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**TRANSPORTATION ON INTERSTATE PIPELINES**

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The terms of a transportation contract with an interstate pipeline may, in large part, be dictated by the FERC Gas Tariff which that pipeline has on file with the Federal Energy Regulatory Commission (Commission). Nevertheless, there are options which a shipper or potential shipper should explore in the process of contract negotiation. Certain types of certificates being issued to interstate pipelines provide substantially more latitude in negotiations than the blanket certificate issued pursuant to Section 7 of the Natural Gas Act and the regulations promulgated under Section 311 of the Natural Gas Policy Act of 1978. The optional certificate is an example. Moreover, the negotiation forum has shifted to a significant degree to proceedings at the Commission. The specific terms and conditions and the rates to which shippers will be subject when entering into transportation contracts with interstate pipelines are the subject of ofttimes protracted settlement proceedings or litigation at the Commission. Shippers (producers, marketers, and end users) may intervene and participate in these proceedings. These proceedings are, in effect, a part of the contract negotiation process.

**I.   THE NATURAL GAS ACT - HISTORICAL UNDERPINNINGS**

The Natural Gas Act covers three things: sales for resale of natural gas in interstate commerce, transportation of natural gas in interstate commerce, and companies engaging in either or both of these pursuits.[[1]](#footnote-2)1 Under Section 7 of the Natural Gas Act a company may not engage in transportation or sales for resale of gas in interstate commerce without first obtaining a certificate of public convenience and necessity-[[2]](#footnote-3)2 In particular, that Act provides:

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations....

15 U.S.C. § 717f(c) (1988).

The Act further provides:

Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefore, authorized in the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

15 U.S.C. § 717f(e) (1988).

Historically, under this scheme the applicant controls in the first instance the transaction proposed to be authorized by the Commission. The Natural Gas Act is founded on the voluntary and independent actions of business persons reflected in negotiated contracts.[[3]](#footnote-4)3 Traditionally, these private negotiations culminate in a contract which accompanies an application for certificate of public convenience and necessity when it is filed with the Commission-[[4]](#footnote-5)4 Under the Act the Commission has veto power over contracts and may attach reasonable conditions to any certificate approving them.[[5]](#footnote-6)5 While private negotiations are not dispositive of the Natural Gas Act duties of the Commission, "[t]he Commission is not justified-..in cavalierly disregarding private contracts."[[6]](#footnote-7)6

Accordingly, the Act and historical practice under it left substantial room for negotiation of contractual provisions tailored to meet the particular transportation transaction involved and to accommodate the interests of the parties and their allocation of the risks associated with the business transaction. That is not to say that contract negotiations were totally unbridled by regulatory considerations. Over the years, the Commission's regulations and the body of case law construing provisions of the Natural Gas Act and the regulations thereunder provided legal and practical constraints on the negotiation of provisions of contracts. For example, Section 4 of the Act provides that rates, charges and practices filed for jurisdictional services must be just and reasonable. The "just and reasonable" standard has been construed as providing for cost-based rates. Section 5 of the Act specifically forbids provisions of contracts which are unjust, unreasonable, unduly discriminatory, or unduly preferential.[[7]](#footnote-8)7 Under the case law, the prohibition against undue preferences and undue discrimination means that similarly situated customers or classes of customers must be dealt with in similar fashion- Differences in treatment are justified only where there are differences in customers or classes of customers.[[8]](#footnote-9)8

Another more specific prohibition provision applied during the period of active regulation of producer sales for resale in interstate commerce. Under the Commission regulations certain types of indefinite price escalator clauses were rendered inoperative.

Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a)   Provisions that change price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b)   Provisions that change a price to a specific amount at a definite date;

(b-1)   Provisions that permit a change in price to the applicable just and reasonable ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c)   Provisions that once in five-year contract periods during which there is no provision in a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings and, are in the area in the price in question: Provided further, That any contract executed on or after April 2, 1962 containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.[[9]](#footnote-10)9

After the enactment of the Natural Gas Policy Act of 1978 (NGPA),[[10]](#footnote-11)10 the Commission promulgated regulations which ofttimes required specific contractual language in order to permit a producer to collect a certain NGPA ceiling rate- For example, particular types of clauses or language were needed to collect tight formation prices under Section 107 of the NGPA[[11]](#footnote-12)11 and compression allowances.[[12]](#footnote-13)12 The Commission governed take-or-pay provisions entered into by pipelines through a policy statement establishing a rebuttable presumption that prepayments based on contracts entered into on and after December 23, 1981 with take-or-pay provisions exceeding 75% of annual deliverability would not receive rate base treatment-[[13]](#footnote-14)13

Nevertheless, there was room for negotiation of contractual provisions in transportation contracts. Indeed, prior to enactment of the NGPA, many transportation contracts typically were not included in the Volume 1 of pipeline tariffs for generically applicable services, but in Volume 2 which includes transactions specifically negotiated to fit specific factual circumstances.[[14]](#footnote-15)14

**II-   THE INFLUENCE OF THE NATURAL GAS POLICY ACT OF 1978**

On November 8, 1978 Congress enacted the NGPA which became effective on November 9, 1978. The NGPA, both because of what the statute specifically says and because of the interpretation of it, has changed the Commission's approach to transportation in interstate commerce. Two critical areas of the statute have led to this change. First, under the NGPA producer wellhead price controls were substantially phased out over a period of time. Second, Section 311 of the NGPA contains provisions permitting interstate pipelines on the one hand and intrastate pipelines on the other to engage in transportation transactions approved by rule or order of the Commission without subjecting intrastate pipelines to control and regulation under the Natural Gas Act. While these provisions were originally designed to increase gas production available to the interstate market and to eliminate the distinctions between the inter- and intrastate markets, the Commission and the courts have construed Section 311 in conjunction with phased wellhead price decontrol as indicating Congressional intent to foster a nationwide transportation network and competition in the market so that consumers of gas will have the ability to choose among alternative sources of supply and lower gas costs.[[15]](#footnote-16)15

The Commission's actions which were milestones in this march to increased competition were not many, but were sweeping their application and implications- First, in the Order No. 380 series the Commission eliminated the variable cost portion of pipeline minimum commodity bills.[[16]](#footnote-17)16 Elimination of this provision of pipeline contracts with their customers was not accompanied by elimination of pipeline take-or-pay, take-and-pay, and similar provisions contained contracts with their suppliers. As a result, customers were given substantial options to choose among alternatives, but there was some dislocation on the producer-pipeline side of the equation.[[17]](#footnote-18)17 This move was followed by Order No- 436 in which the Commission promulgated generic rules under Section 7 of the Natural Gas Act and under Section 311 of the NGPA to permit pipelines to implement on a self-executing basis transportation transactions in interstate commerce and between interstate and intrastate markets. Since Section 311 only contemplated transactions "on behalf of" certain consumers of gas, the Commission likewise promulgated regulations for a blanket certificate under Section 7 of the Natural Gas Act to permit self-implementing transportation to all consumers of gas. These new regulations were accompanied by several significant conditions. First, the transportation had to be "open access." It had to be non-discriminatory.[[18]](#footnote-19)18 It had to be accomplished on a first come, first served basis. It had as its goal promotion of competition. In its efforts to foster competition, however, the Commission has ended up with intricate regulations governing the transportation of gas in interstate commerce, some of which leave little to the negotiating imagination free from searching Commission oversight.

Interstate transportation contracts fall in at least five broad general categories today. First, there are transportation contracts entered into pursuant to generic transportation rate schedules covering firm and interruptible transportation under the Commission's open access regulations. Typically, the open access-related details respecting these contracts are carefully regulated to prevent unduly discriminatory and unduly preferential action on the part of the pipeline, particularly if the pipeline is still in the merchant function. A second broad category covers those contracts entered into under the optional certificate regulations. While the law in this area is still developing, the approach now taken by the Commission grants some latitude between pipelines and their shippers (at least if they are large, sophisticated entities) to negotiate terms of contracts so long as the pipeline bears an appropriate share of the risk of the project. A third area is transportation associated with incremental facilities which a pipeline may build on its system. Often a pipeline will offer a service through facilities to be newly constructed, and that service will be subscribed to by some, but not all, of the customers on the pipeline's system. While these services are available to a number of shippers, and are contained in Volume One of a gas pipeline's tariff, they may be more individualized because of the fact that they relate to new construction and to particular locations on a pipeline's system. There may be more negotiating leeway than is the case under a generically available open access service agreement at least on certain issues. Fourth, contracts may be individually negotiated and included in Volume 2 of the pipeline tariff. Historically Volume 2 was used for contracts that were particularized as to a transaction between two parties, and were not available to all comers. What can be done by way of Volume 2 tariff agreements is narrowing. They may be available in limited circumstances only. Fifth, contracts may be assigned pursuant to transportation assignment programs or capacity brokering programs established by interstate pipeline companies. The general terms of these programs are established by the Commission. However, there is room for negotiation at the assignment level as to rate and term. In addition, there may be room for negotiation as to what role the assignor plays and the assignee plays to comply with the capacity brokering program requirements. Such program adds flexibility to transportation in interstate commerce both for the assignor and the assignee. On the other hand, such programs may reduce interruptible transportation opportunities on a pipeline's system, and may leave certain interruptible transportation in the control of the historical customers of the system which have converted to firm transportation and utilize the assignment program.

**III.   PART 284 OF THE COMMISSION'S REGULATIONS**

**A.   Self-implementing Transactions under Section 311 and Section 7**

A certificate of public convenience and necessity is not required in order to implement transactions under Section 311 so long as the pipeline adheres to the Section 311 regulations. Section 7 self-implementing transactions require that a pipeline hold a blanket transportation certificate. The regulations applicable to both types of transactions are detailed. While there is some room for negotiation, the major "negotiation" takes place during Commission proceedings addressing the terms of the tariff and in selective discounting, discussed below.

The blanket certificate is one component of the Commission's non-discriminatory, open access transportation program.[[19]](#footnote-20)19 In particular, under Subpart G of Part 284 of the Commission's regulations, 18 C-F.R. Part 284 Subpart G (1991), any interstate pipeline may apply for a single blanket certificate authorizing the transportation of natural gas on behalf of others. A certificate issued pursuant to such application is deemed granted pursuant to Section 7 of the Natural Gas Act.[[20]](#footnote-21)20

There are numerous conditions applicable to Section 311 transportation under Subpart B and to blanket certificates issued pursuant to Subpart G. First are those standard open access conditions set forth in Subpart A of Part 284. These conditions are numerous and material to a pipeline's transportation function.[[21]](#footnote-22)21

Any rate charged for transportation under Subparts B and G must be established under a rate schedule on file with the Commission prior to commencement of service that conforms to the requirements of Section 284-7, the open access rate provisions.[[22]](#footnote-23)22 Under Section 284.7 maximum rates are to be designed so that (a) rates for service during peak periods ration capacity, and (b) rates for firm service during off-peak periods and for interruptible service during all periods maximize throughput. Also, the pipeline's revenue requirement allocated to firm and interruptible service is to be attained by providing the projected units of service in peak and off-peak periods at the maximum rates for each service.[[23]](#footnote-24)23 Thus, costs and throughput are segregated for specific services-

Except with respect to a reservation fee for firm transportation service, open access rates must be one part rates that recover the costs allocated to the service to the extent that the projected units of that service are actually purchased. The rate structure may not include a demand charge, a minimum bill, or minimum take provision or any other type of provision which has the effect of guaranteeing revenue. The rate must separately identify (unbundle) cost components attributable to transportation, storage, and gathering costs.[[24]](#footnote-25)24

Any rate must be designed to recover costs on the basis of projected units of service- Fixed costs allocated to capacity reservation for firm transportation are to be used along with the projected nominations accepted by the pipeline to compute the unit reservation fee. The remaining fixed costs and all variable costs are to be used to determine the volumetric rate computed on the basis of projected volumes to be transported. The units projected for the service may be changed only in a subsequent rate filing under Section 4 of the Natural Gas Act.[[25]](#footnote-26)25

Any rate filed for service under Subparts B and G must reasonably reflect any material variation in the cost of providing the service (1) due to whether the service is provided during a peak or an off-peak period (seasonal rates) and (2) due to the distance over which the transportation is provided.[[26]](#footnote-27)26 The Commission has clarified that the requirement for seasonal rates is also triggered by material variations in usage-[[27]](#footnote-28)27

The rates are to be cost-based. In other words, any maximum rate must be designed to recover on a unit basis, solely those costs which are properly allocated to the particular service to which the rate applies. Minimum rates must be based on the average variable costs which are properly allocated to the service to which the rate applies.[[28]](#footnote-29)28 A pipeline may not file a revised or new rate designed to recover costs not recovered under the rates previously in effect-[[29]](#footnote-30)29

As indicated above, the rate structure must include a maximum and minimum rate. A pipeline may discount the maximum rate down to the minimum rate, so long as it does so on a non-discriminatory basis.[[30]](#footnote-31)30 If a pipeline does not hold a Subpart G blanket certificate it may not charge in a transaction involving its marketing affiliate a rate that is lower than the highest rate it charges in any transaction not involving its marketing affiliate-

Compliance with Section 284.7 is the subject of numerous proceedings pending before the Commission at this time. In ***Interstate Natural Gas Pipeline Rate Design, supra*,** the Commission stated that in its attempt to implement open access, non-discriminatory transportation on an expedited basis it had not required full compliance with the rate standards set forth in Section 284.7. Thus, the Commission required that pipelines in all pending rate cases develop a record and put on the evidence with respect to their compliance with Section 284.7 or explain and support any deviations therefrom. Generally, the burden of proof is on the pipeline company, with changes in existing rate design to be applied on a prospective basis. In its policy statement the Commission did not indicate what the results should be on the merits, but rather listed those issues which must be addressed in any record developed pursuant to the policy statement. In particular, pipelines and other parties were directed to address (i) whether the modified fixed variable cost classification and rate design methodology, including the annual demand charge (D-2), ought to be retained or modified; (ii) whether material variations in cost or usage require seasonal rates; (iii) whether rates are appropriately mileage sensitive; (iv) the appropriate rates for backhauls and exchanges; (v) maximum rates for interruptible transportation (100% load factor or other); (vi) throughput levels and how such levels ought to reflect rate discounting; (vii) whether capacity adjustments ought to be made in light of changes in rates for peak day service; and (viii) whether unbundling of services and rates is appropriate. A few settlements have been approved by the Commission, although they are principally on smaller pipelines. Several major pipeline rate cases have now gone through litigation on the policy statement issues, initial decisions have been issued, and they are ripe for decision by the Commission.[[31]](#footnote-32)31 Differing results have been reached based on the specific facts and circumstances of the cases-[[32]](#footnote-33)32

An interstate pipeline providing transportation service under Subparts B and G must offer transportation service on both a firm and an interruptible basis.[[33]](#footnote-34)33 Service on a "firm basis" means service that is not subject to a prior claim by another customer or another class of service and which receives the same priority as any other class of firm service-[[34]](#footnote-35)34 Interruptible service means that the capacity used to provide the service is subject to a prior claim and receives a lower priority than other classes of service.[[35]](#footnote-36)35

A major provision of the blanket certificate is that both firm and interruptible transportation must be provided on a non-discriminatory open access basis- This is defined in separate regulations applicable to firm service and interruptible service, respectively, as providing service "without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind."[[36]](#footnote-37)36 Reasonable operational conditions may be imposed for both types of service provided they are filed as part of the transportation tariff.[[37]](#footnote-38)37 A pipeline may impose a reservation fee or charge on a shipper as a condition for firm service- Such fee may not recover any variable costs or any fixed costs in excess of those that would be recovered by using the same ratemaking methodology used for determining the demand charge in the pipeline sales rate.[[38]](#footnote-39)38 No reservation fee may be charged for open access interruptible transportation.[[39]](#footnote-40)39

Pipelines providing service under Subparts B and G are not required to provide transportation service for which capacity is not available or which would require the construction or acquisition of any new facilities-[[40]](#footnote-41)40 The Commission has reserved the right, however, to require construction of facilities to remedy a case of undue discrimination, ***i.e*.,** a situation in which a pipeline has constructed for one shipper but not for another similarly situated shipper.[[41]](#footnote-42)41

There is an important provision relating to conversion to a firm transportation from firm sales-[[42]](#footnote-43)42

Subpart G is not supposed to preclude an interstate pipeline from applying for an individual certificate of public convenience and necessity for any particular transportation service.[[43]](#footnote-44)43 However, often the Commission has required pipelines to perform transactions under the blanket certificate rather than pursuant to individual Section 7 certificates-[[44]](#footnote-45)44

The certificate granted under Subpart G is for transportation services only. Facilities authorization must be acquired pursuant to a Section 7 blanket certificate under Subpart F of Part 157, pursuant to Section 157.208 (1990) or pursuant to Sections 157.221(b) and 157.205 (1990).

Under the blanket certificate a pipeline has flexible receipt point authority in that it may at the request of a shipper and without prior notice reduce or discontinue receipts of natural gas at a particular receipt point from a supplier and commence or increase receipts at a particular receipt point from that supplier or any other supplier provided that the total volumes received by the pipeline following any such reassignment must not exceed the total volume of gas that the interstate pipeline may transport under a certificate granted under Subpart G.[[45]](#footnote-46)45 In addition, an interstate pipeline authorized to transport gas under a Subpart G blanket certificate may, at the request of the shipper and without prior notice, reduce or discontinue deliveries at a particular delivery point and commence or increase deliveries at a particular delivery point provided the total natural gas volumes delivered following such reassignment must not exceed the total amount of natural gas the interstate pipeline is authorized under the blanket certificate to transport on behalf of the shipper-[[46]](#footnote-47)46

An interstate pipeline issued a blanket certificate may transport natural gas on behalf of another interstate pipeline under the terms and conditions applicable to transactions under Subpart B of Part 284. As discussed, the principal provisions of Subpart B are (i) those spelled out in Subpart A of Part 284 described above, (ii) detailed reporting requirements, and (iii) the requirement that rates must comply with Section 284.7 also described above.

Pursuant to Section 284.223 an interstate pipeline issued a blanket certificate may for a period of up to 120 days transport gas for any shipper for any end use by that shipper or any other person without prior notice to the Commission.[[47]](#footnote-48)47 An additional 120 day transportation authority is permitted only if after the commencement of the previous 120 day transportation term and prior to the commencement of the new 120 day transportation term the transportation arrangement was authorized under the prior notice procedures of 18 C-F.R. § 157.205 (1990). The regulations prescribe the details of the prior notice filings, of the reporting requirements, and of notifications of termination.

Under 18 C.F.R. § 284.224 (1991) a local distribution company served by an interstate pipeline or any Hinshaw pipeline may apply for a blanket certificate. Sections 284.225 and 284.226 provide the terms and conditions under which interstate pipelines transport gas released pursuant to the good faith negotiation rules promulgated by the Commission in Order No. 451.

**B.   Commission Policies on Open Access Transportation Tariffs**

The Commission has been extremely active in reviewing proposed open access tariff sheets and routinely alters them in many respects in the course of its review. An entire body of case law is devoted to the subject of the terms and conditions applicable under a blanket certificate of public convenience and necessity. Set forth below are some of the recurring themes and rulings in these orders dealing with applications for blanket certificates.

**1.   Waivers**

The Commission has been sensitive to provisions of rate schedules which permit the pipeline to waive any provision of the tariff or to make a determination "in the pipeline's sole discretion." Generally, in order to avoid the possibility of discrimination the Commission has required tariff language that specifically spells out the terms and conditions upon which waivers will be granted and indicates that waivers will be granted on a non-discriminatory basis.[[48]](#footnote-49)48 Indeed, the Commission has on occasion actually rejected a pipeline's request for waiver where it has failed to specify the provisions it seeks discretion to waive and why such waiver is appropriate-[[49]](#footnote-50)49

**2.   Receipt Point and Delivery Point Flexibility**

The Commission has required receipt point and delivery point flexibility in light of complaints against a proposal to deem any request for a new receipt and delivery point, an increased MDQ at any point, or an increase in the aggregate MDQ, as constituting a request for new service.

Shippers need maximum receipt point flexibility in order to rely on transportation and direct purchases from producers instead [sic] purchases from traditional pipeline suppliers. For this reason, we will grant Hadson's request that the Commission require Trailblazer to file revised tariff sheets which permit a firm or interruptible shipper (1) to switch to new receipt points not previously designated in the service contract and (2) to adjust capacity in the shipper's existing receipt points as long as the change of receipt points does not "bump" any shipper currently receiving firm services at that receipt point.[[50]](#footnote-51)50

In this regard, the Commission has permitted bumping of interruptible service by firm, but has imposed upon the pipeline a 24-hour notice requirement to the interruptible customers-[[51]](#footnote-52)51 In permitting receipt point flexibility, the Commission has required the specification of how other shippers' priorities would be affected.[[52]](#footnote-53)52 Also, the Commission has held that a pipeline may limit the sum of a shipper's receipt point volumes to the maximum transportation contract volume if it allows firm shippers to establish additional interruptible receipt points-[[53]](#footnote-54)53

As to delivery point flexibility, the Commission has held that a change in delivery point results in a new service, requiring a new or amended contract. The shipper thus loses its place in line for first come, first served purposes as to the new service accommodated by the change in delivery point.[[54]](#footnote-55)54

**3-   Changes in Flexible Rates**

The Commission on occasion has addressed policies affecting changes in rates within the maximum rate-minimum rate band. The Commission has required that in instances in which a higher rate than that previously in effect is established as a result of the change the pipeline must give advance notice and allocate capacity by price.[[55]](#footnote-56)55 A change pursuant to a generally applicable flexible rate provision cannot override a contractual commitment-[[56]](#footnote-57)56

**4.   Regulatory Fees**

A pipeline is entitled to reimbursement of fees that are required by a regulatory agency to implement service to a particular shipper under an applicable rate schedule and which are not generally applicable regulatory fees which are already incurred and recovered as regulatory expenses pursuant to a pipeline's Section 4 filings.[[57]](#footnote-58)57 Pipelines may also charge incidental charges, such as new facilities costs and any other charges as may be authorized by the Commission-[[58]](#footnote-59)58 Provisions to charge must be contained in the tariff.

**5.   Balancing of Gas**

One provision which is inevitably the subject of protests and comments by shippers is that dealing with the balancing of gas and the assessment of penalties for imbalances or unauthorized tenders or takes. The Commission has held that scheduling penalties should be assessed on the difference between the volumes the shipper nominated to be tendered for receipt by the pipelines and the actual volumes tendered. It has held that the scheduling penalty amount should be the interruptible transportation rate for volumes that deviate from tolerances permitted by the Commission.[[59]](#footnote-60)59

Balancing penalties are to be assessed on the difference between volumes tendered and volumes received by the pipeline- In addition, penalties apply only to volumes in excess of the tolerance levels. Penalties may not be based on the difference between volumes nominated and taken. The Commission has held that a $1 per Mcf monthly imbalance penalty is acceptable for both over-deliveries and under-deliveries since less than the maximum penalties permitted.[[60]](#footnote-61)60

Further, the Commission has held that a pipeline may impose a penalty on excess gas that the shipper continues to tender after the pipeline has given the shipper notice that it must take corrective action within 48 hours.[[61]](#footnote-62)61

**6-   Additional Facilities Charge**

Under the open access regulations pipelines are not required to build new facilities, at least in the absence of a finding of harm related to undue discrimination. However, the Commission has required that the pipeline specify the criteria used to determine whether it would build new facilities or not. Further, the Commission has permitted the pipeline to require that a shipper reimburse it for the cost of facilities; provided, however, the pipeline must indicate the criteria for determining when to require reimbursement or not.[[62]](#footnote-63)62 The Commission has also required that a pipeline spell out how it would implement provisions (if it chose to include this option) allowing a shipper to make full payment by an installment or a monthly payment option-

The payment must not be designed such that it is tantamount to a self-implementing incremental rate outside the limits of the approved maximum/minimum rates for transportation and containing components for operation and maintenance expenses, administrative and general expenses, depreciation, return and taxes, or other cost-of-service derived items. Such an additional rate would be in violation of Section 4 of the NGA.[[63]](#footnote-64)63

The costs which may be reimbursed are the capital costs of the facilities, tax effects related thereto, and the appropriate Commission approved interest expense for the time value of money-[[64]](#footnote-65)64

**7.   Authorized Overrun Service**

Authorized overrun service has also been the subject of numerous rulings by the Commission. The Commission has required specific operational criteria for a pipeline's decision to receive, transport, and deliver authorized overrun volumes. It may not include in its tariff a provision which relies in this regard on the pipeline's "sole judgment."[[65]](#footnote-66)65

**8-   Use-or-lose**

A typical provision in a blanket certificate is a use-or-lose provision whereby if a shipper fails during any consecutive period of time (**e.g.** three months) to utilize a specified average daily flow then the pipeline may unilaterally terminate service or reduce the shipper's MDQ.[[66]](#footnote-67)66

**9-   Open Season**

The Commission has imposed open season provisions on pipelines so that new shippers may have an equal opportunity to gain access to remaining firm and interruptible capacity.[[67]](#footnote-68)67

**IV-   OPTIONAL CERTIFICATES**

The optional certificate procedure in particular has led to individual contract negotiations. In a series of orders dealing with applications to authorize the construction of facilities and transportation of gas principally for the enhanced ***oil*** recovery (EOR) market in California, the Commission has permitted individual transactions, with a principal focus on the negotiation of the applicable reservation fee for the particular service involved. The fate of these individual contracts shows that there is room for negotiation whereas, as evidenced by the description above, the Commission's generically applicable open access rules, regulations, and orders simply do not permit much latitude.

The optional certificate procedure was promulgated into the regulations with Order No. 436 and continued in the regulations with Order No. 500. The goals of the program, as stated in Order Nos. 436 and 500 are:

**(1)   To provide the full benefits of competition to consumers by facilitating easier entry and exit from services;**

**(2)   To ensure the most efficient scale for facilities by removing certification as a barrier to entries; and**

**(3)   To provide incentives for competition where none exists by maximizing the use of alternative market access for producers and consumers.**[[68]](#footnote-69)68

The optional certificate procedure was developed substantially in the WyCal, ***Kern*** River, and Mojave orders- In a key ruling, in ***WyCal I***[[69]](#footnote-70)69 and ***Mojave I***[[70]](#footnote-71)70 the Commission required that optional certificate applicants make the lowest negotiated reservation fee available to all customers on a non-discriminatory basis-

The scope of contract negotiations to be provided to the pipelines and their shippers was discussed at several points in the WyCal/***Kern*** River/Mojave orders. When ***Kern*** River made its compliance filing[[71]](#footnote-72)71 the Commission was required to deal with the issue procedurally- ***Kern*** River proposed to provide service to thirteen customers under the tariff and to the remaining four under self-contained service agreements. The self-contained service agreements contemplated that the tariff itself would not apply. Rather, only those portions of the tariff as modified through negotiations which were restated in the service agreement would apply. In addition, the thirteen service agreements that were executed under the tariff contained certain provisions which purported to modify the tariff as it applied to particular customers.

The Commission agreed with ***Kern*** River's contention that the compliance filing and service agreements were within the scope of the certificate due to the Commission's authorization to negotiate the allocation of risk. However, the Commission had this to say regarding such service agreements:

The Natural Gas Act and the Commission's regulations require every pipeline to file schedules with the Commission showing all rates and charges for jurisdictional services, as well as all classifications, practices, rules, and regulations affecting such rates. A regulated pipeline is prohibited from providing service on any other terms. (footnote omitted). Accordingly, in order for ***Kern*** River to modify service pursuant to the negotiated agreements, ***Kern*** River must modify the tariff to accommodate the service agreements within the provisions of its General Terms and Conditions. Of course, only those terms and conditions that are in the parameters of the certificate can be included in the tariff.[[72]](#footnote-73)72

The Commission also clarified the issue from a procedural standpoint in ***Kern River Transmission Company*-**[[73]](#footnote-74)73 In connection with the initial rates, the Commission required that Mojave make a tariff filing three years after its in-service date either justifying its existing rates or proposing alternative rates to be effective no later than three years after the in-service date. It stated again, however, that the previously negotiated reservation fees would not be subject to review and that any rate adjustment would have to be made to the usage charge.[[74]](#footnote-75)74 Second, the Commission addressed a request from Mojave that it clarify Mojave's ability to negotiate a different "rate form-" It stated:

The Commission will clarify its prior order. Mojave is free to negotiate terms and conditions with shippers, provided such terms and conditions are consistent with the parameters set forth in the tariff for the particular service. Any negotiated terms and conditions, including "rate forms", which require a change to the tariff must be authorized by the Commission in an appropriate Section 4 proceeding regardless of whether the rates that result from the application are between the approved maximum and minimum rates. Further, such negotiations must be conducted on a non-discriminatory basis.[[75]](#footnote-76)75

Because of these Commission-imposed procedural requirements and the Natural Gas Act requirement of non-discriminatory treatment, each negotiated agreement may effectively provide the lowest common denominator for the next agreement- On the other hand there are specifies which may apply to some but not all shippers. For example, some shippers may be transporting gas for use in cogeneration facilities, with different load patterns. Others may be transporting for more general use, including resale into a market characterized by different types of end use, from residential to industrial.

The Commission addressed individual contract negotiations substantively in ***Wyoming California Pipe Line Company***.[[76]](#footnote-77)76 There it stated:

Before addressing the arguments raised by the parties, we will clarify the elements that must be present in order to satisfy the assumption of risk provision contained in the optional certificate procedures- Whether or not the rate design might be characterized as modified fixed variable is not the issue. The key element underlying the assumption of risk provision is that the risk of the project cannot be borne by existing customers. As such, under no circumstances can the risk of the project be shifted or allocated to existing customers. Next, a sharing of the risk can be negotiated between the applicant and the customers for the service so long as the customers are willing customers, and the negotiation processes at arm's length.

The reservation fee established in an optional certificate proceeding is a maximum reservation fee, and the pipeline and its customers are free to negotiate a reservation fee up to that level.[[77]](#footnote-78)77

The Commission indicated as areas for negotiation a higher reservation fee with a lower usage fee, a higher reservation fee in return for a higher priority in contracting for firm capacity on the pipeline, and a priority based on term of the contract assuming the same reservation fee is agreed to-

The Commission further stated:

Future rate levels can change as a result of changes in the cost. Any such changes in the rates would stem from either Section 4 or Section 5 proceedings. Although we cannot bind the actions of future Commissions, it is our intent that the negotiated rate design would not be subject to change in a future Section 4 or Section 5 rate proceeding, either by the applicant or by the Commission, because that rate design reflects the assignment of risk agreed to by the parties in order to construct the project.[[78]](#footnote-79)78

The Commission clarified that an optional certificate applicant could file under Section 4 of the Natural Gas Act to increase rates associated with an increase in costs, but the negotiated rate design would not be open to change-[[79]](#footnote-80)79 Presumably, however, if the parties were in agreement as to a change in rate design such a change would be permissible so long as it did not allocate costs to others.[[80]](#footnote-81)80

Finally, the Commission addressed a request that it clarify the scope of contract terms that may be negotiated with the enhanced ***oil*** recovery customers- In connection with this request, ***Kern*** River noted that traditionally the only terms in a service agreement that are individually negotiable are discounts from the maximum rates, the length of the contract, the volume to be transported, and receipt and delivery points. The Commission stated as follows:

The Commission believes that in this proceeding that WyCal will be negotiated with sophisticated customers in the EOR market place. To the extent that these customers enter into negotiations with WyCal, it will be on equal footing. The Commission perceives these customers to be willing customers, capable of turning elsewhere for their energy needs should WyCal not offer them service at competitive prices with attractive terms and conditions. Moreover, WyCal's rates are designed such that WyCal is assuming the appropriate economic risk in the project.

It is in this context that we clarify that the scope of contract terms that are negotiable may be broad. For example, WyCal may negotiate a sharing of the risk with the potential customers, since in this case the customers are willing customers rather than captive ones. Although WyCal may not insist on minimum firm transportation volumes or on a minimum length of contract, all other things being equal, contracts for longer terms would have a higher present value and therefore a higher priority. As such, WyCal may strive to negotiate for such contracts.[[81]](#footnote-82)81

The Commission once again addressed the scope of negotiation in ***Mojave Pipeline Company***, Order on Compliance Filing and Clarifying Prior Order, Docket Nos- CP89-1-006 and CP89-2-005, issued August 13, 1991. Its order clarifies the scope of negotiation and the interrelationship of that negotiation with the Commission's optional certificate regulations and orders and with Section 4 of the Natural Gas Act. On rate matters, the Commission will prohibit any provisions which it sees as a means of evading the general restrictions placed on the optional procedure rate. For example, Mojave had negotiated a cap on its transportation charge which escalated over time. In addition, certain of the service agreements contained provisions allowing the banking of such increases to the extent not collected currently for inclusion in future rates. The Commission found this rate mechanism inconsistent with the flat rate that it had approved in the Mojave certificate order and required the elimination of the escalations and banking provisions. It did, however, state that rates may be changed in a Section 4 proceeding for prospective treatment. In that regard, Mojave had negotiated discounted reservation fees which excluded the return on equity. The Commission found that such exclusion was permissible, but put Mojave on notice that if it did not achieve its projected throughput it could not at a later approach the Commission to recover foregone revenue related to its equity return. It could, however, file under Section 4 to include its return on equity in its reservation fee on a prospective basis because the original Mojave order permitted return on equity to be included in the reservation fee. Finally, the Commission held that rates may not be developed for particular service agreements that reflect other than the depreciation life approved in the optional certificate order for the pipeline.

The Mojave service agreements for certain of the shippers included rights of first refusal on additional firm capacity which became available over time. The Commission required removal of these provisions on grounds that they circumvented the first come, first served principle underlying the queue which Mojave was utilizing in its tariff for firm transportation service.

The service agreements contained provisions which stated that the terms of the service agreement controlled to the extent inconsistent with the tariff. In a third major ruling, the Commission found this unacceptable and required Mojave to remove from the service agreements provisions which indicated that the service agreements took precedence over the tariff, the Mojave certificate order, or the Commission's Rules and Regulations.

Thus, the scope of negotiation under the optional certificate procedure appears to include those matters which traditionally would be negotiable (volumes, term, point of delivery), those matters relating to the allocation or sharing of risks, and those matters which are specifically designated in the Commission orders as being available for negotiation, such as payment in the event of force majeure conditions. Specifically excluded are those items listed by the Commission as specifically excluded, such as the capacity assignment program, insistence on minimum duration of contract, and insistence on minimum volume. Neither party can negotiate around the Commission optional certificate orders. If a rate change is not within the parameters of the certificate a rate filing is necessary.

What falls in the category of "risk allocation" or "risk sharing" is not crystal clear.

**V.   INCREMENTAL SERVICES**

Some pipelines have been successful in the last 10 years in marketing services on an incremental project basis. Pipelines plan an incremental expansion of a facility be it looping, mainline expansion, compression, storage, or a combination thereof, and market it to their customers. The particular program may meet the needs of some, but not all, of the customers on the system. For example, some customers may have a great need for storage and associated transportation to satisfy peak day needs. Others may look as storage as a means of reducing the cost of their gas supplies overall. These services, subscribed to by a limited number of customers, are the subject of an application for a certificate of public convenience and necessity filed with the Commission. Because they are incremental services tailored to meet the needs of a limited group of customers, typically there are provisions which are unique to them.

An area which has been the subject of much controversy in recent years relating to incremental services is the rate applicable to such service. Many pipelines were successful in reaching agreement with their customers on a full fixed variable or a 100% demand rate for the services to be performed through newly constructed incremental facilities. In part, such rate recognized the capital intensive nature of such facilities and the financial backup needed for them. The Commission in recent years has consistently rejected this contractual arrangement and imposed instead the cost classification and rate design utilized on the pipeline system as a whole, usually the modified fixed variable method predominant on most interstate pipelines.[[82]](#footnote-83)82

A large number of these projects were filed with the Commission in response to its Northeast Open Seasons invitation- The Northeast Open Seasons was a proceeding in which the Commission recognized that there were additional markets to be served in the northeast by gas and, largely to avoid the delay inherent in comparing competitive applications under the Ashbacker doctrine, set a deadline for certificate applications to be considered simultaneously.[[83]](#footnote-84)83 Many of these projects were negotiated on a 100% demand basis utilizing a system-wide return on equity. Initially the Commission rejected the 100% demand rate approach and instead imposed the modified fixed variable method of cost classification and rate design, placing the pipeline more at risk and creating the possibility that shippers would in fact utilize lower cost transportation rate schedules to transport gas through the newly constructed facilities than had been contemplated.[[84]](#footnote-85)84

Because some of the gas associated with these projects was to be imported from Canada, the applications were caught up in a controversy over fair and equitable treatment of domestic supplies of gas versus Canadian supplies- In a reverse of its previous position, on June 21, 1991, the Commission issued numerous orders on rehearing permitting the 100% demand charge rate as an initial rate.[[85]](#footnote-86)85 In so doing, it pointed out that it would be looking at enhanced fixed variable and 100% demand rates as rate methodologies to ensure the fair and equitable treatment of domestic supplies of gas versus Canadian supplies in its Notice of Proposed Rulemaking to be issued in Docket No. RM91-11.[[86]](#footnote-87)86

The June 21, 1991 Orders on Rehearing mark a revival of the contractual basis for transportation transactions at least in some instances- The Commission announced that it would honor contractual provisions on rate design unless it was unreasonable to do so as might be the case if a pipeline had exercised monopoly power in extracting an agreement to a 100% demand charge or had engaged in other marketing abuses. In the certificate proceedings before it, however, the Commission found that there was no evidence that the shippers had done anything other than follow their own legitimate business concerns in agreeing to the 100% demand rate. Accordingly, it permitted initial rates equal to a 100% demand charge. However, the Commission at the same time reduced the return on equity for services to be rendered through the incremental facilities by 25 basis points from that return on equity that a pipeline enjoyed under the modified fixed variable method of cost classification and rate design. It did so it said because "theoretically" a pipeline's risk was reduced by 100% demand rate billing. Rehearing applications have been filed of the Commission's orders on this issue. Further, the matter will clearly be examined in Docket No. RM91-11. Finally, the issue also may be examined in individual pipeline rate cases if the pipeline moves to change its initial rates or in an appropriate Section 5 proceeding brought on complaint of the initial rate.

**VI.   INDIVIDUAL SECTION 7 APPLICATIONS**

With the advent of the Part 284 regulations and the blanket certificate, the areas in which true negotiation can occur in a transportation contract have been narrowed. The parties may choose to file pursuant to Section 7 on a case-specific basis, rather than turning to the generic regulations. Section 224.221(e) of the Commission's regulations specifically states that acceptance of a blanket certificate under Part 284 is not intended to prohibit pipelines from filing for case-specific certificate applications. In fact, however, the Commission has narrowed what pipelines may actually pursue pursuant to a case-specific Section 7 certificate by requiring that pipelines perform pursuant to the blanket certificate unless they can show exceptional circumstances meriting individual certificate treatment. For example, it has stated that it will consider a Section 7 certificate in cases in which substantial new construction is involved.[[87]](#footnote-88)87 It has expressed the view that use of an individual certificate may be appropriate in which tariff sheets involving the allocation of transportation rights have not yet been filed-[[88]](#footnote-89)88 Some have argued that the Commission is forcing the pipelines into transactions pursuant to Part 284 under which most of its terms are dictated by the Commission in advance.

Of course, even without its regulations, the Commission could and still does establish many of the guidelines for transportation on a case-by-case basis with single precedents ofttimes applied unwaveringly in other cases to establish tariff sheets under blanket certificate. As a result, pursuing a case independently of the blanket certificate and the Part 284 regulations may provide only a margin of additional latitude in individual negotiations.

**VII.   AREAS FOR NEGOTIATION**

**A.   The Transportation Contract**

**1.   Typical Provisions**

A pipeline tariff includes three sections which form the "transportation contract." First, there is the rate schedule. A rate schedule is defined as a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the Commission's jurisdiction and all of the terms, conditions, classifications, practices, rules and regulations affecting such rate or charge.[[89]](#footnote-90)89 The term also is defined to include specific contracts under so-called X-rate schedules-[[90]](#footnote-91)90 The rate schedule is to contain a statement of the rate or charge and all the terms and conditions governing the application as follows:

**(a)   Title (designation and statement of the type of classification of service),**

**(b)   Availability (including geographic zone, if necessary),**

**(c)   Applicability and character of service,**

**(d)   Statement of rate,**

**(e)   Minimum bill (including a statement that there is no minimum bill if none is provided),**

**(f)   Other major provisions such as determination of billing demand, contract demand, heating content, and measurement base either separately or by incorporation by reference of the applicable General Terms and Conditions, and**

**(g)   The applicable General Terms and Conditions.**[[91]](#footnote-92)91

The General Terms and Conditions contain provisions which apply to all or any of the rate schedules and which may be more conveniently arranged in a separate section of the tariff-[[92]](#footnote-93)92 Finally the service agreement is in fact the form or unexecuted copy of the service agreement which provides for the insertion of such items as the name of the purchaser, the service to be rendered, the area to be served, the maximum delivery obligation, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and the identification of any prior agreements being superseded.[[93]](#footnote-94)93 The effective tariff and executed service agreements must be on file with the Commission in order for the pipeline to charge the rates or impose any of the other terms and conditions permitted by such tariff and executed service agreements on the shipper-[[94]](#footnote-95)94 Filings made to change the tariff, executed service agreement, or parts thereof must follow the details set out in 18 C.F.R. § 154.63 (1990).

Examples of a firm transportation rate schedule for open access transportation, along with the form of service agreement is set forth in Appendix A hereto. An example of a rate schedule, form of service agreement, and executed service agreements for optional certificate service is set forth in Appendix B. As required by the regulations a firm transportation rate schedule generally includes a statement of the availability of the service, the applicability and character of service, data requirements for valid requests for firm transportation, rates (including overruns and imbalance charges), scheduling of receipts and deliveries, delivery pressure, a statement regarding impairment of receipts and deliveries, other operating conditions, general provisions relating to points of receipt, general provisions relating to measuring equipment, a statement concerning governmental authorizations necessary for performance, a statement as to the general determination of deliveries under the firm transportation rate schedule, provisions relating to transportation on the Outer Continental Shelf Lands Act pursuant to Order Nos. 509 and 509-A, provisions governing capacity brokering or transportation assignment, and an incorporation of the General Terms and Conditions of the tariff.

The General Terms and Conditions generally include definitions, provisions permitting election among rate schedules, quality provisions, details respecting measurement and measuring equipment, provisions concerning billing and payment, provisions on possession of gas and warranty of title to gas, pressure, force majeure provisions, generally applicable curtailment provisions, and generally applicable rate provisions, such as transportation and compression cost trackers and take-or-pay surcharges. The typical Form of Service Agreement set forth in Appendix A contains a scope of agreement which sets out (a) the applicable transportation quantities, (b) the term of agreement, again to be negotiated although some settlements require minimum contract commitments, and (c) a general incorporation of the rate schedule, particularly as regards rates. The rate article will typically include so-called "Memphis clause" which outlines what changes in rates and other terms and conditions of service a pipeline may unilaterally change by way of making a filing with the Commission. It also typically permits the other party to the contract to challenge and protest any proposed changes. Many pipelines include this provision in the service agreement itself because of the greater contractual nexus provided by the executed form of service agreement. The service agreement also designates the points of receipt and delivery and delivery pressure. It may contain provisions permitting the extraction of natural gas liquids. It includes references to the applicable state law to govern the interpretation of the contract. Finally it typically describes the relationship with any other contracts that are on file with the Commission.

The Appendix B optional certificate form of service agreement and executed service agreement shows the leeway built into the optional certificate procedure negotiation.

Normally the Form of Service Agreement sets out blanks for terms that are to be negotiated. In deleting a provision in the Form of Gas Inventory Charge Sales Agreement that provided that the buyer would pay seller in accordance with its Rate Schedule on file with the FERC from time to time, the Commission stated:

El Paso is therefore required to amend the language in the three items above so that anything that could be negotiated in the contract does not appear in the Rate Schedule or in the General Terms and Conditions part of the tariff. However, the contracts will need to be filed.

Mimeo at 87. ***El Paso Natural Gas Company*,** Docket Nos. RP88-44, ***et seq*.** Order Granting in Part and Denying in Part Requests for Rehearing and Clarification and Terminating Certain Proceedings, issued August 14, 1991. But see ***Mojave*,** supra.

**B.   Pricing**

Ironically, one of the impacts of the move to deregulation at the wellhead and increased competition at the pipeline level has been increased control over the terms and conditions of service, but with additional leeway given in the matter of price of services that did not exist previously. In particular, the Commission has interpreted the combination of wellhead decontrol embodied in the NGPA and Congressional passage of the Natural Gas Wellhead Decontrol Act of 1989[[95]](#footnote-96)95 as permitting the determination of natural gas prices in an open marketplace so long as that marketplace is "workably competitive" consistent with the statutory standard contained in the Natural Gas Act that rates be just and reasonable-[[96]](#footnote-97)96 This concept has become the standard in determining market-based gas inventory charges.[[97]](#footnote-98)97 Under this concept the Commission has even approved an arbitration standard when parties are unable to agree on price that includes a guideline that the price to be determined by the arbitrators "will, among other things, compensate [pipeline] for the value of providing continued long-term gas supplies, on terms and conditions consistent with a swing service-"

Whether reliance on contractual negotiation will ultimately be found consistent with the Natural Gas Act is open to question. On the one hand, prior judicial decisions have held that the Commission has leeway in setting rates.[[98]](#footnote-99)98 Non-cost factors may be taken into account in setting rates under the Natural Gas Act-[[99]](#footnote-100)99 On the other hand, the Supreme Court appeared to reject the attempt to "deregulate" prices in favor of determination of prices by market forces in addressing small producer regulations.[[100]](#footnote-101)100 Such decisions predated current attempts to ensure competitive markets, however-

While exhibiting leeway in the regulation of the gas cost component of rates, the Commission has held that because a pipeline would continue to have a monopoly over transportation even under the new regime the Commission will continue to regulate transportation rates, terms and conditions in a traditional manner.[[101]](#footnote-102)101 However, under open access transportation a pipeline must establish a minimum/maximum rate- It may discount between those rates. Individual discounts may be negotiated, although the restriction on undue preferences and undue discrimination applies.

Selective discounting was a key issue in the promulgation of Order No. 436. In Order No. 436, Docket No. RM85-1-000, issued October 9, 1985, the Commission addressed the legal authority for selective discounting. Finding that there was no "per se" rule under the Natural Gas for determining when a preference or advantage was "undue" or a difference in rates "unreasonable", the Commission cited the general rule that discrimination is "undue" when there is a difference in rates or service among similarly situated customers that is unjustified, whether by differences in the costs of providing the service or by some other legitimate factors. Its review of the cases revealed that the finding of undue discrimination was predicated on actual or potential harm to the customer not qualifying for the discriminatory treatment. In each of the cases researched the Commission found that the advantage to one customer came at the expense of some other customer. Citing to ***Transcontinental Gas Pipe Line Corporation***, 28 F.P.C. 979 (1962), the Commission found that the touchstone in analyzing whether discrimination is undue in the rate context is whether or not the pipeline was fully at risk for undercollections. Accordingly, it found that generally speaking permitting a pipeline to selectively discount would not result in rates in violation of the non-discriminatory requirement of Section 4(b) of the Natural Gas Act so long as the ceiling rate and the minimum rate were properly designed. It found that its maximum and minimum open access rate restrictions met this standard. First, ceiling rates would be fully allocated, cost justified, just and reasonable rates. Second, floor rates would be no less than the average variable cost of the pipeline in the relevant period. This floor equates to the economic test ordinarily used for determining when discounted pricing becomes predatory pricing within the meaning of the antitrust laws. Third, the Commission had structured the rates to prevent a pipeline from requiring a captive customer to cross-subsidize a discount to a competitive customer by requiring that rates be established based on projected units of service.

In further support of selective discounting, the Commission found that the court's analysis in ***Sea-Land Service v. ICC*,** 738 F.2d 1311 (D.C. Cir. 1984) applied. There the court found that unique competitive conditions could justify different discounts without violation of non-discriminatory rate prohibitions.

To protect against any further problems the Commission required pipelines to file selective discounts and stated it would entertain complaints under 18 C.F.R. § 385.206 from any party which believed that a particular discount violated the non-discriminatory provisions of the Natural Gas Act.

Selective discounting survived court review in ***Associated Gas Distributors v. FERC*.**[[102]](#footnote-103)102

Selective discounting has been found applicable to transportation under blanket certificates- In ***ANR Pipeline Co***., 55 F.E.R.C. ¶ 61,415, at 62,232 (1991), the Commission held Texas Gas could not discount the rates it charges its affiliate Transco to transport gas through expanded facilities approved in this order. The new facilities are to move gas from Texas Gas' system in Texas and Louisiana to CNG Transmission's facilities in Lebanon, Ohio which will transport the gas and deliver it to Transco in Leidy, Pennsylvania for delivery through Transco's system in the Northeast. Texas Gas and Transco insisted that because they are open access pipelines, Texas Gas should be able to discount so that Transco could compete with other transporters that deliver gas in the Northeast. The Commission rejected this argument because Texas Gas had sought "traditional Section 7(c) authorization for this service" as opposed to "self-implementing transportation under its blanket certificate" and that it was contrary to Commission policy to equate the two. The Commission noted that Texas Gas would use the increased capacity to transport gas only for Transco and not for any shipper under its blanket certificate. The Commission said that this was not the type of situation in which it had allowed the benefits of open access in the past.

The Commission is reviewing its position on selective discounting in the context of throughput under the rate design policy statement currently. In ***CNG Transmission Corp***., 48 F.E.R.C. ¶ 61,141, at 61,559-60 (1989), the Commission removed requirements previously imposed on CNG that CNG "(1) eliminate its filed revenue credit for projected discounted transportation revenues, and (2) impute all its projected discounted interruptible transportation volumes at the maximum rate in its allocation and rate design methodology." CNG argued that (1) unless these conditions were removed, discounting would prevent it from recovering its cost of service, and (2) CNG would not be able to transport any interruptible volumes at its maximum rate. The Commission accepted CNG's arguments and removed the requirements based on the goal, discussed in its Rate Design Policy Statement, to maximize throughput. The end result there could erode to some extent the legal argument in favor of selective discounting because of the effect on rates for other services.

Transportation of gas in interstate commerce is clearly a jurisdictional activity subject to the Commission's jurisdiction under the NGA. Storage, exchanges, and backhauls have also been subjected to the Commission's jurisdiction under the Natural Gas Act.[[103]](#footnote-104)103

The physical act of gathering is not jurisdictional- It is specifically excluded from the jurisdiction of the Commission under the Natural Gas Act along with production and local distribution. With the unbundling of services that accompanied open access transportation, a question arose as to whether or not a pipeline could separately set rates and terms of conditions of service applicable to deliveries through gathering facilities.[[104]](#footnote-105)104 Certificate authority is certainly not needed for purposes of building facilities which are solely gathering in nature.[[105]](#footnote-106)105 A separate question was raised as to rates applicable to services through such facilities, however-

Northern Natural took the position originally that it was free to negotiate whatever rates it could with respect to services through such facilities. It filed such rates with the Commission for informational purposes. The case found its way up to the Tenth Circuit and in an opinion in ***Northern Natural Gas Company v. FERC***,[[106]](#footnote-107)106 the court found that such rates were jurisdictional for purposes of Section 4 of the Natural Gas Act- The court reasoned that rates applicable to gathering which led to interstate transmission were incident to the Commission's Section 4 powers and should therefore be regulated. Otherwise, an interstate pipeline could utilize its power to effect undue discrimination in access to interstate transportation. The court emphasized, however, it was not changing its approach as to the physical attributes of gathering not subject to the Commission's jurisdiction. Accordingly, it appears that certificates are not required, but that gathering rates can be regulated for purposes of Section 4 of the Natural Gas Act. The Tenth Circuit pointed to the fact that the question had never arisen while gathering was bundled. Even though non-jurisdictional, pipelines routinely included costs associated with gathering facilities as part of their transportation and sales rates. If rates are subject to regulation on grounds of undue discrimination, other terms and conditions of service may likewise be subject to such regulation since Section 4 covers not only charges, but other terms and conditions of service.

The decision can lead to an anomaly in which initial rates and terms and conditions of service may not be regulated since the facilities are not required to be certificated, but can only be reached in the context of a Section 4 proceeding in which rates are changed. Accordingly, the court's decision leaves a possible "gap." The court's decision also leaves open the rate question in instances in which the service might be solely through the gathering facilities and not lead to transportation on the same pipeline that owns the gathering facilities. Also, gathering facilities owned by an entity other than the interstate pipeline but which interconnect with a regulated interstate pipeline might not be regulated. Thus, there may be room still for free negotiation in rates and other terms applicable to services to be rendered through gathering facilities.

**C.   Marketing Affiliates**

As a result of the development of open-access transportation and the soon to be complete elimination of regulation of first sales of natural gas,[[107]](#footnote-108)107 interstate pipelines have increased incentives to market gas through unregulated affiliates- This association with marketing entities has raised concerns over whether interstate pipelines have or will participate in self-dealing and unfair competitive practices. It was in response to these concerns, as well as shipper complaints, that the Commission promulgated regulations through Order Nos. 497 and 497-A.[[108]](#footnote-109)108

These regulations, codified at 18 C.F.R. Part 161, are designed to prevent interstate pipelines from giving preferential treatment to their affiliates in providing transportation services. The regulations apply to a pipeline if (i) the pipeline is an interstate pipeline that provides certain expedited or self-implementing transportation;[[109]](#footnote-110)109 (ii) the pipeline and its affiliate are sufficiently related such that the pipeline can control the affiliate;[[110]](#footnote-111)110 (iii) the pipeline provides transportation for the affiliate;[[111]](#footnote-112)111 and (iv) the affiliate is involved in marketing or brokering, which are defined to include a first sale or a sale for resale, but not to include producers, processors or gatherers who sell gas who sell gas solely from their own production, processing or gathering facilities-[[112]](#footnote-113)112 For the regulations to apply, each of these elements must be met. Thus, for example, if a pipeline and its affiliate otherwise fall with the definitions, but the affiliate sells gas only from its own production, the regulations do not apply.[[113]](#footnote-114)113

Application of these regulations may not be easy in some cases- For instance, questions regarding application of the affiliate/control element are likely to arise in the future because the definition of this element obviously does not establish a bright-line standard. Sometimes a problem may arise because if one becomes so concerned with application of the affiliate/control or the marketing elements it is easy to forget that the pipeline must also provide transportation for an affiliate for the regulations to apply. For example, Texas Eastern Transmission Corporation (Texas Eastern) has sought rehearing of orders in which the Commission has said Texas Eastern must report the operating employees it shares with its affiliates Trunkline LNG Company and Pan National Gas Sales, Inc. because Texas Eastern contends that it performs no transportation services for these companies.[[114]](#footnote-115)114

The Commission has proposed in its recently issued Notice of Proposed Rulemaking ("Mega-NOPR"), in which the Commission proposes to require pipelines to unbundle their sales services, to extend the application of these regulations "to the pipeline as a provider of unbundled sales services."[[115]](#footnote-116)115 The Commission believes this extension necessary because

[t]he pipeline as merchant would be the functional equivalent of a marketing affiliate- Therefore, it is self evident that the non-pipeline suppliers and other customers need protection from preferences that could be given to the pipeline as merchant just as much as protection is needed from potential preferences that could be given to marketing affiliates.[[116]](#footnote-117)116

If adopted, this extension of the rule will undoubtedly create additional complications for pipelines.

If a pipeline/affiliate relationship falls within the elements above, then the pipeline must comply with twelve standards of conduct set forth in the regulations.[[117]](#footnote-118)117 Three of the standards discuss reporting and record-keeping obligations "to enable the Commission and the public to monitor the pipeline-affiliate relationship-"[[118]](#footnote-119)118 The other nine standards of conduct can, for convenience of discussion, be broken into two groups. One group includes five standards that focus primarily on the pipeline itself and its relationship with its marketing affiliate. These standards require the pipeline (i) to have its "operating employees" and those of its affiliate function separately "[t]o the maximum extent practicable;"[[119]](#footnote-120)119 (ii) to strictly enforce non-discretionary tariff provisions;[[120]](#footnote-121)120 (iii) to process all transportation requests in the same manner and in the same period of time;[[121]](#footnote-122)121 (iv) not to disclose to its affiliate any information received from a non-affiliate;[[122]](#footnote-123)122 and (v) not to tie an agreement to release gas under a take-or-pay contract to an agreement by the other party to use some service provided by the pipeline's affiliate or performed by the pipeline for the affiliate-[[123]](#footnote-124)123

The remaining four standards include those that could require a pipeline to offer a non-affiliated shipper or prospective shipper some privilege or information that the pipeline has given its affiliate. The first compels a pipeline to apply a discretionary transportation tariff provision in the same manner to similarly situated persons.[[124]](#footnote-125)124 One issue related to this standard that has received some attention is pipeline enforcement of penalty provisions- In addition to claiming that pipelines have selectively enforced penalty provisions, some commenters in Order No. 497 contended that for pipeline affiliates to be treated similarly with respect to penalties, the Commission must require penalties collected from affiliates to be credited to other shippers on the system.[[125]](#footnote-126)125 Otherwise, commenters said, a penalty paid by an affiliate is a mere intra-corporate transfer of funds.

In Order No. 497, the Commission responded to these comments by stating that this proposal "may have merit" but that it would consider the question in individual proceedings.[[126]](#footnote-127)126 However in the Mega-NOPR, the Commission appears to endorse the policy of requiring a pipeline to credit penalties collected from affiliates to the pipeline's customers-[[127]](#footnote-128)127 Whether this policy is correct or not may depend on whether the objectives for which a given penalty provision is adopted are punitive or compensatory. If the objectives are punitive, then the policy may be appropriate because otherwise a penalty creates no disincentive for the pipeline which simply transfers funds from one pocket to the other. On the other hand, if the objectives are compensatory and designed to reimburse the pipeline for costs incurred, then forcing the pipeline to credit the money to its customers works a double penalty because the pipeline not only incurs costs, but it is required to forfeit the penalty.

The second standard prohibits a pipeline from giving its marketing affiliate preference over nonaffiliated customers in matters related to Part 284 transportation including scheduling, balancing, transportation, storage, or curtailment priority.[[128]](#footnote-129)128 The Commission has indicated in an order regarding Columbia Gulf Transmission Company's Order No- 497 compliance filing that this standard is designed to prevent any preferences. Columbia Gulf had proposed tariff language to the effect that it would not give its marketing affiliates "undue" preference over nonaffiliates.[[129]](#footnote-130)129 The Commission responded,

In Standard C, the Commission has identified the kinds of preferences that, by their nature, are "undue" and which pipeline may not give to their marketing affiliates. By stating that it will not give its affiliate "undue" preferences in those areas identified in Standard C, Columbia Gulf incorrectly implies that there are situations in which it may favor its marketing affiliate.... Because ... preferences will always be undue, Columbia Gulf should not imply otherwise.[[130]](#footnote-131)130

The third standard requires a pipeline to give general information regarding transportation, marketing or sales that the pipeline gives to its marketing affiliate contemporaneously to all current or potential shippers-[[131]](#footnote-132)131 The Commission explained in Order No. 497-A that by contemporaneous, it means that a pipeline must communicate the information no later than the same day using an electronic bulletin board, telephone or fax.[[132]](#footnote-133)132 Thus, the Commission has found that mailing this information or establishing a telephone number shippers can call will not fulfill this requirement-[[133]](#footnote-134)133

The Commission said in Order No. 497 that the disclosure requirement applies only to general information.[[134]](#footnote-135)134 Thus, a pipeline is not required to disclose to other shippers information that the pipeline gave its marketing affiliate in response to a specific request- In Order No. 497-A, however, the Commission recognized that this specific request exception could "swallow the [contemporaneous disclosure] rule."[[135]](#footnote-136)135 To prevent this, the Commission gave three examples to clarify the standard.[[136]](#footnote-137)136

In the first, a pipeline planned to build a new pipeline under Part 284 of the Commission's regulations- When the pipeline communicates its plans to its marketing affiliate, it must also disclose this to other to all potential shippers.

In the second example, the pipeline discusses its proposed construction with a nonaffiliated shipper, which then discusses the proposal with a marketing affiliate of the pipeline. If the marketing affiliate then asks the pipeline a specific question regarding the proposal, the Commission said the pipeline must disclose this information to all potential shippers because "[i]nformation concerning transportation on a new line would involve new or changed general information...."[[137]](#footnote-138)137

The third example involves a request by a marketing affiliate for transportation for a customer on the new line- The Commission said that in this case the pipeline "would not have to disclose the information transmitted to the marketing affiliate to perfect the transportation request...."[[138]](#footnote-139)138

The key to the Commission's interpretation of this standard thus depends not on the context of a pipeline's communication to its marketing affiliate but on whether new general information is disclosed to the affiliate. If general information, yet unavailable to all potential shippers, is communicated to a marketing affiliate by the pipeline, the same information must be disclosed to all potential shippers the same day.

Another problem some pipelines face regarding the contemporaneous disclosure standard is that they have not separated completely their operational personnel from those of their marketing affiliates. The Commission said in Order No. 497-A that if a pipeline and its affiliate share an employee, "any gas sales, marketing or transportation information such an employee may receive in his or her capacity as a pipeline employee will be considered information provided to the affiliate. This information must then be contemporaneously disclosed to all potential shippers."[[139]](#footnote-140)139

For small pipelines that share employees with affiliates and cannot afford to separate their functions, the answer to this problem lies in requesting a partial waiver of this standard-[[140]](#footnote-141)140 Under a partial waiver, the pipeline will have to disclose all information to nonaffiliated shippers that it provides to its marketing affiliate, except for information received from other nonaffiliated shippers.[[141]](#footnote-142)141 The partial waiver of section 161-3(f) is therefore to protect nonaffiliated shippers.

For larger pipelines, compliance with section 161.3(f) may not be as easy. This is especially true for those that are highly integrated with their marketing affiliates.[[142]](#footnote-143)142 The Commission has said that waiver of Standard F is not an option for larger pipelines-[[143]](#footnote-144)143 How such problems are resolved will become more important if the Order No. 497 standards are extended to the marketing divisions of pipelines in the Mega-NOPR.

The final standard requires a pipeline that has given a discount to its marketing affiliate to make a comparable discount available to all similarly situated shippers.[[144]](#footnote-145)144 The Commission's review of Tennessee Gas Pipeline Company's Order No- 497 compliance filing indicates how thorough the Commission will be in enforcing compliance with this and the other standards adopted. Tennessee proposed tariff language to the effect that, in the Commission's words, Tennessee

shall make available to nonaffiliated transportation customers transportation rate discounts on the same basis and under the same facts and circumstances as transportation rate discounts are made available to its affiliated transportation customers. Tennessee also states that it will offer the discounts contemporaneously.[[145]](#footnote-146)145

The Commission required Tennessee to change its language because it was not sure that Tennessee's "discounts on the same basis" was equivalent to the Commission's "comparable discounts" or that Tennessee's "under the same facts and circumstances" was the same as the Commission's "to all similarly situated nonaffiliated shippers-"[[146]](#footnote-147)146

One issue that was raised by commenters on Order No. 497 regarding this standard is the question of affiliate losses. Commenters argued that pipelines might evade the comparable discount requirement by simply having its affiliate take a loss in lieu of having to give discounts to other shippers.[[147]](#footnote-148)147 This is so, commenters said, because for the corporate entity, having the affiliate take a loss is the same as requiring the pipeline to give a discount to its affiliate- This is unfair for other marketers, the argument continues, because "independent marketers cannot afford to provide the service at a loss while, for the marketing affiliate, this 'loss' is no more than a disguised discount available only to the affiliate."[[148]](#footnote-149)148

The Commission responded to these arguments by noting that it had not seen widespread evidence of affiliate losses and that, therefore, it would not announce a general policy with regard to affiliate losses.[[149]](#footnote-150)149 It said, however, that it would not rule out future action if affiliate losses become a problem-

The standards adopted in Order No. 497 and 497-A, while relatively new, have already played a role in at least two Commission proceedings. In one, involving Northwest Pipeline Corporation, the Commission instituted an investigation of Northwest's assignment of its gas supply contracts to its marketing affiliate Williams Gas Supply Company ("WGS").[[150]](#footnote-151)150 The Commission ordered Northwest to show cause why it had not violated the standards established in 18 C-F.R. sections 161.3(c), (f) and (h) by (i) granting WGS a preference "in the form of information as well as guaranteed sources of gas," (ii) failing to provide information to nonaffiliates regarding the assignment of these contracts, and (iii) "tying its agreement to release gas subject to take-or-pay relief to requiring producers that are parties to the contracts assigned to WGS to use the services of WGS to sell or market gas produced under those contracts."[[151]](#footnote-152)151 The Commission also said that Northwest may have violated the standards in 161.3(g) and (j) by not separating its operations from those of WGS and by not reporting its affiliation with WGS. Commission resolution of these charges is still pending.

In the other case, one recently concluded involving Transcontinental Gas Pipe Line Corporation, the Commission considered, among other things, Transco's assignment of its merchant function to its affiliate Transco Energy Marketing Company ("TEMCO").[[152]](#footnote-153)152 For reasons similar to those in the ***Northwest*** case, the Commission said this assignment may have violated sections 161-3(c), (f), (g) and (h). While the question of whether Transco actually violated these sections was not decided, it is apparent that these sections did have an effect on the settlement because in addition to reversing the assignment of gas from TEMCO to Transco and agreeing to pay refunds to its sales customers, Transco agreed to completely and permanently separate its functions from TEMCO's.[[153]](#footnote-154)153

Based on these cases, and upon the Commission's meticulous review of pipelines' Order No. 497 compliance filings, it seems that the pipeline/marketing affiliate regulations will have an important role to play in the future natural gas pipeline industry. This will be especially true if the regulations are extended as proposed in the Mega-NOPR.

Thus the Commission pays particular attention to transactions entered into by interstate pipelines with their marketing affiliates and has devised a complex set of regulations and standards of conduct relating to same. Certain of these regulations may benefit independent shippers on a pipeline system. For example, a pipeline may not offer a lower discount to its affiliate than to others unless it has accepted a blanket certificate.[[154]](#footnote-155)154 Also, the rule of no undue discrimination/no undue preference plus the sensitivity of the marketing affiliate relationship means terms offered affiliates are probably available to other shippers- Also, shippers may obtain a substantial amount of information as a result of the requirement that an interstate pipeline reveal to non-affiliated companies transportation, sales, and marketing information which it divulges to an affiliate.

**D.   General**

There are other areas in which negotiating latitude is still permitted even under the Commission's current approach. First, some provisions of the tariff may permit the pipeline to act or not depending on whether certain specifications are met. Ofttimes these specifications are rather broad. For example, in the area of construction of new interconnection facilities, the Commission has stated as its policy that a pipeline may choose to construct or not to construct and may choose to require reimbursement by shippers or not, so long as it does so on a non-discriminatory basis.[[155]](#footnote-156)155 Thus, a shipper may be able to negotiate within those standards for particular treatment of interconnections which it envisions will apply to its transaction-

The actual points of delivery and points of receipt are typically left open in the form of precedent agreement, as are the quantities to be transported.

Another provision which seems to have survived Commission scrutiny, is the most favored nations clause.[[156]](#footnote-157)156 Presumably, a most favored nations clause would be fully consistent with the Natural Gas Act requirement and the requirement in the NGPA regulations that services be provided on a non-discriminatory basis-

One area that should be explored in any negotiation is what may be filed for under the Natural Gas Act by the regulated company. Under the so-called ***Mobile-Sierra*** Doctrine,[[157]](#footnote-158)157 the contract (or service agreement) between the parties governs whether and what a party may file with the Commission under the Natural Gas Act, what to change- According to the courts, the ***Sierra-Mobile*** Doctrine "is refreshingly simple: the contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid."[[158]](#footnote-159)158 Generally, the Commission has no discretion to accept a filing under Section 4 of the Natural Gas Act which contravenes a private contract.[[159]](#footnote-160)159 Thus, one area for negotiation is whether a party will be bound by all of the terms and conditions of the service agreement as originally negotiated or whether the regulated company will be permitted to file to make changes in the agreement between the parties and, if so, in what areas- Typically, service agreements permit filings to change rates, the so-called ***Memphis*** clause. It is becoming more important to be able to file to change rate schedules and General Terms and Conditions of service. On the other hand, the non-regulated company may wish to bind the pipeline to certain of the original terms of the agreement such as term or duration of contract, character of service (firm, interruptible, or some combination thereof), and whether such contract constitutes a warranty of service. A sample of a ***Memphis*** clause is contained in the Form of Service Agreement contained in Appendix A.

This provision can be critical since it affects to certainty of service on the one hand and on the other affects the terms which are essential to financing of projects. It can be particularly important in the context of new construction. There are some regulatory parameters within which such provisions may be negotiated. For example, it is unlikely that the Commission would permit a party to negotiate away protections under the optional certificate regulations. Nevertheless, this is an important clause in the ongoing relationship of the parties.

Last, pipelines typically have a number of rate schedules that are generically available. It may be possible to choose among various options depending on the type of service which a shipper wants. Indeed, this is an area which should be looked at very carefully. In addition to generic firm and interruptible transportation, many pipelines have other services which they provide which fall in between these two extremes or which are tailored to particular types of activities, such as storage or gathering.

**E.   Commission Proceedings**

There are three types of proceedings at the Commission that may in fact provide the most leeway for negotiation. First, pipelines may file for certificates of public convenience and necessity to construct facilities and propose related terms and conditions related to service through such facilities.[[160]](#footnote-161)160 Second, the pipeline may make individual tariff filings under Section 4 of the Natural Gas Act affecting its open access transportation tariff provisions- Third, pipelines file rate cases pursuant to Section 4 of the Natural Gas Act in order to reflect changes in costs and related rates applicable to transportation services. These cases may be consolidated one with another and may involve substantial restructuring of the services on a pipeline system that generally enhance the availability of transportation in general.[[161]](#footnote-162)161 These forums involve the basic types of services, the allocation of capacity and availability of it for such services, access, scheduling, nomination and related penalties, and rates. If a shipper desires to avoid being faced with a ***fait accompli***, participation in Commission proceedings may be important.

The restructuring of pipeline systems towards transportation and away from the merchant function is a case in point. In large part such negotiations have involved the abandonment in whole or in part of existing contracts between a pipeline and its historical customers, and a complete restatement of the pipeline's tariff and the renegotiation of the contracts on its system for both firm and interruptible services. Usually these include a broad panoply of services, such as unbundled storage and perhaps new balancing services. The Notice of Proposed Rulemaking on comparability in Docket No. RM91-11 discussed ***infra***, will cause another round of reformation or, if possible, reaffirmation of contracts already restructured.[[162]](#footnote-163)162 Recently, the Commission issued an order on rehearing in ***El Paso Natural Gas Company***, Docket Nos- RP88-44-011, -016, -017, ***et seq***. in which described the process and the scope of negotiation.

Where the settlement deviates from Commission policy in ways the Commission found unreasonable, the Commission required the settlement to be altered. Where, however, the settlement deviates from existing policy, but in ways which the Commission did not find to be unreasonable, the Commission allowed it to stand. This conclusion was based on an evaluation of the comments to the settlement, and whether the deviation was outweighed by the other benefits of the settlement. This is consistent with ***Tejas***. The Commission cannot overlook particular elements of the settlement merely because they are agreed to by the parties, but the Commission does not have to ensure the settlements conform to Commission policy in all aspects. Rather, the Commission must examine this element as part of the entire agreement to see if, on the whole, it is balanced by the other elements of the settlement. That is what the Commission did in this instance....

Furthermore, it was appropriate for the Commission to examine the settlement as a whole, recognizing that it is the result of negotiation and compromise. As the Commission stated, it is reluctant to revise substantially a settlement which reflects significant concessions and compromises by all parties and which is the result of more than two years of negotiations. The Commission must "give weight to the contracts and the settlements of the parties before it." (Citing ***Tejas*).** The Commission followed the requirements of its regulations in closely examining the settlement and finding there to be considerable benefit to the public interest in approving a settlement which yields rates that are within a range of just and reasonable rates and provisions. The Commission may have reached other conclusions and approved other rates within that range of just and reasonable rates had the instant case been presented in a form other than as a settlement **(*e.g*.,** after litigation before an ALJ), but the rates and provisions approved in this settlement are within that range.

Mimeo at 9.

**G.   The Complaint Procedure**

Section 5 of the Natural Gas Act is also available for complaint proceedings. If a shipper or customer believes that it has been discriminated against unduly, it may file a complaint pursuant to Rule 206 of the Commission's Rules of Practice and Procedure.[[163]](#footnote-164)163 The Commission has recently looked carefully at complaints brought by shippers alleging undue discrimination under Section 5 of the Natural Gas Act and in violation of the Commission's open access NGPA regulations-

For example, on March 30, 1990 Pennzoil Exploration and Production Company and Pennzoil Gas Marketing Company (Pennzoil) filed a complaint alleging discriminatory practices by Southern Natural Gas Company (Southern). Pennzoil sells gas in Southern's market area through its marketing subsidiary and other gas marketers. Southern is the only means of transporting Pennzoil's gas to market. Pennzoil ships pursuant to Rate Schedule IT. Southern's IT Rate Schedule provides that curtailment of service occurs on a last on, first off basis if Southern has insufficient capacity to perform all interruptible services. Pennzoil filed a complaint based on Southern's alleged unjustified interruption of transportation service in December of 1989. In its complaint Pennzoil alleged that Southern had initiated a curtailment of interruptible transportation on December 12, 1989 without justification, and at the same time offered to purchase the gas for system supply at $1.80 per MMBtu and imposed a maximum rate for interruptible transportation in the production area in which Pennzoil produces gas. While the Commission found that, based on the record before it, it appeared that Southern may not have curtailed in a manner inconsistent with its currently approved tariff, it noted that Pennzoil's complaint raised the issue of whether Southern's curtailment plan is inconsistent with Commission regulations and open access policies and whether Southern had too much discretion in determining its customers' needs, resulting in an abuse of market power to the detriment of interruptible customers such as Pennzoil. Accordingly, the Commission by order of April 29, 1991 established a technical conference after which it is to determine whether further action under Section 5 of the Natural Gas Act is warranted.

At or about the same time the Commission instituted other investigations under Section 5. In ***Columbia Gulf Transmission Company***,[[164]](#footnote-165)164 the Commission determined to investigate whether or not Columbia Gulf had engaged in undue discrimination by paying for facilities to provide service for certain shippers and not for others and by hoarding capacity in its lateral lines, either for its parent or other shippers, in violation of Order Nos- 436 and 500. In ***Industrial Gas Corporation v. Nycotex Gas Transport*,**[[165]](#footnote-166)165 the Commission instituted an investigation as to whether Nycotex had discriminated against Industrial Gas Corporation (IGC) by refusing to transport gas, whether Nycotex had engaged in the transportation of gas in interstate commerce without proper authorization, and what remedial action was appropriate, if any. In ***Indicated Shippers v. El Paso Natural Gas Company*,**[[166]](#footnote-167)166 the Commission required El Paso to show why it had not engaged in acts violating the terms and conditions of an interruptible sales service certificate, the Natural Gas Act, and the Commission's regulations- In particular, Indicated Shippers had alleged that El Paso had entered into a gas sales contract with Southern California Gas Company in violation of the terms and conditions of an interruptible sales service certificate and requested that the Commission nullify such contract. Also on April 29, 1991, the Commission issued a Notice of Complaint in ***Arkla Energy Resources, a division of Arkla, Inc*.**,[[167]](#footnote-168)167 Southwestern Glass Company complained that Arkla had refused to provide tap and firm transportation services to Southwestern in an unduly discriminatory fashion.

Thus, the complaint procedure is a viable, if time consuming, procedure for changing transportation tariffs and/or enforcing provisions of existing transportation tariffs.

**G.   Comparability of Service**

Currently, a major issue in the transportation of gas is whether or not the service offered to transport gas is offered on the same terms and conditions as the transportation component of the pipeline's merchant function. This issue, called "comparability of service", is as yet unresolved as a generic matter, although it has been the subject of several case-specific settlements approved by the Commission. Generally, the question is whether a shipper has equal or substantially equal access to the pipeline system, including (a) flexible receipt point treatment, (b) scheduling and nominations, (c) imbalance penalties, (d) rights to utilize system storage, (e) rates, and (f) other terms and conditions of service as the pipeline provides in support of its merchant function. Needless to say the issues are complicated ones involving many aspects of a pipelines tariff. It is made more complicated by the fact that it involves, in a large number of instances, a move from an historical role played by the pipelines, underscored by existing producer-supplier contracts and in some instances supported as well by third party transportation and compression services, to a more restricted merchant role.

The issue has come up in a number of contexts, all having to do with the pipeline's ability to exercise monopoly control over its system and exercise market power. For example, in establishing gas inventory charges, whether a pipeline's market is competitive is at issue. Substantial comparability is a key test of whether or not the market is competitive.[[168]](#footnote-169)168 In some instances the Commission has regarded the existence of comparability as a necessary predicate for implementation of gas inventory charge- Also, the Commission has looked to whether or not a pipeline has established comparability on its system in determining whether or not to permit an interstate pipeline to flow through its PGA on an "as-billed" basis producer demand charges contained in a pipeline's producer-supplier contracts. It has looked to whether there is substantial comparability on a pipeline's system as one test in determining whether to permit a pipeline to establish market-based rates.[[169]](#footnote-170)169

Most recently it has issued its Mega-NOPR in Docket Nos. RM91-11 to explore the pipeline's service obligation and comparability of service. The original notice was accompanied by a Staff White Paper discussing and listing issues which were to be addressed in response to the Mega-NOPR. The Staff White Paper envisioned what has now been described as "line item comparability"; ***i.e*.**, full unbundling of services, establishment of pooling points on the pipeline system, moving the point of delivery away from the city gate back to the supply area, and accompanying changes in access to the system, storage, and rates to reflect this change on the pipeline system in roles and services. A number of comments were filed in response to the Commission's Notice of Inquiry taking various positions. A public conference was held with a view to issuing a Notice of Proposed Rulemaking.

The Mega-NOPR was issued on July 31, 1991. The proposed rule contemplates the full unbundling of the pipeline merchant and transportation functions. The merchant function would still be regulated; however, the merchant could charge market-based rates. The merchant function of the pipeline would be treated as a marketing affiliate would, subject to the regulations and code of conduct respecting marketing affiliates. The Commission proposes to retain pregranted abandonment for interruptible and short term firm transportation, to permit pregranted abandonment for long-term firm transportation only when the customer does not exercise the right of first refusal proposed as part of the restructuring process, and to permit pregranted abandonment in connection with unbundled sales services. The transportation function would be comparable and would include storage. As part of the new program the Commission proposes to do away with existing capacity brokering programs and institute a voluntary capacity reallocation program for both the permanent and temporary of release of firm capacity. In a significant change, the Commission proposes to require that pipelines derive transportation rates using a straight fixed variable, as opposed to a modified fixed variable, rate design method.

Under the proposal, pipelines would meet with all parties and customers immediately following the final rule. Thereafter pipelines would have filing dates for implementation of the restructuring program regardless of whether settlement can be reached. Comments on the proposal are due September 30, 1991, with Reply Comments due October 30, 1991.

As proposed, it appears that there will be bargaining during the restructuring phase, but once the transportation structure is set there may be little individual bargaining since all shippers will presumably be treated alike. There will be bargaining with respect to supplies purchased from pipelines or from others. Future negotiation, if any, respecting transportation would appear to occur at the voluntary reallocation and capacity relinquishing stage.

Of course, this is merely a Commission proposal at this point. Undoubtedly it will be the focus of numerous comments and statements of position. Any rule will be subject to requests for rehearing at the Commission and perhaps petitions for review filed with the courts.

Gas Tariff

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1. 115 U.S.C. § 717 (1988). [↑](#footnote-ref-2)
2. 215 U.S.C. § 717f (1988). [↑](#footnote-ref-3)
3. 3***United Gas Pipe Line Co. v. Mobile Gas Service Corp*.**, 350 U.S. 332 (1956); ***Pennzoil Co. v. FERC***, 645 F.2d 360, 373 (5th Cir. 1981), ***cert. denied***, 454 U.S. 1142 (1982). [↑](#footnote-ref-4)
4. 418 C.F.R. Part 157 (1990). Such contracts were proof of the necessary supply and markets. See ***Kansas Pipeline and Gas Co***., 2 F.P.C. 29 (1939); ***Northern Natural Gas Co*.**, Opinion No. 618, 47 F.P.C. 1202 (1972); ***Arkansas Louisiana Gas Co*.**, Opinion No. 612, 47 F.P.C. 583 (1972); ***Northern Natural Gas Co***., 25 F.P.C. 540, 544 (1961). [↑](#footnote-ref-5)
5. 515 U.S.C. § 717f(e) (1988). [↑](#footnote-ref-6)
6. 6***ANR Pipeline Co. v. FERC***, 771 F.2d 507, 519-20 (D.C. Cir. 1985); see also ***Tennessee Gas Pipeline Co. v. FERC***, 867 F.2d 688, 692 (D.C. Cir. 1989); ***Texas Eastern Transmission Corp*.,** 55 F.E.R.C. ¶ 61,477 (1991). [↑](#footnote-ref-7)
7. 715 U.S.C. § 717d (1988). [↑](#footnote-ref-8)
8. 8***Cities of Newark, v. FERC***, 763 F.2d 533, 546 (3rd Cir. 1985); ***Cities of Alexandria v. FPC***, 555 F.2d 1020, 1027-28 (D.C. Cir. 1977); ***St. Michaels Utils. Comm'n v. FPC***, 377 F.2d 912, 915 (1967); ***Pacificorp Elect. Operations*,** 54 F.E.R.C. ¶ 61,296, at 61,855 (1991); ***City of Gainesville v. Florida Gas Transmission Co*.**, 55 F.E.R.C. ¶ 61,486, at 62,663 (1991); ***Arcadian Corp. v. Southern Natural Gas Co*.**, 55 F.E.R.C. ¶ 61,207, at 61,687-88 (1991). [↑](#footnote-ref-9)
9. 918 C.F.R. § 154.93 (1990). [↑](#footnote-ref-10)
10. 1015 U.S.C. §§ 3301, ***et seq*.** (1988). [↑](#footnote-ref-11)
11. 1118 C.F.R. §§ 271.702(a)(1) & 271.703(a) (1990). [↑](#footnote-ref-12)
12. 1218 C.F.R. § 271.1104(c)(4) (1990). [↑](#footnote-ref-13)
13. 1318 C.F.R. § 2.103 (1991). [↑](#footnote-ref-14)
14. 1418 C.F.R. § 154.34 (1990). [↑](#footnote-ref-15)
15. 15See, ***e.g*.,** In Re Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation under Part 284 of the Commission's Regulations, Notice of Proposed Rulemaking, Docket No. RM91-11, issued July 31, 1991 (hereinafter "Mega-NOPR"). [↑](#footnote-ref-16)
16. 16Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, Order No. 380, 27 F.E.R.C. ¶ 61,318 (1964); Order No. 380-A, 28 F.E.R.C. ¶ 61,175 (1984); Order No. 380-C, 29 F.E.R.C. ¶ 61,677 (1984); Order No. 380-D, 29 F.E.R.C. ¶ 61,332 (1984); ***aff'd Wisconsin Gas Co. v. FERC***, 770 F.2d 1144 (D.C. Cir. 1985). ***Transwestern Pipeline Co*.,** Opinion No. 238, 32 F.E.R.C. ¶ 61,009 (1985) (elimination of fixed costs in minimum bill). [↑](#footnote-ref-17)
17. 17Studies performed by the Interstate Natural Gas Association of America indicate that interstate pipelines have incurred take-or-pay obligations as these regulatory changes have occurred in the billions of dollars. [↑](#footnote-ref-18)
18. 18One key to the protection provided by a tariff under open access, non-discriminatory regime is what constitutes undue discrimination or undue preference. Generally, under the case law a party complaining that it has been unduly discriminated against must first show a difference in treatment. Thereafter, the pipeline must demonstrate that the discrimination is not unreasonable, undue or otherwise unlawful. See ***ANR Pipeline Co***., 41 F.E.R.C. ¶ 61,043, at 61,126 (1987), ***reh'g granted in part and denied in part*,** 42 F.E.R.C. ¶ 61,077 (1988). See also ***Sebring Util. Comm'n v. FERC*,** 491 F.2d 1003 (5th Cir. 1979), ***cert denied*,** 444 U.S. 897 (1979). To meet the first part of the test the complainant must show that it is similarly situated with others receiving different treatment. See ***City of Gainesville v. Florida Gas Transmission Co*.,*supra*.** Thereafter the difference must be shown to be undue, as noted before. The Commission has held recently that increased business opportunity can constitute a basis for a difference in treatment which is not deemed undue. See ***Arcadian Corp. v. Southern Natural Gas Co*.,*supra*.** [↑](#footnote-ref-19)
19. 19Open access transportation occurs under Section 311 of the Natural Gas Policy Act of 1978 if it is on behalf of an intrastate pipeline or a local distribution company served by an interstate pipeline. No certificate is required. See 18 C.F.R. § 284.101-284.106 (1991). All other transportation must be authorized under a certificate issued under Section 7 of the Natural Gas Act. The blanket certificate, subject to the open access condition, was devised to avoid case-by-case processing of Section 7 applications. Some pipelines initially were reluctant to accept the Section 7 blanket certificate because, unlike transportation under Section 311, Commission abandonment authorization was required to terminate open access transportation under the blanket certificate. [↑](#footnote-ref-20)
20. 2018 C.F.R. § 284.221(a) (1991). [↑](#footnote-ref-21)
21. 21Transportation includes exchanges, backhauls, displacement, or other methods of transportation. 18 C.F.R. § 284.1(a) (1991). [↑](#footnote-ref-22)
22. 22Any rate or charge collected for any transportation under Subparts B and G which exceeds the rates or charges authorized is to be refunded with interest at lagged prime rates. 18 C.F.R. § 284.2 (1991). [↑](#footnote-ref-23)
23. 2318 C.F.R. § 284.7(c) (1991). [↑](#footnote-ref-24)
24. 2418 C.F.R. § 284.7(d)(1) (1991). [↑](#footnote-ref-25)
25. 2518 C.F.R. § 284.7(d)(2) (1991). [↑](#footnote-ref-26)
26. 2618 C.F.R. § 284.7(d)(3) (1991). [↑](#footnote-ref-27)
27. 27***Interstate Natural Gas Pipeline Rate Design*,** 47 F.E.R.C. ¶ 61,295 (1989), Order on Rehearing, 48 F.E.R.C. ¶ 61,122 (1989). [↑](#footnote-ref-28)
28. 2818 C.F.R. § 284.7(d)(4) (1991). [↑](#footnote-ref-29)
29. 2918 C.F.R. § 284.7(d)(5) (1991). [↑](#footnote-ref-30)
30. 30Order No. 436, ***FERC Stats. and Regs. Preambles*,** 1982-1985 ¶ 30,665, at 31,543 (1985). [↑](#footnote-ref-31)
31. 31***Panhandle Eastern Pipe Line Co*.**, 53 F.E.R.C. ¶ 63,003 (1990); ***Trunkline Gas Co***., 55 F.E.R.C. ¶ 63,005 (1991); ***Northwest Pipeline Corp***., 53 F.E.R.C. ¶ 63,024 (1990); ***United Gas Pipe Line Co*.**, 53 F.E.R.C. ¶ 63,019 (1990), Order Vacating Initial Decision, issued August 5, 1991; ***Piaute Pipeline Co***., 54 F.E.R.C. ¶ 63,028 (March 26, 1991); ***Pacific Gas Transmission Co***., 55 F.E.R.C. ¶ 63,033 (June 11, 1991). [↑](#footnote-ref-32)
32. 32The rate design policy is the subject of an appeal pending before the courts on the question of whether it was improperly issued as a policy statement when in fact it is a binding Commission regulation. [↑](#footnote-ref-33)
33. 3318 C.F.R. §§ 284.8 & 284.9 (1991). [↑](#footnote-ref-34)
34. 3418 C.F.R. § 284.8(a)(3) (1991). [↑](#footnote-ref-35)
35. 3518 C.F.R. § 284.9(a)(3) (1991). [↑](#footnote-ref-36)
36. 3618 C.F.R. §§ 284.8(b) & 284.9(b) (1991). [↑](#footnote-ref-37)
37. 3718 C.F.R. §§ 284.8(c) & 284.9(c) (1991). [↑](#footnote-ref-38)
38. 3818 C.F.R. § 284.8(d) (1991). [↑](#footnote-ref-39)
39. 3918 C.F.R. § 284.9(d) (1991). [↑](#footnote-ref-40)
40. 4018 C.F.R. §§ 284.8(e) & 284.9(e) (1991). [↑](#footnote-ref-41)
41. 41***Arcadian Corp. v. Southern Natural Gas Co*.**, 55 F.E.R.C. ¶ 61,267 (1991); see Order No. 436, ***FERC Stats. & Regs. Preambles*.,** 1982-1985 ¶ 30,665, at 31,550-51. [↑](#footnote-ref-42)
42. 42There are also provisions relating to transportation credits for take-or-pay which do not appear to be applicable here. [↑](#footnote-ref-43)
43. 4318 C.F.R. § 284.221(e) (1991). [↑](#footnote-ref-44)
44. 44Opinion No. 357, 53 F.E.R.C. ¶ 61,194 (1990), Order on Rehearing, Opinion No. 357-A, 54 F.E.R.C. ¶ 61,103 (1991); ***Tennessee Gas Pipeline Co*.,** 43 F.E.R.C. ¶ 61,042 (1988); ***Transcontinental Gas Pipe Line Corp***, 43 F.E.R.C. ¶ 61,446 (1988). [↑](#footnote-ref-45)
45. 45The receipt points to which natural gas volumes may be reassigned include eligible facilities under 18 C.F.R. § 157.208 (1990) which are authorized to be constructed and operated pursuant to a certificate issued under Subpart F of Part 157 of the regulations. [↑](#footnote-ref-46)
46. 4618 C.F.R. § 284.221(h) (1991), but see discussion ***infra*** concerning the queue. [↑](#footnote-ref-47)
47. 4718 C.F.R. § 284.223(a)(1) (1991). [↑](#footnote-ref-48)
48. 48***Trailblazer Pipeline Co***., 55 F.E.R.C. ¶ 61,050, at 61,144-45 nn. 7-8 (1991) (citing ***Moraine Pipeline Co*.,** 49 F.E.R.C. ¶ 61,255 at 61,879 (1989) and ***Pacific Gas Transmission Co***., 40 F.E.R.C. ¶ 61,193 at 61,624 (1987), ***reh'g denied*,** 42 F.E.R.C. ¶ 61,014 (1988)), Order Granting Clarification and Waiver, 55 F.E.R.C. ¶ 61,455 (1991). [↑](#footnote-ref-49)
49. 4955 F.E.R.C. at 61,145 & n.10. (citing ***Black Marlin Pipeline Co***., 45 F.E.R.C. ¶ 61,119 (1988), (rejecting tariff sheets which permit the pipeline to waive any provisions of its transportation rate schedules and holding that the discretion to waive "should be on a provision-to-provision basis upon application to the Commission.")). [↑](#footnote-ref-50)
50. 50***Trailblazer***, 55 F.E.R.C. at 61,146 & n.16 (citing ***Texas Eastern Transmission Corp*.,** 46 F.E.R.C. ¶ 61,112 at 61,439 (1989)). [↑](#footnote-ref-51)
51. 51***Id*.** at 61,146 & n.19 (citing ***Arkla Energy Resources***, 48 F.E.R.C. ¶ 61,305, at 61,984 (1989); ***Great Lakes Transmission Co***., 52 F.E.R.C. ¶ 61,255, at 61,898 (1990). [↑](#footnote-ref-52)
52. 52***Id*.** at 61,146. [↑](#footnote-ref-53)
53. 53***Id*.** (citing ***Algonquin Gas Transmission Co***., 49 F.E.R.C. ¶ 61,393 at 62,426 (1990)). [↑](#footnote-ref-54)
54. 54***Id*.** at 61,146 & n.22 (citing ***Overthrust Pipeline Co***., 53 F.E.R.C. ¶ 61,125, at 61,415 (1990); ***Great Lakes Gas Transmission Co***., 52 F.E.R.C. ¶ 61,255, at 61,898 (1990); ***Equitable Gas Co*.**, 40 F.E.R.C. ¶ 61,093, at 61,267 (1987). [↑](#footnote-ref-55)
55. 55***Id*.** at 61,147 (citing ***Colorado Interstate Gas Co***., 49 F.E.R.C. ¶ 61,203, at 61,721 (1989)). By way of example, if the maximum rate is 10 cents/dth, and the pipeline is charging a discounted rate of 5 cents/dth, an increase to 7 cents/dth requires that the pipeline notify the shipper. A discounted shipper is permitted a period to match or surpass a competing offer to pay the higher rate. The pipeline must accept any increase that meets or exceeds the competing offer. If a shipper meets or exceeds the competing offer, it retains its priority. As among shippers paying the same rate, first come, first served principles govern. If a shipper is unwilling to pay the higher rate it may not later offer to pay the higher rate and reclaim its place in the queue. [↑](#footnote-ref-56)
56. 56***Id*.** [↑](#footnote-ref-57)
57. 57***Id*.** at 61,148 (citing ***Natural Gas Pipeline Co. of America***, 39 F.E.R.C. ¶ 61,153, at 61,600-01 (1987), rehearing denied in part, 41 F.E.R.C. ¶ 61,164 (1987); and ***Overthrust Pipeline Co***., 44 F.E.R.C. ¶ 61,077, at 61,220 (1988), reh'g denied and blanket certificate vacated, 45 F.E.R.C. ¶ 61,196 (1988). [↑](#footnote-ref-58)
58. 58***Id*.** (citing ***Florida Gas Transmission Co***., 51 F.E.R.C. ¶ 61,309, at 62,007 (1990). [↑](#footnote-ref-59)
59. 59***Id*.** at 61,149 (citing ***Texas Eastern Transmission Corp*.**, 37 F.E.R.C. ¶ 61,260, at 61,689 (1986). [↑](#footnote-ref-60)
60. 60***Id*.** [↑](#footnote-ref-61)
61. 61***Id*.** [↑](#footnote-ref-62)
62. 62***Id.*** at 61,149-50. [↑](#footnote-ref-63)
63. 63***Id.*** at 61,150. [↑](#footnote-ref-64)
64. 64***Id.*** [↑](#footnote-ref-65)
65. 65***Id.*** at 61,151. [↑](#footnote-ref-66)
66. 66***Id.*** [↑](#footnote-ref-67)
67. 67***Id.*** "An open season is a period in which all requests for service received within the defined time frame are accorded the same transportation priority. The purpose of an open season is to allow shippers that were previously unable to obtain access to transportation to have an equal opportunity to gain a place in the pipeline's queue." ***Wyoming Interstate Co***., 53 F.E.R.C. ¶ 61,229, at 61,958 (1990). [↑](#footnote-ref-68)
68. 68***Kern River Gas Transmission Co***., 50 F.E.R.C. ¶ 61,069, at 61,149 (1990). See 18 C.F.R. §§ 157.100-157.106; 50 Fed. Reg 42,408 at 42,467-76. [↑](#footnote-ref-69)
69. 69See ***Wyoming-California Pipeline Co***., 44 F.E.R.C. ¶ 61,001 (1988); ***vacated in part*,** 44 F.E.R.C. ¶ 61,210 (1988); 45 F.E.R.C. ¶ 61,234 (1988); 45 F.E.R.C. ¶ 61,353 (1988); and 46 F.E.R.C. ¶ 61,029 (1989), respectively. [↑](#footnote-ref-70)
70. 70***Mojave Pipeline Co*.**, Order Issuing Certificates, 47 F.E.R.C. ¶ 61,200 (1989). [↑](#footnote-ref-71)
71. 71***Kern River Gas Transmission Co***., 53 F.E.R.C. ¶ 61,172 (1990). [↑](#footnote-ref-72)
72. 72***Id*.** at 61,632. [↑](#footnote-ref-73)
73. 7350 F.E.R.C. ¶ 61,069 (1990). [↑](#footnote-ref-74)
74. 74***Id.*** at 61,153. [↑](#footnote-ref-75)
75. 75***Id.*** [↑](#footnote-ref-76)
76. 7645 F.E.R.C. ¶ 61,234 (1988). [↑](#footnote-ref-77)
77. 77***Id***. at 61,677-78. [↑](#footnote-ref-78)
78. 78***Id***. at 61,678. [↑](#footnote-ref-79)
79. 79***Id***. at 61,680. [↑](#footnote-ref-80)
80. 80See 18 C.F.R. §§ 284.221(f)(2)-(3) & 157.103(d)(8) (1990). [↑](#footnote-ref-81)
81. 8145 F.E.R.C. at 61,683. [↑](#footnote-ref-82)
82. 82Under the modified fixed variable method of cost classification and rate design, return on equity and associated taxes and production related costs are included in the commodity rate. All other fixed costs are included in the demand component of rates. Under a full fixed variable rate all fixed costs are included in the demand rate; all variable costs in the commodity rate. A 100% demand charge has no commodity component. All costs are regarded as demand related for purposes of this particular rate design. [↑](#footnote-ref-83)
83. 83Other certificate applications could be filed. However, they were not to be processed on the same track as the Northeast Open Seasons projects if filed after the specified deadline. [↑](#footnote-ref-84)
84. 84See, ***e.g., Texas Eastern Transmission Corp***., 52 F.E.R.C. ¶ 61,001 (1990). [↑](#footnote-ref-85)
85. 85***Texas Eastern Transmission Corp***., 55 F.E.R.C. ¶ 61,477 (1991). [↑](#footnote-ref-86)
86. 86The Commission's intent to cover this issue in the Docket No. RM91-11 proceedings was announced at a Commission Sunshine meeting of July 17, 1991 in which it endorsed straight fixed variable rate design. See the discussion of the Mega-NOPR below. [↑](#footnote-ref-87)
87. 87***Tennessee Gas Pipeline Co. v. FERC***, 898 F.2d 801 (D.C. Cir. 1990). [↑](#footnote-ref-88)
88. 88***Iroquois Gas Transmission System, L.P***., 54 F.E.R.C. ¶ 61,285 (1991), Order on Rehearing, 55 F.E.R.C. ¶ 61,276 (1991). [↑](#footnote-ref-89)
89. 8918 C.F.R. § 154.11 (1990). [↑](#footnote-ref-90)
90. 90***Id*.** [↑](#footnote-ref-91)
91. 91***Id*.** § 154.38 (1990). [↑](#footnote-ref-92)
92. 92***Id***. § 154.39 (1990). [↑](#footnote-ref-93)
93. 93***Id***. § 154.40 (1990). [↑](#footnote-ref-94)
94. 94***See Id***. § 154.21 (1990). [↑](#footnote-ref-95)
95. 95Public Law No. 101-60, 103 Stat. 157 (codified at note preceding 15 U.S.C. § 3311 (Supp. I 1989)). [↑](#footnote-ref-96)
96. 9615 U.S.C. § 717c(a) (1988). [↑](#footnote-ref-97)
97. 97***Transcontinental Gas Pipe Line Corp***., 55 F.E.R.C. ¶ 61,446 (1991); ***Transcontinental Gas Pipe Line Corp***., 48 F.E.R.C. ¶ 61,199, at 61,753 (1989); ***El Paso Natural Gas Co*.**, 54 F.E.R.C. ¶ 61,316 (1991); ***Transwestern Pipeline Co***., 53 F.E.R.C. ¶ 61,298 (1990); and ***Transwestern Pipeline Co***., 43 F.E.R.C. ¶ 61,240 (1988), ***reh'g granted in part*,** 44 F.E.R.C. ¶ 61,64 (1988), ***remanded on other grounds, Transwestern Pipeline Co. v. FERC*,** 897 F.2d 570 (D.C. Cir.), ***cert. denied*,** 111 S.Ct. 373 (1990). [↑](#footnote-ref-98)
98. 98In re ***Permian Basin Area Rates*** cases, 390 U.S. 747 (1968). [↑](#footnote-ref-99)
99. 99***Permian***, 390 U.S. at 793-95; ***Southern Louisiana Area Rate Cases v. FPC*,** 428 F.2d 407, 441 (5th Cir.), ***cert. denied sub. nom., Associated Gas Distrib. v. Austral Oil Co*.,** 400 U.S. 950 (1970). [↑](#footnote-ref-100)
100. 100***FPC v. Texaco, Inc*.,** 417 U.S. 380 (1974). [↑](#footnote-ref-101)
101. 101***El Paso Natural Gas Company*,** Order Granting in Part and Denying in Part Requests for Rehearing and Clarification and Terminating Certain Proceedings, Docket Nos. RP88-44, ***et seq*.,** issued August 14, 1991. [↑](#footnote-ref-102)
102. 102824 F.2d 981 (D.C. Cir. 1987), ***cert. denied*,** 485 U.S. 1006 (1988). [↑](#footnote-ref-103)
103. 103***Washington Water Power Co***., 53 F.E.R.C. ¶ 61,238 (1990; ***El Paso Natural Gas Co***., Opinion No. 620, 47 F.P.C. 1527 (1972); Opinion No. 480, 34 F.P.C. 1258, 1261 (1965); Opinion No. 480-A, 35 F.P.C. 189 (1966); and Order Modifying Opinion Nos. 480 and 480-A, 44 F.P.C. 1597 (1970). See also, 18 C.F.R. § 284.1(a) (1990). [↑](#footnote-ref-104)
104. 104What constitutes gathering is not always easily definable. It is safe to say that the cases are fact-specific; however, the results are sometimes not easily predictable. Three basic tests have historically been utilized to determine whether exempt gathering is involved.

     The first test comprises cases using the "behind the plant" test which presumes that gathering takes place until the gas is cleaned and made to be of pipeline quality. See, ***e.g., Brooks Gas Corp. v. FPC***, 383 F.2d 503 (D.C. Cir. 1967). Under this test facilities that are located behind the gas processing plant are deemed to be gathering facilities while those located beyond the plant are deemed to be transportation facilities.

     A second test is the "central point in the field" test, first articulated in ***Barnes Transportation Company, Inc***., 18 F.P.C. 369 (1957). Under this test, gathering is defined as the collection of gas from various wells and movement by separate and individual lines to a central point where it is delivered into a single line. Gathering under this test ends when the gas has reached a central point for delivery into a single line. The third test is termed the "primary function" and was first applied in ***Ben Bolt Gathering Co***., 26 F.P.C. 825 (1961), ***aff'd***, 323 F.2d 610 (5th Cir. 1963). Under this test the Commission focuses on the totality of facts and circumstances of each case to determine whether the subject facilities more generally resemble transportation or gathering facilities. Post-NGPA, the Commission has indicated its adherence to the primary function test. ***Farmland Industries, Inc***., 23 F.E.R.C. ¶ 61,063 (1983). In ***Farmland***, the Commission stated that the following criteria would be evaluated in determining the primary function of the particular facility: (1) the diameter and length of the facility, (2) location of compressor and processing plants, (3) extension of facilities beyond the central point in the field, (4) location of wells along all or part of the facility, and (5) the geographical configuration of the system. Most recently, the Commission has refined its primary function approach when offshore facilities are involved, citing to technological advances and changes in offshore activities. ***Amerada Hess***, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990). Because of these changes, said the Commission,

     a relatively long pipeline on the OCS may be consistent with a primary function of "gathering or production" whereas an onshore pipeline of similar length would not. Therefore, in applying the modified "primary function" test to OCS pipeline facilities the Commission will apply, in effect, a sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area. [↑](#footnote-ref-105)
105. 105Historically, however, some facilities which were part of a larger certificate application involving transmission facilities were technically "certificate." [↑](#footnote-ref-106)
106. 106929 F.2d 1261 (D.C. Cir. 1991), Petition for Certiorari filed (July 2, 1991) (No. 91-14). [↑](#footnote-ref-107)
107. 107See Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified at note preceding 15 U.S.C. § 3311 (Supp. I 1989)). [↑](#footnote-ref-108)
108. 108Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 Fed. Reg. 22,139 (June 14, 1988), ***FERC Stat. & Regs. Preambles*** ¶ 30,820 (June 1, 1988), ***order on reh'g***, Order No. 497-A, 54 Fed. Reg. 52,781 (Dec. 22, 1989), ***FERC Stats. & Regs. Preambles*** ¶ 30,868 (Dec. 15, 1989), ***petition for review filed, Tenneco Gas v. FERC***, No. 89-1768 (D.C. Cir. filed Dec. 21, 1989). [↑](#footnote-ref-109)
109. 10918 C.F.R. § 161.1. Section 161.1 indicates the types of transportation affected by referring to sections that authorize the following: (i) transportation authorized by an individual section 7(c) certificate of public convenience and necessity; (ii) transportation under a optional expedited section 7(c) certificate; (iii) transportation provided on behalf of an intrastate pipeline or local distribution company under authority of section 311(a)(1) of the NGPA; (iv) transportation provided for others under blanket certificate authority; and (v) transportation of gas on or across the Outer Continental Shelf under Order No. 509 blanket certificate authority. [↑](#footnote-ref-110)
110. 110See 18 C.F.R. § 161.2 (1990). Section 161.2 defines control as the ability to "direct or cause the direction of the management or policies" of the affiliate; it further indicates that control is presumed if the pipeline has a voting interest of 10% or more in the affiliate. [↑](#footnote-ref-111)
111. 111*Id*. § 161.1. Section 161.2 defines transportation broadly to "include[] any transactions which provide for receipt of gas at one point and redelivery of gas to a second point...." [↑](#footnote-ref-112)
112. 112*Id*. Order No. 497 indicates that the terms marketing and brokering are to be construed to include any transaction conducted on a pipeline that benefits the pipeline or corporate group of which it is part. Order No. 497 at 31,130. Section 161.2 states that the rules apply to instances in which LDCs or intrastate pipelines are not acting within their traditional roles, that is, when an LDC or pipeline is selling gas off-system or when an intrastate pipeline is selling gas under NGPA section 311(b) to an interstate pipeline or LDC without prior Commission approval. See 18 C.F.R. § 161.2; Order No. 497-A at 31,592 - n.21. [↑](#footnote-ref-113)
113. 113See ***Kentucky West Virginia Gas Co***., 55 F.E.R.C. ¶ 61,295 (1991). [↑](#footnote-ref-114)
114. 114See "Application for Rehearing and Clarification of Texas Eastern Transmission Co.", Docket No. MT88-9-000 (June 24, 1991). [↑](#footnote-ref-115)
115. 115Mega-NOPR, mimeo at 36. [↑](#footnote-ref-116)
116. 116***Id***. [↑](#footnote-ref-117)
117. 11718 C.F.R. § 161.3. [↑](#footnote-ref-118)
118. 118Order No. 497-A at 31,599. The reporting requirements are found at 18 C.F.R. § 161.3(j)-(1) and discussed in Order No. 497-A at 31,599-602. [↑](#footnote-ref-119)
119. 11918 C.F.R. 161.3(g). [↑](#footnote-ref-120)
120. 120***Id***. § 161.3(b). [↑](#footnote-ref-121)
121. 121***Id***. § 161.3(d). [↑](#footnote-ref-122)
122. 122***Id***. § 161.3(e). In ***National Fuel Gas Supply Co***., 55 F.E.R.C. ¶ 61,316, at 61,934-35 (1991), the Commission made it clear that this standard prohibits disclosure of any information. The Commission has also indicated that a pipeline may not be in compliance with this standard even if its only contact with its marketing affiliate is that they share the same building (see, ***e.g., Trailblazer Pipeline Co.,*** 55 F.E.R.C. ¶ 61,310 (1991)) or one employee (see ***ARKLA Energy Resources Inc.,*** 55 F.E.R.C. ¶ 61,286 (1991)) - in both cases, a pipeline must make sure that nonaffiliated shipper information is not shared with an affiliate. [↑](#footnote-ref-123)
123. 12318 C.F.R. § 161.3(h). [↑](#footnote-ref-124)
124. 124***Id***. § 161.3(a). [↑](#footnote-ref-125)
125. 125Order No. 497 at 31,134. [↑](#footnote-ref-126)
126. 126***Id***. [↑](#footnote-ref-127)
127. 127Mega-NOPR, mimeo at 29. [↑](#footnote-ref-128)
128. 12818 C.F.R. § 161.3(c). [↑](#footnote-ref-129)
129. 129***Columbia Gulf Transmission Co***., 55 F.E.R.C. ¶ 61,303, at 61,923 (1991). [↑](#footnote-ref-130)
130. 130***Id***. [↑](#footnote-ref-131)
131. 13118 C.F.R. § 161.3(f). [↑](#footnote-ref-132)
132. 132Order No. 497-A at 31,596 & n.32. [↑](#footnote-ref-133)
133. 133See ***Valero Interstate Transmission Co***., 55 F.E.R.C. ¶ 61,283, at 61,903 (1991) (rejecting use of mail); ***Carnegie Natural Gas Co***., 55 F.E.R.C. ¶ 61,301, at 61,920 (1991) (establishing a 24-hour telephone number that shippers may call is inadequate). [↑](#footnote-ref-134)
134. 134Order No. 497 at 31,141-42. [↑](#footnote-ref-135)
135. 135Order No. 497-A at 31,597. [↑](#footnote-ref-136)
136. 136***Id*.** [↑](#footnote-ref-137)
137. 137***Id*.** [↑](#footnote-ref-138)
138. 138***Id*.** [↑](#footnote-ref-139)
139. 139Order No. 497-A at 31,595. [↑](#footnote-ref-140)
140. 140See ***Northern Border Pipeline Co***., 55 F.E.R.C. ¶ 61,262, at 61,842-43 (1991) (waivers granted to Western Transmission Corp. and Ringwood Gathering Co.); ***MIGC, Inc*.**, 55 F.E.R.C. ¶ 61,281 (1991) (FERC suggests pipeline request waiver of standards). In addition to receiving a partial waiver of 161.3(f), the pipelines must also receive a waiver of section 161.3(e), which prohibits communication of any information received from a nonaffiliate shipper to the pipeline's marketing affiliate. This is so because this standard is always violated when a shared employee learns nonaffiliate information while wearing his or her pipeline hat. [↑](#footnote-ref-141)
141. 141***Northern Border*** at 61,843. [↑](#footnote-ref-142)
142. 142See ***Carnegie Natural Gas Co***., 55 F.E.R.C. ¶ 61,301, at 61,920 (1991). [↑](#footnote-ref-143)
143. 143***Id*.** [↑](#footnote-ref-144)
144. 14418 C.F.R. § 161.3(i). [↑](#footnote-ref-145)
145. 145***Tennessee Gas Pipeline Co***., 55 F.E.R.C. ¶ 61,285, at 61,905 (1991). [↑](#footnote-ref-146)
146. 146***Id*.** [↑](#footnote-ref-147)
147. 147Order No. 497-A at 31,603. [↑](#footnote-ref-148)
148. 148***Id*.** [↑](#footnote-ref-149)
149. 149***Id*.** at 31,604. [↑](#footnote-ref-150)
150. 150***Northwest Pipeline Corp***., 49 F.E.R.C. ¶ 61,023 (1991). [↑](#footnote-ref-151)
151. 151***Id*.** at 61,084. [↑](#footnote-ref-152)
152. 152***Transcontinental Gas Pipe Line Corp***., 55 F.E.R.C. ¶ 61,318 (1991). [↑](#footnote-ref-153)
153. 153*Id*. at 61,937. [↑](#footnote-ref-154)
154. 15418 C.F.R. § 284.7(d)(5)(ii)(B) (1991). [↑](#footnote-ref-155)
155. 155***Pacific Gas Transmission Co***., 40 F.E.R.C. ¶ 61,193, at 61,624 (1987). [↑](#footnote-ref-156)
156. 156***Mojave Pipeline Co*.,** Order on Compliance Filing and Clarifying Prior Order, Docket Nos. CP89-1-006 and CP89-2-005, issued August 13, 1991. [↑](#footnote-ref-157)
157. 157See ***FPC v. Sierra Pacific Power Co*.,** 350 U.S. 348 (1956); ***United Gas Pipe Line Co. v. Mobile Gas Service Corp*.,** 350 U.S. 332 (1956). [↑](#footnote-ref-158)
158. 158***Richmond Power & Light v. FPC*,** 481 F.2d 490, 493 (D.C. Cir.), ***cert. denied*,** 414 U.S. 1068 (1973). [↑](#footnote-ref-159)
159. 159***Papago Tribal Util. Auth. v. FERC***, 628 F.2d 235, 245 (D.C. Cir.), ***cert. denied*,** 449 U.S. 1061 (1980); ***Transmission Agency of Northern California v. Pacific Gas & Electric Co*.,** 55 F.E.R.C. ¶ 61,417, at 62,252 (1991) (discussion of same issues under the Federal Power Act). [↑](#footnote-ref-160)
160. 160See, ***e.g***., discussion of the Iroquois proposal discussed at ***Iroquois Gas Transmission System, L.P***., 53 F.E.R.C. ¶ 61,194 (1990), Order on Rehearing, 54 F.E.R.C. ¶ 61,103 (1991). [↑](#footnote-ref-161)
161. 161***E.g., Transcontinental Gas Pipe Line Co***., 55 F.E.R.C. ¶ 61,446 (1991); ***El Paso Natural Gas Co***., 56 F.E.R.C. ¶ 61,290 (1991). [↑](#footnote-ref-162)
162. 162By way of example, Transcontinental Gas Pipe Line Corporation's restructuring settlement was recently approved in Docket Nos. RP87-7, ***et al***. In many respects it appears that it meets many of the goals set forth in the Mega-NOPR. In some respects it may not as noted in the decision approving such settlement. This will have to be addressed in further negotiations with customers. [↑](#footnote-ref-163)
163. 16318 C.F.R. § 206 (1990). [↑](#footnote-ref-164)
164. 16455 F.E.R.C. ¶ 61,131 (1991). [↑](#footnote-ref-165)
165. 16555 F.E.R.C. ¶ 61,129 (1991). [↑](#footnote-ref-166)
166. 16655 F.E.R.C. ¶ 61,130 (1991). [↑](#footnote-ref-167)
167. 16755 F.E.R.C. ¶ 61,133 (1991). [↑](#footnote-ref-168)
168. 168It is not entirely clear that substantial comparability and the existence of a competitive market equal or whether they constitute two separate tests. [↑](#footnote-ref-169)
169. 169***United Gas Pipe Line Company***, 55 F.E.R.C. ¶ 61,152 (1991). [↑](#footnote-ref-170)