each producer for the proceeds of each bale of the producer's cotton which the attorney-in-fact redeems and sells and each equity which the attorney-in-fact transfers, unless the attorney-in-fact has a valid annual marketing agreement with such producers authorizing the attorney-in-fact to pool the cotton or the proceeds therefrom.

(c)(1) A producer or the producer's authorized agent may enter into an agreement with a person or persons to redeem the producer's cotton and may authorize the release of the applicable warehouse receipts to such person(s) or transferee (hereinafter called the "buyer") on Form 813. If the buyer executes and files the Form 813 with the loan originating office the buyer shall be obligated to redeem the cotton specified on such form on or before the maturity date of the loan which is applicable to such cotton. CCC will use its best efforts to make certain that the cotton is not redeemed by anyone other than the buyer and to provide for the delivery to the buyer of the warehouse receipts (and, if requested, the classification memoranda) covering the cotton upon the repayment of the loan principal together with any applicable interest and other charges, to the loan originating office.

(2) If the loan documents are sent to a bank for collection, repayment of the loan, together with any applicable interest and other charges, must be made within 5 business days after the documents are received by the bank. All charges assessed by the bank to which the documents are sent must be paid by the buyer. Redemptions will not be permitted after the maturity date of the loan. Upon the failure of the buyer to redeem all such cotton pledged as loan collateral:

(i) Title to the cotton shall, at CCC's election and without a sale thereof, immediately vest in CCC, and there shall be no obligation on the part of CCC to pay for any market value which such cotton may have in excess of the principal amount of the loan thereon, together with any applicable interest and other charges. The buyer shall be personally liable for any amount by which the amount due on the loan on such cotton exceeds the market value of the cotton as of the date title to the cotton vests in CCC, as determined by CCC.

(ii) CCC may, at CCC's election and without notice to the buyer, sell, transfer and deliver the cotton or documents evidencing title thereto, at such time, and in such manner, and upon such terms and conditions as CCC may determine, at any cotton exchange or elsewhere, or through any agency, at public or private sale, for immediate or future delivery, and without demand advertisement, or notice of the time and place of sale or adjournment thereof or otherwise. Upon such sale, CCC may become the purchaser of the whole or any part of such cotton at its market value, as determined by CCC. Any overage remaining from the proceeds received therefrom shall, after deducting from such proceeds the principal amount of the loan on such cotton, together with any applicable interest and other charges, be paid to the buyer or the buyer's personal representative without right of assignment to, or substitution of, any other person. If the proceeds from the sale do not cover the principal amount of the loan on such cotton, together with any applicable interest and other charges, the buyer shall be liable to CCC for any difference.

(d) Warehouse receipts will not be released except as provided in paragraphs (a), (b), and (c) of this section.

10. Section 1427.25 is amended by revising paragraph (b) as follows:

§ 1427.25 Kansas City Commodity Office and Kansas City Management Office.

* * * * *

(b) Accounting, recording, and reporting for all States will be handled through Kansas City Management Office, P.O. Box 205, Kansas City, Missouri 64141.

Signed at Washington, DC, on December 17, 1985.

Everett Rank,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 85-30229 Filed 12-20-85; 8:45 am]

BILLING CODE 3410-05-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2, 157, 284, and 375

[Docket No. RM85-1-000]

Regulation of Natural Gas Pipelines After Partial Wellhead Deregulation

Issued: December 12, 1985.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; Order Granting in Part and Denying in Part Applications for Rehearing, Denying Petition for Stay, and Granting Clarification.

SUMMARY: On October 9, 1985, the Federal Energy Regulatory Commission (Commission) issued Order No. 436,[1] a final rule pursuant to the Natural Gas Act (NGA)[2] and the Natural Gas Policy Act of 1978 (NGPA),[3] which substantially changed the Commission's regulation of the natural gas industry. The Commission received many applications seeking rehearing of the order.[4] In addition to the applications to rehear the order, the Commission has received numerous general requests for clarifications.[5] The issues raised by the applications seeking rehearing and some of the applications for clarification are addressed in this order.

This order grants rehearing in part and denies rehearing in part. It also clarifies Order No. 436 and denies a petition for stay of Order No. 436.

EFFECTIVE DATE: Sections 284.10(a) and 284.223(g)(3)(i) are effective December 12, 1985. The remaining changes are effective January 22, 1986.

FOR FURTHER INFORMATION CONTACT:

For implementation matters: Kenneth A. Williams, Federal Energy Regulatory Commission, Office of Pipeline and Producer Regulations, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8500

For legal matters: Christopher J. Warner, Federal Energy Regulatory Commission, Office of the General Counsel, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8440

For policy matters: Charles E. Teclaw, Federal Energy Regulatory Commission, Office of Regulatory Analysis, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8100

SUPPLEMENTARY INFORMATION:

Order Granting in Part and Denying in Part Applications for Rehearing, Denying Petition for Stay, and Granting Clarification

Before Commissioners: Raymond J. O'Connor, Chairman; A.G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol; Docket Nos. RM85-1-000 through -003, -006 through -009, -011 through -038, -040 through -046, -048 through -071, -073 through -100, -102 through -125, -127 through -133, and -136 (Parts A-C); Order No. 436-A.

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[1] 50 FR 42408 (Oct. 18, 1985).

[2] 15 U.S.C. 717-717w (1982).

[3] 15 U.S.C. 3301-3432 (1982).

[4] A list of the applicants is included in Appendix A.

[5] A list of the petitioners is included in Appendix B.

I. Introduction

On October 9, 1985, the Federal Energy Regulatory Commission (Commission) issued Order No. 436,[1] a

[1] 50 FR 42408 (Oct. 18, 1985).

final rule pursuant to the Natural Gas Act (NGA) [2] and the Natural Gas Policy Act of 1978 (NGPA),[3] which substantially changed the Commission's regulation of the natural gas industry. The Commission received many applications seeking rehearing of the order.[4] In addition to the applications to rehear the order, the Commission has received numerous general requests for clarifications.[5] The issues raised by the applications seeking rehearing and some of the applications for clarification are addressed in this order.

This order grants rehearing in part and denies rehearing in part. It also clarifies Order No. 436 and denies a petition for stay of Order No. 436.

II. Background

A. Procedural History

The Commission began this rulemaking proceeding with the first phase of a Notice of Inquiry (NOI) issued on December 24, 1984,[6] and a second and third phase issued on January 18, 1985.[7] After reviewing the comments received in response, it issued a Notice of Proposed Rulemaking (NOPR) on May 30, 1985, following decisions by a Federal court in the *Maryland People's Counsel* cases.[8] The NOPR proposed a package of four parts. Part A included a comprehensive, simplified transportation program, including blanket certificates under NGA section 7 and self-implementing transportation under NGPA section 311. Part B included a proposal to alleviate the gas marketing problems caused by take-or-pay provisions in gas purchase contracts. Part C included a procedure for optional expedited certificates under NGA section 7. Finally, Part D included a new requirement that gas supplies subject to the maximum lawful prices of NGPA categories 104, 106(a) and 109 be billed separately from all other gas supplies.

The Commission received over 200 comments in response to the three phases of the NOI. In addition, it held public hearings on February 20, 1985, and on March 28–29, 1985. In response to the NOPR, the Commission received approximately 300 comments. The Commission heard two days of oral presentations by over 100 commenters at a public hearing held on August 1–2, 1985. In formulating the final rule, the Commission relied on both the written and oral comments in response to the NOIs and the written and oral comments in response to the NOPR.

The final rule adopted Parts A and C of the NOPR, with modifications. It did not adopt Part B. Instead, the Commission reaffirmed its policy statement issued on April 10, 1985.[9] In addition, it issued a new statement of policy providing for expedited processing of producer abandonment applications under existing substantive criteria. In a separate document, the Commission requested supplemental comments on Part D of the proposal.[10] Specifically, the Commission expressed its interest in gathering additional information on the effects of its proposal on the national gas supply and on gas consumers. The Commission has received over 200 comments in response to this notice.

B. Summary of Provisions of Final Rule

Part A—Transportation

Consistent with its original proposal, the Commission adopted a simplified transportation program, including blanket certificates under section 7 of the NGA and self-implementing transportation under section 311 of the NGPA, conditioned to require non-discriminatory access to such transportation.

Rates for the service must be volumetric, downwardly-flexible, cost-of-service rates, differentiated by time-of-use and distance, and consistent with sections 4 and 5 of the NGA. A pipeline's participation under the new rules also offers its customers an opportunity to modify their existing service agreements in order to reduce their firm sales entitlements. This customer option is available if the pipeline holds itself out as a transporter of gas for others, *i.e.*, if the pipeline decides to participate in the new transportation program. Abandonment is available to the pipeline to the extent of any customer's reduction. This will enable such customers to choose more freely among a portfolio of service options offered by pipelines. In addition to the option to reduce sales entitlements or contract demand, the rule also affords firm sales customers of a transporting pipeline the opportunity to convert from firm sales to firm transportation, upon payment of a reservation fee.

The final rule contains some necessary refinements to the proposal. It recognizes a pipeline's need to impose reasonable operational conditions on requests for service and, therefore, includes a requirement that any such conditions be filed as part of the tariff. The final rule provides for a reservation charge for firm transportation service, requires the use of interim transportation rates effective November 1, 1985, and exempts intrastate pipelines from the rate conditions for self-implementing transportation, from the firm sales entitlements adjustment obligations, and from the requirement to offer firm service. Under the rule, projected levels of service that form a basis for interstate pipeline rates for transportation under Part 284 may be changed in rate cases. Finally, certain transportation transactions are allowed to continue after November 1, 1985, to permit a smoother transition to the new transportation programs.

Part B—Take-or-Pay Buy-Outs and Producer Abandonment

Although the Commission had proposed to establish, during a limited transition period, a rebuttable presumption of prudence for certain payments made by pipelines to extinguish problem contracts, the record persuaded it not to adopt the approach. Still recognizing the extent of the problems caused by continued take-or-pay obligations and non-market responsive prices the Commission reaffirmed the approach contained in the April 10, 1985, policy statement in Docket No. PL85-1-000, which establishes a policy of expeditious rate review and certificate or abandonment proceedings necessary to effectuate service modifications that arise from pipeline buy-outs of their take-or-pay obligations. In the final rule, the Commission also stated its intent to expedite processing of producer abandonment applications if producers are subject to substantially reduced takes of gas without payment or if the underlying contract has expired.

Part C—Optional Expedited Certificates

The Commission proposed and established optional expedited certificate procedures under section 7 of the NGA for new services, facilities, and operations made available by pipelines willing to assume the financial risk of

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[2] 15 U.S.C. 717–717w (1982).

[3] 15 U.S.C. 3301–3432 (1982).

[4] A list of the applicants is included in Appendix A.

[5] A list of the petitioners is included in Appendix B.

[6] Interstate Transportation of Gas for Others, 50 FR 114 (Jan. 2, 1985) (Phase I).

[7] Natural Gas Pipeline Ratemaking, Risk and Financial Implications After Partial Wellhead Decontrol, 50 FR 3801 (Jan. 28, 1985) (Phases II and III).

[8] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 FR 24130 (June 7, 1985). *See* Maryland People's Counsel v. FERC, 761 F.2d 768 (D.C. Cir. 1985) and Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985).

[9] 18 CFR 2.76, 50 FR 16079 (Apr. 24, 1985).

[10] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol: Proposed Rule, 50 FR 42372 (Oct. 18, 1985).

these ventures. That willingness is manifested by the pipeline's agreement to provide such service or facilities subject to specified conditions, including volumetric rates similar to those established for transactions under new Part 284.

Appropriate abandonment is conditionally pre-granted to the pipeline to be effective at the expiration of the underlying contracts. Since pipelines would knowingly assume the risk of these ventures, competing certificates may be granted.

The Commission added a requirement that an applicant seeking a certificate to provide transportation service must obtain a blanket transportation certificate under § 284.221. The final rule prohibits shifting costs from so-called "new service" to existing pipeline customers, if revenues are underrecovered. Abbreviated application procedures under § 157.7 are also available for optional expedited certificates.

C. Effect of Technical Corrections

On October 24, 1985, the technical corrections to Order No. 436 were issued. These corrections made several changes to Order No. 436 to rectify inadvertent errors that occurred in the process of the order's rapid preparation in anticipation of the November 1, 1985, termination date imposed by the Court of Appeals for certain ongoing transportation programs. To ensure timely compliance and to minimize misunderstanding during the initial implementation of the Commission's rule, the corrections were issued at the earliest possible date. The Commission now ratifies those corrections, effective October 9, 1985, as expositions of its original intent.[11]

Specifically, the notice made technical corrections to reflect the Commission's intent that:

1. No notice period associated with a reduction or conversion of firm sales entitlements may begin sooner than February 1, 1986, unless a pipeline agrees otherwise;

2. An NGPA section 311 self-implementing transportation arrangement authorized and for which service had commenced on or before October 9, 1985, may continue under the original terms and conditions (except for § 284.7 and the new reporting requirements of §§ 284.106 and 284.126) until the expiration of its authorized original or extended term that was in effect on October 9, 1985, or until October 9, 1987, whichever comes first;

3. An authorized transportation arrangement under Order Nos. 60 (interstate pipelines on behalf of other interstates) and 63 (LDCs or Hinshaw pipelines on behalf of interstates) may continue subject to the transition provisions of Subparts B and C of Part 284, as amended, respectively;

4. An NGPA section 311 transportation arrangement authorized and for which service had commenced on or prior to October 9, 1985, pursuant to a Commission order under § 284.107 or § 284.127 of the Commission's regulations as in effect prior to November 1, 1985, may continue under the original terms and conditions (except for § 284.7 and the new reporting requirements of §§ 284.106 and 284.126) until the expiration of its authorized original or extended term that was in effect on October 9, 1985, or until October 9, 1987, whichever comes first;

5. Any blanket certificate transportation arrangement authorized and for which service had commenced on or before October 9, 1985, under then existing § 157.209(a) of the Commission's regulations (Order No. 319), may continue for the time remaining in its authorized term after November 1, 1985;

6. Any transportation arrangement authorized on a self-implementing basis for 120 days pursuant to existing § 157.209(e)(1) of the Commission's regulations (Order No. 234–B), may continue only for the time remaining in its 120-day term past October 31, 1985;

7. *Only* optional *transportation* certificates, not optional sales certificates, will be subject to the prerequisite that the applicant file for, and state it will accept, a new blanket transportation certificate under new § 284.221 of Part 284 of the Commission's regulations.

D. Case-Specific Clarifications

Order No. 436 affects a great variety of gas transportation and sales transactions. In particular, the transitional provisions that allow certain arrangements previously authorized under section 311 or under NGA blanket certificates to continue after November 1, 1985, pertain to hundreds of contracts, construction and service schedules, and other fact-specific situations that may be immediately affected. To date, the Commission has received variously-styled pleadings from pipelines or their customers requesting clarification, interpretation, or waiver of the regulations. In recognition of the unique situation created by Order No. 436 and the need to avoid inequities to the extent feasible, the Commission has responded with orders on clarification of Order No. 436. The following list summarizes briefly the issues involved in each.

1. *Northwest Pipeline Corp.* (Oct. 29 1985) (Filing a statement of notification to continue transportation for a low priority end-user authorized under a blanket certificate does not commit an interstate pipeline to becoming an open transporter after the transition period).

2. *Intercon Gas, Inc.* (Oct. 30, 1985) (Section 311 transactions commenced after October 9, 1985, do not qualify under the transitional rules).

3. *El Paso Natural Gas Company* (Oct. 30, 1985) (Written contracts for transportation service on a month-to-month basis, which were executed before October 9, 1985, do qualify under § 284.105 until the end of the final month or October 9, 1987).

4. *Panhandle Eastern Pipe Line Company* (Oct. 30, 1985) (Transportation arranged under Order No. 60 may continue subject to the transition provisions. Only transportation service actually commenced on or before October 9, 1985, qualifies under § 284.105(a), and the underlying transportation arrangement may not be amended after October 9, 1985. Transportation under a new blanket certificate issued under new § 284.221 cannot be performed until the certificate is issued).

5. *Hadson Gas System, Inc.* (Oct. 30, 1985) (Any changes to the terms and conditions of a transitional section 311 transaction is an initiation of a new NGPA section 311 transportation transaction).

6. *Consolidated Fuel Supply, Inc.* (Oct. 31, 1985) (Any changes to the terms and conditions of the originally certificated blanket certificate transaction that

[11] The Commission does not believe that a correction made before a rule's effective date constitutes retroactive rulemaking. The assertions in the applications for rehearing that the technical corrections constitute retroactive rulemaking, if taken seriously, would preclude the Commission from making any significant modifications in a rule in response to rehearing applications. Thus, the Commission rejects any assertion that the technical corrections are procedurally defective. The only issue is whether the modifications are reasonable. The Commission finds the October 24, 1985, corrections are reasonable. Specifically, the potential that interstate and intrastate pipelines would begin new transportation transactions before November 1, 1985, only to avoid the conditions established in Order No. 436 for transportation transactions is greater than the ill effects from amending the transitional provisions to include, among other things, the October 9, 1985, cut-off date for eligible transactions. In addition, the Commission has sought to provide relief on a case-by-case *basis to any persons unnecessarily harmed by the change. See* discussion, *infra.*, Section VII.C.

qualified under the transitional provisions would require an application for a new blanket certificate).

7. *Columbia Gas Transmission Corp.* (Oct. 31, 1985) (New or expanded NGPA section 311 transportation transactions may be commenced after October 9, 1985, and terminated on a non-discriminatory basis before December 15, 1985, without subjecting the pipeline to non-discriminatory access, CD adjustment obligations or the new rate conditions after December 15, 1985).

8. *Texas Eastern Pipeline Co.* (Oct. 31, 1985) (Initiation of new section 311 transactions under Order No. 436 subjects the pipeline to the non-discriminatory access condition applicable to such service, but does not obligate the pipeline to file for a new blanket certificate under Subpart G of Part 284).

9. *Midwest Solvents Company* (Oct. 31, 1985) (Transportation for high priority users that was authorized under former § 157.209(e) does not qualify under transitional provisions that apply to former § 157.209(a) concerning automatic authorization for transportation for high priority end-users).

10. *Amstar Corporation* (Oct. 31, 1985) (Transportation service must have actually commenced on or before October 9, 1985, to qualify under §§ 284.105, 284.125, and 284.223(g)(1)).

11. *Carnation Company.* (Oct. 31, 1985) (In order to qualify under transitional provisions applicable to Order No. 319 transportation arrangements, that service must have been both authorized and commenced on or before October 9, 1985, regardless of whether the gas was transported under an SMP).

12. *Pacific Gas and Electric Company* (Oct. 31, 1985) (A verbal agreement is sufficient to meet the "authorized" test for transitional NGPA section 311 transportation as long as the arrangement was commenced on or before October 9, 1985, and the parties to the transaction have complied with all applicable reporting requirements).

13. *El Paso Natural Gas Company* (Oct. 31, 1985) (Filing of an extension report prior to October 9, 1985, pursuant to executed letter agreements that permit continuance of NGPA section 311 transportation service beyond November 1, 1985, is sufficient to meet the "authorized and commenced" prior to October 9, 1985, tests of the transitional provisions, provided all the statutory and regulatory requirements are met).

14. *Transcontinental Gas Pipeline Corp.* (Nov. 1, 1985) (Certain section 311 transportation service qualifies under transitional provisions, provided the pipeline files an affidavit that the transportation services affected were small in number and were intended to continue past October 31, 1985).

15. *Orange and Rockland Utilities, Inc. and Transcontinental Gas Pipeline Corp.* (Nov. 1, 1985) (A section 311 transportation arrangement that commenced after October 9, 1985, qualifies under transitional provisions because of unique circumstances, including the extent of prior investment).

16. *Michigan Gas Utilities Company* (Nov. 7, 1985) (Transportation for a high priority end-user was authorized under former § 157.209(a), even though the initial report identified the transaction as an "industrial process use" within former § 157.209(e) and this report was not corrected until after October 9, 1985, *distinguishing Midwest Solvents Company* (Oct. 31, 1985). The *authority* to continue blanket certificate transportation between November 1, 1985, and December 15, 1985, is co-extensive with the *obligation* to serve in a non-discriminatory manner *all* customers, old and new, that request transportation service without need for further grant of authority from this Commission).

17. *ANR Pipeline Company* (Nov. 7, 1985) (Order accepts ANR's filing that states that ANR intends to comply with non-discriminatory access conditions for the period ending December 15, 1985. But, the order rejects that part of ANR's filing that states that it lacks authority to provide transportation for an end-user during the transition period without a new certificate under NGA section 7(c) since the existing blanket certificate provides authority for new transportation for the 45-day period ending December 15, 1985.[12] Refusal by a company that has voluntarily assumed the non-discriminatroy obligations of §§ 284.8(b) and 284.9(b) to provide service, if in fact it occurs, is inconsistent with the regulations).

18. *Algonquin Gas Transmission Company* (Nov. 8, 1985) (Algonquin was permitted to charge for its transitional NGPA Section 311 transportation arrangements a one part rate that is included in a rate schedule that was on file with the Commission and effective prior to November 1, 1985).

19. *El Paso Natural Gas Company* (Nov. 8, 1985) (Order treated request for clarification as a report required under former § 284.106(b) for NGPA section 311 transportation service).

20. *Transcontinental Gas Pipe Line Corp.* (Nov. 8, 1985) (Arrangement that was initated many months ago as an ordinary section 311 transaction and at a substantial expense to a distributor was found to qualify under transitional provisions, since the pipeline actually commenced service on October 9, 1985, when it delivered gas into the purchaser's pipeline for testing).

21. *Northwest Pipeline Corp.* (Nov. 8, 1985) (Restates and amplifies *ANR Pipeline* Company (Nov. 7, 1985)).

22. *Carnegie Natural Gas Company* (Nov. 13, 1985) (Consistent with § 157.18, a pipeline may terminate transactions initiated pursuant to a new blanket certificate without triggering the contract demand reduction and conversion rights in § 284.10, if it applies for and the Commission grants it appropriate abandonment authorization prior to December 15, 1985. Sections 284.7, 284.8 and 284.9 would also cease to apply after such termination).

23. *Dresser Industries, Inc.* (Nov. 13, 1985) (Granted a section 7(c) exemption consistent with *Caterpillar Tractor Company*, 11 FERC ¶61,076 (1980)).

24. *Tex-La Gas Company* (Nov. 13, 1985) (Although company failed to timely file a 30-day report for a NGPA section 311 transportation, transaction company qualified under the transitional provisions, since it filed the report before issuance of Order No. 436).

25. *Hadson Gas Systems, Inc.* (Nov. 15, 1985) ("New" section 311 transportation may be terminated prior to December 15, 1985, to avoid the requirements of § 284.10, without affecting a pipeline's authority to continue beyond December 15, 1985, transportation that qualifies for transition under § 284.105(a)).

26. *Hadson Gas Systems, Inc.* (Nov. 22, 1985) (If a blanket certificate did not, prior to November 1, 1985, authorize transportation of Federal offshore gas for end-users, the transitional provisions under § 284.223(g) do not confer authority to transport Federal offshore gas. But, after November 1, 1985, all interstate pipelines are authorized to transport gas from any source, including Federal offshore, under the self-implementing authority of § 284.102).

27. *Frito-Lay, Inc.* (Nov. 22, 1985) (Although end-user's proposed transportation arrangement was not eligible under one transitional provision (§ 284.223(g)(1)), the order determined that a company may obtain, until December 15, 1985, transportation service from a pipeline providing similar service under a related transitional rule (§ 284.223(g)(2) to other end-users).

28. *Battle Creek Gas Company* (Nov. 22, 1985) (Because the parties did not notify the Commission that they were

[12] *See, infra,* Section VIII, INGAA Classification

relying on § 157.209(a) for transportation authority until well after Order No. 436 was issued, a transportation transaction that qualifed as high-priority service under § 157.209(a), but was authorized under § 157.209(e), did not meet the requirements of the transitional provisions of new § 284.223(g)(1); order applies *Midwest Solvents Company* decision).

29. *Energy Marketing Exchange, Inc.* (Nov. 22, 1985) (Order applies *Midwest Solvents* (Oct. 31, 1985) and emphasizes that the eligibility for particular transitional provisions depends on the authority under which the transportation transaction was authorized on or before October 9, 1985).

30. *TeePak, Inc. and Consolidated Fuel Supply, Inc.* (Nov. 22, 1985) (Order applies *Midwest Solvent* (Oct. 31, 1985) and concludes transaction did not qualify under transitional provision of § 284.223(g)(1)), since company did not attempt to convert the transportation service from § 157.209(e) for all end-users to § 157.209(a) for high-priority end-users until after October 9, 1985).

31. *Valley Gas Company* (Nov. 27, 1985) (Order applies *Pacific Gas and Electric Company* (Oct 31, 1985) and concludes that transitional provisions apply to service which commenced prior to October 9, 1985, pursuant to a verbal agreement as long as the parties have complied with all applicable reporting requirements).

32. *Michigan Consolidated Gas Company*. (Nov. 27, 1985) (Order applied § 284.125 to clarify that the transportation service described in the request for clarification was authorized and commenced on or before October 9, 1985, may continue until October 9, 1987, under the terms and conditions that applied prior to November 1, 1985, with the exception of the reporting requirements of § 284.126.

III. Overview of Issues on Rehearing

The Commission received applications for rehearing or clarification from individual companies and their trade associations representing every segment of the natural gas industry. These included producers and marketers of natural gas, interstate and intrastate transporters, local distribution companies (LDCs), industrial and other end users, and state and Federal government agencies. This section generally reviews the broad issues raised by these applications.

A. Producers and Marketers

The major producers assert that the CD reduction option effectively authorizes unilateral breach of contract by a pipeline's customers. Some of the independent producers (including Mesa, Panhandle Producer and Royalty Owners Assoc.) take the opposite tack and urge the Commission to expressly find that Order No. 436 does not constitute "*force majeure*." While raising a number of other points regarding transportation, the producers generally focus the rest of their arguments on the statement of policy on take-or-pay and producer abandonment, arguing, for example, for a rebuttable presumption in favor of abandonment of service by producers when an abandonment application under the expedited procedure is protested.

B. Pipelines

1. Interstate Pipelines

Almost all of the interstate pipelines argue that the Commission's transportation program is effectively involuntary. In fact, they maintain that the Commission is attempting to impose mandatory carriage. However, the majority of these applicants argue that the Commission should condition producer access on take-or-pay relief to the pipeline.

These applicants raise legal and economic arguments in opposition to contract adjustments by their customers. First, they argue that the Commission's actions constitute an unconstitutional taking and violate sections 4, 5, and 7 of the Natural Gas Act. Second, they argue that the Commission's actions will have adverse affects on the market and on natural gas supply.

Also, many of the pipelines raise issues relating to the rate conditions that range from general legal arguments that the rates are confiscatory to a proposal that reservation fees should also be allowed for optional sales certificates, not only for optional transportation certificates under Part C.

2. Intrastate Pipelines

Intrastate pipelines argue that the non-discriminatory access provision violates NGPA sections 601 and 602 because it imposes common carrier status and encroaches on state authority.

They also raise specific issues relating to delivery points and applicability of the rate conditions. For example, they argue that intrastate pipelines should be permitted to discount their transportation rates below their fair and equitable ceilings and that they should be permitted to impose a reservation charge.

C. Local Distribution Companies (LDCs)

LDCs are unanimous in arguing that the Commission's regulations improperly promote bypass of their systems by pipelines and end-users. First, while supporting non-discriminatory access generally, they argue that the non-discriminatory access condition inhibits LDCs from negotiating flexible transportation arrangements with pipelines which oppose the condition. However, many LDCs argue that if a pipeline agrees to provide non-discriminatory access, LDCs should be preferred for such access.

Secondly, while generally supporting the "CD" reduction/conversion condition, they argue that it may cause adverse supply impacts if it threatens the pipeline's role as a supplier. They view these regulations as leading to capacity-management problems, such as overbooking and misallocation of service between firm and interruptible service.

Third, they argue that the rate conditions allow for undue discrimination. Many of the applicants request specific clarifications and suggest alternatives.

With regard to the optional expedited certificates, the majority of the LDCs oppose the presumption of public convenience and necessity in favor of granting a certificate where by-pass is involved. They argue that the presumption violates section 7 of the Natural Gas Act and states' rights, that it will have adverse economic effects on LDCs or competing pipelines, and that it reverses long-standing Commission policy in favor of LDCs. Also, many LDCs argue that the notice and protest procedures are inadequate and request a longer review period.

D. End-Users

The majority of the end-users favor the non-discriminatory access condition as a means of making available to them new gas supplies. In fact, they propose that the Commission broaden the blanket certificate transportation programs by exempting end-users from prior notice procedures. Many of these applicants submit specific requests for clarification relating to the continuation of certain transportation arrangements begun before November 1, 1985. The Commission is deciding these on a case-by-case basis.

E. State and Federal Agencies

The majority of the state applicants argue that the Commission exceeded its jurisdiction in establishing a rebuttable presumption of public convenience and necessity for qualified applicants under its optional expedited certificate regulations.

Also, the majority of the applicants argue that the Commission did not adequately resolve the take-or-pay problem. They argue that the Commission should condition producer access on providing take-or-pay relief.

Many of the state applicants suggest specific revisions to clarify that state laws control in the situation they outline. Both state applicants and the Department of Energy suggest that all pipeline customers be permitted to reduce or convert CDs whether or not their pipleline suppliers agree to transport on a non-discriminatory basis.[13]

F. Major Issues

Before discussing the specific issues raised by the applications for rehearing, the Commission will consider and respond to two general issues which appear common to most of the applications. The first issue relates to the scope of the Commission's conditioning authority under section 7(e) of the NGA and section 311(c) of the NGPA. The second issue relates to the Commission's treatment of "take-or-pay problems" in existing pipeline-producer contracts.

1. Scope of Conditioning Authority Under NGA Section 7 and NGPA Section 311

First, applicants allege that the conditions placed by the Commission on self-implementing transportation and blanket transportation certificates are unreasonable and, therefore, an unlawful exercise of the Commission's conditioning authority under section 7(e) of the Natural Gas Act and section 311(c) of the Natural Gas Policy Act of 1978.

In particular, applicants assert that the condition permitting firm sales customers to reduce or convert their contract demands ("CDs") constitutes an unlawful unilateral abrogation of pipeline contracts with those customers. Applicants also allege that the non-discriminatory access condition attached to self-implementing and blanket certificate transportation "economically coerces" pipelines to provide such transportation.[14] Therefore, applicants say, the non-discriminatory access condition constitutes a common carriage or mandatory carriage obligation unlawful under the NGA and NGPA.

a. *Reasonableness of CD Reduction/Conversion Condition.* To the extent applicants attack the "CD" reduction/conversion condition as sanctioning abrogation of their contracts with their firms sales customers, they misunderstand the operation of Order No. 436. The Commission made clear in Order No. 436 that the choice to provide transportation service on a self-implementing basis or under a blanket certificate is purely the pipeline's choice, and the Commission is not mandating what that choice is.

What Order No. 436 does provide, however, is that if a pipeline provides self-implementing or blanket transportation, it must *also* offer its firm sales customers an opportunity to adjust their sales service agreements over a phased period to take advantage of the resulting new opportunities for transportation services. The Commission notes that data on file at the Commission and reproduced at Exhibit D of Order No. 436 indicates that the overwhelming majority of transportation arrangements undertaken on behalf of local distribution companies in the first six months of 1985 have been for partial requirements customers with alternate pipeline suppliers and *not* for full requirements customers supplied solely by one pipeline. While the refusal to transport for full requirements customers may also be due to refusal by pipelines to transport gas that would displace their sales, it is nevertheless clear that firm sales service agreements inhibit the ability of full requirements customers to choose from among a portfolio of gas supplies.

Firm sales customers are bound by their firm sales entitlements to pay for the pipeline capacity set aside for those entitlements, regardless of whether it is used. Full requirements customers, of course, purchase all of their gas requirements from a single pipeline. Partial requirements customers and most direct users are not bound to purchase their full requirements from one pipeline, and therefore have more flexibility to purchase gas elsewhere, either from another pipeline or directly in the field under a transportation arrangement with their pipeline-supplier.

Order No. 436 found that sole-supplied firm sales customers would not realistically be as able as partical requirements customers to enjoy the benefits of non-discriminatory transportation services unless they were able to adjust their sales entitlements with their pipeline suppliers.

In fact, the Commission concludes that firm sales customers, especially small municipal systems, without the CD reduction/conversion condition, would be denied the most important tool available to them to compete with interstate pipelines seeking to by-pass them and transport gas directly to end-users: the ability to obtain firm "booked" transportation capacity on the pipeline in order to acquire suppliers that will enable them to compete.

Otherwise, the enormous flexibility of transportation under a NGA section 7 blanket certificate would permit pipelines to squeeze market share from LDCs, while denying those LDCs the same flexibility to keep their customers by providing firm self-implementing transportation service under section 311 of the NGPA. Thus, the CD reduction/conversion condition is an indispensable element of non-discriminatory access to transportation.

Furthermore, the CD reduction/conversion condition is just that, a *condition* on the flexibility provided to interstate pipelines under the new transportation services authorized by Order No. 436. In return for accepting this condition, pipelines obtain a "two-way street" of benefits under Order No. 436, such as the expanded eligibility of gas categories, shippers and terms of transactions for self-implementing or blanket certificate transportation.

On the other hand, in return for exercising their conditional right to reduce or convert CDs, firm sales customers must be willing to agree to a commensurate adjustment in the certificated obligation of their pipelines to provide them with sales service under the CDs. This necessarily means that they must assume some of the supply risks previously borne by the pipelines.

The Commission intends the CD reduction/conversion condition to provide full requirements customers the same opportunity to choose among natural gas suppliers that the Order No. 380 minimum bill rule provides partial requirements customers.[15] However, as under the minimum bill rule, the exercise of the conditional rights does not prejudge the determination in individual rate cases of the appropriate

[13] The Commission also received on December 5, 1985, a pleading filed by the Honorable Don Nickles, United States Senator, in this docket. The Comm'ssion is accepting this pleading as a request for reconsideraton and is responding to ORA the issues it raises herein.

[14] *See* Interstate Natural Gas Association of America (INGAA) at pp. 13–16 ("* * * if a competitor of Pipeline A participates in the transportation program, and thereby achieves a competitive edge, Pipeline A may find that it has no choice but to participate, notwithstanding the legal and operational disadvantages.").

[15] *See* Wisconsin Gas Co. v. FERC, No. 84–1358 (D.C. Cir. 1985), slip op. at 38–39, 43.

allocation of risks and revenue responsibilities attributable to the exercise of those rights. Under Order No. 436, each pipeline subject to a CD reduction or conversion will continue to be able to file with the Commission, as appropriate, new rates to reflect the resulting adjustments in revenue responsibility.

In the first year, no CD reduction rights become effective before a pipeline has filed new rates. In subsequent years, a pipeline may specify a single date by which customers must give notice of their CD reductions in order that the pipeline may plan its rate filings accordingly. The CD conversion option is available at any time during the year, upon 60 days' notice by the LDC.

Thus, Order No. 436 leaves entirely to determination in future rate cases the appropriate allocation of risks, including the rate of return and revenue responsibility, among a pipeline and its customers exercising CD reduction or conversion rights.

The Commission rejects those petitions which allege the CD reduction/conversion condition would abrogate contracts. Order No. 436 clearly permits CDs to be reduced or converted *only* if a pipeline chooses to provide Order No. 436 transportation services; every pipeline remains free to choose to provide such services or instead provide other services not subject to the CD reduction/conversion condition, such as transportation or sales service under an individual certificate pursuant to section 7(c) of the NGA.

The Commission rejects those applications for rehearing which assert that the Commission may not impose the CD reduction/conversion condition except after a finding that current CDs are unjust and unreasonable under section 5 of the NGA. The Commission does not doubt it has the authority under section 5 to do so. The Commission need not do so here, because Order No. 436 makes clear that CD reduction/conversion rights are imposed as a *condition* under sections 7(e) of the NGA and 311(c) of the NGPA, not as a *mandate* under section 5 of the NGA.

For the same reason, the Commission rejects the argument that the condition constitutes an unlawful delegation to private parties of its authority to set rates under section 4 or to condition certificates under section 7. Order No. 436 clearly limits CD reduction and conversion to a condition which a pipeline is free to accept or reject as an element of its mix of sales and transportation services. The Commission clearly has the authority to impose this condition generically.[16] Moreover, the conditions are a transitional tool only and will not apply to agreements entered into after the effective date of the rules. *See* § 248.10(b).

Finally, the condition is not legally infirm because it would affect sales service agreements filed with the Commission in connection with initial rates contained in certificates previously issued under section 7 of the NGA. The Commission is not amending previously-issued sales certificates or retroactively adjusting initially-certificated rates; it is merely imposing a condition on transportation service which a pipeline may or may not choose to offer.

That this condition may be exercised so as to affect initially certificated rates or previously certificated sales service is left to determination if and when the conditional rights are exercised and new rates are filed. However, the Commission's ability to may affect sales service agreements through its section 7 conditioning authority is without doubt.[17]

b. *Reasonableness of Non-discriminatory Access Condition.* The Commission also rejects the contention that the non-discriminatory access condition constitutes "economic coercion" and therefore is not a reasonable condition under section 7 of the NGA.

When stripped of its rhetorical weight, the "economic coercion" alleged by applicants is no more than the competitive pressures which already exist in natural gas markets. Interstate pipelines argue that they will be forced to provide Order No. 436 transportation merely because (1) other pipelines are providing the same services, or (2) pipeline customers are requesting the services.[18]

Thus, interstate pipelines appear to be arguing that the Commission has committed legal error by not including in Order No. 436 some sort of exemption or immunity from competition with other pipelines who choose to offer transportation services or pipeline customers who request such services on a non-discriminatory basis.

The Commission not only rejects this definition of "economic coercion," it finds that a change in the non-discriminatory access condition which would have the effect of granting any pipeline an exclusive franchise to provide self-implementing or blanket certificate transportation to any particular class of customers would violate the Natural Gas Act and the Natural Gas Policy Act of 1978.

Sections 4 and 5 of the NGA prohibit unduly discriminatory or perferential practices, and section 7(g) of the NGA makes clear that certificates issued by the Commission are not required to be exclusive. Section 311 of the NGPA was expressly intended by the Congress to encourage the free movement of gas on a self-implementing basis, and carving out exclusive service areas for pipelines providing section 311 services would directly contradict that Congressional purpose.[19]

The Commission believes that the allegation by some applicants that the non-discriminatory access condition is involuntary because the Commission's review of individual section 7(c) applications is not as timely as its review of blanket certificate applications reflects considerable misunderstanding. The Commission has made very clear its intention to carry out its mandates under the NGA and the NGPA to process the Commission's caseload in an efficient and timely manner *consistent with the procedural rights of all parties.* While blanket certificates offer the considerable advantage of authorizing individual transactions in expeditious fashion, the consideration afforded application for the certificate itself is equivalent to that given other section 7(c) applications. Nevertheless, in separate orders issued prior to the effective date of Order No. 436, the Commission made clear that it expects that applications for individual section 7(c) transportation certificates will be processed on a timely basis and may be determined on a delegated basis by the Director of the Office of Pipeline and Producer Regulation *where unopposed.*[20] These delegated orders may be issued in a timely manner following completion of the public notice period and staff review. In fiscal year 1985, the Director of OPPR issued 211 orders in an average of 125 days from receipt to completion, involving individual section 7 pipeline certificates for construction and operation, transportation, sales, and abandonment.

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[16] Id. 54–56.

[17] Atlantic Refining Co. v. PSC of New York, 360 U.S. 378 (1959); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1960).

[18] *See* INGAA at 13, 16; Natural Gas Pipeline Co. of America at 23; Transcontinental Gas Pipeline Corp. (Transco) at 7–8; *but see* Department of Energy (DOE) at 4–5 (criticizing the Order No. 436 transitional "provisions [that] allow pipelines an opportunity to maintain many of their current transportation services for up to two years before meeting the requirements of the open access rule.").

[19] Committee on Interstate and Foreign Commerce, Report on H.R. 6831, "National Energy Act" (July 19, 1977) at 92–95.

[20] ANR Pipeline Company, Docket No. CP85-621, CP85-674, CP85-713, CP85-714, Order Setting Case for Hearing and Denying Temporary Authorization and Stay (October 31, 1985).

It must be recognized that this time period included the notice period, requests for, and receipt of, supplemental information, and in some instances the resolution of protests. These orders represented 35 percent of the total pipeline certificate orders issued during the same period covering similar proposals.

On the other hand, the Commission has also made clear that, under court precedents, where intervening parties raise material issues of fact, the Commission will set an individual section 7(c) application for hearing under the Natural Gas Act. For example, the Commission notes that this same standard applies to individual transactions authorized under blanket transportation certificates; the Commission's regulations require that such transactions be converted to individual section 7(c) applications *if* protested during the 120-day automatic authorization period and the protest cannot be resolved. The Commission also notes that the NGPA does not provide a *right* to pipelines to provide self-implementing transportation under section 311; it merely provides that the Commission may authorize such transportation under such terms and conditions as it may believe necessary.

Finally, the Commission notes that 132 individual section 7(c) certificate applications or authorization or amendments to prior authorizations were filed at the Commission between October 15, 1985, and November 15, 1985. The Commission considers that it has adequate resources to process these applications on a timely basis in fiscal year 1986, and also has adequate flexibility within its overall resources to respond to such future filings. For this reason, the Commission rejects the allegation that individual section 7(c) certificates are not a realistic alternative to transportation under a blanket certificate or transportation under self-implementing authority. This finding is based not only on the Commission's caseload data, but also on the fact that Order No. 436 does no more than codify the Natural Gas Act's requirement that rates and practices, such as access to transportation and levels of contract demand, must be just and reasonable and not unduly discriminatory or preferential. This requirement applies equally to both Order No. 436 transportation and to transportation under an individual section 7(c) certificate.

2. The Commission's Policies on Take-or-Pay

The majority of pipeline and local distribution company applicants allege error in the failure of the Commission to condition producer access to non-discriminatory transportation on take-or-pay relief.

In the alternative, these applicants assert that Order No. 436 is arbitrary and capricious to the extent it provides for non-discriminatory access and CD reduction/conversion conditions without at the same time "resolving" the liability of pipelines under take-or-pay clauses in their so-called "problem" contracts with producers.

This is error, applicants say, because non-discriminatory access and CD reduction/conversion would expose pipelines to displacement of their own gas sales by gas bought directly in the field. In turn, they say, displacement of their own gas sales by gas transportation would increase the pipelines' take-or-pay liability with their producers for gas not taken under long-term contracts. Thus, they conclude, Order No. 436 does not adequately address this take-or-pay exposure and, therefore, is arbitrary and capricious.

A fundamental criticism of Order No. 436 made by virtually all interstate pipelines and by many of their customers is that the Commission has not dealt in the desired way with non-market responsive contracts between producers and pipelines. The criticism was put succinctly by the American Gas Association (AGA) (at 4):

> The issue is really bargaining power. The Commission is decreasing pipeline bargaining power, but increasing producer bargaining leverage by requiring pipelines to transport unconditionally for producers and by allowing unilateral producer abandonments under new §2.77.

AGA further summarized the criticism of a number of companies [21] when it asserted (at 8) that:

> The non-discriminatory access provisions of new transportation §§ 284.8(b) and 284.9(b), plus new § 2.77 on expedited abandonment, take away a pipeline's only tools for renegotiating these contracts.

All this means is that the company management must evaluate its business options. A pipeline may determine that certain of its existing business arrangements make participation in the new rules unwise or undesirable. The pipeline might wish, prior to committing to the new rules, to alter any of a number of its existing business arrangements, including, to give but a few examples, the extent of its leveraged capital structure, the extent of its non-pipeline business interests or its existing contracts with producers. Nothing in Order No. 436 precludes a company's management from deferring participation until after these existing arrangements are modified.

In essence, these applicants are asserting that their "primary" or "only" tool for modifying contracts with producers is the ability to deny access to interstate transportation or to utilize the abandonment procedures under a Federal law to deny a producer the ability to move gas to market.

The Commission rejects these assertions concerning the effect of Order No. 436, and furthermore finds that conditioning producer access on take-or-pay relief would be inconsistent with the non-discrimination requirements of both Order No. 436 and the Natural Gas Act.

It is obvious that pipelines have been successfully using section 311 and end-user transportation to offset declines which have already occurred in their gas sales.[22] It is also clear that local distribution companies, the prime users of self-implementing transportation services, look on such services as an opportunity to supplement, not replace, the security of their agreements with pipelines for firm sales services at times of peak demand. In other words, LDCs look on gas transportation as one tool to supplement their on-peak firm sales revenues with revenues from interruptible sales to off-peak users.

The reason for this is made obvious by the comments filed in this docket by the AGA. AGA demonstrated that the decline in gas sales demand between 1980 and 1985 is not due to reductions in *peak* demand but to declines in *off-peak* demand by industrial users. This is confirmed by data filed with the Commission by pipelines in FERC Form No. 16. The Form No. 16 data indicates that the sales load factors of most interstate pipelines have declined since 1980 and are at historically low levels.[23]

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[21] *See also, e.g.*, applications of Northwest Pipeline Company, at 20 (pipeline access to transportation systems is really a pipeline's only trading card in seeking to renegotiate producer contracts); Tennessee Gas Transmission, at 6 (offering of transportation services in exchange for contractual concessions are the pipeline's "primary bargaining leverage against the producer"); and Natural Gas Pipe Line Company of America, at 17 (it is imperative for FERC to assist pipelines by providing them "trading chips" in dealing with producers, including conditioning producers' access to the interstate system).

[22] *See* "Voluntary Carriage Through Midyear 1985," Interstate Natural Gas Association of America (November 1985) at 1–3 ("Strong transportation growth offset sales declines during the second quarter of 1985. * * * This increase has occurred despite sizable declines in the pipelines' traditional sales business.").

[23] *See* Comments of AGA at 23, Attachment A. *See also* Final Rule, 50 FR 42413 (Oct. 8, 1985).

If LDCs exercise their option to convert or reduce firm sales service at times of peak demand, the Commission considers it more likely that they will either convert to firm transportation on the same pipeline, or else free up underutilized capacity under uneconomic CDs for use by other customers on the same pipeline. In either case, the pipeline may actually increase throughput and, therefore, gain the net benefits of spreading its fixed costs over greater units of gas service.

In the situation where an LDC actually displaces the pipeline's own system supply gas, the Commission believes that the pipeline's revenues from sales may not necessarily decline and may in fact increase. This is because the LDC is unlikely to switch to transportation unless it can obtain gas supplies cheaper than the pipeline's own system supply. To that extent, the pipeline will be competing with itself as both merchant and transporter, and therefore will seek to adjust its gas purchasing practices so as to lower its weighted average cost of gas *to all customers*. If it does so, it stands to gain additional sales revenues overall, as it competes with other pipelines and other fuel sources for new customers.

However, in the unlikely case that a pipeline is unable or unwilling to seek to compete for its own sales customers who switch to transportation, the Commission rejects the assertion that the pipeline would necessarily bear the risk of increased take-or-pay liability under its contracts with producers.

As Order No. 436 demonstrated at Exhibit O, take-or-Pay prepayments included by pipelines in rate base have remained stable or declined slightly between 1982 and 1985, despite the nearly 200 percent increase in pipeline transportation for LDCs and end users, and the continuing decline in pipeline sales during the same period. Although take-or-pay prepayments are in most cases less than a pipeline's potential take-or-pay liability, such prepayments do indicate the actual experience of the industry over the last few years. This actual data should be considered in contrast with various theoretical projections of such potential liability.

In addition, the Commission makes clear here what it intended in Order No. 436: nothing in Order 436, including the non-discriminatory access and CD reduction/conversion conditions, is intended to affect the rights of parties to gas supply contracts between pipelines and their suppliers, nor to affect the existing jurisdiction of state and local agencies over the production and conservation of natural gas. Thus, to the extent an LDC or end-user contracts with pipelines for transportation services under Order No. 436, nothing in Order No. 436 is intended to abridge the rights and obligations regarding take-or-pay liabilities under contracts between those pipelines and their suppliers.

To the extent these rights and obligations are renegotiated or become the subject of litigation, the non-discriminatory access and CD reduction/conversion conditions are not intended to affect such renegotiations or litigation. To the extent a pipeline in fact incurs additional take-or-pay liability due to transportation services under Order No. 436, nothing in Order No. 436 is intended to preclude the Commission from determining the appropriate allocation of revenue responsibility among the pipeline and its customers in an individual rate case filed to reflect the adjustments in sales and transportation service. Thus, Order No. 436 leaves to individual rate cases the determination of whether a pipeline, or its customers, or both, will bear any risk or revenue responsibility for actual take-or-pay expenditures.

Finally, the Commission rejects the argument that Order No. 436 fails to "adequately deal" with take-or-pay problems. Part B of Order No. 436 reaffirms the April 10, 1985, Statement of Policy issued by the Commission on take-or-pay "buy-outs" negotiated by pipelines and producers. Part B was adopted in the final rule in lieu of the more specific presumption of prudence for certain specified take-or-pay settlement costs proposed in the Notice of Proposed Rulemaking. This more specific proposal was unanimously rejected *as inadequate* by the overwhelming majority of interstate pipeline commenters and producer and LDC commenters as well.

For this reason, the Commission in Part B of the final rule reaffirmed the take-or-pay policy statement and adopted a new policy statement on expedited producer abandonment. This new policy statement provides that the Commission will expeditiously review unopposed applications for abandonment of gas subject to take-or-pay relief or substantially reduced takes. In the latter case, even where take-or-pay relief is not an express element of the abandonment application, the abandonment and sale of the gas elsewhere may make available to former pipeline purchasers the usual contract remedies against the producer for mitigation of damages, including mitigation of take-or-pay obligations.

The Commission notes with interest the study on high-cost gas contracts appended to AGA's petition for rehearing. This appendix indicates the bulk of high-cost "problem" contracts without "market-outs" may be those entered into prior to 1982 involving offshore gas regulated under NGPA section 102. To this extent, Order No. 436 as well as a recent order of the Commission [24] indicate that producers of such gas will not be granted blanket transportation authority independent of that provided by pipelines on a voluntary basis under Order No. 436. Producers of such gas may be able to obtain blanket authority to abandon their service obligations to pipelines and sell such gas elsewhere. However, voluntary release of such gas may be the subject of take-or-pay negotiations. In fact, Order No. 436 positively encourages on-going and potentially successful private negotiations between the parties regarding their take-or-pay rights and obligations, such as the recent contract settlement between Columbia and its customers and suppliers.[25]

Finally, regardless of whether these three assertions by petitioners are true or not, the Commission declines to condition producer access for another reason: conditioning producer access on take-or-pay relief would be patently inconsistent with the non-discriminatory access requirements of Order No. 436 as well as sections 4 and 5 of the NGA.

Where a willing producer-seller and a willing buyer agree to a contract for the sale of gas, it would be unduly discriminatory for a pipeline to refuse to provide transportation service for the gas under Order No. 436, merely because the producer and pipeline cannot agree on take-or-pay relief in another contract. Such a refusal would discriminate not only against the producer-seller, but also against the willing buyer who has never been a party to the take-or-pay contract in the first place.

Moreover, nothing precludes any gas shipper, whether end-user, LDC, or independent broker, from negotiating *on its own behalf* a condition in a "self-help" gas sales contract which would require the producer-seller to grant take-or-pay relief to the shipper's pipeline supplier before the shipper takes delivery of the gas. This is especially true where the shipper is attempting to purchase gas supplies that are currently under contract to a pipeline, but are not

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[24] Tenneco Oil Co., *et al.*, Order Permitting and Approving Limited Term Abandonments and Granting Certificates, Docket No. CI85-633-000, *et al.* (Oct. 29, 1985).

[25] *See also* "Columbia Gas Says 4 Suppliers Reduced Prices," *Wall Street Journal*, November 12, 1985.

being taken because of the pipeline's reduced need for those gas supplies.

For all these reasons, the Commission declines to condition producer access to non-discriminatory transportation on take-or-pay relief.

IV. Discussion of Transportation Issues (18 CFR Part 284)

A. Non-Discriminatory Access Under §§ 284.8(b) and 284.9(b)

1. Legal Authority Under NGA Section 7(e)

In Order No. 436, IV. A., the Commission defended the non-discriminatory access condition against attacks that it equates with the imposition of mandatory carriage requirements by explaining that the requirement that pipelines transport natural gas without undue discrimination is only "a *condition* on the certification or authorization of certain self-implementing transportation services which a pipeline may voluntarily choose to perform or not."

Some applicants believe that the mandatory nature of the decision to provide transportation services under Order No. 436 is further emphasized by the Commission's "threats" regarding the adverse consequences of a refusal to provide transportation services under Order No. 436. (*See* Tennessee Gas Pipeline at p. 7, NGPL at p. 25, Texas Gas Transmission at pp. 20–21.) These applicants cite the Commission's statements in Order No. 436 that it "fully intends to closely scrutinize projected levels of service and rates of return filed in rate cases as a means of assuring that pipelines bear their fair share of the risks of maintaining pipeline throughput" (Order No. 436 at IV. A.) and that the Commission intends to establish imputed sales levels and to remove underutilized facilities from pipelines' rate bases as incentives for pipelines to offer transportation services to maintain pipeline throughput.

Further, as noted by NGPL (at p. 25), there is no guarantee that non-discriminatory access conditions will not be attached to certificates issued in traditional section 7 proceedings, as the Commission indicated in Order No. 436 (at IV. A.) that it might on a case-by-case basis.

Several applicants emphasize that only Congress can impose common carrier status upon contract carriers [26] and that Congress has consistently refused to require mandatory carriage or to impose common carrier status on natural gas pipelines, as recognized by the Commission in Order No. 436 (at IV. A.).[27] Tennessee Gas Pipeline notes that in hearings on H.R. 11662, a predecessor to the bill that became the Natural Gas Act of 1938, Congressman Cole and Dozier A. Devane, Solicitor of the Federal Power Commission, clearly stated that natural gas pipelines would not be common carriers:

> MR. COLE: Where you find a line is not transporting gas to its fullest capacity, the idea is to compel that line to take gas from anyone in the field where the pipeline gets its gas?
>
> MR. DEVANE: There is no provision in here which gives the Commission the authority to make them take gas, no; they would have to have available at the source sufficient gas to fill the pipeline to its capacity.
>
> MR. COLE: They are not made common carriers.
>
> MR. DEVANE: No; not the gas pipelines.[28]

As evidence of Congressional reluctance to impose common carriage requirements on pipelines, several petitioners [29] point out, as discussed below, that in section 602(b)(2) of the NGPA, the Congress specifically provided that:

> *Common Carriers*—No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation . . .

(2) Authorized by the Commission under section 311(a) of this Act.

Further the applicants emphasize that the only instances in which Congress has empowered an agency to require natural gas pipelines to render services are (1) the Outer Continental Shelf Lands Act of 1978, 42 U.S.C. 1334 (e) and (f), which requires that pipelines authorized to transport OCS gas provide transportation on a non-discriminatory basis; and (2) section 7(a) of the Natural Gas Act which authorizes the Commission to order a natural gas company to provide sales service to a local distribution company if (a) no undue burden is placed on the natural gas company, and (b) there is no resulting impairment of the Company's ability to render adequate service to its other customers.

INGAA (at p. 15) and CIG (at p. 36) further argue that the court's mandate in the *Maryland People's Counsel v. FERC* cases, 761 F.2d 768; 761 F.2d 780; 768 F.2d 450 (D.C. Cir., 1985) and consolidated case 85–1086 did not require that the Commission adopt regulations that indirectly impose common carriage.

These applicants assert that pipelines and their customers should be permitted to negotiate transportation access on terms that recognize the individual circumstances of particular systems. There should be some recognition of the long-standing contractual relationships among the customers themselves. Order No. 436 would, they assert, abruptly cancel these contractual relationships and cause cost-shifting among customers. However, desirable the objective of non-discriminatory transportation, reasonable latitude should be permitted to pipelines and their customers to work out arrangements that would clearly pass non-discrimination tests without drastic economic consequences either to the pipeline or its customers.

In short, these applications claim that: (1) Order No. 436 is coercive and hence in fact an involuntary program; (2) the non-discriminatory access condition, because it is involuntary, effectively mandates carriage and hence unlawfully turns pipelines into common carriages; (3) the Commission erred in determining that it is *per se* unduly discriminatory for a pipeline to refuse to transport gas that displaces its own sales; and (4) the rate and CD adjustment conditions are unreasonable.

The Commission considered most of the arguments raised by the applicants which suggest that the Commission lacks legal authority to apply the non-discriminatory access condition to interstate transportation under the NGA prior to issuing Order No. 436. Further, the Commission reviewed the requirements of the NGA, the legislative history of the NGA, and relevant case law.

Section 7(e) of the NGA, which was added as an amendment to the act in 1942, states, in pertinent part, that:

> The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

According to the Supreme Court:

> The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges . . .

[26] *See* Northern Natural at p. 5, *citing* FCC v. Midwest Video Corp., 440 U.S. 689, 702–709 (1978) and Florida Power and Light Company v. FERC, 660 F.2d 668 (5th Cir. 1981).

[27] *See, e.g.*, Tennessee Gas Pipeline at p. 8; Northern Natural at p. 5; NGPL at p. 22; Florida Gas Transmission at p. 14; and CIG at p. 37.

[28] Tennessee Gas Pipeline at p. 8, quoting Roach & Gallagher, *A Compilation of the Legislative History of the Natural Gas Act* (1935—July 1, 1968) Part I, at page 70.

[29] *See* Tennessee Gas Pipeline at p. 8; Northern Natural at p. 5.

. . . In view of this framework in which the Commission is authorized and directed to act, the initial certification of a proposal under section 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in section 5 proceedings through which initial certificated rates are reviewable appears nigh interminable.[30]

Thus, as stated by the Commission in Order No. 436 (at Section IV.A.), the Commission's certificate and conditioning authority is the means by which it effectuates the purpose of the NGA to underwrite just and reasonable rates to the consumers of natural gas.[31] Any attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity.

While determined to use the full breadth of its section 7 conditioning authority to end discriminatory transportation practices and thereby fulfill its obligation under sections 4 and 5, the Commission recognized that its actions could neither directly nor indirectly impose common carrier obligations on pipelines in violation of the NGA.[32]

Further, the condition only applies with regard to each of the individual types of Order NO. 436 transportaiton sesrvice offered. Therefore, for example, an interest pipeline may transport under the Part 284, Subpart G blanket certificate program without becoming subject, by reason of such blanket certificate transportation, to an obligation to provide service under Subpart B of Part 284 and vice versa. Further, the non-discriminatory access provisions of §§ 284.8(b) and 284.9(b) *per se* do not cover transportation under existing individual section 7 certificates or new individual section 7 certificates filed outside of the optional expedited certificate procedure.

The Commission agrees with those petitioners that state that the court's mandate in *Maryland People's Counsel* v. *FERC*, 761 F.2d 768 and 768 F.2d 780 (D.C. Cir. 1985), was not intended to require that the Commission adopt mandatory carriage regulations. In any event, the Court's mandate clearly did judicially recognize all that is necessary for present purposes, that is the Commission has the authority to impose non-discriminatory access conditions on piple line transportation.[33]

The Commission determined that the non-discriminatory access conditions in Order No. 436 did not amount to a "direction" or a "mandate" to pipelines to transport for others as an "affirmative duty" because the condition is only a condition. As it stated in the order: "a *condition* on the certification or authorization of certain self-implementing transportation services which a pipeline may *voluntarily choose to perform or not*, strictly at its own option." Thus, Order No. 436 does not "direct" or "mandate" a pipeline to do anything. Further, the non-discriminatory access condition, even when accepted by a pipeline as part of its self-implementing transportation program, does not impose any "affirmative duty" on a pipeline to transport. It only requires that when a pipeline *does* choose to transport on a self-implementing basis, it must provide those transportation services in a non-discriminatory manner. Nor does the condition cover all transportation services and thus operate as mandatory *in effect*. A pipeline remains free to seek authorization for other transportation not covered by the condition and the Commission will review them on a case-by-case basis.[34]

Furthermore, the Commission is not dissuaded by the comparisons made by several petitioners including, e.g., NGPL (at pp. 12, 28) and City of Willcox, Arizona (at p. 35), between Order No. 436 and the legislative proposals to mandate common-carriage transportation that have been considered, but not enacted by Congress over the years. Nor does the Commission believe that Order No. 436 is inconsistent with section 602(b)(2) of the NGPA, which provides that no person shall be subject to regulation as a common carrier by reason of any transportation authorized under section 311(a) of the NGPA. In the first place, the Commission notes that neither the NGA nor the NGPA defines "common carrier." Nevertheless, the provisions of

[30] Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388–89 (1959) (CATCO).

[31] Id. at 389.

[32] An important factor in the Commission's determination that it does not have the authority to mandate common cariage was the legislative history of sections 303 and 304 of Title III of H.R. 5423 which was introduced on February 6, 1935, (74th Congress 1st Session) by Representative Sam Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce.

Sections 303 and 304 of H.R. 5423 provided in pertinent part (emphasis added):

Section 303(a). *It shall be the duty of every distributor to* furnish natural gas, to exchange natural gas with, and *transmit natural gas for any person* upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable . . .

Section 304. Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, *it may by order direct a distributor* to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more persons, to permit use of its facilities by one or more persons, or utilize the facilities of, sell natural gas to, purchase natural gas from, *transmit natural gas for*, or exchange natural gas with *one or more other persons* . . .

. . . [T]he Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of reimbursement reasonably due to any of them.

Sections 303 and 304 must be read in the context of sections 4(b) and 5(a) of the NGA as enacted. In contrast to the affirmative duty of unenacted section 303 of H.R. 4523, section 4(b) of the NGA flatly prohibits "any undue preference or advantage" and "any reasonable difference" in service or as between classes of service. In contrast to the discretionary proposed authority in unenacted section 304 of H.R. 5423 to *order* transportation, section 5(a) of the NGA contains *no express authority to order transportation*. Instead, section 5 limits the Commission to fixing prospectively by order the "just and reasonable . . . rule, regulation, practice or contract" to be observed.

[33] In its order on the blanket certificate program (No. 84–1090), the court noted (761 F.2d at 789 n.19) that MPC's plea that blanket transportation certificates be conditioned on non-discriminatory access accords with the recommendation of the Department of Energy: "To achieve the benefits of a properly developed spot market for natural gas . . . FERC should use its authority over natural gas transportation to require pipeline companies to provide carriage on a non-discriminatory basis whenever there is idle pipeline capacity." Second DOE Section 123 Report at p. 82. The court further noted that the Commission does not question that it has such authority, *citing* Tennessee Gas Pipeline Co. v. FERC, 680 F.2d 212, 214–15, (D.C. Cir. 1982); Transcontinental Gas Pipeline Corp. v. FERC, 589 F.2d 186, 190 (5th Cir. 1979) (invoking "the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity"), *cert. denied*, 445 U.S. 915 (1980).

[34] Several petitioners argue that Order No. 436 is similar to regulatory programs rejected by the courts in Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) and Consolidated Edison Company of New York v. FPC, 511 F.2d 372,377 (D.C. Cir. 1974). The Commission does not believe these cases are germane in this instance. In *Moss* the Civil Aeronautics Board failed to comply with the public notice and hearing requirements of the Federal Aviation Act in prescribing a fare formula for domestic airlines. Moreover, the court found that the formula actually amounted to a prescription of rates, because the Board admitted that the pressures on carriers to file conforming rates was "great if not irresistable." In a similar vein, the court held in *Consolidated* Edison that if end-use curtailment plans were not filed voluntarily by pipelines but were the result of coercion by the Federal Power Commission the plans would be invalid, because the Commission could not impose a change on an existing tariff without complying with section 5 of the Natural Gas Act.

Neither of these cases applies to the circumstances of Order No. 436. In the first place, Order No. 436 was issued in compliance with applicable rulemaking procedures, which involved extensive public participation. Moreover, as the Commission has already explained, the self-implementing transportation program is voluntary and indeed alternative authority is fully available under traditional Natural Gas Act procedures.

Order No. 436 do not regulate pipelines as common carriers, as that term is commonly understood.[35]

For instance, even though Order No. 436 requires, as the cited legislative proposals would have required, non-discriminatory access, the all-important distinction is that Order No. 436 allows a pipeline the option of applying to provide transportation services under individual NGA section 7 certificates. Order No. 436 also gives a pipeline that has opted for self-implementing transportation the opportunity to cease such transportation and resume its status as a merchant. None of the mandatory common-carriage proposals considered heretofore by Congress have included any equivalent option. While a transportation application under the regular NGA section 7 procedures is open to challenge on the grounds that approval of the application would result in undue discrimination, only the individual transportation arrangement covered by the pipeline's applications is at issue in a regular NGA section 7 certificate proceeding and, therefore, denial of a certificate in that proceeding does not prejudice certificate applications by the same pipeline in other proceedings. This option, unlike the legislative proposals for common-carriage, effectively allows a pipeline the discretion to determine whether or not to become a transporter of gas. Further, while allegations of unduly discriminatory effects will be considered in regular NGA section 7 transportation certificate proceedings, a regular NGA certificate is not conditioned on a pipeline's providing transportation to all shippers requesting service. For example, if the Commission should determine that approval of a regular NGA section 7 transportation certificate application would cause undue discrimination to another party, the discrimination could be cured by an amendment to the application as it affects a particular additional shipper.

The Commission cannot agree with those applicants that insist that it is not unduly discriminatory for a pipeline that transports gas to refuse to transport gas that displaces the pipeline's sales. This is precisely what the court found objectionable in *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir., 1985). Pipelines that were willing to transport gas for their fuel-switchable customers were not required to transport for their captive sales customers that were incapable of switching fuels.

2. Effects of Non-Discriminatory Access

a. *On Order No. 319 Transactions.* Certain of the applications for rehearing request that the Commission amend the final rule to allow new transactions to provide transportation for local distribution companies and high-priority end users, previously authorized under NGPA § 311 and Order Nos. 319 and 60, to continue to be made without requiring interstate pipeline companies to provide non-discriminatory access. Philadelphia (passim), CIG (at pp. 25–28) and BUG (at pp. 3–8) assert that the access condition is inconsistent with the NGPA and is not required by the *Maryland People's Counsel* decisions of the D.C. Court of Appeals. Huffco (at pp. 17–18) contends that certificates for the transportation of gas to high-priority end users are required to be issued by section 7(c)(2) of the NGA.

Existing transportation for high-priority end users that had been authorized under § 157.209(a) of the regulations has been permitted to continue for the term of the transportation arrangement, subject to the terms and conditions existing at the time it was authorized. *See* § 284.223(g). New high-priority end-user transportation, section 311 transportation for intrastate pipelines and local distribution companies, transportation for end users under § 157.209(e), and transportation for interstate pipelines, are subject to the express requirement that the transporting pipeline provide non-discriminatory access for all shippers and the various other requirements of § 284.7 *et seq.* The Commission has determined that the practice of restricting access to transportation is unduly discriminatory and preferential and has prevented consumers from obtaining the lowest reasonable rates for both gas and transmission. With that determination, and in view of the many other reasons expressed in the final rule for requiring open access for future transportation, it would be inconsistent with the whole rationale underlying the final rule (and, in the Commission's view, with the rationale underlying the *Maryland People's Counsel* cases as well) to permit new transactions to be initiated for service without adherence to the requirements of the final rule.

BUG alleges that by imposing new conditions on the transportation of gas under section 311 to local distribution companies, the rule will deprive it of gas at a time when it is most needed, during the coming winter heating season. BUG claims that the new conditions should not be made effective until after the winter is past.

BUG advises that several pipelines now transporting gas under section 311 have indicated that they do not intend to transport long-term and non-SMP gas supplies after December 14, 1985. However, BUG has not shown that gas service from its suppliers will not be available in fact. At most, its filing reflects only that some changes may be necessary in the prior terms and conditions of its transportation arrangements. Moreover, the rules allow most transportation services which had commenced on or before October 9, 1985, to continue under the pre-existing conditions (except as to rates and reporting) until the earlier of the expiration of the term of the transportation agreement or October 9, 1987. These transition provisions should operate to diminish any discontinuance of service. Finally, pipelines now transporting long-term gas supplies under section 311 may also apply for NGA section 7 certificates to continue such transportation.

Section 7(c)(2) of the NGA provides that the Commission *may* issue a certificate for high-priority transportation. It does not *require* it, and certainly does not preclude certificates that are issued from being subject to a pipeline's providing nondiscriminatory access.

Section 284.10(a) is modified to allow new transportation arrangements under section 311 of the NGPA to be commenced or continued for a transitional period through February 15, 1986, without triggering the CD reduction/conversion condition. The purpose of this change is to extend through the major portion of the 1985–1986 winter heating season the transition period intended by Order No. 436. This transition period is intended to permit different segments of the industry to adjust their commercial arrangements to take advantage of the new opportunities under Order No. 436, without unduly disrupting transportation during the winter heating season.

b. *On Intrastate Pipelines.* The State of Louisiana (at pp. 4–9) asks that the Commission clarify that the non-discriminatory access condition only applies to interstate service and not to purely intrastate service even if the latter service is performed "on behalf of" an interstate pipeline acting as a broker, seller, or off-system seller.

As framed, the question answers itself for if the transportation is, in fact, purely intrastate, then the Commission lacks

[35] Since Order No. 436 does not have the effect of imposing common carriage status on contract carriers, cases cited for the proposition that only Congress can impose that status (FCC v. Midwest Video Corp., 440 U.S. 689, 702–09 (1978) and Florida Power and Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981)) are not applicable.

jurisdiction over the transportation. The Commission declines, however, to render any generalizations about jurisdictional status. Persons may seek a declaratory order if they have questions regarding specific circumstances.

Louisiana Intrastate (at pp. 6–7), Termac (at pp. 4–6), Tenngasco (at pp. 9–10) Amoco Gas (at pp. 2–3), and Louisiana Resources (at 5) argue that the non-discriminatory access condition is arbitrary and discriminates against intrastate pipelines because they have no option to avoid that condition other than to become subject to the NGA or to completely withdraw from the interstate market. Amoco Gas also asserts that a NGPA section 502(c) adjustment is an alternative as well. Interstate pipelines, they assert, have an advantage because they can opt for a NGA section 7(c) certificate without the condition. Tenngasco, for example, urges that, if the condition remains, the rule should be modified to reinstate the prior approval application procedure that the Commission removed (§ 284.127). In that way, they would be permitted to seek prior approval of section 311 transportation without the non-discriminatory condition. Termac (p. at 8) adds that section 311(a) of the NGPA reflects Congress' intent that not everyone has a right to participate in a section 311 transaction.

The Commission does not agree that the non-discriminatory access condition is arbitrary or discriminates against intrastate pipelines. Contrary to some petitioners' assertions, section 7(c) certificates are available to intrastates on a "limited jurisdiction" basis without the full panoply of NGA rate and service obligations. That is, jurisdiction extends only to the specific service authorized, and the interstate remains non-jurisdictional with respect to its remaining operations (*See, e.g., United Gas Pipe Line Co.*, 1 Ferc ¶ 61,247(1977)).

Moreover, there are various differences in the Commission's treatment of intrastate pipelines that counter-balance the alleged disadvantage they have. In recognition of the different circumstances of intrastate pipelines, the Commission has given intrastate pipelines the advantage of being able to choose whether or not to offer firm transportation, interruptible transportation, or both.[36] Participating interstate pipelines must provide both types of service. Moreover, interstate pipelines who accept optional expedited certificates for transportation also must accept the non-discriminatory access condition.[37] And, among other counter-balancing differences, interstate pipelines alone are subject to the CD reduction and conversion provisions of § 284.10.

Finally, the Commission notes that §§ 284.107 and 284.127 were dropped because the reasons for their existence (the system supply test and the two-year limitation) were eliminated by the final rule. But there is no reason to reinstitute them as a means of avoiding the non-discriminatory access provision. The nondiscriminatory access condition serves a valid regulatory purpose of being the first line of defense against arbitrary or exclusionary interstate transportation by any participating pipeline, whether inter- or intrastate.[38]

For these reasons, it would be counter-productive to reinstitute the prior approval procedure under section 311(a) just to provide a means for intrastates to avoid the condition that is the very cornerstone of the entire program.

c. *On Curtailment Plans of Interstate Pipelines.* Texas Gas, Northwest Natural and APGA assert in their requests for rehearing that Order No. 436 inadequately considers the effects of the non-discriminatory access condition (§ 284.8(b) of the final rule) on both capacity-related and supply-related curtailments. Texas Gas (at p. 28) is concerned that the final rule, by affording firm sales and firm transportation customers equal access to pipeline capacity during times of capacity-related curtailment, will induce low-priority sales customers to convert their existing sales entitlements to firm transportation. Texas Gas maintains that, as a result, transportation for low-priority end users will occur at the expense of higher-priority sales customers.

If pipelines manage their systems prudently the Commission would expect capacity-related curtailments to continue to be relatively rare. Capacity-related curtailments would only be expected to impact on firm service customers in the event of a pipeline's overbooking of capacity or short-run *force majeure* conditions. Also, *force majeure* conditions, which by their very nature are unexpected and temporary, are unlikely to alter a sales customer's long-term gas purchasing profile. In addition, pipeline practices in booking firm transportation service and assessing capacity reservation charges are subject to prudency review under sections 4 and 5 of the Natural Gas Act and remedies for overbooking can be fashioned in individual cases by the Commission.

A pipeline overbooking its firm pipeline capacity could also be subject to contractual liability in the event that it was unable to provide the contracted level of service. Nothing in the Commission's final rule operates to affect the contractual provisions between the parties that may govern liability relating to a pipeline's overselling or overbooking its pipeline capacity.

Thus as a practical matter, the Commission expects that the non-discriminatory access condition of the final rule will have slight effect on pipeline curtailment plans for gas supplies.

Northwest Natural (at p. 12) and APGA (at pp. 21–26) are both concerned that under the conversion option of § 284.10 of the final rule, sales customers serving essential agricultural users and process or feedstock requirements will lose the curtailment priority established for such end uses under sections 401 and 402, respectively, of the NGPA. They both foresee situations in which a firm sales customer will convert its service to firm transportation service and lose a high-priority claim to the pipeline's system capactiy. APGA goes on to urge that in the event of capacity curtailments the Commission requires that a pipeline allocate its capacity to both sales and transportation customers on the basis of end-use profiles. To do otherwise, it argues, violates Title IV of the NGPA.

At the time the NGPA was enacted, the curtailment plans on file with the Commission generally governed only the interruption of sales. In addition, most of these plans applied only to supply shortages, not capacity limitations. If Congress intended to require, as APGA suggests, that end-use curtailment be imposed on all transportation service as well as on sales, it would have done so explicitly. On the contrary, the Commission believes that in conferring high-priority status under NGPA sections 401 and 402 on certain end uses, it was intended that such priorities were to be applied in the context of the curtailment plans previously approved by the Commission. (Note that even before Order No. 436, customers could substitute transportation service for sales if the pipeline agreed to it and applied for appropriate authority under the Natural Gas Act.) If a pipeline's approved curtailment plan applies only to sales, then sales for essential agricultural, process or feedstock requirements, are entitled to the NGPA

[36] 50 FR 42434.

[37] 50 FR 42436.

[38] 18 CFR 157.102(a)(2).

priority, but transportation of shipper-owned gas is not affected. This interpretation is supported by the NGPA conference report, which states in relevant part:

The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray . . . . For example, the conferees do not intend the reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.

Joint Explanatory Statement of the Committee of Conference, Title IV, section 401, I FERC Statutes and Regulations ¶ 3101 at p. 3121.

AGPA maintains that in the event of supply-related curtailments, a pipeline transporter should be able to call on transportation gas owned by others and use that gas to meet its own high-priority sales requirements.

As the Commission stated in Order No. 436, 50 Fed. Reg. at 42,436, during the supply curtailment era it never allocated gas supplies owned by individual shippers among sales customers of the transporting pipeline. *See Sebring Utilities Commission v. FERC,* 591 F.2d 1013 (5th Cir. 1979). Aside from a declared emergency under section 303, nothing in the NGPA requires this. To do so would be inconsistent with the purpose of NGPA sections 311 and 312, which was designed in part to encourage transportation of excess gas supplies to relieve markets curtailed because of supply shortages.

Texas Gas suggests that the first-come, first-served requirement for the allocation of capacity to potential shippers means that in the event of capacity-related curtailments, pipelines are required under the final rule to interrupt transportation on a "last-on, first-off" basis. Texas Gas misunderstands the applicability of the first-come, first-served requirement. This stricture is to be followed in *contracting* for available capacity. Curtailment resulting from insufficient transportation capacity among firm contract customers because of pipeline overbooking is doubtful in light of contractual liability that may result. Capacity-related curtailment, if occurring at all, is likely to be caused by *force majeure* conditions, such as winter freeze-offs, compressor station failure, line failures, and the like. Incidents such as these generally impact on particular segments of a pipeline's system and overall system capacity may be unaffected or affected to a lesser extent. Remedial measures employed by the pipeline-transporter are usually of short duration, localized and traditionally affect only a small portion of its overall operations. Thus, if capacity is insufficient to meet demand, the final rule allows pipelines to allocate the limited capacity of their systems among their firm and interruptible customers—whether sales or transportation customers—on the same basis that they allocated capacity prior to the rule.

d. *On Prices of Natural Gas.* Laclede (at p. 20) asserts that, while distributors must be assured of long-term supplies at a reasonable cost to meet the needs of their high-priority markets, Order No. 436 gives no such assurance. Laclede argues that, regardless of Order No. 436, the only gas that distributors will be able to buy at a reasonable price likely will be short-term supplies on the spot market. Indeed, Laclede believes the cost of long-term supplies will be greater than that of current supplies. This projection is based on the assumption that the large producers, which alone can provide long-term reliable supply, will demand a price premium for selling gas to distributors because (1) the distributor will demand greater supply reliability than that usually needed by a pipeline buyer that has many supply sources; (2) a distributor will be a less predictable and less reliable purchaser than the much larger pipeline since a distributor is unable to take gas at even flow rates and perform other load balancing functions as efficiently as a pipeline; and (3) producers, in the hope that gas prices will rise, would rather sell their least expensive gas to low-priority end users, who will buy on a short-term basis, than bind themselves to low prices under long-term contracts with distributors.

Laclede (at p. 21) further argues that, even if distributors can buy reasonably-priced long-term supplies in the field, the Commission still assumed too much in issuing Order No. 436. Laclede emphasizes that bottlenecks in the pipeline system can prevent the transmission of gas to distributors' markets. Further, Laclede believes that Order No. 436 assumes unrealistically that available pipeline capacity will be in the right place to transport distributors' gas purchases to them.

In sum, Laclede attacks what it believes to be the basic assumptions underlying Order No. 436: that effective pipeline-to-pipeline competition exists and will increase and that distributors will be able to compete effectively with pipelines in purchasing competitively-priced gas from producers. Further, Laclede believes that producers that have gas supplies that cannot be marketed readily at today's average gas prices will be encouraged by Order No. 436 to sell lower-priced gas to the competitive industrial boiler fuel market which will purchase such supplies on a short-term basis. Under Laclede's scenario, captive high-priority markets will not get a fair share of lower-priced gas because the distributors cannot meet their long-term commitments by purchasing lower-priced gas,which producers would rather sell on a short-term basis. Producers do not have the fear that distributors may switch to other fuels, which would provide a contervailing incentive to provide lower-priced supplies to distributors, since the price of alternative fuels to distributors' residential and commercial markets would be much higher (after factoring in the costs end users would incur in converting facilities to alternative fuel-use capability) than the price charged to large industrial customers.

Laclede (at p. 23) criticizes Order No. 436 for failing to provide effective restraints against monopolistic pricing. Laclede believes that the Commission is wrong when it claims [39] that, having given pipelines a real opportunity to enter one another's markets, it can deregulate the prices that pipelines charge for much of their gas. This position is based on Laclede's assumption that the new industry structure created by Order No. 436 will not result in effective competition. Laclede states that, because of Order No. 436, the price of gas in its market could rise higher than the price of electric heat.

Southern Natural Gas Company (at p. 17) also believes the Commission's conclusions regarding the spot market for gas are incorrect. This petitioner states that the Commission is wrong in relying on the availability of spot market gas as a reliable long-term gas suply alternative since that gas presumably will be bought up by pipelines' customers that exercise their contract demand reduction rights under § 284.10.

Southern Natural (at p. 18) states that, unlike with oil and coal, there is no ability to stock-pile or to provide for any reasonable volume of gas to serve the nation's gas needs for a significant period; these requirements are met in the long run, not by gas deliverability, but by gas reserve addition. Therefore, according to Southern Natural, the Commission must distinguish excess gas deliverability from gas reserve inventory. Southern Natural states further that, whether the emergence of the current spot market for gas production results from excess deliverability, conservation, reduced gas markets, or other factors, the gas

[39] *See* Notice Requesting Supplemental Comments Mimeo at 78–82.

markets cannot have a long-term reliable gas supply based on the assumption there will be a continuing spot market for gas production. But, according to Southern Natural, such an assumption is implicit in Order No. 436, since it allows customers of pipelines maximum flexibility in tapping different sources of gas.

Southern Natural (at p. 19) alleges that the Commission has provided no findings to support the conclusion that gas reserves will be sufficient to allow a continuation of spot market sales at the current 2 to 2.5 trillion cubic feet per year level. According to Southern Natural, 85 percent of current spot market sales may be from excess deliverability or produced from existing committed gas reserves, although Southern Natural (at p. 20) admits it is unlikely that spot market sales depend so heavily on these sources of supply. It nevertheless criticizes the Commission for not explaining in Order No. 436 the sources of the 2 to 2.5 trillion cubic feet of gas currently moving in the spot market. Furthermore, Southern Natural (at p. 21) asserts that the Commission has not gathered either the individual or industry-wide data required to sustain a conclusion that the current spot market will be viable for the long run. In this regard, Southern Natural states that current gas consumption statistics are not a substitute for the facts on the volumes of gas in identified reserves.

Furthermore, Southern Natural (at p. 21) argues that, while the Commission recognizes that purchasers of gas are seeking the same opportunities to swing from one gas supplier to another, as partial requirements customers currently do, the Commission has failed to evaluate the consequences that customers' switching of suppliers will have upon the ability of pipelines to continue to offer reliable, long-term service to their sales customers in the future. Southern Natural (at p. 22) asserts that the comparative shopping by customers that is encouraged by Order No. 436 will make it virtually impossible for a pipeline to make efficient business judgments in acquiring gas reserves to meet the needs of its customers in the future since the pipeline will have no way of accurately forecasting the portions of those customers' demands for natural gas that they ultimately will expect the pipeline to satisfy. Southern Natural (at pp. 22–23) further states that, despite the Commission's assertions regarding the increase in storage capacity in the United States, a pipeline's knowledge that available storage capacity is sufficient to hold any gas it buys and cannot resell is not a reasonable basis, as the Commission seems to contend it is, for the pipeline to contract for the reserves needed to supply its customers' firm, peak-day requirements without having some assurance that its customers actually will purchase at least a certain level of supplies from the pipeline during the remainder of the year.

The Commission disagrees that it has not adequately supported its conclusions. There is sufficient pipeline-to-pipeline competition to justify expanding the opportunities for pipelines to transport into one another's traditional markets and for gas purchasers to reduce their contract demand entitlements in order to purchase gas from all available supply sources.

While it is true that pipelines generally continue to be fairly fully utilized during peak period operations, as indicated in Order No. 436, total deliveries through their systems have fallen sharply from the 1972–1973 period. This phenomenon has been reflected in lower annual load factors for interstate pipelines and higher unit costs of providing service. It has also meant a significant increase in the amount of capacity available for transportation outside of the periods of peak demand.

Further, the maturing of the pipeline industry in recent decades has meant that there is now an interconnected nationwide pipeline grid. This enables increasingly efficient transportation transactions through backhauls, displacement and exchanges, which enable the "transportation" of a particular supply to a particular purchaser that is far removed from the supply and indeed may not even be physically connected with the field supply source. Thus, even a customer that actually has only one supplier nevertheless has access to gas supplies located in virtually any producing area in the Nation, if the customer has non-discriminatory access to transportation services under just and reasonable rates. Conversely, a producer of gas—given the same non-discriminatory access to the transportation grid—now can seek markets for its gas virtually anywhere in the Nation.

In view of the above consideration, the Commission believes, contrary to Laclede's and Southern Natural's claims, that many LDCs and other purchasers will be able to arrange for transportation of competitively-priced gas supplies by their traditional pipeline suppliers, even if the supplies are not directly accessible to those pipelines. The Commission recognizes, however, that some LDCs, including some that exercise their § 284.10 contract demand reduction and conversion options, will not be able in all instances to arrange for transportation of lower-priced gas that they locate.

Admittedly, the pipeline configuration of those suppliers with which a customer is connected with sometimes make transportation of their customers' self-help gas purchases infeasible. Further, every gas purchaser will not be able to take advantage of the pipelines' expanded authority and its obligation to transport whenever the LDC can acquire cheaper gas.

An LDC, like Laclede, that is willing to accept that gas generally may be available in plentiful supply but at uneconomic prices or inaccessible to the LDC's pipeline suppliers, will have to consider these factors when deciding whether to exercise its option under § 284.10. In any event, the failure of Order No. 436 to guarantee to every gas purchaser that it always will be able to arrange for transportation of lower-price gas supplies does not diminish the substantial benefits to LDC and end users as the result of Order No. 436. The final rule is designed to provide all current and future gas customers with a broader array of supply options; it is not designed to guarantee that any one supply option is necessarily cheaper and/or less risky than all others, or that all potential shippers will be able to contract for and have transported gas that is cheaper than pipeline supplies.

Also, commercial storage has continued to increase over the years to a total of 8,043 Bcf in 1984. (*See* Order No. 436). The availability of this storage capacity means that gas does not have to be produced and consumed at identical rates in order to avoid the shutting in of production or the making of "dump" sales. Rather, a pipeline can take receipt of gas volumes even when it has no immediate market for the gas. Operational constraints remain a limitation, of course. But operational flexibility has increased enormously.

The spot market has been steadily increasing also. Thus, by the summer of 1985, the spot market was accounting for a substantial percentage of the total market. As shown in Order No. 436 (in Exhibit D, which summarizes experience under the Commission's transportation programs from January 1, 1985, to June 30, 1985; Exhibit J, which lists local gas utilities and intrastate pipelines receiving gas under NGPA section 311; and Exhibit K, which lists end-users receiving gas under blanket certificates), transactions under both NGPA section 311 and blanket transportation certificates were being performed by virtually every major pipeline, hundreds of local gas utilities, and hundreds of individual end-users. Customers in the great majority of the states have been benefitting from access to the national gas market under the NGPA section 311 transportation program, the blanket certificate program, or both.

While it is true that estimates of the exact size of the spot market vary, a study submitted in this docket by the United States Department of Energy (DOE) estimates that by January 1985 the total spot market (including intrastate transactions) had increased to between 2 to 2.5 Tcf per year (compared to total gas consumption of about 17–18 Tcf). This figure represents a tripling in the size of the spot market in the space of one year. Moreover, the great bulk of this growth has taken place in the interstate market.

In addition, the DOE study documented several significant trends that are evident in the filings made with the Commission:

(1) The average size of the spot transaction is continuing to decrease, indicating a broadening of the array of buyers and sellers in the market.

(2) Local gas distribution utilities are increasingly involved as nearly all states have approved, or are considering, gas transportation rates for local utilities.

Finally, the Commission notes that over the last two years the market has developed an infrastructure that includes trade publications following prices and market developments and at least one electronic buy-sell exchange to which members of the public are free to subscribe.

For the above reasons, as more fully discussed in Order No. 436, the Commission concluded, and hereby reaffirms its conclusion, that in view of the breadth and variety of the spot market it is not a transitory phenomenon. Rather, the development of this market is an indication of the radical change that the natural gas industry has under gone and is continuing to experience as a result of the development of distinct gas markets and the reemergence of unbundled transportation service. To be sure, the exact size of the spot market in future years will change as the preferences of buyers and sellers change, again however, the Commission notes that it is only providing a framework within which all customers can participate in the market, it is not requiring them to so participate.

In view of these considerations, the Commission disagrees with Laclede's and Southern Natural's assertions that distributors will be unable to arrange with producers for long-term supply arrangements for gas at reasonable prices. Regardless of the nature of the spot market for gas transportation and supplies, Order No. 436 assumes that self-implementing and blanket transportation arrangements may be performed on both a short-term and long-term basis, in times of shortage as well as times of surplus, in response to current market conditions. By removing restrictions on eligible gas categories, shippers, and the duration of transactions, Order No. 436 actually enhances the flexibility of pipelines to maintain their role in providing long-term, reliable services to their customers, contrary to the assertions of the applicants.

Since the NGPA does not prohibit a producer from selling its gas below market clearing price or below the applicable NGPA maximum lawful price, the producer may charge different customers different prices. Laclede argues that, the producer will not reduce the price of the gas it sells directly to distributors because of the seasonal changes in the distributors' needs and because distributors require long-term supply arrangements. The Commission does not agree with Laclede's conclusion. The Commission believes that purchasers such as Laclede should be able to negotiate for supplies at prices representing their commodity value under contracts with market responsive provisions. Under such circumstances, it should be possible to arrange for longterm supplies.

e. *On Transportation of Gas from the Outer Continental Shelf.* One commenter, Ashland Exploration, Inc. (Ashland), addresses the issue of whether the non-discriminatory access condition applicable to new transportation service under §§ 284.8 through 284.10 conflicts with provisions of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA) (42 U.S.C. 1334 (e) and (f) (1982)).

Ashland (at pp. 2–3) asserts that (1) pipelines currently operating on the Outer Continental Shelf (OCS) have a mandatory obligation under the OCSLA to provide non-discriminatory access to their OCS facilities, (2) many pipelines have indicated that they will elect not to provide new system-wide non-discriminatory transportation under §§ 284.8 through 284.10, and (3) if pipelines decline to utilize Order No. 436 transportation authority, then the delivery of substantial volumes of OCS gas to the interstate market could be delayed and much of the flexibility and many of the competitive advantages envisioned by the Commission in Order No. 436 will be lost or frustrated. Ashland concludes that because the non-discriminatory access obligation of the OCSLA is mandatory, not voluntary, and since extending the obligation system-wide may have the effect of curtailing OCS transportation, the Commission should permit pipelines operating on the OCS to implement transportation under Order No. 436 to transport OCS gas subject to §§ 284.8 through 284.10 without subjecting their entire systems to non-discriminatory access requirements.

In issuing Order No. 436, the Commission neither relied on its authority under the OCSLA to require non-discriminatory transportation of OCS gas nor has it implemented such a requirement in the final rule. Order No. 436 provides an opportunity for persons to transport voluntarily under authorizations which provide for non-discriminatory access pursuant to statutory authority wholly separate and apart from the OCSLA.

Ashland may be correct that implementation of Order No. 436 may initially delay transportation of some OCS gas which is already subject to open access under the OCSLA. However, in *Maryland Peoples Counsel v. FERC,* 761 F.2d (D.C. Cir. 1985); 768 F.2d 1354 (D.C. Cir. 1985), the court directed the Commission to use its authority over natural gas transportation to provide carriage on a nondiscriminatory basis, if such transportation is to be offered at all. In any event, pipelines, including those operating on the OCS, retain the option of proceeding under section 7 of the NGA without triggering the access provisions of Order No. 436.

In conjunction with the *MPC I* and *MPC II* mandates, Order No. 436 establishes a comprehensive regulatory framework which provides the Commission the opportunity to allow the commodity market for natural gas to develop in a competitive fashion. On balance, the Commission believes that any short-term adverse consequences of Order No. 436, such as delay in transportation of OCS gas, are outweighed by the long-term benefits to be derived from, implementation of the rule on the comprehensive basis contemplated. Nothing that the Commission does in this rule, however, changes the obligation of pipelines to provide non-discriminatory access to the transportation of gas in the OCS. The Commission notes that most of this transportation is provided under individual section 7 certificates.

3. Relationship to Incremental Pricing

Northern Illinois Gas Company (NI–GAS) (at pp. 40–41) notes that the Commission did not address the comments by NI–GAS and others concerning the impact of the incremental pricing provisions of Title II of the NGPA or LDCs and interstate pipelines in light of the transportation provisions of Order No. 436. NI–GAS asserts that when industrial boiler fuel users can avail themselves of pipeline transportation services and purchase gas directly from producers or brokers, who are not required by Title II to impose incremental surcharges, LDCs and pipelines, who must impose the surcharges, will be placed at a competitive disadvantage.

The Commission did not address incremental pricing regulations in Order No. 436, even though various commenters on the NOPR suggested a concurrent suspension of those regulations because they are beyond the scope of this rulemaking proceeding. Title II of the NGPA requires the imposition of incremental surcharges on gas sales to large industrial boiler fuel facilities. The Commission has authority, however, under NGPA sections 206(d) and 502(c) to provide for an exemption from incremental pricing to any industrial facility, or category thereof, as necessary to prevent special hardship, inequity, or unfair distribution of burdens. The Commission recognizes there may be instances in which Title II of the NGPA creates a temporary competitive disadvantage. The Director of the Office of Pipeline and Producer Regulation has granted exemptions, from the operation of the Commission's incremental pricing regulations when the availability of lower priced fuel from alternative sources renders the incrementally-priced gas uncompetitive. *See*, for example, *Southern California Gas Company*, 30 FERC ¶ 62,138 (1985). The Director will continue to consider petitions for exemption on a case-by-case basis and will advise the Commission if experience under the Order No. 436 regulations indicates a need for revisions to the incremental pricing regulations.

4. Requests for Different Procedures, Minimum Commitments

The Commission indicated in Order No. 436 that pipelines which have elected to operate under any of the Order No. 436 programs may terminate their participation so long as they do so in a non-discriminatory fashion. Brooklyn Union Gas Company (at p. 15) requests clarification as to the Commission's intentions regarding how pipelines may exercise this discretion. Brooklyn Union Gas Company is concerned that some pipelines will seek to defeat or subvert the conditions of Order No. 436 by participating in the Order No. 436 programs only in the summer when competitive pressures are more intense. Such seasonal participation, according to Brooklyn Union Gas Company, would minimize the benefits of Order No. 436 to "captive" markets and local distributors serving such markets, as well as other gas users whose demands for gas are highest or occur primarily during the winter period. Brooklyn Union Gas Company states that all of its pipeline suppliers have indicated that their present intention is to forego participation in the Order No. 436 programs, and thereby avoid operation under the non-discriminatory conditions, for any extended period during the forthcoming winter heating season.

Brooklyn Union Gas Company (at p. 16) urges the Commission to clarify on rehearing that participation by pipelines in the Order No. 436 programs only on a seasonal basis is *per se* unduly discriminatory. Further, Brooklyn Union Gas Company requests that the Commission require that an election by a pipeline after January 1, 1986, to operate under any of the Order No. 436 programs will be binding for a minimum of one full year unless a Commission waiver of this requirement is secured in advance. Brooklyn Union Gas Company believes application of this requirement should be prospective only in order to avoid prejudice to any pipeline that already has made an election to participate in an Order No. 436 program on a short-term basis in reliance on the absence of any regulatory requirement that its participation continue for any fixed period of time.

The Commission denies Brooklyn Union Gas Company's requests. A pipeline's participation in Order No. 436 transportation programs only during the summer season would certainly raise the issue that the pipeline was opting in and out of the program in a discriminatory manner, but such a pattern of participation need not be held in and of itself to demonstrate discrimination. The Commission plans to review such cases that are brought to its attention on a case-by-case basis since legitimate operational considerations may conceivably limit some pipelines to seasonal participation. For the same reason, the Commission also will perform case-by-case reviews in instances where such action seems appropriate and necessary to determine whether a pipeline's decision to terminate its participation in an Order No. 436 program after less than a year had unduly discriminatory effects.

5. Non-discriminatory Access to Distribution Systems

API (at pp. 1–8), El Paso (at pp. 17–21), Tenngasco (at p. 13), and Industrial Groups (at p. 17) reiterate a request that was specifically rejected in the final rule (50 FR 42,433): that the Commission require that an LDC provide non-discriminatory access to its own system as a condition to any interstate pipeline being granted a blanket certificate to transport gas on the LDC's behalf. In Order No. 436, the Commission concluded that such a condition would bring the Commission into direct conflict with state authorities with regulatory responsibilities over such entities. Applicants now generally assert that there would be no conflict with the states because the program is voluntary and that this condition is necessary to prevent LDCs from becoming bottlenecks to direct access by end users to wellhead suppliers. API (at p. 3) argues that this condition, being voluntary, would not "mandate" transportation by LDCs any more than the non-discriminatory access condition established in Order No. 436 mandates interstate pipelines to transport gas. El Paso (at p. 17) asserts that non-discriminatory access by LDCs is mandated by *MPC I* and *MPC II* since end users who are captive customers of an LDC are denied direct access to wellhead suppliers unless the LDC chooses to allow such access. API (at p. 6) asserts that it is unduly discriminatory to allow an LDC to deny its customers access to low-priced self-help supplies while, at the same time, imposing the non-discriminatory access condition on its interstate pipeline supplier. In its opinion, this violates sections 4 and 5 of the NGA.

The Commission denies rehearing on this issue. The non-discriminatory access condition imposed on interstate pipelines transporting gas under section 311 or § 284.221 blanket certificate and intrastate pipelines in section 311 situations is not analogous to an open access condition on LDCs. The most critical distinction is that an interstate pipeline is a regulated entity under the Natural Gas Act and the open access condition applies to the interstate transportation of gas by such entities. On the other hand, the local distribution of gas (or Hinshaw transportation) is not subject to Federal jurisdiction.[40] Instead,

[40] Where an LDC engages in interstate transportation of gas, Order No. 436 treats it as an

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NGA sections 1 (b) and (c) exempt LDCs and Hinshaw pipelines from NGA jurisdiction. Moreover, as stated in Order No. 436, a conflict with the states could arise if the Commission were to impose a non-discriminatory access condition on LDCs. Further, *MPC I* and *MPC II* do not compel a different result. The discrimination that concerned the court in each case was that committed by natural gas companies within the Commission's jurisdiction; those cases did not involve discrimination by non-jurisdictional LDCs. Any such discrimination, if it occurs, is within the province of the state authorities and does not result in a violation of the NGA or the NGPA. Only jurisdictional natural gas companies and intrastate pipelines engaged in interstate transactions, respectively, are subject to its provisions.

B. Producer Access to Pipeline Systems and Take-or-Pay Relief

1. Take-or-pay Relief as a Pre-Condition

In Order No. 436, the Commission considered and rejected various proposals by commenters to condition producer access to intersate transportation on producer waiver of take-or-pay provisions in gas purchase contracts. In general, these commenters asserted that the Commission has the requisite legal and statutory authority to impose such a condition on producer access to transportation and that such a condition is required to prevent increased take-or-pay liability.

On rehearing, numerous applicants again urge the Commission to impose a producer access condition on transportation and require producers to waive or renegotiate take-or-pay provisions in contracts.[41] INGAA (at p. 11), Con Ed (at p. 4), AGA (at p. 10), Northwest Pipeline (at p. 19) point out that in the SMP orders, the Commission always required take-or-pay relief for gas released by a pipeline into an SMP and purchased by another party. AGA suggests that proliferation of producer-sponsored SMPs, plus many recent applications for limited-term abandonment, show that producers willingly trade contract rights for transportation rights. These applications assert that the Commission's decision to continue to allow unconditioned access by producers is arbitrary and capricious, and discriminates against interstate pipelines.

AGA (at pp. 3–8) says that if the rule provides meaningful take-or-pay relief, there will be an incentive, rather than the current disincentive,to participate in transportation. AGA would require producers to renegotiate and amend contracts to include market-out or price redetermination clauses. Appended to AGA's application is a study purporting to show that 17 percent of major interstate supplies of gas is purchased under old (pre-1982), high-priced contracts. Most of these contracts contain take-or-pay clauses. AGA strongly believes that unless pipelines can condition transportation on contract relief, it will be virtually impossible to renegotiate these contracts.

Applicants maintain that the Commission has broad conditioning authority under section 7(e) of the NGA to impose an access condition. INGAA, AGA (at p. 9) and El Paso (at p. 24) point out that since such a condition would attach to the pipeline's blanket *transportation* authority and would not require a producer to provide take-or-pay relief; therefore, the question of regulation of first sales or producer contracts is avoided.[42] INGAA (at p. 10) states that the Commission can find that the threat to pipeline financial viability makes it in the public interest to condition access to certificates.

Similarly, Natural (at p. 18) asserts to the rule falls short by instituting a jurisdictional program without considering non-jurisdictional impacts and whether appropriate access conditions were developed.

The applicants assert that the non-discriminatory access requirements of the new transportation scheme, coupled with the contract demand reduction/conversion feature, will increase pipelines' take-or-pay liability and market loss and that the access condition is needed to offset this. AGA points out that as long as the weighted average cost of gas remains above the spot market price, distribution companies will be pressured to cut back their pipeline purchases, thus increasing take-or-pay liability.

The Commission declines to revisit its decision not to impose a producer access condition. As it said in the final rule, the Commission cannot allow some shippers to be "more equal" than others if its goal is to provide equal and non-discriminatory access to transportation. The Commission has considered the extensive legal arguments made by petitioners, and is unpersuaded that the reservations it expressed in the final rule are misplaced.

Applicants also argue that the rule is deficient in failing to address the take-or-pay issue or provide any take-or-pay relief.[43] Without such relief, it will be difficult for the other parts of the package to work. INGAA (at p. 6–7) charges that the Commission failed to meet its statutory obligations to consumers and pipelines. Transco believes the Statement of Policy is unsatisfactory since it contains no presumption of prudence. AGA (at p. 2) flatly asserts there is no take-or-pay relief under Order No. 436 and that the Commission must provide relief if it wants new Part 284 to work. Similarly, Natural (at p. 16) asserts that the interstate pipelines have "excess baggage" in the form of high-cost, high take-or-pay contracts that have to be shed before pipelines can become effective participants.

The final rule fully explains the Commission's decision not to promulgate Part B and to affirm its April 10, 1985, Policy Statement. Contrary to applicants' arguments, the Policy Statement procedures are effective, as evidenced by the number of settlements reached under them. The Commission continues to believe the procedures in the Policy Statement are best suited to providing a framework within which parties can resolve current take-or-pay problems. It does not believe that the situation has changed appreciably since comments were filed on the proposed rule, except that now the pipelines imply that they will not participate in the new authorized transportation program unless additional take-or-pay relief beyond that in the Policy Statement is granted. The Commission concludes that the Policy Statement guidelines provide an adequate requlatory framework within which pipelines can address take-or-pay problem contracts.

2. Unilateral Reduction in Obligations by Pipelines

The final rule permits customers to reduce or covert to transportation their

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intrastate pipeline, subject to the access condition in the same fashion. *See* § 284.8(b) of the final rule.

[41] Florida Gas, at p. 5, 16; El Paso, at pp. 21–24; INGAA, at p. 7; Transco, at pp. 3–8; AGA, at pp. 3–11; Consolidated Nat., at p. 3; Natural, at pp. 15–25; Memphis, at p. 2; Northwest Central, at p. 9; and Northwest Pipeline, at pp. 2, and 18–22.

[42] A substantial part of the problem contracts identified by AGA are contracts for gas supply that qualifies under NGPA section 102(d). Such gas is therefore subject to the Commission's NGA jurisdiction and producers who makes sales for release of such gas in interstate commerce are natural gas companies under the NGA. The decision concerning take-or-pay relief, however, is not based on whether the *producers* are jurisdictional. Instead, the question is whether such a condition would be a reasonable exercise of the Commission's authority over interstate transportation, regardless of the source of the gas.

[43] Transco at pp. 13–17; AGA, at p. 2; ANR, at p. 25; Consolidated Nat., at p. 3; Natural, at pp. 3, 15–20; Memphis, at p. 1; ConEd., at pp. 1–2.

sales contract entitlement. Some applicants believe pipelines should have a corresponding right to unilaterally reduce their contractual obligations to producers. Florida Gas (at p. 17) argues that even though a pipeline may have kept its gas supply and sales in balance, exercise of the CD reduction/conversion option could create take-or-pay liability. Similarly, Consolidated Natural (at p. 7) foresees declining sales, but no relief from existing minimum bill obligations.

Transco (at p. 7) asserts that granting open access at the distribution end—by permitting distributors to abrogate their contracts with pipelines—is totally inconsistent with precluding pipelines from a concomitant modification of their producer contracts.

The Commission does not believe that a right to reduce obligations under producer contracts necessarily flows from its decision to permit customers to reduce or convert their contract demands. The Commission instituted the CD reduction/conversion option to allow customers and purchasers to obtain access to other supply sources and to choose the type of service best suited to their individual needs. Because customers will have more options, pipelines will have more incentive to keep sales and transportation services competitive and to engage in continued renegotiation of "problem" take-or-pay contracts. Indeed, a customer's CD reduction may not increase a pipeline's take-or-pay obligations because the customer may only be bringing its CD in line with its new market requirements and would not have bought additional gas under any circumstances.

The contracts under which pipelines purchase gas from producers are straightforward commercial agreements, not utility-type "service agreements." A reduction in the volumetric level of a pipeline's service agreement with its customers may or may not result in a change in the rate for providing the reduced service depending on the disposition of the pipeline's subsequent rate case. A reduction in the volume level of a take-or-pay clause in a producer's contract to sell gas to the pipeline, however, would simply reduce the minimum dollar obligation of the pipeline; the producer cannot file a subsequent rate case to seek to collect the same level of revenues over a smaller number of sales units. In short, the analogy drawn between pipeline-LDC and producer-pipeline contracts confuses utility service agreements under a regimen of cost based rates with commercial contracts for the sale and delivery of a commodity.

The Commission denies these rehearing requests because it does not have jurisdiction over many of the producer-pipeline contracts at issue. It would be inequitable to allow pipelines to reduce their takes only under contracts still subject to the Commission's NGA jurisdiction, particularly because many of the problem contracts are not subject to the Commission's jurisdiction. Finally, as it indicated in Order No. 436, the Commission is convinced that the April 10, 1985, Statement of Policy provides an adequate framework within which pipelines may address the problem of take-or-pay liabilities. Moreover, many pipelines have made progress in renegotiating their contracts and substantial liabilities have been settled.

C. Firm Sales Entitlements Reduction and Conversion Under § 284.10

1. Legal Authority Under NGA Sections 5 and 7

a. *Alleged Contract Abrogation.* Section 284.10 of the final rule provides that a firm sales customer of an interstate pipeline will have the option to reduce its firm sales entitlements (or contract demand) and the option to convert firm sales entitlements into firm transportation. Specifically, Order No. 436 established § 284.10(c), which provided the customer the option of reducing its firm sales entitlements by up to 25 percent per year as long as it gives the pipeline written notice not later than 150 days before the proposed reduction. Similarly, § 284.10(d) provided the customer the option of converting up to 25 percent per year of its firm sales entitlements to firm transportation so long as it gives the pipeline 60 days written notice before the proposed conversion. The two primary purposes of this section, as originally promulgated and as amended in this order, include the "freeing up" of presently contracted firm service so that the transmission capacity presently "bundled" with the sales entitlement may be sold separately to willing shippers and permitting customers of pipelines flexibility in the services they take from pipelines.

A significant number of applicants addressed this issue, most of which challenged the CD reduction/conversion condition as an unlawful unilateral abrogation of pipeline contractual rights. Panhandle, at pp. 5–7; Tetco, at p. 13; CIG, at pp. 20–25; Northwest Pipeline, at pp. 4–7; Algonquin, at pp. 11–34; Monterey, pp. 13–15; Northern Natural, pp. 6–9; MRT, pp. 2, 11; Texas Gas, p. 14; Natural, pp. 16–18, 30, 40; Pan-Alberta Gas, at pp. 1–2, 6–9; and Coastal, at p. 2.

Generally, the applicants state that the Commission erred by instituting a mechanism allowing unilateral alteration of the terms of the contract without satisfying the statutory requirements under section 5 of the NGA. They state that the unilateral contract abrogation will have a destabilizing effect both upon pipelines and the consuming public and that long-term service arrangements and the security of supply have been sacrificed by focusing on spot market considerations. (INGAA, at p. 19). They further state that the right of customers to abrogate such contracts constitutes a unilateral right to abandon the certificated service without a proper factual showing that abandonment is in the public convenience and necessity as required by section 7(b) of the NGA. (INGAA, at p. 20). They state that this provision imposes an unjustifiable economic squeeze on pipelines which have procured gas to meet their firm sales contract obligations, and therefore would subject the pipelines to reduced sales and increased take-or-pay (or minimum bill) obligations related to that very same gas supply. (Algonquin, at p. 20). Since those sales contracts are the underpinnings for the pipeline industry and for lenders who made their investments predicated on those contracts, this rule would disrupt settled expectations. (Algonquin, at p. 21). They further contend that the contract demand reduction requirement is improperly coercive, in that participation in the program is not truly voluntary. (Algonquin, at p. 29). As demonstrated by the decision in *ANR Pipeline Co. et al.*, 33 FERC ¶ 61,149, Docket No. CP85-621-000, *et al.*, (October 31, 1985), commenters argue that it appears the substantive aspects of the rule are being applied to individual section 7 certificate applications and that the Commission's generic definition of a public convenience and necessity has been modified to comport with that stated in Order No. 436. (Algonquin, at pp. 29–32).

They state that there is no basis for allowing customers who no longer require their contract demand to repudiate their existing contractual commitments, and that the Commission has failed to show any "unequivocal public necessity" for relieving any party to a contract of its bargain. (Northwest Natural, at pp. 17–18).

The Commission disagrees with the applicants that the CD reduction/conversion condition is an unlawful unilateral abrogation of the pipeline's contractual rights. Order No. 436 neither modifies contracts by its own terms nor creates any "unilateral" rights to breach contracts. Nor is the Commission here relying on the statutory requirements of section 5 of the Natural Gas Act. Rather, the CD reduction and conversion options in § 284.10 are merely a condition—imposed pursuant to the Commission's authority under section 7(e) of the Natural Gas Act and section 311(c) of the NGPA—to which the pipeline must agree in order to provide service prospectively under the self-implementing transportation rules. When changes occur, the rates charged for that converted transportation will continue to be set under the Natural Gas Act, with proper consideration given for changes in cost incurrence and cost responsibility. 50 FR 42439. Since the final rule does not require that a pipeline operate under the self-implementing rules, the final rule does not override any existing contracts. And the provisions of section 5 of the Natural Gas Act do not apply because the Commission is not modifying the provisions of any existing certificates. As stated in the final rule, one purpose of the CD reduction option is to permit a "freeing up" of unused firm capacity that existing customers may have "booked" but not longer need and no longer desire to reserve. 50 FR 42440. Therefore, the final rule does not modify the contracts parties have entered into, but merely provides that a condition of participating in the self-implementing operating rules, is for the pipeline to agree to provide the reduction and conversion options to its firm sales customers as a condition of that choice.

It is the voluntary decision of a pipeline to accept self-implementing transportation authority that reflects the concomitant agreement to provide the contract reduction and conversion option to its customers. 50 FR 42440. A pipeline that believes such a commitment is at odds with the "settled expectations" reflected in its sales contract (Algonquin, at p. 21) is free not to participate. The assertion that the Order No. 436 program is, in effect, coercive and mandatory rather than voluntary is discussed above. The discussion need not be repeated.

Algonquin's suggestion that the Commission applied the provisions of Order No. 436 to an application under NGA section 7 in *ANR* is wrong. The order issued in that case merely set the proceeding for hearing, to resolve issues of *material* fact raised by an intervenor. The hearing was required by the Natural Gas Act. While the order does indicate that the Commission will review under section 4(b) of the NGA allegations of discrimination in the context of its decision to grant individual section 7(c) transportation certificates, the order cited did not resolve any substantive issues as to what will constitute such discrimination.

b. *Alleged Certificate Amendment.* A number of applicants state that the Commission is applying its conditioning authority under section 7(e) of the Natural Gas Act to permit the CD reduction/conversion option. Panhandle, at p. 5; Texas Eastern at p. 8; Memphis, Light Gas & Water Division, at pp. 11–12; Natural Gas Pipeline, at p. 50; Algonquin, at p. 25; Amoco, at pp. 2, 4–5, 9–10; Mississippi River Transmission, at pp. 18–19; Northwest Natural, at pp. 19–21; Monterey, at p. 14; Indicated Producers, at pp. 6–10; Transwestern, at p. 19. Generally, the applicants state that the conditioning authority under section 7(e) can only be exercised when the certificate is issued, and unless a pipeline requests or agrees to the modification or ratification of a certificate or has violated the terms of its certificate, the Commission has no authority to modify or revoke an existing section 7 certificate. (Indicated Producers at p. 6). For example, Algonquin (at pp. 26–27) states that the Natural Gas Act does not give the Commission the power to alter, amend or in any way modify a certificate of public convenience and necessity. They state that while section 7(e) of the NGA authorizes the Commission to place reasonable conditions upon a certificate, that certificate must stand until the pipeline seeks abandonment of the service under section 7(b) of the NGA.

Amoco Production Company (at pp. 9–12) states that the Commission is attempting to use its section 7 transportation authority as a substitute for performing its duties under section 5. They contend that the 25 percent reduction/conversion provision in the final rule is being applied to the blanket *transportation* certification, and not to the certificate governing the jurisdictional firm *sale* to be affected. They contend that the condition is being applied to the wrong certificate. They contend that *Panhandle Eastern Pipeline Company v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979) makes clear that the Commission cannot use its section 7(e) authority as a proxy for its section 5 authority. They acknowledged that while *Panhandle* dealt with a rate issue, the decision is essentially founded on the same basic interplay between sections 5 and 7(e). Amoco Production further contends that even if the reduction/conversion rule is a valid section 7(e) condition, it is unreasonable. Amoco states that the Commission's purpose for permitting this option is to "free up" capacity for transportation under the new rule. However, the Commission has not indicated why this option outweighs the long-recognized importance of private contractual agreements. Moreover, Amoco Production (at pp. 13–17) contends that the Commission failed to consider how a voluntary mutual negotiation between pipelines and suppliers could not achieve essentially the same result.

Virtually all of these arguments were raised in comments to the Commission's proposed rule and were addressed in its Order No. 436. 50 FR 42439. As explained more fully in the final rule, these applications appear to assume that the rule would automatically allow firm sales customers to shift cost responsibilities on to other customers or on to the pipeline's shareholders. Before any such shifting occurs, the pipeline is required to file appropriate adjustments to its rates. The Commission will review any proposed reallocation of fixed costs in the rate case. In the case of the conversion option, the Commission notes that the reservation charges permitted for firm service recognize cost responsibility for firm service and sharply reduce the potential for cost-shifting.

Second, as stated earlier, the CD reduction option is intended to allow a "freeing up" of firm capacity and does not establish rate levels. Moreover, the CD reduction and conversion options are not mandatory. They are merely a condition of participating in self-implementing transportation programs. Pipelines that choose not to participate in the new program will not be subject to the CD reduction and conversion options. Pipelines, however, that choose to participate in the new program will be agreeing to the condition and accepting *new* certificates with the CD reduction and conversion conditions. To this extent, the Commission is not amending previously issued certificates, but is allowing pipelines the opportunity to accept a new certificate with new conditions that apply prospectively.

In the *Panhandle* case cited by applicants, the court found that the Commission could not use revenue crediting to reduce previously approved rates, without a finding under section 5 of the NGA that the previously approved rates were not just and reasonable. Order No. 436, by contrast, will not reduce previously approved rates by revenue credit or any other means. Pipelines voluntarily choose whether to participate in self-implementing transportation. Similarly, the pipeline is free to choose when and if it wishes and make an appropriate rate filing under section 4 of the NGA to reflect the changed circumstances resulting from customers' exercise of the CD adjustment options. As noted above, such rate filings will be reviewed on a case-by-case basis.

c. *Alleged Bias For Firm Sales Customers.* Indicated Producers (at p. 5) state that the conversion option discriminates unduly in favor of a pipeline's firm sales customers and is contrary to the prohibition against undue preference and discrimination in sections 4(b) and 5(a) of the Natural Gas Act. They stated (at pp. 3–5) that while firm transportation capacity is generally available on a "first-come, first-served basis", firm sales customers that convert to firm transportation are given priority over other potential customers. They state that once a customer makes the business decision to reduce its purchases, it should stand in no better position than any other prospective shipper who seeks transportation on a first-come, first-served basis.

The Commission disagrees with this analysis. Firm sales customers, who are already on the system and have been paying to reserve firm capacity all along, have a legitimate claim on that capacity. Whether they call on that capacity in the form of sales or transportation, the capacity available for new customers is generally the same. While the Commission recognizes that in some cases a customer will be seeking to use different segments of the pipeline system, these situations can be dealt with on a case-by-case basis.

d. *Alleged Unlawful Delegation.* A number of applicants claim that the Commission has in effect delegated to private parties its abandonment responsibilities under section 7(b) of the Natural Gas Act.[44] Generally, applicants state that specific findings under section 7(b) of the Natural Gas Act would be required in order for the Commission to permanently reduce a customer's contract demand. By authorizing contract demand reductions at the sole option of a customer without any case specific finding, they contend the Commission has delegated its responsibility under section 7(b) to the pipeline's customer (Northwest Natural Gas, at pp. 6–13).

Other customers contend that the Commission has delegated its authority under section 5 of the Natural Gas Act. (Algonquin, at p. 5; and Amoco Production, at p. 7.) For example, Algonquin states that section 5 requires the Commission to make findings that the contract provisions are unjust, unreasonable or otherwise unlawful. However, the Commission has not made these findings, says Algonquin, but rather has given the pipeline customer authority to unilaterally modify the firm contract demands up to a certain percent per year. Amoco Production contends that while the Commission has delegated its authority to third parties, it attempts to justify that delegation by setting limits on that delegation. In effect, the customer and not the Commission determines what is the lawful exent of the firm service reduction. Amoco Production (at pp. 6–9) states that these determinations must be made by the Commission in accordance with section 5 and cannot be delegated to the customers.

The Commission disagrees with the applicants. Furthermore, it is clear from § 284.10(f) of the final rule that abandonment authority will be available if a customer exercises its conversion or reduction options under § 284.10. On the other hand, this abandonment flexibility is not mandatory, *i.e.*, a pipeline may choose to retain its section 7 sales certificate in order to stand ready to permit its customer to "swing" back on to sales service. Moreover, a customer and a pipeline always retain the flexibility, even where a certficate has been abandoned, to apply for a new or amended section 7 certificate to resume the sales service or some other form of transportation service. 50 FR 42443.

Section 284.10 is not a delegation of any responsibility under section 7(b) of the Natural Gas Act. Section 284.10(f) specifically provides that if a customer exercises an option to reduce or convert its firm sales entitlements, the pipeline may file an application under the Commission's rules to abandon that portion of the sales service.

Moreover, the Commission is not invoking its authority under section 5, because the final rule does not modify any contract provisions. Pipelines that apply for a certficate under the new program are agreeing voluntarily to all the terms and conditions of that program as set out more fully in the regulations. Similarly, a pipeline customer who uses the CD reduction and conversion option is making a determination that it desires to amend its current service contract. Nothing in the statute prevents the Commission from permitting parties from agreeing to amend or modify their contracts.

2. Effects of Reduction/Conversion Options

a. *Reasonableness; Unlawful Taking.* A few applicants claim that the CD reduction and conversion option essentially establishes a methodology for avoiding existing contracts between pipelines and distribution companies, and that such action constitutes a taking of property without just compensation in violation of section 5 of the U.S. Constitution. (Panhandle, at p. 9; Texas Eastern, at p. 24; Algonquin, at p. 29; Natural Gas Pipeline, at pp. 46–50). For example, Natural Gas Pipeline (at pp. 46–50) contends that the Commission's action interferes with private contractual relationships. They state that while the Commission attempts to justify the interference on the basis that the action is voluntary on the part of the pipeline, it is not clear why a pipeline's willingness to transport should automatically trigger a contract reduction option. They contend that the Commission has no statutory authority to abrogate the pipelines' contracts.

Similarly, Texas Eastern (at pp. 24–27) states that the CD reduction and conversion options deprive it of its lawful contract rights without due process and are in violation of the Fifth Amendment. They further contend it violates the Natural Gas Act which requires the pipelines' rates to be "just and reasonable". Under their interpretation, this means that those rates not only must yield revenues to cover prudently-incured costs, but also that the rates must allow an opportunity to earn a return on invested capital. They claim that the CD reduction and conversion options threaten the financial integrity of pipeline companies, both with respect to operating revenues and in terms of servicing the dividend on stock.

As explained above, the final rule does not override contracts. There is no requirement that a pipeline operate under the self-implementing rules. For the same reason, there is no taking of property. If pipelines decide that the generic CD reduction and conversion options may adversely impact their financial integrity, they may exercise their business judgment in deciding not to participate in the new program. As long as the condition is reasonable under the NGA and the NGPA, it must pass constitutional muster.

The Commission also disagrees with Texas Eastern's argument (at p. 25) that pipelines have been assigned all the additional risks associated with the rule. A pipeline's customers that decide to exercise the CD reduction or conversion

[44] Foothills, at p. 773; Algonquin, at p. 16; Mississippi River Transmission, at pp. 18–19; Texas Eastern, at pp. 18–21; Northwest Natural, at pp. 4–12; Northwest Central, at p. 6; Natural, at p. 8.

option also incur a risk by selecting an alternative source of gas supply and will be deemed to have waived rights to protest abandonment application.

ANR Pipeline Co. (ANR) (at p. 7) asserts that a reduction in firm sales entitlements to a customer means that the customer will pay a lesser proportion of the demand costs of the pipeline which must then be borne by other customers. Further, ANR argues that while conversion to firm Transportation service can offset the revenue loss from the reduction in firm sales entitlements, such offset will not be complete because such items as pipeline supplier demand charges will not be recovered from transportation customers. For this reason, ANR asserts that other customers or the pipeline will be injured by a conversion from firm sales entitlements to firm transportation.

ANR also asserts (at p. 8) that to the extent a reduction or conversion of firm sales entitlements results in less gas purchases than would have resulted absent the reduction, then a pipeline's take-or-pay and minimum take liabilities will cause increased costs which will adversely affect all consumers.

ANR argues (at pp. 13, 16) that § 284.10 should be eliminated or changed on rehearing. The change requested by ANR is that customers who convert their purchase entitlements to transportation entitlements should be required to pay fully compensatory rates for transportation service (at p. 16).

Finally, ANR argues (at p. 16) that a pipeline should not be required to file an adjustment to its rates under § 284.10(g) every time a customer's firm sales entitlement is changed under § 284.10. ANR asserts that a change may not be necessary, and that under the Natural Gas Act, pipelines have the option to file for rate changes.

Trunkline Gas, Trunkline LNG, and Panhandle assert (at p. 9) that any reduction of firm sales entitlements and any conversion to firm transportation should be permitted only on a single annual date to be fixed by the pipeline after prior notice of at least nine months. Further, they seek clarification as to the effect on pipeline minimum bills of a reduction in firm sales entitlements and a conversion to firm transportation. They point out that § 284.10(c)(4) requires a reduction of minimum commodity bills by an amount proportionate to any reduction of firm sales entitlements, while § 284.10(d)(5) requires a credit against the minimum commodity bill for each unit of firm transportation service purchased, and that it is not clear that only one of these provisions will apply exclusively in each case (at p. 10).

As set forth below, rehearing on these issues is generally denied. With regard to ANR's concern, the Commission recognizes that some cost shifting may occur as a result of the conversion and reduction provisions; however, as stated in Order No. 436.

> First, by adding the conversion option and specifically allowing for reservation charges for firm service, the final rule recognizes cost responsibility for firm service and sharply reduces the potential for cost shifting. Second, the primary purpose of the CD reduction option is to allow a freeing up of firm capacity, not to allow existing customers to simply reduce the level of monthly payments. The issue of establishing rate levels is left to individual cases; the instant rule seeks only to establish a rate structure. 50 FR 42439.

Order No. 436 further states that:

> The rule in no way resolves the issue of how those costs [resulting from CD reductions or conversions] will be allocated, however. Hence, the cost allocation issues will be decided on a case-by-case basis. 50 FR 42442.

Thus, while some cost shifting may occur under the rule, the case-by-case review of cost allocation provided by the rule provides a forum so as to prevent any unreasonable cost shifting.

The Commission agrees with ANR that a pipeline should not be required to file an adjustment to its rates everytime a customer's firm sales entitlement is changed under § 284.10. The Commission notes that under § 248.7(b)(2), a pipeline operating under the new rules must file transportation rates that conform to the standards of § 248.7. Pipelines must, of course, make appropriate adjustments to a customer's demand and minimum bill charges when a reduction or conversion becomes effective. After that, there is no need to require additional filings, because no cost-shifting to other customers can occur prior to any new filing; so there is no harm to pipeline customers. Of course, nothing in the rule precludes a pipeline from filing to adjust its rates at any time. Accordingly § 284.10(g) will be deleted from the final rule.

With regard to Trunkline Gas, Trunkline LNG, and Panhandle's arguments, the final rule provides that a pipeline may establish a single date during each calendar year for *reductions* to take effect, and that customers must provide the pipeline with 150 days notice before a proposed reduction. As discussed in Order No. 436, (50 FR 42445) this procedure should accommodate the needs of pipelines to prepare any necessary rate filings. With regard to the applicants' concern about effects on pipeline minimum bill provisions as a result of reductions or conversions of firm entitlements, the rule clearly provides that § 284.10(c)(4) applies to customers who simply reduce their firm sales entitlements, while § 284.10(d)(5) applies to customers who convert their firm sales entitlement to firm transportation.

b. *Shippers on the "Prebuild" Portion of ANGTS.* Pan-Alberta Gas and Foothills Pipe Lines (Yukon) express concern over the potential impact of the contract adjustment provisions in § 284.10 on the financial integrity of the "prebuilt" portions of the Alaska Natural Gas Transportation System (ANGTS). Pan-Alberta sells Canadian natural gas to Northwest Alaskan Pipeline Company, which in turn resells that gas to shippers at the U.S.-Canada border. Foothills transports the Pan-Alberta gas from Alberta to the border through the "prebuilt" Canadian segment of the ANGTS. The gas is then transported for the shippers from the border into the U.S. by the U.S. "prebuilt" segments of the ANGTS.

The Commission notes, at the outset, that the transportation programs authorized by Order No. 436 are purely voluntary. In that respect, the final rule differs significantly from Order No. 380, cited by Pan-Alberta. Because of its voluntary nature, Order No. 436 does not undermine the financial integrity of the ANGTS. Indeed, Pan-Alberta and Foothills themselves acknowledge in their requests for rehearing (Pan-Alberta, at p. 8); Foothills, at p. 4)) that § 284.10 does not threaten the financial integrity of the ANGTS. In any event, the Commission affirms that no action taken here is intended to alter its prior commitments made with respect to that ANGTS pre-build. To the extent that Pan-Alberta, Foothills, and Westcoast Transmission argue that § 284.10 indirectly threatens the financial integrity of "the North American Gas industry," their arguments parallel arguments advanced by others. These points are addressed by the Commission throughout this order.

c. *Nexus Between CD Adjustments and Transportation.* A few applicants state that the Commission has not established a nexus between the contract demand reduction condition and the exercise of transportation rights under the NGPA and the NGA. Texas Eastern, at p. 12; Algonquin, at p. 17; ANR, at p. 13, Amoco, at pp. 12–17. The Commission disagrees. The nexus lies at the heart of Order No. 436 and is simply stated. While pipelines legitimately exercise "natural" monopoly power in many geographic areas over interstate *transportation*, there is no clear economic basis for pipelines to wield "natural" monoply power over the purchasing and selling of the natural gas *commodity*. *Pennzoil v. FERC*, 645 F.2d 360, 378–379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). Accordingly, there is a sound regulatory basis for the Commission to take those steps necessary to fulfill the NGPA goal to remove federal price regulation over markets for the natural gas commodity at the wellhead.

The CD adjustment options, by allowing a freeing-up of capacity now booked for firm sales service, allow shippers the ability to book *equally firm* transportation service in order to link up the two sides of a competitive market in the gas commodity. Algonquin makes a somewhat different point when it states (at pp. 17–22) that pipeline facilities typically have been constructed to provide capacity for firm sales and transportation requirements. Unless these contracts have expired or been amended through bilateral agreements approved by the Commission, the available firm jurisdictional pipeline capacity is fully subscribed. Since the rule requires pipelines to accord firm sales customers a priority opportunity to convert their firm sales rights to firm transportation, some customers, Algonquin states, will convert all of their firm sales entitlements to transportation. If the customers need the capacity, it is likely they would convert their firm sales entitlement to firm transportation.

If Algonquin's analysis is correct, then it only means that customers will prefer the conversion option over the reduction option. If Algonquin is wrong, then the reduction option will serve as a useful device to free up capacity that consumers no longer wish to pay for. In either event, the Commission sees no reason to modify this feature of the rule because the Commission's objective is to free up capacity not required for sales or transportation service to existing customers.

d. *On Contracts Providing for Annual Entitlements.* ANR asserts in its application for rehearing (at p. 6) that the term "firm sales entitlements", as used in § 284.10, is not defined but seems to include not only "contract demand," or "Maximum Daily Quantity" amounts, but also "annual contract quantity," or "Annual Entitlement" amounts. ANR seeks clarification that the latter, annual amounts are included in the definition of firm sales entitlements. Memphis asserts in its application for rehearing (at pp. 11–13) that the Commission erred in Order No. 436 by not allowing customers of pipelines to reduce their firm sales entitlements for D-2 quantities which relate to expected annual purchases or curtailment entitlements, under the modified fixed-variable rate design. As set forth below, rehearing on these issues is denied.

With regard to ANR's concerns, Order No. 436 provides that "firm sales entitlements" means ". . . not only contract demand but such Annual Contract Quantities, or perhaps certain curtailment entitlements. To the extent that there may be some particular questions as to whether a specific vehicle operates to fix firm sales entitlement, these issues may be appropriately addressed on a case-by-case basis." Thus, firm sales entitlements covers both peak and annual volumes. With regard to Memphis' concern, Order No. 436 clearly provides that the CD reduction and conversion options are intended to allow reductions in the volumetric levels of service, not in the amount of fixed charges paid to the pipeline under a particular rate design. However, as set forth above, Memphis may pursue its argument, to the extent it relates to volumetric reductions, in an individual case. For these reasons, rehearing is denied on these issues.

e. *On existing Full Requirements Customers.* In Order No. 436 we held that customers served under a contract that required them to buy all their gas from one supplier or were subject to a sole supplier clause could neverthless reduce or convert their firm sales entitlement. 50 FR 42445. The Commission declined, however, to hold that the customers served under contracts like these could continue to purchase gas under the pipeline's full requirements rate schedule. The Commission did so because there could be differences between the costs of providing full requirements sales service and full requirements transportation service. It said, however, that if there were disagreements on what the proper rate should be, they would be resolved in individual cases. *Id.*

On rehearing Tennessee Small General Service Customer Group (at pp. 3–4), CILCO (at pp. 2–17), and Illinois (at pp. 2–12) argue that the Commission erred in not addressing the rate question. The Commission sees nothing in CILCO's or Illinois' arguments; however, that warrants a different conclusion. The full requirements rate schedule establishes certain criteria that customers must meet in order to be subject to the full requirements rate schedule. (The full requirements rate schedule is typically a more favorable rate schedule than a partial requirements rate schedule, in terms of the price that is paid for a unit of service). If after taking advantage of a reduction or conversion a customer still complies with the criteria for being a full requirements customer, then that customer should continue to be a full requirements customer. If that customer no longer meets the criteria for a full requirements customer after a reduction or conversion, then that customer would be a partial requirements customer and come under whichever rate schedule that meets the customer's current contract. A customer that moves from a full requirements customer to a partial requirements customer as a result of a contract reduction or conversion may then use the next rate case as an opportunity to argue that the criteria for full requirements customers should be amended so that it could continue to take advantage of the full requirements rate schedules. In the interim before the next rate case is filed, the customer should pay under the rate schedule that meets the criteria for its contract. For example, if a customer reduces its entitlement by, say, 15 percent and takes no gas from any other pipeline and takes no transportation services from the pipeline with which it has a contract, then, as long as there is not a volume minimum for contract demand for full requirements customers, it would continue to use the full requirements rate schedule. If the customer converted 15 percent of its firm sales contract demand to transportation service but still continues to take all of its pipeline services from the pipeline with which it has the contract (even though it buys some gas directly from producers) then, if this is not prohibited by the full requirements rate schedule, the customer would continue to be a full requirements customer. If the full requirements rate schedule, however, prohibited customers from buying gas directly from producers and transporting it on the pipeline, then the customer would no longer be a full requirements customer.

3. Proposed Procedural Changes

a. *Length of Notice.* As stated earlier, § 284.10 provides that customers that exercise their CD reduction option or conversion option are required to give the pipeline 150 days notice or 60 days notice, respectively, before the proposed change. INGGA states that the 60 day notice period is too brief if pipelines are to plan their long term supply arrangements at the lowest reasonable rate. They suggest that the Commission should require all such parties converting service to file at the same time annually, with that conversion to be effective nine months thereafter (INGGA at p. 18).

Washington Natural Gas Company states that even assuming a pipeline elects to accept the new blanket certificate, local distribution companies do not have enough time by the February 1, 1986, deadline in the final rule to determine whether it is a prudent economic decision to reduce or convert their contract demands. Moreover, Washington Natural maintains that the Commission's proposal on block billing in Part D of the rule will also affect the distributors' decisions. (Washington Natural Gas Company, at p. 4).

Kansas Power and Light Company states (at pp. 2–3) that in the second and subsequent calendar years, it appears that § 284.10(c)(2) permits the pipelines to designate dates on which CD reductions will occur. If this is correct, Kansas Power and Light states that pipelines could set the first election date after February 1, 1986 at December 31, 1987. This means that a pipeline's customers would only be allowed to make one CD reduction election which would be effective in the first three winters after the issuance of Order No. 436. They further state that it is unclear whether § 284.10 permits the pipeline to change the election date from year to year or whether it must select a permanent annual election date. If the date is not permanent, they state the pipeline could pick January 1, in one year and December 31, in the next, and thereby impede the implementation of the CD reductions. They suggest that the Commission require pipelines to select an initial CD election date in the period from February 1, 1986, to May 18, 1986 and that that date would be a permanent election date.

The Commission believes that the 60-day notice period is reasonable. This notice period is the minimum period within which a pipeline's customers may give notice of a CD conversion. Presumably, some customers will give notice before that date. Even if other customers provide only the minimum notice period, that 60-day period may be the earliest time at which the customer can assess the options available to it. The Commission believes that the 60-day notice period appropriately balances the time needed for the pipeline to assess its supply and demand against the customer's need for flexibility in assessing its options. Further, a converting customer will continue to contribute to the recovery of fixed costs at essentially similar levels. As contrasted with a reducing customer, the converting customer is not leaving the system.

With respect to Washington Natural's comment, the earliest for electing CD reductions for 1986 was February 1, 1986, under Order No. 436. If a customer does not exercise its CD reduction option in 1986, it can still elect that option for 1987. In any event, the CD conversion option may be exercised at any date each year following the appropriate 60-days' notice.

Finally, Kansas Power and Light is correct that § 284.10(c)(2) allows pipelines to designate the date during each calendar year that the CD reductions are to take effect and that the pipeline may change this date from year to year.

In response to these requests, § 284.10(c)(2) is modified to establish more certain notice deadlines and effective dates for customers to exercise their CD reduction options. Under § 284.10(c)(1), the "trigger" date for the availability of the CD reduction option is the date the pipeline first commences or continues a new section 311 arrangement after February 15, 1986, or accepts a new blanket certificate. Section 284.10(c)(2), as modified, would require that, unless the pipeline agrees otherwise, a customer wishing to exercise its CD reduction option the first year it is available, must give the pipeline written notice of the level of its first year reduction not later than 45 days following the "trigger" date established under § 284.10(a). This 45-day notice requirement is only applicable to firm sales customers in the first year the CD reduction option is available. Because § 284.10(c)(1) establishes a single date for first year reductions to take effect, the 45-day notice requirement is intended to provide customers adequate time to decide their first reduction elections under § 284.10.

In addition, § 284.10(c)(2) requires that, in the first year, all such customer reductions take effect 150 days following the close of the required 45-day customer notice period. This will assure that all customers enjoy the same 45-day period to make their CD reduction elections, and that all such CD reduction elections will take effect on the same day the first year. The Commission intends this modification to provide pipelines and their customers with the certainty and predictability necessary to plan their first service agreement modifications and tariff filings under Order No. 436.

In subsequent years, § 284.10(c)(2) is modified to permit a pipeline to establish a single effective date for all CD reductions to take effect, as long as the pipeline provides its customers with 180 days written notice prior to such date. This change would permit pipelines the flexibility to change the effective date for CD reductions in subsequent years, as long as the changed effective date is no later than the "anniversary" date of their customers' last such reduction, and as long as their customers are provided prior notice of the changed effective date. In this way, a pipeline may choose to require that all CD reductions take effect on a single date, and customers will be assured that such effective date is no later than 12 months following the effective date of their last such reductions.

b. *Gradual Phase-in.* Several petitioners argue on rehearing that the Commission should have considered alternatives to the schedule of phasing-in the CD adjustment options. Elizabethtown Gas Company states (at pp. 11–12) that the Commission should limit the options to a total of 20 percent over a four-year period. Petitioners state that until the Commission has had actual experience with the effect of its program on the maintenance of continuous, adequate and reliable natural gas service, such a limitation would not prevent pipelines and their customers from negotiating larger reductions and conversions, but that those reductions and conversions would be subject to case specific applications under section 7(b) of the Natural Gas Act. They suggest that this approach would afford a meaninful recognition of the competitive market while testing the ability of the pipeline to meet its obligations through firm transportation services. Elizabethtown also argues that limiting the options would mitigate adverse cost-shifting.

American Public Gas Association (APGA) and Wisconsin Distributors Group (WDG) make arguments (at p. 36 and at p. 11, respectively) similar to Elizabethtown's that limiting the CD adjustment options would mitigate the problem of shifting costs to remaining customers. Specifically, APGA recommends that the 25 percent annual ceiling be reduced to 15 percent, so that CD adjustments would be more gradual and spread over a greater number of years. WDG simply supports reducing 25 percent to a smaller percentage.

MPC (at pp. 9–12) takes issue with the Commission's four-year phased-in approach to CD conversions (25 percent maximum each year). It charges that LDCs will be put in a dilemma of having to use up their CD reduction option to avoid cost shifting when their large industrial/commercial customers swing to direct producer purchases.

Accordingly, MPC (at p. 12) recommends elimination of the 25 percent limitation on CD conversions. Alternatively, it urges that LDCs be given credit toward their contract demand charge payments to their pipeline suppliers to the extent that their large industrial or commercial customers purchase transportation directly from the pipeline servicing the LDC. It asserts that this latter option would prevent LDCs from having to use up their limited 25 percent options to eliminate their payments for CD capacity that are already being made directly to the pipelines by the LDCs own former sales customers who are now purchasing transporation.

In addressing these concerns over the schedule adopted in Order No. 436 for phasing-in CD reductions and conversions, the Commission believes it is important to reiterate the intent and purpose behind CD adjustments as a general matter. Order No. 436 is designed to promote alternatives to the traditional marketing of gas in which the pipeline purchases gas at the wellhead, transports it and resells it to its customers. The CD reduction/conversion options provide pipelines' firm sales customers, especially full requirements customers, with a greater ability to purchase gas from nontraditional suppliers and to have it transported on a firm or interruptible basis. For this policy to be effective, there must be access to firm pipeline capacity. Otherwise, interruptible loads, including the large volume of fuel-switchable load, would be primarily, if not virtually the exclusive, beneficiary of the freed-up gas supplies.

At the same time, it is clear that a transition period is appropriate in view of the need for so many business participants to review and perhaps revise their existing arrangements in light of wellhead decontrol and Order No. 436. The Commission also must assure that its approach will allow it to monitor the evolution of the market, to respond to problems as they arise, and to make any mid-course adjustments that become necessary.

The Commission provided for a transition period in Order No. 436. However, we are persuaded by the petitions, especially those of APGA and WDG, associations of primarily small, full-requirements customers, that the transition period should be slightly more graduated and gradual.

The Commission is therefore granting rehearing in order to modify the CD reduction/conversion phase-in period. First, it will provide for a five-year phase-in period. Second, it will cap adjustments at 15 percent for each of the first two years, 20 percent for the third year, and 25 percent for each of the last two years. (The "years" will be twelve-month periods dating form the date on which the pipeline first becomes subject to § 284.10 by virtue of commencing a new section 311 transaction or accepting a new blanket certificate under § 284.221.) Third, it will require that the adjustments be cumulative.[45]

Accordingly, the Commission adopts the following schedule:

Year	Annual changes (percent)	Cumulative reduction/ conversion (percent)
1	15	15
2	15	30
3	20	50
4	25	75
5	25	100

The Commission believes that the modifications to the CD reduction/conversion schedule adopted herein will better enable pipelines to accommodate their customers' CD adjustments in a more orderly and less disruptive manner. Pipelines and their customers will benefit from a more gradual CD adjustment program to the extent it ensures a more predictable transition and mitigates potential take-or-pay exposure. Most significantly, as pointed out by APGA and WDG, limiting the CD adjustment options will help to mitigate adverse cost-shifting.

The nondiscriminatory access conditions in Order No. 436 are intended to give all customers of a pipeline access to available transportation capacity. In the near future, as pipeline customers revisit their traditional relationships with pipeline suppliers and gain experience in finding and purchasing non-traditional supplies, most transportation services will probably be on an interruptible basis. A customer's ability to obtain interruptible transportation service does not necessarily depend upon CD reductions and conversions.

However, Order No. 436 recognizes the possibility of structural changes in the gas industry. Distribution customers and end-users may choose to purchase more of their gas supplies, either short-term or long-term, from producers, brokers and other nontraditional suppliers. In these cases, pipeline customers would require long-term firm transportation arrangements. The CD reduction/conversion options are important in this respect to free up some pipeline capacity and to give firm sales customers, especially full requirements customers, greater options. However, recognizing that these new pipeline service options involve structural changes in the industry, the Commission must ensure that use of these new options does not greatly disadvantage any one class of customers.

Changes in purchasing patterns may be more prevalent in some areas of the country than others, or for some customers more than others. Partial requirements customers have historically been able to "swing" on a competitive basis between multiple pipeline suppliers, an ability that was enhanced by Order No. 380. It is reasonable to assume that the ability to "swing" has translated to expertise on the spot market as well. In this regard, the Commission notes that data on file at the Commission and reproduced at Exhibit D of Order No. 436 indicates that the overwhelming majority of transportation arrangements undertaken on behalf of local distribution companies in the first six months of 1985 have been for partial requirements customers with alternate pipeline suppliers and *not* for full requirements customers supplied solely by one pipeline.

Since many partial requirements customers have greater experience with spot market and interruptible transportation transactions, we believe that they have developed greater knowledge of the competitive market infrastructure, with greater resources to make direct purchases of competitively priced gas. This customer class may be better situated, therefore, to take immediate and full advantage of the CD options.

Full requirements customers, on the other hand, have not had the same opportunities to play the competitive field between pipeline suppliers. Nor in many cases have they had the opportunity to gain extensive experience in making spot market or direct producer purchases. Accordingly, many may be reluctant to immediately forgo the reliability of service which comes from their present suppliers' firm sales obligations. As a result, full requirements customers will probably be unwilling to reduce or convert their firm entitlements as rapidly as many partial requirements customers.

To the extent partial requirements customers can better take advantage of the CD reduction election than full requirements customers, there may be

[45] The "cumulative" requirement here implements the Commission's intention that firm sales customers be provided maximum options for transportation services, regardless of whether they choose to exercise those options to the full extent from year to year during the CD reduction/conversion phase-in schedule.

cost-shifting from partial to full requirements customers. This is so because some portion of fixed costs are allocated on the basis of firm entitlements. If partial requirements customers reduce their entitlements in a disproportionately greater amount than the reductions by full requirements customers, these latter customers may be allocated a greater share of the fixed costs. By setting the CD reduction cap higher in the initial years, the Commission inadvertently may have disadvantaged the very customers that the CD reduction provisions are intended to benefit. Therefore, as indicated above, we have decided to modify those provisions to provide for a more graduated and gradual phase-in period.

c. *Reduction of Transportation Entitlements.* One applicant, Columbia Gas Transmission Company, states that the Commission should also allow reductions in exisiting firm transportation contracts. It states that, as a corollary to the Commission's regulations permitting pipeline customers to reduce their sales contracts by a certain percent a year, customers with the ability to reduce their firm transportation contracts by a similar percent a year should be afforded the same treatment. Columbia contends that this is especially important for upstream pipelines who are transporting gas for the benefit of another pipeline's system supply. It states that present over-supply situations have resulted from down stream pipelines paying significant demand charges which are in excess of daily deliveries of gas by the upstream pipelines. It also believes that the situation will be aggravated as additional pipelines sales are replaced by greater transportation quantities under Order No. 436. (Columbia, at p. 15).

The purpose of the rule is to provide greater use of transportation services, to encourage the development of a competitive wellhead market and to give customers' options to take either sales or transportation service. There is nothing that precludes a firm transportation customer from negotiating for a reduction in its firm transportation entitlement and seeking the necessary certificate authority. However, that is beyond the scope of this rule, which is directed toward encouraging greater use of pipeline capacity for transportation. *See Mississippi River Transmission Corp. v. United Gas Pipeline Co.*, 29 FERC ¶ 61,171 (Nov. 13, 1984); 33 FERC ¶ —— (1985).

4. Allocation by Distributors of Minimum Bill Credits That Arise From Reduction/Conversion

Memphis (at pp. 13–14) and Panhandle Eastern (at p. 10) request clarification that the Commission intended no double reduction in an LDC's minimum commodity charges under §§ 284.10(c)(4) and (d)(5) when an LDC reduces sales CD in the process of converting sales CD to transportation CD under § 284.10(d)(5). Each section provides for concomitant reductions in minimum commodity bills to reflect the reduced sales CDs. Panhandle Eastern states that nothing indicates that the two provisions will apply exclusively in each case. BUG (at pp. 9–11), on the other hand, interprets the conversion provision of § 284.10(d)(5) to be discriminatory because, in its view, the provision provides no mechanism for a reduction in minimum commodity bill charges and has the effect of indirectly assigning such charges to transportation in contravention of § 284.8(d). Frito-Lay (at pp. 2–3) seeks clarification that the minimum bill reduction and credit provisions of § 284.10(c)(4) and (5) apply when an end-user elects to take transportation services from an interstate pipeline, even though the LDC has not elected to reduce or convert its contract demand for sales.

At the outset, the Commission notes that the minimum bill reduction/credit provisions of §§ 284.10(c)(4) and (d)(5) are mutually exclusive and cannot result in a duplicate reduction in minimum commodity bill liability in the event of a CD conversion. If the LDC converts CDs, then § 284.10(d) applies to the CD volume converted. If it elects to reduce CDs (and seek a new source of supply, for example), § 284.10(c)(4) applies to the CD volumes reduced. Both rules cannot operate with respect to a conversion. Further, BUG is off the mark in its comments. Section 284.10(d)(5) does expressly effect a reduction in minimum commodity bill charges and is therefore not different in that respect, than § 284.10(c)(4), CD reductions. Moreover, while the net effect of a conversion on the pipeline's recovery of fixed costs may be minimal (due to the reservation fee provision) (*see* 50 FR 42444), the fact that the LDC that converts CDs may pay more than one that strictly reduces CD is justified. The converting LDC still should pay to tie up the pipeline's firm capacity even it is now in the form of firm transportation service. Further, and differences in cost recovery as a result of CD reductions will ultimately depend on the outcome of the pipeline's rate proceeding. (*See* 50 FR 42440). The purpose of both the CD reduction and the CD conversion provisions is to free up unused capacity by allowing reductions in volumetric levels of sales service; not to reduce costs *per se.*

Frito-Lays' requested changes are at odds with the plain language of §§ 284.10(c)(4) and (d)(5). No minimum bill reductions or credits arise unless the LDC elects to reduce or convert its demand for sales service. It is equitable to preclude the same minimum bill reductions or credits when an end-user obtains transportation that by-passes the LDC because the pipeline still must maintain by capacity and stand ready to serve that LDC in the event it is able to replace the end users and require its full contracted service.

D. Rate Conditions Under § 284.7

1. Value of Service

Several applicants state that the rate criteria in §§ 284.7(c) and 157.103(d)(2) for transportation under Part 284 and any new service under optional expedited certificates, respectively, are invitations to "value of service" ratemaking; *i.e.*, all fixed costs will be charged to on-peak customers thus giving off-peak customers a "free ride."

APGA asserts in its application for rehearing (at pp. 42–43) that the Commission has authority under the Natual Gas Act to consider seasonal differences in the cost of rendering service in setting rates, as provided in §§ 157.103(d)(5) and 284.7(d)(3) of the rule. APGA further asserts that because pipelines can develop cost based rates for peak and off-peak periods, it is unnecessary to include §§ 284.7(c) and 157.103(d)(2) in the rule. These sections are essentially similar and set forth the rate objectives related to self-implementing transportation and optional expedited certificates. Section 157.103(d)(2) provides as follows:

> Maximum rates for both peak and off-peak periods must be designed, to the maximum extent possible, to achieve the following three objectives:
>
> (i) Rates for service during peak periods should ration capacity;
>
> (ii) Rates for firm service during off-peak periods and for interruptible service during all periods should maximize through-put; and
>
> (iii) The certificate holder's revenue requirement allocated to firm and interruptible services should be attained by providing the projected units of service in peak and off-peak periods at the maximum rate for each service.

APGA contends (at pp. 43–44) that §§ 157.103(d)(2) and 284.7(c) serve no useful or legally permissible purpose, that the sections will be used by pipelines to adopt "value-of-service" rates rather than cost-based just and reasonable rates, and that the sections should be eliminated from the rule.

As set forth below, APGA's application for rehearing on this issue is denied. Order No. 436 clearly provides that rates under the final rule must be cost-based and must be designed so that the pipeline has a reasonable opportunity to recover its costs. Further, the rates should be designed to ration capacity at the peak and to encourage full utilization of the pipeline. *See* 50 FR 42448. Order No. 436 also provides that "the rates for firm or interruptible transportation under this rule will be based on the fully allocated, separately established cost of providing the service and shall separately identify the cost-component attributable to transportation, storage, and gathering." (*Id.*) Because of the strong support for cost-based ratemaking in Order No. 436, APGA's concern that the Commission will permit pipelines to abandon cost-based ratemaking in favor of value-of-service ratemaking is unfounded. For these reasons, rehearing is denied.

2. Generic v. Case-by-Case Approach

Section 284.7(d) imposes numerous rate conditions on pipelines transporting natural gas under Subparts B, G, or H of Part 284. This section provides that the rates must be volumetric, one-part rates that recover costs allocated to the service on the basis of projected units of service, except to the extent a reservation fee is permitted by § 284.8(d) for firm transportation; separately identify the cost component attributable to transportation, gathering, and storage; and reasonably reflect any material variation in the cost of providing service due to the time at which the service is provided and the distance over which it is provided.

Several commenters argue that rates designed consistent with these conditions will not enable pipelines to recover their costs. Several of these commenters—El Paso (at pp. 13–14), UDC (at pp. 44–52), Transwestern (at pp. 17–20)—contend that the solution to this problem is to eliminate the rate conditions and provide that the rates will be established on a case-by-case basis.

The Commission sees no merit in this argument. The rate conditions in § 284.7(d) simply establish the basic ratemaking framework. The actual rate levels will be set on a case-by-case basis. 50 FR 42448. Moreover, as stated in Order No. 436, one of the critical elements to be considered in setting rates for transportation under Subparts B, G, and H is to design rates that will allow the pipeline to recover its costs plus a fair return. Finally, the essence of § 284.7(d) is that rates must be designed so that the pipeline will recover the costs allocated to the service if it transports the volumes (the "projected units of service") used to design the rates. This is exactly the same method the Commission uses to design rates for other pipeline services, such as firm sales. No tenable argument can be made that this method does not permit pipelines to recover their costs plus a fair return.

Nor does the Commission see any merit to the arguments when the specifics of § 284.7(d) are considered. El Paso (at pp. 9–10) and UDC (at pp. 48) argue that § 284.7(d) will not permit pipelines to recover their costs because § 284.7(d)(3)(i) requires the rates to reasonably reflect any material variation in the cost of providing the service due to "whether the service is provided during a peak period or an off-peak period." This is so, El Paso argues, because the rate for transportation during the peak period will be higher than the rate for sales services, which generally do not differentiate between peak and off-peak periods. Hence the customers will tend to buy gas during the peak period. But during the off-peak periods the transportation rate will be lower so that customers will transport rather than buy gas. The problem with this argument is that it assumes that all the fixed costs associated with providing self-implementing transportation will be allocated to the peak period.

The final regulations do not presuppose that all fixed costs will be allocated to the peak period. That will be determined in the rate case in light of the rate objectives of § 248.7(c) and other basic goals and elements of the rate design process, such as the necessity of designing rates that permit pipelines to recover their costs. *See* 50 FR 42447–48. Furthermore, nothing precludes a pipeline from using the rate objectives of § 248.7(c) when designing its sales rates

El Paso and UDC also argue that pipelines will not recover their costs because the rate conditions require pipelines to offer "unbundled rates" for transportation while sales rates are not "unbundled." Section 284.7(d)(1) provides that the rates must "separately identify the cost components attributable to transportation, storage and gathering costs." To the extent certain services are not required for the transportation of gas, some of the costs can be avoided by pipelines. Other costs will have to be reallocated in rate proceedings, depending on the reasons for their incurrence. This does not mean that the pipelines will be unable to recover costs prudently incurred.

Finally, UDC argues (at pp. 44–95) that the pipelines will not recover their costs because the reservation fee does not "guarantee recovery of an appropriate level of fixed costs." Nothing in the statute requires us to guarantee the recovery of fixed costs. All that is required is that the pipeline be given the opportunity to recovery its costs. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). The reservation fee provided by the regulations gives pipelines the opportunity to recover essentially the same level of transportation-related fixed costs recovered in their sales demand rates. Indeed, if the maximum volmetric rate is collected for the projected units of service, the pipeline will recover its fixed costs even without charging a reservation fee. Accordingly, the Commission sees no reason to grant rehearing on this issue.

3. Reservation Fees

a. *Diminution of Risk of Pipelines.* APGA (at pp. 37–38) argues that no reservation fee should be permitted for firm transportation under subparts B, G, and H or for sales service. APGA argues that this is necessary to place pipelines at risk. The Commission disagrees. First, the question of the appropriate method of developing rates for sales service is considerably beyond the scope of this rule. Second, the reservation fee pipelines may impose for firm transportation under subparts B, G, and H enables them to recover no more than the same portion of fixed costs recovered in their sales demand rates. It does not guarantee recovery of all fixed costs. Those costs remain at risk, depending on the level of throughput. *See* 50 FR 42471.

b. *Proposed Exemption for Small Sales Customers.* APGA (at p. 39) also argues that, if pipelines are permitted to impose a reservation fee, they should not be permitted to impose a reservation fee on a customer that converts from firm sales to transportation where the rate the customer paid for sales service was a one part rate. In short, APGA argues that, if the customer did not pay a demand charge when it was a sales customer, it should not pay a reservation fee when it converts to firm transportation. The Commission disagrees. In Order No. 436, the Commission decided pipelines should be permitted to impose a reservation fee for firm transportation to minimize the possibility that, because of the non-discriminatory access condition, customers would "overbook" capacity. 50 FR 42449. Sales service is not subject to a non-discriminatory access condition. Consequently, the Commission sees nothing in the fact that customers do not pay a demand charge for sales service to warrant exempting them from the reservation fee for self-implementing transportation. Moreover, the program is voluntary. If the customer is better off as a sales customer; it will remain a sales customer. If it is better off as a transportation customer, notwithstanding a reservation fee, it can exercise the option it prefers.

c. *Applicability to Intrastate Pipelines.* Producers Gas (at p. 8) seeks clarification of whether the permission that the rule gives to interstate pipelines to impose a reservation fee applies to intrastate pipelines. It does to the extent that the intrastate pipeline offers firm transportation subject to the non-discriminatory access condition in § 248.8 and that the total rate meets the fair and equitable standard. If a pipeline provides firm service in intrastate commerce and charges a reservation fee for that service that is consistent with the requirements of § 248.8(d), the pipeline may use that reservation fee for service provided under Supbart C. If the pipeline has no such reservation fee and seeks to impose a reservation fee for firm interstate service, it must, consistent with § 248.123(b)(2), file the reservation fee with the Commission and support it. *See* § 248.123(b).

4. Cost Allocation Issues

a. *Reasonableness of Allocating Between Peak and Off-Peak Periods.* Section 284.7(d)(3)(i) provides that rates must reasonably reflect any material variation in the cost of providing service due to whether the service is provided during peak or off-peak periods. APGA (at p. 44) argues that the term "off-peak period" should be construed in accordance with pre-existing cost classification and allocation precedents, such as *Atlantic Seaboard Corp.*, 11 FPC 43 (1952). APGA's point seems to be that in setting rates for self-implementing transportation the Commission should follow its past practice of allocating a substantial amount of fixed costs to off-peak periods.

The Commission is not adopting this clarification. Although the result of the ratemaking process may or may not be that substantial amounts of fixed costs will be allocated to the off-peak period, the Commission sees no reason to determine the result now. Instead, the question of how much of the pipeline's fixed costs are to be allocated to off-peak periods will be determined on a case-by-case basis in light of the rate objectives in § 248.7(c).

b. *Meaning of "Properly Allocated".* Section 284.7(d)(4) provides that the rates for a transportation service provided under subparts B, G, and H must recover "solely those costs which are properly allocated to the service to which the rate applies." APGA (at pp. 45–57) argues that the Commission should modify § 248.7(d)(4) to require pipelines to allocate storage, production, gathering, and "as billed" fixed costs to their firm transportation services on the same basis that these costs are allocated to their firm sales service.

The Commission declines to adopt this modification. The basic rule the Commission follows in allocating costs to sales service is to allocate to each service and each class of customers the costs the pipeline incurs in serving them. *See generally Columbia Gulf Transmission Co.*, Opinion No. 173, 23 FERC ¶ 61,396, at 61,850 (1983), *aff'd sub nom., City of Charlottesville v. FERC*, No. 83–2059 (D.C. Cir. Oct. 18, 1985). The Commission intends no departure from that rule in allocating costs to transportation services. *See* 50 FR 42448. Hence the general rule to be followed in allocating costs to transportation services will be the same as the rules followed in allocating costs to sales services. The consequence of this, however, may well be that the amounts and types of costs allocated to transportation services will differ from those allocated to sales service. For example, a pipeline may incur production costs to provide sales services, but it may not incur those costs to provide transportation services. Consistent with the general rule, the pipeline should therefore not allocate production costs to transportation. Accordingly, the Commission sees no basis for requiring pipelines to allocate to transportation services the same costs allocated to sales services. Instead, the costs to be allocated to transportation must be resolved, as they always have been, in individual rate cases.

5. Selective Discounting

a *Legal Authority.* Among the rate conditions imposed on transportation performed under subparts B, G, and H is the requirement of § 284.7(d)(5)(i) that the rate schedule set forth a maximum rate and a minimum rate. A pipeline may then charge a customer the maximum rate, the minimum rate, or any rate in between. *See* § 284.7(d)(5)(ii).

APGA (at pp. 47–67), Laclede (at pp. 12–14), NI-Gas (at pp. 22–30), Southern Indiana (at pp. 29–35), Ohio Association (at pp. 2–4), and IOGA (at pp. 2–3), oppose this aspect of the rate. Each argues that section 4(b) of the Natural Gas Act prohibits a pipeline from charging one customer one rate and another customer a different rate. The Commission disagrees.

In Order No. 436 the Commission reviewed the applicable law and precedents. It concluded that section 4(b) was not intended to prohibit pipelines from discounting its rates to its customers to meet competition. *See* 50 FR 42452.

None of the parties opposing § 284.7(d)(5)(ii) challenge the Commission's analysis of the statute's legislative history. Instead, they argue around the question. For example, APGA argues (at pp. 57–59) that allowing pipelines to discount their rates to particular customers to meet competition is inconsistent with the holding of the D.C. Circuit in *MPC II*, which is, APGA alleges, that the NGA requires the same rate to be charged to captive and non-captive customers. The problem with this argument is that the issue before the court was not whether the Commission could allow a pipeline to offer a discount to a particular customer to meet competition. The issue was whether the Commission could allow a pipeline to deny access to transportation (and therefore to the competitive nationwide market for gas supplies) to some customers. To be sure, there is language in the court's opion, 761 F.2d at 784–85, that says the NGA requires pipelines to charge the same rate to captive and non-captive customers. But this language is in the section of the opinion in which the court is summarizing the petitioner's arguments. Nothing in the rest of the opinion suggests that the court was thereby adopting those arguments as its own statement of the law on an issue that was not then before it.

NI-Gas also argues (at pp. 25–27) that § 284.7(d)(5)(ii) is inconsistent with the D.C. Circuit's holding in *MPC II*. But NI-Gas. argument is that to permit pipelines to charge customers different rates for transportation amounts to allowing pipelines to discriminate among customers in terms of access to transportation. This is incorrect. The two situations are different. In the case before the court in *MPC II* the Commission had denied captive customers access to transportation. Here, by contrast, the Commission's regulations require pipelines to grant access to transportation to all customers willing to pay the just and reasonable rate.

NI-Gas (at pp. 28–30) and Laclede (at pp. 13–14) argue that permitting pipelines to offer a discount to a particular customer will remove the competitive pressure on producers to reduce the price of gas at the wellhead. But in Order No. 436 the Commission examined the impact that permitting pipelines to offer discounts to particular customers might have on wellhead prices. 50 FR 42454. The Commission concluded that permitting pipelines to discount selectively would likely have no effect on prices at the wellhead. The Commission sees nothing in the arguments of NI-Gas and Laclede that requires a different conclusion.

b. *Anticompetitive Effects.* APGA (at p. 47), Ohio Association, IOGA, and Southern Indiana (at p. 32) argue that permitting pipelines to discount selectively will have anticompetitive effects. For example, Southern Indiana argues that a pipeline could use § 284.7(d)(5)(ii) to charge the maximum rate to an LDC while charging an end-user, formerly served by the LDC, a discounted transportation rate, thereby imposing a price squeeze on the LDC. The problem with this argument is that it overlooks the fact that the conduct of a pipeline offering a discount to one customer but not to another is still subject to scrutiny under both the antitrust laws and sections 4 and 5 of the NGA. The Commission made that clear in Order No. 436. *See* 50 FR 42454.

Moreover, *both* rates are fully subject to the Commission's rate jurisdiction and full remedial powers. Hence, the situtation is entirely distinguishable from the price squeeze issue as it arises under the Federal Power Act. *Cf., Mid-Tex Electric Cooperative* v. *FERC,* 773 F.2d 327, 355–56 (D.C. Cir. 1985) (sl. op., at pp. 58–59).

In short, all that Order No. 436 provides is that a pipeline offering a discount to one customer but not to another is not by that mere fact engaging in unduly discriminatory conduct. It does not provide that a pipeline may engage in anticompetitive or unreasonable conduct or that the Commission will not take action to remedy unduly discriminating rates being charged. Accordingly, the Commission sees no reason to eliminate § 284.7(d)(5)(ii).

c. *Proposed Upward Flexibility.* Several pipelines—Cascade (at p. 10), Florida Gas (at pp. 17–18), ANR (at p. 27), and Tennessee (at pp. 31–35)—argue that not only should they have the flexibility to offer discounts below the maximum rate but also that they should have the flexibility to charge rates above the maximum. Essentially two reasons are given in support. First, ANR and Florida Gas argue that allowing pipelines to charge above the maximum rate is necessary to balance the fact that the rate conditions will allegedly produce non-compensatory rates. Second, Cascade argues that allowing pipelines to charge above the maximum when competitive conditions permit is consistent with the behavior of unregulated companies.

The Commission sees no merit in these arguments. With respect to the first argument, it does not believe rates designed in conformity with the rate conditions will be non-compensatory. Simply put, the rate conditions provide that the rates must be designed to provide the company a reasonable opportunity to recover the costs allocated to the service, including a fair profit, by transporting the volumes used to design the rates. This does not differ from the method used to design rates for other jurisdictional services. No tenable objection can be made to that time-tested method. Nor is it an objection to the rate conditions that the pipeline offering a discount may not recover its costs. If the Commission did not permit the pipeline to discount, the alternative to offering a discount and not recovering some costs would be to not transport certain gas at all and recover even fewer costs. Moreover, depending on the elasticities of the customers' demands, discounting the rate may enable the pipeline not only to recover all of its costs, but also to earn increased returns. In short, downward flexibility in unit rates does not necessarily mean reduced total revenues.

With respect to the second argument, the Commission sees nothing in the fact that an unregulated company may charge more than its costs plus a fair return when competitive conditions permit. In an unregulated industry, business usually can set the price of its goods at a level above what is needed to recover costs plus a fair return only when the business has a degree of market power. The Commission regulates pipelines to prevent them from exercising the market power they have. Hence, the Commission sees no justification for allowing pipelines to charge a rate higher than is needed to recover their costs plus a fair return.

d. *Discounts to Affiliates.* AGD (at p. 31), Consolidated Fuel Supply (at p. 3), and the Ohio Association (at p. 3) argue that the Commission should at least prohibit or restrict the ability of a pipeline to offer discounts to its affiliates. In Order No. 436 the Commission recognized that a discount offered to an affiliate may be made for legitimate competitive reasons. The Commission also notes that there are certain safeguards to prevent pipelines from abusing its discounting authority. As stated in Order No. 436, such discounts will be carefully scrutinized. 50 FR 42454. AGD, Consolidated Fuel Supply, and Ohio Association do not challenge this conclusion. Accordingly, the Commission sees no reason to grant rehearing on this issue and prohibit pipelines from offering discounts to their affiliates.

e. *Filing Requirements.* Southern Indiana (at pp. 33–34) argues that § 284.7(d)(5) is inconsistent with section 4(c) of the NGA. The purpose of section 4(c) is to give the Commission notice of the rate the pipeline is charging. *See City of Cleveland* v. FPC, *525 F.2d 845, 854 (D.C. Cir. 1976). The Commission sees nothing in § 284.7(d)(5) that contradicts this purpose. The rate for the service—reflecting the reasonable range between the maximum and minimum—is required to be on file prior to the service being offered. In addition, § 284.7(d)(5)(iv) requires the pipeline charging a customer a discounted rate to file a report with the Commission. This report, which will be attached to the pipeline's rate schedule, will show the rate within the range that the pipeline actually charged. 50 FR 42455. In response to Southern Indiana, the Commission will modify the reporting requirement to ensure that such reports will be filed 15 days after the close of the billing period, as compared to the 45 days contained in Order No. 436. See* new § 284.7(d)(5)(iv). This will provide sufficient notice to the Commission and the public of the rate the pipeline is charging.

f. *Miscellaneous Matters.* There are also two requests for clarification of § 284.7(d)(5). First, the Association of Texas Intrastate Natural Gas Pipelines seeks clarification of whether intrastate pipelines may offer discounts below the maximum rate. Section 284.7(d)(5) does not apply to intrastate pipelines transporting under Subpart C of Part 284. By its terms, § 284.7 applies only to interstate pipelines transporting under Subparts B, G, or H. *See* § 284.7(a). Thus, the rates intrastate pipelines may charge will be subject to the same rules they always have been. *See* 50 FR 42408. Since those rules permit intrastate pipelines to charge a customer a rate that does not exceed the fair and equitable rate, *see, e.g., Red River Pipeline Co.,* 30 FERC ¶ 61,226 at 61,452 (1985), intrastate pipelines may continue to offer discounts to customers.

Second, Columbia (at p. 20) argues that the basic intent of Order No. 436 is that the pipeline may offer a discount if the discount is not anticompetitive and the pipeline assumes all risks of under-recovery. Columbia seeks clarification because the Commission's discussion, 50 FR 42452, of *Sea-Land Services Inc.* v.

ICC, 738 F.2d 1311 (D.C. Cir. 1984), suggests that a discount must be offered to all "similarly situated customers." A discount to one customer need not be provided to any other customer. Discounts in transportation rates may be offered on a selective basis. Since a pipeline operating under the new rules will be operating in a more competitive environment, it is appropriate to provide it greater flexiblity—within the approved maximum and minimum—in pricing its services. Under the conditions contained in the new rates, where it is clear that the discount is solely at the pipeline's expense, selective discounts will not ordinarily be unduly discriminatory. Complaints will be entertained as a means of determining whether a particular discount is pernicious.

Finally National Fuel Gas Supply Corp. asks how long beyond December 15, 1985, it may transport gas pursuant to the transitional provisions of §§ 284.105 and 284.223 without becoming subject to the rate filing requirements of § 284.7(b)(2). If an interstate pipeline plans to terminate all transportation under Subpart B and G prior to July 1, 1986 (the date specified in § 284.7(b)(2) as the time by which new rates must be effective), § 284.(b)(2) will not be applicable, assuming all Part 284 transportation is actually terminated, as planned, prior to July 1, 1986. If new rates are not filed in time to be effective by July 1, 1986, transportation must be interrupted on that date, as the interim rate under § 284.7(b)(1) apply only until July 1, 1986.

6. Effective of Waiver Request for Applicability of Rate Conditions

Northern Border requests (at p. 2) the Commission on rehearing to clarify: (1) Whether it may file for a blanket transportation certificate under subpart G of Part 284 of the Commission's regulations which does not conform to—and thus requires a waiver of—certain of the requirements of Order No. 436; and (2) whether the mere filing of a proposal would subject Northern Border to the "open access" and rate requirements of Order No. 436, or whether such requirements would only apply if Northern Border's filings is approved as filed. Northern Border states that its participation in a blanket certificate program under the revised regulations or in self-implementing transportation is possible only if the new rate conditions which attach to such transportation can be modified to be compatible with Northern Border's underlying financial agreements and a prior Commission order approving its cost of service tariff.

Northern Border is a partnership which primarily transports Canadian natural gas owned by shippers from the international border in Montana to a terminus near Ventura, Iowa. It does not buy or resell gas. Northern Border states that, under the loan agreement to finance construction of Northern Border's pipeline, it may be found in default if the pipeline's tariff is amended or modified and such change materially and adversely affects eiher the ability of Northern Border to perform its obligations under the loan documents, or the rate of amortization of the notes held by the lender. The pipeline states that under the rate conditions of new § 284.7(d), its costs, previously assured of recovery under a full cost-of-service tariff, would be placed at risk (at p. 9). Thus, it would be unable to continue the interruptible transportation service currently performed for certain of its customers. Revenues from those services are currently credited to its cost of service. The company states that it presently operates under an open and non-discriminatory tariff and that the incentive to provide incremental transportation is already present, since each of Northern Border's shipper-partners benefits from the crediting of revenues to Northern Border's cost of service.

In response to Northern Border's questions, as the Commission stated in Order No. 436, the program is completely voluntary. If Northern Border can show that its proposed transportation services achieve the objectives of Order No. 436 and that it has valid reasons for not being able to conform to all of the rate conditions of § 284.7(d), Northern Border should file for a waiver of the specific provisions that impede its participation in the Order No. 436 programs. The mere filing of such waiver request with a blanket certificate application does not automatically subject the applicant to the rate conditions of § 284.7(d) and the non-discriminatory access conditions. Northern Border should, however, request a waiver prior to beginning self-implementing transportation, since the rate charge for such transportation must comply with subpart A of Part 284. If Northern Border is unable to show good grounds for waiver, its transportation rate would be subject to revision. Any request for a waiver will be carefully scrutinized to ensure that pipelines are not placing imaginary obstacles in the way of implementing either the non-discriminatory access provision or the rate conditions. Waivers can thus only be considered in a case-specific setting.

E. Transitional Treatment of Existing Transactions

1. Nondiscriminatory Access as a Condition

DOE recommends that the final rule be amended to provide for continuation of transactions for only those pipelines that apply to participate in the nondiscriminatory transportation program. DOE points out that some reductions in transportation services have occurred, as most pipelines have been unwilling as yet to apply for a new blanket transportation certificate. A decision to limit the interim continuation of on-going transportation arrangements solely to situations where the pipeline agrees to the nondiscriminatory access condition, and the other conditions of the final rule, would operate to eliminate the voluntary nature of the program, and open the Commission to a charge that it was mandating common carriage. The Commission believes that the acceptance of the program by pipelines must be voluntary if the program is to be found valid under the existing statutory authority. As discussed in the final rule, the transitional provisions were carefully adopted to occasion minimum disruption in existing transportation arrangements, while endeavoring to establish and foster a framework for the widest possible acceptance of the new terms and conditions, conditions which do not have the features of the earlier transportation programs found objectionable by the Court of Appeals in the *Maryland People's Counsel* cases. The numerous clarifications of Order No. 436 issued since the Order's adoption should serve to diminish many of the piplines' initial concerns and to permit on-going transportation arrangements to continue under the conditions of the final rule.

2. Transactions Under NGPA Section 311

a. Continuation of Long-Term Transactions. Louisiana Resources (at p. 6), Louisiana Intrastate (at p. 9–10), Amoco Gas (at p. 4) and Tenngasco (at p. 8) contend that the provision of the final rule limiting transitional treatment of existing section 311 transportation arrangements by intrastate pipelines on behalf of an interstate pipeline or local distribution companies served by an interstate pipeline to the earlier of the expiration of their term or October 9, 1987, is arbitrary and discriminatory. Willcox likewise argues that all such section 311 transportation arrangements entered into and commenced before the final rule became effective should be permitted to remain in effect without change for their full contractual term.

The pre-existing Part 284, subpart B regulations automatically authorized all contracts which satisfied the criteria of section 311(a)(1). Section 284.102(b), however, imposed a maximum two-year term as a condition on such contracts. In Order No. 46 which first promulgated Part 284 and in which the two-year term first was applied, the Commission stated that successive extensions of two years on section 311(a) transactions would be self-implementing "unless the Commission decides that an extension is not in the public interest." In § 284.5 of the regulations, the Commission reserved authority to impose further terms and conditions prospectively, as deemed appropriate, on transactions authorized by Part 284. The Commission concludes, for reasons amply expressed in that final rule, the further extension of authority after expiration of the time limits authorized in the rule are not in the public interest unless the conditions of the new rule are met. Contrary to Willcox's claim (at p. 46), such determination is within the Commission's reserved authority and does not constitute a retroactive revocation of prior pre-granted approval for the full contract term of all section 311(a) gas transportation agreements entered into and commenced before the final rule became effective.

Tenngasco argues that existing section 311 transportation arrangements performed by intrastate pipelines that had received prior approval under former § 284.127 of the regulations, and were not subject to the two-year limitation imposed on self-implementing transactions, should be continued after October 9, 1987. The request is denied. The same reasons that justify a limited authority to continue self-implementing transportation transactions are applicable to transactions of the type referred to by Tenngasco. Because Order No. 436 eliminates the two-year term restriction on NGPA section 311 arrangements, shippers now have the same flexibility to enter into long-term arrangements under all section 311 provisions as they did under former §§ 284.107 and 284.127. Thus, the transitional provisions should be identical for both.

b. *Alleged Discrimination Against Transactions Not Effective on or Before October 9, 1985.* The Fertilizer Institute (FI) has requested that the final rule be amended to allow continued transportation for high-priority end users without regard to whether such transportation was commenced under § 157.209(a)(1) or was certificated by separate SMP authority. The request must be denied. All SMP transportation authority and all end-user transportation under § 157.209(e) ceased with the termination of those programs on October 31, 1985, in accordance with the *Maryland People's Counsel* cases (except for transactions allowed to continue under § 284.223(g)(2), subject to conditions consistent with the mandate of those cases). High-priority end user transportation authorized under former § 157.209(a) and commenced on or before October 9, 1985, is authorized for its full term. Continued transportation can only be effected if consistent with the new regulations. See *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol* (Midwest Solvents Company), Docket No. RM85-1-000, issued October 31, 1985 (Order Denying Request For Clarification).

FI asserts (at p. 3-4) that new end-user transportation, and extensions of end-user transportation previously authorized under Order No. 234, should be authorized on the same basis as transportation on behalf of pipelines and local distribution companies. The request is denied. The reasons for the differentiation have been expressed amply in the preamble to the final rule. In the Commission's opinion, the provisions for the initial 120-day authorization and the notice and protest procedure set forth in § 157.205 will be adequate to consider whether such transportation should be authorized further and the appropriate conditions therefor.

Citizens Energy requests that the Commission reduce the duration of the two-year grandfather period on self-implementing section 311 transactions to possibly July 1, 1986. The two-year maximum period was selected in light of the authorized duration of many existing self-implemented transactions and to avoid the necessity for unduly infringing on those arrangements. The Commission finds no validity in Citizens Energy's proposal. The provisions as established in the final rule will remain unchanged.

Citizens Energy also requests clarification (at p. 3-4) whether a change may be made in the supplier of gas to be transported or the agents utilized by the local distribution company in effecting the transportation arrangement without violating the transitional provision. This matter was answered in an order issued on October 30, 1985, in response to a request for clarification. See *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol* (Hadson Gas Systems, Inc.), 33 FERC ¶ 61,142 (1985). In brief, the "grandfathered" transportation transactions must continue without change as they existed on October 9, 1985, including with regard to the supplier of the gas.

Finally, Northern Illinois (NI-Gas) recommends (at p. 7) that the Commission allow pipelines to provide local distribution companies and high-priority end users new transportation services until the earlier of July 1, 1986, or the effective date of a pipeline's rate case in which representative levels for self-implementing transportation transactions are reflected. Such interim provision of new section 311 or Order No. 319 transportation would be on a non-discriminatory basis, and would not trigger § 284.10 unless the pipeline elected to become an open access transporter under either Subparts B or G of Part 284 of the Commission's regulations.

As the Commission has indicated previously, the reductions and conversions of entitlements provided by § 284.10 are essential in order to make the non-discriminatory access conditions for transportation meaningful for pipeline sales customers. The Commission does not believe that there is good reason to delay implementing the condition as suggested by NI-Gas.

3. Blanket Certificate Transactions Under NGA Section 7

a. *Forty-five Day Period for New Certificate Applications Should be Extended.* Several applicants have alleged that the 45-day grace period for deciding whether to file for a blanket certificate under the new rules is too short and should be extended. Southern Union Gathering (at p. 7-8) and the Industrial Groups (at p. 16) ask that the time be set at 60 days after a final order on rehearing. Southern Union Gathering specifically includes rehearing of the final rule regarding block billing, which has yet to be issued. Consolidated Natural (at p. 6) requests that the transitional period be extended, at a minimum, to the end of 1985. Tenneco (at p. 8) requests March 31, 1986, as the end of the transition period.

The requests are denied. The Commission believes it is important that the transportation program, and any necessary accommodating adjustments, be initiated without undue delay. The Commission believes the existing transitional period is adequate to allow the final rule to be evaluated and the requisite managerial decisions to be made on a timely basis. It is not convinced that additional time is necessary and, in particular, that the period need be extended until a decision is made on the block billing proposal. Moreover, the Commission notes that there is nothing that precludes a pipeline from determining to proceed under the new rules at any later date.

Tenneco points out that no transition period was provided for gas that had been authorized to be sold to end users after October 31, 1985, under blanket section 7(c) authority. The Commission assumes Tenneco is referring to the blanket SMP certificate program vacated by the Court of Appeals in *Maryland People's Counsel*, 761 F.2d 780 (D.C. Cir. 1985). Since that program was found inadequate and could not be continued, it has been replaced under the new rules. No transition period is required or is appropriate in this situation.

b. *Existing Transportation Rates Should be Continued.* Pacific Gas contends (at p. 6–8) that the rate structures for all existing section 311 transportation arrangements should be allowed to continue for their remaining duration under the transitional provisions. Southern Union likewise requests modification of the transitional provisions of Order No. 436 to permit all transactions commenced before October 9, 1985, to continue without modification until the earlier of their scheduled expiration or October 9, 1987. Both applicants seek a change in § 284.7. That section permits an interim rate to be charged until July 1, 1986, provided it is a one part rate included in an appropriate rate schedule on file and effective prior to November 1, 1985. After July 1, 1986, the rate must meet the requirements of §§ 284.7 (c) and (d).

The Commission believes this provision should remain unchanged. Existing rates may not meet the objectives set out in § 284.7(c) which, in its opinion, are necessary for the provision of truly viable, non-discriminatory transportation services at reasonable rates. The Commission preceives no reason why the rates for these transportation arrangements, some of which can remain in effect for an extended period into the future, depending on the service provided and the form of the authorization secured, should not be required to conform to the rate objectives as soon as reasonably possible.

Pacific Gas raises a special concern regarding the interrelationship of its rates under its cost-of-service tariffs and the "extraordinary historic facts" underlying those tariffs. This issue is more appropriate for consideration in a petition for waiver of the rule as it applies to Pacific Gas than in a request to modify the generic effect of the rule on rehearing.

4. Proposed Procedural Changes

MRT (at p. 12), Louisiana Intrastate (at p. 9–10) and the Industrial Groups (at pp. 3, 16) have requested that the Commission extend the term and/or scope of the transitional provisions. Louisiana Intrastate's petition has been considered above in the section of this order disallowing its request that section 311(a) transportation arrangements that were not eligible for self-implementation be continued for their full contract term. It contends that there is no justification for requiring long-term section 311 transportation transactions to terminate by October 9, 1987, while allowing section 7(c) authorizations to continue. The Commission disagrees. The Commission has determined as a matter of policy that all section 311 authorizations should be required to conform to the non-discriminatory access condition not later than October 9, 1987. The transition period of up to two years gives transporters adequate time to make adjustments. In this respect, there is no basis to differentiate the treatment on the basis of the original authorization.

MRT asks that all transportation contracted for prior to November 1, 1985, be allowed to continue through October 31, 1987, and under the rate conditions previously applicable until July 1, 1986. The Commission stated in the final rule why different treatment has been accorded various forms of transportation transactions. MRT has presented no basis for a change in those conclusions. The provision in § 284.7(b) dealing with interim rates for Part 284 transactions is, the Commission believes, a reasonable requirement to assure that the objectives of the final rule will be accomplished and that such rates are just and reasonable.

The Industrial Groups request that the December 15, 1985, date by which pipelines must discontinue transportation service under the non-discriminatory access statements, in the absence of a filing for a blanket certificate under § 284.221, be changed to sixty days after issuance of the order on rehearing of Order No. 436. The petition presupposes that substantial changes in Order No. 436 will be made on rehearing. In the Commission's view, affected pipelines will have had adequate time by December 15, 1985, to study the Commission's orders and to decide whether they will avail themselves of the opportunities therein presented. The request for an extension is denied.

F. Capacity Allocation; First-Come, First-Served Rule; Annual Filings

1. Effect of "First-Come, First-Served" Rule on Existing Contracts and Supply Arrangements

Consolidated Edison argues that the Commission's first-come, first-served policy with regard to the allocation of pipeline capacity should be revised. According to Consolidated Edison, under that policy, customers who have never paid any of the pipeline's fixed costs of providing capacity should not stand on an equal footing with customers who have paid such costs. Transwestern Pipeline Company also contends that pipelines should not be required to allocate capacity on a first-come, first-served basis and that they should be allowed to use other just and reasonable methods. The Commission disagrees. The first-come, first-served method ensures that capacity will be allocated on a non-discriminatory basis and is consistent with the concept that the non-discriminatory access condition is a contract carriage condition, rather than a common carriage condition. While other methods of allocating capacity could be devised, the requirement that all pipelines operate on the first-come, first-served principle ensures that they all stand on an equal footing in obtaining customers and their customers stand on an equal footing in obtaining service.

The Interstate Natural Gas Association of America (INGAA) contends that the adoption by the Commission of the non-discriminatory access provision, the first-come, first-served capacity allocation mechanism, and the CD reduction procedure means that pipelines will lose their ability to manage their own systems so as to provide for the long-term needs of existing customers. According to INGAA, by this impairment of pipelines to render adequate service, the Commission has shirked its role of consumer protection and has thereby violated its statutory mandate. The Commission does not agree. Nothing in the rule precludes pipelines from entering into long-term agreements for firm transportation or sales service. Nothing precludes a pipeline from seeking authority to construct new capacity to provide the service under either traditional section 7(c) procedures or under the optional expedited procedures. Hence, pipelines will not lose their ability to manage their own systems as claimed by INGAA.

Tenngasco Corporation requests clarification as to the meaning of first-come, first-served. In particular, it wishes the Commission to make clear whether an executed contract (or commencement of service) is required to establish priority status or whether a nomination to the pipeline reserves the shipper's position in line.

Natural Gas Pipeline Company of America (Natural) urges that the first-come, first-served policy should not be applied to interruptible transportation service and that such service should be governed by contract. Natural contends that pipelines need the ability to overbook interruptible service to provide a reasonable opportunity to earn the allowed return, to maximize customers' utilization of facilities, and to provide customers an incentive to sign up for firm service and pay a reservation charge.

In response, the final rule discussed how the Commission intended the first-come, first-served principle to work.

> Prior to offering any transportation services pursuant to the rule, a pipeline will make a determination of capacity available for such services. . . . The amount so determined will be proposed and supported in the pipeline's rate case. In fulfilling its non-discriminatory obligations, a pipeline must accept nominations up to this level. As the pipeline accepts nominations for firm transportation services the amount of remaining capacity available for firm transportation will decrease. 50 FR 42450.

In response to Tenngasco's request for clarification as to whether first-come, first-served applies to executed contracts or to requests for services, the final rule makes it clear that a customer's place in line is determined by when it makes a request for service, not when his contract is executed. The pipeline must consider whether there is sufficient capacity available to serve customers who request service on a first-come, first-served basis. The pipeline cannot accept requests for service over a period of time and determine which contracts to execute and then determine a shipper's place in line by virtue of the executed contracts. As the Commission discusses below, however, a person's place in the line is only ensured by a request for service if the customer is willing to pay the maximum rate for service, including any reservation fee where applicable, and of course to meet the reasonable operational conditions on file.

Columbia Gas Transmission Corporation and United Distribution Companies request that the Commission clarify that the allocation of interruptible capacity will not disturb the priority for existing interruptible shippers. In other words, Columbia contends that existing interruptible shippers who already have been receiving transportation service should be considered as having already "come" on the system for capacity allocation purposes. Similarly, Brooklyn Union Gas Company requests that the Commission confirm that existing long-term, certificated, interruptible services are to be accorded a higher priority of service than new, self-implementing and optional certificate interruptible service and sale arrangements.

Baltimore Gas and Electric Company (BG&E) seeks clarification that a pipeline must award capacity to a shipper willing to pay a higher transportation rate than another shipper (within the rate limits of § 284.7) even though the first shipper is further down in line. BG&E contends that two shippers closely placed in line for transportation capacity could compete for that capacity on the basis of the rate to be paid.

Several petitioners request that the Commission clarify how the first-come, first-served concept will work for interruptible service. As noted above, if a customer requests interruptible service, and is willing to pay the fully allocated rate established for interruptible service then the pipeline must provide service to that customer after all prior requests (including shippers existing prior to the date of the final rule) for interruptible service have been satisfied by the pipeline. The Commission notes, however, that a pipeline is *never* required to accept a request for service by a customer if that customer has not indicated a willingness to pay the maximum rate. Selective discounting is totally at the discretion of the pipeline. Thus, a customer that indicates that it will only book service if the pipeline provides such service at a discounted rate is subject to the willingness of the pipeline to discount. However, if a request for service at a discounted rate is accepted by the pipeline, it must honor that contract on a first-come, first-served basis. Parties may nevertheless agree to make such interruptible service subject to another customer coming in at a later point willing to pay a higher rate than the discounted rate determined between the pipeline and the first customer. The Commission notes, however, that this discretion would not exist with regard to the grant of a selective discount for firm service. To allow the pipeline to reserve the right to grant firm transportation capacity to a customer willing to pay a higher rate would essentially convert firm transportation service into interruptible service, that is, service that could be interrupted by a customer with a higher claim to the capacity. This, then, might be used to exceed the maximum rate (generally lower than the firm maximum rate) determined for interruptible service.

Mississippi River Transportation Corporation (MRT) requests that the Commission clarify that the reasonable operating conditions which a pipeline is allowed to impose on service by §§ 284.8(c) and 284.9(c) of the regulations would permit a pipeline to preclude or remedy a bottleneck on its system. MRT is concerned that a customer may desire firm transportation that would use only a few miles of the pipeline system and that such transportation might preclude the pipeline, under the non-discriminatory access provisions, from providing other transportation that would use more of the spare capacity available over a longer distance.

The question posed by MRT is too hypothetical to be addressed meaningfully at this time. Suffice it to say that an interstate pipeline engaging in self-implementing transportation may not, in general, decline to provide firm transportation because it would interfere with some other preferred use of its system capacity. Unusual circumstances that would produce unreasonable results under a strict application of the rule, however, are appropriately addressed in their reasonable operating conditions filing.

Monterey Pipeline Company seeks clarification concerning the relationship between an intrastate pipeline's NGPA section 311 transportation and the pipeline's strictly intrastate transportation and sales. First, Monterey requests that the Commission make explicit that the first-come, first-served principle applies to an intrastate pipeline's section 311 transactions only and that the Commission does not intend to require such pipelines to serve section 311 shippers to the detriment of their intrastate customers. This is already explicit in Order No. 436. The Commission reiterates that it does not intend for the regulations to impair the ability of intrastate pipelines to provide reliable service to their intrastate customers. An intrastate pipeline is not obliged to provide transportation in interstate commerce on a firm basis. In the event that it does offer firm interstate transportation, however, that transportation must be offered on a non-discriminatory basis. (This would necessarily include a first-come, first-served allocation of the firm capacity available to interstate transportation.) Similarly, if it offers interruptible interstate transportation, it must do so on a non-discriminatory basis. The regulations apply to section 311 service, not to strictly intrastate service.

Monterey also requests clarification on whether the non-discriminatory access provision applies to all of an intrastate pipeline's system or only between those points on its system which the pipeline wishes to open up to section 311 transportation. Monterey poses the following example: If it provides section 311 service between points A and B, must it also provide such service between points C and D? The Commission makes clear that if an intrastate pipeline has physically separate segments of its system over which interstate transportation will be provided, that the provision applies to the physically individual systems rather than the intrastate corporate entity. If section 311 transportation is undertaken by the corporate entity, however, the provision applies to the entirety of its operations.

Finally, Monterey requests clarification as to how the Commission intends to implement the first-come, first-served principle as applied to section 311 transactions by intrastate pipelines. In response, a pipeline may provide section 311 service if capacity is available for that service. The pipeline may offer such service on a firm or interruptible basis. Firm service, if offered, must be offered on a first-come, first-served basis. Thus, exactly as for interstate pipelines, firm shippers have priority over interruptible shippers. Curtailments of service within each of those two shipper classes would be subject to the pipeline's contractual arrangements with the shippers.

2. Proposed Procedural Changes

a. *Protection for Small Companies; Lotteries.* The American Public Gas Association (APGA) contends that the first-come, first-served policy is not appropriate because not all potential transportation customers have the sophistication or resources to take advantage of the policy. APGA contends that the policy will ensure that those market participants with the closest ties to interstate pipelines or the greatest resources to devote to the race will be able to take an inordinately large share of available transportation capacity and that municipal distributors will not be able to effectively compete for capacity. APGA suggests that an acceptable solution to this problem would be a solicitation round of initial nominations followed by a lottery. In a similar vein, Consolidated Edison requests that the Commission adopt an allocation method that recognizes the superior rights of direct pipeline customers over indirect customers. Memphis Light, Gas and Water Division and Elizabethtown Gas Company contend that the regulations should provide priority transportation to local distribution customers.

The Commission believes that the first-come, first-served policy is appropriate. The purpose is to enable potential customers to receive transportation service on a non-discriminatory basis. The Commission, however, cannot guarantee that all potential customers will be able to book capacity. But customers will have an equal opportunity to do so. Moreover, as the Commission indicated in Order No. 436, the imposition of a resevation fee by a pipeline should discourage overbooking by customers. The Commission has discussed this issue more completely above. Accordingly, the nomination and lottery system proposed by APGA is not considered necessary to ensure equal access by potential transportation customers.

b. *Reservation Procedures Requested.* Indicated Producers argue that reservation fees for firm transportation may not be adequate to prevent overbooking of pipeline capacity and that the Commission should establish procedures, such as a "use it or lose it" condition, for making such capacity available again. The Commission does not believe that further procedures are necessary. A reservation fee should be sufficient to prevent overbooking by pipelines. It is not likely that a shipper will pay such a fee without intending to use the capacity reserved. Further, if a customer does not use its booked capacity, the pipeline may still use that capacity on an interruptible basis.

c. *Required Filings.* Transwestern Pipeline Company maintains that § 284.12 of the regulations, which requires pipelines to make an annual filing designating the capacity of their systems, is meaningless because conditions vary from point to point and day to day. The Commission believes that a pipeline should be required to shown the estimated peak day capacity, and the use of that capacity, of the system under reasonably representative operating assumptions. This should provide a reasonable estimate of pipeline capacity and is a necessary step in ensuring compliance with conditions for self-implementing transportation.

Maryland People's Counsel (MPC) requests that the Commission require pipelines to state the date on which they receive applications for service in the reports they are required to file pursuant to §§ 284.106, 284.126, and 284.233 of the regulations. MPC argues that the reporting requirement would not be burdensome to pipelines, but would provide disappointed shippers with a ready means of ascertaining whether they have been refused service in a discriminatory manner and would assist in determining whether to file a complaint with the Commission. The Commission rejects this request. The present reporting requirements strike an appropriate balance between the need for the Commission to obtain information concerning transportation transactions and the burden imposed on pipelines in supplying such information. The information requested by MPC is not needed by the Commission to monitor pipeline transportation.

d. *Nomination Procedures.* Consolidated Edison and APGA request that the Commission modify the regulations to set forth specific procedures to be followed by pipelines in accepting nominations for transportation service. The Commission does not believe that such a modification is necessary. Once the pipeline determines the level of capacity that is available for transportation, it may accept nominations for that capacity. Potential customers will specify in their nominations relevent information such as volumes to be transported, origins and destinations of the volumes, and periods of transportation. Pipelines will receive the nomination and make decisions as to whether customers can be accommodated. The regulations set out the pipelines' obligations should they elect to provide non-discriminatory transportation under the regulations. Spelling out the nomination procedures in further detail would be an unnecessary intrusion into the pipelines' management prerogatives.

3. *Deterrence to Overbooking Capacity.* Yankee Resources, Inc. requests that the regulations be modified to permit a pipeline to increase transportation volumes for a customer by up to 5000 Mcf per day for a period of 120 days during which time a new prior notice procedure under § 284.222 can be completed. Yankee Resources argues that this proposed procedure would enable pipelines to allocate capacity based on the actual needs of the customers rather than on inflated estimates of capacity needs and thereby prevent overbooking of capacity. The Commission will not modify the regulations as requested by Yankee Resources. A pipeline may require a reservation fee to prevent overbooking with respect to firm service. As to interruptible service, such service, by its nature, is interruptible when a pipeline is operating at full capacity.

NI-Gas argues that overbooking of firm capacity should be prohibited rather than treated as a contract matter susceptible to traditional measures of contract damages. As the Commission discusses above, the Commission does not think such a prohibition is necessary. As discussed in Order No. 436, overbooking of firm capacity by customers should not be a significant problem. Section 284.4(d) permits a pipeline to impose a resevation fee as a condition of providing firm transportation service to a shipper. Such fees should discourage overbooking. If experience shows that overbooking by pipelines becomes a problem, further steps can be taken to deal with it.

Pennzoil (at pp. 5–7) argues that a reservation fee is inadequate to solve the problem of customers' overbooking capacity. This is so, Pennzoil says, because customers will still reserve capacity and not use it even though they have to pay a reservation fee. Pennzoil suggests customers might do this to pre-empt the market or to sub-lease the capacity reserved. Pennzoil recommends that in addition to paying a reservation fee customers should be required to use the capacity they reserved within 90 days or lose it.

The Commission declines to adopt this suggestion. It has no reason to believe, let alone to speculate as Pennzoil does, that requiring customers to pay a reservation fee will not be effective to prevent customers from overbooking capacity.

G. Canadian Gas Imports

Mesa Petroleum (at p. 10) and the Panhandle Association (at p. 4) ask the Commission to revise the blanket certificate and self-implementing transportation provisions so that they would not be applicable to the first pipeline that receives imported gas at the U.S. border. They request that the first transportation by a U.S. pipeline of Canadian gas be made subject to the prior notice procedure.

The applicants, all of whom are domestic producers, state that the Economic Regulatory Administration (ERA) has recently adopted policies regarding natural gas imports that run counter to the NGPA-mandated objective of encouraging domestic exploration and development. Mesa Petroleum argues that, historically, the Commission could be relied upon to examine the impact of a proposed import on domestic reserves in a combined proceeding under sections 3 and 7 of the NGA. However, the division of responsibility between the FERC and ERA under section 3 of the NGA was redefined last year by Delegation Order Nos. 0204–111 and 0204–112 (49 FR 6684 Feb. 22, 1984) and all policy matters concerning imports are now considered by ERA. Since ERA has declined to consider the impact of proposed Canadian gas imports on domestic reserves, the applicants argue, "[it] is incumbent upon the Commission to provide an opportunity for interested parties to contest the importation of gas into the United States." (Panhandle, at p. 5.)

The Commission believes that the matters raised by Mesa Petroleum and the Panhandle Association are outside the scope of this rulemaking. First, the applicants attempt to do indirectly what they were unable to do directly, namely to stop the importation of Canadian gas. As Mesa Petroleum itself points out, the question of whether to permit the importation of such gas is a matter for ERA to determine. Thus, it is for ERA to examine the impact on domestic drilling and reserves of importing Canadian gas. The Commission's job, under sections 4, 5 and 7 of the NGA, is to determine the appropriate rate treatment of the imported gas, the rate to be charged for its transportation, the construction and operation of particular facilities, the siting of facilities and the place of entry for such imports. Those responsibilities do not include reexamining whether the authorized importation is in the public interest.

Second, permitting imported gas to be transported under the blanket certificate procedures in no way impairs the Commission's authority to examine, in the appropriate proceeding, such issues as the proper rate treatment of demand charges, pipeline minimum commodity bills and the treatment of take-or-pay liabilities. This, however, is not the appropriate proceeding. Contrary to Mesa Petroleum's assertions (at p. 12), such issues are wholly unrelated to the transportation of imported gas and are properly raised in a section 4 or section 5 case involving the sales rates for Canadian gas. Mesa Petroleum and the Panhandle Association are free to raise any issues affecting their interests in the appropriate rate case.

Since the Commission is presented with no valid reasons for distinguishing between the transportation of imported gas and the transportation of domestic gas, the Commission denies the applicants' request to make the first transportation segment of imported gas subject to the prior notice procedure. Moreover, the Commission notes that the bulk of commenters in the Notice of Inquiry proceeding urged the Commission to include imported supplies under the new rules.

Pursuant to authority delegated to him by the Secretary of Energy, the Administrator of the ERA has exclusive jurisdiction under section 3 of the Natural Gas Act to approve or disapprove the importation of natural gas into the U.S. Under those circumstances, it would be singularly inappropriate for the Commission to adopt more stringent procedures with respect to the transportation from the border of gas that the Administrator of ERA has authorized to be imported at that border.

H. Filing Requirements Under New Part 284

1. Reporting Requirements

Several applicants argue that the Commission's reporting requirements for transportation services are inadequate. The Order No. 436 procedures, set forth in §§ 284.106, 284.126 and 284.223, require pipelines to file: (i) Initial reports within 30 days after commencing transportation; (ii) subsequent reports reflecting any material change in the transportation arrangement within 30 days of such change; (iii) annual reports not later than May 1 of each year; and (iv) a final statement within 30 days after termination of service. The specific information that each report must contain is discussed in the final rule.

Con Ed (at pp. 11–12) states that monthly reports by pipelines of all interruptible service are necessary for a successful compliance monitoring program. Iowa (at pp. 9–10) also believes that reports should be filed on a more frequent basis to ensure the timely evaluation of program results. According to Con Ed, the reports should also identify, among other things, when the service was requested and agreed to. Hadson (at p. 1) is likewise in favor of monthly reports on all requests for section 7(c) certificate applications. Similarly, Mesa (at pp. 12–13) and Panhandle Association (at pp. 6–7) suggest that all interstate pipelines maintain for public inspection a log of all transportation requests. MPC (at pp. 20–21) also agrees that pipelines should indicate in the reports the date on which they receive applications for service. Finally, Industrial Groups (at pp. 12–14) claim that detailed tariffs or sworn statements of current transportation policies and practices would facilitate Commission oversight.

MRT (at p. 20), however, takes the position that, given the addition of the annual reporting requirement, the final report under § 284.106(d) is superfluous. In the alternatives, it asks that the deadline for filing the statement be extended from 30 days to 60 days.

The Commission does not feel that further revisions to the reporting procedures are warranted. The present requirements provide the Commission and the public with sufficient information to monitor the transportation activities. In the final rule, the Commission attempted to strike a balance between the interests of all parties involved, including pipelines and shippers. On the one hand, the Commission sought to avoid unnecessary pipeline filings while, at the same time, it sought to guarantee adequate safeguards against discriminatory practices. Reductions were achieved in frequency (eliminating the 48-hour report) and quantity (*e.g.*, deleting information on price and end use). Measures to ensure compliance with the anti-discrimination provisions of the rule were also recognized (*e.g.*, pipeline operational conditions are to be stated in the respective tariffs). Moreover, potential shippers who believe that the pipelines are not complying with the open access requirements of § 284.8(b) and § 284.9(b) may file complaints in specific cases.

The Commission adopts Mesa's and Pandhandle Association's suggestion that interstate pipelines be required to keep a log of all transportation requests, however. The Commission believes that such a log will provide a protestor with the access to information it needs to determine whether the pipeline is acting on a discriminatory basis. The Commission is not requiring that the pipeline file this information with the Commission. Rather, the log should be maintained by the pipeline and be made available for inspection by the public at the company's corporate headquarters during the company's normal business hours. Information that may be contained in such a log could include, but not be limited to: (1) The date of the request for service; (2) the name of the person requesting transportation service; (3) the volume of gas to be transported; (4) the receipt and delivery points; (5) the duration of the service; (6) whether the service sought was firm or interruptible; (7) the percentage of pipeline capacity allocated to firm and interruptible volumes under contract at the time of the request; and (8) the date and manner of disposition of the request. As the Commission and the industry gain actual experience in operating under the new rules, additional mechanisms may or may not be found appropriate.

As for elimination of the notification of termination under § 284.106(d), the Commission again emphasizes that in order to fulfill its regulatory responsibilities in monitoring transactions conducted under Order No. 436 it needs to know when transportation arrangements cease, as well as the total volumes transported and the revenues received. Moreover, inasmuch as Order No. 436 allows the statement to be a simple one page notice or telegram, pipelines should not be inconvenienced by the 30-day time restriction.

2. Effective Date of New Blanket Certificates

Yankee proposes (at pp. 2–4) that the final rule be modified to permit pipelines to begin blanket transportation after November 1, 1985, on a self-implementing basis upon the filing of an application for a new blanket certificate under § 284.221, without the necessity of waiting until the certificate is issued and accepted. Any transactions implemented in the period before issuance of the certificate would be subject to the same terms and conditions as transactions which commence after issuance of the certificate.

As recognized in Yankee's application, this issue has already been considered and decided. In a clarification to the final rule issued to Panhandle Eastern on October 30, 1985, the Commission stated that if a pipeline elects to obtain a new blanket transportation certificate, transportation under the blanket certificate cannot be performed, under NGA section 7, until the blanket certificate has been issued. 33 FERC ¶61,139 (1985). The order also indicated that if the pipeline wishes to commence a transportation service prior to issuance of that new blanket certificate, it may use other self-implementing authority available to it under NGPA section 311. If a pipeline elects to initiate NGPA section 311 transportation on an interim basis pending the issuance of the blanket certificate, however, it will incur the responsibilities attached to that authority, such as, *inter alia*, the filing fee, initial report, and termination notice when the transaction is transferred to its blanket certificate authority, as well as the more substantive non-discriminatory access and CD reduction/conversion provisions.

The Commission believes that allowing a pipeline to commence service before the Commission has acted on its application for a certificate would be inconsistent with section 7 of the NGA as well as the notice requirements of the Administrative Procedure Act. Moreover, the Commission does not believe that these procedural requirements place unreasonable regulatory burdens on the participants, nor that these requirements will be the cause of delays and timing problems for multi-pipeline transactions. It also notes that the problems foreseen by Yankee will be minimized or eliminated if pipelines apply for new blanket certificates well in advance of the time such authorization is required.

With respect to blanket certificates available to Hinshaw pipelines and LDCs served by interstate pipelines, further modifications are in order. Given the generally small size of such entities and the fact that they are not subject to the Commission's jurisdiction apart from the blanket certificate, existing Order No. 63 certificate holders (issued pursuant to § 284.222 as it existed prior to November 1, 1985) need not file new applications for the § 284.224 certificate. Since the old and new certificates are identical but for the non-discriminatory access condition related to transportation transactions, the Commission is instead requiring that persons holding Order No. 63 certificates only file a letter with the Commission by (30 days from rehearing date) which either (1) ratifies the terms and conditions applicable to transportation transactions under § 284.224; or (2) surrenders the Order No. 63 certificate which will be deemed terminated as of November 1, 1985, as to new transportation transactions. Either option will not affect the grandfathering of transportation transactions begun prior to October 9, 1985, which are subject to § 284.125, or the sales and assignment authorization under such certificates. Furthermore, since the person holding an Order No. 63 certificate is neither amending its existing certificate, nor applying for a new certificate, no filing fee under Part 381 of the Commission's regulations is due. The Commission is merely requiring the pipeline to conform to the nondiscriminatory access condition.

The Commission notes here that the Order No. 63 or the new § 284.224 certificate merely puts the certificate holder in the same position as an intrastate pipeline with respect to NGPA section 311 and section 312 eligibility. That is, it permits sales, assignments and transportations. However, it is only the exercise of the transportation authority pursuant to subpart C of Part 284 that triggers nondiscriminatory access under § 284.8(b) or § 284.9(b).

Finally, through inadvertence, the Commission omitted delegation authority to the OPPR Director to issue § 284.224 blanket certificates. The

Commission is providing that authority here.

I. Intrastate Pipeline Issues, Generally

1. Requested Exemptions.

a. *From Environmental Compliance Under § 284.11.* Section 284.11 provides that any authorization granted under subparts, B, C, and H of Part 284 that involves construction or abandonment with removal of facilities is subject to compliance with various Federal environmental laws and regulations, as set forth in § 157.206(d). Producers Gas asserts that § 284.11, Environmental Compliance, should be amended to remove reference to subpart C, because intrastate pipelines are not subject to the Commission's jurisdiction. According to Producers Gas, intrastate pipelines which may conduct NGPA section 311 transactions under subpart C are not subject to the NGA certificate and abandonment authorization that applies to interstate pipelines, including environmental review under § 157.206. Producers Gas, therefore, believes that the reference in subpart C is an oversight. Producers Gas further asserts that the states exercise jurisdiction over construction and abandonment of intrastate pipelines, and therefore, there is no reason for the Commission to pre-empt state regulation with respect to environmental compliance.

In response, the Commission emphasizes that the application of § 284.11 to section 311 transactions by intrastate pipelines was not an oversight. The Commission has a statutory obligation under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* to assess the reasonably foreseeable impacts of its action on the environment. In order to ensure that this rule is not a major Federal action significantly affecting the quality of the human environment by authorizing unrestricted gas transportation arrangements, the Commission determined that all transactions under Part 284 must be made responsive to the mandate of NEPA and other environmental laws. The laws described in § 157.206(d) manifest environmental concerns that are shared by the states. The Commission has not delegated its NEPA responsibilities, however. The potential effects of non-jurisdictional construction or abandonment of facilities, which may be incidental to transactions under Order No. 436, are therefore its concern, particularly because intrastate transactions are increasingly an integral part of the Nation's gas transportation system. This comprehensive and integrated approach to NEPA implementation is not an attempt by the Commission to broaden its jurisdiction under the NGA or to preempt state regulation. It is, rather, a recognition that its responsibilities under NEPA may not be arbitrarily demarcated according to its NGA authority.

The Commission does not believe that the reporting obligations imposed on intrastate pipelines are unduly burdensome. The same rules apply to interstate pipelines and only apply to an intrastate pipeline that participates in transporting gas in the interstate transportation grid. A pipeline must undertake its responsibilities in compliance with Federal environmental laws.

Producers Gas also asserts that the notice provisions of the APA, 5 U.S.C. 553(c), were violated because the Commission gave no notice that it proposed to issue an environmental compliance condition in the NOPR issued May 30, 1985.

In Part VIII of the NOPR, issued May 30, 1985,[46] the Commission gave notice that it would be considering the potential environmental effects of the proposed rulemaking, including "secondary effects of non-construction transaction." Section 284.11 is a logical outgrowth of the Commission's intervening consideration of those effects as discussed in the environmental assessment above. Therefore, there was adequate notice and a reasonable opportunity to participate was accorded, even though the exact provisions of the final rule differed from those proposed.

b. *From filing tariffs with the Commission.* Sections 284.8(c) and 284.9(c) require each participating pipeline, if it seeks to impose reasonable operating conditions on the availability of transportation service, to file them as part of its "transportation tariff". Producers Gas (at pp. 7–8), Louisiana intrastate (at p. 11), Oklahoma Natural and ONG (at pp. 11–12), and Texas Intrastate Pipelines (at pp. 3–4) note that intrastate pipelines covered by the rule do not have such "tariffs" on file with the Commission. They assert that the rules should be modified to remove that obligation. Texas Intrastate Pipelines suggests that the intrastate pipelines could be permitted to post their operational conditions as part of their tariffs on file with the states or could include them as part of standard form transportation contracts. This would be in lieu of a new filing obligation which Texas Intrastate Pipelines asserts would be unduly burdensome. Producers Gas notes that applications for rate approval generally include transportation contracts; which should be sufficient. Louisiana Intrastate (at p. 11) requests that the Commission amend § 284.123 to require the pipeline to file a statement of its operating conditions.

The Commission agrees that it did not intend that intrastate pipelines be required to file "tariffs" with the Commission just to provide their operating conditions. However, it did intend that they file reasonable operating conditions as a condition to commencing transportation of gas under the program. A number of vehicles are available to obtain this information to enforce the non-discrimination provisions of the rules such as special filings, attachments to initial reports, or a modification of the Form 549–ST itself. Because of the nature of the information, the Commission believes that Louisiana Intrastate's suggestion has merit. The Commission is modifying § 284.123 by adding a new paragraph (e) that provides that each participating intrastate pipeline shall make a one-time filing containing a statement of the pipeline's operating conditions. This filing is due within 30 days of the date of issuance of this order for those pipelines that have already elected to participate in the new program. For those pipelines that do not now intend to transport under the new program but decide to do so in the future, this filing will be required within 30 days of commencement of the new service. The new rule also clarifies that changes in operating conditions must also be filed. The Commission does not believe that such a generally one-time filing imposes an undue burden that outweighs the benefits of the information to the Commission and to prospective shippers.

2. Extent of State Regulations of NGPA Section 311 Transactions

a. *Restriction to Interruptible Service.* Under the rules, intrastate pipelines have an option to provide either firm transportation, interruptible transportation, or both. Louisiana (at p. 3) requests that we clarify that state authorities can condition authorizations to perform section 311 transportation to require intrastate pipelines to offer only interruptible section 311 service. Louisiana asserts that, without this authority, federal-state conflicts will arise, as the Commission will be impermissibly regulating intrastate transportation of gas. The purpose, it asserts, is to prevent firm transportation service being required to be offered to

[46] 50 FR 24154

interstate shippers to the detriment of local needs.

The Commission cannot agree with Louisiana. At the outset, the Commission notes that its contention is based in part, on the incorrect premise that our non-discriminatory access condition constitutes regulation of purely intrastate transportation. Its involvement, and particularly the open access condition itself, only applies to interstate transactions after the intrastate pipeline has embarked on the interstate service. *See*, for example, *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 378 (1960). Any resultant impact on the level or quality of purely intrastate service performed by a participating pipeline would only be the result of the voluntary choices made by the pipeline itself and would not rise to the level of actual federal regulation of intrastate commerce.

b. *Allocation of Capacity*. Louisiana (at 3–5) asks that the Commission clarify that states have the power to set relative priorities of users competing for the capacity of intrastate pipelines who participate in the new transportation program. Louisiana asserts that local transportation, both firm and interruptible, must take precedence over new interstate transportation "mandated" by the rule, and that states should be the ones to decide how to allocate that capacity. Louisiana requests that the Commission modify § 284.8 either to delete the firm service option or to clarify that it is not intended to supplant any local service, firm or interruptible, whether in the past, present, or future.

The Commission believes that its program for section 311 transportation affords states sufficient latitude to perform their jurisdictional responsibilities. Nothing in Order No. 436 requires intrastate pipelines to offer firm transportation service.

Moreover, the Commission emphasizes and clarifies that existing local transportation arrangements can have priority over new interstate transportation. For example, there should be no question that a firm existing intrastate transportation service has contractual priority over a new interruptible interstate transportation. Likewise, firm interstate service has priority over non-firm interstate service. Accordingly, the Commission does not perceive any conflicts arising, at least in the near term, over priorities. The Commission's self-implementing rules incorporate the business decisions of the intrastate pipelines and only may affect them to the extent that the non-discriminatory access condition requires them to provide interstate shippers with access to capacity that the pipeline voluntarily chooses to make available to the interstate market.

3. Applicability of Non-Discriminatory Access Condition

Intrastate pipelines and state regulatory commissions and some interstate pipelines [47] cite the NGPA section 602(b) prohibition on common carrier status for section 311 transporters as an absolute ban on application of the non-discriminatory access condition to their operations. Some petitioners [48] also state that the condition is illegal under NGPA section 601(a)(2)(A), which exempts transportation by intrastate pipelines under section 311(a) of the NGPA from Commission jurisdiction for purposes of section 1(b) of the NGA.

As stated in Order No. 436 (at IV.A.23), the Commission has absolutely no intention of regulating *intra*state transportation of natural gas. Rather, the intent of Order No. 436 is simply that the same non-discriminatory access condition will apply to all transportation in interstate commerce, whether by an entity subject to Commission jurisdiction under the NGA or to other entities allowed by the Commission under the NGPA to engage in such interstate commerce without becoming subject to the NGA. Indeed, several changes were made in Order No. 436 to clarify this intent. First, the proposed rule was revised so that there would be no requirement that intrastate pipelines transporting under NGPA section 311 provide such transportation service on a firm basis. (*See* § 284.8(a)(ii).) Firm transportation is not prohibited, however. In the event an intrastate pipeline offers firm transportation, then § 284.8(b) requires that it provide "such" service on a non-discriminatory basis.

Similarly, if an intrastate pipeline offers interruptible interstate transportation (under § 284.9(a)(ii)), the only obligation is to provide interruptible service on a non-discriminatory basis. (*See* § 284.9(b).)

By means of these limitations, Order No. 436 completely avoids the situation whereby an intrastate pipeline is required to offer firm service for out-of-state shippers, thus, progressively being turned into an interstate pipeline against its will and against the will of the responsible state authorities.

With regard to the rate conditions of § 284.7, while the proposed rule would have required intrastate pipelines to comply with the same conditions, Order No. 436 makes it clear that the rate conditions of § 284.7 apply only to transportation under subparts B, G, and H of Part 284 of the regulations. Order No. 436 retains the pre-existing rules regarding rates for subpart C transportation. (*See* § 284.123.) With regard to the argument by some petitioners that the non-discriminatory access condition violates section 602(b), the Commission reiterates that the NGPA does not define "common carrier" and that there is but scant legislative history to section 602(b). The only mention of the purpose of section 602(b) in the Conference Agreement merely states that the House bill had provided that "the intrastate pipeline would not have been subjected to regulation as a common carrier. * * *" [49] The Commission notes that Congress did not directly authorize or create a right to section 311 transportation, as indicated by some petitioners, but gave the Commission the discretion to authorize such transportation under such terms and conditions as the Commission might prescribe under sections 311(c) and 501(a) of the NGPA.[50]

In Order No. 436, the Commission simply has ensured that where a new entity enters the field of offering interstate transportation services, that it do so on a non-discriminatory basis. The Commission cannot accept the premise that section 602(b) is a Congressional license to "intrastate pipelines" to enter into the field of interstate commerce on an avowedly discriminatory basis. Whatever else the prohibition regarding "common carriage" status may do, it does not sweep so broadly as to license unduly discriminatory rates or practices.[51] The same conclusion applies

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[47] *See* Mississippi River Transmission Corporation at 17; Valero Transmission Corporation at 4; Louisiana Intrastate Gas Corporation at 4; the Association of Texas Intrastate Natural Gas Pipelines at 4; Florida Gas Transmission Company at 14; Panhandle Companies at 5; Oklahoma Natural Gas Company, a Division of ONE OK, and ONG Transmission Company at 2; Louisiana Resources Company at 3; State of Louisiana at 9; INGAA at 14; Houston Pipeline Company at 4; City of Willcox, Arizona, and Arizona Electric Power Cooperative at 14.

[48] The Association of Texas Intrastate Natural Gas Pipelines at 2; City of Wilcox, Arizona, and Arizona Electric Power Cooperative at 22.

[49] Joint Explanatory Statement of the Committee on Conference, H.R. 5289, Natural Gas Policy Act of 1978, at 106.

[50] Section 311(c) provides that "any authorization granted under this section shall be under such terms and conditions as the Commission may prescribe." Section 501(a) provides in part that the Commission "is authorized to perform any and all acts," and "to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act."

[51] Neither NGPA section 601(a)(2)(A)(ii) nor 311(a)(2)(B) exempt intrastate pipelines transporting under section 311 from the NGA prohibitions on undue discrimination.

to interstate pipelines operating under section 311.

Further, notwithstanding the arguments of some petitioners,[52] it appears from the legislative history of the NGPA that the Commission's conditioning authority under NGPA sections 311(c) and 501(a) is coextensive with the broad discretion granted to the Commission under section 7(c) of the NGA.[53] Section 311(c) must be read in light of the fundamental intention of the NGPA to facilitate the movement of gas between the intrastate and interstate markets following a period of severe curtailment of interstate supplies coincident with ample intrastate supplies.[54] In this regard, the Commission emphasizes that, while it has construed its conditioning authority under NGPA sections 311(c) and 501(a) to be coextensive with that under NGA section, 7, it has not relied, as some petitioners appear to believe, on its NGA section 7 conditioning authority in applying any conditions of Order No. 436 to NGPA section 311 transportation.

Although the Commission has determined that the non-discriminatory access condition does not violate section 602(b), the Commission emphasizes that it fully respects the bounds of its jurisdiction under section 1(b) of the NGA as reaffirmed by section 601(a)(2)(A) of the NGPA. The Commission has clearly indicated that it does not intend that any aspect of Order No. 436 intrude in any way whatsoever on the sound discretion of the states to regulate strictly intrastate transactions in the public interest. (*See* Order No. 436 at IV.A. 25–26.) Nor does the Commission intend Order No. 436 in any way whatsoever to impair the ability of intrastate pipelines to provide reliable service tho their intrastate customers.

4. Possible Detriment to Intrastate Customers of Intrastate Pipelines

Monterey (at pp. 6–8) seeks clarification of the "first-come, first-served" principle underlying the non-discriminatory access condition as applied to section 311 transactions. It seeks the Commission's assurance that the principle does not require intrastate pipelines to serve their section 311 shippers to the detriment of their intrastate customers, even if an intrastate arrangement is entered into subsequent to the section 311 transactions. Accordingly, Monterey would be permitted to discretion to reallocate its capacity as it sees fit, subject to any contractual constraints. Otherwise, it asserts, this program would have the effect of regulating intrastate commerce by affecting the amount of gas transported or sold in the intrastate market. Texas Intrastate Pipelines (at pp. 6–7) asserts that non-discriminatory access will impair the ability of intrastate pipelines to continue to provide adequate and reliable service at the state level by the displacement of sales and loss of revenues. Accordingly, it asserts that the condition improperly encroaches on the operation of state regulatory programs.

Certainly, the Commission did not intend that its rule would operate to harm intrastate consumers. And it believes that its program is flexible enough to accommodate exigencies that may arise. But the exact answer depends on the circumstances. The Commission's program is not intended to interfere with existing contractual obligations. Nor, for example, does it mandate that a new firm intrastate service take a lower priority than an existing interruptible interstate transportation service. What it does require is that once it contracts to provide *firm* interstate service, it may not then subordinate that service to subsequent customers, whether in interstate or intrastate commerce. If an intrastate pipeline does not wish to provide firm service to interstate customers, it does not have to. But having chosen to provide that service it cannot then favor intrastate interruptible customers at the firm customer's expense. If a new intrastate shipper is first in line, then so be it. If not, then it may have to wait for remaining capacity to become available again to the intrastate market. Otherwise, the progression to an integration of the inter- and intrastate transportation systems into a national transportation grid would be impaired. Moreover, for the same reasons expressed above with respect to state claims regarding authority to control allocations, the Commission rejects Monterey's contention that the Commission's action constitutes the unlawful regulation of intrastate transportation.

J. Section 311 Transactions and Distributor By-Pass

Southern Indiana (8–9), Laclede (10–14) and GDIS (passim) point out what they allege is an anomaly in the final rule. The prior notice and protest procedures of the earlier blanket certificate regulations, as restated in § 157.205 of the revised regulations, have been retained for certain NGA section 7 applications filed under Part 157, Subparts E and F, where transportation service by an interstate pipeline may be authorized by the Commission to permit direct delivery by the pipeline to an end-user without going through a local distribution company, *i.e.*, the local distribution company would be by-passed. However, the requirement for prior notice to the local distribution company and an opportunity for such company to protest is not required for transactions under NGPA section 311 and Part 284 of the regulations, which can be undertaken without prior Commission approval, i.e., self-implementing transportation transactions subject to automatic authorization, which likewise can lead to distributor by-pass.

Section 311 of the NGPA and § 284.102 of the regulations, issued pursuant to section 311, require that any transportation performed by an interstate pipeline pursuant thereto must be "on behalf of" an intrastate pipeline or a local distribution company. Section 284.122 of the regulations, the companion section to § 284.102 but applicable to transportation by intrastate pipelines, allows such transportation to be made without prior Commission approval "on behalf of" an interstate pipeline or a local distribution company served by an interstate pipeline. The applications for rehearing contend that the regulations issued in the final rule permit transportation for any of these potential sellers or intermediate transporters directly to an end-user customer, even if currently served by a local distribution company, without notice to the local distribution company and without any Commission scrutiny. They also note that since the earlier "system supply" requirement for section 311 transactions has been eliminated, facilities may be constructed and operated by a pipeline without further authorization to deliver gas to any local distribution company's customer as long as the "on behalf of" requirement is satisfied.

Finally, GDIS claims that even though the prior notice and protest procedure is embodied in § 284.223(b), transportation by-passing a local distribution company could be performed by an interstate pipeline by means of a series of short-term (less than 120-day) transactions as long as different "shippers" (such as spot sellers) are involved in each 120-day transaction.

The policy considerations relevant to transactions under NGPA section 311

[52] *See* City of Willcox, Arizona, and Arizona Electric Power Cooperative at pp. 6–12; Huffco Petroleum Corporation at pp. 8–10; and Valero Transmission Company at pp. 6–7.

[53] 124 Cong. Rec. H.13, 118–119 (Oct. 14, 1978).

[54] Committee on Interstate and Foreign Commerce, Report on *H.R.* 6831, "National Energy Act" (July 19, 1977) at 92–95.

are substantially different than those applicable to blanket certificates and other authorizations under NGA section 7. Section 311 involves gas moving from intrastate to interstate markèts or vice-versa. The section reflects the fact that one of the main purposes underlying the NGPA was and is the integration of these two formerly wholly separate markets and that this purpose could outweigh the Commission's historic policy favoring service by local distribution companies to end-users located within the distributor's market area. This conclusion is demonstrated by the fact that Congress provided in NGPA section 311 for the Commission to authorize transportation by pipelines, not only on behalf of local distribution companies, but also on behalf of other pipelines without any condition that the gas would in turn be delivered by those pipelines to local distribution companies so that they could distribute the gas to end-users. Removal of the system supply test (which is not required by the NGPA) without also requiring that there be notice and opportunity for protest might not have been appropriate heretofore. However, application of the non-discriminatory access conditions to pipelines that undertake new NGPA section 311 transportation will allow distributors to avoid being by-passed by those pipelines, as the local distribution companies themselves can locate lower-priced gas for their customers and require that the pipelines transport the gas to the local distribution companies for distribution to the end-users.

Appropriate notice procedures are required by section 7 of the NGA for certificates issued thereunder. It is not required by the NGPA for transactions under section 311. In the Commission's opinion, the "integration of markets" purpose underlying section 311 justifies omission of the notice requirement in these instances. However, in order to ensure that LDCs and their state regulatory authorities are informed prior to commencement of section 311 services that would result in an LDC by-pass, the Commission is modifying the reporting requirements for both interstate and intrastate pipelines engaged in such arrangements to require that they make such notifications of potential by-pass in writing prior to commencement of service.

Insofar as notice of the construction and operation of facilities for the implementation of section 311 transactions is concerned, including transactions that may by-pass a local distribution company, the Commission observes that pipeline facilities to make such transportation possible can be used only for section 311 purposes. These facilities cannot be used for transportation or sales subject to the Commission's jurisdiction under the NGA without further approval.

Finally, on the matter raised by GDIS regarding the possibility of successive 120-day transactions defeating the purpose of § 284.223(b), § 284.223(a)(2) makes clear that a second 120-day transaction is permitted between a particular transporter and an identified end-user, irrespective of the seller or sellers of the gas, only if the first 120-day automatically authorized transaction was followed by a transportation period authorized under the prior notice procedures of § 157.205.

V. Discussion of Take-or-Pay/Producer Abandonment Issues

A. Take-Or-Pay Relief

1. Conditioning

In their requests for rehearing, a number of applicants describe Order No. 436 as arbitrary, capricious, and not based on substantial evidence because the order does not condition producer abandonment on take-or-pay relief for pipelines. These applicants argue that producers should be required to waive take-or-pay obligations in order to quality for abandonment under the procedures adopted in the § 2.77 Policy Statement.[55] Upon review, the Commission concludes that the applicants' arguments are without merit and thus do not warrant modification of Order No. 436.

The April 1985 Policy Statement provides guidelines applicable to the regulatory review of the renegotiation of economically burdensome contracts. The Policy Statement addresses the situation where there is a reduction or elimination of pipeline take-or-pay liability under individual contracts in return for lump sum payments by the pipelines to producer-sellers. To the extent Commission abandonment authorization is needed to implement buy-outs of take-or-pay liability, the Policy Statement provides for expedited consideration of the producers' abandonment applications. It is thus clear that take-or-pay relief is the *sine qua non* of the Policy Statement. The Commission finds no basis in the rehearing applications to attempt to prescribe take-or-pay relife beyond that provided for by the Policy Statement.

Order No. 436 also provided for expedited consideration of abandonments in cases where the producer is subject to substantially reduced takes without payment. In many instances, producers of old, low priced gas are being subjected to reduced takes because pipelines are purchasing higher priced supplies in order to minimize their take-or-pay liability. The rehearing applicants request that in cases where abandonment is sought by a producer because of reduced takes, the producer should be required to provide take or pay relief to the purchaser. This is an issue that should be raised and considered in connection with individual abandonment cases.

2. Whether Order No. 436 Is a Force Majeure Defense To Take-or-Pay Contracts

Mesa and Panhandle Assoc. maintain that Order No. 436 does not create an imminent emergency on pipeline systems and therefore request clarification that the rule does not constitute a *force majeure* event. El Paso, on the other hand, requests that the Commission affirmatively state that it will not prohibit any contract defenses, specifically *force majeure* as a result of Order No. 436, which a pipeline may raise to terminate a contract.

Without referring to a specific page in the order, El Paso interprets Order No. 436 as suggesting that the rule may not legally operate as a *force majeure* for a pipeline seeking relief under take-or-pay contract provisions. Relying on *Pennzoil v. FERC*, 645 F.2d 360, 380–82 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), which held that the Commission lacks the power to interpret pipeline-producer gas purchase agreements for the sale of gas removed from NGA jurisdication, El Paso claims that the Commission has no authority to rule on the validity of possible contract defenses a pipeline may raise against its producer-supplier.

Mesa and the Panhandle Association anticipate that pipelines will invoke *force majeure* to obtain relief from substantial take-or-pay obligations incurred because of historic projections of gas requirements of their customers. To eliminate the need for pipelines to raise this contract defense, Panhandle Assoc. suggests that the Commission clarify the rule to provide that a reduction in minimum commodity bills is not applicable to that portion of the rate that represents recovery of take-or-pay obligations. Mesa specifically requests

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[55] Northwest Central Pipeline Corporation, at p. 9; Texas Gas Transmission Corporation, at pp. 11 & 26; American Gas Association, at Appendix A, p. 14; Consolidated Natural Gas Company, at p. 3; Pan-Alberta Gas Ltd., at p. 12; Baltimore Gas and Electric Company, at p. 7; Memphis Light, Gas & Water Division, at p. 2; Public Utilities Commission of the State of California, at p. 3; United Distribution Companies, at p. 54; Tennessee Gas Pipeline Company, at p. 11; and Consolidated Edison Company of New York, Inc., at p. 1.

that the Commission make inapplicable to take-or-pay clauses § 284.10(c)(4) of the rule, which presently mandates the reduction of minimum commodity bills in proportion to the reduction in contract firm sales entitlements. Mesa claims that if pipelines could file tariffs for the recovery of take-or-pay obligations which were not subject to this reduction, pipelines could continue to recover from those customers for whom they originally incurred such obligations.

Mesa also asks the Commission to instruct any pipeline believing the rule causes undue hardship to seek an adjustment under section 502(c) of the NGPA. Additionally, Mesa requests that when establishing an appropriate rate of return the Commission consider a pipeline's assertion that the rule operates as a *force majeure* occurrence.

As the Commission states in Order No. 436, nothing in the order, including the non-discriminatory access and CD reduction/conversion conditions, is intended to affect the rights and obligations of parties to gas supply contracts between pipelines and their suppliers. 50 FR 42443 (1985). Thus, to the extent an LDC or end-user contracts with pipelines for transportation services under Order No. 436, nothing in the order is intended to abridge the rights and obligations regarding take-or-pay liabilities under contracts between those pipelines and their suppliers, including any right to raise *force majeure* as a defense in an appropriate case. Because the Commission does not intend the rule to affect such contract rights, it need not reach the issue raised by El Paso concerning its authority to do so.

The Commission further states in Order No. 436 that it fully recognizes that the exercise of reduction and conversion options by pipeline customers might require pipelines to adjust their gas supplies under contracts with producers, and for that reason it reaffirmed in the rule the April 10, 1985 Policy Statement concerning take-or-pay buyouts. 50 FR 42443, 42462 (1985). Accordingly, the Commission believes that to mandate any type of take-or-pay "pass through" mechanism as proposed by Mesa and Panhandle Assoc. is inconsistent with the use of the guidelines in the Policy Statement as the means for addressing the recovery of take-or-pay obligations.

With respect to Mesa's remaining requests, a pipeline maintaining that the rule has created a special hardship is of course free to seek a waiver from any Commission regulation. Finally, in any section 4 rate case the Commission considers all relevant factors in establishing an appropriate rate of return and would therefore consider the impact on the pipeline of market conditions brought about by Order No. 436.

B. Expedited Producer Abandonments Under § 2.77

1. Lawfulness of the Policy of Expeditious Consideration of Abandonment Applications

A number of applicants for rehearing contend that the Commission's § 2.77 Policy Statement, which provides for review of abandonment applications on an expedited basis in cases where the producer is subject to substantially reduced takes without payment, is unlawful. These applicants include the American Gas Association (at p. 10), Kansas Power and Light Company (App. at pp. 14–18), Northern Natural Gas Company (at pp. 12–14), Public Service Electric and Gas Company (at pp. 5–6), Transcontinental Gas Pipe Line Corporation (at pp. 17–18), and United Distribution Companies (at pp. 52–54). Generally, the applicants view the Policy Statement as meaning that the Commission will grant producer abandonment applications on a generic basis based solely on a showing of reduction in takes even though the pipeline formerly purchasing the gas opposes the abandonment.

The applicants state that granting abandonment on such a basis would be unlawful since the Commission would not consider all relevant factors in determining whether abandonment is permitted by the public convenience and necessity as required by section 7(b) of the NGA.[56]

The answer to this contention is that Order No. 436 does not provide for the automatic granting of abandonment applications based upon a showing of reduced takes without payment. Rather, the Commission simply determined that it would, as a matter of policy, consider applications for abandonment in cases of reduced takes on an expedited, case-by-case basis and grant such applications where permitted by the public convenience or necessity. *See* 18 CFR 2.77(a). The Commission provided an opportunity for any person to intervene in order to oppose a producer's application for abandonment.[57] Nothing in Order No. 436 forecloses intervenors from raising any issue relevant to a determination whether abandonment is in the public interest or from seeking permission to conduct discovery or present evidence with respect to those issues. Indeed, the Commission expressly stated, "It is not possible to foresee all issues that may arise in connection with abandonment applications that are opposed and that must therefore be decided * * * on a formal basis consistent with the requirements of section 7(b) of the NGA. The Commission will therefore not attempt at this time to establish criteria to be applied in determining whether abandonment requests should be granted or denied. The standards to be applied will instead be developed on a case-by-case basis." The Commission continues to adhere to that position.[58]

One of the principal policy objectives underlying Order No. 436 is to insure that natural gas markets are sufficiently competitive so that natural gas service can be provided consumers at the lowest reasonable cost consistent with reliable, long-term service. It is clear that where a pipeline is purchasing high cost gas in order to minimize its take-or-pay liability while at the same time reducing its purchases of otherwise available low-cost gas, a significant market disorder is created. The NGPA is predicated on the proposition that the price and allocation of natural gas can and should be determined to a greater extent by market forces rather than by means of the strict utility-type regulation previously employed under the NGA. It is therefore imperative that obstacles to the orderly operation of market forces be eliminated to the extent possible. The Commission believes that in order to achieve this goal producers should be able to market low-priced gas. It is for this reason that the Commission provided for expeditious consideration

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[56] In this connection, one applicant, the American Gas Association (at pp. 11–12), requests that the Commission state that take-or-pay payments for gas that cannot be made up violate NGPA Title I ceiling prices. This issue is beyond the scope of this rulemaking. It is presently before the Commission in a number of cases (*See, e.g.*, Producer's Gas Co., Docket No. GP83–48–000; El Paso Natural Gas Co., Docket No. G84–49–000; Transcontinental Gas Pipeline Corp., Docket No. GP85–1–000; and Southern Natural Gas Co. v. Pogo Producing, Docket No. GP85–11). The Commission believes it is more appropriate to address the issue on a case-by-case basis in those proceedings in the context of the precise fact situations there presented.

[57] The only exception is a buyer who agrees to cancellation of a contract in return for a take-or-pay buy-out. Such a buyer is considered to have waived any right to oppose the abandonment.

[58] Two applicants, Panhandle Producer and Royalty Owners Association and Independent Petroleum Association of Mountain States (at p. 5), request that the Commission set forth in its regulations all the situations in which it will permit abandonment. As stated above, the Commission believes that, at least until it has gained more experience, it is best to determine the exact circumstances in which abandonment should be granted by adjudication in individual cases rather than in this rulemaking. The issues involved are too varied and complex for the Commission now to determine all the situations in which abandonment would be justified.

of abandonment applications irrespective of the NGPA price category of the gas. Relevant policy considerations should and will be considered in determining whether abandonment is permitted by the public convenience and necessity, and the Commission's consideration of these factors is accordingly in no way inconsistent with section 7(b).

Three other assertions by applicants concerning the unlawfulness or wisdom of the policy statement require comment. Associated Gas Distributors (AGD) objects (at p. 30) to the Commission's direction to the Director of the Office of Pipeline and Producer Regulation to grant promptly any unopposed producer abandonment application pursuant to his delegated authority. AGD claims that even where an application is unopposed, the Commission must develop the facts relevant to the public interest, including whether the former pipeline purchaser's supply of gas is adequately protected, before granting abandonment.

The Commission rejects this contention. This aspect of the policy statement represents no change from the Commission's current treatment of unopposed applications for abandonment. Pursuant to 18 CFR 375.307(a)(6), the staff currently reviews each application. Unopposed producer abandonment applications are routinely granted by the Director of the Office of Pipeline and Producer Regulation. If any party feels that it would be adversely affected by a proposed abandonment, the Commission assumes that party would oppose the application.

Two applicants for rehearing, Pennzoil Producing Company (at pp. 8–9) and Indicated Producers (at pp. 8–10), object to the Commission's assertion in the policy statement that, upon expiration of the underlying contract, the purchaser has no obligation to continue purchasing from the seller although the seller has a continuing obligation to sell. The applicants contend that the purchaser does have a continuing obligation to purchase gas. This matter is not essential to the statement of policy. Regardless of a purchaser's obligation to continue purchasing gas upon expiration of a contract, the policy considerations underlying the Commission's statement of policy, including the need to enable producers to market low-priced gas, support the Commission's determination to provide for expedited review of abandonment applications. The Commission made this statement in explaining its concern about the need for abandonment in cases where the underlying contract has expired.

Finally, People Gas Light and Coke Company and North Shore Gas Company (at pp. 14–16) requests that the Commission delay implementation of the policy statement in order to allow adversely affected persons an opportunity to comment on the policy statement's guidelines for granting abandonment. The Commission sees no need to so delay implementation of the policy statement. As stated above, nothing in the policy statement prejudges whether any particular abandonment application will be granted. The Commission intends to determine whether contested abandonment requests will be granted on a case-by-case basis. Any person adversely affected by a particular application for abandonment may intervene in opposition to that application. Accordingly, there is no need to amend the policy statement or to provide for further comments concerning it.

2. Conditioning Abandonment on Take-or-Pay Relief to Pipelines

As previously stated, Order No. 436 does not modify the substantive criteria for deciding when abandonment should be granted, or what conditions should be attached to the grant of abandonment. The Commission continues to believe that these issues should be addressed on a case-by-case basis in connection with individual abandonment applications.

3. Pipeline Protests in Cases Where Take-or-Pay is Settled

In Order No. 436, the §2.76 Policy Statement was amended to provide that where an abandonment application is based on payments made in lieu of take-or-pay obligations pursuant to the Policy Statement, the interstate pipeline making the payments will be deemed to have waived any right to oppose the abandonment.

The American Public Gas Association (APGA) urges that § 2.76(e) be amended to provide for a rebuttable "presumption of nonopposition" to abandonment by the pipeline rather than an absolute bar. APGA is concerned that an adequate amount of reasonably-priced, long-term reserves remain to serve the pipeline's customers, and suggests that a pipeline be required to submit a statement explaining why it entered into the take-or-pay buy-out agreement and why it believes the agreement to be in the best interests of its customers. The Commission does not believe that any such statement is necessary. If APGA members are concerned about a particular abandonment application, they will have the opportunity to raise their objections at the time the application is made.

APGA also suggests that possibly a few cases might involve economic "duress" during the contract renegotiations, or a mutual mistake of fact, and that in such cases a pipeline should not be barred from later protesting the producer's abandonment application. We believe that any such situations, as APGA acknowledges, will be rare. Accordingly, there is no need to modify the procedures set forth in §§ 2.76 or 2.77. If in particular cases a pipeline believes that it is necessary in order fairly to protect its interests to protest a producer abandonment application related to a take-or-pay buy-out, it may request waiver of the prohibition against pipeline opposition. Any such cases will be decided based on the facts of the particular case.

4. Requested Procedural Changes

a. *Objections to the Fifteen-Day Notice Period Under the § 2.77 Policy Statement.* Several commenters [59] complain that the 15-day notice period provided for abandonment and certificate applications filed pursuant to the § 2.77 policy statement is too short to allow them to receive notice, review the matter, and file comments, and that these procedures, in conjunction with the abbreviated adjudiction schedule, will not afford them a fair opportunity to be heard.

Upon further consideration of this matter, the Commission concludes that the notice provisions of the § 2.77 policy statement should be clarified to reflect accurately the Commission's intent. The deadline for protests or interventions will be 15 days following publication of notice in the **Federal Register**. This will yield a total notice period of 15 days plus about a week, the approximate time required for a notice to appear in the **Federal Register**. The Commission believes that period is ample and that it should satisfy the objections raised on this point.

In this connection, the Commission believes the applicants overestimate the degree of complexity required in filings submitted in response to the notice. The critical information is the filing party's request to intervene and a statement of that party's position regarding the application and whether a hearing is requested. While the Commission welcomes more information, a filing providing the basic information is all

[59] Northwest Central, Northwest Pipeline, APGA, Kansas Power, Peoples, SoCal, UDC, and AGA.

that is required and, as a practical matter, is all that is usually filed at the comment-intervention point.

The procedures prescribed in § 2.77 do no differ materially from standard Commission practice. Unopposed certificate and abandonment applications are normally processed by staff and granted promptly by the Director, Office of Pipeline and Producer Regulation; contested applications are considered on a case-by-case basis. The main difference here is the procedures established for the purpose of expediting resolution of contested cases. The Commission intends to provide parties with the opportunity to present their comments, and, if necessary, evidence and relevant arguments on issues of law and policy. Accordingly, we find the objections to the § 2.77(b) procedures to be without merit.

b. *Burden of proof.* Arkla, Inc. requests that § 2.77(a)(1) not be deemed to grant producers a presumption in favor of abandonment. The Specified Producers on the other hand argue that the Commission should establish a rebuttable presumption in favor of granting abandonment applications filed pursuant to the § 2.77 Policy Statement. Under such a presumption, a protestor would have the burden of showing that abandonment is *not* in the public convenience or necessity. Specified Producers assert that the NGA may be interpreted to permit this presumption.

Under NGA section 7(b) and applicable case law, the applicant has the burden of demonstrating that an abandonment is permitted by the public convenience or necessity. *See, e.g., Michigan Consolidated Gas Co.* v. *FPC*, 283 F.2d 204 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960). In issuing Order No. 436, the Commission did not intend to relieve applicants of the burden of demonstrating that a proposed abandonment meets the statutory requirements of section 7(b) of the NGA. Requests that the Commission adopt presumptions either for or against abandonment are rejected. Commission decisions on abandonment applications will be based on the record in each case. The Commission will of course also consider the policies and purposes underlying Order No. 436 in ultimately determining whether abandonment is permitted by the public convenience or necessity consistent with the requirements of NGA section 7(b).

5. Definition of Substantially Reduced Takes

The Commission's § 2.77 policy statement provides for expedited consideration of producer abandonment applications in cases where the producer is subject to "substantially reduced takes without payment". Several applicants request the Commission to define the term "substantially reduced takes" with greater precision or to establish specific criteria to be applied in determining when takes would be deemed substantially reduced.[60] One applicant for example, asserts that substantially reduced takes should be defined as "50 percent of full deliverability." [61] These applicants state that clarification is needed to eliminate uncertainty and to enable affected parties to make informed business judgments.[62] The Commission is also requested to clarify whether § 2.77(a)(1) is intended to require any particular duration of reduced takes; [63] whether an allowance or exception is contemplated for temporary reductions caused by economic conditions or facility failures; [64] or whether any allowance will be made for applicable field or state production regulations.[65] The Commission is also requested to adopt the expedited abandonment procedures in situations involving drainage of gas, lease maintenance, and undeveloped acreage [66] and to clarify whether expedited producer abandonment procedures apply to first sellers who are not producers, such as gatherers, resellers, or interstate pipelines which sell their own production.[67]

Clarification of the term "without payment" is also requested by applicants.[68] In particular, Mesa Petroleum Company seeks clarification concerning whether acreage released in lieu of making a required take-or-pay payment, as contractually provided, would come within the scope of § 2.77(a)(1).[69] The Commission is also requested to expand application of the take-or-pay buy-out provisions of the § 2.76 Policy Statement to "all negotiated modifications of any and all forms of contractual pipeline purchase obligations. . . ."[70]

Modification of the subject policy statements has not been shown to be reasonable or necessary at this time. The Commission stated in Order No. 436 that it was not possible to foresee all issues which might arise in connection with abandonment applications filed pursuant to the rule and that it intended to proceed on a case-by-case basis.[71] The Commission will not attempt to establish in advance specific standards intended to apply to various hypothetical situations which may or may not arise in the future. In its policy statement the Commission reaffirmed that it would not depart from the traditional case-by-case approach to abandonments under section 7(b) of the NGA. Consequently, all parties will be free to present arguments regarding the definition or application of substantially reduced takes, including duration, drainage, undeveloped acreage and other factors, in individual cases arising under the rule. The Commission will rule on the issues raised at such time as the cases are decided. Further clarification or revision of the § 2.77 policy statement or of the provisions of the Commission's rule will be implemented only if shown to be justified based on experience gained in individual cases.

The Commission also declines at this time to modify the § 2.77 policy statement to add new categories of cases which would be subject to expedited procedures. References to possible situations involving drainage, lease maintenance, and undrilled acreage do not provide sufficient basis for establishing new categories. However, in these types of cases, producers are in no way precluded from filing abandonment applications in accordance with the Commission's normal filing requirements. *See* 18 CFR 157.18 (1985). Applicants may request expedited consideration of any applications so filed. Commission action will be based on the facts of each particular case. Accordingly, the requests for modification of the policy statement are denied.

The request for clarification of Southern Union Gathering company is reasonable and is granted. The expedited abandonment procedures set

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[60] *E.G.*, Specified Producers, at pp. 4–5; Northern Natural Gas Company, at p.14; Northwest Central Pipeline Corp., at p. 15; Associated Gas Distributors, at p. 31; Arkla, Inc., at p. 10; Mesa Petroleum Co., at p. 4; Panhandle Producer, *et al.*, at p. 5; Kansas Power and Light Company, at p. 15; Southern Union, at p. 2.

[61] Specified Producers, at p. 4.

[62] *E.g.*, Northwest Central Pipeline Company, at p. 15.

[63] Specified Producers, at p. 5; Northern Natural gas Company, at p. 14.

[64] Northern Natural Gas Company, at p. 14; Associated Gas Distributors, at p. 31.

[65] Northern Natural Gas Company, at p. 14; Arkla Inc., at p. 10.

[66] Specified Producers, at pp. 6–7.

[67] Southern Union Gathering Company, at p. 2.

[68] *E.g.*, Specified Producers, at p. 6; Mesa Petroleum Co., at p. 9

[69] Mesa Petroleum Co., at p. 12.

[70] Northwest Central Pipeline, at p. 15. *See also*, Northern Natural Gas Co., at pp. 13–14; Specified Producers, at pp. 6–9.

[71] Order No. 436, 50 FR. 42465–466.

forth in the § 2.77 policy statement will be available to all first sellers of gas, including producers, gatherers, resellers, and interstate pipelines.

6. Abandonment Should Not Necessarily Be Limited to High-Cost Gas

Several rehearing applicants suggest that expedited producer abandonment procedures be limited to high-cost gas.[72] Generally, the applicants suggest that the expedited procedures should apply only to gas priced under NGPA sections 102(d) and 108 and should exclude gas priced under NGPA sections 104, 106 and 109.[73] The Iowa State Commerce Commission asserts that captive pipeline customers were to receive the benefit of the low-cost gas and will receive no benefit or protection from the expedited abandonment procedures.[74] Another applicant claims the Commission, in the NOPR to Order No. 436, acknowledged that Congress intended the economic benefits of low-cost gas to continue to "historical pipeline sales customers."[75]

The Commission declines to adopt the applicants' recommendations. The abandonment procedures and general policy do not establish binding substantive norms. Hence, all of these applicants' concerns may be fully aired and resolved in individual cases. As we have indicated on several occasions, Order No. 436 does not provide for the automatic grant of abandonments based solely on reduced takes. Each case will be decided on its merits consistent with the requirements of section 7(b) of the NGA. The Commission holds that there should be no automatic or general bar to the abandonment of particular gas supplies based solely on their NGPA price category.

7. Effects of Expedited Abandonment on Long-Term Supply

Memphis Light, Gas & Water Division asserts that the Commission erred in allowing producer abandonments without adequate safeguards for long-term pipeline supply needs. Memphis states that the §§ 2.76 and 2.77 Policy Statements violate section 7 of the NGA and do not adequately protect the long-term supply needs of the pipelines. In a similar vein, Peoples Gas Light and Coke Company and North Shore Gas Company argue that these sections should be revoked because they open the door to withdrawal from the interstate market of low cost regulated supplies.

These arguments are without merit. Nothing in Order No. 436 was intended to suggest that the supply consequences of abandonment would be ignored by the Commission or that affected parties would be precluded from arguing that a proposed abandonment should be denied because of alleged adverse effects on the existing purchaser or its customers. Section 2.77(b)(3) provides that in cases where certificate or abandonment applications are opposed, the Commission will consider the objections and rule on the applications if possible or, if necessary, will set the applications for hearing. A pipeline or distribution company will have full opportunity to show that the loss of a particular source of supply does not serve the public convenience or necessity and the abandonment should therefore either be denied or limited as to scope or duration.

C. Applicability of NGPA Section 315(a)(3) to Transportation of OCS Gas

Tenngasco Corporation requests the Commission to clarify its policy with regard to the application of NGPA section 315(a)(3). Tenngasco argues that this section should not be interpreted to require inflexible 15-year contracts involving the sale of OCS gas. Tenngasco argues that such an approach would be inconsistent with the Commission's stated goal of creating a competitive, price-responsive maket for gas and that in order to achieve this goal contracts must be permitted to include flexible, market-based pricing provisions. Tenngasco suggests that contracts for the purchase of OCS gas should be allowed to include flexible marketout provisions alllowing for termination of the contract in the event the parties are unable to agree on essential terms in the future. Tenngasco argues that there is nothing in the legislative history of the NGPA to indicate Congress intended otherwise.

The Commission is in basic agreement with Tenngasco on this point. The Commission has previously held that contracts subject to section 315(a)(3) do not comply with that section if they provide for a 15-year term subject to earlier termination by mutual agreement of the parties. *Tenneco Oil Company, et al.*, 31 FERC ¶ 61,301 (1985). Upon further review, the Commission believes this determination should be reconsidered. The Commission concludes, consistent with the views expressed by Tenngasco, that mutual termination and similar contract provisions are not precluded by the terms of section 315(a)3). While the Commission agrees with Tenngasco in principle, it is not possible to establish a general rule which would be applicable in all situations. To the extent of its jurisdiction, the Commission will review each case on its merits depending on the particular terms incorporated in the contract. The Commission's policy regarding application of NGPA section 315(a)(3) will accordingly be developed on a case-by-case basis.

VI. Discussion of Optional Expedited Certificates (Subpart E, Part 157) Issues

A. Presumption of Public Convenience and Necessity

A number of petitioners oppose the adoption of a presumption of public convenience and necessity established in § 157.104(c)(3) of the Final Rule.

Petitioners opposing the establishment of the presumption include primarily LDCs, but also serveral public entities, as well as associated groups such as the American Gas Association (AGA), the National Association of Regulatory Utility Commissioners (NARUC), United Distribution Companies (UDC), and the Wisconsin Distributors Group. For example, Columbia Gas Distribution Companies and Memphis Light, Gas & Water Division state that it is beyond the power of the Commission under the Natural Gas Act to establish the "competitive incentive" embodied in the proposed rule's rebuttable presumption, particularly in the situation where service is currently provided through the facilities of an LDC. Northern Illinois Gas Company states that a service cannot be presumed to be in the public interest merely because the pipleline is willing to place its shareholders at risk, because the Commission cannot fully shield customers from the costs of pipeline mistakes.

Other petitioners complain that the presumption provides a procedural barrier to protecting their interests. Gas Distributors Information Service, (GDIS) complains that simply to obtain a procedural right, a protestor must prove the ultimate issue. In this regard several petitioners such as the California Public Utilities Commission and GDIS intimate that legal discovery is necessary in order to rebut the presumption. Others such as Atlanta Gas Light Company and American Public Gas Association believe the Commission must consider the individual circumstances of each case and therefore, should provide formal hearings in all cases involving by-passes of LDCs. NARUC

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[72] *E.g.*, American Public Gas Association, at p. 83; Public Service Gas and Electric Company, at p. 7; Peoples' Gas, Light and Coke Company, at p. 19; Kansas Power and Light Company, at p. 15, note 5; and Iowa State Commerce Commission, at p. 3.

[73] Public Service Electric and Gas Company, at p. 7; Peoples Gas, Light and Coke Company, at pp. 19–20; American Public Gas Association, at p. 83.

[74] Iowa State Commerce Commission, at p. 3.

[75] American Public Gas Association, at p. 83.

recommends amending § 157.102(b)(2) to provide intervenors and protestors with the time and opportunity to discover material facts after filing their initial pleadings and the opportunity to file supplemental pleadings bringing such facts to the Commission's attention.

Some petitioners such as UDC request that the Commission amend the rule to require hearings in all cases where a protest is filed. UDC recommends that the Commission provide for full hearings under the procedures set forth in section 17(a) of the Natural Gas Act in all cases involving by-pass of an LDC. In addition, UDC believes that the Commission could provide the states with a meaningful opportunity to participate in assessing the validity of a proposed by-pass by providing a joint hearing procedure under section 17(a).

The Commission need not repeat its extensive discussion from the preamble regarding its responsibility to determine public convenience and necessity. (See 50 FR 42474–42475, October 18, 1985). The Commission reaffirms its conclusion that it is reasonable to presume that the requirements of the NGA have been met (subject to rebuttal) in light of the protection that the rule provides ratepayers. (See § 157.103). The Commission reiterates its intention that the rule is not a substitute for its obligation to determine whether individual applications are required by the public convenience and necessity. In this regard, it is not requiring the protestor to "prove the ultimate issue" as contended by GDIS. Those petitioners who request additional assurances of the opportunity for legal discovery have not demonstrated why the Commission's procedural rules for optional expedited certificates are inadequate to accomplish their perceived need for additional factual information.

Accordingly, the Commission does not believe that it is unreasonable to impose on protestors the burden under § 157.102(b)(2) to identify those issues of fact material to a determination of whether the applicant's certificate is required by the public convenience and necessity. The Commission will consider carefully all protests filed, with the caveat that speculative or unsupported allegations will not be considered a sufficient basis for withholding a certificate or ordering a hearing. (See 50 FR 42476).

Sections 157.10 and 385.214 of the Commission's rules specifically provide for participation of state commissions and regulatory agencies in proceedings before this Commission. In implementing these provisions in conjunction with Subpart E, the Commission will give the states an opportunity to raise any issues affecting their interests prior to approval of any proposal under Subpart E. A substantial record has already been compiled on all aspects of this rulemaking proceeding, however, and the Commission does not believe that additional procedures suggested by some commenters are needed to coordinate the final rule with the states.

B. Distributor By-Pass: State Regulatory Authority

1. Anticompetitive Effects of By-Pass: Unfair Cost Shifting

Each of the LDCs petitioning for rehearing on Optional Expedited Certificates allege that the Commission has not adequately addressed the by-pass issue in the Final Rule. Virtually all the applicants repeat the arguments they made in their comments on the NOPR. In this regard, LDCs specifically object to the establishment of the rebuttable presumption in applications resulting in the bypass of an LDC. They assert that LDCs cannot compete on an equal basis with interstate pipelines.

Consumers Power Company, for example, highlighted some of the economic and competitive circumstances it believes distinguish LDCs from pipelines: (1) LDCs have a greater duty to serve than do pipelines; (2) residential and small commercial customers have no practical alternative; (3) LDCs are limited to geographic service areas and are much less able to replace lost industrial customers; (4) LDCs, unlike pipelines, have not been able to directly influence producer field prices. Other petitioners who generally share this view are Kansas Power and Light Company, Elizabethtown Gas Company, Southern Indiana Gas and Electric Company (SIGECO) and UDC. Accordingly, UDC contends that only large industrial end-users will benefit from the new rule at the expense of commercial and residential customers. Each of these petitioners reasserts the "cost-shifting" arguments previously advanced in the comments to the NORP.

Several petitioners such as Peoples Gas Light and Coke Company argue that the Commission did not provide standards in Subpart E requiring applicants to show that the proposed service is necessary or would in any way provide a net economic benefit to consumers in comparison with competing services. They contend the rule contains no standards for evaluating the effects of duplication of facilities and cost shifting on core market consumers. AGA states the Commission is required under sections 7(c) and 7(e) of the NGA to determine where the public interest lies and that we cannot evade our statutory duties by effectively delegating this responsibility to the market place. UDC contends that the requirements imposed on certificate applicants are *pro forma* filings amounting to little more than the applicant's agreement to assume "financial accountability" for the proposed service.

Several applicants request that the requirement of non-discriminatory transportation be imposed on optional certificate applications for sales service. Consumers Power Company, Michigan Gas Storage Company and Kansas Power and Light Company complain that a pipeline could use the expedited certificate procedures to by-pass LDCs even without opening its system to non-discriminatory access. (See Technical Corrections, Docket No. RM85-1-000, October 25, 1985, mimeo at pp. 2–3). Similarly, they observe that the pipeline's customers would not have the ability to reduce contract demands or escape full requirements contracts since only transportation by the pipeline under a blanket certificate makes those options available to the LDCs.

Process Gas Consumers Group (PGC) contends that the omission of the non-discriminatory access requirement on optional certificate sales service contradicts the Commission's determination that the availability of non-discriminatory transportation is one of the criteria relevant to the Commission's presumption that an optional certificate is in the public interest. Accordingly, PGC recommends that the Commission condition optional certificates for on-system sales programs on the applicant's applying for and accepting a nondiscriminatory blanket transportation certificate under Order No. 436. They assert that such a modification would be consistent with the Commission's recent decision rejecting an extension of Northern Natural's discriminatory discount rate under Order No. 436. (See Docket No. CP83-14-103, October 25, 1985.)

As the Commission stated in Order No. 436, it is not pursuaded that cost-shifting which may occur as a result of a bypass of an LDC justifies forbidding a bypass to occur. (50 FR 42468.) The petitioners have not raised any new arguments sufficient to reverse the Commission's earlier judgment. Likewise, the petitioners have not demonstrated that the rule will allow pipelines to engage in "unfair" competitive practices. The rule requires actual notice to affected LDCs of any by-pass proposal under an application for an optional expedited certificate. This will ensure that LDCs have every opportunity to exercise their rights to protest a specific proposal. If the facts of a particular situation subject to the hearing provided for in § 157.104, reveal the existence of, or potential for, unfair practices, the Commission may take appropriate remedial action. As regards the interest of the commercial and residential customers, the affected states have authority to prevent cost-shifting where the LDCs fail to compete aggressively in the absence of "unfair" competition. As stated above, the Commission believes the rule provides protection of the public interest notwithstanding potential by-passing of some LDCs.

With respect to petitioners' concern over non-discrimination in sales authorized under the final rule, the Commission rejects their recommendation to extend the non-discriminatory condition to those sales. It was never the Commission's intention in Order No. 436 to force "merchant" pipelines to become "transporter" pipelines or vice versa. One of the fundamental policies of this new program has been to provide pipelines the election to include transportation as a significant component of the services they offer or to be an exclusive merchant. (*See* NOPR, Mimeo at 8, 29.) Optional certificates are a new tool available to pipelines in a more competitive environment, to seize new opportunities to serve new markets. While the Commission believes transportation services will be an important part of this environment, it believes that pipelines ought to retain substantial discretion as to what services they offer. Discretion justifies the imposition of accountability for the business decisions made by the pipleine. Pipelines may legitimately decide to remain merchant pipelines. The Commission believes it would be poor policy to tie one hand behind the merchant pipeline's back by removing from it the ability to accept financial risk and to move quickly to serve new sales markets. This would be fundamentally inconsistent with the Commission's policy of promoting competition in the natural gas industry.

2. Infringement on State Authority Over Distribution of Gas

Several state public service commissions strongly object to the rules for Optional Expedited Certificates arguing that they effectively pre-empt the judgment of the state commissions. The New York Department of Public Service, for example, contends that the Commission, by allowing by-pass of LDCs, is entering the "thicket" of the retail rate regulation and holding itself out as prepared to make the ultimate determination of how gas is to be delivered to individual end users. Other state commissions such as the Minnesota Public Utilities Commission and the Minnesota Department of Public Service assert that the states are uniquely able to determine the local effects of by-pass transportation to an end-user. Therefore, they request the Commission to remove transportation directly to an end-user from among the services which pipelines may provide under the optional certificate. The Iowa State Commerce Commission requests a broader exclusion by asking the Commission to remove optional authority in any instance to by-pass an LDC. The Kentucky Public Service Commission believes that the Commission is making the ultimate determination as to whether a by-pass is or is not to be authorized, thereby impinging on the retail cost allocation problems which the Natural Gas Act reserves to the states.

The Columbia Gas Distribution Companies (CDC) provide extensive legal arguments that § 157.104 exceeds the jurisdiction of the Commission under the NGA, and trespasses upon legitimate state authority to determine local convenience and necessity. CDC reiterates its position stated in its comments to the NOPR and concludes that the Commission should accept the determinations of the local convenience and necessity by appropriate state bodies, or condition its orders on subsequent approvals by state regulators. One LDC, SIGECO, proposes that state regulatory review and approval of transactions involving LDC by-pass should be required as a condition to engaging in optional certificate transactions.

Most of the petitioners who argue that the rule interferes with state authority rely on the principles set forth in *Panhandle Eastern Pipe Line Co.* v. *Michigan PSC*, 341 U.S. 329 (1951), and *Panhandle Eastern Pipeline Co.* v. *PSC of Indiana*, 332 U.S. 507 (1947). Finally, APGA repeats its recommendation as stated in its comments to the NOPR that the Commission deny certificate authorization in by-pass cases unless (i) the affected LDC consents to the by-pass *or* (ii) the state or local regulatory body issues an order declaring the by-pass to be in the public interest.

It is well established that the Commission's authority over the transportation of gas in interstate commerce includes the authority to issue certificates for the transportation of gas and the construction and operation of facilities from which direct sales are made. The authority to set rates for direct sales lies exclusively with the states. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Panhandle Eastern Pipe Line Company* v. *F.P.C.*, 232 F.2d 467 (1956).

The Commission has frequently exercised its authority over transportation to authorize pipelines in interstate commerce to construct and operate the facilities necessary to make direct sales, including transactions involving issues of distributor by-pass. In some instances, the Commission denied requests for direct sales that would by-pass a distributor; in others, it approved the proposal, depending on the circumstances of the case and the factors bearing on the public interest. *See, e.g., Panhandle Eastern Pipe Line Company*, Order Denying Request for Rehearing, 31 FERC 61,333 (1985). The final rule does nothing to change this, nor does it alter traditional jurisdictional relationships between state and federal governments or preempt the states' authority to regulate rates for the retail sale of gas.

The Commission notes that the Staff Subcommittee on Gas of the National Association of Regulatory Utility Commissioners (NARUC) has reported to the NARUC Committee on Gas regarding the by-pass issue. In its report, dated November 7, 1985, the Subcommittee concluded and recommended that "The by-pass issue is best handled by a cost-based rate design which provides services on an unbundled basis. The states should not adopt a policy of prohibition of by-pass. . . Sensibly designed transportation rates would substantially eliminate the incentive to by-pass the LDC . . ."[76]

3. Miscellaneous

One pipeline, Transcontinental Gas Pipeline Corporation (Transco), expresses concern that the rule may not provide true incentives which would exist in a free market environment. Transco believes that the Commission has not clearly and unequivocally provided for increased earnings potential for those pipelines willing to take on added risks. The matter of appropriate earnings potential will be considered with other risk factors related to a pipeline's rate of return along with the issue of how to allocate

[76] Staff Subcommittee on Gas, Report to Gas Committee, "Proposed State Regulatory Actions for Implementation of FERC Rules in Docket No. RM85-1-000, NARUC, at 2-3.

the costs of unused capacity, which will be addressed in future rate cases of the participating pipeline.

C. Rate Conditions Under § 157.103

1. Prohibition on Changing Projected Units of Service

Section 157.103(d)(4) provides that any rate for new service must be designed to recover costs on the basis of projected units of service. The units projected for the new service in the initial rates may be increased in a subsequent rate filing, but may not be *decreased*.

Northern Natural (at pp. 16–19) asserts the prohibition against reducing projected levels is unlawful and confiscatory. Such a provision is also claimed to be unjust and unreasonable because it will not allow the pipeline to reallocate costs resulting from the reduction in sales volumes under the new transportation program.

Northern Natural further believes it may be reasonable to impose this condition upon facilities or expenditures directly related to a new service, but not upon any existing system costs or facilities allocated to the new service. It asserts that a pipeline will never have a realistic opportunity to earn a profit (since units of service will always be adjusted upward) but will always assume the costs if the project fails. Northern Natural contends this result violates the principle that public utilities are entitled to a just and reasonable rate of return, as enunciated in *Smyth* v. *Ames*, 169 U.S. 466 (1898), and *Bluefield Water Works & Improvement Co.* v. *Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

With regard to this requirement, Natural (at p. 73) points out that projected units of service are generally annualized service levels associated with a particular service or class of service. Natural believes that if an optional service is granted for a specific period with pregranted abandonment, the pipeline should not be precluded from reducing projected levels in a rate case after the service is no longer authorized.

The Commission will not alter the prohibition against decreasing projected levels of service. As it stated in the final rule, the *optional* expedited certificate procedure is a voluntary procedure available to those applicants willing to shoulder the economic risks of a project. Applicants' concerns ignore this fundamental premise by requesting modifications that would allow ratepayers to assume some risk. In deciding whether to seek an optional expedited certificate for a new service, applicants must carefully consider and project the need for the economic feasibility of the new service and the possibility of diminished profit or even losses if the applicants' expectations do not come to fruition. This is common business reality in competitive markets. The knowledge that the costs of unsuccessful projects cannot be recovered ensures pipeline accountability which is necessary in an atmosphere of increased competition. If the facilities are used for system-wide services after the abandonment of an optional expedited certificate, the pipeline may include the costs of those facilities in rates under § 157.103(d)(8).

2. Reservation Fees and Pipeline Risk

Section 157.103(e) of the final rule permits a reservation charge for firm transportation service consistent with the conditions in § 284.8(d), but not for sales service.

By permitting a reservation charge, the rule, CPUC (at p. 4) asserts, will *not* make the pipeline assume the full financial risk of the project, and that customers will thus bear a portion of the fixed costs regardless of their volumetric purchases. Accordingly, CPUC believes the Commission cannot presume that the initial rate is just and reasonable under section 4 of the NGA.

As the Commission explained in the final rule, a reservation fee for transportation, while admittedly assuring some recovery of fixed costs, does not insulate the pipeline from as much risk as a demand charge would. A pipeline must still find customers who will agree to pay a reservation fee to book firm transportation service, and the customer can determine in its negotiations with the pipeline the duration of the service. Additionally, pipelines are not guaranteed the payment of a reservation fee. Customers may have sufficient options available to avoid paying a reservation fee by shifting risk to the pipeline during the negotiation process. Further, the Commission noted, a reservation fee promotes customer accountability by deterring a few customers from overbooking available capacity. The Commission believes the balance should be struck in favor of opening up capacity to as many shippers as possible, even if this shifts some risk from pipelines to customers. On the whole then, the Commission does not agree that permitting a reservation fee where customers agree to it is inconsistent with the rebuttable presumption that a certificate application under these procedures is in the public interest. The applicant would still bear a substantial risk, and the presumption remains subject to rebuttal through the protest procedures.

Northern Natural (at p. 19) states that the rule unreasonably prohibits a reservation charge for a new sales service and unfairly puts pipelines at a competitive disadvantage. The pipeline asserts that competing non-regulated gas suppliers may require reservation charges, minimum bills, and minimum throughput provisions. Northern Natural believes there is no reason for restricting pipelines in competing for new sales services and that this requirement indicates a bias against pipeline sales services and for transportation.

Tennessee argues that the condition of the regulations which prohibits a pipeline from imposing a reservation charge, under the optional certificate procedures, on sales customers is unreasonable and that such a charge is necessary to prevent firm sales customers from overbooking capacity. Northwest Central (at pp. 19–20), Arkla (at pp. 5–7), and BUG (at p. 17) assert that the rule is arbitrary and unfair because, contrary to the Commission's rationalizations, the same need exists to prevent customers from overbooking sales service as well as transportation service. The Commission disagrees.

The optional expedited certificate removes certification as a barrier to entry where the pipeline assumes all the risks. (50 FR 45467). Allowing a pipeline to require a reservation fee for firm sales tends to inappropriately shift the risks away from the pipeline to the customer. As such, permitting pipelines to require a reservation fee for firm sales tends to undercut the basis for granting the optional, expedited certificate. To be sure, § 157.103(d)(3) permits pipelines to charge a reservation fee for firm transportation. But this limited exception to the requirement that the pipeline assume all the risks is necessary because firm transportation is subject to the non-discriminatory access conditions of §§ 284.8 and 284.9. Hence, the pipeline needs to have some means of preventing customers from booking more capacity than they are likely to use. (50 FR 42471.) The reservation fee is that means. Firm sales service provided under an optional expedited certificate, however, is not subject to a first-come, first-served, non-discriminatory access condition. Pipelines have more control in selecting which customers to serve under an expedited sales certificate. Accordingly, there is no need to permit an exception to the general rule under which the optional expedited certificates are granted, namely that, the pipeline assume all the risks. With respect to Northern Natural's contentions that the lack of a reservation fee puts pipelines at a competitive disadvantage, the Commission believes that the opposite may be true. Customers may well prefer to purchase service without any minimum charge.

D. Other Proposed Limitations

1. Direct Pipeline Sales

Atlanta Gas (at pp. 1, 9–10), Industrial Groups (at pp. 19–21) and Transco (at p. 20 n.3) are unclear whether an interstate pipeline seeking to make direct *sales* to industrial customers under the optional expedited certificate procedures must also provide all customers with non-discriminatory access to *transportation*. Atlanta Gas and Industrial Groups are in favor of open access, whereas Transco asserts that open access to transportation in this situation is an unjustified "additional burden".

The October 24, 1985, Technical Corrections to Order No. 436 removed the words "or sales" from the applicable discussion in the final rule. In this way, the Commission reflected its "intent that *only* optional transportation certificates, *not* optional sales certificates, will be subject to the prerequisite that the applicant has filed for and will accept a new blanket transportation certificate under new § 284.221 . . . "(emphasis in original). (Technical Corrections, Mimeo at pp. 2–4.) This clarification applies to a pipeline's direct sales as well as its sales for resale.

2. Environmental Requirements

Arkla's (at pp. 8–9) second concern relates to the environmental information required by new §157.102(b)(1)(v). Specifically, that section provides that any application filed under Subpart E must contain an environmental report, as sepcified in Appendix B to Part 2 of the Commission's regulations. In the preamble to the final rule, the Commission also states that "the provisions of § 157.7 of Subpart A, which permit abbreviated applications, will be available for applications under Subpart E as well." (Section IV.C. of Order No. 436.) Moreover, § 2.82(a) provides that, in certain situations, applications need not be accompanied by the detailed report specified in Appendix B. From this, Arkla reasons that the detailed environmental report should not be required for abbreviated certificate applications submitted under Subpart E. Accordingly, it requests that § 157.102(b)(1)(v) be revised to exclude such applications.

Arkla, however, has overlooked an important point. The environmental requirements of § 2.82(a) apply only to applications filed under no-longer-effective §§ 157.7(b), (c) and (d) for the construction of budget-type facilities. These budget certificates only permitted the construction of facilities within specified dollar amounts, thus providing a check on potential environmental consequences. Moreover, such budget certificates have been superseded by the blanket certificate program which is subject to Subject F of Part 157 which is subject to § 157.206(d) environmental conditions. As of November 18, 1985, the optional expedited certificates, available under Subpart E of Part 157 were also made subject to the § 157.206(d) conditions. Moreover, there are no similar limits on construction that may occur under Subpart E. Therefore, the Commission does not believe that the requirements for the filing of environmental information should be relaxed in this instance.

3. Entry of Unsafe Pipeline Systems

Under Subpart E of Part 157, an "eligible applicant" is defined at § 157.101(b)(1) as "any natural gas company or person that will be a natural gas company upon completion of any proposed construction or extension of natural gas facilities." California PUC (at p. 15), however, suggests that the Commission narrow the eligibility requirements "to ensure that the public is not endangered through a proliferation of pipelines operated by companies not currently subject to governmental regulations for pipeline operations."

This concern is unfounded. First, California PUC offers no explanation of what restrictions it thinks the Commission should impose to limit entry into the field. Second, once the applicant becomes a natural gas company, it will be subject not only to regulation by the Commission, but also to the safety requirements of the Department of Transportation in its implementation of the Natural Gas Pipeline Safety Act of 1968. In the Commission's view, this constitutes sufficient protection against unsafe systems. Therefore, modification to §157.101(b)(1) is unnecessary.

4. Qualifying Facilities

Another question with respect to Subpart E is raised by Arkla (at pp. 7–8). In particular, Arkla states that qualifying facilities that are constructed pursuant to Subpart E should be available at any time following their construction for the performance of self-implementing blanket transportation transactions under Subparts B and G of Part 284. A "qualifying facility" is defined in § 157.101(b)(3) as "a facility or a portion of a facility that will be used solely to provide new service" and, pursuant to § 157.101(b)(2), "new service" means "a service for which the applicant for a certificate under this subpart does not have certificate authority."

The Commission agrees with Arkla's interpretation of the Commission's optional certificate regulations. The definition of "new service" in § 157.101(b)(2) could be read to imply that facilities built under an optional certificate can only be used to provide a service for which no prior certificate authority existed. The problem with this interpretation comes when considering the interrelationship of this provision with blanket certificate authorizations. Since an applicant for an optional certificate may have already received a blanket certificate, it could be argued that our regulations prohibit blanket transportation through optional certificate facilities since the holder of a blanket transportation already has "certificate authority" to provide service and thus does not fall within the definition of "new service."

The Commission does not adopt this interpretation of its regulations. Section 157.101(b)(2) as written is consistent with Arkla's request that facilities installed under the optional procedure be useful for blanket transportation. The certificate authority granted in a blanket transportation certificate is only valid to the extent certificated capacity exists. Since there is no requirement that additional capacity be constructed (§ 284.8(e)), the blanket certificate authority for transportation is only triggered when the facility is built. Such capacity can be the result of an optional certificate or a traditional certificate. Thus, "new service" cannot be provided by the applicant, under a blanket transportation certificate until, in the case of Arkla's question, the facility is build under the optional procedures.

VII. Discussion of Procedural and Administrative Issues

A. Scope of Notice

1. Notice of Grandfathering Provisions was Adequate

Colorado Interstate, (at p. 28) Intercon Gas (at p. 6) and Cascade Natural (at pp. 13–15) argue that they had insufficient notice and opportunity to comment on the specific rules for determining whether particular pre-existing transportation services are grandfathered. Texas Eastern Transmission also argues that the NOPR was inadequate in setting out criteria for grandfathering section 311 transactions, since the NOPR failed to mention how transactions existing before Order No. 436 would be treated in the final rule. Similarly, AGA argues that the abrupt termination of existing and important transportation programs was not indicated in the NOPR, and thus the industry was without notice and opportunity for comment on this aspect of the final rule.

The Commission believes that the public was provided with sufficient notice and opportunity to comment on the extent that existing programs would be allowed to continue, without subjecting the pipeline to the requirements and regulations promulgated by Order No. 436. Specifically, the NOPR proposed extensive revisions to the then existing authority of interstate and intrastate pipelines to transport gas under NGPA section 311. By proposing to revise the requirements under which existing NGPA section 311 transactions are authorized for a maximum of two years and to substitute new requirements for all NGPA section 311 transactions of indefinite term, the Commission raised for comment the issues of when the new requirements would apply and when the old requirements would no longer apply. The Commission's resolutions are logical and integral parts of implementing the overall proposal. The Commission believes that the transitional provisions address inevitable implementational concerns about which requirements would apply effective on November 1, 1985, and which requirements would apply for any transaction authorized and commenced on or before October 9, 1985. See §§ 284.105 and 284.125.

Identical issues were also raised in the NOPR, to the extent that the requirements for the then-existing blanket certificate programs were revised. In fact, the proposed rule specifically provided that existing blanket certificate authority for transportation under former § 157.209(a)(1) would continue until the end of the term originally authorized. Section 284.223(f) provided that new blanket certificates would not provide for continued transportation under former § 157.209, beyond the date authorized by the certificate issued under that section. At the expiration of that authorization, however, a new authorization would be available under the proposed new blanket certificate regulations (50 FR 24146). In addition, specific transitional provisions were proposed for transportation for low-priority end users under former § 157.209(e), because the United States Court of Appeals for the District of Columbia had mandated that all transportation under that section must end by October 31, 1985.

The Commission also proposed to eliminate particular programs, including Order No. 60 arrangements, by revising § 284.221 which authorized these arrangements. (50 FR 24143.) Five year and 10-year automatic transportation authorization for high-priority end users would be eliminated prospectively for transactions commencing after a date certain. (50 FR 24145.) Finally Order No. 63 transactions would be abolished by making them subject to the same access and rate conditions that apply to intrastate pipelines. (50 FR 24146). The Commission's exploration of these issues was relatively detailed.

2. Expedited Producer Abandonment Policy and the Scope of the Notice of Proposed Rulemaking

In Order No. 436, the Commission affirmed its policy of granting abandoment authorizations on an expedited basis by means of existing procedures if: (1) The producer is subject to substantially reduced takes without payment; (2) the producer and pipeline have engaged in a "buy-out" as contemplated by the Commission's policy statement (§ 2.76); or (3) the underlying contract has expired.

Northwest Central (at p. 12) argues that implementation of the Commission's policy concerning expedited producer abandonments is not supported by substantial evidence and that it is procedurely defective, since the Commission failed to provide parties sufficient notice and a fair opportunity to comment on an aspect of the final rule that is tied to and a part of the new transportation program. Similarly, AGA (Appendix A at pp. 4–5) complains that the Commission reaffirmed and modified its prior statement of policy on take-or-pay (§ 2.76) without notice or an opportunity for comment, with no consideration of the public policy interest of maintaining reliable gas supplies, and with no consideration or provision for the financial impact of this new provision on pipeline buyers. Consolidated Natural and United Distribution Companies (at pp. 52–54) note that the NOPR requested comment on what, if anything, the Commission should do to expedite producer abandonment (50 FR 24145), but argues that the issuance of entirely new provisions for abandonment of gas dedicated to the interstate market is plainly unlawful. The commenters complain that no proposals were made in reference to: (1) The scope or terms of expedited abandonment; (2) the categories of gas affected; or (3) the protest procedures that would be available. In contrast, Peoples Gas recognizes that the Commission's policy statement on producer abandonments does not have the legal force and effect of a substantive rule and that pipelines and producers must support their applications on a case-by-case basis. This commenter nevertheless argues that the Commission must permit an opportunity for comment on this policy, because an expression of intent to expedite this type of proceeding in a quick and possibly truncated procedure, lends a certain general presumption of validity to these applications.

The Commission believes that commenters had notice that it was intending to address the issue of expedited producer abandonments in the final rule. As noted by Consolidated and UDC, the Commission specifically requested comment on what procedural changes to the producer abandonment and certificate regulations are needed to allow efficient implementation of transportation arrangements under the regulations permitting transportation by interstate pipelines on behalf of shippers other than other interstate pipelines. (50 FR 24145).

The Commission also believes that the applicants have misconstrued the substantive and procedural requirements that must be followed to promulgate and support implementation of a statement of policy. Specifically, the Administrative Procedure Act (5 U.S.C. 553 (1982)) does not require the Commission to provide notice and opportunity for comment before expressing its tentative intentions in a statement of policy.[78] Similarly, the Commission is not required to support a policy statement with substantial evidence or an analysis of the effects from the implementation of its policy at the time the policy statement is promulgated, because any application of a policy to an individual case must be supported by the fact and record in the case.[79] Consequently, an opportunity to

[78] The Administrative Procedure Act does not require an agency to publish a general notice of proposed rulemaking in the **Federal Register** before it promulgates a statement of policy, 5 U.S.C. 553(d)(A) (1982).

[79] *See* Pacific Gas & Electric Co. V. FPC, 506 F. 2d 33, 38–40 (D.C. Cir. 1974); American Bus Association v. United States, 627 F.2d 525, 527–31 (D.C. Cir. 1980); Amrep Corp. v. FTC, 768 F.2d 1171, 1177–78 (10th Cir. 1985).

present views on the fairness and the effect of the policy statement are afforded affected parties during individual cases, when a policy may be applied.

3. Application of Non-discriminatory Access to all Part 284 Transactions and the Scope of the Notice of Proposed Rulemaking

Natural Gas argues (at p. 56) that the Commission failed to give proper notice, as required by the Administrative Procedure Act (5 U.S.C. 553), of its intent to subject section 311 or Order No. 60 arrangements to additional access conditions.

The Commission believes that it provided sufficient notice of its intent to impose additional access conditions on section 311 and Order No. 60 arrangements. In particular, §§ 284.104(b), 284.124(b) and 284.221(c)(1) of the proposed regulations contained a new non-discriminatory access provision applicable to interstate and intrastate pipelines transporting under NGPA section 311. (50 FR 24 142–43.) Similarly, the NOPR proposed to substantially revise the regulations that permitted Order No. 60 arrangements to consolidate this blanket certificate with the blanket transportation authorization proposed by the NOPR. In fact, the NOPR proposed to amend the regulations that authorized Order No. 60 transactions to establish the general terms and conditions for these blanket certificates. (50 FR 24,143).

4. The Notice of Proposed Rulemaking Provided Insufficient Notice to Abolish all Minimum Commodity Bills

In the final rule, the Commission denied commenters' requests to abolish all minimum commodity bills. The Commission reasoned that these proposals went considerably beyond its original proposal. The final rule, however, requires reductions of certain minimum commodity bills by an amount proportionate to the reduction in the firm sale entitlement. Similarly, it requires a pipeline to credit against a minimum commodity bill any obligations for firm sale entitlements that are converted to firm transportation entitlements.

The reductions in, and credits to, minimum commodity bills are consistent with and implement the goal of freeing up unwanted firm capacity and providing flexibility for customers. Under new § 284.106, the Commission will facilitate the reduction in firm sales entitlements and encourage conversions to firm transportation. In essence, these reductions and credits are a logical outgrowth and an appropriate extension of the Commission's original proposal to permit any firm sales customer of an interstate pipeline that becomes an open transporter to reduce contract demand for firm sales service from that pipeline.

Although recommending that the Commission issue a notice and request comment on the issue of eliminating minimum commodity bills, Columbia nevertheless argues that the issues raised by the elimination of minimum commodity bills are within the scope of this rulemaking. In particular, Columbia argues that eliminating minimum commodity bills would advance three basic objectives of the final rule by eliminating the distortions in gas costs to consumers, permitting purchasers an effective choice of supply and permitting pipelines to compete on a "level playing field."

The Commission still believes that eliminating all minimum commodity bills, including those of pipelines that decide not to take advantage of the programs established by Order No. 436, is considerbly beyond the scope of this rulemaking. As discussed above, the reductions and credits permitted in the final rule implement the reduction and conversion of firm sales entitlement by firm sales customers. In contrast, the Commission did not propose to eliminate all minimum commodity bills on a generic basis. The commission does not believe that it is necessary to eliminate all minimum commodity bills in order to implement the final rule. In addition, elimination of minimum commodity bills could have adverse effects that are not now apparent. For these reasons, the Commission will continue to examine fixed cost minimum bills on a case-by-case basis.[90]

B. Allegedly Unlawful Use of Rulemaking Authority: Reduction/ Conversion Options

Panhandle Eastern and Texas Eastern claim that Order No. 436 represents an unlawful exercise of the Commission's generic rulemaking authority.

Texas Eastern asserts that the rule abrogates its resale contracts and service agreements without considering the specific facts and circumstances surrounding each contract and without making the necessary findings based on substantial record evidence. Panhandle Eastern maintains that, because it does not resolve pipeline take-or-pay obligations, the rule is not a comprehensive package, and the initial justification for conducting generic rulemaking no longer exists.

[90] Transwestern, 32 FERC ¶ 61,009 (1985).

The Commission has broad discretion to proceed through a generic rulemaking or on a case-by-case basis.[91] Through Order No. 436 the Commission furthers comprehensive regulatory goals in a manner that it could not accomplish effectively through case-by-case determinations. The Commission proposed the rule after it concluded from five months of extensive inquiry that the regulatory framework for the natural gas transmission industry has not sufficiently adjusted to economic changes to promote the public interest in the evolving market. The goal of the rule is to ensure that natural gas markets are sufficiently competitive to provide consumers with natural gas at the lowest reasonable rates consistent with reliable, long term service. The Commission's choice not to adopt a new policy or rule but to reaffirm its previous Statement of Policy does not alter the comprehensive nature of Order No. 436. In any event, the validity of any generic rulemaking depends not on whether it comprehends all aspects of a problem but, rather, on whether it is a reasonable response to the issues it does address.

C. Legality of Technical Corrections

On October 24, 1985, the Commission issued technical corrections to certain provisions of Order No. 436.

Among other things, the document corrected the eligibility dates in §§ 284.105, 284.125 and 284.223(g) for permitting the continuation of existing transportation arrangements during the initial implementation of Order No. 436.[92] The corrections also made clear that the transactions eligible to be "grandfathered" for a limited term and, in some cases, subject to new conditions are only those services actually being provided on or before October 9, 1985.[93]

AGA, ANR, Cascade, Florida Gas, Oklahoma Natural, Teepak and Texas Eastern variously claim that, by correcting Order No. 436, the Commission undertook substantive changes in the rule and therefore violated their 5th Amendment due process rights and contravened the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553. Additionally, AGA, Cascade, Consolidated Fuel Supp., Florida Gas and Teepak characterize the issuance of

[91] *See* SEC v. Chenery Corp., 332 U.S. 194, 202–3 (1947); Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968); Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1166 (1985).

[92] *See* Section II.C. *supra*.

[93] The Commission subsequently allowed very limited exceptions to this restriction. See Transcontinental Pipeline Company clarification, Section II.D., *supra*.

such technical corrections as retroactive rulemaking.

Petitioners assert that the correction of the dates in all three sections will have a material effect on the natural gas industry. Petitioners' concerns with respect to the changes in §§ 284.105 and 284.125 can be summarized by the position taken by Florida Gas that such corrections could operate to force interstate pipelines to become a "transporter by default" if, in reliance on Order No. 436 it contracted for and/or commenced service pursuant to a section 311 transportation agreement after October 9, 1985, but before October 24, 1985.

Most of the petitioners request that the Commission restore the "effective dates" in Order No. 436.[84] AGA asks that the Commission grandfather any transaction authorized before November 1, 1985, or alternatively, grant a rehearing on the new effective date. Cascade requests that the Commission withdraw the new date or extend the grandfather provisions to cover any Section 311 service commenced on or before October 24, 1985, the date of the Technical Corrections rule.

The Commission's corrections of October 24, 1985, were "technical" in the sense that they codified the Commission's intent incorrectly stated in Order No. 436. The Commission recognizes its obligation under the Administrative Procedures Act to provide adequate public procedures before substantively amending its regulations. The October 24 changes conform to those obligations in two ways. First, they do not represent a departure from the scope or intent of Order No. 436, as issued on October 9, 1985, with regard to the appropriate treatment of existing self-implementing (NGPA section 311) or blanket certificate transactions. These transactions which would have terminated at some time under new regulations, in any event. Participants in the proceeding had ample opportunity to present their views on how this transition should occur after November 1, 1985. Second, the corrections issued before the effective date of the rule and were promulgated before the end of the Commission's statutory opportunity to modify its orders.[85]

After issuance of Order No. 436, it was discovered that the Commission had inadvertently provided a "window" in the provisions of §§ 284.105, 284.125, and 284.223(c) within which parties could negotiate new transactions or activate transportation arrangements that had existed only on paper with the single purpose of avoiding having to make a serious choice about participating in the new program and, in some cases, about providing non-discriminatory access to pipeline transportation services. This result was plainly contrary to the goals of the order and action was taken quickly to clarify the Commission's original intent.[86] The Commission could have delayed action on these changes but did not do so for reasons of fairness. It determined that parties to existing section 311 and blanket certificate transactions could not be expected to wait for a rehearing order to be told of the entirety of a Commission decision that affects the continuance or discontinuance of ongoing gas supply arrangements. The Commission chose to act quickly.

The Commission recognizes that, because transactions authorized or commenced after October 9, 1985, may not be continued under the former rules, some sellers and purchasers of gas were caught unaware. The Commission does not believe, however, that the final result was entirely unexpected by these persons or that the impact of the change in dates has been inordinately harsh. The position of these parties, including the applicants, is obviously no different than it would have been if Order No. 436 as originally issued had specified the dates announced in the Technical Corrections. More importantly, the parties to these transactions had little reason, in light of the breadth of the Commission's proposal, to depend on the indefinite continuation of existing transactions.

Finally, as stated above, the Commission is unpersuaded by the claims of retroactive rulemaking presuppose that the Commission acted to amend or reverse the prior rule and policy in disregard of the impacts that such action would have on those who relied on Order No. 436, as issued.[87] The claim by Florida Gas that the Commission's correction could have made it a "transporter by default," *i.e.*, subject unintentionally to non-discriminatory access, reflects a misunderstanding. No transaction begun before November 1, 1985, except those originally authorized under the Commission's Order No. 234-B, are now or would have been subject to the open access condition after November 1, 1985. The Commission's swift issuance of corrections was aimed at averting misunderstandings and detrimental reliance.

D. Postponing Consideration of Part D

In the NOPR, the Commission proposed a package of four parts: Part A included a comprehensive transportation program; Part B included a program to alleviate the problem of take-or-pay; Part C included an optional expedited certificate program under NGA section 7; and Part D included a new billing procedure. In response to the written and oral comments, the Commission issued in Order No. 436 Parts A through C and requested supplemental oral and written comments on Part D.

Many applicants, including pipelines such as Transco, Panhandle, Northwest, Northwest Central and Natural, distributors such as Columbia Gas Distribution, NI-Gas, SoCal, Washington, North Carolina, and UDC, two trade associations (APGA and INGAA) and the California PUC criticize the Commission's decision to extend the public procedures for Part D, Block Billing procedures, rather than adopt a final rule on that subject. They point out that the Commission argued in the NOPR that the four parts of the NOPR were interrelated, interdependent portions of one rule. Therefore, they conclude that the Commission should not have issued Parts A, B and C separately.

UDC argues that the Commission's piecemeal action conflicts with its policy concerns that it issue an integrated comprehensive program to address the marketing problems in the natural gas industry. Citing *ITT World Communications v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984), Northwest Central argues that it is clear that "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future."

Other applicants raise two practical problems for the Commission's failure to issue Part D. The California PUC argues that, without block billing, producers of high-cost gas will rely on rolled-in pricing which will make distributors and pipelines uncertain whether to participate in the Commission's transportation programs. The California PUC concludes that gas consumers will therefore not obtain a needed reduction

[84] Consolidated Fuel Supply and Teepak ask that the Commission only consider their requests for rehearing in the event that the Commission adversely disposes of their Joint Emergency Request for Clarification, filed November 6, 1984, in which they seek clarification that their present transportation arrangements may continue after November 1, 1985.

[85] *See* section 19(a) of the Natural Gas Act.

[86] That intent is made clear today by the Commission's formal ratification of those changes in this order.

[87] *See* Note 11, *supra*.

in the cost of high-cost gas to market-clearing levels.

Similarly, Panhandle and Transco argue that, without immediate final action in Part D and continued rolled-in pricing, pipelines cannot adequately compete in the spot market. Panhandle argues that because the Commission has failed to define the billing changes, it is uncertain how a pipeline will try to market its gas supplies and recover its gas costs.

Several LDCs, NI-Gas, Washington, Columbia Dist., North Carolina and SoCal, and a pipeline company, Northwest, argue that it is impossible for LDCs to ascertain whether to convert their firm purchase entitlement to transportation because, until block billing is adopted, it is impossible to determine at what price the pipeline would sell gas to compete with non-regulated markets. As a possible solution, NI-Gas suggests that a decision to convert or reduce CD either should be made reversible, or made effective within 150 days of final determination of Order No. 436 or Part D.

In the request for supplemental comments on Part D, the Commission reviewed extensively the arguments for and against postponing final action on block billing, while issuing final regulations in the other three parts. 50 FR 42373-375. Briefly, the Commission discussed the numerous motions from every segment of the industry and requests from members of Congress who asked that the Commission acquire additional information on the overall affects of Part D on the industry. A petition filed by ANR Pipeline and supported by 21 other persons on August 14, 1985, requested the Commission to issue an interim rule in Part A and to renotice Part D. The Commission received responses to ANR's petition which argued for and against issuing separate parts of the rule. The majority of the applicants requested that the Commission delay action in order to acquire additional information.

The Commission also received numerous comments that raised specific issues relating to implementation of final regulations. These commenters offered alternatives to the proposal. The commenters raised serious questions that convinced the Commission that it had to acquire additional information before issuing a final rule.

For the renotice, the Commission revised the block billing procedures based on proposals raised by commenters. The request for supplemental comments discusses the proposed revisions. Recognizing the critical importance of addressing the billing issues, the Commission nevertheless does not believe that severing Part D creates inevitable inconsistencies with Order No. 436. Arguments based on the *ITT World Communication* case therefore provide no useful guidance on the issue of whether the Commission is dealing appropriately with Part D. The Commission's objective, regardless of the nature of its final action on Part D, is to develop a comprehensive regulatory scheme for gas transportation and pricing that will enhance the economic efficiency of the market. Assessment of any "potential inconsistency" must await the Commission's final rule in Part D.

The Commission's further examination of these issues can only benefit the industry. There is no justification for delaying the effect of the other parts of the rule.

VIII. Further Clarification and Denial of Petition for Stay

A. Request by INGAA for Clarification

Following issuance of Order No. 436, the Commission received numerous petitions requesting clarification of the final rule or some other special relief from application of the rule. The following discussion is part of the Commission's series of responses but addresses the generic or hypothetical situations presented to it by a major trade association.

On October 31, 1985, the Interstate Natural Gas Association of America (INGAA) filed a request for clarification of Order No. 436. INGAA's request raises a number of issues regarding the transition period provided by Order No. 436.[88]

Question. Concerning contracts amended between October 9, 1985, and November 1, 1985, to provide for transportation extension periods beginning after October 9, 1985, do § 284.105 and 284.125 provide for interstate pipelines and intrastate pipelines, respectively, to transport after October 31, 1985, pursuant to such extension agreements?

Answer. No. In order for the transitional transportation authority under § 284.105 or 284.125 to apply, the extension period must have been contractually provided for on or prior to October 9, 1985, and otherwise authorized under the Commission's regulations.[89]

Question. Concerning an interstate pipeline that (1) continues any blanket certificate transportation authorized under previously effective § 157.209(e) (Order No. 234-B transportation[90] after October 31, 1985, but (2) does not apply under § 284.221 before December 15, 1985, for a new blanket certificate, and (3) ceases all Order No. 234-B transportation as of that date: After December 15, 1985, will the pipeline remain subject to the open-access and rate conditions of Order No. 436 by reason of having continued its Order No. 234-B transportation after October 31, 1985, and therefore be required to accept requests for either blanket certificate or NGPA section 311 transportation received after December 15, 1985?

Answer. An interstate pipeline will not be required pursuant to the non-discriminatory access conditions of §§ 284.8 and 284.9 to provide blanket certificate transportation in response to transportation requests received after December 15, 1985, if by that date the pipeline ceases all Order No. 234-B transportation and all new blanket certificate transportation commenced during the period November 1, 1985, to December 15, 1985.

An interstate pipeline that continues any blanket certificate transportation after October 31, 1985, is deemed to be still transporting under authority of its original blanket certificate issued under previously-effective § 157.209, since a new certificate may not have been issued under § 284.221 as revised by Order No. 436 by that time. Further, a pipeline's continued exercise of its original blanket certificate transportation authority and reliance on new § 284.223(g)(2) to maintain its Order No. 234-B transportation arrangements will, as provided in § 284.223(g)(2), subject the pipeline to the non-discriminatory access conditions of Order No. 436. Therefore, the pipeline will be required to accept, under its old blanket certificate, new requests for transportation that the pipeline is authorized to provide under the revised blanket certificate regulations.

If an interstate piepline does not apply under § 284.221 by December 15, 1985, for a new blanket certificate, the pipelines authority under its old blanket certificate will be deemed to cease to the extent that it provided for (1) the continuation of Order No. 234-B transportation and (2) the performance of new blanket certificate transportation required, pursuant to §284.223(g)(2), to

[88] 33 FERC ¶61,007 (1985), 50 FR 42408 (October 18, 1985).

[89] Similar clarification requests were filed by El Paso Natural Gas Company on October 22, 1985, and Panhandle Eastern Pipe Line Company on October 21, 1985. The Commission responded to these requests in its orders issued in this docket on October 30, 1985.

[90] 48 FR 34875 (Aug. 1, 1983).

be undertaken during the period from November 1, 1985, to December 15, 1985. Accordingly, if an interstate pipeline does not apply by December 15, 1985, for a new blanket certificate, it must by that date cease *all* blanket certificate transportation under Part 157 *except* its Order No. 319 transportation initially authorized under previously-effective § 157.209(a)(1) which is permitted to continue under new § 284.223(g)(1). However, by ceasing all blanket certificate transportation except that which qualifies under § 284.223(g)(1) on a non-discriminatory basis by December 15, 1985, or any other date certain, the pipeline will shield itself from the requirement to honor requests after that date for blanket certificate transportation.

If an interstate pipeline that has filed a statement of notification in accordance with § 284.223(g)(2)(i) does apply under § 284.221 prior to December 15, 1985 for a new blanket certificate, the pipeline's transportation authority under its old blanket certificate to continue its Order No. 234–B transportation and to undertake new blanket certificate transportation will remain in effect (subject to the conditions of §§ 284.223(g) (1) and (2), as applicable) until the pipeline's new blanket certificate is issued and a reasonable time for the pipeline to accept the certificate has elapsed. Further, if an interstate pipeline applies by December 15, 1985, for a new blanket certificate, thereby providing for the full transportation authority under its old blanket certificate to be extended until the new certificate is issued, the requirement under § 284.223(g)(2) that the pipeline provide additional blanket certificate transportation on a non-discriminatory basis, upon request, will continue during such period following December 15, 1985.

Acceptance of a new blanket certificate by an interstate pipeline will simultaneously extinguish the pipeline's transportation authority under the old certificate, place all existing blanket certificate transportation under the new blanket certificate, and continue the pipeline's non-discriminatory access obligations under §§ 284.8 and 284.9. Upon acceptance of a new blanket certificate, a pipeline will be subject to the open-access conditions of §§ 294.8 and 284.9 by operation of § 284.221(c), which is applicable to all blanket certificates issued after November 1, 1985, for the entire periods that they are in effect, as opposed to § 284.223(g)(2), which relates only to the transition period.

An interstate pipeline will not be required to provide any NGPA section 311 transportation by reason of a blanket certificate, including transportation under Order No. 234–B continued under § 284.223(g)(2), even if such transportation is continued beyond December 15, 1985. A pipeline is required under §§ 284.8 and 284.9 to provide additional NGPA section 311 transportation only if the pipeline has already undertaken new NGPA section 311 transportation after October 31, 1985. That is, the *first* new NGPA section 311 transportation undertaken by a pipeline after October 31, 1985, is entirely within the pipeline's discretion. However, the pipeline's choice to accept its first new NGPA section 311 transportation arrangement after October 31, 1985, makes the pipeline subject to the non-discriminatory access conditions. Further, the Commission wishes to make a clarification regarding pipeline that commenced or extended NGPA section 311 or blanket certificate transportation arrangements during the period October 9, 1985, to November 1, 1985. Regardless of the purported expectation of the pipelines, if a transportation arrangement did not qualify for continued transportation under § 284.105 or § 284.223(g)(1), the continuation of such transportation on and after November 1, 1985, constitutes the commencement of new transportation on November 1, 1985, and thus makes the pipeline subject to the non-discriminatory access conditions of Order No. 436.

A pipeline will be required under § 284.7(b)(2) to file new rates to be effective by July 1, 1986, only for those transportation arrangements that will still be in effect on July 1, 1986. Therefore, for example, if the pipeline ceases all Order No. 234–B transportation by December 15, 1985, the pipeline is not required to file for such transactions rates to be effective July 1, 1986. However, rates charged prior to December 15, 1985, will be subject to refund if it is determined that they were not consistent with the interim rate conditions in § 284.7(b)(1).

Question. Concerning an interstate pipeline that begins a new NGPA section 311 transportation arrangement prior to December 15, 1985, pursuant to the non-discriminatory access conditions that will attach if Order No. 234–B transportation is continued after October 31, 1985; must the new NGPA section 311 transportation arrangement end on December 15, 1985, if the pipeline has not filed an application for a new blanket certificate as of that time?

Answer. INGAA's question in this regard indicates a misunderstanding of the operation of the non-discriminatory access conditions in the context of the transitional provisions of § 284.223(g)(2). An interstate pipeline that continues Order No. 234–B transportation after October 31, 1985, is not required by reason of such Order No. 234–B transportation to provide NGPA section 311 transportation service. The December 15, 1985, date in § 284.233(g)(2) is relevant only to blanket certificate transportation continued under authority of, or required to be commenced pursuant to, that section. If a pipeline begins any new NGPA section 311 transportation, such transportation may continue after December 15, 1985, subject to the non-discriminatory access condition and the other Part 284 conditions, until the expiration of its underlying contractual terms, as provided by §§ 284.102 or 284.122, as applicable. But, as the Commission stated elsewhere, if a pipeline stops all NGPA section 311 transportation on a non-discriminatory basis, the pipeline is no longer subject to the non-discriminatory access provisions applicable to NGPA section 311 transportation.

Question. If an interstate pipeline commences new NGPA section 311 service because it is subject to the open-access conditions of Order No. 436 by reason of its Order No. 234–B transportation, will the pipeline be subject to the open-access conditions with respect to all requests for transportation that the pipeline would be authorized to provide under NGPA section 311?

Answer. Again, as explained above, an interstate pipeline is not required to agree to additional transportation under NGPA section 311 because it chooses to continue its Order No. 234–B transportation. A pipeline, including an intrastate pipeline, is required by the non-discriminatory access conditions of Order No. 436 to provide additional NGPA section 311 transportation only once the pipeline, in its sole discretion, has already begun its first new NGPA section 311 transportation arrangement on or after October 9, 1985.

While the non-discriminatory access conditions will not apply to an interstate pipeline after December 15, 1985, if by that date the pipeline has ceased (1) all blanket certificate transportation begun or extended during the period October 9, 1985, to December 15, 1985, (2) all Order No. 234–B transportation, and (3) all NGPA section 311 self-implementing transportation commenced on or after October 9, 1985, the rate conditions of

§ 284.7 will apply to all Order No. 319 blanket certificate and NGPA section 311 transportation arrangements commenced prior to October 9, 1985, that are still in effect after December 15, 1985.

Question. If an interstate pipeline ceases all Order No. 234–B transportation by December 15, 1985, and does not accept a new blanket certificate by that date, will the pipeline be required under the open-access conditions to accept requests received after December 15, 1985, for NGA section 7 transportation?

Answer. It is unclear whether INGAA's reference to section 7 transportation means only blanket certificate transportation or all section 7 transportation, including that under traditional section 7 certificates. In either case, however, if an interstate pipeline has ceased all blanket certificate transportation other than Order No. 319 transportation continued under § 284.223(g)(1) by December 15, 1985 and has not *applied* for a new blanket certificate by that date, the interstate pipeline will not be required after December 15, 1985, by reason of the open-access conditions of Order No. 436, to accept service requests that require utilization of either blanket certificate or traditional NGA section 7 authority. Further, in such cases, the interstate pipeline will not be required pursuant to the open-access conditions to enter into new transportation arrangements after December 15, 1985, even if the interstate pipeline began new blanket certificate transportation during the period November 1, 1985, to December 15, 1985. That is because these arrangements, even if commenced solely because of the non-discriminatory access conditions in § 284.233(g)(2), must also cease on December 15, 1985, if the interstate pipeline has not filed for a new blanket certificate. As explained above, the pipeline's failure to apply for a new certificate will result in the extinction of the pipeline's authority under its old certificate to provide any blanket certificate transportation except transportation authorized under other terms of Order No. 436 (including Order No. 319 transportation continued under § 284.223(g)(1).)

Question. If a pipeline enters new blanket certificate transportation arrangements after December 15, 1985, may it ever terminate its obligation to provide such transportation?

Answer. Yes. A pipeline may determine that it will not accept new transportation requests and will not agree to extensions of service for NGPA section 311 transportation as of any given time. If so, however, the pipeline must first seek to surrender its blanket certificate and abandon transportation thereunder pursuant to § 157.18 of the Commission's Regulations. *See* 50 FR 42434 (1985). A pipeline's obligation to accept new transportation requests will cease under its blanket certificate when it receives such abandonment approval. If such transportations are covered by the pre-granted abandonment under § 284.221(d), the blanket certificate must still be surrendered. A pipeline may terminate its obligation to transport gas under NGPA section 311, as long as it ceases or discontinues all such transportation, except transportation authorized to continue under § 284.105 or § 284.125, on a non-discriminatory basis. However, the undertaking thereafter of any new blanket certificate or NGPA section 311 transportation will cause the pipeline to again become subject to the non-discriminatory access conditions. Further, as explained in Order No. 436,[91] a pipeline may not decide that it will provide no further self-implementing blanket certificate transportation and then again start accepting new customers in a manner that has the effect of discrimination against shippers that sought transportation during the pipeline's period of "retirement".

Question. Concerning a pipeline that continues an NGPA section 311 transportation arrangement that was commenced prior to October 9, 1985, (1) only until the earlier of October 9, 1987, or the expiration date of the contractual primary term or extension period, as applicable, that was in effect on October 9, 1985, or (2) after the expiration date of the primary term or extension period that was in effect on October 9, 1985; does such transportation in either case make the pipeline subject to the non-discriminatory access conditions of Order No. 436, if the pipeline has not applied for a blanket certificate?

Answer. Regardless of whether an interstate pipeline accepts a new blanket certificate, it is required to provide non-discriminatory access to NGPA section 311 transportation only if it undertakes new NGPA section 311 transportation service after October 31, 1985, or agrees to an extension of an NGPA section 311 arrangement so that transportation will continue beyond the expiration of the primary term or extension period that was in effect on October 9, 1985.

Question. If a pipeline commences new NGPA section 311 transportation after October 31, 1985, will the pipeline be required, pursuant to the non-discriminatory access conditions of Order No. 436, to provide:

(1) NGPA section 311 transportation for other shippers seeking service?

Answer. Yes, on a non-discriminatory basis subject to the terms and conditions in Order No. 436.

(2) NGPA section 311 transportation for shippers seeking extensions of such service that was commenced prior to October 9, 1985?

Answer. Yes, on a non-discriminatory basis subject to the terms and conditions in Order No. 436.

(3) Blanket certificate transportation?

Answer. Not by reason of the new non-discriminatory access condition applicable to new NGPA section 311 transportation service.

Question. If, after October 31, 1985, an interstate pipeline enters a new blanket certificate arrangement to transport gas under § 284.222 on behalf of another interstate pipeline, will the transporting interstate pipeline be required, by reason of such transportation and the open-access conditions of §§ 284.8 and 284.9, to provide

(1) NGPA section 311 transportation under Subpart B of Part 284?

Answer. Not by reason of the transportation on behalf of an interstate pipeline under § 284.222 and the non-discriminatory access condition applicable thereto. However, since LDCs are covered by the blanket certificate as eligible shippers, the question of whether a pipeline must provide the transportation to LDCs under section 311 is largely irrelevant.

(2) Blanket certificate transportation under § 284.222 for interstate pipelines that request extensions of service that was commenced prior to October 9, 1985, under the provisions of previously effective § 284.221?

Answer. Yes.

(3) Blanket certificate transportation under § 284.223 for shippers other than interstate pipelines?

Answer. Yes.

Question. If, after October 31, 1985, an interstate pipeline offers to provide NGPA section 311 transportation under Subpart B of Part 284 on behalf of local distribution companies and intrastate pipelines, must the interstate pipeline also offer, in order to avoid undue discrimination against customers of other classes (*e.g.*, end users that are not or cannot be costrued to be "intrastate pipelines"), to provide blanket certificate transportation under Subpart G of Part 284?

Answer. No.

Question. Concerning blanket certificate and NGPA section 311 transportation arrangements authorized

[91] 50 FR 42408, 42434 (October 18, 1985).

and commenced prior to October 9, 1985, where the contracts for such service are amended on or after October 9, 1985, (1) to allow natural gas to be received from, or delivered to, points other than those permitted under the contract prior to such amendment, or (2) to allow additional volumes of natural gas to be transported; will such amendments to the service contract remove the transportation arrangement from the scope of § 284.223(g) or § 284.105, as applicable, and thus cause the transporting pipeline to be subject to the open-access conditions of §§ 284.8 and 284.9?

Answer. *Yes.*[92]

Question. Under what circumstances is transportation deemed to constitute agreement by an interstate pipeline to offer its customers the right to reduce their firm sales entitilements and convert such entitlements to firm transportation service?

Answer. If an interstate pipeline (1) commences a new NGPA section 311 transportation arrangement under authority of § 284.102 or § 284.243, after February 15, 1986, or (2) accepts a blanket certificate issued under § 284.221, the interstate pipeline is deemed to have agreed to offer its firm sales customers the contract demand reduction and purchase-to-transportation conversion rights specified in §§ 284.10(c) and (d), respectively. The change in dates is accomplished by this rehearing order.

A transportation "arrangement" is an agreement providing for the transportation of natural gas. A transportation arrangement is "commenced" when a pipeline first takes receipt of any natural gas purusant to the transportation agreement. A "new" transportation arrangement is a transportation arrangement under which the initial or primary transportation term or an extension commences on or after December 15, 1985.

B. Petition for Stay

The City of Willcox, Arizona, and the Arizona Electric Power Cooperative (Willcox) request that the Commission stay the effective date of the regulations promulgated by Order No. 436 until the day after the Commission issues a rehearing order in this proceeding.[93] In support of its petition, Willcox contends that it will be irreparably harmed if the final rule is not stayed because it will be unable to finalize arrangements for the purchase, transportation, and sale of gas. Willcox is particularly concerned about the transportation arrangement. It asserts that it has been informed by its pipeline supplier, El Paso Natural Gas Company (El Paso), that the pipeline will not participate in the Order No. 436 transportation program. Willcox claims that, if the Commission grants a stay it will be able to negotiate the purchase of gas with a producer and finalize the arrangements with its customer before the new effective date of the regulations and that its transportation arrangements would then be grandfathered for two years.

Willcox' petition for a stay is denied. Section 705 of the Administrative Procedure Act authorizes the Commission to postpone the effective date of action taken when it finds that justice so requires. The Commission is unable to make that finding here. First, the Commission does not believe that staying the effectiveness of Order No. 436 would be in the public interest. As the Commission has indicated in this order, the final rule will benefit consumers by stimulating competition in natural gas markets. Second, Willcox has not demonstrated that implementation of the regulations will cause it imminent irreparable harm. Willcox's allegation that it will not be able to secure a new customer is unsustantiated. Moreover, even if the allegation is true, it would not constitute irreparable harm. The regulations do not deprive the customer or service available under the Natural Gas Act. The new program provides alternative means by which natural gas service may be supplied.

IX. Changes to the Regulations

As discussed above in this order, the following revisions to the regulations promulgated in Order No. 436.

A. Notice of Filing of Application in § 2.77

The Commission received numerous comments that argue that the 51-day notice period provided for abandonment and certificate applications under § 2.77 is too short to afford them sufficient opportunity to review the application and to file comments. In this order, the Commission clarifies that it intended that the 15-day period begin after publication of the notice of the application in the **Federal Register.** The amendment to the regulation reflects that clarification of its general policy.

B. Report to the Commission of Change in Discount Rate Under § 284.7(d)(5)(iv)

Under § 284.7(d)(5)(iv), a pipeline is required to file within 45 days of the close of the billing period any change in its discount rate under § 284.7 Several applicants argue that 45 days does not provide them with timely notice. The Commission agrees with the applicants and is changing the requirement to 15 days.

C. Rate Adjustment Under § 284.10(g)

The Commission is eliminating the requirement of § 284.10(g) that the pipeline file a change to rates every time there is a change in the customer's firm sales entitlement. Under § 284.7, a pipeline that provides transportation under Subparts B, G, and H is required to file a rate for such transportation. The Commission believes that the initial filing under § 284.7 is sufficient. Of course, pieplines may file subsequent rate changes at their discretion.

D. Requiring Interstate Pipeline to Keep a Log of Requests for Transportation

The Commission is amending its regulations to require interstate pipelines that transport under Subparts B, G, or H to keep a log of all transportation requests. This log is intended to provided interested persons with the information they need to determine whether the pipeline is operating an a non-discriminatory basis. The log is to be kept available for public inspection at the company's corporation headquarters during the company's normal business hours.

The pipeline is required to begin keeping the log within 30 days after it begins to transport under the Commission's programs. The log must show the date of the transportation request, the name of the person requesting the transportation, and the volume of gas to be transported.

The Commission believes that this requirement is consistent with the purposes of its new transportation program and its responsibilities under the NGA and that it is not unduly burdensome. Pipelines already keep this information in the normal course of business. Furthermore, the benefit to interested persons to provide them with this type of information that is available only to the pipeline outweighs the inconvenience to the pipeline. Moreover, the Commission is also interested in the information in the log and may request that the pipeline provide the

[92] A similar clarification was included in the Commission's October 30, 1985 order in response to Panhandle Eastern's Pipe Line Company's Request for Clarification filed October 21, 1985.

[93] Although styled as a motion, Willcox's pleading is treated as a petition because there are no motions in rulemakings. 18 CFR Part 385.

Commission with data from it for information purposes.[94]

E. Filing by Intrastate Pipelines of Their Operating Conditions

The Commission is adding a new paragraph (e) to § 284.123 to require an interstate pipeline that participates in the Commission's transportation program to file a one-time statement that describes how it will operate under the program. This statement should contain the pipeline's conditions, including quality standards and financial viability of the shipper. The pipeline is required to file any amendments to this statement within 30 days of commencement of the change. If a pipeline has already elected to participate in the program, the filing is due no later than Feburary, 1, 1985. If a pipeline decides to transport under the new program in the future, it must file the statement within 30 days of commencement of the new service.

F. Changes to the Commission's Delegations of Authority

The Commission is amending its regulations in § 375.307 in order to authorize the Director of the Office of Pipeline and Producer Regulation to pass on uncontested applications for blanket certificates by Hinshaw pipelines and LDCs served by interstate pipelines. At the same time, the Commission is consolidating redundant sections relating to the Director's delegated authority to pass on uncontested blanket certificate applications.

G. Notice of LDC By-Pass

The Commission is amending its regulations relating to new service provided under either section 311 of the NGPA or under the optional expedited certificate procedures in Order No. 436 to assure that LDCs and their apprporiate state regulatory agencies are notified in writing prior to the commencement of such services to a customer that is located in the service area of the LDC. *See*, new §§ 284.106(a)(4), 284.126(a)(6), and 157.102(b)(iv).

H. Phase-In Schedule of CD Reduction/Conversion Condition

The Commission is revising § 284.10, the CD reduction/conversion condition, in three respects.

First, § 284.10(a) is modified to allow new transportation arrangements under section 311 of the NGPA to be commenced or continued for a transitional period through February 15, 1986, without triggering the CD reduction/conversion conditions. The purpose of this change is to extend through the major portion of the 1985–1986 winter heating season the transition period intended by Order No. 436. This transition period is intended to permit different segments of the industry to adjust their commercial arrangements to take advantage of the new opportunities under Order No. 436, without unduly disrupting transportation during the winter heating season.

Because the bulk of self-help transportation services are those implemented under section 311 and because Order No. 436 provides pipelines new flexibility to provide section 311 services to local distribution systems for both system supply and direct end-uses, the change to § 284.10(a) would extend the CD reduction/conversion "trigger" date for new section 311 arrangements from December 15, 1985, to February 15, 1986. However, all other Order No. 436 conditions applicable to such 311 services, such as the non-discriminatory access conditon, would continue to apply as required by Order No. 436.

Under this change, all segments of the industry more readily will be able to adjust their commercial relationships, while at the same time meeting Order No. 436's overall goal of permitting pipelines and their customers to maximize the movement of gas on a non-discriminatory basis in response to competitive conditions.

Second, § 284.10(c)(2) is modified to establish more certain notice deadlines and effective dates for customers to exercise their CD reduction options. Under § 284.10(c)(1), the "trigger" date for the availability of the CD reduction option is the date the pipeline first commences or continues a new section 311 arrangement after February 15, 1986, or accepts a new blanket certificate. Section 284.10(c)(2), as modified, would require that, unless the pipeline agrees otherwise, a customer wishing to exercise its CD reduction option the first year it is available, must give the pipeline written notice of the level of its first year reduction not later than 45 days following the "trigger" date established under § 284.10(a). This 45-day notice requirement is only applicable to firm sales customers in the first year the CD reduction option is available. Because § 284.10(c)(1) establishes a single date for first year reductions to take effect, the 45-day notice requirement is intended to provide customers adequate time to decide their first reduction elections under § 284.10.

In addition, § 284.10(c)(2) requires that, in the first year, all such customer reductions take effect 150 days following the close of the required 45-day customer notice period. This will assure that all customers enjoy the same 45-day period to make their CD reduction elections, and that all such CD reduction elections will take effect on the same day the first year. The Commission intends this modification to provide pipelines and their customers with the certainty and predictability necessary to plan their first service agreement modifications and tariff filings under Order No. 436.

In subsequent years, § 284.10(c)(2) is modified to permit a pipeline to establish a single effective date for all CD reductions to take effect, as long as the pipeline provides its customers with 180 days written notice prior to such date. This change would permit pipelines the flexibility to change the effective date for CD reductions in subsequent years, as long as the changed effective date is no later than the "anniversary" date of their customers' last such reduction, and as long as their customers are provided prior notice of the changed effective date. In this way, a pipeline may choose to require that all CD reductions take effect on a single date, and customers will be assured that such effective date is no later than 12 months following the effective date of their last such reductions.

Third, in response to rehearing requests concerning the ability of pipelines and their customers to adjust to the CD reduction and conversion options during an orderly transition period, § 284.10(c) and § 284.10(d) are modified to extend the 4-year phase-in schedule for such options to 5-years. This modification would also clarify that the phase-in schedule runs for the five-year period beginning when the pipeline first commences or continues a new section 311 arrangement after February 15, 1986, or accepts a new blanket certificate. Finally, the modification would clarify that the reduction/conversion options are cumulative; that is, any customer that does not elect to reduce or convert its firm sales entitlements in the full amount in any given year, may in subsequent years reduce or convert the full, cumulative amount eligible to be reduced or converted in that and all previous years. The cumulative nature of the CD reduction/conversion option is intended to assure firm sales customers maximum

[94] Consistent with its findings in Order No. 436, the Commission believes these changes will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612 (1982).

choices for transportation services regardless of whether they choose to exercise those options to their full extent from year to year.

Thus, under the revised 5-year phase-in schedule, subject to the notice and effective date requirements in § 284.10 (c)(2) and (d)(2), a customer would be permitted to convert/reduce up to 15 percent during the first year, up to 30 percent the second year, up to 50 percent the third year, up to 75 percent the fourth year, and up to 100 percent the fifth year and thereafter.

The purpose of this more gradual, 5-year phase-in schedule is intended to enable pipelines to accommodate their customers' CD adjustments in a more orderly and smooth manner. Pipelines and their customers will benefit from a more gradual program to the extent it ensures a more predictable transition and mitigates potential cost-shifting.[95]

I. Change in Transition Date

Under the old transitional provisions, the authorization for certain transportation under § 157.209(e)(1) ceased on December 15, 1985 unless the pipeline files for a blanket certificate under § 284.221 before that date. Since December 15 is a Sunday, the Commission extends this date to 11:59 p.m. on December 16, 1985 to permit pipelines and their customers an additional working day to adjust their commercial arrangements in light of the changes made by this order.[96]

[95] Generally, a rule becomes effective not less than 30 days after it is published in the **Federal Register**. A rule may become effective sooner if it is an interpretive rule or policy statement, if it relieves a restriction or grants an exemption, or if the agency finds there is good cause to do so. 5 U.S.C. 553(d) (1982).

The Commission finds good cause to make the changes to §§ 284.10(a) and 284.223(g)(3)(i) effective upon issuance. Section 284.10(a) originally vested rights in pipeline's sales customers to reduce or convert the level of those customers' firm sales entitlements, if their pipeline is providing new transportation service after December 15, 1985. The revisions to § 284.10(a) postpone the date on which these rights may vest until after the winter heating season and avoids the uncertainty in the gas industry that may have been likely under the old rules. In addition, this change can be effective immediately without affecting any ongoing transactions or contractual arrangements, because customers could not have exercised any reduction or conversion rights under the old rules until February 1, 1985, as a practical matter. See note 96, infra.

[96] The Commission finds good cause under the Administrative Procedure Act, 5 U.S.C. 553(d) (1982) to extend this date to 11:59 p.m. on December 16, 1985, to permit pipelines and their customers an additional working day to adjust their commercial arrangements in light of the changes made by this order by amending § 284.223(g)(3)(i). In addition, this minor change in the regulations primarily relieves a restriction on pipelines and their customers by permitting transportation authority to continue one additional day.

X. Effective Date and Paperwork Reduction Act Statement

The changes to the Commission's regulations contained in this order are effective January 22, 1986, unless otherwise stated in this order. The effectiveness of new data collection provisions are subject to approval by the Office of Management and Budget.

The new information collection and retention provisions in this order will be submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. 3501–3502 (1982) and OMB's regulations, 5 CFR 1320.12 (1984). Interested persons can obtain information on these provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. (Attention: Ellen Brown, (202) 357-8272). Comments on these provision can be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Regulatory Commission).

XI. Commission Order

In consideration of the foregoing, the Commission:

A. Denies in part the applications for rehearing of Order No. 436, as specified in this order;

B. Grants in part the applications for rehearing of Order No. 436, as specified in this order, and amends accordingly Chapter 1, Title 18 of the *Code of Federal Regulations*, as set forth below, effective January 22, 1986, unless made effective immediately as stated in this order;

C. Denies the petition for stay of Order No. 436 filed by the City of Willcox, Arizona and the Arizona Electric Power Cooperative.

By the Commission. Chairman O'Connor concurred in part and dissented in part. Commission Stalon concurred in part and dissented in part and will have a separate statement to be issued later.

Kenneth F. Plumb,

Secretary.

PART 2—[AMENDED]

1. The authority citation for Part 2 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); Exec. Order No. 12,009, 3 CFR 142 (1978); Federal Power Act, 16 U.S.C. 791a–828c (1982); Natural Gas Act, 15 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645 (1982); and the National Environmental Policy Act, 16 U.S.C. 4321–4361 (1978), unless otherwise indicated.

2. In § 2.77, paragraph (b)(1) is revised to read as follows:

§ 2.77 Policy on expedite producer abandonment.

* * * * *

(b) *Procedures.*

(1) Applications will be noticed promptly and a period not to exceed 15 days after publication of the notice in the **Federal Register** will be provided for comments or interventions.

* * * * *

PART 157—[AMENDED]

3. The authority citation for Part 157 continues to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); Executive Order No. 12,009, 3 CFR 142 (1978).

4. In § 157.102, paragraph (b)(1)(iv) is revised to read as follows:

§ 157.102 Contents of application and other pleadings.

* * * * *

(b) *Specific contents.* (1) Any application under this subpart must contain:

* * * * *

(iv) If the proposed new service would be provided to a customer that is located in the service area of a local distribution company, a statement that the applicant has served a copy of this application on that local distribution company and the local distribution companmy's appropriate state regulatory agency;

* * * * *

PART 284—[AMENDED]

5. The authority citation for Part 284 continues to read as follows

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); Executive Order No. 12,009, 3 CFR 142 (1978).

§ 284.7 [Amended]

6. In § 284.7(d)(5)(iv), the number "45" is removed and the number "15" is added in lieu thereof.

7. In § 284.10, paragraph (g) is removed, and paragraphs (a), (c)(1), (c)(2), (c)(3), (d)(1), (d)(3), and (e) are revised to read as follows:

§ 284.10 Reductions in firm sales entitlements and conversions to firm transportation.

(a) *Agreement to offer reduction and conversion options.* An interstate pipeline is deemed to have agreed to offer its firm sales customers the options set out in paragraphs (c) and (d) of this section, if it:

(1) Commences or continues a new transportation arrangement under authority of § 284.102 or § 284.243 of this chapter after February 15, 1986; or

(2) Accepts a certificate issued under § 284.221 of this chapter.

* * * * *

(c) *Option to reduce certain firm purchase obligations*—(1) *Customer option.* An interstate pipeline subject to this section agrees to offer, and is deemed to offer, every firm sales customer the option to reduce the level of the customer's firm sales entitlements under any eligible firm sales service agreement with that pipeline.

(2) *Notice by Customer*—(i) *Initial year.* (A) Unless the pipeline agrees otherwise, a customer of a pipeline that wishes to exercise its option under this paragraph during the first twelve-month period after the pipeline becomes subject to this section must provide the pipeline written notice of the level of any first year reduction not later than 45 days following the date the pipeline becomes subject to the provisions of this section.

(B) Such reductions will take effect 150 days following the close of the 45-day period provided in paragraph (c)(2)(i)(A) of this section.

(ii) *Subsequent years.* (A) During each twelve-month period after the date on which customer reductions took effect under paragraph (c)(2)(i)(B) of this section, the pipeline may establish a single effective date for later reductions in accordance with paragraph (c)(3) of this section, provided:

(*1*) The pipeline provides its firm sales customers 180 days written notice prior to such a date; and

(*2*) Such date is not later than the date such reductions took effect in the previous year.

(B) Unless the pipeline agrees otherwise, a customer of a pipeline that wishes to exercise its option under this paragraph must provide the pipeline written notice of the level of the reduction not later than 150 days before the effective date.

(3) *Level of reduction.* (i) A customer of a pipeline subject to this section may elect to reduce the level of its existing firm sales entitlements under any eligible firm sales service agreement with that pipeline, in accordance with the following schedule:

(A) During the first twelve-month period after the pipeline first becomes subject to this section, up to 15 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(B) During the second twelve-month period after the pipeline first becomes subject to this section, up to 30 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(C) During the third twelve-month period after the pipeline first becomes subject to this section, up to 50 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(D) During the fourth twelve-month period after the pipeline first becomes subject to this section, up to 75 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline; and

(E) Beginning the fifth twelve-month period after the pipeline first becomes subject to this section, up to 100 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(ii) A pipeline subject to this section may, at any time, permit a firm sales customer to reduce its firm sales entitlements by more than the amount provided in the schedule in paragraph (c)(3)(i) of this section.

* * * * *

(d) *Option to convert to firm transportation.*—(1) *Customer option.* An interstate pipeline subject to this section agrees to offer, and is deemed to offer, every firm sales customer the option, under this paragraph, to convert a portion of its firm sales entitlements under any eligible firm sales service agreement to a volumetrically equal amount of firm transportation service.

* * * * *

(3) *Level of Conversion.* (i) A customer of a pipeline subject to this section may convert to firm transportation its existing firm sales entitlements under any eligible firm sales service agreement with that pipeline, in accordance with the following schedule:

(A) During the first twelve-month period after the pipeline first becomes subject to this section, up to 15 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(B) During the second twelve-month period after the pipeline first becomes subject to this section, up to 30 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(C) During the third twelve-month period after the pipeline first becomes subject to this section, up to 50 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(D) During the fourth twelve-month period after the pipeline first becomes subject to this section, up to 75 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline; and

(E) Beginning the fifth twelve-month period after the pipeline first becomes subject to this section, up to 100 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline.

(ii) A pipeline subject to this section may, at any time, permit a firm sales customer to convert to firm transportation by more than the amount provided in the schedule in paragraph (d)(3)(i) of this section.

* * * * *

(e) *Limitation.* Reductions of firm sales entitlements under paragraph (c) of this section and conversions of firm sales entitlements under paragraph (d) of this section may not, in combination, without the consent of the pipeline, affect more than 15 percent of a customer's eligible firm sales entitlements during the first 12-month period subsequent to the date on which customer reductions took effect under paragraph (c)(2)(i)(A) of this section; more than 30 percent during the second 12-month period subsequent to such date; more than 50 percent during the third 12-month period subsequent to such date; more than 75 percent during the fourth 12-month period subsequent to such date; or more than 100 percent after the fourth 12-month period subsequent to such date.

* * * * *

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS ACT AND THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

8. The table of contents for Part 284 is amended by adding under Subpart A a new § 284.13 to read as follows:

Subpart A—General Provision and Conditions

Sec.

* * * * *

284.13 Recordkeeping requirement.

* * * * *

9. Part 284 is amended by adding new § 284.13 to read as follows:

§ 284.13 Recordkeeping requirement.

(a) Within 30 days after commencement of any transportation arrangement under Subpart B, G, or H of this part, the interstate pipeline that provides such service must keep a log of the request for such service that, at a minimum, includes:

(1) The date of the request;

(2) The name of the person requesting transportation; and

(3) The volume of gas to be transported.

(b) The log required under this section must be available for public inspection at the company's corporate headquarters during the company's normal business hours.

10. In § 284.106, a new paragraph (a)(4) is added to read as follows:

§ 284.106 Reporting requirements.

(a) * * *

(4) If such transportation is provided to a customer that is located in the service area of a local distribution company, a statement that the interstate pipeline has notified the local distribution company and the local distribution company's appropriate regulatory agency in writing of the proposed transportation prior to comments.

* * * * *

11. In § 284.123, a new paragraph (e) is added to read as follows:

§ 284.123 Rates and charges.

* * * * *

(e) *Filing requirements.*—(1) *General rule.* Except as provided in paragraph (e)(2) of this section, within 30 days of commencement of new service, any intrastate pipeline that engages in transportation arrangements under this subpart must file with the Commission a one-time statement that describes how the pipeline will engage in these transportation arrangements, including operating conditions, such as, quality standards and financial viability of the shipper. If the pipeline changes its operations under this subpart, it must amend the statement and file such amendments not later than 30 days after commencement of the change in operations.

(2) *Exception.* Any intrastate pipeline that engages in transportation arrangements authorized under this subpart before December 15, 1985, must file the statement described in paragraph (e)(1) not later than February 1, 1985. Any amendments to this statement must be filed in accordance with paragraph (e)(1).

12. In § 284.126, a new paragraph (a)(6) is added to read as follows:

§ 284.126 Reporting requirements.

(a) * * *

(6) If such transportation is provided to a customer that is located in the service area of a local distribution company, a statement that the intrastate pipeline has notified the local distribution company and the local distribution company's appropriate state regulatory agency in writing of the proposed transportation prior to commencement.

* * * * *

13. In § 284.223, paragraph (g)(3) is revised to read as follows:

§ 284.223 Transportation by interstate pipelines on behalf of shippers other than interstate pipelines.

* * * * *

(g) *Transitional rule for transportation arrangements*

* * * * *

(3) Authorization for transportation service under paragraph (g)(2) of this section;

(i) Ceases at 11:59 p.m. December 16, 1985, unless the pipeline files for a blanket certificate under § 284.221 before that time; and

(ii) Is subject to compliance with the requirements of § 284.8(b), or § 284.9(b), as appropriate and § 284.7.

* * * * *

PART 375—[AMENDED]

14. The authority citation for Part 375 continues to read as follows:

Authority: Department of Energy Organization Act 42 U.S.C. 7101–7352 (1982), Executive Order 12009, 3 CFR, 142 (1978); Administrative Procedure Act, 5 U.S.C. 553 (1982).

§ 375.307 [Amended]

15. Section 375.307(a)(7) is amended by removing the term "§ 284.222," and inserting in lieu thereof the term "§ 284.224."

16. Section 375.307(a)(15) is amended by removing the phrase "Subpart G of Part 284 and" before the term "Subpart F of Part 157."

17. In § 375.307, paragraph (w) is removed.

Appendix A

Note.—Appendix A will not appear in the Code of Federal Regulations.

In the Matter of: RM85-1-000—*Request for Rehearing*

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Hadson Gas Systems, Inc	002
Orange and Rockland Utilities	007
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Michigan Consolidated Gas Company	009
CP National Corporation's	011
Oklahoma Natural Gas Company, Division of ONEOK Inc., and ONG Transmission Company	012
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Northern Natural Gas Company	021
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Florida Gas Transmission Company 050
Northwest Natural Gas Company 051
Houston Pipe Line Company 052
Transwestern Pipeline Company 053
Columbia Gas Transmission Corporation 054
ANR Pipeline Company 055
Columbia Gas Distribution Companies 056
Northern Illinois Gas Company 057
Coastal Oil and Gas Corporation 058
Tenngasco Corporation 059
Tenneco Oil Company 060
Tennessee Gas Pipeline Company, Division of Tenneco 061
The Brooklyn Union Gas Company 062
Alabama-Tennessee Natural Gas Company 063
America Council on Education 064
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United Gas Pipe Line Company 067
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The Independent Oil & Gas Producers of West Virginia 069
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Ashland Exploration, Inc. 077
The Wisconsin Distributors Group 078
The Association of Texas Intrastate Natural Gas Pipelines 079
The Association of Texas Intrastate Natural Gas Pipelines 080
Southern Union Gathering Company 081
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Louisiana Resources Company 086
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Northwest Pipeline Corporation 088
North Carolina Natural Gas Corporation and Public Service Corporation of North Carolina, Inc. 089
Northwest Central Pipeline Corporation 090
El Paso Natural Gas Company 091
Northern Border Pipeline Company 092
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United Distribution Companies 094
Algonquin Gas Transmission Company 095
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American Paper Institute 097
Natural Gas Pipeline Company of America 098
Air Products and Chemicals, Inc. 099
The City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc. 100
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The American Public Gas Association 104
Seagull Energy Corporation 105
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Appendix B

Note.—Appendix B will not appear in the Code of Federal Regulations.

In the Matter of: RM85-1-000—*Request for Clarification*

Panhandle Eastern Pipeline Line Company 000
El Paso Natural Gas Company, comments supporting applicants were filed by: Public Utilities Commission of the State of California; Pacific Gas and Electric Company; Southern California Gas Company; National Council of Senior Citizens; California State Grange 000
Northwest Pipeline Corporation, comments supporting applicants were filed by: Washington, Water Power Company; Northwest Natural Gas Company; Gilmore Steel Corporation; Washington Natural Gas Company 000
American Paper Institute Inc.'s 000
Consolidated Fuel Supply, Inc 000
Midwest Solvents Company 000
Energy Marketing Exchange, Inc 000
Transcontinental Gas Pipe Line Corporation, comments supporting applicants were filed by: Lynchburg Gas Company 000
Exxon Corporation 000
Elizabethtown Gas Company 000
Southern Edison Company 000
California Edison Company 000
Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company 000
Texas Eastern Gas Pipeline Company 000
Frito-Lay Inc. 000
Process Gas Consumers Group, American Iron and Steel Institute, Chemical Manufacturers Association, Association of Businesses Advocating Tariff Equality and Georgia Industrial Group 000
Orange and Rockland Utilities, Inc. 000
Exxon Corporation 000
Algonquin Gas Transmission Company 000
Battle Creek Gas Company, comments supporting applicants were filed by: Panhandle Eastern Pipe Line Company 000
Southern Natural Gas Company, comments supporting applicants were filed by: Columbia Nitrogen Corporation 000
Michigan Gas Utilities Company, comments supporting applicants were filed by: Panhandle Eastern Pipe Line Company 000
Lynchburg Gas Company 000
Southern Gas Pipeline Company 000
Columbia Gas Transmission Corporation, comments supporting applicants were filed by: Mountaineer Gas Company 000
Northwest Central Pipeline Corporation, comments supporting applicants were filed by: Diamond Shamrock Exploration Company; Reese Exploration Incorporated; Mickey DeBernard and Associates; Vanguard Pipeline Corporation; Simco Petroleum and Caporale Energy Corporation; Answer of Jerry Lutz; Triple-T Pipelines Inc.; Bill Schuette, US House of Representatives 000
Teepak, Inc. and Consolidated Fuel Supply, Inc., comments supporting applicants were filed by: Panhandle Eastern Pipe Line Company 000
Carnegie Natural Gas Company 000
Kellog Company 000
UGI Corporation 000
Hadson Gas Systems, Inc. 000
Specified Producers 000
McMoran 000
Kansas Pipeline Company 000
Natual Gas Pipeline Company of America 000
Entrade Corporation 000
J.R. Simplot Company 000
GGSI Gathering and Processing Company and Power-Tex 000
Midwestern Gas Transmission Company 000
FPM Operating Company comments supporting applicants were filed by: McMoran Oil & Gas Inc. 000
Texas Gas Transmission Corporation 000
Southern Natural Gas Company 000
Power-Tex 000

Methanol Production Corporation, comments supporting applicants were filed by: West Texas Gas Inc.; Harper, Charles E.; Caddo Management, Inc.; Jernigan, E.D.; King, Julius W.; Gas Research Institute; Creole Gas Pipeline Corporation; Mountain Fuel Resources, Inc.; Pride Energy Pipeline of Kentucky Corporation 000
Intercon Gas Inc. 003
Natural Gas Pipeline Company of America 006

[FR Doc. 85-29967 Filed 12-20-85; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 19 and 21

Conflict of Interest; Protection of Privacy

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations for conflict of interest to update references to organization designations. In addition, FDA is amending the regulations for protection of privacy to update references to organization designations and to be consistent with changes made in the Privacy Act Record System.

EFFECTIVE DATE: December 23, 1985.

FOR FURTHER INFORMATION CONTACT: Melissa M. Moncavage, Office of Management and Operations (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4976.

SUPPLEMENTARY INFORMATION: In the Federal Register of January 10, 1985 (50 FR 1278), an FDA reorganization retitled the Division of Personnel Management as the Division of Human Resources Management and retitled the Policy Management Staff as the Division of Ethics and Program Integrity. This document changes these titles wherever they appear in 21 CFR Parts 19 and 21. FDA is also updating its regulations under Part 21 to be consistent with changes made in the Privacy Act Record System. In addition, FDA is revising § 21.31 to reflect the establishment of the National Archives and Records Administration (see 50 FR 15722; April 19, 1985).

List of Subjects

21 CFR Part 19

Conflict of interests.

21 CFR Part 21

Privacy.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, Parts 19 and 21 are amended as follows:

PART 19—STANDARDS OF CONDUCT AND CONFLICTS OF INTEREST

1. The authority citation for 21 CFR Part 19 is revised to read as set forth below and the authority citations following 21 CFR 19.10 and 19.21 are removed.

Authority: Sec. 701(a), 52 Stat. 1055 (21 U.S.C. 371(a)); 21 CFR 5.10.

§ 19.10 [Amended]

2. Section 19.10 *Food and Drug Administration Conflict of Interest Review Board* is amended in paragraph (a) by revising "Division of Personnel Management" to read "Division of Human Resources Management."

§ 19.21 [Amended]

3. Section 19.21 *Duty to report violations* is amended in paragraphs (a), (b), and (c) by revising "Policy Management Staff" to read "Division of Ethics and Program Integrity."

PART 21—PROTECTION OF PRIVACY

4. The authority citation for 21 CFR Part 21 is revised to read as set forth below and the authority citations following 21 CFR 21.1, 21.20, 21.32, 21.40, 21.41, 21.42, 21.43, 21.50, 21.51, and 21.61 are removed.

Authority: Sec. 701(a), 52 Stat. 1055 (21 U.S.C. 371(a)); 5 U.S.C. 552a; 21 CFR 5.10.

§ 21.1 [Amended]

5. Section 21.1 *Scope* is amended in paragraph (b)(4) by revising "Division of Personnel Management" to read "Division of Human Resources Management."

§ 21.31 [Amended]

6. Section 21.31 is amended by revising the section heading to read "§ 21.31 *Records stored by the National Archives and Records Administration*" and in paragraph (a) by revising "General Services Administration" to read "National Archives and Records Administration".

§ 21.32 [Amended]

7. Section 21.32 *Personnel records* is amended in paragraphs (b) (1)(ii) and (2), (c), and (d)(5) by revising "Division of Personnel Management" to read "Division of Human Resources Management."

§ 21.40 [Amended]

8. Section 21.40 *Procedures for submitting requests for notification and access* is amended by removing paragraph (g).

9. Section 21.52 is amended by revising pararaph (a), to read as follows:

§ 21.52 Administrative appeals of refusals to amend records.

(a) If an individual disagrees with a refusal under § 21.51(a)(2) to amend a record, he or she may appeal that refusal to the Commissioner of Food and Drugs, Rm. 14-71, 5600 Fishers Lane, Rockville, MD 20857.

* * * * *

10. Section 21.61 is amended by removing paragraph (b)(4) and by revising paragraph (b)(1) and the first sentence in paragraph (c), to read as follows:

§ 21.61 Exempt systems.

* * * * *

(b) * * *

(1) Bio-research Monitoring Information System—HHS/FDA/09-10-0010.

* * * * *

(c) The system described in paragraph (b)(3) of this section includes investigatory records compiled solely for the purpose of determining suitability, eligibility, or qualification for Federal civilian employment, military service, Federal contracts, and access to classified information. * * *

11. Section 21.71 is amended by revising paragraph (a) (1) through (9) and by adding new paragaph (a) (10), (11), and (12), to read as follows:

§ 21.71 Disclosure of records in Privacy Act Record Systems; accounting required.

(a) * * *

(1) To those officers and employees of the agency which maintains the record who have a need for the record in the perfomance of their duties;

(2) Required under section 552 of the Freedom of Information Act;

(3) For a routine use as described in the routine use section of each specific system notice;

(4) To the Bureau of Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13 of the United States Code;

(5) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and that the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives and Records Administration of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or to the Archivist of the United States or his or her designee for evaluation to determine whether the record has such value;

(7) To another agency or to an instrumentality of any government jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if, upon such disclosure, notification is transmitted to the last known address of such individual;

(9) To either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) To the Comptroller General, or any of his or her authorized representatives in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to the order of a court of competent jurisdiction; or

(12) To a consumer reporting agency in accordance with section 3(d) of the Federal Claims Collection Act of 1966 (31 U.S.C. 952(d)). (This "Special Disclosure" statement does not apply to any FDA system of records.)

* * * * *

Dated: December 13, 1985.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 85-30202 Filed 12-20-85; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Part 178

[Docket No. 81F-0154]

Indirect Food Additives; Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of 1,3,5-tris(4-*tert*-butyl-3-hydroxy-2,6-dimethylbenzyl)-1,3,5-triazine-2,4,6-(1*H*,3*H*,5*H*)-trione as an antioxidant for olefin polymers used in the manufacture of articles or components of articles intended for use in contact with food. This action responds to a petition filed by the American Cyanamid Co.

DATES: Effective December 23, 1985; objections by January 22, 1986.

ADDRESS: Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Marvin D. Mack, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of June 5, 1981 (46 FR 30197), FDA announced that a petition (FAP 1B3548) had been filed by the American Cyanamid Co., One Cyanamid Plaza, Wayne, NJ 07470, proposing that § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) be amended to provide for the safe use of 1,3,5-tris(4-*tert*-butyl-3-hydroxy-2,6-dimethylbenzyl)-1,3,5-triazine-2,4,6-(1*H*,3*H*,5*H*)-trione as an antioxidant in polypropylene and high-density polyethylene, without limitation regarding the condition of use.

In an amended notice published in the **Federal Register** of Octobr 10, 1985 (50 FR 41411), FDA announced that the petitioner had amended this petition to provide for the use of this additive in all olefin polymers, including polypropylene and high-density polyethylene, without limitation regarding the conditions of use.

FDA has evaluated data in the petition and other relevant material. It concludes that the additive is safe for use in all olefin polymers, and that the regulations should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition (address above) by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. FDA's regulations implementing the National Environmental Policy Act (21 CFR Part 25) have been replaced by a rule published in the **Federal Register** of April 26, 1985 (50 FR 16636, effective July 25, 1985). Under the new rule, an action of this type would require an environmental assessment under 21 CFR 25.31a(a).

Any person who will be adversely affected by this regulation may at any time on or before January 22, 1986, submit to the Dockets Management Branch (address above) written objections thereto and may make a written request for a public hearing on the stated objections. Each objection shall be separately numbered and each numbered objection shall specify with particularity the provision of the regulation to which objection is made. Each numbered objection on which a hearing is requested shall specifically so state; failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held; failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this regulation. Received objections may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging, Sanitizing solutions.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, Part 178 is amended as follows: