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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 4

Claims Against Indemnity Fund Under Programs Administered by Agricultural Stabilization and Conservation County Committees

AGENCY: U.S. Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: Part 4 of this title was issued to prescribe procedures for making claims for indemnification for losses resulting from certain actions of Agricultural Stabilization and Conservation (ASC) county committees. Valid claims were paid from a general Indemnity Fund (the Fund) maintained in the U.S. Treasury. The Fund is currently depleted and there is no authority to replenish the Fund. Therefore 7 CFR Part 4 is removed.

EFFECTIVE DATE: June 9, 1987.

FOR FURTHER INFORMATION CONTACT: Bill Waggener, claims specialist, Claims Administration and Contract Procedures Branch, U.S. Department of Agriculture—ASCS, P.O. Box 2415, Washington, DC 20013. Telephone (202) 447–4298.

SUPPLEMENTARY INFORMATION: The Fund was established in 1938 in the U.S. Treasury to indemnify the producers for losses sustained from the destruction of crops as a result of their reliance on an erroneous notice of acreage furnished by ASC committeemen or employees of ASC committees in connection with the operation of programs administered through ASC committees. In the future, claims for such losses may be filed under the Federal Tort Claims Act (28 U.S.C. 2671 through 2680) in accordance with procedures available in ASCS county offices.

Accordingly, Part 4 of Title 7 of the Code of Federal Regulations is amended as follows:

PART 4—[REMOVED AND RESERVED]

Part 4 is removed and reserved.

(7 U.S.C. 1375)

Signed at Washington, DC, on June 3, 1987.

Milton J. Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 87–13098 Filed 6–8–87; 8:45 am]

BILLING CODE 3410-05-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 70, 72, 73, and 74

Changes to Safeguards Reporting Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations for the reporting of safeguards events. These amendments clarify the reporting requirements for NRC licensees and will improve the NRC safeguards event data based by requiring more uniform safeguards event reports. Licensees who are affected include power and non-power reactors, fuel cycle facilities, and transporters, importers, and exporters of special nuclear material. The NRC uses the reported information to assure safety during safeguards-related emergencies and to identify and characterize generic and facility specific precursors that can be utilized to preempt duplicative or similar events in the future. The benefits derived from this action are the elimination of unnecessary reports without degradation to safeguards, the extension of the period for written report submittals and an improved data analysis system to provide industry feedback for improving safeguards systems.

EFFECTIVE DATE: October 8, 1987.

FOR FURTHER INFORMATION CONTACT: Loren Bush, Office of Nuclear Reactor Regulation, or Priscilla A. Dwyer, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492–8080, or (301) 427–4773, respectively.

SUPPLEMENTARY INFORMATION:

Background

10 CFR 73.71 establishes an event reporting program to inform the Commission of safeguards events to permit timely and appropriate response to incidents. Safeguards events include actual or attempted theft of special nuclear material (SNM); actual or attempted acts or events which interrupt normal operations at power reactors due to unauthorized use of or tampering with machinery, components, or controls; certain threats made against facilities possessing SNM; and safeguards system failures impacting the effectiveness of the system. The data from this reporting program further allows the Commission to identify and characterize generic and facility specific precursors to safeguards events. Since the issuance of 10 CFR 73.71 (47 FR 11511), the NRC staff has found that the requirements are frequently misinterpreted, that written follow-up reports submitted pursuant to the regulation lack uniformity, and that within these reports insufficient data is reported for NRC analysis.

For these reasons, on August 27, 1985, the NRC published proposed amendments in the **Federal Register** (50 FR 34708) to clarify and simplify the requirements of 10 CFR 73.71; conforming amendments to 10 CFR 70.52, 72.52, 73.67, and 74.71 were also proposed at that time. The comment period which was to have ended on November 27, 1985 was extended to December 31, 1985 to permit sufficient time for review of companion guidance issued after the proposed rule publication.

Summary of Public Comment

Comments were received from twenty-six respondents comprised of power reactor licensees, one fuel processing licensee, three industry groups and one private citizen. Copies of comment letters are available for public inspection and copying for a fee at the NRC Public Document Room at 1717 H Street NW., Washington, DC.

The proposed amendments have been modified in response to comments received, as appropriate, and are being published in final form, to become effective 120 days after publication of the notice. A summary of the public comments, along with their resolution, follows. The comments have been placed in the following categories:

1. Safeguards log.

2. Reporting of interruption of normal operations at power reactors.

3. Reporting of unauthorized entry through required barrier.

4. Administrative issues.

5. Clarifications needed.

6. Miscellaneous issues.

1. *Safeguards log.* The majority of respondents commented on some aspect of the safeguards log. These comments have been divided into the following issues that the respondents raised:

a. Items to be logged.

b. Maintenance and submittal of stand-alone log.

c. Additional discussion of burden imposed by log.

(a) *Items to be logged.* Respondents indicated that the provision to log any other failure of a safeguards system "* * * not included in paragraph II(a) * * * if the failure degrades the effectiveness of the system * * *" would require the logging of a great deal of insignificant data. Respondents suggested that unless the provision was made clearer, substantial disagreement could exist between licensees and NRC inspectors over what items are required to be logged. The provision may be subject to broad interpretation because of its open-ended nature. For this reason this provision has been revised to read: "Any other threatened, attempted, or committed act not previously defined in Appendix G with the potential for reducing the effectiveness of the safeguards system below that committed to in a licensed physical security or contingency plan or the actual condition of such reduction in effectiveness." The supporting guidance for the rule has been revised accordingly in response to these revisions.

(b) *Maintenance and submittal of stand-alone log.* The majority of commenters including two utility groups indicated that the maintenance and submittal of a stand-alone log was a large administrative burden on the licensee implemented for the convenience of the NRC. The recommendation was made that this requirement be deleted in its entirety. Justification for this recommendation included the opinion that the events to be logged are insignificant and their logging will not increase safeguards effectiveness, submittal of the log will require increased review of the log by licensee management to assure that events required to be logged are in fact logged, and records of the events to be logged are presently maintained onsite and readily available for NRC inspection.

In response to these comments, it is believed this provision has been subject to much misinterpretation. The proposed reporting and recordkeeping requirements are intended to keep NRC informed concerning the degradation/failure or attempted/actual penetration of each licensee's physical security system as well as credible threats made against the licensee's facility. NRC staff intends to use the reported/recorded safeguards information to assure that appropriate action is taken by the licensee to address physical security degradation/failure and/or threats against the facility. Further, such information is used to identify and characterize generic and facility specific precursor information that could be utilized to preempt duplicative or similar events in the future. These considerations support the need for the reporting of these types of events. Regarding the maintenance of a stand-alone log, it is noted that this is not a new requirement and that under the previous 10 CFR 73.71(c), licensees were required to maintain a separate log to record events reportable under § 73.71. Furthermore, examples of the types of events other than those required by 10 CFR 73.71(c) that need be "recorded" under the previous regulation are identified in Regulatory Guide 5.62, Reporting of Safeguards Events. (Copies of this Regulatory Guide are available for inspection or copying for a fee at 1717 H Street, NW., Washington, DC.) Comparison of this information with the events to be logged under the proposed regulation indicates an overall reduction in the burden to licensees resulting from events to be reported. This is based on the fact that the majority of events previously required to be reported within 24 hours (with a follow-up written report) have been picked up as log entries under the revised regulation. As a log entry, the follow-up written report need not be submitted, substantially reducing the overall burden. Some commenters interpreted the increased number of examples in the supporting guidance for the proposed rule as meaning more events were required to be reported. The staff notes at this time that the examples in the original regulatory guide were never intended to be all-inclusive and that the additional examples have been provided to aid the licensee in understanding the intent of the regulation. Commenters also indicated that not all events required to be logged under the present requirement are logged in one log, but a number of logs, i.e., maintenance log, alarm station log, etc. It is the opinion of these commenters that revising their procedures to maintain one log, as opposed to multiple logs, will greatly increase their burden. It is anticipated that the revised regulation will reduce the burden to licensees. Accordingly, no revision has been made to the revised rule in the area of maintenance of a stand-alone log.

Regarding the submittal of the stand-alone log to the NRC requiring additional review time by licensee management, commenters are reminded that the requirement to maintain a log, regardless of its submittal to the NRC, carries with it the requirement for correct and accurate entries. The concern over review for accuracy associated with the act of submitting the log to the NRC should also be applied to the maintenance of a log onsite for review by inspectors. Hence, with respect to review time, there is no difference, from a regulatory standpoint, in the level of burden imposed between a log maintained onsite versus one submitted to the NRC. It is noted that the log submitted to the NRC does not have to be typewritten as long as it is legible. The supporting guidance for the rule has been revised to reflect this and to include examples of sample log entries for clarification regarding length and content.

Finally, regarding the comment that the log need not be submitted to NRC Headquarters because records are available for onsite inspection, the staff believes that with the justification of a stand-alone log established, the onerous nature of the log submittal to the NRC, as noted in comments, is greatly lessened. In review, this is based upon no requirement to submit a *typed* or original log (xeroxed is acceptable as long as it is legible) and no additional requirement imposed on the accuracy of a log submitted to the NRC versus one maintained onsite.

(c) *Additional discussion of burden imposed by log.* As previously discussed, the overall burden on licensees for the reporting/logging of safeguards events is in fact reduced by the proposed requirement. However, based upon the number of comments received on this issue, the Regulatory Analysis for this rulemaking has been thoroughly reviewed and revised, as appropriate, to assure that respondents' concerns have been considered.

2. *Reporting of interruption of normal operations at power reactors.* The proposed regulation under § 73.71(b) and I(a)(3) of Appendix G to Part 73 requires that actual or attempted acts or events which cause or could cause interruption of normal operation of a licensed

nuclear power reactor through the unauthorized use of its machinery, components, or controls be reported within one hour to the NRC. Various comments were received from respondents on this issue. The majority of comments indicated that some clarification of the provision is needed. Specific suggestions included limiting the provision to deliberate, intentional, or malicious acts and focusing the provision on an actual act of sabotage rather than interruption of normal operation. A few comments indicated that the interruption of normal operation should not be considered a safeguards event and that such events are already reportable under Part 50 requirements. Finally, specific definitions for the terms "tampering" and "interruption of normal operation" were requested.

The inclusion of this provision within the reporting requirements for safeguards events was prompted by amendments in 1981 to the Atomic Energy Act of 1954, as amended, (the Act). At that time a new subsection (section 236b) was added which subjects to criminal penalty any person who intentionally or willfully causes or attempts to cause an interruption of the normal operation of specified nuclear facilities through the unauthorized use of or tampering with the machinery, components, or controls for such facilities. The Federal Bureau of Investigation (FBI), as the Federal agency charged with the criminal investigation of sabotage at nuclear reactors, has revised its internal policy on the definition of sabotage to be consistent with the Act. The revision to 10 CFR 73.71 is necessary to bring NRC regulations into line with the Act. Because the question of intent cannot normally be determined in a one hour time frame, the term "willfully" and "intentionally" are not included in the reporting requirements.

A proper application of the term "interruption of normal operations" will put the reporting of these events in proper perspective. The legislative history for the aforementioned amendments to the Act states that the term refers to the cessation of actual production, utilization, or storage operations which, if accomplished, would result in substantial economic harm or cost to the licensee. For the purpose of this rulemaking, this term will be used only to refer to utilization operations. The term sabotage is not specifically used within the regulation to assure that the actual act is reported while allowing the FBI to investigate whether a violation of law has occurred. In addition, the word "tampering", when used in conjunction with this reporting requirement only, means altering for improper purposes or in an improper manner. It is noted that all terms or phrases clarified as a result of comment analysis for the proposed rule are included in a glossary added to the supporting guidance for this rule, Regulatory Guide 5.62, "Reporting of Safeguards Events," Rev. 1. Finally regarding duplication of reporting with Part 50 requirements, the revisions to 10 CFR 73.71 explicitly state that duplicate reports are not required for events that are also reportable under 10 CFR 50.72 and 50.73.

3. *Reporting of unauthorized entry through a required barrier.* Sections 73.71(b)(1) and I(c) of Appendix G to Part 73 of the proposed regulation required any unauthorized entry through a required barrier (whether or not the event is properly compensated) to be reported to the NRC within one hour of discovery. Comments on this issue questioned the need for reporting of all unauthorized entries especially those by authorized individuals and indicated that unauthorized entries due to procedural or unintentional errors need not be reported especially when the event is properly compensated. Specific definitions for the terms "unauthorized entry" and "required barriers" were requested.

The staff agrees in part with these comments and recognizes the fact that some unauthorized entries through a required barrier may not involve malevolent intent particularly those involving "tailgating" by individuals into areas to which they are authorized unescorted access. Conversely, however, the staff believes it prudent and appropriate that malevolent intent be assumed if an individual makes an actual entry into an area to which he or she is not authorized unescorted access. For these reasons, this provision has been revised to require one-hour reporting of: "Any actual entry of an unauthorized person into a protected area, a material access area, controlled access area, vital area, or transport." An unauthorized person is defined as an unescorted individual in an area to which the individual is not granted unescorted access. All other acts or events involving invalid or incorrect entry procedures should be logged. To clarify this issue, additional pertinent examples have been added to the rule's supporting guidance. In addition, the intent of proposing to require the reporting of any unauthorized entry through a required barrier was also to require the reporting of the introduction or attempted introduction of contraband into the facility. While § I(a) of Appendix G could also be cited as requiring the reporting of such an event, the staff has added a separate provision to make it clear such events are required to be reported within one hour.

4. *Administrative issues.* The proposed regulation required the use of the Licensee Event Report (LER) form, NRC Form 366, for the submittal of follow-up written reports by power reactor licensees. Public comment, including the comment of one utility group, identified problems with the use of these forms and recommended the use of letter format for report submittal as required for all but power reactor licensees. Commenters opposed the use of the form by noting that the form was prepared for the reporting of safety events under Part 50 requirements and, hence, did not quite "fit" the planned usage under 10 CFR 73.71. From a philosophical standpoint, commenters felt the use of a common form blurred the important distinction between safety and safeguards. The purpose in requiring the use of this common form was to simplify report submittal. It is believed that the form has been designed with enough flexibility to accommodate the reporting of both safety and safeguards events. Furthermore, use of a common form will simplify administrative procedures. For these reasons, no change has been made to the regulation regarding use of the LER form. However, guidance on use of the form by power reactor licensees for the reporting of safeguards events has been added to the rule's supporting guidance.

A few comments were received which requested the one-hour reporting requirement be extended to 4 or 24 hours and the requirement to log an event within 24 hours of its discovery be extended to 72 hours. No revision to the proposed rule has been made in response to these comments. In the case of extending the one-hour limit, the proposed rule represents appropriate revisions to the present requirement that assure only those events requiring a one-hour report are in fact required to be reported within one hour. In the case of extending the 24-hour limit, a 24-hour period to document an event in a log is more than sufficient time and already represents a relaxation over immediate logging.

Also in the area of reporting periods, commenters, including one utility group, commented that the initiation of the time period for reporting should be tied to discovery by a member of the security organization, not just by any licensee employee, and that the security organization should make the determination that a safeguards event has occurred, again, not just any employee. The staff agrees that the determination for reporting an event should be made by onsite security management or equivalent. This information has been added to the rule's supporting guidance. It is believed, however, that the discovery of an event should not be limited to discovery by a member of the security organization. All regular site employees should receive training by the security organization to foster an awareness of site security. In this regard, site employees should be briefed on their responsibility to immediately notify site security of safeguards anomalies. The staff, therefore, has made no revision to the proposed regulation in response to this particular comment.

Commenters, including one utility group, requested that the required record retention period of three years be revised downward to one year. In this regard, there is an ongoing NRC rulemaking which will standardize all record retention periods to 3 years, 5 years, 10 years, or life in order to ease the burden on affected licensees who are subject to diverse reporting and recordkeeping requirements. The three-year period required in 10 CFR 73.71 is consistent with this policy. As this policy evolves, any revisions to the standardized retention periods would be reflected in a conforming amendment to § 73.71.

Respondents further expressed the view that immediate reports should be made to the appropriate NRC Regional Office, not the Operations Center and that the procedure for revising written reports, i.e., complete report resubmittal, was overburdensome and unnecessary. Justification for changing the designated report recipient to the Region included the fact that immediate response is provided by the Region, not NRC Headquarters, and that current practice is to notify a Regional Office during day-time work duty hours and to notify the Operations Center during night off-duty hours.

The NRC purpose in requiring reports to be made to the Operations Center, as required under present § 73.71 requirements, is to assure safety through appropriate action taken in response to emergencies or other acts or events inimical to the public health and safety. Through pre-established procedures, this centralized point can notify designated personnel for action as appropriate. It is also believed that simplified procedures, such as use of one centralized point for the reporting of significant events (both safety and safeguards), will assist licensees in responding to continuing developments if an actual emergency progresses for some time. Accordingly, this provision remains as required under the present regulation. Regarding the submittal of a revised report, requiring full report resubmittal assists in standardizing the procedures for the reporting of safety and safeguards events. For safety-related events, these procedures are described in NUREG-1022, Supplement No. 1, "Licensee Event Report System" which states:

> The revised LER must stand alone. In addition, it would be very helpful if the licensee would indicate in the text on the LER form the revised or supplementary information. The revised or supplementary information could be noted in a manner analogous to amendments for FSARs by placing a vertical line in the margin.

For this reason, no changes have been made in response to this comment.

Finally, the staff has re-evaluated the need to provide a copy of the safeguards log to ". . . if applicable, the appropriate NRC Resident Inspector . . ." and has determined this is an unnecessary burden to licensees and inconsistent with the goal of consistency with safety-event reporting procedures. Accordingly, this requirement has been deleted.

5. *Clarifications needed.* Public comment requested clarification of a number of terms and expressions used in the guidance for the proposed regulation. Some of these have been clarified under the discussion of other comment issues. The remaining terms are clarified here. All terms or expressions discussed as part of public comment analysis for this rule are included in a glossary added to the rule's supporting guidance, Regulatory Guide 5.62, Reporting of Safeguards Events, Rev. 1.

a. "Safeguards system." This term covers the equipment, personnel, and procedures that comprise the physical protection program necessary to meet Part 73 requirements.

b. "Any failure of a safeguards system or the discovered non-inherent vulnerability * * * etc." In an attempt to clarify this phrase it has been revised to refert to: "Any failure, degradation, or discovered vulnerability * * *" and to delete the proposed definition of compensatory measures. Rather than add an additional definition for compensatory measures to the Federal Code (which could be confusing), the existing definition found under 10 CFR 73.46(g)(5) and 73.55(g)(1) will be used. This definition will be referenced in the supporting guidance for this rulemaking. For further clarification, descriptions of acceptable compensatory measures have been added to the supporting guidance.

c. "Credible" threat. A threat should be considered credible when (1) physical evidence supporting the threat exists, (2) information independent from the actual threat message exists which supports the threat, or (3) a specific group or organization claims responsibility for the threat.

d. "Significant physical damage" (as applied to a power reactor, a facility possessing SSNM or its equipment, carrier equipment transporting nuclear fuel or spent nuclear fuel, or to the nuclear fuel or spent nuclear fuel a facility or carrier possesses). This term covers physical damage to the extent that the facility, equipment, transport, or fuel cannot perform its normal function.

e. "Lost" versus "unaccounted for" re: transportation of material. The term "lost" covers material that is no longer in the possession of the party authorized to possess it during a specific time period and a search for the material verifies this. "Unaccounted for" refers to material in transit which has not arrived at its delivery point four hours or more after the estimated arrival time. However, a search has not confirmed the material to be lost.

f. "Theft of SNM." The term refers to the unauthorized taking of SNM for unauthorized use.

g. "Diversion of SNM." This term refers to the unauthorized movement of SNM by individuals authorized access to or control over the material.

h. "Loss of SNM." This term refers to (1) a failure to meausre or account for material, authorized to be possessed by the licensee, by the material control and accounting system approved for the facility and not confirmed stolen or diverted or (2) an accidental (i.e. unplanned) offsite release or dispersal of SNM known or suspected to be 10 times greater than normal operating losses for the time frame in question whether or not the release is measured. The term "loss" implies that a search has been conducted to confirm the material loss. For fixed sites, this search should be conducted within the one-hour time frame of reportability.

i. "Safeguards Event Log." This term refers to a compilation of log entries for the events described under section II of Appendix G to 10 CFR Part 73. Entries must include date and time of event, summary description of event, and action taken. For repeated events, the date and time should be recorded; however, the summary and action taken need only reference the initial event of the series of identical events. An active "safeguards event log" is not required to be maintained in one location onsite. Its format may be typed or handwritten as long as it is legible and reproducible. Entries in a "safeguards event log" submitted to the NRC need not be in time sequential order.

6. *Miscellaneous issues.* This rulemaking grants a portion of a petition for rulemaking assigned Docket No. PRM 50-36 from the Nuclear Utility Backfitting and Reform Group (NUBARG). This rule responds specifically to section VI of the petition, Reporting Requirements Associated with 10 CFR 73.71. In this section the petitioner suggests that the regulation be amended to provide for written report submittal by the licensee within 30 days of initial notification rather than within 15 days. According to the petitioner, this would allow a licensee's staff more time during the critical period immediately following an event to devote to the resolution of the problem and would minimize interference with daily operation. The NRC has agreed with this suggestion in the past and included this revision within the final rule. Comments received on this issue universally support the extension of the time period for written report submittal. NUBARG acknowledged the action and requested a prompt response from the NRC on the remaining items of the petition.

Comments received from one low enriched uranium fuel fabrication licensee noted that its NRC-approved physical security plan specifically identifies the reporting requirements for shipments that have not reached their destination by the estimated time of arrival. This commenter requested that the requirements for licensees subject to § 73.67 not be changed because these changes would produce no benefit but would result in added costs. The staff has made a thorough review of this issue, including inspection of reporting commitments in the subject licensee's physical security plan and finds no conflict. A "lost" shipment carries with it the understanding that a search or trace investigation has determined the shipment to be verified lost (see paragraph 5e above). A shipment may be "unaccounted for" for up to 4 hours before it is determined "lost." There is no difference in a reporting period described as "within one hour of discovery of a loss" versus "within one hour of obtaining results of a trace investigation."

Finally, during the course of public comment analysis, a question arose whether licensees would be required to submit physical security plan amendments to conform with this revised regulation. The revised regulation supersedes the previous § 73.71 and any previous security plan commitments dealing with reporting of safeguards events. Licensees are not required to submit plan changes in response to the new regulation; however, those licensees who have paraphrased the previous 10 CFR 73.71 in their security plans should revise their plans to delete previous commitments in this area; these plan revisions may be submitted under the provisions of 10 CFR 50.54(p). It is noted that based upon the expected reduction in burden to affected NRC licensees with no resultant safeguards degradation, this regulation has been approved as a generic backfit and a backfit analysis is incorporated within this notice.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget approval numbers 3150-009, 3150-0132, 3150-0002, and 3150-0123.

Regulatory Analysis

The NRC staff has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, 1717 H Street, NW., Washington, DC 20555. Single copies of the analysis may be obtained from Priscilla A. Dwyer, Safeguards Reactor Regulatory Requirements Section, Division of Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 427-4773.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this revised rule does not have a significant economic impact on a substantial number of small entities and will result in a reduction in burden to affected licensees. Some transporters, importers, and exporters of special nuclear material (SNM) and spent fuel will be affected by this rule. Each year out of approximately 600 reported events, about 3 come from this group which includes small entities. The rule also affects licensees who operate nuclear power plants and fuel facilities under 10 CFR Parts 50 and 73. The companies that own these plants and facilities do not fall within the scope of the definition of "small entities" set forth in § 605(b) of the Regulatory Flexibility Act of 1980, or within the definition of Small Business Size Standards set out in regulations issued by the Small Business Administration in 13 CFR Part 121.

Backfit Analysis

As required by 10 CFR 50.109 (50 FR 38097), the NRC staff has completed a backfit analysis for this final rule. The staff has determined, based on this analysis, that backfitting to comply with the requirements of this final rule is justified because imposition of these requirements will result in a substantial increase in the overall protection of the public health and safety or the common defense and security and direct and indirect costs are justified in view of the increase in protection. The backfit analysis, which includes a summary regulatory analysis, follows.

I. Summary Regulatory Analysis

1. *Objective.* In general, the objective of this rule is to clarify and simplify the reporting of safeguard events to the NRC by licensees. Safeguards events include actual or attempted theft of special nuclear material (SNM), actual or attempted acts or events which interrupt normal operations at power reactors due to unauthorized use of or tampering with machinery, components or controls, certain threats made against facilities possessing SNM, and safeguards system failures impacting the effectiveness of the system. The reporting of this data to the NRC is necessary to assure safety during safeguards-related emergencies and to allow the Commission to identify and characterize generic and facility-specific precursors to certain safeguards events. Since the original issuance of § 73.71, the staff has found the requirements are frequently misinterpreted, that written follow-up reports submitted pursuant to the regulation lack uniformity and that within these reports insufficient data is reported for NRC analysis.

Specifically, these revisions will: (1) Clarify to licensees the safeguards events that must be reported, (2) extend the period of time for submittal of licensee written reports, (3) assure standardized and sufficient report-making to assist NRC data evaluation, (4) eliminate telephonic notification and written reporting deemed unnecessary by the staff, and (5) assure a consistent and comparable level of reporting for safety and safeguards events.

2. *Description of activity.* At present, licensees are required to report certain events within one hour or 24 hours of their occurrence with submittal of written follow-up reports within 5 or 15 days depending upon the event. All events reportable are required to be maintained in a separate log onsite, while other events are simply required to be recorded. The specific events reported within these time periods or logged are described by such broad phrases as "potential loss," "moderate loss of effectiveness" and "major loss of effectiveness."

The revisions to § 73.71 require events to be either reported within one hour or logged with the log submitted to the NRC on a quarterly basis. Events reported within one hour are required to be followed up by a written report within 30 days. In describing the events to be reported, an attempt has been made to describe only those types of events actually requiring reporting and to assure that categorization of events which may warrant Federal involvement is made by appropriate Federal agencies, not the licensee.

The net results of the final regulations are to (1) eliminate the present 24-hour reporting requirement (most items presently reportable within 24 hours will be logged, only, under the final rule), (2) eliminate the requirement to log items reportable to the NRC within one hour, (3) clarify and simplify the descriptions of events to be reported or logged including clarification of information to be reported, and (4) require the submittal of a log of safeguards events to the NRC on a quarterly basis.

Since licensees are currently required to immediately report or log certain safeguards events, the major new activity required of the licensee under this amendment is submittal of the quarterly log to the NRC.

3. *Potential change in risk to the public from accidental offsite release of radioactive material.* An improved system for the reporting of safeguards events, which might or in fact do lead to a radioactive release, e.g., radiological sabotage, could permit more timely and effective response to the incident. This could have the effect of decreasing the risk to public from an offsite release by allowing more timely mitigation of the event or more timely implementation of necessary contingency action.

4. *Potential impact on radiological exposure of facility employees.* To the extent that an improved reporting system will permit more timely mitigation of a safeguards event involving a radioactive release, the potential impact of radiological exposure on facility employees will be reduced. Otherwise, with respect to radiological exposure, there is no impact on facility employees.

5. *Installation and continuing costs.*

Current Annual Licensee Operational Cost	$15k/site.
Revised Annual Licensee Operational Cost	6k/site.
Decreased Cost Resulting from Revised Regulation.	9k/site.

6. *Potential safety impact of changes in plant or operational complexity.* None.

7. *Estimated resource burden on the NRC.*

Current NRC Operational Cost	$126k/all sites.
Revised NRC Operational Cost	266k/all sites.
Increase Cost to NRC Resulting from Revised Regulation (due to increased time needed to analyze quarterly submitted log).	140k/all sites.

8. *Potential impact of differences in facility type or age.* No potential impact is noted of differences in facility type or age on the relevance or practicability of implementing this rule.

9. The rule is final.

II. Justification

1. *Increased protection of the public health and safety.* The staff believes that issuance of this final rule will improve the implementation of reporting of safeguards events requirements due to increased clarity. Further, it will improve the ability of the NRC to uncover generic precursors to events or defects in the safeguards systems used to protect the plant. Clarifying and simplifying procedures for reporting can have a significant impact on the timeliness and effectiveness of establishing the NRC-licensee interface or other possibly necessary Agency interfaces (e.g., with the FBI) during actual safeguards emergencies. This results in increased protection to the public health and safety because it facilitates a timely, coordinated response to safeguards emergencies by the NRC, licensees, and other Agencies, as appropriate. Improving the ability of the NRC staff to uncover generic precursors or defects provides the NRC with an improved capability to initiate corrective action, if needed, prior to a vulnerability having a detrimental effect on the public health and safety. This action will, thus, also improve the protection of the public health and safety.

2. *Cost implications.* Implementation costs are expected to be negligible because neither security plan amendments nor their review will be required. Annual operating costs are anticipated to decrease for industry, from $15k to $6k per site, because of a reduced reporting burden, and increase for the NRC, from $126k to $266k for all sites, because of the increased time needed to review quarterly submitted logs.

3. *Priority and scheduling.* Based upon the resulting substantial increase in the overall protection of the public health and safety, as discussed above, this backfit is considered to be a high priority. The proposed changes do not affect the schedules of other regulatory activities on-going at nuclear power plants.

4. *Findings.* The NRC staff finds that issuance of this final rule will result in a substantial increase in the overall protection of the public health and safety and direct and indirect costs are justified in view of the increase in protection.

List of Subjects

10 CFR Part 70

Hazardous materials—transportation, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 73

Hazardous materials—transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 74

Accounting, Material control and accounting, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 70, 72, 73 and 74.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

1. The authority citation for Part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.19(c), 70.21(c), 70.22 (a), (b), (d)-(k), 70.24 (a) and (b), 70.32 (a)(3), (5), (6), (d), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70.42 (a) and (c), 70.56, 70.57 (b), (c), and (d), 70.58 (a)-(g)(3), and (h)-(j) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 70.7, 70.20a (a), and (d), 70.20b (c) and (e), 70.21(c), 70.24(b), 70.32 (a)(6), (c), (d), (e), and (g), 70.36, 70.51(c)-(g), 70.56, 70.57 (b) and (d), 70.58 (a)-(g)(3) and (h)-(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)), and §§ 70.5, 70.20b (d) and (e), 70.38, 70.51 (b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58 (g)(4), (k), and (l), 70.59, and 70.60 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 70.52 is revised to read as follows:

§ 70.52 Reports of accidental criticality or loss or theft or attempted theft of special nuclear material.

(a) Each licensee shall notify the NRC Operations Center [1] within one hour after discovery of any case of accidental criticality or any loss, other than normal operating loss, of special nuclear material.

(b) Each licensee who possesses one gram or more of contained uranium-235, uranium-233, or plutonium shall notify the NRC Operations Center within one hour after discovery of any loss or theft or unlawful diversion of special nuclear material which the licensee is licensed to possess or any incident in which an attempt has been made or is believed to have been made to commit a theft or unlawful diversion of such material.

(c) This notification must be made to the NRC Operations Center via the Emergency Notification System if the licensee is party to that system. If the Emergency Notification System is inoperative or unavailable, the licensee shall make the required notification via commercial telephonic service or other dedicated telephonic system or any other method that will ensure that a report is received by the NRC Operations Center within one hour. The exemption of § 73.21(g)(3) applies to all telephonic reports required by this section.

(d) Reports required under § 73.71 need not be duplicated under the requirements of this section.

[1] Commercial telephone number of the NRC Operations Center is (301) 951-0550.

PART 72—LICENSING REQUIREMENTS FOR THE STORAGE OF SPENT FUEL AT AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION

1. The authority citation for Part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2239, 2282); sec. 274, Pub. L. 88-373, 73 Stat. 688, as amended (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332).

Section 72.34 also issued under sec. 189, 68 Stat. 955, (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); 72.6, 72.14, 72.15, 72.17(d), 72.19, 72.33(b)(1), (4), (5), (e), (f), and 72.36(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); 72.10, 72.15, 72.17(d), 72.33(c), (d)(1), (2), (e), 72.81, 72.83, 72.84(a), and 72.91 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and 72.33(c)(3), (d)(3), (f), 72.35(b), 72.50-72.52, 72.53(a), 72.54(a), 72.55, 72.56, 72.80(c), and 72.84(b) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 72.52 is revised to read as follows:

§ 72.52 Reports of accidental criticality or loss of special nuclear material.

(a) Each licensee shall notify the NRC Operations Center [1] within one hour of discovery of accidental criticality or any loss of special nuclear material.

(b) This notification must be made to the NRC Operations Center via the Emergency Notification System if the licensee is party to that system. If the Emergency Notification System is inoperative or unavailable, the licensee shall make the required notification via commercial telephonic service or any other dedicated telephonic system or any other method that will ensure that a report is received by the NRC Operations Center within one hour. The exemption of § 73.21(g)(3) applies to all telephonic reports required by this section.

(c) Reports required under § 73.71 need not be duplicated under the requirements of this section.

[1] Commercial telephone number of the NRC Operations Center is (301) 951-0550.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

1. The authority citation for 10 CFR Part 73 is revised to read as follows:

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245 (42 U.S.C. 5841, 5844).

Section 73.37(f) also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99-399 and sec. 161i, 68 Stat. 949 (42 U.S.C. 2201(i)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 73.21, 73.37(g), 73.55 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 73.20 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.55, and 73.67 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§73.20(c)(1), 73.24(b)(1), 73.26(b)(3), (h)(6), and (k)(4), 73.27(a) and (b), 73.37(f), 73.40(b) and (d), 73.46(g)(6) and (h)(2), 73.50(g)(2), (3)(iii)(B) and (h), 73.55(H)(2), and (4)(iii)(B), 73.70, 73.71, 73.72 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 73.67 paragraphs (e)(3)(vii) and (g)(3)(iii) are revised to read as follows:

§ 73.67 Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance.

* * * * *

(e) * * *

(3) * * *

(vii) Notify the NRC Operations Center [1] within one hour after the discovery of the loss of the shipment and within one hour after recovery of or accounting for such lost shipment in

[1] Commercial telephone number of the NRC Operations Center is (301)951-0550.

accordance with the provisions of § 73.71 of this part.

* * * * *

(g) * * *

(3) * * *

(iii) Conduct immediately a trace investigation of any shipment that is lost or unaccounted for after the estimated arrival time and notify the NRC Operations Center [1] within one hour after the discovery of the loss of the shipment and within one hour after recovery of or accounting for such lost shipment in accordance with the provisions of § 73.71 of this part.

3. Section 73.71 is revised to read as follows:

§ 73.71 Reporting of safeguards events.

(a) (1) Each licensee subject to the provisions of §§ 73.25, 73.26, 73.27(c), 73.37, 73.67(e), 73.67(g) shall notify the NRC Operations Center [1] within one hour after discovery of the loss of any shipment of SNM or spent fuel, and within one hour after recovery of or accounting for such lost shipment.

(2) This notification must be made to the NRC Operations Center via the Emergency Notification System, if the licensee is party to that system. If the Emergency Notification System is inoperative or unavailable, the licensee shall make the required notification via commercial telephonic service or other dedicated telephonic system or any other methods that will ensure that a report is received by the NRC Operations Center within one hour. The exemption of § 73.21(g)(3) applies to all telephonic reports required by this section.

(3) The licensee shall, upon request to the NRC, maintain an open and continuous communication channel with the NRC Operations Center.

(4) The initial telephonic notification must be followed within a period of 30 days by a written report submitted to the U.S. Nuclear Regulatory Commission, Document Control Desk, Washington, DC 20555. The licensee shall also submit one copy to the appropriate NRC Regional Office listed in Appendix A to this part. The report must include sufficient information for NRC analysis and evaluation.

(5) Significant supplemental information which become available after the initial telephonic notification to the NRC Operations Center or after the submission of the written report must be telephonically reported to the NRC Operations Center and also submitted in a revised written report (with the revisions indicated) to the Regional Office and the Document Control Desk. Errors discovered in a written report must be corrected in a revised report with revisions indicated. The revised report must replace the previous report; the update must be a complete entity and not contain only supplementary or revised information. Each licensee shall maintain a copy of the written report of an event submitted under this section as record for a period of three years from the date of the report.

(b)(1) Each licensee subject to the provisions of §§ 73.20, 73.37, 73.50, 73.55, 73.60, or 73.67 shall notify the NRC Operations Center within one hour of discovery of the safeguards events described in paragraph I(a)(1) of Appendix G to this part. Licensees subject to the provisions of §§ 73.20, 73.37, 73.50, 73.55, 73.60 or each licensee possessing strategic special nuclear material (SSNM and subject to § 73.67(d) shall notify the NRC Operations Center within one hour after discovery of the safeguards events described in paragraphs I(a)(2), (a) (3), (b), and (c) of Appendix G to this part. Licensees subject to the provisions of §§ 73.20, 73.37, 73.50, 73.55 or 73.60 shall notify the NRC Operations Center within one hour after discovery of the safeguards events described in paragraph I(d) of Appendix G to this part.

(2) This notification must be made in accordance with the requirements of paragraphs (a) (2), (3), (4), and (5) of this section.

(c) (1) Each license subject to the provisions of §§ 73.20, 73.37, 73.50, 73.55, 73.60, or each licensee possessing SSNM and subject to the § 73.67(d) shall maintain a current log and record the safeguards events described in paragraphs II (a) and (b) of Appendix G to this part within 24 hours of discovery by a licensee employee or member of the licensee's contract security organization. The licensee shall retain the log of events recorded under this section as a record for three years after the last entry is made in each log.

(2) Every three months, each licensee shall submit to the NRC copies of all safeguards event log entries not previously submitted. Each licensee shall submit one copy of their log entries to the U.S. Nuclear Regulatory Commission, Document Control Desk, Washington, DC 20555.

(d) Each licensee shall submit to the Commission the 30-day written reports and copies of the safeguards event log entries required under the provisions of this section that are of a quality which will permit legible reproduction and processing. If the facility is subject to § 50.73 of this chapter, the licensee shall prepare the written report of NRC Form 366. If the facility is not subject to § 50.73 of this chapter, the licensee shall not use this form but shall prepare the written report in letter format. The report must include sufficient information for NRC analysis and evaluation.

(e) Duplicate reports are not required for events that are also reportable in accordance with §§ 50.72 and 50.73 of this chapter.

4. A new Appendix G is added to read as follows:

Appendix G—Reportable Safeguards Events

Pursuant to the provisions of 10 CFR 73.71 (b) and (c), licensees subject to the provisions of 10 CFR 73.20, 73.37, 73.50, 73.55, 73.60, and 73.67 shall report or record, as appropriate, the following safeguards events.

I. *Events to be reported within one hour of discovery, followed by a written report within 30 days.*

(a) Any event in which there is reason to believe that a person has commited or caused, or attempted to commit or cause, or has made a credible threat to commit or cause:

(1) A theft or unlawful diversion of special nuclear material; or

(2) Significant physical damage to a power reactor or any facility possessing SSNM or its equipment or carrier equipment transporting nuclear fuel or spent nuclear fuel, or to the nuclear fuel or spent nuclear fuel a facility or carrier possesses; or

(3) Interruption of normal operation of a licensed nuclear power reactor through the unauthorized use of or tampering with its machinery, components, or controls including the security system.

(b) An actual entry of an unauthorized person into a protected area, material access area, controlled access area, vital area, or transport.

(c) Any failure, degradation, or the discoveed vulnerability in a safeguard system that could allow unauthorized or undetected access to a protected area, material access area, controlled access area, vital area, or transport for which compensatory measures have not been employed.

(d) The actual or attempted introduction of contraband into a protected area, material access area, vital area, or transport.

II. *Events to be recorded within 24 hours and submitted in quarterly log.*

(a) Any failure, degradation, or discovered vulnerability in a safeguards system that could have allowed unauthorized or undetected access to a protected area, material access area, controlled access area, vital area, or transport had compensatory measures not been established.

(b) Any other threatened, attempted, or committed act not previously defined in Appendix G with the potential for reducing the effectiveness of the safeguards system below that committed to in a licensed physical security or contingency plan or the actual condition of such reduction in effectiveness.

[1] Commercial telephone number of the NRC Operation Center is (301)951-0550.

1

PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

1. The authority citation for Part 74 is revised to read as follows:

Authority: Secs. 53, 57, 161, 182, 183, 68 Stat. 930, 932, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2077, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 74.17, 74.31, 74.51, 74.53, 74.55, 74.57, 74.59, 74.81, and 74.82 are issued under secs. 161b and 161i, 68 Stat. 948, 949, as amended (42 U.S.C. 2201(b) and 2201(i)); and 74.11, 74.13, 74.15, and 74.17 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 74.11 is revised to read as follows:

§ 74.11 Reports of loss or theft or attempted theft of special nuclear material.

(a) Each licensee who possesses one gram or more of contained uranium-235, uranium-233, or plutonium shall notify the NRC Operations Center [1] within one hour of discovery of any loss or theft or other unlawful diversion of special nuclear material which the licensee is licensed to possess, or any incident in which an attempt has been made to commit a theft or unlawful diversion of special nuclear material. The requirement does not pertain to measured discards or inventory difference quantities.

(b) This notification made to the NRC Operations Center via the Emergency Notification System if the licensee is party to that system. If the Emergency Notification System is inoperative or unavailable, the licensee shall make the required notification via commercial telephonic service or other dedicated telephonic system or any other method that will ensure that a report is received by the NRC Operations Center within one hour. The exemption of § 73.21(g)(3) applies to all telephonic reports required by this section.

(c) Reports required under § 73.71 need not be duplicated under requirements of this section.

Dated at Bethesda, Maryland, this 21st day of May 1987.

For the Nuclear Regulatory Commission.

Victor Stello, Jr.,

Executive Director for Operations.

[FR Doc. 87-13135 Filed 6-8-87; 8:45 am]

BILLING CODE 7590-01-M

[1] Commercial telephone number of the NRC Operations Center is (301) 951-0550.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 86-CE-10-AD; Amendment 39-5639]

Airworthiness Directives; Cessna Model T303 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revises Airworthiness Directive (AD) 86-01-01R1, Amendment 39-5316, published in the Federal Register on May 21, 1986 (51 FR 18573), applicable to Cessna Model T303 airplanes. The AD removed approval for flight into known icing conditions for those Model T303 airplanes with flight in known icing approval. It also added more information to the emergency procedures section of the Pilot's Operating Handbook and FAA Approved Airplane Flight Manual (POH/AFM) to aid in the event of an inadvertent icing encounter. The manufacturer has developed an aerodynamic modification for the airplanes which eliminates the unsafe conditions when operating in icing conditions. This amendment restores approval for flight in known icing conditions for those airplanes which install the aerodynamic modification, associated POH/AFM revisions, and would otherwise have been approved for flight in known icing conditions.

DATE: *Effective date:* July 13, 1987.

Compliance: As prescribed in the body of the AD.

ADDRESSES: Cessna Service Bulletins ME86-17 and ME86-18, applicable to this AD may be obtained from Cessna Aircraft Company, Customer Services, P.O. Box 1521, Wichita, Kansas 67201. This information may be examined at the Rules Docket, FAA, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Bennett L. Sorensen, Aerospace Engineer, Wichita Aircraft Certification Office, ACE-160W, FAA, Central Region, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; Telephone (316) 946-4433.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an alternate method of compliance to AD 86-01-01R1, which removed approval for flight into known icing conditions for certain Cessna Model T303 airplanes was published in the Federal Register on February 27, 1987 (52 FR 6001). The proposal resulted from an AD which was written because there were several reported occurrences of rudder/rudder pedal oscillations, pitch oscillations, and uncommanded nose-down pitch changes when conducting flight in icing conditions. AD 86-01-01 and AD 86-01-01R1 were sent to all known registered owners by priority mail on January 2, 1986, and January 17, 1986, respectively. The Final Rule AD 86-01-01R1, Amendment 39-5316, was published in the Federal Register (51 FR 18573) on May 21, 1986. The AD removed approval for flight into known icing conditions for those Model T303 airplanes with flight in known icing approval. It also added more information to the emergency procedures section of the Pilot's Operating Handbook and FAA Approved Airplane Flight Manual (POH/AFM) to aid in the event of an inadvertent icing encounter. Cessna Aircraft Company has developed an aerodynamic modification for the airplanes which eliminates the oscillations and uncommanded nose-down pitch changes when operating in icing conditions. This amendment restores approval for flight in known icing conditions for those airplanes which have: (a) installed the aerodynamic modification (Part Number (P/N) SK303-39 (or SK303-39A) called out in Service Bulletin (S/B) MEB86-18); (b) associated POH/AFM revisions (P/N D1596R7-13PH for S/N's T30300001 thru T30300175, P/N D1602R3-13PH for S/N's T30300176 thru T30300247, or P/N D1607R2-13PH for S/N's T30300258 thru T30300315, called out in S/B MEB86-17); and (c) would otherwise have been approved for flight in known icing conditions.

The FAA has determined there are approximately 169 airplanes affected by the proposed amendment to the AD. The cost of modifying these airplanes is estimated to be $990 per airplane. The total cost is estimated to be a maximum one-time fleet cost of approximately $167,310. However, since Cessna Aircraft Company has announced that it is furnishing and installing the kits at their expense, this action will not impose an adverse economic impact on the owners. Interested persons have been afforded an opportunity to comment on the proposal. No comments or objections were received on the proposal or the FAA determination of the related cost to the public. Accordingly the proposal is adopted without change (except for minor editorial changes).

Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979; and (3) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aviation safety, Aircraft, Safety.

Adoption of the Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising and reissuing AD 86–01–01R1, Amendment 39–5316, as follows:

(1) Redesignate paragraph (e) as paragraph (f).

(2) Add a new paragraph (e) to read as follows:

(e) The requirements of paragraphs (a) through (d) do not apply to airplanes equipped with Cessna Part Number SK303–39 (or SK303–39A) (called out in Cessna Service Bulletin MEB86–18) and associated POH/AFM revisions—either Cessna Part Number D1596R7–13PH for S/N's T30300001 thru T30300175, Cessna Part Number D1602R3–13PH for S/N's T30300176 thru T30300247, or Cessna Part Number D1607R2–13PH for S/N's T30300258 thru T30300315 (called out in Cessna Service Bulletin MEB86–17).

This amendment becomes effective on July 13, 1987.

Issued in Kansas City, Missouri, on May 28, 1987.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 87–13017 Filed 6–8–87; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154 and 271

[Docket No. RM86-7-000; Order No. 473]

Compression Allowances and Protest Procedures Under NGPA Section 110

Issued June 3, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing compression allowances and protest procedures under section 110 of the Natural Gas Policy Act of 1978 (NGPA). 18 CFR 271.1104 (1986), 49 FR 49623 (Dec. 21, 1984). The Commission is amending its regulations to allow first sellers to recover under section 110 of the NGPA the fuel or power costs incurred to drive compressors constructed prior to enactment of the NGPA. The Commission also is amending its regulations to provide parties an opportunity to protest allowances for delivery of natural gas heretofore presumed authorized by "area-rate" clauses in gas contracts.

EFFECTIVE DATE: August 10, 1987.

FOR FURTHER INFORMATION CONTACT: Peter J. Roidakis, Office of the General Counsel, 825 North Capitol Street NE., Washington, DC 20426.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations at 18 CFR 271.1104 (1986), issued under section 110 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3320 (1982), in two respects. First, the Commission is amending its regulations to allow a first seller to recover the fuel or power costs incurred in driving a compressor constructed on or before November 8, 1978. Second, the Commission is establishing procedures to permit any affected person to rebut the presumption that an area rate clause in a natural gas contract was intended to permit collection of production-related costs for delivery of natural gas. In so doing, the Commission is implementing the decision in *Texas Eastern Transmission Corporation* v. *FERC (Texas Eastern)*, 769 F.2d 1053 (5th Cir. 1985), *cert denied*, 106 S. Ct. 1967 (1986).

II. Background

In Order No. 94–A,[1] the Commission implemented section 110 of the NGPA by promulgating regulations in 18 CFR § 271.1104. These regulations allow first sellers to recover certain costs incurred to perform production-related serices and define the costs a first seller may recover.[2] The Commission also established generic allowances for the delivery and compression of natural gas.[3] *Texas Eastern* involved consolidated appeals challenging, among other things, the Commission's implementation of NGPA section 110 in Order No. 94–A and related orders. The court in *Texas Eastern* affirmed the Commission's production-related cost regulations in all but two respects. The court instructed the Commission to amend its rules to allow a first seller with a pre-NGPA compressor, that is, a compression facility construction of which commenced before enactment of the NGPA, to collect a compression allowance for the costs of fuel or power required to drive the compressor from the same date and to the same extent such costs are recoverable for a post-NGPA compression facility. In addition, the court directed the Commission to provide for a protest procedure, modeled on those established in Order No. 23–B,[4] to allow parties the opportunity to show a particular area rate clause did not authorize the recovery of a delivery allowance.[5] The Commission issued a notice of proposed rulemaking (NOPR) on July 31, 1986, to modify its regulations consistent with the directives of the court in *Texas Eastern*.[6]

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[1] Order No. 94–A, 48 FR 5152 (Feb 3, 1983), FERC Stats. & Regs. [Reg. Preambles 1982–1985] ¶ 30,419.

[2] 18 CFR § 271.1104(c)(7) (1986).

[3] Order No. 334, 48 FR 44495 (Sept. 29, 1983), FERC Stats. & Regs. Reg. Preambles 1982–1985] ¶ 30,495.

[4] Order No. 23–B, "Order Adopting Final Regulations Establishing Protest Procedures Regarding Blanket Affidavit Filings and Interim and Retroactive Collection Filings," 44 FR 38834 (July 3, 1979), FERC Stats. and Regs. [Reg. Preambles 1977–1981] ¶ 30,065; and *reh'g of Order No. 23–B*, 44 FR 48174 (Aug. 17, 1979), FERC Stats. & Regs. [Reg. Preambles 1977–1981] ¶ 30,073.

[5] Texas Eastern, 769 F.2d at 1065. (As a general matter, the court found "unassailable" the Commission's argument that "prior experience under the Gas Act, 15 U.S.C. 717 *et seq.*, supports the construction of area rate clauses as authorizing delivery allowances" but *not* other allowances. *Id.*)

[6] Compression Allowances and Protest Procedures Under NGPA Section 110, 51 FR 28102 (Aug. 5, 1986) (notice of proposed rulemaking).

The Compression Proposal

In the notice of proposed rulemaking, the Commission proposed to amend § 271.1104(d)(1)(iv) to provide a compression allowance for fuel and power costs incurred from July 25, 1980 in driving a pre-NGPA compressor.

The Commission proposed to require certain sellers with pre-NGPA compressors to amend their blanket affidavits [7] covering notice of rate change under the Natural Gas Act before collecting fuel and power costs related to those compression facilities. Sellers already exempted from filing rate schedules [8] also would be exempted from the blanket affidavit requirement. The retroactive fuel and power cost allowances for pre-NGPA compression facilities were proposed to be made payable in a lump sum, with interest, within 60 days after a bill is served on the purchaser.

The Protest Procedure Proposal

In the notice of proposed rulemaking, the Commission proposed to establish a protest procedure for rebutting the regulatory presumption that an area rate clause is intended to permit the collection of production-related *delivery* costs. Specifically, the Commission proposed to amend § 271.1104 of its regulations to provide Commission staff, pipeline purchasers, and other parties in interest, including state commissions and local distribution companies, the opportunity to address whether the contracting parties' intent diverged from the general presumption.

The proposed protest procedure followed the model of Order No. 23-B,[9] as the court had suggested, and would apply to all NGPA categories of gas except sections 105 and 106(b). There was no need for a protest procedure for these categories of gas because they are not covered by the presumption that the area rate clause evidences the purchaser's agreement to pay a delivery allowance.[10] Under the proposal, each interstate pipeline would submit to the Commission lists of producer-sellers that assert contractual authority to collect delivery allowances pursuant to an area rate clause and identify the contracts relied upon by date and contract number, or other satisfactory identification. One list would enumerate those contracts in which the pipeline does not dispute that the area rate clause includes a delivery allowance. The second list would state those contracts in which the pipeline does dispute that the area rate clause encompasses a delivery allowance. In addition, pipelines would be required to file data to support their protest, and any information submitted to the pipeline by the first seller under § 271.1104(f) of the Commission's regulations. To minimize the filing burden, pipelines would be permitted to refer to specific data already on file in purchased gas adjustment (PGA) proceedings or elsewhere with the Commission, rather than file the data anew. Pipelines would update the lists as needed.

The pipeline listing would be published in the **Federal Register** so that other persons might also protest the producer's authority to collect a section 110 allowance under any particular area rate clause. Each protest, whether by the pipeline or by a third party, in turn would be noticed and transmitted to the Chief Administrative Law Judge for assignment to an Administrative Law Judge. The protests would then be set for hearing absent summary disposition.

The standards developed in the Order No. 23 series of orders and the case law interpreting those orders would apply to the summary disposition and hearing process established under this rule. Particularly with regard to overcoming the presumption that an area rate clause "expressly authorizes" a delivery allowance, the Commission stated its intention to apply the standards of *Pennzoil Co.* v. *FERC*, 645 F.2d 360 (5th Cir. 1981) (*Pennzoil I*), and *Pennzoil Co.* v. *FERC*, 789 F.2d 1128 (5th Cir. 1986) (*Pennzoil II*), insofar as they are applicable.

The Commission received seventeen comments on its proposed rule—eight from pipelines, seven from producers and producer associations, and two from local distribution companies and a state agency.[11] The Commission is adopting the proposed regulations with modifications in response to the comments received, as discussed more fully below.

III. Discussion

A. Comments on the Compression Proposal

1. Payment and Billing Deadlines

Several pipelines have requested that the Commission extend the time for pipelines to pay the power and fuel cost allowance beyond 60 days from date of billing. ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG), for example, suggest at least 120 days from date of billing; Columbia Gas Transmission Corporation (Columbia) requests that lump-sum payment not be due until twelve months after a bill is served on the purchaser. Columbia also urges that the producer "provide all information to verify the amounts charged." Since this information is already required under the regulations, additonal language would be redundant. Nor is there any reason to extend the payment-due date for power and fuel costs that should be paid promptly to eligible sellers. The Commission declines to adopt a general rule for direct billing of these costs at this time, but would be receptive to filings by pipelines for such direct billing mechanisms where appropriate, as suggested by United Gas Pipe Line Company and Natural Gas Pipeline Company of America. Absent such direct billing authorization, flow-through in Account No. 191 of lump-sum payments will proceed according to established purchased gas adjustment (PGA) procedures. Permission to flow-through such amounts at the time they are made may require an "out-of-cycle" PGA, which may be applied for, if required. However, as suggested by Indicated Producers, (and discussed further below) direct billing of lump sum compression costs (power and fuel allowances) may be allowed on a case-by-case basis where any pipeline is significantly affected, but the requirement for payment within 60 days of the date of billing will remain.

Several pipelines ask that a deadline be set by which sellers must serve on their purchasers bills for the power and fuel cost allowance. Transcontinental Gas Pipe Line Corporation (Transco) asks that a billing deadline of 60 days from the effective date of the final rule be established, and ANR and CIG ask that producer claims be submitted no later than 180 days following publication of the final rule.

The Commission believes that prompt payment and resolution of such claims can generally be expected, since producers generally have an economic incentive to seek payment as soon as possible. There could, however, be circumstances where a seller might indefinitely postpone sending a bill; for example, where a seller is authorized to collect interest at favorable rates for past-due unbilled accounts under his contract, and has no need of immediate cash flow. If there were no billing deadline whatsoever, such "banking" of bills could occur in some cases.

Accordingly, the Commission finds merit in the suggestion that there be

[7] *See* 18 CFR § 154.94(k) (1986), and Appendix B to § 154.94(k) (1986). FERC Stats. & Regs. ¶ 19,194 at 12,791-3 to 12,791-4.

[8] *See* 18 CFR § 154.92(c) (1986).

[9] 44 FR 38834 (July 3, 1979).

[10] 18 CFR § 271.1104(c)(4)(ii)(B) (1986).

[11] *See* Appendix for complete list of persons filing initial comments.

some date certain after which claims could no longer be submitted. The Commission believes that a deadline of 60 or even 180 days may be too short, however, since it may take time for smaller producers to become aware of the rule. The Commission is therefore adopting a billing deadline of one year from the effective date of the final rule. This will provide ample time for all first sellers to become aware of, and submit their claims under the rule.

2. Interest

Several pipelines also express concerns about the automatic collection of interest on power and fuel costs (El Paso Natural Gas Company, Tennessee Gas Pipeline Company (Tennessee), and Transco). Since the Commission's intention is to provide equivalence of treatment for pre-NGPA compressor fuel and power cost allowances, and since retroactive fuel and power costs for post-NGPA facilities only earn interest "if expressly authorized," [12] the Commission will modify proposed § 271.1104(d)(1)(iv)(B)(*2*)(*iii*) to allow recovery of interest for pre-NGPA facility costs only where specific contractual authority exists.[13]

3. Billing Disputes

The remaining, and perhaps more difficult issues raised in the comments about the power and fuel cost allowance relate to procedures for resolving potential disputes over the accuracy and completeness of the supporting data provided by the seller. Panhandle Eastern Pipe Line Company and Trunkline Gas Company (Panhandle and Trunkline), for example, ask that the due date of payment within 60 days of a complete and valid claim still permit the purchaser "to verify * * * calculations and to resolve any limited disputes about the precise amount due in the usual, informal fashion, such as by adjusting the bill or delaying payment of the disputed amount pending discussions or receipt of further explanations." ANR and CIG suggest that where disputes arise over billings, pipelines should be allowed either (1) to suspend payments on disputed amounts until the dispute is resolved; (2) to pay such disputed amounts into an interest bearing escrow account; or (3) to make payment subject to refund plus interest.

The Commission is adopting ANR and CIG's option 3 for treating disputes over billing.[14] The purchaser will be required to pay the producer the amount billed, subject to refund with interest (determined in accordance with § 154.102(c) of our regulations) should the billing subsequently be determined to be inaccurate or unsupported. Requiring prompt payment within 60 days of billing, subject to refund with interest, will avoid the possibility that "verification" requirements will be used as a means of delaying payments. At the same time, it will provide adequate time for purchaser verification. The Commission anticipates that claims for power and fuel costs should be reasonably straightforward. As long as the compression allowance is "expressly authorized" by the contract, a reasonably detailed calculation of the power and fuel costs claimed and costs incurred should satisfy a purchaser acting in good faith. The Commission recognizes that disputes may arise. However, such disputes under the self-implementing framework of Order No. 94–A are essentially contractual and are best resolved by the parties themselves, or at last resort, in an appropriate forum.[15]

4. Miscellaneous Compression Changes

The Commission is adopting two suggestions by Indicated Producers and Phillips with respect to the power and rule allowance. First, the Commission is revising § 271.1104(d)(1)(iv)(B)(*2*)(*iii*) to permit recovery of the power and fuel allowance retroactive from August 10, 1987, to July 25, 1980, or any earlier date on which the seller filed an application with the Commission to recover these costs. This will make such allowances recoverable to the same extent the allowances for post-NGPA facilities are recoverable and clearly define the retroactive period. (Of course, the allowance may be collected prospectively from the effective date of the rule as well.)

Second, as suggested by Indicated Producers and Phillips, the Commission will waive the filing fee for the amended blanket affidavit required to collect the power and fuel allowance for pre-NGPA compressors for a temporary period. The Commission is waiving this fee for a time to encourage prompt filing and because the amended affidavit is necessary only because the initial regulations failed to include an allowance for pre-NGPA compressors.[16] However, the waiver period will not be open-ended but will expire 60 days after the effective date of this rule, on October 7, 1987. After that date, the filing fee will no longer be waived. Additionally, affidavits filed after that date will be effective on the date of filing, as are other affidavits reflecting section 110 costs filed after May 6, 1983 (*see* 18 CFR 154.94(k)(4)).[17]

In response to a request from ANR and CIG, the Commission clarifies that any pre-NGPA power and fuel cost reimbursement is required only to the extent the compression meets the 3.5 to 1 ratio (of the outlet pressure of the last stage of compression to the inlet pressure of the first stage of compression) applicable to post-NGPA compression. See 18 CFR 271.1104(d)(1)(iv)(A) (1986). This accords equal treatment to pre-NGPA and post-NGPA compression facilities.[18]

B. Comments on the Protest Procedure Proposal

1. Relation of NGPA Sections 601 and 110

Virtually all producer commenters argue that the protest procedure for delivery allowances should not apply to NGPA section 102(c), 103(c), and 107(c)(1)–(4) gas because such volumes (and others) are removed from the Commission's Natural Gas Act (NGA) jurisdiction by NGPA section 601(a)(1)(A) and (B), and in *Pennzoil I* the court determined the Commission lacks jurisdiction to interpret contracts with respect to these sections.

[12] *See* 18 CFR § 271.1104(e)(2) (1986).

[13] *See also Texas Eastern* at 1066 n.27.

[14] This is consistent with the Commission's general rule governing refund obligations. Pipelines, as ANR and CIG suggest, may challenge the level of fuel reimbursement claimed by a producer.

[15] The methods for resolving disputes over power and fuel costs are the same methods available for other Order No. 94 disputes, as suggested by ANR and CIG.

[16] As suggested by Phillips, producers filing amended blanket affidavits must use the term "power and fuel" when amending Exhibit A to the affidavit to facilitate administration of the new allowance for pre-NGPA-installed compressors.

[17] The Commission is also making a number of technical clarifications. In response to Tennessee's request, the regulatory text will be amended by inserting "(§ 271.1104(d)(1)(iv)(B))" following "under this paragraph" and "amounts owed under this paragraph," in §§ 271.1104(d)(1)(iv)(B)(*2*)(*ii*) and (*iii*), respectively, to make the reference to the paragraph clear. The Commission also clarifies that under § 271.1104(d)(1)(iv)(B)(*2*)(*i*), the blanket affidavit under § 154.94(k) and Appendix B thereto must be amended (or filed, if an affidavit has not been previously filed), prior to collecting the allowance. (The second comma in subparagraph (*i*) will be deleted to make this clear).

[18] To make clear when filed blanket affidavits to collect fuel or power costs will become effective the Commission is amending § 154.94(k) (4) and adding § 271.1104(d)(1) (iv)(B)(*2*)(*iv*). The regulatory text at § 154.94(k)(4) will be amended by inserting "§ 271.1104(d)(1)(iv)(B) and" following "Except as otherwise permitted for delivery and compression allowance under" and the new § 271.1104(d)(i)(iv)(B)(*2*)(*iv*) provides that blanket affidavits to collect fuel or power costs that are filed within 60 days of the effective date of this order shall become effective on the effective date of this order and blanket affidavits filed more than 60 days after the effective date of this order will become effective on the date of filing.

The Commission does not agree that NGPA section 601(a)(1) removes its authority to adopt the delivery allowance protest procedures for contracts covering gas removed from it Natural Gas Act jurisdiction. Section 601(a)(1) (A) and (B) provide that "the provisions of the *Natural Gas Act* and the jurisdiction of the Commission under the Act shall not apply" to various categories and vintages of gas. At issue is whether this section of the NGPA removes the Commission's jurisdiction to adopt rules under section 110 of the NGPA governing the collection of delivery allowances under contracts for these various categories and vintages of gas. We note that the Commission's authority to adopt these protest procedures is *not* derived from the Natural Gas Act, but rather comes from section 110 of the NGPA. The allowable add-on procedures were implemented in Order No. 94–A, which the court upheld in *Texas Eastern*. The Commission reads the *Texas Eastern* decision as requiring it to establish protest procedures for all delivery allowances collected under NGPA section 110, not just for allowances for Natural Gas Act gas. If the procedures were only applicable to certain categories of price-regulated gas, as the producers claim, uniform implementation of section 110 would be encumbered.

Another point the Commission wants to emphasize is that the section 110 delivery allowances only apply to gas which is still subject to a maximum lawful price. Once gas is price-deregulated under section 121 of the NGPA, there is no regulatory purpose served by imposing any procedures or limitations on the collection of add-ons to the contract price. This is consistent with the language of section 110 itself, which provides that "a price for the first sale of natural gas shall not be considered to exceed *the maximum lawful price applicable to the first sale of such natural gas* under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover" production-related costs.

2. Refund Procedures

Pogo Producing Company (Pogo) asks that the Commission make clear that the generic allowance for delivery services rendered during the period an area rate clause is protested may continue to be collected pending a final and unappealable decision by the Commission in the protest proceeding, and any refund resulting from implementation of the protest procedures is not payable until the protest procedure and administrative appeals are concluded. The Commission grants this clarification to ensure that unwarranted adjustments and readjustments to accounts are avoided and that refunds are made only upon issuance of a final Commission order. This clarification will preclude the aggressive use of the billing adjustment provision at § 270.101(f) of the Commission's regulations by an overzealous purchaser to pay itself refunds before a final decision on the merits.

Pogo also suggests that if a protest is ultimately upheld, an optional installment method of refunds should be available to minimize potential economic hardship on producers making refunds. This suggestion has merit and is consistent with previous installment payment provisions in Order No. 93–A (where Btu refunds could be spread over six or twelve months depending on the producer's size) and Order No. 94–A (where retroactive generic allowances could be spread over as much as twenty-one months). Refunds payments in installments will also limit any potential misuse of the pipeline's PGA filing as an artificial marketing tool by including lump sum refunds in one PGA filing. Petitions to make installment payments may be filed with the Commission, setting forth the proposed method and period of disbursement. Purchasers will have an opportunity to answer the seller's proposal, and the Commission will make a determination on a case-by-case basis. As a rule-of-thumb, however, payment extensions over a six- or twelve-month period depending on the producer's size—as was done with Btu refunds—will represent the outer limits of the payment extension.

3. Operation of Delivery Allowance Presumption

Indicated Producers and Producer Associations request certain clarifications regarding the operation of the presumption that an area rate clause encompasses a delivery or gathering allowance and the burden of proof in protest procedures where that presumption is operative.

Indicated Producers request that the Commission clarify that even if a protester overcomes the presumption, the trier of fact may still consider the predicated facts—such as the parties' assertions of intent to pay and collect a delivery allowance, their course of dealings, and the long-standing practice of the Commission and industry to consider area rate clauses as sufficient authority to collect gathering allowances—and may infer from those facts that contractual authority exists. Indicated Producers also ask that the Commission make clear that

> [i]f the competing extrinsic evidentiary contentions of the protesters and the seller, i.e., evidence apart from the predicate facts, are in equipoise, or if the extrinsic evidence is ambiguous, then the seller may establish the claimed contractual authority by a preponderance of the evidence based upon the probative weight of the predicate facts.[19]

The Commission is granting the clarifications requested since they fully conform to the court's decision in *Pennzoil II* [20] as discussed in the notice of proposed rulemaking.

It was the Commission's intent that once sufficient evidence is presented to overcome the presumption, "[e]videntiary weight may still be given to the parties' assertions and to the contractual language" and other predicate facts in reaching a decision.[21] This conforms to the two *Pennzoil* decisions,[22] particularly *Pennzoil II*, which supports the view that the contract language, the parties' course of dealings, and the long-standing practice of the Commission and the industry out of which the presumption arises remain, and may be given probative weight to determine the preponderance of the evidence.

Producer Associations argue that even after the presumption has been overcome, the protesting pipeline or third party should bear the burden of proof and that any refund decision in a protest proceeding should have prospective effect only because rate schedules in most cases will already have been accepted under section 4 of the NGA. Under section 5 of the burden of proof is on the person seeking a changed rate, and the changed rate can only take effect prospectively.

The Producer Association's arguments based on NGA section 5 rate concepts are inapposite to NGPA delivery allowance collection and to the court-ordered procedures for protesting a delivery allowance. The protest procedures do not amount to an NGA section 5 rate case. Rather, their purpose is to determine whether a contractual

[19] Indicated Producers Initial Comments at 16.

[20] Pennzoil Co. v. FERC, 789 F.2d 1128 (5th Cir. 1986).

[21] 51 FR 28104 (Aug. 5, 1986).

[22] Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981) (*Pennzoil I*), and Pennzoil Co. v. FERC, 789 F.2d 1128, 1137 (5th Cir.) (*Pennzoil II*), *quoting McCormick on Evidence*, § 345(A) at 821 (the presumption, even though it has been removed as a presumption, remains in respect to the evidentiary facts upon which it was established, which may still be considered by the trier of fact. In short, the legal consequence of the presumption being removed, the inference, as a matter of reasoning, may still remain).

agreement existed to authorize payments of a delivery allowance for costs incurred at some time in the past.[23] Accordingly, the Association's suggestion is not adopted. Nor does the protesting pipeline or third party always bear the burden of proof in such protest procedures. While the protester has the initial burden of coming forward with substantial evidence to overcome the presumption that an area rate clause encompasses a delivery allowance, one the presumption is overcome the party or parties asserting that such delivery allowance was intended by the area rate clause bear the burden of persuasion by a preponderance of the evidence. The Commission wishes to stress again, however, that evidentiary weight may still be given to the predicate facts that buttressed the presumption even after the presumption has been dispelled.

4. Proposals to Expand Procedures

Indicated Producers argue that what they term the "presumption" against the collectibility of compression allowances under an area rate clause should also be rebuttable, and that it was error to limit protests to delivery allowances, since the court's instructions, in their view, can be read as recommending protests for compression allowances as well. Phillips Petroleum Company and Phillips 66 Natural Gas Company (Phillips) echo this view. In addition, Phillips suggests that the allowance for compression proposed by the rule should be referred to as a "power and fuel allowance" to distinguish it from the Commission's post-NGPA generic compression allowance.

The Commission agrees with the commenter's latter suggestion and adopts the term "power and fuel allowance" for the pre-NGPA compression allowance. The Commission declines, however, to provide a protest procedure for disputes over the power and fuel allowance. Phillips and indicated producers appear to have misunderstood the essential structure of Order No. 94f-A and the court's directive in *Texas Eastern*. Order No. 94-A created no "presumption" against compression allowances. Rather, the guiding principle of Order No. 94-A was contractual self-implementation by the parties, and this required that all allowances thereunder must be "expressly authorized" by contract.[24] Only delivery allowances were presumed to be "expressly authorized" under area rate clause,[25] because of the historic practice of the Commission to encompass gethering costs under such clauses. Thus, what the producer-commenters call a "presumption" that compression allowances are not collectible is not a presumption at all, but simply reflects the operation of the general rule of Order No. 94-A that any allowance thereunder be "expressly authorized" by contract.

This general rule was fully affirmed by the court in *Texas Eastern*. As a general matter, the court found "unassailable" the Commission's argument that prior experience under the Gas Act, 15 U.S.C. 717.717w (1982), supports the construction of area rate clauses as authorizing delivery allowances, but not other allowances.[26] Whild the Commission does not intend to prejudge the issue of the collection of any particular pre-NGPA compression allowance, as some commenters claim, it reiterates that any power and fuel allowance must be "expressly authorized" by contract. The producer-commenters' strained reading of the *Texas Eastern* decision is essentially based on one word—the court's use of the plural "presumptions" when it referred to the protest procedure for delivery allowances. Far from including compression in the sweep of area rate clause protests, this language refers to the variety of area rate clauses, and the multiplicity of intents and rebuttable presumptions that might arise under them with respect to allowances for the gathering of natural gas—the only presumption created under Order No. 94-A. Accordingly, the Commission declines to adopt Indicated Producers' related request to delete the opening phrase of § 271.1104(d)(1)(iv)(B)(*1*): "If expressly authorized pursuant to paragraph (c)(4)(ii)(A) of this section." It is neither redundant nor prejudicial to restate the general rule of the self-implementing Order No. 94-A procedures that all allowances thereunder must be "expressly authorized" by contract.

5. Proposals to Streamline Procedures

Several commenters suggest ways to streamline the evidentiary standares in light of experience under the Order No. 23 series, in order to mitigate any significant economic impact on a substantial number of small entities.

Bass and Samson, for example, characterize Order No. 23 as a regulatory "maelstrom" and urge that care be taken in interpreting the *Texas Eastern* court's instruction to "model" procedures on Order No. 23. These commenters even suggest the court's directive can be read to limit protests to contracting parties. The Commission finds Bass and Samson's rational thin on this point [27] and declines to adopt it. However, the Commission does believe that the court's suggestion of use of Order No. 23 as a model does not preclude narrowly interpreting third-party access to participation in the protest procedures in the context of their application for NGPA section 110 purposes.

Bass and Samson make two chief suggestions: (1) Provide for dismissal of protests where the subject area rate clause was already found to authorize collection of the highest prices permitted by law in Order No. 23-B proceedings, and (2) where pipelines didn't protest collection of NGPA maximum lawful prices under area rate clauses, they may not now protest collection of section 110 delivery costs based on area rate language alone. In such cases a pipeline (or third-party) may protest only where specific contract language precludes production-related cost collection, or clear, substantial extrinsic evidence directly contradicts the producer's intent to collect such costs.

The Commission declines to adopt the first suggestion. The first suggestion is rejected because it comes close to subverting the *Texas Eastern* court's order that protest procedures with respect to the parties' intent to collect section 110 costs under area rate clauses is an issue separate and apart from whether the area rate clause has been determined to authorize collection of the applicable maximum lawful price under the NGPA. Since NGPA section 110 costs are "not considered to exceed the maximum lawful price applicable" to the gas, their collection under area rate clauses represents an issue of intent

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[23] Costs incurred in providing that service prior to March 7, 1983, but after the earlier of July 25, 1980, or the date on which the seller filed an application with the Commission to recover these costs; provided that the seller is expressly authorized, as defined in paragraph (c)(4) of this section, to provide such service and be compensated for so doing, and that this authorization was in effect during the period the costs to be collected were incurred; however, amounts so collected must be reduced by any amounts collected prior to March 7, 1983, to recover these costs. (*See* 18 CFR 271.1104(e)(1) (1986).)

[24] This means a contract provision "expressing an amount, or a method for determining an amount, that the purchaser agrees to pay the seller for providing the specified service." 18 CFR 271.1104(c)(4)(ii)(A) (1986).

[25] CFR 271.1104(c)(4)(ii)(B) (1986).

[26] Texas Eastern, 769 F.2d at 1065.

[27] "[B]y reference to an aggrieved party's attempt to show that *'its'* area rate clause is not subject to the Commission's presumption that area rate clauses authorize the collection of delivery allowances, (the court) seems to suggest that the section 110 protest procedures be limited to contracting parties." Bass and Samson Initial Comments at 6.

arguably separate from the question of intent to collect the NGPA maximum lawful price under the area rate clause. For this reason, and the unequivocal nature of the court's directive, the Commission declines to adopt Bass and Samson's first suggestion.

The Commission finds the second suggestion, however, to be generally consistent with the standards for obtaining a hearing under the Order No. 23 "model" procedures. Bass and Samson's second suggestion, related to the evidentiary standards that must be met in order to obtain a protest and hearing and avoid dismissal, is adopted insofar as it conforms with the model standards requested by the court. In Opinion No. 135 [28] the Commission clarified the standards that must be met *both* to rebut a certain presumption about contract interpretation *and* to avoid summary dismissal of protests to the interpretation favored by the presumption. The Commission has decided to adopt similar standards here for examining protests of the collectibility of production related costs of delivery under area rate clauses. Accordingly, in order to rebut the presumption of collectibility and avoid summary dismissal, a protest must be supported by: (1) Contract language which *precludes* a reasonable person from interpreting the contract as intended to provide for the collection of production related costs of delivery, or (2) reliable and probative extrinsic evidence specifically contradicting that interpretation and dispositive against the presumption favoring that interpretation.[29] Accordingly, we generally adopt Bass and Samson's limits on the threshold requirements for rebutting the presumption and thereby avoiding summary dismissal of a protest, insofar as they conform to the Opinion No. 135 standards.[30]

The chief administrative law judge should therefore generally not entertain protests supported by evidence that merely disagrees with the Commission's characterization of prior practice under the Natural Gas Act, or attacks the reasonableness of the area-rate delivery-allowance presumption itself, since it has been sustained in *Texas Eastern*. Such "blanket" protests would arguably not meet the Opinion No. 135 tests for rebutting the presumption, which are also the evidentiary threshold requirements for avoiding dismissal of a protest and obtaining a hearing.[31]

6. Filing Requirements

Indicated Producers ask that the Commission expressly authorize pipelines to make references back to their original and supplementary evidentiary submissions filed pursuant to Order No. 23–B in fulfillment of data filing requirements under proposed § 271.1104(h). This was the Commission's intent in the notice of proposed rulemaking, and § 271.1104(h)(1) will be amended to expressly include "original or supplementary evidentiary submission" as a document that may be referred to without filing.

Indicated Producers also ask that the Commission either require protesters to serve copies of their protests upon affected first sellers, or require purchasing pipelines receiving protests to do so, as in the Order No. 23 series. The Commission finds merit in this suggestion and will modify the notification of protest procedure by amending § 271.1104(h)(6)(i) to require the pipeline purchaser or third-party protester to serve each affected first seller with a notice of any protest. Pipelines will provide names and addresses of such affected first sellers to third parties for this purpose. Producer Associations request that the purchaser be required to serve each working interest owner with a notice of any protest. We shall deny this request since the identity of each working interest owner is not necessarily known to the purchaser. In most cases, the affected first seller acts as representative for other interest owners in a fiduciary relationship and is the proper party to be served with a notice of protest.

Several pipeline commenters [32] believe the filing requirements in the protest procedures are unfairly placed on pipelines and that producers, not pipelines, should be required to file lists of contracts they believe authorize delivery costs under an area rate clause. In addition to shifting the filing burden, Columbia suggests allowing pipelines 90 days to determine whether they agree and to file the respective lists proposed in the notice.[33]

The Commission is not inclined to shift the filing burden from pipelines to producers. The Order No. 23 filing burden, which was also placed upon pipelines, is the pattern on which the court directed the instant procedures be modeled. The Commission is sensitive to the Regulatory Flexibility Act requirements and has attempted to shield a significant number of small producer entities from any initial filing burdens. The Commission believes it is also administratively more manageable to require filings from a few large entities than from a multitude of small ones. Furthermore the Commission has lessened the burden on the interstate pipelines to a great extent by permitting them to reference data already on file with the Commission rather than file it anew. To respond to the pipeline commenters' concerns, however, the Commission will extend the time for filing the pipeline submissions from 60 days from **Federal Register** publication of the final rule to 90 days, and will amend § 271.1104(h)(4) accordingly.

Some pipeline commenters [34] suggest that, at minimum, the Commission should only require a pipeline to file information for contracts under which a pipeline doesn't dispute claims and has been paying production-related delivery costs, so that third parties could protest.[35] Mountain Fuel also requests that the Commission allow pipelines to consolidate information concerning claims on one document and, to the extent producers filed unique documents, to include those. Then, if others protest, the actual documents could be submitted.[36]

The Commission has determined not to limit pipeline filings to situations where the pipeline *does not* dispute claims. Such a limitation would depart drastically from the Order No. 23 model, and would hinder third parties from

[28] *Transcontinental Gas Pipe Line Corporation*, 17 FERC ¶ 61,232, Opinion and Order Remanding for Limited Purposes, Docket No. GP80–24. (Dec. 11, 1981).

[29] *See id.* at 61,450–51.

[30] A protest will thus be dismissed unless (1) specific contract language precludes a reasonable person from interpreting the contract as intended to provide for the collection of production-related costs of delivery, or (2) reliable and probative extrinsic evidence specifically contradicts and is dispositive against the presumption favoring that interpretation.

[31] Compare rejection of "blanket protests" in Associated Gas Distributors *et al.* v. FERC, No. 84–1454, slip op. at 16 (D.C. Cir. Jan. 23, 1987) ("The generality of petitioners' proffer renders it an impermissible collateral attack on, and not a rebuttal of, a presumption upheld in previous litigation and not open to relitigation.")

[32] *See* Panhandle and Trunkline, and Columbia initial comments.

[33] The notice of proposed rulemaking would have required pipelines to publish such lists without producer help, and within 60 days after the rule is published.

[34] *See* Mountain Fuel, Panhandle and Trunkline initial comments.

[35] Mountain Fuel also suggests that where a producer and pipeline are deadlocked over a claim and have decided to ask the Commission to resolve the dispute, the pipeline would file the required data.

[36] Mountain Fuel would have the producer, not the pipeline, submit these documents. Since the pipeline will already have the documents, the Commission believes it will not be unduly burdensome for the *pipeline* to photocopy and serve the documents. As discussed *supra*, administrative concerns and other factors militate against shifting any of the filing duties onto the numerous seller small entities that may be involved.

joining the protest of claims disputed by the pipeline. The Commission is willing to allow pipelines to consolidate information concerning claims on one document and, to the extent producers filed unique documents, to include those. However, the pipeline would be required to file those documents with the Commission.

Tennessee asks the Commission to make clear that by filing its statements of contractual authority, no pipeline thereby waives its right to contest any pricing provision as a "so-called" area rate clause. Tennessee also requests a clarification that any payments already made may be recovered by a pipeline under appropriate circumstances.

The Commission is willing to grant the clarifications requested by Tennessee but with a *caveat* based on the discussion, *supra*, regarding the evidentiary standards that must be met to avoid summary dismissal. Clearly, a pipeline, by the mere ministerial listing of contract data does not waive any rights. However, if a pipeline has been paying an allowance, it has the burden to show the parties' intent differed from that alleged by the seller, and was actually an intent *not* to pay, even though the pipeline *did pay* the allowance. Conceivably, there may be circumstances where the parties did not intend a particular area rate clause to encompass a delivery allowance, which might justify recovery of payments erroneously paid.

Southern California Gas Company (SoCal), and Asociated Gas Distributors and the Department of Public Service of the State of New York (AGD and New York) are concerned that the data and information filed by the interstate pipelines be made available to the customers of the pipelines and interested state commissions. SoCal states that only the pipeline "lists" are now published, not the underlying data. AGD and New York ask that the Commission clarify that the Commission intended that the text of any contract provisions, and any other evidence which the pipeline believes constitutes, or may constitute, contractual authority to collect delivery allowances "is subsumed within the category of 'data' supporting the pipeline's position as to the seller's contractual authority." [37] The Commission did intend that the data required to be filed would encompass contract text and other evidence as was the case in the Order No. 23–B procedures, [38] and grants AGD and New York's clarification as to the point. The Commission declines to require that such data be filed with a pipeline's customers or interested state commissions. The Commission wishes to minimize the filing burden on pipelines as much as possible. The data will be in the public files of the Commission to which any interested customers or state commissions will have access. Furthermore, the Commission has extended the protest deadline to 90 days from publication of the pipeline lists under § 271.1104(h)(4), which should provide ample time for third parties to review the data in the Commission's files.

7. Settlement Negotiations

Mountain Fuel is concerned that the Commission not preclude potential settlement by the parties themselves. To this end, it proposes that pipeline filings be permissive rather than mandatory [39] so that a protest proceeding would not be initiated automatically, thereby disrupting ongoing negotiations. Mountain Fuel further proposes that the Commission state that pipelines need not make filings to agree or disagree with producer claims where producers (1) have said they would file a claim but never followed up with details; (2) have provided details but never responded to pipeline objections; or (3) have formally settled or waived a claim.

The Commission will modify the proposed rule to accomodate ongoing settlement of disputes but declines to adopt Mountain Fuel's suggestions which leave a great deal to the unilateral discretion of the purchasing party and may hinder conclusive resolution for all disputed area clauses as envisioned in *Texas Eastern*. The Commission will modify § 271.1104(h)(4) to allow contracting parties to waive the former 60-day (now 90-day) filing deadline by written mutual agreement in furtherance of voluntary settlement of protests. (*See* discussion *supra*.) The waiver agreement may not extend further than 180 days from the date the protest would otherwise be due, and must be filed with the Commission. This approach, unlike Mountain Fuel's proposal, permits ongoing settlement negotiations to extend the filing deadline by *mutual* agreement, and yet provides a date certain at which closure must be reached and the underlying data filed for others to evaluate and protest. Thus, the issues will be joined for determination without unwarranted delay, and reasonable efforts at settlement will be supported. Mountains Fuel's recitation of situations where producers never filed a claim or failed to provide follow-up data is not a persuasive reason for adopting Mountain Fuel's suggestion which would effectively eliminate many pipeline filings and shield numerous potentially valid claims from review. Producers may not have filed a claim or follow-up data because of unreasonable data requests by the purchasing party, or a perception on the seller's part that the effort would be futile. Of course, if parties have formally settled or waived a claim in writing, they would ordinarily be bound by it.

Finally, Indicated Producers make some technical suggestions to encourage settlements. While supporting the 60-day time limit for third-party protests, they request that parties be allowed to waive the 60-day limit in order to encourage settlements without litigation. The Commission is adopting this suggestion to further its policy of encouraging settlements, and proposed § 271.1104(h)(4) will be amended accordingly, to require filing of such waiver agreements with the Commission, but with an outer limit on such waivers of 180 days in order to encourage prompt closure of any potential dispute. The Commission is also extending 60-day time limit for third party protests to 90 days, even where no waiver is obtained, as discussed *supra*, in response to requests from potential third-party protesters.

8. Miscellaneous

a. *Technical conference*. AGD and New York note that the pipeline may refer to documentation already on file. AGD and New York suggest that an informal technical conference could address any practical problems that might arise regarding these filing requirements. The Commission does not see the need for a technical conference at this time, but confirms that when it eased the pipeline's filing burden by allowing references to documentation already on file, it understood that such documentation would be complete, adequately identified and described, and reasonably accessible. If the sufficiency of documentation or reasonable access to it becomes an

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[37] AGD and New York initial comments at 2.

[38] *See* 18 CFR § 154.94(j)(1)(iv)(B) (1986).

[39] Mountain Fuel also suggests that a claim might be presented to the Production-Related Costs Board (or to an ALJ) if the dispute cannot be resolved by the parties. The Commission declines to adopt this suggestion. The Commission has determined to administer section 110 delivery protests as it did the Order No. 23 protests—through the Chief Administrative Law Judge and the respective presiding administrative law judges. To do otherwise would not only strain the limited resources of the Board, but would arguably be discontinous with the Order No. 23 model without good reason.

issue in a particular case, it should be brought to the Commission's attention.

b. *Previous agreement for Btu-offset purposes.* Producer Associations and CNG Producing Company (CNG) request that where a purchaser has already paid the delivery allowance under an area rate clause, it should be presumed to have intended its authorization, and should not be allowed to list that contract as "disputed" as its past expressions of intent should be binding on it. The Commission finds some merit to this suggestion but declines to adopt it out of a desire to conform fully with the court's order. However, the Commission will clarify that where a pipeline has paid or is paying the delivery allowance without dispute, such conduct is relevant with respect to intent, and may even constitute a contract amendment under state law.[40] Yet, because of the multitude of possible reasons for a purchaser making payment, and the variety of intents expressable under various area rate clauses, as well as the varying state laws that may apply, the Commission is reluctant to foreclose entirely any pipeline from disputing an allowance it has previously paid. However, where a pipeline purchaser has agreed with its producer-seller as to the intent and sufficiency of its authorization for delivery allowances for purposes of Btu-offset procedures, the pipeline should be estopped from challenging the delivery allowance in the proposed protest procedures.[41]

IV. Final Regulatory Flexibility Analysis

Whenever the Commission is required by section 553 of the Administrative Procedure Act (APA) [42] to publish a general notice of proposed rulemaking, it is also required by section 603 of the Regulatory Flexibility Act (RFA) [43] to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). After comments on the IRFA are received a final analysis is prepared. The analysis must describe the impact the proposed rule will have on small entities. The broad purpose of the RFA is to ensure more careful and informed agency consideration of rules that may significantly affect small business and small government entities and to encourage cost-benefit analyses of these rules as well as the agency's consideration of alternative approaches that may better resolve any unnecessarily costly or adverse effects on these small entities. The Commission is not required to make an RFA analysis, however, if it certifies that a rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities." [44]

In the notice, the Commission presented its reasons for this agency action, its objective and the legal basis for this rulemaking. As discussed, the final rule would allow small producers to recover the fuel or power costs in driving certain compressors and establishes procedures to permit any affected person to rebut the presumption that an area rate clause in a natural gas contract permits collection of production-related delivery costs.

This rule could affect approximately 10,000 natural gas producers, a significant proportion of which would probably be classified as small businesses.[45] However, the Commission has minimized any disproportionate burden the proposal would have on small producers. The final rule does require producers to amend their blanket affidavits covering notices of rate change, but waives filing fees for such amendments, and the Commission regulations relieving small producers from most filing requirements are not affected,[46] and remain applicable. Similarly, the Commission does not impose any reporting requirements on producers under the protest procedures. Instead, all reporting requirements are imposed on pipeline-purchasers. A producer becomes involved in a particular proceeding only after a protest is lodged. Furthermore, in proposing protest procedures, the Commission is attempting to satisfy the directive of the United States Court of Appeals for the Fifth Circuit in *Texas Eastern*.

The Commission believes the rule, as proposed, represents a fair balance that would satisfy the mandate of the court and fulfill the purpose of the Regulatory Flexibility Act. In response to one comment on the IRFA, the Commission reiterates that many small producers will not need to participate in the protest procedures because any amounts in controversy are likely to be relatively small and most small producers will negotiate any disagreements over contractual intent with the pipeline. The Commission has also modified the final rule to facilitate such negotiation. In addition, the Commission does not believe that participation in the protest procedures will be unduly burdensome or costly. For these reasons, the Commission certifies that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities."

V. Paperwork Reduction Act Statement

The information collection provisions in this final rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act [47] and OMB's regulations.[48] Interested persons can obtain information on the proposed information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. (Attention: Ellen Brown, Information Collection Analysis Branch, (202) 357–8272). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, DC 20503 (Attention: Desk Officer for Federal Energy Regulatory Commission).

VI. Effective Date

This final rule is effective August 10, 1987.

List of Subjects

18 CFR Part 154

Alaska, Natural gas, Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 271

Continental shelf, Natural gas, Price controls, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 154 and Part 271, Chapter I, Title 18, Code of Federal Regulations as set forth below.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 154—RATE SCHEDULES AND TARIFFS

1. The authority citation for Part 154 is revised to read as follows:

[40] Bass Enterprises Production Co. and Samson Resources Company (Bass and Samson) express this view.

[41] *See* CNG comments at 2. Equity would seem to require that a person that has benefited from the assertion of one version of its intent be estopped from later denying that intent in order to avoid a detriment.

[42] 5 U.S.C. 553 (1982).

[43] 5 U.S.C. 601–612 (1982).

[44] 5 U.S.C. 605(b) (1982).

[45] 5 U.S.C. 601(c) (1982), citing to section 3 of the Small Business Act, 15 U.S.C. 632 (1982). Section 3 of the Small Business Act defines small business concern as a business which is independently owned and operated and which is not dominant in its field of operation.

[46] 18 CFR 157.40 (1986).

[47] 44 U.S.C. 3501–3520 (1982).

[48] 5 CFR 1320.12 (1986).

Authority: Natural Gas Act, 15 U.S.C. Secs. 717–717w (1982); Department of Energy Organization Act, 42 U.S.C. Secs. 7102–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142; Independent Offices Appropriations Act, 31 U.S.C. Sec. 8701 (1970), unless otherwise noted.

2. In § 154.94, paragraph (k)(4) is revised to read as follows:

§ 154.94 Changes in rate schedules.

* * * * *

(k) *Affidavit to collect production-related costs.* * * *

(4) *Effective date of coverage under affidavit.* Except as otherwise permitted for delivery and compression allowances under § 271.1104(d)(1)(iv)(B) and § 271.1104(e), an affidavit filed under this paragraph by May 6, 1983, shall become effective with respect to deliveries beginning on March 7, 1983; an affidavit filed under this paragraph after May 6, 1983, shall become effective on the date of filing with respect to deliveries beginning on and after the date of filing. Any amendment filed under paragraph (k)(2) of this section will be subject to the filing requirements of § 154.92 of this chapter.

* * * * *

PART 271—CEILING PRICES

3. The authority citation for Part 271 is revised to read as follows:

Authority: Natural Gas Act, 15 U.S.C. Secs. 717–717w (1982); Department of Energy Organization Act, 42 U.S.C. Secs. 7101–7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142; Natural Gas Policy Act of 1978, 15 U.S.C. Secs. 3301–3432 (1982).

4. In § 271.1104, paragraph (d)(1)(iv) is revised to read as follows:

§ 271.1104 Production-related costs.

* * * * *

(d) *Amounts necessary to recover production-related costs.*—(1) *General rule.* * * *

(iv) *For compression facilities.*—(A) *For recent compression facilities.* For compressing natural gas by compressor facilities, the construction of which commenced on or after November 9, 1978, used to effectuate delivery of such gas to any interstate pipeline, intrastate pipeline, local distribution company or any person for use by such person, the seller may collect an amount not to exceed:

(*1*) Six cents ($0.06) per MMBtu for each qualified stage of compression set at a ratio of 3.5 to 1 (representing the overall compression ratio of the outlet pressure of the last stage of compression to the inlet pressure of the first stage of compression), not to exceed three stages; plus

(*2*) The cost of fuel or power to drive the compressor.

(*3*) For purposes of the compression allowance under this clause, "construction" of facilities includes the complete and necessary replacement of old facilities with new facilities and the necessary addition of any new stage of compression to existing facilities.

(B) *For old compression facilities.*—(*1*) *Authority for collecting the allowance.* If expressly authorized under paragraph (c)(4)(ii)(A) of this section, for compressing natural gas by compressor facilities, the construction of which commenced on or before November 8, 1978, used to effectuate delivery of such gas to any interstate pipeline, intrastate pipeline, local distribution company or any other person for use by such person, the seller may collect the cost of fuel or power to drive the compressor.

(*2*) *Procedure for collecting the allowance.*—(*i*) *Blanket affidavit.* If a seller has made an effective filing under § 154.94(h) of the Commission's regulations, prior to collecting the allowance, the seller must amend its blanket affidavit under § 154.94(k) and Appendix B, or file a blanket affidavit under § 154.94(k) and Appendix B, if it has not previously done so.

(*ii*) *Method of payment.* Amounts owed under this paragraph (§ 271.1104(d)(1)(iv)(B)) are due in a lump sum payment within 60 days of the submission required under paragraph (f) of this section, for each qualified stage of compression set at a ratio of 3.5 to 1.

(*iii*) *Retroactivity.* Amounts owed under this paragraph (§ 271.1104(d)(1)(iv)(B)) may be collected retroactive from August 10, 1987, to July 25, 1980, or any earlier date on which the seller filed an application with the Commission to recover these costs, with interest computed under §§ 154.102(c)(2)(iii) (A) and (B) of this chapter, if interest is expressly authorized by contract.

(*iv*) *Effective date of blanket affidavit.* Blanket affidavits filed under § 154.94(k) of this chapter to collect amounts owed under this paragraph (271.1104(d)(1)(iv)(B)) that are received within 60 days of August 10, 1987, shall become effective on August 10, 1987; a blanket affidavit filed more than 60 days after August 10, 1987, shall become effective on the date of filing.

* * * * *

5. In § 271.1104, a new paragraph (h) is added to read as follows:

§ 271.1104 Production-related costs.

* * * * *

(h) *Pipeline list submissions and protest procedure*—(1) *Pipeline filings.* The information required by § 271.1104(h) (2) and (3) must be filed with the Commission within September 8, 1987. A pipeline may submit the contractual authority to collect delivery allowances pursuant to any area rate clause:

(i) A statement specifying for each first seller whether, in the opinion of the interstate pipeline, that first seller has, or does not have, contractual authority to collect production-related costs permitted under § 271.1104 of this chapter;

(ii) Any data that supports the statement made under paragpraph (h)(2)(i) of this section;

(iii) A copy of any data submitted under paragraph (f) of this section for each first seller; and

(iv) The rate schedule number (or if none has been assigned, the date of the contract) and the name of the seller for each first sale of natural gas where the seller has made a submission under paragraph (f) of this section.

(3) *Lists of first sellers.* An interstate pipeline must also file a list of first sellers and a list of the respective contracts that the pipeline identified under paragraph (h)(2) of this section to be published by the Commission in the **Federal Register.**

(4) *Pipeline, third-party, and staff protests.* A protest to the delivery allowances claimed on the pipeline submissions filed under paragraph (h)(2) of this section must be submitted to the Commission, within 90 days of the publication in the **Federal Register** of the pipeline list, described in paragraph (h)(3) of this section, referencing the contract which governs the filed-for production-related delivery costs to which the protestant objects. Parties may waive the 90-day filing deadline by written mutual agreement, in furtherance of voluntary settlement of protests. The waiver agreement may not extend further than 180 days from the date the protest would otherwise be due, and must be filed with the Commission to be effective.

(5) *Contests of protests.* A protest filed under paragraph (h)(4) of this section must:

(i) Specifically identify each contract that is protested;

(ii) Set forth the text of the contractual provisions which the protestant believes to be inconsistent with the conclusion that the contact authorizes the seller to collect the filed-for production-related costs, and the specific reasons why the protestant believes such inconsistency exists; and

(iii) Provide any other evidence which the protestant believes is relevant to the issue of the existance of contractual authorization to collect the production-related costs.

(6) *Protest procedure.* (i) The Commission will publish in the Federal Register a notice of a protest filed under paragraph (h)(4) of this section. The pipeline-purchaser or third-party must serve each first seller with any protest at the same time the protest is submitted to the Commission. Pipeline-purchasers will provide the names and addresses of such first sellers to any third-parties that must make service under this section upon request.

(ii) The Commission will transmit the pipeline protest filing, the protest filed under paragraph (h)(4) of this section, and the list of first sellers identified as *not* having contractual authority to collect production-related costs, to the Chief Administrative Law Judge.

(iii) Any third-party, staff, or pipeline protest will be set for hearing unless summary disposition is made of the protest.

(iv) Upon receipt by the Commission of any third-party or staff protest, or pipeline protest of first sellers identified as not having contractual authority to collect production-related costs referred to in this section, the seller in the first sale will be joined as a party.

(7) *Authority of Chief Administrative Law Judge.* In the case of any proceeding relating to a third party, staff, or pipeline protest filed under this section, the Chief Administrative Law Judge is authorized to issue such procedural orders, including orders setting matters for hearing, severing and consolidating proceedings, and certifying questions to the Commission, as he determines necessary or appropriate for the expeditious consideration of such portests. The Chief Administrative Law Judge may, by such order, authorize the Administrative Law Judge to whom a third-party protest or a pipeline's protest is assigned to issue similar procedural orders relating to that protest.

(8) *Rules of practice and procedure.* Part 385 of this chapter (relating to rules of practice) will apply to such third party, staff, and pipeline protest proceedings except to the extent otherwise provided by a procedural order issued by the Chief or Presiding Administrative Law Judge under paragraph (h)(7) of this section. Section 385.715 of this chapter will apply to any procedural order issued under paragraph (h)(7) of this section.

Appendix

Note.—This Appendix Will Not Appear In The Code of Federal Regulations

Initial Comments in Docket No. RM86-7-000

Timely-Filed

1. ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG).
2. Associated Gas Distributors and Department of Public Service of the State of New York (AGD and New York).
3. Bass Enterprises Production Co. and Samson Resources Company (Bass and Samson).
4. CNG Producing Company (CNG).
5. Columbia Gas Transmission Corporation (Columbia).
6. El Paso Natural Gas Company (El Paso).
7. Indicated Producers.[1]
8. Mountain Fuel Resources, Inc. (Mountain Fuel).
9. Panhandle Eastern Pipe Line Company and Trunkline Gas Company (Panhandle and Trunkline).
10. Phillips Petroleum Company and Phillips 66 Natural Gas Company (Phillips).[2]
11. Pogo Producing Company (Pogo).
12. Producer Associations.[3]
13. Southern California Gas Company (SoCal).
14. Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee).
15. Transcontinental Gas Pipe Line Corporation (Transco).
16. United Gas Pipe Line Company and Natural Gas Pipeline Company of America (United and Natural).

Late-Filed.[4]

17. Diamond Shamrock Corporation (adopting Initial Comments of Indicated Producers).

[FR Doc. 87-13082 Filed 6-8-87; 8:45 am]

BILLING CODE 6717-01-M

[1] Comprised of: Phillips Petroleum Company, Phillips 66 Natural Gas Company, Amerada Hess Corporation, Arco Oil and Gas Company, Ashland Exploration, Inc., BHP Petroleum, Inc., Chevron. U.S.A., Inc., Cities Service Oil and Gas Corporation, Conoco Inc., Exxon Corporation, Kerr-McGee Corporation, Marathon Oil Company, Mitchell Energy Corp., Mobil Oil Corporation, Mobil Oil Exploration & Producing Southeast Inc., Mobil Producing Texas & New Mexico Inc., Mobil Exploration and Producing North America Inc., Pennzoil Company, Pennzoil Producing Co., Pennzoil Oil & Gas, Inc., Shell Oil Company, Sun Exploration and Production Company, Tenneco Oil Company, Texaco Inc., and Union Oil of California.

[2] Supplemental Initial Comments, as corrected September 12, 1986.

[3] Comprised of: Independent Petroleum Association of America, Panhandle Producers and Royalty Owners Association, Independent Petroleum Association of Mountain States, and Independent Petroleum Association of New Mexico.

[4] Since no person will be prejudiced thereby, the motion to file comments out-of-time is granted.

18 CFR Parts 270 and 284

[Docket Nos. RM86-3-069—077; Order No. 451-B]

Ceiling Prices; Old Gas Pricing Structure

Issued June 3, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order Granting Rehearing in Part, Denying Rehearing in Part, Clarifying Final Rule, and Denying Stay Request.

SUMMARY: The Federal Energy Regulatory Commission is granting in part and denying in part rehearing of, and clarifying Order No. 451-A which amended Order No. 451. The final rule adopted in those orders established a new alternative ceiling price for old gas priced under sections 104 and 106 of the Natural Gas Policy Act of 1978. The final rule also established a "good faith negotiation rule" with which producers must comply before collecting a higher price under an existing contract, absent voluntary renegotiation of the contract. In addition, the final rule provided blanket transportation certificates to non-Order No. 436 interstate pipelines which formerly purchased, or provided upstream transportation of, gas released under the good faith negotiation rule in order to facilitate marketing of that gas to a new purchaser. On rehearing of Order No. 451-A, the Commission amends the regulations implementing the good faith negotiation rule to clarify the effect of assignments on the parties' rights under that rule and to permit first sellers and purchasers to mutually agree to shorten the notice which must be given before sales or purchases are abandoned or terminated. The Commission also grants intrastate pipelines a limited jurisdiction certificate to perform the same transportation which Order Nos. 451-A and 451-B authorize or require non-Order No. 436 interstate pipelines to perform. Finally, the Commission denies the request of Williams Natural Gas Company for a stay of Order Nos. 451 and 451-A.

EFFECTIVE DATE: The amendments to the Commission's regulations adopted in this order shall become effective on June 3, 1987 except that §§ 284.225(f)(4) and (g) and 284.226(d) shall not become effective until July 9, 1987.

FOR FURTHER INFORMATION CONTACT: Richard Howe, Jr., (202) 357-8308, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North

Capital Street, NE., Washington, DC 20426.

SUPPLEMENTARY INFORMATION:

Order Granting Rehearing in Part, Denying Rehearing in Part, Clarifying Final Rule, and Denying Stay Request

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

I. Introduction

On December 15, 1986, the Commission issued Order No. 451–A[1] amending the final rule adopted in Order No. 451.[2] That final rule modified the price structure of old natural gas and established regulations governing implementation of the revised price structure. The Commission has received three timely applications for rehearing or clarification of Order No. 451–A, and five requests for reconsideration.[3] This order grants in part and denies in part rehearing of, and clarifies, Order No. 451–A. It also denies a request by Williams Natural Gas Co. that the Commission stay Order Nos. 451 and 451–A pending judicial review.

II. Background

In Order No. 451, the Commission established a new, alternative ceiling price for old gas priced under sections 104 and 106 of the Natural Gas Policy Act of 1978 (NGPA).[4] That ceiling price is equal to the existing ceiling price for post-1974 old gas. In order to prevent indefinite price escalation clauses from automatically raising prices to the new ceiling price regardless of the market price, and in order to provide balanced negotiating rights among the parties, the Commission required that parties to existing contracts, who do not voluntarily negotiate a new or amended contract price, comply with a "good faith negotiation rule" before collecting higher prices. That rule establishes a three-step procedure by which contracts are placed on the bargaining table.

In step 1, a producer may request the purchaser to nominate a new price for any old gas sold under existing contracts which authorize a higher price. In step 2, the purchaser may request that the producer nominate a new price for any old or other gas sold by the producer under contracts covered by the producer's request. In addition, the purchaser may request the producer to nominate a new price for any gas sold by the producer under any other existing contract between the parties which contains some old gas. In step 3, the producer may request the purchaser to nominate a new price for its old gas in the contracts brought to the negotiating table by the purchaser in step 2. If the parties agree to a new price, sales continue under the existing contract at the agreed upon price. If the parties do not agree, the party that requested nomination of a price may cease sales or purchases of the gas covered by the nomination request and abandonment is deemed granted. Whenever gas previously sold to a non-Order No. 436 pipeline is eligible for release under the good faith negotiation rule, the producer must give the pipeline's firm sales customers a right of first refusal before selling released jurisdictional gas to a third party. Non-Order No. 436 interstate pipelines which formerly purchased released gas must transport that gas to their existing customers or to interconnecting pipelines. The Commission granted a blanket certificate for the performance of such transportation.

In Order No. 451–A, the Commission generally denied rehearing of Order No. 451. However, the Commission did modify the regulations governing the rates charged by non-Order No. 436 pipelines for transportation performed under the rule in order to assure that those rates are the same as those for comparable transportation under Order No. 436. The Commission also authorized non-Order No. 436 interstate pipelines, which provided transportation of released gas upstream of the releasing pipeline immediately before the release, to continue the transportation on behalf of any shipper. Finally, the Commission clarified the operation of the good faith negotiation rule in various respects and made several minor modifications in the regulations implementing that rule. The applications for rehearing of Order No. 451–A raise a number of issues concerning the good faith negotiation rule and the transportation provisions of the final rule as modified in Order No. 451–A.

III. Discussion

1. The first, and perhaps most significant issue raised, concerns the operation of the good faith negotiation rule when a producer has assigned gas to another producer subject to an existing sales contract. On rehearing of Order No. 451, some rehearing applicants expressed concern that producers might seek to avoid renegotiation of their new gas in multi-vintage contracts in step 2 of the nominating process by transferring or assigning their old or their new gas to another entity so that all new and old gas is in separate contracts. The Commission stated that this was not a significant danger under the rule as adopted. As explained in the Order No. 451–A preamble:

> "Mere assignment to another corporate entity of old or new gas covered by a multi-vintage contract without amendment of the sales contract itself could not insulate the new gas from renegotiation in step 2. This is because the original owner of the gas would still appear on the contract with the purchaser as the seller of that gas. The purchaser is entitled to obtain renegotiation in step 2 of all gas sold under the contract as it was on July 18, 1986, by the seller regardless of whether the seller claims someone else owns the gas." [5]

IPAA, Texaco, Conoco, and Arco assert that this statement is inconsistent with state law. Once an assignment has occurred, the assignor has no further legal authority to negotiate on behalf of the assignee. Thus, if a producer assigned its new gas to another producer and thereafter requested the purchaser to nominate a new price for its old gas, any request by the purchaser in step 2 that the assignor nominate a price for the new gas would be futile since that producer no longer has legal authority to negotiate the price of that gas.

IPAA suggests that, consistent with state law, the Commission modify the definition of "first seller" and "party to a contract," set forth in § 270.201(a)(2)(iii), to include only persons having a direct contractual relationship with the purchaser as of the date a nomination request is made. The effect of such a provision, in the absence

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[1] 51 FR 46762 (December 24, 1986).

[2] 51 FR 22168 (June 18, 1986).

[3] Meridian Oil, RM86–3–069, January 14, 1987; Independent Petroleum Association of America (IPAA), RM86–3–070, January 14, 1987; General Service Customer Group (GSC), RM86–3–071, January 14, 1987. On April 13, 1987 Williams Natural Gas Company filed a motion for reconsideration of Order No. 451–A. Panhandle Eastern Pipe Line Co. (Panhandle) and Trunkline Gas Co. (Trunkline) filed a joint motion for reconsideration on April 23, 1987.

On February 5, 9, and 19, 1987, respectfully, Texaco, Inc., Arco Oil and Gas Co., and Conoco, Inc., filed "comments" on IPAA's request for rehearing generally supporting that request on the assignment issue. On March 16, 1987 Columbia Gas Transmission Corp. (Columbia) filed comments opposing IPAA's request for rehearing. On March 31, 1987 Amoco Production Company (Amoco) filed a response to Columbia's filing.

The Commission's procedural regulations do not permit answers to rehearing requests. 18 CFR 385.713(d)(1) (1986). However, the Commission will treat Texaco's, Arco's, and Conoco's comments as requests for reconsideration of Order No. 451–A, since those comments seek changes in Order No. 451–A. Columbia's comments, which do not seek changes in Order No. 451–A, are rejected and will not be considered in this order. It follows that Amoco's response to Columbia's comments must also be rejected.

[4] 15 U.S.C 3314 and 3316 (1982).

[5] 51 FR at 46795–796.

of any other change in the regulations implementing the good faith negotiation rule, would be that when an assignor or assignee makes a nomination request in step 1, the purchaser in step 2 could only seek negotiation of gas currently sold it by that assignor or assignee. This is because the regulations currently permit the purchaser to seek renegotiation in step 2 only of gas sold it by the "first seller" who made the nomination request in step 1.

Texaco, Conoco, and Arco agree with IPAA that a purchaser should be permitted in step 2 to seek renegotiation only of gas currently sold it by the assignor or assignee initiating good faith negotiation at least where the assignor and assignee are not affiliated. They state that there is little danger that producers will significantly circumvent purchasers' step 2 rights through assignment except possibly where producers are affiliated. Too many other considerations are involved when producers assign gas leases for them to manipulate such assignments for purposes of circumvention. Texaco also states that producers lack any incentive to try to circumvent the purchasers' step 2 rights, since, as the Commission stated in Order No. 451, the price of high-cost new gas will be forced downward as a result of higher prices for old gas even apart from the purchaser's rights in step 2.

Furthermore, Texaco, Conoco, and Arco contend that permitting the purchaser to renegotiate both the assignor's and assignee's multi-vintage gas when only one of them initiates good faith negotiation could be unfair to some producers. For example, an assignor who assigned old gas in one contract for legitimate business reasons could find all its multi-vintage contracts subject to good faith negotiation solely because of the actions of the assignee, even though the assignor desired to forego good faith negotiation.[6] Texaco states that, in order to avoid this possibility, it has begun requiring persons to whom it makes assignments to waive any rights to initiate good faith negotiation with respect to the assigned gas as a condition of the assignment. While Texaco, Conoco, and Arco agree with IPAA that a purchaser in step 2 should be limited to seeking renegotiation only of gas currently sold it by the assignor or assignee initiating good faith negotiation, they contend that that result can be achieved under the existing regulations and that there is no need for the amendment suggested by IPAA. They also state that, if the Commission desires to prevent circumvention by affiliates, it should adopt a regulation addressing that specific problem.

The Commission agrees with Texaco that, over the long term, any attempt through an assignment to insulate high-cost gas from renegotiation downward is likely to prove futile. As discussed in detail in Order No. 451,[7] the Commission expects new gas prices to be renegotiated downward as a result of the market forces released under this rule, apart from the rights granted purchasers in step 2. However, the Commission nevertheless found the purchaser's step 2 rights necessary to assure that in the short term there is no lag between the producer's obtaining a higher price for old gas and the purchaser's obtaining lower prices for new gas sold in multi-vintage contracts.[8] The Commission desires to minimize any possible circumvention of this assurance by producers through assignments. The danger of circumvention is not limited to assignments among affiliates, as suggested by Texaco, Conoco, and Arco. For example, a producer who owned mostly new gas and therefore did not desire to initiate good faith negotiation might sell its old gas in a multi-vintage contract to a second, unaffiliated producer for a price based upon the value of the gas when sold subject to the alternative ceiling price. When the second producer initiated good faith negotiation for the assigned gas, the purchaser would not be able to make a nomination request in step 2 for the unassigned new gas. Accordingly, the Commission does not adopt the rehearing applicants' proposal.

However, the Commission is sympathetic with the concern of Texaco, Conoco, and Arco that permitting the purchaser in step 2 to make nomination requests with respect to all gas which would have been eligible for renegotiation in the absence of the assignment—the approach suggested in the Order No. 451-A preamble—could be unfair to some producers. As stated by the rehearing applicants, only the assignee has power to contract with respect to the assigned gas, just as only the assignor has power to contract with respect to unassigned gas.[9] Therefore, in order to implement the approach suggested in the Order No. 451-A preamble, the purchaser would have to be given the right, when an assignor or its assignee initiates good faith negotiation, to request the other to nominate a price for any gas which would have been subject to good faith negotiation in the absence of the assignment. This would mean that an assignor or assignee who did not desire to engage in good faith negotiation could nevertheless be drawn into such negotiation as a result of the nomination request of the other. This could have a particularly adverse effect on assignors, all of whose multi-vintage contracts would become subject to good faith negotiation as a result of a nomination request by the assignee.

For these reasons, the Commission is modifying Order No. 451-A with respect to assignments (or other transfers that in substance yield the same effect) on or after the issuance of this order as follows. A producer who validly assigns gas subject to a contract existing on July 18, 1986 which included old gas will be ineligible to initiate good faith negotiation for any gas it sold to the purchaser unless the purchaser in step 2 can renegotiate all the gas which would have been subject to renegotiation in the absence of the assignment. The same rule will also apply to the assignee; however, its ineligibility to initiate good faith negotiation will be limited to the assigned gas.[10] The purchaser's ability to renegotiate the gas which would have been subject to renegotiation in the absence of the assignment could arise, for example, through an agreement by the assignor or assignee to permit renegotiation of its gas if the other initiates good faith negotiation or through the assignment itself under state law. This rule will protect purchasers from circumvention of their step 2 rights as a result of assignments after the issuance of this order, without requiring any producers involuntarily to renegotiate their gas except where state law permits purchasers to require such renegotiation.

The Commission will not apply the above described rule to assignments before the issuance of this order. In its

[6] Similarly, the gas assigned to the assignee could likewise become subject to renegotiation solely because the assignor initiated good faith negotiation.

[7] 51 FR at 20196-198.

[8] Order No. 451-A, 51 FR at 46788-789.

[9] In general when a producer assigns gas to another producer, the assignee succeeds to all the rights and obligations of the assignor with respect to the assigned gas. *See* 4 Williams, Oil & Gas Law § 735 (1985).

[10] The assignee's ineligibility need not extend to the gas it sells under its own contracts with the purchaser in order to prevent circumvention of the purchaser's step 2 rights. If there had been no assignment and the assignor had requested the purchaser to nominate a price for the assigned gas, the purchaser would not have been entitled in step 2 to reach the assignee's gas. The purchaser could only reach that gas if the assignee makes a nomination request for some of its gas, and in such circumstances the purchaser can reach that gas in step 2 after the assignment as well as before.

interim order on rehearing issued July 18, 1986 the Commission stated that it would only change its regulations governing eligibility to initiate good faith negotiation prospectively. Those regulations, as in effect before issuance of this order, permitted producers to make assignments without potential loss of eligibility to initiate good faith negotiation.[11] It would be unfair to deprive a producer of its eligibility for good faith negotiation because of an assignment made when the Commission had given no notice that assignments could cause such a loss of eligibility. However, as stated above, the Commission believes that the rule suggested by the Order No. 451–A preamble is also unfair. Accordingly, the Commission has determined not to apply that rule to assignments before the issuance of this order either. Rather, this order provides that, when gas in an existing contract including old gas has been assigned before the issuance of this order, the purchaser in step 2 may seek renegotiation of any multi-vintage or old gas currently sold by the assignor or assignee initiating good faith negotiation, but not any other gas. Accordingly, assigned gas shall be subject to renegotiation in step 2 only when the assignee initiates good faith negotiation for old gas in any of its contracts with the purchaser. Similarly, the unassigned gas will be subject to renegotiation in step 2 only when the assignor initiated good faith negotiation.[12]

Furthermore, the Commisson believes that any impact on purchasers as a result of some above-market gas not being subject to renegotiation in step 2 through application of the above described rule will often be counterbalanced by other high-cost gas becoming subject to renegotiation which otherwise would not have been. For example, a producer who does not intend to initiate good faith negotiation may, for legitimate business reasons, have assigned high-cost gas to another producer who owns a large amount of old gas and will initiate good faith negotiation. As a result the purchaser will now have an opportunity to renegotiate that gas in step 2 which it would not have had without the assignment.[13] Finally, even when high-cost gas is not subject to renegotiation in step 2 as a result of an assignment before issuance of this order, the competitive forces in the natural gas market released by this rule should enable the purchaser to renegotiate that gas downward. The Commission concludes that the rule adopted here governing assignments before the date of this order provides the best method of handling such assignments, since these rules should not result in significant circumvention of the purchaser's step 2 rights and the identified alternatives as discussed could have an unfair impact.

The Commission is also amending the regulations governing good faith negotiation so as to authorize the purchaser, when gas is assigned after the issuance of this order and the assignor or assignee is eligible to initiate good faith negotiation,[14] to renegotiate in step 2 all gas which would have been subject to renegotiation in the absence of the assignment. This amendment is necessary, since the current regulations do not specifically authorize the purchaser, in any circumstances when an assignee or assignor initiates good faith negotiation, to request the other to nominate a price for its gas. When a producer who assigned gas after the issuance of this order initiates good faith negotiation for gas sold under the contract which includes the assigned gas or sold under another contract, the amended regulations authorize the purchaser in step 2 to request the assigneee to nominate a new price for the assigned gas. The purchaser may also request the assignor to nominate a new price for any unassigned gas in the assignor's multi-vintage contracts with the purchaser which contain some old gas. If the assignee initiates good faith negotiation, the purchaser may request in step 2 that the assignor nominate a new price for any unassigned gas in any of its multi-vintage contracts with the purchase. The purchaser also may request that the assignee nominate a new price for the assigned gas. However, the purchaser may not request the assignee to nominate a new price for any other gas sold under contracts between the purchaser and the assignee. The purchaser could not have reached that gas if the assignment had never occurred and the assignor had initiated good faith negotiation.[15] These procedures are designed only to give the purchaser the same rights it would have had in the absence of an assignment, not to expand those rights.

While in the circumstances described above, when an assignor or assignee initiates good faith negotiation, the purchaser may make nomination requests to the other, the assignor and assignee are still considered separate first sellers and parties to the contract for purposes of the good faith negotiation rule. Thus, when the purchaser makes nomination requests to both, each must nominate a price for its gas and the purchaser may accept the nomination of one and reject the nomination of the other as it chooses although, consistent with the rules governing good faith negotiation generally, the purchaser cannot partially accept or reject the nomination of a particular assignor or assignee. Furthermore, if an assignor or assignee initiates good faith negotiation and the purchaser does not exercise its right to request the other to nominate a price, then the negotiation between the party initiating good faith negotiation and the purchaser will not affect the other's right subsequently to initiate good faith negotiation. An assignor or assignee loses its right subsequently to initiate good faith negotiation only if its gas is placed on the bargaining table.[16] Of course, if the purchaser does request the other to nominate a price, the assignor or assignee must make any nomination request it desires in step 3. This is consistent with the general rule governing signatory working interest owners' loss of right to initiate good faith negotiation. *See* Order No. 451–A, 51 FR at 46801.

2. Williams Natural Gas Company (Williams) requests that the Commission expand purchasers' step 2 rights to permit purchasers to seek lower prices for new gas covered by any contract between the parties, regardless of whether that contract includes old gas. Williams states that this change in Order Nos. 451 and 451–A is necessary because of the decision of the Tenth Circuit Court of Appeals in *Martin Exploration Management Co. v.*

[11] *See* Order No. 451–A, 51 FR at 46796, in which the Commission raised the possibility of loss of eligibility for good faith negotiation as a result of an assignment only if the producer and the purchaser actually amended the sales contract to name the assignee as a seller.

[12] This result is reached through application of the existing regulations governing the purchaser's step 2 rights. Under § 270.201(b)(2) the purchaser may make a nomination request in step 2 only to the "first seller" initiating good faith negotiation. That "first seller" under § 270.201(b)(2) is the assignor or assignee initiating good faith negotiation.

[13] It should be observed that no assignment after July 18, 1986 of the old or new gas in a multi-vintage contract can alter the fact that the new gas is sold under a multi-vintage contract including the sale of old gas. Pursuant to § 270.201(a)(2)(ii)(B), a contract includes the sale of old gas if on July 18, 1986 it encompassed the sale of such gas.

[14] As discussed above the assignor or assignee would be eligible to initiate good faith negotiation if the other agrees that the purchaser may renegotiate its gas in step 2, state law permits the purchaser to do so, or for some other reason the purchaser must be given such a right.

[15] For the same reasons, if the assignee requests the purchaser to nominate a price for gas sold under its own contracts with the purchaser, the purchaser may not request the assignee in step 2 to nominate a price for the assigned gas.

[16] See 18 CFR 270.201(a)(4).

FERC.[17] In that case, the court reversed the Commission's holding in Order No. 406 [18] that, when gas has been determined to qualify for both a deregulated gas category and a regulated category, the gas is deemed deregulated. Among the categories of gas which were deemed price-deregulated under Order No. 406 was certain gas qualifying under NGPA section 107(c)(5) as new tight formation gas. Order No. 406 thus permitted many purchasers to pay less than the relatively high section 107(c)(5) ceiling price for that gas through, for example, contract clauses providing for price redetermination upon deregulation. Williams alleges that the reversal of Order No. 406 means that producers with indefinite price escalation clauses will now again be eligible to receive the section 107(c)(5) ceiling price, currently $6.36. This could significantly increase pipelines' cost of gas. Williams states that expansion of purchasers' step 2 renegotiation rights will give pipelines an opportunity to mitigate the effect of *Martin*.

The Commission does not adopt Williams' proposal. The reasons the Commission gave in Order No. 451–A for refusing to permit purchasers in step 2 to renegotiate new gas not in multi-vintage contracts are as valid after *Martin* as before. As the Commission stated in Order No. 451–A, the competitive forces in the natural gas market, which will be strengthened by the increased production and more accurate price signals resulting from this will over time force down new gas prices wholly apart from the good faith rule, negotiation rule.[19] Thus, it is unnecessary to expand the purchasers' step 2 rights in order to enable them to bring down the price of new gas, including section 107(c)(5) gas. Furthermore, permitting the purchaser to renegotiate all new gas would increase the potential cost to many producers of initiating good faith negotiation, with the result that fewer producers would do so. This would seriously impede achievement of the Commission's goal of market responsive prices for old gas so as to avoid premature abandonment of that gas. Therefore, the Commission continues to believe that a proper balance between the need for higher prices for old gas and fairness to purchasers is achieved by permitting purchasers to renegotiate in step 2 only new gas sold in multi-vintage contracts.

[17] Case Nos. 84–2756 *et al.* decided March 9, 1987.

[18] Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, 49 FR 46874 (Nov. 29, 1984).

[19] 51 FR at 46790–791.

This assures that there is no lag between the producer's obtaining a higher price for old gas and the purchaser's obtaining a lower price for new gas sold under multi-vintage contracts, thereby avoiding disruption of the mutuality of consideration in multi-vintage contracts in which all terms are interrelated. At the same time, however, it avoids making good faith negotiation so costly that few producers initiate it.

3. Meridian observes that some multi-vintage contracts may provide no authority for a higher price for the old gas and yet also contain high-priced new gas. An example would be a contract containing only minimum rate old gas and deregulated new gas. Meridian requests clarification whether the producer may request a price nomination for the old gas in such a contract in step 3, if the purchaser requests a price nomination for the new gas in step 2. The situation posed by Meridian cannot arise because the purchaser could not make a nomination request with respect to the contract in question in step 2. Section 270.201(b)(2) only authorizes the purchaser to make nomination requests in step 2 with respect to "any existing contract with the purchaser that includes the sale of any old gas." Section 270.201(a)(2)(ii) (A) defines "existing contract" as a contract in effect on July 18, 1986 "that . . . provides authority for the first seller to collect a higher price upon establishment by the Commission of a higher maximum lawful price." Thus, the only multi-vintage contracts which the purchaser in step 2 can bring to the bargaining table are those which permit a higher price for at least some of the old gas in the contract. Of course, where the purchaser in step 2 requests the producer to nominate a price for new gas in a multi-vintage contract providing authority for a higher price for some but not all of the old gas in the contract, the producer in step 3 could only request the purchaser to nominate a price for the old gas for which there was authority for a higher price.

4. A producer must enter into a contract to sell to a third party and give the purchaser 30-days notice before terminating sales under the good faith negotiation rule. IPAA requests that the Commission clarify that, where a producer must comply with the Order No. 451 right of first refusal, it may give the 30-days notice to the pipeline as soon as it has obtained an offer substantially accepted in principle from the non-firm sales customer, rather than waiting until it has executed a contract with either the non-firm sales customer or a firm sales customer exercising its right of first refusal. Permitting the 30-day notice period to run concurrently with the presentation of a third-party offer to the pipeline's firm sales customer allegedly would further the policy objectives of Order No. 451 by permitting released or abandoned gas to be sold to alternative purchasers at market-responsive prices more quickly. It would also make third parties more willing to purchase released gas since deliveries could start more quickly after the agreement in principle with the producer. Finally, because some pipelines require transportation to begin within a certain period of the signing of the transportation agreement, arrangement of transportation to the new purchaser would be easier.

The Commission rejects IPAA's proposed clarification. In Order No. 451–A, the Commission clearly stated its intent that the producer must execute a contract with the new purchaser before giving the existing purchaser the 30-days notice of terminaton of sales.[20] When the producer must give the firm sales customers a right of first refusal of an offer accepted by a non-firm sales customer, no contract can be executed until after the offer has been presented to the firm sales customers. Accordingly, the 30-days notice cannot be given until after the right of first refusal has been complied with. Without the requirement of an executed contract before the producer gives the 30-days notice, there would be a possibility that upon completion of the 30-day notice period the producer still would not have executed a contract to sell the gas to another purchaser and thus would not qualify for the abandonment granted under the good faith negotiation rule.[21] It would be difficult for the purchaser to contract to purchase replacement supplies from another producer if it could not be certain that upon completion of the 30-day notice period sales by the first producer would be abandoned. Avoiding any uncertainty

[20] 51 FR at 46784.

[21] Even if the producer had presented a third-party offer to firm sales customers concurrently with giving the 30-days notice so that the 20 day period for responding to the third party offer would expire before the 30-days notice, there could be no certainty that a sales conract would actually be executed with a new purchaser before the end of the 30-day notice period. If all the firm sales customers rejected the third-party offer, the deal between the producer and the non-firm sales customer might still fall through, requiring the producer to start all over again looking for a new purchaser and comply with the right of first refusal a second time if the next potential purchaser is a non-firm sales customer. If more than one firm sales customer accepted the offer, it might take beyond the 30-days notice period for the producer to choose to which one to sell and execute a contract.

over whether the abandonment will occur at the end of the 30-day notice period justifies any additional delay in the commencement of sales to the new purchaser. Such additional delay would in no event be more than the 30-day notice period. With regard to IPAA's concern about pipeline requirements that transportation service begin within a certain period after it is arranged, the Commission observes that operational conditions imposed on any transportation service required by Order No. 451 must be reasonable and not unduly discriminatory or preferential. Such operational conditions may not be imposed in order to avoid the Order No. 451 transportation obligation.

5. Purchasers must give the first seller 60-days notice before abandoning or terminating purchases under the good faith negotiation rule. Panhandle and Trunkline request that the Commission provide that the first seller and purchaser may mutually agree to shorten this 60-day notice period. The Commission established the 60-day notice period in order to give the first seller a reasonable opportunity to arrange sales to an alternative purchaser.[22] Since the 60-day notice period is for the protection of the first seller, there appears no reason not to permit the first seller to waive that notice through a mutual agreement with the purchaser. In additional, such a shortening of the notice period would permit the Commission's goal of more market-responsive pricing to be achieved more quickly for the gas in question. The Commission believes that the same reasoning also supports permitting the first seller to abandon or terminate sales under the good faith negotiation rule upon less than the required 30-days notice when the parties mutually so agree. Accordingly, the Commission is modifying its regulations to permit the parties to mutually agree to shorten the notice period for termination or abandonment of both sales and purchases.

6. In Order No. 451–A, the Commission stated that a firm sales customer's Order No. 451 right of first refusal and a non-Order No. 436 pipeline's NGPA section 315(b) right to a bona fide offer and right of first refusal [23] could never arise simultaneously with respect to the same gas. The Order No. 451 right of first refusal only applies to non-jurisdictional gas such as that covered by section 315(b) if it is packaged with jurisdictional gas. The Commission stated that a producer may not package gas covered by section 315(b) with other gas when giving the original purchaser its section 315(b) rights. Accordingly, the gas covered by section 315(b) will never be available for packaging with released jurisdictional gas for purposes of the Order No. 451 right of first refusal. IPAA questions whether the Commission's section 315(b) regulations prohibit the packaging of section 315(b) gas with other gas. Accordingly, it suggests that under the Commission's current regulations producers may be required with respect to the same gas both to give the original purchaser its section 315(b) rights and to give the firm sales customers a right of first refusal under Order No. 451. It proposes that the Commission solve this problem by amending its section 315(b) regulations to provide that a producer's compliance with the Order No. 451 right of first refusal extinguishes the original purchaser's section 315(b) rights.

The Commission rejects IPAA's proposal. First, that proposal would violate section 315(b) by depriving the original purchaser of its right under that section to receive a bona fide offer and right of first refusal. Second, IPAA is incorrect in suggesting that a producer may package gas covered by section 315(b) with other gas when giving the original purchaser its section 315(b) rights. Section 315(b) requires that the producer give the original purchaser a bona fide offer and right of first refusal with respect to the gas covered by that section. Inclusion of other gas in the offer presented to the original purchaser would mean that the offer was not an offer to continue sales of the gas covered by section 315(b), but an offer only to sell a larger package of gas. Furthermore, permitting the producer to include other gas in the offer would allow it to circumvent the original purchaser's section 315(b) rights by including a large amount of other gas for which the purchaser had no need. As explained in Order No. 451–A,[24] since the non-jurisdictional gas covered by section 315 cannot be packaged with the jurisdictional gas covered by the Order No. 451 right of first refusal for purposes of giving the original purchaser its section 315(b) rights, there can be no overlap between the section 315(b) and the Order No. 451 rights of first refusal.

7. NGPA section 315(a) requires the Commission to prescribe a rule providing that contracts for the first sale of Outer Continental Shelf gas qualifying under NGPA sections 102(b) or 107(c)(1)–(4) be for a duration of not less than 15 years. IPAA requests that the Commission modify 18 CFR 277.101, adopted pursuant to section 315(a), so as to exclude from the 15 year duration requirement contracts for the sale of the relevant Outer Continental Shelf gas where that gas has been released under the good faith negotiation rule. Adoption of the proposed modification would violate section 315(a)'s requirement that contracts for the sale of all section 102(b) or 107(c)(1)–(4) Outer Continental Shelf gas be for a term of at least 15 years. Accordingly, the Commission cannot modidy its regulations as proposed.

8. IPAA requests that the Commission modify the non-discriminatory access provision imposed on intrastate pipelines performing transportation under NGPA section 311(a)(2) by Order No. 436 [25] so as to permit intrastate pipelines to transport gas released under the good faith negotiation rule without being subject to the nondiscriminatory access provision. IPAA argues that such a modification is necessary to permit intrastate pipelines unwilling to become access pipelines to transport gas released under the good faith negotiation rule and would be analogous to the transportation authorizations provided non-Order No. 436 interstate pipelines in Order Nos. 451 and 451–A.

The Commission agrees that, to the extent intrastate pipelines require Commission authorization to transport gas, those pipelines should be authorized to perform transportation analogous to that which Order Nos. 451 and 451–A authorize or require non-Order No. 436 interstate pipelines to perform. The same policy considerations supporting the transportation authorization for non-Order No. 436 interstate pipelines also apply in the case of intrastate pipelines. In order for the potential benefits of this rule to be realized in terms of both supply and price response, producers must be able to market released gas. Some producer's ability to market released gas could be hindered when an intrastate pipeline unwilling to become subject to the non-discriminatory access provisions of Order No. 436 refuses to perform section

[22] Order No. 451–A, 51 FR at 46799.

[23] Section 315(b) requires that when a contract for the sale of NGPA section 102(c), 103(c), or 107(c)(1)–(4) gas which was subject to the Commission's Natural Gas Act (NGA) jurisdiction on the day before enactment of the NGPA expires or is terminated, the seller must give the existing purchaser a bona fide offer and right of first refusal before selling that gas to a third party.

[24] 51 FR at 46805.

[25] 18 CFR 284.9(b). Under section 311(a)(2), the Commission may authorize intrastate pipelines to transport gas on behalf of interstate pipelines or local distribution companies served by interstate pipelines.

311(a)(2) transportation. Accordingly, the Commission shall provide blanket "limited jurisdiction" section 7(c) certificates authorizing intrastate pipelines which either purchased, or provided upstream transportation of, released gas immediately before its release to transport that gas on behalf of either interstate pipelines or local distribution companies served by interstate pipelines. All transportation under these certificates shall be voluntary. As we stated in Order 451–A with respect to upstream interstate pipelines, any intrastate pipeline electing to provide transportation under this authorization must do so in a not unduly discriminatory manner. *See* 51 FR at 46809.

The rate charged by an intrastate pipeline for transportation of released gas which the pipeline purchased immediately before the gas release shall be determined pursuant to § 284.123(b). This assures that the rate shall be the same as if the transportation were provided under section 311(a)(2). The rate charged by an intrastate pipeline for upstream transportation of released gas shall be identical to the rate charged for the same service previously provided to the releasing pipeline.

8. The Order No. 451 transportation obligation and the Order No. 451 right of first refusal apply only to non-Order No. 436 interstate pipelines and the firm sales customers of such pipelines respectively. Order No. 451 defines non-Order No. 436 pipelines as pipelines not subject to the non-discriminatory access provisions of § 284.8(b) and § 284.9(b). Pipelines performing section 311 transportation on an interim basis [26] are subject to these non-discriminatory provisions [27] and accordingly are considered Order No. 436 pipelines for purposes of Order No. 451. GSC and IPAA assert that this means such pipelines could nullify their customers' ability to obtain alternative supplies through the Order No. 451 right of first refusal and transportation provisions by going through good faith negotiation while still an Order No. 436 pipeline performing interim section 311 transportation but thereafter ceasing the interim transportation. The pipeline could then refuse to transport any gas to the customers not purchased from the pipeline. GSC suggests that the Commission solve this problem by expanding the definition of non-Order No. 436 pipelines to include all pipelines who have not been granted and accepted an Order No. 436 blanket certificate under § 284.221 of the Commission's regulations. IPAA suggests alternatively that the Commission require that an Order No. 436 pipeline certify that it will remain such for at least 12 months. In the absence of such certification the Order No. 451 transportation obligation would apply to such pipelines.

The Commission refuses to modify Order No. 451's definition of non-Order No. 436 pipelines or to adopt IPAA's alternative suggestion. So long as a pipeline is subject to the non-discriminatory access provisions of Order No. 436, there is no reason to require it to transport gas under Order No. 451 or to give the pipeline's firm sales customers a right of first refusal. Transportation is already available under the non-discriminatory access provisions, thus permitting customers to purchase alternative supplies from any source and have that gas transported to them. It is true that pipelines may terminate the performance of interim section 311 transportation at any time and must do so when certain Order No. 436 filings have been processed. Nevertheless, the Commission does not believe that this fact will enable pipelines to prevent their customers from purchasing gas from alternative suppliers in the manner suggested by GSC and IPAA. Any pipeline terminating interim transportation that does not accept an Order No. 436 certificate or continue section 311 transportation [28] would be required under Order No. 451 to transport gas released under the good faith negotiation rule to its customers or interconnecting pipelines. This requirement would apply to all released gas regardless of whether the release occurred before or after the interim transportation ceased. In addition, the firm sales customers of such a pipeline would be entitled to a right of first refusal as to all released gas not already sold to a third party. With all interim transportation authority scheduled to end upon the processing of certain Order No. 436 filings, it is likely that a substantial portion of the gas ultimately released under the good faith negotiation rule will not be released until after the termination of interim transportation and would thus remain available for the firm sales customers' right of first refusal. This is particularly true in light of the fact that pipelines have no control over the timing of good faith negotiation. Initiation of good faith negotiation is in the sole discretion of the producer. It appears that many producers are delaying initiation of good faith negotiation while they seek voluntary negotiation or for other reasons. Finally, the Commission observes that although pipelines may terminate interim transportation, the Commission has stated that such termination must not be unduly discriminatory.[29]

10. In Order No. 451–A, the Commission held that a non-Order No. 436 pipeline's election to bid less than the highest price permitted under its contract necessarily includes an agreement to waive any full requirements or sole supplier clause which would prevent a firm sales customer from exercising its right of first refusal.[30] Otherwise, the right of first refusal granted such customers would be a nullity. GSC contends that the Commission should extend this waiver requirement to Order No. 436 pipelines. It observes that, in refusing to extend the right of first refusal to the customers of an Order No. 436 pipeline, the Commission stated that such customers have no need of the right of first refusal, since they can purchase any gas, whether or not previously sold to the pipeline or released under the good faith negotiation rule, and obtain transportation from the Order No. 436 pipeline. However, GSC states that a full requirements clause may bind customers of Order No. 436 pipelines to purchase from the Order No. 436 pipeline, particularly where the pipeline is only performing interim transportation and is thus not subject to the contract demand reduction and conversion rights of § 284.10. GSC states that the Commission has not yet clarified this issue. Accordingly, GSC contends that a requirement that an Order No. 436 pipeline potentially losing gas under the good faith negotiation rule waive any full requirements clause is necessary to ensure that its customers may purchase gas from alternative suppliers.

The Commission will not extend the waiver requirement to Order No. 436 pipelines. Where a pipeline has accepted an Order No. 436 blanket

[26] The Commission has authorized certain pipelines to continue transportation under section 311 without becoming subject to the contract-demand reduction and conversion rights in § 284.10 until 30 days after the Commission issues the first order on rehearing of the individual pipeline's pending Order No. 436 settlement or blanket certificate. *See* Texas Eastern Gas Pipeline Co., 39 FERC ¶61.027 (1987).

[27] Texas Eastern Gas Pipeline Co., 33 FERC ¶61.159 (1985).

[28] Of course, if the pipeline does accept an Order No. 436 certificate or continues section 311 transportation, transportation would be available to its customers under Order No. 436 on a long term basis after interim transportation ends.

[29] Columbia Gas Transmission Corp., 33 FERC ¶61.158 (1985).

[30] 51 FR at 46811.

certificate or commences or continues a section 311 transaction after expiration of its interim transportation authorization and is therefore subject to the contract-demand reduction and conversion requirements of § 284.10, it must agree to modify any existing contract terms, such as a full requirements clause, which would prevent the customer's exercise of these options.[31] In such circumstances, therefore, a customer currently subject to a full requirements clause could nevertheless, through the exercise of its contract demand reduction and conversion rights, purchase gas from alternative suppliers and obtain transportation of that gas by the pipeline.[32]

Customers of Order No. 436 pipelines performing only interim transportation under section 311 would, it is true, have no contract demand reduction and conversion rights under § 284.10 and thus would be unable to purchase from another supplier unless the pipeline voluntarily agreed to modification of the full requirements clause. However, this situation will be only temporary. Interim transportation is scheduled to cease upon the processing of certain Order No. 436 filings. When that happens, pipelines must either: (1) Continue Order No. 436 transportation under a blanket certificate or section 311 which would require them to offer their customers the contract-demand reduction and conversion option in § 284.10 or (2) stop all Order No. 436 transportation, which would require them to waive any full requirements clauses preventing any firm sales customer from exercising the Order No. 451 right of first refusal. In either case, the customers could purchase gas from alternative suppliers. They could also obtain transportation, either under the Order No. 436 non-discriminatory access provisions or under the Order No. 451 transportation obligation. As discussed in the preceding section, the Commission expects that a substantial portion of the gas ultimately released under the good faith negotiation rule will not be released until after interim section 311 transportation ceases and will thus remain available for the Order No. 451 right of first refusal at that time. Accordingly, the Commission believes that the full requirements customers of pipelines currently performing interim section 311 transportation will have ample opportunity to purchase gas from alternative suppliers. Therefore, there is no need to further complicate the rule by requiring pipelines performing interim transportation to waive full requirements clauses.

11. IPAA states that some Order No. 436 pipelines might not provide transportation for amounts of gas below a particular minimum. A package of gas released under the good faith negotiation rule for which transportation is desired might be less than the applicable minimum. In such instances IPAA suggests that the Order No. 451 transportation provisions should apply even though the pipeline is an Order No. 436 pipeline. The Commission refuses to adopt this suggestion. Minimum volume conditions violate the non-discriminatory access provisions of Order No. 436 unless they can be justified as reasonable operating conditions.[33] In *Texas Eastern Transmission Corp.*, the Commission eliminated a minimum volume condition from Texas Eastern's Order No. 436 settlement on the ground that it was not necessary for operational reasons such as ensuring that the quantities of gas to be transported would be large enough to be metered.[34] Where an Order No. 436 pipeline's minimum volume condition is valid as a reasonable operating condition, that condition would likely also be a valid condition to any transportation under Order No. 451, since transportation under that order is also subject to reasonable operating conditions. *See* 18 CFR 284.225(f). Accordingly, if transportation pursuant to Order No. 436 is unavailable because of a minimum volume condition, transportation under Order No. 451 would also be unavailable. Therefore, no purpose would be served by applying the Order No. 451 transportation provisions to Order No. 436 pipelines in the situation described by IPAA.

12. Section 270.226(a) defines upstream pipelines for purposes of the upstream transportation authorization as interstate pipelines "authorized under a certificate of public convenience and necessity" to transport the gas, before its release, between the wellhead and the releasing pipeline. IPAA states that the requirement that the prior transportation have been pursuant to a certificate of public convenience and necessity appears to exclude from the upstream transportation authorization interstate pipelines previously performing transportation other than under a section 7(c) certificate. An example would be grandfathered section 311 transportation under § 284.105. IPAA requests that the Commission expand the upstream transportation authorization to cover such pipelines. In Order No. 451-A, the Commission stated that the upstream transportation authorization was intended to "serve the twin public interest goals of protecting existing firm customers *and* continuing the flow of gas to the market." [35] Continued upstream transportation by interstate pipelines serves these goals regardless of the authority under which it was previously performed. Accordingly, the Commission is amending § 270.226(a) to remove the requirement that the prior transportation have been pursuant to a certificate of public convenience and necessity.

13. Williams Natural Gas Co. (formerly Northwest Central Pipeline Corporation) has requested that the Commission stay Order Nos. 451 and 451-A pending judicial review. Williams asserts that the final rule adopted in those orders is illegal and will cause Williams irreparable harm. Thirteen producers have submitted a joint answer to Williams' request, opposing it.

The Commission rejected similar stay requests in Order No. 451-A, holding pursuant to the standard set forth in the Administrative Procedure Act, 5 U.S.C. 705 (1982), that justice did not require a stay.[36] For essentially the same reasons, the Commission rejects Williams' stay request. The Commission answered all arguments concerning the illegality of Order No. 451, including those now made by Williams, in detail in Order No. 451-A. Furthermore, Williams' contention that Order Nos. 451 and 451-A will cause it irreparable harm is speculative and unsubstantiated. There is no certainty that all, or even many, producers who sell gas to Williams will initiate good faith negotiation. Even if all do, Williams could, as stated in Order No. 451-A, offset over two-thirds of any old gas price increase to an estimated market price of $1.80/MMBtu by reducing its new gas WACOG to $1.68/MMBtu, its current all-gas WACOG. Furthermore, the Commission considers it unlikely old gas suppliers could sustain price increases in excess of Williams' $1.68/MMBtu old gas WACOG.[37] In any event, even if

[31] *See* Order No. 436-A, FERC Stats. and Regs., Regulations Preambles 1982-1985 ¶30,665 at 31,530, and Northwest Central Pipeline Co., 38 FERC ¶ 61,170 at 61,542-543 (1987).

[32] Of course, since the customer would no longer be a full requirements customer, it might no longer be entitled to purchase gas from the pipeline at the full requirements rate.

[33] Order No. 436, FERC Statutes and Regulations, Regulations Preambles 1982-1985 ¶ 30,665 at 31,495.

[34] 37 FERC ¶ 61,260 at 61,680 (1985).

[35] 51 FR at 46809 (emphasis in original).

[36] 51 FR at 46817.

[37] Williams' allegations of harm as a result of *Martin's* reversal of Order No. 406 are irrelevant to a consideration of whether Order Nos. 451 and 451-A should be stayed. Any harm, as alleged by

Continued

Williams does suffer economic damages, such damages are insufficient to constitute "irreparable harm." *See, e.g., Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n.*, 259 F.2d 921, 925 (D.C. Cir. 1958). If the courts modify Order No. 451 on review, monetary adjustments may be made to make the parties whole. Finally, the long-term public interest benefits to consumers and the industry as a whole of the greater degree of market-responsiveness in the gas markets resulting from the rule outweigh any initial detriment to those few entities that benefited from a distorted market.

The amendments to the Commission's regulations adopted in this order on rehearing shall become effective upon issuance of this order except that §§ 284.225 (f)(4) and (g) and 284.226(d), involving reporting requirements, shall not become effective until July 9, 1987. In addition, the amendments to 18 CFR 270.201 shall not apply to negotiations under the good faith negotiation rule commenced by a nomination request under § 270.201(b)(1) made by the first seller before the issuance of this order.

The Administrative Procedure Act generally requires that a substantive rule be published "not less than 30 days before its effective date." 5 U.S.C. 553(d). However, there are exceptions to the advance notice requirement where a substantive rule "relieves a restriction" or where the Commission otherwise finds good cause to make the rule effective less than 30 days after publication. 5 U.S.C. 553(d) (1) and (3). There is good cause to make the amendments adopted here effective immediately. While the preamble to Order No. 451–A suggested that purchasers could renegotiate in step 2 all gas in multi-vintage contracts as those contracts existed on July 18, 1986 regardless of subsequent assignments, the regulations adopted in that order only permitted purchasers to renegotiate gas currently owned by the assignor or assignee initiating good faith negotiation. *See* the discussion at page 11. Therefore, making the amendments concerning assignments effective immediately is necessary to prevent producers from circumventing the purchaser's step 2 rights through assignments after the issuance of this order. The amendments concerning assignment also relieve a restriction on the ability of purchasers, once good faith negotiation has been initiated, to obtain renegotiation of all gas in multi-vintage contracts as of the issuance of this order regardless of subsequent assignments. The amendment concerning the upstream transportation authorization relieves a restriction on the ability of non-Order No. 436 interstate pipelines to continue upstream transportation of gas released under the good faith negotiation rule regardless of the Commission authority under which the prior transportation was performed, and the amendment concerning transportation by intrastate pipelines relieves a restriction on the ability of intrastate pipelines not desiring to become open access pipelines to transport released gas.

The information collection provisions in this rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act [38] and OMB's implementing regulations.[39] Interested persons can obtain information on these information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (Attention: Ellen Brown (202) 357–8272). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, DC 20503 (Attention: Desk Officer of the Federal Energy Regulatory Commission).

List of Subjects

18 CFR Part 270

Natural gas, Price controls, Reporting and recordkeeping requirements.

18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission is amending Parts 270 and 284, Title 18, Code of Federal Regulations as set forth below.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 270—[AMENDED]

1. The authority citation for Part 270 continues to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E. O. 12,009, 3 CFR 142 (1978); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982).

2. Section 270.201 is amended by redesignating the present paragraphs (a)(5) through (a)(7) as paragraphs (a)(6) through (a)(8) and by adding new paragraphs (a)(5) and (b)(5) and revising the redesignated paragraph (a)(7) as follows:

§ 270.201 Good faith negotiation procedures.

(a) *Applicability, definitions, and general rules.*

* * * * *

(5)(i) A first seller that validly assigns or otherwise transfers gas subject to an existing contract on or after June 3, 1987 may not request a nomination of price under the provisions of this section for any gas sold under any existing contract with that purchaser unless the purchaser's right to renegotiate, under the provisions of this section, the terms of sale of the assigned gas are unaffected by the assignment.

(ii) A first seller to whom gas subject to an existing contract is validly assigned, or otherwise transferred, on or after June 3, 1987 may not request nomination of a price under the provisions of this section for the assigned gas, unless the purchaser's right to renegotiate, under the provisions of this section, the terms of sale of all gas sold under any existing contract between the purchaser and the assignor on June 3, 1987 are unaffected by the assignment.

* * * * *

(7) Any deadline under this section for requesting a nomination of a price, or for nominating a price in response to such a request, may be extended by mutual agreement of the parties in writing. Any notice required under this section to be given before a first seller or purchaser abandons or terminates sales or purchasers may be shortened by mutual agreement of the parties in writing.

* * * * *

(b) *Requests for negotiation and nomination of price.*

* * * * *

(5)(i) The provisions of this paragraph apply when (A) a first seller validly assigns (or otherwise transfers) gas subject to an existing contract to another first seller on or after June 3, 1987 and (B) the assignor or assignee is eligible to request nomination of a price under paragraph (b)(1) of this section.

(ii) If the assignor requests nomination of a price, under paragraph (b)(1) of this section, for old gas sold under any contract between it and the purchaser, the purchaser may request nomination of a price under paragraph (b)(2) of this section for any gas which on June 3, 1987

Williams, of increased gas sales prices that may result from *Martin* would occur regardless of whether Order Nos. 451 and 451–A were stayed.

[38] 44 U.S.C. 3501–3520 (1982).

[39] 5 CFR 1320 (1986).

was subject to an existing contract between the purchaser and the assignor.

(iii) If the assignee requests nomination of a price under paragraph (b)(1) of this section for the assigned gas, the purchaser may request nomination of a price for any gas which on June 3, 1987, was subject to an existing contract between the assignor and the purchaser, but the purchaser may not request nomination of a price for any other gas.

(iv) If the assignee requests nomination of a price under paragraph (b)(1) of this section for old gas other than the assigned gas, the purchaser may not request nomination of a price under paragraph (b)(2) of this section for the assigned gas.

(v) The purchaser must address any requests for nomination of a price authorized by paragraphs (b)(5) (ii) or (iii) of this section to the first seller currently selling it the gas for which nomination of a new price is requested.

(vi) If a first seller receives a request for nomination of a price authorized by paragraph (b)(5) (ii) or (iii) of this section with respect to an existing contract for which it did not make a nomination request under paragraph (b)(1) of this section, the first seller may request under paragraph (b)(3) of this section that the purchaser nominate a price for any old gas sold under that contract, whether or not the contract was named in the nomination request of the assignor or assignee under paragraph (b)(1) of this section.

* * * * *

PART 284—[AMENDED]

3. 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. 7107–7352 (1982); E.O. 12,009, 3 CFR 142 (1978).

4. The entries for §§ 284.225 and 284.226 in the table of contents for Part 284 are revised to read as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

* * * * *

Subpart G—Blanket Certificates Authorizing Certain Transportation by Interstate and Intrastate Pipelines on Behalf of Others and Service by Local Distribution Companies

Sec.

* * * * *

* * * * *

5. Section 284.225 is revised to read as follow:

§ 284.225 Transportation by interstate and intrastate pipelines of gas released under the good faith negotiation procedures.

(a) *Applicability.* This section applies to any interstate pipeline that is required to transport natural gas under paragraph (h) of this section of the good faith negotiation procedures in § 270.201 of this chapter and to any intrastate pipeline that purchased gas immediately before its release due to termination or abandonment under § 270.201 (c), (e), or (f) of this chapter.

(b) *Blanket certificate for interstate pipelines.* An interstate pipeline is granted a blanket certificate of public convenience and necessity that authorizes firm and interruptible transportation of natural gas to any existing customer of the interstate pipeline or to any pipeline to which the interstate pipeline is interconnected, if the gas is released due to termination or abandonment under § 270.201 (c), (e), or (f) of this chapter.

(c) *Blanket certificate for intrastate pipelines.* An intrastate pipeline is granted a blanket limited jurisdiction certificate of public convenience and necessity that authorizes firm and interruptible transportation of natural gas, on behalf of any interstate pipeline or any local distribution company served by an interstate pipeline, to any existing customer of the intrastate pipeline or to any pipeline to which the intrastate pipeline is interconnected, if the gas is released due to termination or abandonment under § 270.201 (c), (e), or (f) of this chapter.

(d) *Definition.* For purposes of this section, "existing customer" means a customer with which the interstate or intrastate pipeline has a contract for the sale or transportation of gas which is in effect on the date a written contract is executed to purchase the gas for which transportation service is available under this section.

(e) *Transportation rates for interstate pipelines*—(1) *Transportation service within contract demand.* If an interstate pipeline provides transportation of gas to an existing customer under this section and, as a result, the total volumes of gas sold and transported to that customer on a firm basis do not exceed existing firm contract demand by that customer, the interstate pipeline:

(i) Must base its transportation rate for such gas on the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and § 284.8(d);

(ii) Must waive any transportation reservation fee to the extent that a customer pays for facilities associated with such transportation service through demand charges under its firm sales rate schedule;

(iii) Must credit the volumes of gas transported against any minimum commodity bill obligation; and

(iv) May recover costs, on an Mcf or MMBtu basis, associated with standing by to serve a firm sales rate schedule customer that does not reduce its contract demand, if the interstate pipeline revises its sales rate schedules on file with the Commission.

(2) *Transportation service in excess of contract demand.* If an interstate pipeline provides transportation of gas to an existing customer under this section and, as a result, the total volumes of gas sold and transported to that customer exceed existing firm contract demand to that customer, the transportation rate for such gas must be the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service.

(3) *Transportation service for other customers.* If an interstate pipeline provides transportation of gas under this section to any pipeline or customer other than an existing customer on a firm basis, the transportation rate for such gas must be the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service.

(4) *Interim rates.* If an interstate pipeline does not have a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service, the interstate pipeline must file such a rate schedule within 60 days after first providing transportation service under this section. Until such a rate schedule becomes effective, the interstate pipeline must provide the transportation service using the rate in one of the interstate pipeline's transportation rate

schedules on file with the Commission which the interstate pipeline determines covers service comparable to transportation service authorized under this section.

(f) *Transportation rates for intrastate pipelines*—(1) *General rule.* Rates and charges for transportation of natural gas by intrastate pipelines under this section shall be fair and equitable as determined in accordance with § 284.123(b) of this chapter, but the intrastate pipeline's election under § 284.123(b) shall not be subject to the conditions in §§ 284.8(b) and 284.9(b) of this chapter.

(2) *Treatment of revenues.* The Commission presumes that all revenues received by an intrastate pipeline in connection with transportation authorized under this section and computed in accordance with § 284.123(b)(1) of this chapter have been or will be taken into account by the appropriate state regulatory agency for purposes of establishing transportation charges by the intrastate pipeline for service to intrastate customers.

(3) *Presumptions.* If the intrastate pipeline is charging a rate computed pursuant to § 284.123(b)(1) of this chapter the rate charged is presumed to be:

(i) Fair and equitable; and

(ii) Not in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(4) *Filing requirements.* Within 30 days of commencement of new service, any intrastate pipeline that engages in transportation arrangements under this section 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.

(g) *Reporting requirements.* An interstate pipeline that transports gas under a certificate granted by this section is subject to the reporting requirements of § 284.223(f). An intrastate pipeline that transports gas under a certificate granted by this section is subject to the reporting requirements of § 284.126.

(h) *Terms and conditions of service.* (1) The terms and conditions of service provided under a blanket certificate granted by this section must conform to the transportation requirements of the shipper, subject to reasonable operating conditions of the pipeline and its available pipeline capacity.

(2) An interstate pipeline that transports gas under a certificate granted by this section and is not otherwise subject to the non-discriminatory access provisions of § 284.8(b) of § 284.9(b) is not required to transport on behalf of others any gas not released due to termination or abandonment under the good faith negotiation procedures of § 270.201 of this chapter.

(3) If a pipeline that transports gas under a certificate granted by this section becomes subject to the non-discriminatory access provisions of § 284.8(b) or § 284.9(b), its authority and service obligation under the certificate to transport gas purchased under a contract in effect before the pipeline becomes subject to those provisions terminates only when the contract expires or is terminated.

6. Section 284.226 is revised to read as follows:

§ 284.226 Transportation by interstate and intrastate pipelines upstream of pipelines releasing gas under the good faith negotiation procedures.

(a) *Applicability.* This section applies to any upstream interstate or intrastate pipeline that is not subject to the non-discriminatory access provisions of § 284.8(b) or § 284.9(b) of this chapter and that provided transportation of gas immediately prior to its release by any interstate or intrastate pipeline due to termination or abandonment under the good faith negotiation procedures in § 270.201 of this chapter. Such upstream pipelines were those authorized under any Commission regulation to transport natural gas, prior to the release of that gas due to termination or abandonment under § 270.201 (c), (e), or (f) of this chapter, along any line between the wellhead and the pipeline that purchased the gas immediately before its release.

(b) *Blanket certificate.* (1) Upstream interstate pipelines are granted a blanket certificate of public convenience and necessity that authorizes transportation of natural gas release due to termination or abandonment under § 270.201 (c), (e) or (f) of this chapter on behalf of any shipper to any interstate pipeline releasing gas under § 270.201 of this chapter, under the same terms and conditions as previously provided to the releasing pipeline.

(2) Upstream intrastate pipelines are granted a blanket limited jurisdiction certificate of public convenience and necessity that authorizes transportation of natural gas released due to termination of abandonment under § 270.201 (c), (e) or (f) of this chapter, on behalf of any interstate pipeline or local distribution company served by an interstate pipeline, to any pipeline releasing gas under § 270.201 of this chapter, under the same terms and conditions as previously provided to the releasing pipeline.

(c) *Transportation rates.* The rates charged by such third-party, upstream pipelines for transportation under this section shall be identical to the rates charged under any pre-existing transportation authorization for the same service previously provided to the releasing pipeline.

(d) *Reporting requirements.* An interstate pipeline that transports gas under the certificate granted by this section is subject to the reporting requirement of § 284.223(f). An intrastate pipeline that transports gas under the certificate granted by this section is subject to the reporting requirements of § 284.126.

[FR Doc. 87-12977 Filed 6-8-87; 8:45 am]
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DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972; Amendment; USS AUSTIN and USS SHREVEPORT

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Secretary of the Navy has determined that USS AUSTIN (LPD-4) and USS SHREVEPORT (LPD-12) are vessels of the Navy which, due to their special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with their special function as naval amphibious transport dock ships. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

EFFECTIVE DATE: May 28, 1987.

FOR FURTHER INFORMATION CONTACT: Captain P.C. Turner, JAGC, U.S. Navy, Admiralty Counsel, Office of the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA