provisions are not enforced." [64]

The Commission has considered all of the comments in this phase of the proceeding regarding the impact application of the rule will have on service reliability. These comments fail to demonstrate that the pipeline's ability to continue to serve its customers will be threatened if the minimum take provisions are not enforced. If Algonquin believes that its ability to continue to serve its customers is threatened without a minimum take provision, Algonquin is free to file for a waiver of the regulation.

I. Columbia Gas Transmission Corporation (Columbia)

Columbia, which neither sells nor purchases gas under tariffs containing minimum take provisions, believes that the Commission should recognize that while minimum purchase requirements may not be proper in all (or even most) circumstances, special circumstances may exist under which such arrangements are appropriate and consistent with the overall public interest.

The Commission acknowledges that special circumstances may exist under which the minimum take provision may be considered appropriate and in the public interest. Those circumstances have not been demonstrated nor is the Commission aware of any circumstances which would justify the use of a minimum take provision in light of their adverse effect on competition. Nevertheless, as noted above, any person is free to file a petition for waiver of that regulation who believes the unique factual circumstances justify an exemption.

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA) [65] requires certain statements, descriptions, and analyses of proposed rules that will have "a significant economic impact on a substantial number of small entities." [66] The Commission is not required to make an RFA analysis if it certifies that a proposed rule will not have "a significant economic impact on a substantial number of small entities." [67]

The rule affects the contents of tariffs filed by pipelines which are regulated as natural gas companies under the Natural Gas Act. These regulated pipelines are virtually all large-size companies that do not fall within the RFA's definition of small entity.[68] The rule denies these regulated natural gas companies the ability to recover purchased gas costs for gas not taken by the buyer, regardless of what form that requirement takes in a pipeline's rate schedule or tariff. By making the rule applicable to take minimum take provisions, no additional refiling requirements are imposed on the pipeline.

Accordingly, the Commission certifies that this rule as applied to minimum take provisions will not have a significant economic impact on a substantial number of small entities.

The Commission Orders:

(A) Section 154.111 of the Commission's regulations will apply to minimum take provisions as the Commission stated in Order Nos. 380 and 380–A and the stay will be lifted as of November 1, 1984.

(B) All requests for waiver, as described in the body of this order, are hereby denied.

(C) MIGC, Inc. shall file, within 7 days of the issuance of this order, an Interim Agreement between MIGC and CIG, dated December 20, 1983, as part of its FERC Gas Tariff.

By the Commission.

Kenneth F. Plumb,

Secretary.

Appendix A

Initial Comments

Algonquin Gas Transmission Company
Arkansas Louisiana Gas Company
California Public Utilities Commission
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
El Paso Natural Gas Company
Federal Energy Regulatory Commission Staff
Great Lakes Gas Transmission Company
Independent Petroleum Association of Canada
Northern Indiana Public Service Company
Pacific Gas Transmission Company and Pacific Gas & Electric Company
Pan-Alberta Gas Ltd. and Foothills Pipe Lines (Yukon) Ltd.
Process Gas Consumers Group *et al.*
San Diego Gas & Electric Company
Southwest Gas Corporation *et al.*
Transwestern Pipeline Company

Reply Comments

Arkansas Louisiana Gas Company
Federal Energy Regulatory Commission Staff
Inter-City Gas Corporation
Michigan Consolidated Gas Company
MIGC, Inc.
Pacific Gas Transmission Company and Pacific Gas & Electric Company
Southern California Gas Company and Pacific Lighting Gas Supply Company
Southwest Gas Corporation, *et al.*
Transwestern Pipeline Company

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18 CFR Part 154

[Docket No. RM83-71-032, 033, 034; Order No. 380-B]

Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions

Issued: October 24, 1984.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order Denying Rehearing and Granting Clarification.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this Order No. 380–B to deny rehearing and grant a clarification to Order Nos. 380 and 380–A.

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[64] Initial Comments of Algonquin Gas Transmission Co., Docket No. RM83-71-001 through 030, filed August 30, 1984, at 2.

[65] Section 8, 5 U.S.C. 601–612 (1982).

[66] *Id.*, section 603(a).

[67] *Id.*, section 605(b).

[68] *Id.*, section 601(3)–(6). *See* Order No. 380, pp. 58–59, n. 62.