Land & Water Law Review

Volume 18 | Issue 1 Article 1

1983

Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation under the Federal Power and Natural Gas Acts

Harvey L. Reiter

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Reiter, Harvey L. (1983) "Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation under the Federal Power and Natural Gas Acts," *Land & Water Law Review*: Vol. 18 : Iss. 1 , pp. 1 - 80.

Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss1/1

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming

College of Law

LAND AND WATER

LAW REVIEW

VOLUME XVIII 1983 NUMBER 1

Today, consumers of natural gas and electricity are beset by ever-increasing prices for those commodities. In this article the author examines the extent to which federal regulation can provide relief from high prices by enhancing competition. In particular, the author examines the importance and the scope of the FERC's role as a guardian of competition in regulated energy industries.

COMPETITION AND ACCESS TO THE BOTTLENECK: THE SCOPE OF CONTRACT CARRIER REGULATION UNDER THE FEDERAL POWER AND NATURAL GAS ACTS

*Harvey L. Reiter**

Regulators, it has been observed, are well advised to consider carefully the benefits that competition might bring to the industries that they regulate.[1] Deregulation is often the buzzword applied, yet its connotations are misleading; they suggest that the solution to poor performance in a regulated industry is simply to remove regulation altogether. This may work well in those industries not characterized by high entry barriers, enormous scale economies, or seller concentration. Airlines and trucking are examples often cited.

Copyright© 1982 by Harvey L. Reiter

*Special Assistant to the Deputy General Counsel for Litigation, Federal Energy Regulatory Commission. B.A., 1972 Michigan State University; J.D., 1975 Boston University School of Law. I wish to express thanks to Daniel Watkiss, John Flynn and Phillip Marston for their helpful comments and suggestions. Special thanks go to my wife Wendy for her helpful criticisms and for her enduring patience.

The opinions expressed in this article are those of the author and do not necessarily represent the views of the Federal Energy Regulatory Commission.

1. BREYER, REGULATION AND ITS REFORM 185-86 (1982). (Mr. Breyer is now a judge on the First Circuit Court of Appeals).

On the other hand, where enhancing competition is the regulator's goal, deregulation may be precisely the wrong answer in those industries characterized by vertical integration and natural monopoly in one or more of the steps in the vertical chain of production.[2] Here, the telecommunications industry provides the classic example. No one today would suggest that telephone equipment need be supplied by only a single firm. Yet it was federal regulation that ended AT&T's restrictions on customer-owned telephones and other attachments,[3] thereby permitting the introduction of competition for the sale and production of that equipment.

The distinction between deregulation and regulation to enhance competition is best observed in the electric utility and natural gas industries. There have been calls in both for the deregulation of electric generation and of natural gas prices. Quite understandably, there have been no serious proposals advanced to deregulate electric power transmission or gas pipeline transportation, areas of traditional governmental regulation. It is in the areas of pipeline transportation and electric power transmission, however, that the key to enhancing competition in these industries lies.

This article focuses upon the question of access to gas pipelines and electric transmission networks by non-owners seeking access to new markets or to alternate suppliers. It begins with an outline of the competitive structures of the two industries and the importance of access to promoting competition in each. Next, the article turns to an examination of the limits of the Federal Energy Regulatory Commission's[4] statutory jurisdiction to address these issues un-

2. Judge Breyer makes this same observation, noting that where natural monopoly exists and is significant, the facts produce a *regulatory* problem and "classical regulation is likely to be appropriate for part of the industry." *Id.* at 314.
3. *See* In the Matter of Carterphone, 13 F.C.C.2d 420 (1968); *See also* BREYER, *supra* note 1, at 285-314.
4. The Federal Energy Regulatory Commission was created on October 1, 1977, pursuant to Section 401 of the Department of Energy Organization Act, (42 U.S.C. § 7171 (1977)) and Executive Order No. 12,009, 42 Fed. Reg. 46,267 (1977). It succeeded to most of the functions previously administered by the Federal Power Commission. 42 U.S.C. § 7172(a) (1977). Unless otherwise noted, when used throughout this article, the term "Commission" refers to the Federal Power Commission ("FPC") or Federal Energy Regulatory Commission ("FERC") depending upon whether events or decisions referred to occurred before or after October 1, 1977.

der the Federal Power and Natural Gas Acts. Finally the article discusses proposals for facilitating access arrangements under existing law.

THE ROLE OF COMPETITION IN THE REGULATED ELECTRIC UTILITY AND NATURAL GAS PIPELINE INDUSTRIES

It is by now a settled proposition that competition, for better or worse, enjoys a protected status in the functioning of the electric utility and natural gas pipeline industries. It is a role protected by the antitrust laws, the existence of federal regulation notwithstanding.[5] Regulation, moreover, must take into account the policies underlying the antitrust laws. Federal Power and Natural Gas Act terms such as "public convenience and necessity," "justness and reasonableness" and "public interest" derive their meaning from various federal policies, including those fundamental national economic policies underlying the antitrust laws.[6] The Supreme Court has observed that the history of Part II of the Federal Power Act, for example, "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."[7] The Court has described the FERC's role as the "first line of defense against those competitive practices that might later be the subject of antitrust proceedings."[8] Indeed, the public interest requires that antitrust policy may have to be considered *sua sponte* by the agency even where no party has raised the issue.[9] Although the message seems to have been less than enthusiastically received by the Federal Power Commission[10] (as is evinced by numerous court cases involv-

5. California v. FPC, 369 U.S. 482 (1962); United States v. El Paso Natural Gas Corp., 376 U.S. 651 (1964); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).
6. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). *See also* NAACP v. FPC, 425 U.S. 662 (1976); FPC v. Conway Corp., 425 U.S. 271 (1976).
7. Otter Tail Power Co. v. United States, 410 US. at 374 (1973).
8. Gulf States Utilities Co. v. FPC, 411 U.S. at 760 (1973)
9. Marine Space Enclosures v. FMC, 420 F.2d 577, 585 (D.C. Cir. 1969).
10. *Gainesville Utilities Dep't v. Florida Power Corp.*, the Supreme Court's landmark decision on the scope of Commission authority to order and es-

Land & Water Law Review, Vol. 18 [1983], Iss. 1, Art. 1

ing that agency),[11] its successor, the FERC, has been more receptive to consideration of competition's role and apparently more philosophically inclined to endorse its potential benefits for the regulated industries.[12]

The ways in which competition operates in the electric utility and natural gas pipeline industries are the subjects of discussion in numerous cases and articles and will not be treated exhaustively here.[13] Nevertheless the subject merits

tablish the terms of interconnection between utilities, is an interesting case in point. 402 U.S. 515 (1971). In the initial litigation before the FPC, the City of Gainesville had sought interconnection with the larger Florida Power Corporation system, which the Company would have agreed to if the City, in turn, had agreed to a territorial division of service areas. No agreement was reached and the Commission ultimately ordered the interconnection without the territorial agreement. Deletion of the territorial restriction was not premised on its potential anticompetitive consequences, but for precisely the opposite reason—in the FPC's view "the continued isolation of Gainesville [i.e., non-interconnected operation] [would] lead only to a more aggressive competition" by the City to increase its load and thereby justify larger, more efficient plants. Gainesville Utilities Dep't v. Florida Power Corp., 40 F.P.C. 1227, 1242 (1968). *See also* Village of Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675 (1971), *aff'd in part, remanded in part*, Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973). In this case, the Commission ordered an interconnection arrangement between Otter Tail and the newly formed municipal electric system of the Village of Elbow Lake under which Otter Tail would provide Elbow Lake with wholesale power. The Commission concluded that an interconnection was necessary to assure reliable electric service to the village, but charged Elbow Lake with an "ill-advised incursion into the power business," warning that its order "must not invite improvident ventures elsewhere." 46 F.P.C. at 677-78. Otter Tail, which had refused to sell or wheel wholesale power to the Village, was ultimately found to have violated the Sherman Act by its conduct preventing the development of competing distribution systems. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

11. It apparently took several trips to court, including two to the Supreme Court, to fully convince the FPC of its statutory mandate to consider antitrust policy in the public interest equation. *See* FPC v. Conway Corp., 425 U.S. 271 (1976); Gulf States Utiilties Co. v. FPC, 411 U.S. 747 (1973); Northern Natural Gas Corp. v. FPC, 399 F.2d 953 (D.C. Cir. 1968).
12. In *Gulf States Utilities Co.*, the FERC first articulated a "least anti-competitive alternatives" test in adopting a *per se* rule against direct resale restrictions imposed by utilities on the wholesale customers. 5 F.E.R.C. ¶ 61,066 (1978). The Commission there concluded that because of the salutary effect of competition on the rates and performance of regulated utilities, competitive restraints would only be tolerated where they served a legitimate business purpose and did so in the least anticompetitive manner. *Id.* at 61,098. Resale restrictions, the Commission held, might serve legitimate planning purposes but were deemed "unnecessarily blunt" devices which would impede competition. The Commission again articulated this test in *Florida Power & Light Co.* holding that competitive restraints would not be tolerated unless justified by "overriding public policy objectives" achieved by the least anticompetitive method. No. ER 78-19 (FERC order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313, 313-15 (1979). This test was reaffirmed in City of Frankfort v. Kentucky Utilities Co., 12 F.E.R.C. ¶ 61,004 (1980), *vacated on other grounds*, 20 F.E.R.C. ¶ 61,173 (1982).
13. *See, e.g.*, Hughes, *Scale Frontiers in Electric Power*, in TECHNOLOGICAL CHANGE IN REGULATED INDUSTRIES 44 (Brookings Institute 1971); Schwartz, *Pricing and Competition in the Regulated Energy Industries*, in NEW DIMENSIONS IN PUBLIC UTILITY PRICING 555 (Michigan State University

some discussion, particularly insofar as it relates to the manner in which the transportation of gas and the transmission of electricity for others affect the feasibility of competition in the electric and natural gas industries.

Electric Utility Competition

The electric utility business can be functionally divided into three separate operations: generation, transmission, and distribution of power. While the vast majority of electric consumers are served by large, vertically integrated utilities,[14] there exist a substantial number of utilities, most publicly owned, engaged solely in the distribution of power purchased at wholesale from the vertically integrated systems.[15] In addition, other utilities are partially integrated, generating only a portion of their load and purchasing the rest from others.[16] Still other utilities, such as the Tennessee Valley Authority, are essentially wholesale power suppliers with no significant retail service responsibilities.[17]

Retail Competition

Competition among electric utilities at the retail level is a ubiquitous phenomenon.[18] While its intensity may vary from region to region,[19] the FERC has established a presumption of its existence, observing that

1976); Weiss, *Antitrust in the Electric Power Industry*, in PROMOTING COMPETITION IN REGULATED MARKETS 135 (Brookings Institute 1975); Fairman and Scott, *Transmission, Power Pools and Competition in the Electric Utility Industry*, 28 HASTINGS L.J. 1159 (1977); Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64 (1972); Essay, *Efficiency and Competition in the Electric Power Industry*, 88 YALE L.J. 1511 (1979).

14. Of the nation's 3,500 electric utilities, the 200 largest systems provide over 90 percent of the generating capacity and account for service to 80 percent of ultimate consumer load. *Power Pooling in the United States*, FERC STAFF REPORT 5, ch. 2 [hereinafter cited as Pooling Study].
15. Only one quarter of the 2,200 state and municipally owned electric systems generate their own power. The more than 1,000 rural electric cooperative systems likewise depend upon wholesale suppliers for 98 percent of their total energy needs. *Id.* at 6.
16. *Id.*
17. Essay, *supra* note 13, at 1541-42. Another federal power agency, the Bonneville Power Administration, serves primarily as a power broker whose essential business is the transmission of power. (*See* Florida Power & Light Co., No. ER 78-19 (Phase I) (filed testimony of Dr. Gordon Taylor, Staff Economist, FERC), Tr. 1522.
18. *See* Curtis, *Report to Congress, Decisional Delay in Wholesale Electric Rate Increase Cases: Causes, Consequences and Possible Remedies* at 23-29 (January 23, 1980) [hereinafter cited as Curtis Report].
19. Pooling Study, *supra* note 14, ch. 8 at 61-68.

it would be a "rare case" in which no such competition would be found.[20] As the Commission defines it, retail competition among electric utilities need not consist of active rivalry.[21] The presence of competition rests upon the existence of actual or potential alternative sources of supply. That in turn is established by the close proximity of two or more utility service areas or by proof that one or more utilities would be possible candidates to take over another utility's retail loads if that utility were to go out of business or otherwise discontinue serving its retail customers.[22] Thus, retail competition may take the form of franchise contests, pitting private utilities against local government-owned alternatives,[23] or of rivalry for the patronage of large industrial customers considering neighboring service areas as location or relocation options.[24]

Wholesale Competition

With the exception of fringe area and head-to-head rivalry[25] among utilities, competition at the retail level is

20. Connecticut Light and Power Co., No. ER 78-517 (FERC Order issued Aug. 20, 1979), slip op. at 10 n.24, 31 PUB. UTIL. REP. 4th 315, 320-22 (1979).
21. *Id.* The records in several cases indicate that there often is no shortage of intensity. *See, e.g.*, Florida Power & Light Co., No. ER78-19 (FERC Order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313 (1979); Southern Cal. Edison Co., No. ER76-205 (FERC Order issued Aug. 22, 1979), *aff'd sub nom.*, City of Anaheim v. FERC, 669 F.2d 799 (D.C. Cir. 1981); Toledo Edison Co., 10 N.R.C. 265 (1979); Consumer's Power Co., 6 N.R.C. 892 (1977).
22. Southern Cal. Edison Co., 10 F.E.R.C. ¶ 61,260 (1980); Commonwealth Edison Co., No. 63 (FERC Opinion issued Sept. 14, 1979); Connecticut Light and Power Co., 31 PUB. UTIL. REP. 4th 315, 321-22 (1979). Recognizing the unique nature of electric utility competition, the Second Circuit recently adopted the Commission's functional definition. City of Groton v. Connecticut Light and Power Co., 662 F.2d 921, 930 (2d Cir. 1981).
23. For example, citizens dissatisfied with service from their publicly owned distribution system may opt for takeover of their system by the surrounding private utility. *See e.g.*, Citizens for Allegan County v. FPC, 414 F.2d 1125 (D.C. Cir. 1969). Similarly, communities served at retail by a vertically integrated private utility may seek to condemn its facilities in their area and establish a government owned system as did the citizens in Elbow Lake, Minnesota. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
24. *See, e.g.*, FPC v. Conway Corp., 426 U.S. 271 (1976).
25. The Yale Essay author notes that competing distribution systems (wholly duplicative systems that compete door to door or "head to head") exist in fewer than 30 communities in the United States. Essay, *supra* note 13, at 1521 n.50. Competition on a head-to-head basis may also occur between utilities at the fringes of their service territories or for individual industrial customers. Curtis Report, *supra* note 18, at 24-26. Not to be discounted is the competitive potential of power produced by non-utilities. Cogenerators—those firms producing electric power as a by-product of some industrial or commercial process—and small producers of energy for renewable resources—such as solar and hydroelectric plants—are given

largely confined to contests for control over local distribution monopolies; there is little of the battle for the patronage of individual customers one associates with conventional forms of competition. Wholesale competition between utilities, on the other hand, exhibits more of the traditional characteristics of competitive behavior.

The feasibility of competition between power suppliers at the wholesale level rests upon the existence of transmission links between the power source and the customer. Technological developments in the transmission of power at high voltages make possible the economic movement of power over great distances,[26] enabling a system like San Diego Gas and Electric Company, for example, to purchase power from sources as far-flung as British Columbia and Canada[27] to the north, Mexico[28] to the south, and Arizona[29] to the east of its service area.

Competition at the wholesale level is not a recent phenomenon. Battles between federal power marketing agencies and privately owned utilities for the business of municipal distribution systems are documented back to the 1940's and earlier.[30] In addition, several cases before the NRC and the FPC have identified yet another wholesale power market, the market for "coordination services."[31]

---

various incentives to develop production facilities under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (Supp. IV, 1980).

26. Curtis Report, *supra* note 18, at 31 (citing CONGRESSIONAL RESEARCH SERVICE, 95th Cong., 1st Sess., REPORT ON NATIONAL ENERGY TRANSPORTATION (1977)).

27. San Diego Gas and Electric Company FERC Form 1, 1979 ANN. REP. 422 [hereinafter cited as SDG&E ANNUAL REPORT].

28. Testimony of Jack Thomas, Vice President-Electric, San Diego Gas & Electric Co., before the FERC in *Pacific Gas & Elec. Co.*, FERC No. E-7777 (II), Transcript (Consol. Helms) 1930, 1933.

29. SDG&E ANNUAL REPORT, *supra* note 27, at 422.

30. *See, e.g.*, REPORT OF JOINT COMMITTEE INVESTIGATION OF THE TENNESSEE VALLEY AUTHORITY, S. DOC. NO. 56, 76th Cong., 1st Sess. *reprinted in* Flynn and Schwartz, ANTITRUST AND REGULATORY ALTERNATIVES 824-31 (1977 ed.); Pacific Gas & Elec. Co., 2 F.P.C. 392 (1941); Curtis Report, *supra* note 18, at 29.

31. *See, e.g.*, Consumers Power Co., 6 N.R.C. 892 (1977); Toledo Edison Co., 10 N.R.C. 265 (1979); Florida Power & Light Co., No. ER 78-19 (FERC Order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313 (1979); City of Frankfort v. Kentucky Utilities Co., 12 F.E.R.C. ¶ 61,004 (1980), *vacated in part on other grounds*, 20 F.E.R.C. ¶ 61,173 (1982).

Participants in the coordination services market often act both as buyers and sellers,[32] supplementing their own generating capacity with short term power purchases during periods of scheduled maintenance on their facilities as well as during system emergencies.[33] Similarly, energy may be purchased when available to displace more costly generation on a utility's own system; this is usually referred to as an economy energy transaction.[34] In addition, utilities may attempt to meet their long term needs through the purchase of entitlements, reserved shares of generating capacity, out of specified generating units owned by others. They may also seek to obtain or dispose of part ownership in units otherwise too large or too expensive to finance for an individual system. A recently released pooling study undertaken by the FERC staff identified some significant competition for these longer term power purchases in the Northeastern United States.[35] According to the study, such competition was possible in large part due to the ready access of participants to the transmission network.[36]

The Importance of Transmission Access to Wholesale Competition

As Professor James Meeks observed in his oft cited *"Concentration in the Electric Power Industry: The Impact of Antitrust Policy,"* the transmission of electric power is generally acknowledged to possess natural monopoly characteristics.[37] This, he noted, is observable from the in-

32. This is not an absolute requirement however. It is feasible for a non-generating entity to assemble a bulk power package of coordination services choosing from among various suppliers to meet its full requirements. Thus, for example, the cities of Anaheim and Riverside, California purchase the bulk of their power needs from the Southern California Edison Company, but when cheaper, non-firm economy energy is available from Nevada Power Company, it is used to displace energy purchases from Edison. Testimony of Everett C. Ross, Director of Public Utilities Department, Riverside, California, Pacific Gas & Elec. Co., FERC No. E-7777 (II), Transcript (Consol. Helms) 2139; Testimony of Gordon W. Hoyt, General Manager, Public Utilities Department, Anaheim, California, Pacific Gas & Elec. Co., *Id.* at 2160.
33. *See* Pooling Study, *supra* note 14, ch. 3.
34. *Id.* at 37.
35. *Id.* at 66-67.
36. *Id.*
37. Meeks, *supra* note 13. Natural monopolies are characterized by decreasing unit costs as output increases over the range of production. *See* Kahn, 1 THE ECONOMICS OF REGULATION 119 (1971).

efficiency and high societal costs of duplicating existing transmission grids and from the policies of state regulatory agencies which prohibit unnecessary duplication of facilities. Economies of scale, environmental and land use considerations, and absolute cost levels render duplicate transmission lines uneconomic and inefficent.[38]

The transmission networks of large, vertically integrated utility systems, which cannot be practically duplicated by competitors, have often been described as "bottleneck" facilities giving their owners a "strategic dominance" over competitors.[39] This strategic dominance enables the owner to exclude competitors from access to alternative supplies, thereby bestowing monopoly power upon it.[40] According to Professor Meeks, "the monopoly over transmission by vertically integrated systems presents the most serious obstacle to potential competition."[41] As the FERC observed in *Florida Power & Light Co.*, a monopolist may effectively deny access by the imposition of impractical terms and prices as readily as by outright refusals.[42]

The necessity for broad transmission access is widely acknowledged as a prerequisite to wholesale competition. Many recent proposals for deregulation or divestiture of the electric utility industry foresee long term advantages in competition among power producers compared to the present regulatory scheme.[43] These benefits, the advocates argue,

38. *Id.* at 91.
39. Pooling Study, *supra* note 14, at 49; Essay, *supra* note 13, at 1522-23; Meeks, *supra* note 13.
40. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. at 377 (1973); Florida Power & Light Co., No. ER 78-19 (FERC Order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313 (1979); Consumers Power Co., 6 N.R.C. at 997-1008; Essay, *supra* note 13, at 1523.
41. Meeks, *supra* note 13, at 87.
42. Florida Power & Light Co., No. ER 78-19 (FERC Order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th at 339 (citing Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)).
43. Bohn, Tabors, Golub, and Schweppe, *Deregulating the Electric Utility Industry*, MIT Energy Laboratory Technical Report No. MIT-EL-82-003 (January 1982); Economics Division, Edison Electric Institute, *Deregulation of Electric Utilities, A Survey of Major Concepts and Issues*, (July 1981); *A New Route for Decontrolling Gas*, BUS. WK. 50, June 29, 1981; J. Plummer, Scenarios for Deregulation of Electric Utilities, Electric Power Research Institute (November 1981) (unpublished article); W. Gillen, A Consideration of Deregulation of Electric Generation (May 1981) (paper for Argonne National Laboratory). FERC Commissioner David R. Hughes has taken a particular interest in the possibilities of divestiture and deregu-

will redound to both financially strapped utilities and retail consumers.[44] Inherent in most of these proposals, however, is the recognition that competition will be feasible and deregulation acceptable, only if the transmission networks now dominated by the largest utilities are required to provide substantially greater access, and perhaps even subjected to divestiture.[45]

The Natural Gas Industry

Like the electric utility industry, the natural gas industry is readily divided into categories of production, transportation and distribution.[46] Indeed the functional separation is more complete, for while entities engaged in any one aspect of the business may be affiliated with others elsewhere on the vertical chain,[47] pipelines, producers and distributors largely retain their individual corporate identity and organization.[48]

---

lation of electric utilities. *See, e.g.*, Remarks by Commissioner David Hughes, Federal Energy Regulatory Commission, American Bar Association National Institute, *Elements of Utility Rate Proceedings*, Washington, D.C. (March 13, 1981); Speech by Commissioner David Hughes, *Innovation in Energy Policy and Research*, Third International Conference of Energy Use Management, Berlin, West Germany (Oct. 29, 1981).

44. The President of Virginia Electric & Power Company (VEPCO), William W. Berry, has been the utility industry's most outspoken advocate of electric generating deregulation and was the first major electric utility executive to publicly support the concept. Knight, *Vepco Chief Advocates Electricity Deregulation*, Wash. Post, Oct. 7, 1981, at D8. Berry argues that competition among independent generators with free entry and no obligation to serve and access to regional transmission networks will spur efficiency with resulting longer term rates lower than those likely under continued regulation. This will also result in returns commensurate with stockholder needs. Remarks of William W. Berry, President Virginia Electric and Power Company, Edison Electric Institute Financial Conference, Palm Beach, Florida (Oct. 6, 1981); Remarks by William W. Berry, National Economic Research Associates Deregulation Workshop (June 5, 1981).
45. *See, e.g.*, Essay, *supra* note 13, at 1534 n.121, 1541; Address by George R. Hall, *Deregulation of Electric Generation: Some Cautionary Considerations*, Fourth Annual Utility Regulatory Conference, Public Utilities Reports, Washington, D.C. (October 2, 1981).
46. 1 FPC NAT'L GAS SURVEY, COMM'N REP. 53 (1975).
47. For example pipelines may own interests in gas production companies. In fact all the major interstate gas pipelines (Panhandle Eastern Pipeline Company, United Gas Pipeline Company, Columbia Gas Transmission Company, El Paso Natural Gas Company, etc.) have substantial exploration, development and production affiliates. Schwartz, *supra* note 13, at 573-74. Some pipelines also operate distribution systems. Arkansas Louisiana Gas Pipeline Company is one such system. *See* Arkansas-Louisiana Gas Pipeline Co., 4 F.E.R.C. ¶ 61,318 (1978). Finally distributors and even direct end users may and are in fact encouraged to develop their own sources of gas. Schwartz, *supra* note 13, at 575; 45 Fed. Reg. 5362 (1978) codified at 18 C.F.R. § 2.79 (1982).
48. 1 FPC NAT'L GAS SURVEY, *supra* note 46, at 53-55.

Competition Among Gas Pipelines

Competition among natural gas pipelines takes two basic forms: competition to secure new gas supplies and competition to supply customers. The latter form of competition has occupied a long-recognized place high on the list of economic values protected by antitrust law and policy. As the D.C. Circuit Court of Appeals noted in *City of Pittsburgh v. FPC*,[49] and again in *Northern Natural Gas Co. v. FPC*,[50] competition and regulation are complementary forces; the potential benefits to consumers of competition among pipelines are not to be lightly regarded.[51]

When gas pipelines compete for gas supplies, the competition is often quite intense. Former FERC economist Robert Anderson[52] in a February 10, 1982 speech before the Symposium on Problems of Regulated Industries,[53] noted that although the Overthrust Belt in the Rocky Mountain states is a major new gas producing area, only a few pipelines are able to transport natural gas from this area. Other major pipelines are interested in this gas, but must either construct their own duplicate pipelines or obtain transportation service over the existing facilities of other pipelines.[54] In

49. 237 F.2d 741 (D.C. Cir. 1956).
50. 399 F.2d 953, 964-65 (D.C. Cir. 1968).
51. The court in *Northern Natural Gas*, observed that the certification of two pipelines to serve a given market could provide incentives for the pipelines to contain costs and improve service in order to retain and attract customers. This same perceived benefit formed the basis of the Supreme Court's decision to reject the merger of the El Paso and Pacific Northwest natural gas pipeline systems as violative of Section 7 of the Clayton Act. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). The Court had two years previously ruled that the FPC had improperly acted upon El Paso's application to acquire the assets of Pacific Northwest Pipeline Company without awaiting completion of the then ongoing antitrust proceedings. California v. FPC, 369 U.S. 482 (1962).
52. Mr. Anderson, at the time the speech was given, was the Deputy Director of FERC's Office of Regulatory Analysis.
53. Paper by Robert E. Anderson, *Greater Access to Transportation Services on Interstate Pipelines*, Symposium on Problems of Regulated Industries, Kansas City, Missouri, (Feb. 10, 1982) [hereinafter cited as Anderson].
54. Anderson, *supra* note 53, at 16. These circumstances apparently led Natural Gas Pipeline Company (Natural) to file an antitrust suit with the U.S. district court in Colorado charging that the Kansas-Nebraska Natural Gas Company (K-N) had the only pipeline facilities which could be utilized to transport gas owned by Natural and that K-N had refused to transport the gas or else agreed to transport it on unreasonable terms in violation of Section 2 of the Sherman Act. Natural Gas Pipeline Co. of America v. Kansas-Nebraska Natural Gas Co., Inc., Pleading No. 80-K-1222, (D. Colo. filed Sept. 16, 1980). Apparently the case was settled and Natural's complaint was dismissed by stipulation in July 1981.

addition, Anderson observed that with the partial decontrol of natural gas prices under the Natural Gas Policy Act of 1978,[55] intrastate pipelines will be placed under substantial pressure to secure adequate supplies in competition with interstate pipelines, which enjoy an advantage due to their substantial supplies of natural gas purchased under lower regulated prices.[56] The FERC takes this point a step further, recently describing competition among gas pipelines generally as "relentless".[57]

Competition Between Gas Pipelines and Customers

Since gas pipelines engage in both the sale and transportation of gas, they are often in direct competition with their customers for gas supplies where those customers have direct access to alternate supplies of gas.[58] Large industrial users, for example, faced frequent shortages and curtailments during the 1970's and view direct purchases as supplements to gas supplied by the pipeline.[59] Pursuant to its Order 533,[60] the FPC adopted a policy statement to encour-

55. 15 U.S.C. §§ 3301-3432 (Supp. IV 1980).
56. Anderson, *supra* note 53, at 9.
57. Statement of Policy, No. PL82-1-000 (FERC issued Feb. 4, 1982); 47 Fed. Reg. 6253 (Feb. 11, 1982); FERC Statutes and Regulations ¶ 30,336 (1982) [hereinafter cited as Policy Statement]. The Commission explains that because many pipelines with substantial quantities of gas under contract at low regulated prices will be able to average these low prices with the relatively high prices of deregulated gas, these pipelines can be expected to bid unregulated well prices considerably above long term market clearing levels. FERC Statutes and Regulations at 30,104, 30,106, and 30,108.
The Antitrust Division has expressed a similar concern, particularly where the result is that pipelines will increase their affiliate operations and simply inflate the price they pay for their own gas. Speech by Ronald G. Carr, *The Antitrust Division Perspective: Mergers and Acquisitions in the Natural Gas Industry* 4, American Gas Association, Arlington, Virginia (Mar. 31, 1982).
58. In addition pipelines compete with suppliers of alternate fuels for their direct-sale industrial customers. Where the price of gas approaches the price of low sulfur No. 6 fuel oil for those customers with fuel switching capability, large industrial consumers of gas are encouraged to change suppliers. Policy Statement, *supra* note 57, at 30,107.
59. Anderson, *supra* note 53, at 8. *See also* FERC Order No. 27, *Certification of Pipeline Transportation for Certain High Priority Uses*, 44 Fed. Reg. 24,825 (Apr. 27, 1979); FERC Order No. 533, 54 F.P.C. 821 (1975); FERC Order No. 533-A, 54 F.P.C. 2058 (1975). Gas distributors may have similar concerns. Anderson, *supra* note 53, at 5.
60. FPC Order No. 433 was affirmed by the D.C. Court of Appeals in American Public Gas Ass'n v. FERC, 587 F.2d 1089 (1978). The court there observed that because the gas prices of interstate pipelines were regulated under the Natural Gas Act and because gas purchased by industrial customers directly from the interstate market was not, end users were better able to compete with exempt intrastate pipelines for scarce gas suppliers than were the regulated interstate pipelines.

age "self-help" arrangements allowing certain commercial and industrial gas users to secure gas directly, with the pipeline acting solely as a transporter.[61] This policy currently remains in effect.[62]

Similarly, gas pipelines may compete for gas supplies with distribution companies for whom they transport gas. In deed, section 603 of the Outer Continental Shelf Lands Act Amendments of 1978[63] encourages gas distributors to develop gas supplies on Outer Continental Shelf leaseholds, and requires the FERC to promulgate a statement of general policy concerning the transportation of distributor-owned gas from an Outer Continental Shelf lease to the distributor's local service area. FERC Order No. 92,[64] which was adopted by the Commission in response to section 603's directive, permits distributors to seek amendments to pipeline certificates on behalf of the pipelines. Such amendments would permit pipelines to transport distributor-owned gas.[65]

Franchise competition and competition for industrial loads may also occur between pipelines and their distribution customers. In one 1978 dispute before the FERC, the

61. In early 1978, the FERC in its Order No. 2 (FERC Docket No. RM75-25 (February 1, 1978)) continued the FPC's Order No. 533 program. This policy was later carried over into section 608 of the Public Utility Regulatory Policies Act of 1978 (Pub. L. No. 95-617, 92 Stat. 3173), which amended section 7(c) of the Natural Gas Act, to explicitly authorize the issuance of certificates of public convenience and necessity for the transportation of direct sale gas intended for certain high priority uses, 15 U.S.C. § 717f(c) (Supp. IV 1980).
62. Conversely, gas producers may compete with gas pipelines for access to distributors and end use customers. *See e.g.*, Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) (Antitrust action by gas producers charging competing producer-pipeline company with monopolization by refusing to deal with plaintiffs or to transport plaintiffs' gas in competition with its own). *See also*, Anderson, *supra* note 53, at 10.
63. 43 U.S.C. § 1862 (1978).
64. No. RM80-11 (FERC issued July 24, 1980), 45 Fed. Reg. 49,247 (July 15, 1980).
65. The Commission rejected arguments that increasing distributor access to OCS gas would lead to undesirable competition between pipelines and distributors, noting that Congress had declared such competition to be in the public interest. Moreover, the Commission observed, competition would likely lead to increased exploration and production of offshore gas. FERC Regs. Preambles ¶ 30,173, at 31,171 (1980), 45 Fed. Reg. 49,247 (July 15, 1980). The Laclede Gas Company, a gas distributor, has urged the Commission to extend its policy of encouraging distributor self-help to all gas sources, not just those located offshore. Its petition for a Commission rulemaking is currently pending. *See* Laclede Gas Co., FERC No. RM82-1 (filed Oct. 14, 1981) [hereinafter cited as Petition].

cities of Winfield and Magnum, Kansas complained that the Arkansas Louisiana Gas Company (ARKLA) was charging them higher rates for gas than the rates charged to the pipeline's affiliated distribution companies, in an attempt to squeeze the municipal systems out of business.[66] Another example of apparent competition for industrial loads appears from a motion recently filed with the Commission by the Tennessee Valley Municipal Gas Association.[67] The Association alleges in its motion that the Alabama-Tennessee Gas Company illegally inserted a provision in its rate filing preventing gas distributors from reselling purchased gas, in competition with the pipeline, to industrial customers located beyond their city limits.[68]

Pipeline Bottlenecks

Like transmission access in the electric utility industry, the availability of transportation service over a gas pipeline may be essential to the feasibility of competition between the owner of that pipeline and end users, distributors, other pipelines, and even producers. As the Supreme Court has stated, the Natural Gas Act[69] was aimed at "monopolistic forces" controlling natural gas.[70] The key to this control is the essential link that the pipeline provides between customer and producer. Ownership of a pipeline facility has been held to give a firm monopoly power over

66. Arkansas-Louisiana Gas Co., 4 F.E.R.C. ¶ 61,318 (1978). The hearing order initiated procedures similar to those it adopted for establishment of a prima facie case of "price squeeze" in electric utilities cases. The Commission's price squeeze procedures, appearing in its statement of policy (18 CFR § 2.17 (1976)) have undergone considerable modification in subsequent case-by-case adjudication. See discussion in FERC No. RM 79-80, *Notice of Proposed Rulemaking: Price Squeeze—Substantive Rules* (No. 19, 1979), 44 Fed. Reg. 67,158 (Nov. 23, 1979).
67. The issue raised in that motion is currently pending before the Commission and is discussed in Alabama-Tennessee Natural Gas Co., 21 F.E.R.C. ¶ 61,391 (1982). The author is involved in this case as FERC counsel.
68. Resale restrictions in electric utility cases have been declared by the FERC to be *per se* unlawful under the Federal Power Act. Central Maine ¶ 61,066 (1978); Louisiana Power & Light Co., 14 F.E.R.C. ¶ 61,075 (1981). *See supra* note 12. Similar restraints imposed by pipelines have been held violative of the Natural Gas Act. Florida Gas Transission Co., 47 F.P.C. 341 (1972); Humble Gas Transmission Co., 37 F.P.C. 920 (1967), *aff'd*, Missisippi Valley Gas Co. v. FPC, 398 F.2d 395 (5th Cir. 1968); Southern Natural Gas Co., 25 F.P.C. 925 (1961), and have been the subject of federal antitrust investigations as well.
69. 15 U.S.C. §§ 717-717(z) (1976 & Supp. IV 1980).
70. FPC v. Texaco, 417 U.S. 380, 397-98 (1974).

gas produced from a single field.[71] Congress has recognized the bottleneck nature of gas pipelines. Discussions in both the Senate and the House of Representatives on Amendments to the Outer Continental Shelf Lands Act[72] indicate that sections 5(e) and 5(f)[73] of the Act were intended to prevent *inter alia* "bottleneck monopolies and other anticompetitive situations involving pipelines."[74] Of equal significance is the fact that the Commission's own certification authority[75] places practical limits upon the number of pipelines that are permitted to serve a given market.[76] The limitation on transportation alternatives available to producers moreover may give individual pipelines monopsony power over those producers.[77]

71. Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d at 1304 (5th Cir. 1971). There the court held that a single gas field was an identifiable relevant geographic market and that defendant's control over transportation gave it monopoly power. *Id.* at 1307. In an unpublished study, FERC economist David Mead notes that while in a number of areas gas producers enjoy a moderate amount of competition among pipelines vying for the right to transport gas *from* producing areas, outside of major producing states, receiving capacity concentration is extremely high, i.e., pipelines or distributors receiving gas from other pipelines have few choices. D. Mead, Concentration in the Natural Gas Pipeline Industry 23-25 (August, 1981) (unpublished study) (emphasis added). Two earlier studies of the monopsony power held by gas pipelines reached similar conclusions: MACAVOY, PRICE FORMATION IN NATURAL GAS FIELDS: A STUDY OF COMPETITION, MONOPSONY, AND REGULATION (1962); Braeutingam, *The Deregulation of National Gas*, in CASE STUDIES IN REGULATION: REVOLUTION AND REFORM 142 (1981).

72. 43 U.S.C. §§ 1331-1356 (1976 & Supp. IV 1980).

73. 43 U.S.C. § 1334(e) and (f) (1978).

74. *See* H. CON. REP. No. 1474 (1978), 95th Cong., 2d Sess. 47. The House discusion of section 1334 in the Conference Committee bill similarly indicates concern that "bottleneck monopolies" would not prevent open and nondiscriminatory access. 124 CONG. REC. H8880 (daily ed. Aug. 17, 1978) (remarks by Rep. Sieberling).

75. Section 7 of the Natural Gas Act grants the Commission authority to issue certificates of public convenience and necessity to applicants seeking authority to construct and operate gas pipeline facilities in interstate commerce. 15 U.S.C. § 717(f) (1976).

76. This authority has been exercised to insure that transportation facilities will achieve scale economies and will not result in duplication of facilities. *High Island Offshore Systems* is a case in point. By its order certificating the High Island Offshore Systems (HIOS) facility the Commission assured that gas produced in the HIOS vicinity would be transported solely over that line. High Island Offshore System, 55 F.P.C. 2674 (1976).

77. Anderson, *supra* note 53, at 10-11. Mr. Anderson discusses the circumstance in which a producer has but one pipeline with which it can connect:

> In such instances, the pipeline may have an unfair bargaining advantage and offers only a low price and other unfavorable contract terms. Alternatively, he may simply refuse to buy gas at all in an attempt to keep gas in the ground and thus available for the future when the pipeline will have a greater need. In the jargon of economics, the pipeline has monopsony power over the producer. *Id.*

Laclede Gas Company complains, for example, that on one occasion, it could arrange to secure the transportation and storage of gas, which it

ACCESS — HOW BIG AN ISSUE?

For smaller electric utility systems, the availability of access to the transmission networks of larger vertically integrated systems has long been recognized as an issue of some importance. The FPC's 1964 National Power Survey stated that all generating utilities ought to look "far beyond" their own service areas in planning new sources of supply[78] and urged small systems in particular to "recognize the need for obtaining their power supply from low cost sources," noting that "there must be opportunity for them to do so."[79]

As Professor Meeks has observed, these smaller systems, which are for the most part municipal utilities or rural electric cooperatives, are almost invariably dependent upon the transmission networks of neighboring utilities for access to competing suppliers:

> Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power . . . . Such control . . . is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area.[80]

Litigation over the rates, terms, and conditions of transmission service, including access, has been brought frequently before the FERC in recent years.[81] Many have noted pre-

produces in Oklahoma to its market in St. Louis, Missouri only by relinquishing two thirds of its annual production to the transporting pipeline companies. Petition, *supra* note 65, at 22. *See also* CIG Exploration Co., 55 F.P.C. 2384 (1976) (approving agreement under which Montana-Dakota Utilities Co. agreed to transport gas for Colorado Interstate Gas Co., and retained option to purchase up to 25% of gas delivered for transportation).

78. FPC, 1964 NATIONAL POWER SURVEY, pt. I, at 3.
79. *Id.* pt. I, ch. 16, at 267.
80. Meeks, *supra* note 13, at 78. Dr. William Hughes, of Charles River Associates, has estimated in testimony before the FERC that the nation's 100 largest utilities are likely to have substantial market power. Pacific Gas & Elec. Co., No. E-7777 (II) Transcript (Consol. Helms) 34,931.
81. *See* Town of Massena v. Niagara Mohawk Power Corp., 13 F.E.R.C. ¶ 63,036 (1980) (Initial Decision) (wheeling conditions found to unreasonably inhibit formation of new system), *complaint withhdrawn and initial decision vacated as moot*, 20 F.E.R.C. ¶ 61,406 (Sept. 30, 1982); Buckeye

viously that the scenarios described in most deregulation proposals acknowledge transmission access as a vital prerequisite for decontrol of electrical generation.[82] Gas pipeline access issues, though less thoroughly documented or discussed than similar issues in the electric utility industry, are nevertheless also issues of unmistakably emerging importance.

The signs are clear. Partial deregulation of natural gas under the NGPA has brought pressure to bear on state commissions, independent gas producers, distributors, and intrastate pipelines—a number of whom view access to transportation service by interstate pipelines as a means to limit what they see as the excessive economic power of the interstate pipelines.

The October 26, 1981 issue of the *Oil & Gas Journal* reported the formation by the Independent Petroleum Association of America of the Association for Equal Access to Natural Gas Markets and Supplies.[83] This Association, the Journal states, seeks greater availabiilty to gas producers of transportation service over intrastate and interstate pipelines.[84] The Association has argued in comments filed with the DOE[85] that intrastate pipelines, without access to the interstate pipeline systems cannot bid on an equal basis with interstate pipelines for new supplies.[86] Similarly, it has pointed out that other potential shippers face the same constraints—independent producers cannot deal freely with would-be purchasers who may have greater need for the gas

Power Inc. v. Cincinnati Gas & Elec. Co., 18 F.E.R.C. ¶ 61,067 (1982) (utility unreasonably limited contract interpretation to exclude customer from service), *appeal pending sub nom.*, Cincinnati Gas & Elec. Co. v. FERC, No. 82-3338 (6th Cir. 1982); Cleveland Elec. Illuminating Co,. 11 F.E.R.C. ¶ 61,114 (1980) (wheeling tariff found to unreasonably limit power exchanges and purchases by wheeling customers); Florida Power & Light Co., 12 F.E.R.C. ¶ 63,014 (1980) (Initial Decision) (utility retained unreasonable arbitrary power to restrict wheeling service), *vacated as part of settlement*, 19 F.E.R.C. ¶ 61,269 (1982).

82. *See supra* notes 43-45.
83. *Common Carrier Role for Gas Pipelines*, OIL & GAS J., Oct. 26, 1981, at 70-71.
84. *Id.*
85. Natural Gas Equal Access Ass'n, Informal Comments of the Association for Equal Access to Gas Markets and Supplies on DOE's Legislative Specifications to Correct the Deficiencies of the Natural Gas Policy Act of 1978 (on file with the author).
86. *Id.*

than the interstate pipeline; as a result, production incentives are reduced and supplies are limited.[87]

Gas distributors recently have voiced similar concerns. The Laclede Gas Company, a gas distributor in the St. Louis area, has petitioned the FERC for rulemaking which would require pipelines seeking certificates to transport gas for distributors as a condition of certification.[88]

A proposal by Michigan Congressman Dingell that would obligate pipelines to transport gas purchased by their distributor-customers within the limits of a pipeline's capacity[89] has received the endorsement of several distributor spokespersons. For example, a recent article by Russell Fleming, Jr., and Joseph M. Oliver, Jr., counsel for a number of distribution companies, that appeared in *Public Utilities Fortnightly*,[90] takes the position that groups of distributors, by combining resources, can bargain effectively with major gas producers.[91] Moreover, the authors contend, while direct

87. Common Carrier Role for Gas Pipelines, *supra* note 83, at 71. In reviewing a draft of this article, Professor John Flynn of the University of Utah School of Law, commented that pipeline monopsony power in a deregulated market for gas supplies might push independent producers to act collectively i.e., fix prices, in order to offset a pipeline's price depressing monopsony advantage. Pointing to In Re New Mexico Natural Gas Antitrust Litigation (MDL No. 403 (D.N. Mexico)), he suggested that similar claims against producers would be likely to arise in the future unless pipeline access conditions are improved, giving producers purchaser alternatives to the dominant pipeline systems. Telephone conversation with Prof. John Flynn, University of Utah School of Law (May 24, 1982).

88. Petition, *supra* note 65. The Association for Equal Access to Natural Gas Markets, mentioned above, has filed comments in support of the petition.

David Mead points out that two-thirds of all gas distributors are served by only a single pipeline, and that, on average, gas distributors are served by 1.8 pipelines. Mead, *supra* note 71, at 25.. He concludes that these concentration indicators suggest the large potential for pipeline monopoly power to be exercised against distributors, at least in the short run, with long run fuel substitution possibilities moderating this power somewhat for industrial users. *Id.* at 34-35.

Pipeline concentration of the nature described by Mead has prompted the attention of the Justice Department, particularly in light of rate deregulation. In a March 31, 1982 speech before the American Gas Association, Deputy Assistant Attorney General Ronald Carr expressed the Antitrust Division's view that pipeline mergers with producers and distributors would be carefully scrutinized in light of the pipeline's potential ability to pass unregulated gas prices on to distributors and the distributors' lack of alternative sources of supply. Carr, *supra* note 57.

89. Speech by Representative Dingell, *The Decontrol of Natural Gas*, Mid-year meeting of Federal Energy Bar Association, Washington, D.C. (Jan. 29, 1981) (cited in Fleming and Oliver, *The Gas Distributor Approaches Deregulation*, PUB. UTIL. FORT., July 2, 1981, at 13).

90. Fleming and Oliver, *supra* note 89, at 13.

91. *Id.* at 15.

distributor-supplier relationships represent a departure from the "first purchase" function traditionally performed by pipelines, the change is of modest proportions, consistent with the gas distributors' need to maintain "retail marketability."[92] The authors state:

> In the context of deregulated wellhead prices, where any price is possible and virtually any price is recoverable by the regulated pipeline, it makes sense for the gas distributor to take responsibility for determining whether a given new gas supply is or is not marketable at the retail level. That role naturally brings the distributor to the bargaining table with the producer or any other supplier of gas.[93]

Since 1981, price and supply pressures on gas consumers in Michigan, Ohio, and Nevada have prompted several filings against pipeline companies with the FERC. In *Northwest Pipeline Corporation*,[94] the Sierra Pacific Power Company, a gas distributor serving northern Nevada, complained to the Commission in an intervention petition that Northwest Pipeline's gas transportation arrangement with Sierra Pacific's wholesale supplier, the Southwest Gas Corporation (SGC), prohibited SGC from transporting certain Utah gas to Sierra Pacific.[95] The petition pointed out that SGC purchased gas from Northwest Pipeline at a higher price than the Utah gas and that Northwest Pipeline did allow SGC to transport other, more expensive gas to northern Nevada.[96] The petition to intervene alleging undue discrimination was withdrawn without explanation[97] and the transportation arrangement was thereafter approved.[98]

Michigan v. Trunkline Gas Co.,[99] is a complaint proceeding pending before the FERC at the time of this writ-

92. The authors point out that the Dingell proposal, loosely referred to as a common carrier alternative, is really only a call for contract carriage obligations consistent with the present statutory scheme. *Id.* This author largely shares that view as is explained later in this article.
93. *Id.*
94. 16 F.E.R.C. ¶ 62,260 (1981).
95. FERC No. CP78-546-005 (filed July 10, 1981).
96. *Id.* at 2.
97. FERC No. CP78-546-005 (filed Aug. 12, 1981).
98. 16 F.E.R.C. ¶ 62,260 (1981).
99. FERC No. RP81-103-000 (filed Aug. 6, 1981).

ing. Among other issues, the state of Michigan alleges that Trunkline's supply contracts with gas distributors in Michigan contain unreasonable take-or-pay provisions which prohibit distributors "from seeking lower priced gas elsewhere."[100] This, the complaint states, "prevents market realignment that would otherwise occur when high prices are charged by one pipeline company"—a problem which, it notes, is exacerbated by gas price decontrol.[101]

In another pending action, the State of Ohio has sought a declaratory judgment from the FERC that portions of Columbia Gas Transmission Corporation's system are non-jurisdictional under the Natural Gas Act. The state wishes to require the pipeline to transport Ohio-produced gas directly for industrial and distribution customers who have secured their own supplies.[102]

The increasing agitation for supply flexibility on the part of gas consumers is indicative of the growing significance pipeline access issues will have in coming years. Parallel issues arising in the electric utility industry underscore the need for a critical analysis of access standards under the Gas and Power Acts. The present state of the law and its limits will largely determine whether the FERC will have the flexibility to meet these challenges of the 1980's.

Recent Decisions

Florida Power & Light Co. v. FERC[103] *(FP&L)* and *New York State Electric & Gas Co. v. FERC*[104] *(NYSEG)*, decisions recently handed down by the Fifth and Second Circuits respectively, both address the breadth of FERC authority to regulate transmission, or wheeling arrangements[105]

100. *Id.* at 4. This complaint was recently set for hearing by the Commission. Michigan v. Trunkline Gas Co., 20 F.E.R.C. ¶ 61,100 (1982). The author has been assigned to this case.
101. *Id.*
102. State of Ohio, FERC No. CP82-202-002 (filed Feb. 10, 1982).
103. 660 F.2d 668 (5th Cir. 1981).
104. 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 105 (1981).
105. The Supreme Court has defined "wheeling" as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facility of an intermediate utility." Otter Power Co. v. United States, 410 U.S. 366 (1973).

between public utilities and their customer-competitors. In each case, actions by the agency to rectify what it perceived as competitive abuses by the utility or to enhance competitive opportunities for the utility's customers were struck down by the courts. The court's decisions may potentially affect not only FERC regulation of transmission arrangements,[106] but also its regulation of other electric services. They may similarly cut across industry lines to restrict FERC regulatory authority over gas pipeline transportation under the Natural Gas Act.[107]

The factual background of the *NYSEG* decision is relatively uncomplicated. On May 25, 1978, the village of Penn Yan, New York filed a complaint with the FERC alleging that the wheeling contract between Penn Yan's power supplier, the Power Authority of the State of New York (PASNY) and NYSEG, the wheeling party, was anticompetitive and in violation of the Federal Power Act.[108] In particular, Penn Yan objected to a provision in the contract between NYSEG and PASNY which limited power wheeled by NYSEG to the territorial boundaries of Penn Yan and other PASNY customers as those boundaries were defined in 1961.[109] In 1967 Penn Yan had annexed the community of Excell Estates whose residents were served by NYSEG.

106. Arguably both decisions are limited to electric transmission cases. They do not purport to deal with other areas of FERC authority. The rationale underlying both decisions however, cannot logically be confined to that limited class of transmission cases. *See infra* text accompanying notes 213-34.

107. The parallel structures of the Natural Gas Act (NGA) and Federal Power Act (FPA) compel similar statutory constructions. Provisions of the FPA are to be read in *pari materia* with analogous provisions of the NGA. FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). The "unusual similarity" between the two acts is discussed at some length in City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1277-78 (S.D. Fla. 1980). As discussed below, the implications of *NYSEG* and *FP&L* for gas regulation are significant. An interesting side effect is the awkward position in which these cases may put certain combination electric and gas utilities. Electric utilities that also operate gas distribution systems may find themselves arguing for stringent limits on the Commission's authority to modify wheeling arrangements, while simultaneously urging the Commission to broaden their access to gas supplies by expanding the availability of transportation service from gas pipelines.

108. Village of Penn Yan v. New York State Elec. & Gas Corp., 6 F.E.R.C. ¶ 61,283 at 61,668 (1979).

109. *Id.* at 61,667; New York State Elec. & Gas Corp. v. FERC, 638 F.2d at 391 (1980). A similar provision was contained in the contract entered into between NYSEG and Penn Yan in 1962 when Penn Yan switched wholesale suppliers from NYSEG to PASNY. *Id.*

Twice, in 1970 and again in 1978, NYSEG turned down Penn Yan's requests to allow the village to serve those customers, each time invoking the limitations in its contracts with the village and with PASNY.[110]

The Commission agreed with Penn Yan's assertions as to the anticompetitive effects of the PASNY-NYSEG contract, noting that NYSEG had justified the challenged restriction as "specifically designed to reserve the territorial integrity of the company's franchise area as of February 10, 1961."[111] Ruling that the contract between PASNY and NYSEG required NYSEG to wheel any additional power required to meet Penn Yan's retail load increases occurring within the village's 1961 borders, the Commission concluded that the contract provision unreasonably limited the use of wheeled power:

> It is only when Penn Yan attempts to utilize wheeled PASNY power to serve outside those boundaries that the restriction comes into play. The effect of those provisions, then is to protect NYSEG from competition for retail customers and to restrict Penn Yan's ability to extend its municipal system, thereby impairing and diminishing competition to serve retail customers in the extended territories.[112]

The Commission ordered the provision deleted[113] and NYSEG appealed, arguing that its contract with PASNY was not subject to FERC jurisdiction. In addition, NYSEG claimed, even if the contract had to be filed with the Commission, FERC had no authority to impose the relief ordered absent appropriate findings made pursuant to provisions of the Public Utilities Regulatory Policies Act of 1978 ("PURPA") which granted the Commission certain authority over wheeling arrangements.[114]

110. Village of Penn Yan v. New York State Elec. & Gas Corp., 6 F.E.R.C. at 61,667 (1979).
111. *Id.* at 61,670.
112. *Id.* at 61,669 (footnote omitted).
113. *Id.* at 61,670.
114. Pub. L. No. 95-617, 92 Stat. 3117 (1978). PURPA amended the Federal Power Act. Under new FPA sections 211 and 212 the Commission may require wheeling, including the expansion of existing transmission facilities under certain specified conditions.

The Second Circuit rejected NYSEG's argument regarding the Commission's jurisdiction,[115] but agreed with the utility that the Commission had compelled wheeling and thereby had exceeded its authority under section 206 of the Act.[116] Relying upon the legislative history of the Act, which the court stated revealed Congressional refusal to grant the Commission broad powers to compel wheeling in the public interest, the court concluded that the Commission's powers to regulation transmission contracts pursuant to section 206 of the Act did not permit the Commission to expand a utility's

115. 638 F.2d at 398.

116. The Court's conclusion on the basis of its own "factual analysis" (638 F.2d at 401) is open to some question. The Commission had determined that its order did not expand NYSEG's wheeling obligation, but merely removed a limitation on the use of wheeled power. As the Commission explained in its order, had the village's new customers been located within the village's 1961 borders, NYSEG would have been obligated under the contract to provide the full power requirements of those additional customers. Village of Penn Yan v. New York State Elec. & Gas Corp., 6 F.E.R.C. at 61,668-69 (1979). Physically, the power supplied to Excell Estates would not be wheeled by NYSEG; the utility would simply transmit the power to Penn Yan's point of delivery. It would then be distributed by Penn Yan to all points on its distribution system including Excell Estates. The nature of the NYSEG contract restriction is perhaps best characterized, as it was by the Commission, as a form of resale restriction. *Id.* at 61,669. Viewed this way, the contract restriction is no different from a provision which would permit Penn Yan to receive PASNY power unless that power were resold to industrial customers. Commission rejection of comparable resale limitations on the power sold by a utility has been sustained by the courts. Georgia Power Co., 35 F.P.C. 436 (1966), *aff'd sub. nom.*, Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967).

The court's unexplained reluctance to defer to the Commission's factual determination in lieu of its own "factual analysis" as to what constitutes "additional wheeling" is in marked contrast to its subsequent decision in City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981). There the court adopted the Commission's definition of electric utility competition, finding the FERC's definition "persuasive both on its face and in light of the Commission's expertise with respect to the electric industry. . . ." *Id.* at 930. The dissent by district judge Goettel (sitting by designation) in *New York State Elec. & Gas Corp.* concluded that any additional wheeling would have been *de minimus*. 638 F.2d at 403.

One other point is worthy of note. The court also found inappropriate the Commission's failure to hold a hearing to determine the reasonableness of the restriction. The Court acknowledged that the avowed purpose behind the restriction was anti-competitive, but that a public interest against the duplication of facilities might be vindicated at a hearing. 638 F.2d at 399-400.

The Commission had considered the question of duplicate retail distribution facilities, but concluded that the reasonableness of the clause did not depend upon this factor; the decision as to service area would be left to the state commission. Village of Penn Yan v. New York State Elec. & Gas Corp., 6 F.E.R.C. at 61,670 n.11 (1979). In rejecting the Commission's rationale, the court appears to have overlooked the principle that private contracts in restraint of competition cannot be justified on the ground that they merely enforce existing state law. *See* City of Huntingburg v. FPC, 498 F.2d 778, 786-87 (D.C. Cir. 1974); City of Groton v. Connecticut Light and Power Co., 456 F. Supp. 360, 370 (D. Conn. 1978).

commitment to wheel.[117] Moreover, the Court noted, while the Commission's new power to order wheeling under PURPA "was undoubtedly intended, at least in part, to serve as a tool for enhancing competition by facilitating bulk purchases of power,"[118] the stringent requirements imposed upon any wheeling order strongly suggested that Congress intended to "safeguard the voluntariness of wheeling arrangements to the greatest extent possible while providing 'assurance to all persons that they will be treated fairly and compensated fully' if they are compelled to provide involuntary services."[119] Finally, the court observed, its ruling would not

117. 638 F.2d at 401.
118. *Id.* at 402.
119. *Id.* (citing H.R. REP. NO. 496 (IV) (July 19, 1977) at 152; 1978 U.S. CODE CONG & AD. NEWS 8595).

It is unclear whether the court was relying upon the legislative history of PURPA merely to aid in its construction of section 206 or whether the court was holding that the passage of PURPA itself limited the Commission's preexisting authority under section 206. To the extent that the court's ruling suggests the latter, it is of dubious validity. Repeals by implication are disfavored. Gordon v. New York Stock Exchange, 422 U.S. 659 (1975); Morton v. Mancari, 417 U.S. 535 (1974). Moreover, section 4 of PURPA provides:

> Section 4, Relationship to Antitrust Laws:
> Nothing in this Act or in any amendment made by the Act affects—
> (1) the applicability of the antitrust laws to any electric utility or gas utility . . . or
> (2) any authority of the Secretary [of Energy] or of the [Federal Energy Regulatory] Commission under any other provision of law (including the Federal Power Act and the Natural Gas Act) respecting unfair methods of competition or anticompetitive acts or practices.

In explaining the above provision, the House and Senate conferences stated their intent that the provisions of PURPA: "*be strictly neutral* and not add or subtract from the immunities and defenses available under such laws *nor add or subtract from authorities contained* in such laws." H.R. REP. No. 95-1750, 95th Cong., 2nd Sess. 68 (1978), S. REP. No. 1292, 95th Cong., 2nd Sess. 68 (1978) (emphasis added).

On October 9, 1978 the full Senate took up the conference report. Senator Howard Metzenbaum of Ohio, discussing the relationship between Sections 203 and 204 of PURPA and the Commission's preexisting authority over transmission service, reiterated that the latter was not affected by the former, as indicated in the following passage:

> It was not the intent of the conferees to modify in any way the rights of parties in presenting a [sic] prosecuting allegations of anticompetitive conduct before the Federal and State Courts, or before administrative agencies, including the FERC and the Nuclear Regulatory Commission. Both have legal obligations to consider antitrust issues. Where any of these agencies have the authority to order transmission, coordination or other relief pursuant to a finding of anticompetitive conduct, undue discrimination or unjust and unreasonable rates, terms, conditions or the like, this authority would not be disturbed. The act does not limit the present authority to these agencies in this regard. Thus, a party which has been denied wheeling service for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere.

124 CONG. REC. 34764 (1978).

prevent the Commission from modifying unlawful transmission rates or practices under section 206, provided that the modification does not amount to an order compelling wheeling.[120]

In *Florida Power & Light Co. v. FERC*,[121] the Fifth Circuit Court of Appeals reached a similar conclusion. There, the court struck down a Commission order directing Florida Power & Light Company ("FP&L") to make certain filings regarding its transmission rates and the terms under which it would provide transmission service. Specifically, the Commission had directed FP&L to file a tariff[122] in substitution for eighteen nearly identical but separate transmission service schedules it had previously submitted to the Commission. In addition, granting an earlier motion filed by its staff,[123] the Commission directed FP&L to include as part of its tariff the four criteria governing FP&L transmission availability which one of its employees, Mr. Ernest Bivans, had articulated in prepared written testimony[124] filed with the Commission in FERC Docket No. ER77-175.[125]

---

120. The court held that where modification of the transmission arrangement amounts to an "expansion" of the wheeling obligation, relief cannot be ordered by the Commission except under the provisions of Sections 211 and 212 of the FPA that were added by PURPA. The difficulty inherent in this formulation and its consistency with the court's view that the 1935 Act was intended to provide *effective* federal regulation of the expanding business of *transmitting* and selling electric power interstate" ((638 F.2d at 393) (emphasis added)) is discussed at some length, *infra* at notes 188-234 and accompanying text.
121. 660 F.2d 668 (5th Cir. 1981).
122. The Commission defines "tariff" under its regulations as follows:

 The term 'tariff' means a compilation, in book form, of rate schedules of a particular public utility, effective under the Federal Power Act, and a copy of each form of service agreement. In connection herewith, attention is invited to Part 154 of this chapter, i.e., the Commission's regulations under the Natural Gas Act, as a guide to the form and composition of a tariff.

 18 C.F.R. § 35.2(b) n.1 (1979).
123. 660 F.2d at 669-70.
124. Mr. Bivans had testiifed that FP&L was willing to provide transmission service when:

 1. The specific potential seller and buyer are contractually identified;
 2. The magnitude, time and duration of the transaction are specified prior to the commencement of the transmission;
 3. It can be determined that the transmission capacity will be available for the term of the contract; and
 4. The rate for such service is sufficient to compensate FP&L for its costs.

 660 F.2d at 671.
125. *Id.* at 670-71.

Reasoning that FP&L had intended for the Commission to rely on Mr. Bivans' sworn statements in adjudging the lawfulness of its rates in that proceeding, the Commission concluded that such statements represented an articulation of company policy. The Commission held that pursuant to section 205(c) of the Federal Power Act,[126] as well as the corresponding provisions of the Commission's regulations,[127] the transmission criteria articulated by the witness should be included in the company's transmission rate schedules as "practices" affecting those rates.[128] In addition, the Com-

126. Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d provides:

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

127. 18 C.F.R. §§ 35.1-35.2 (1981).

Section 35.1 provides in relevant part:

(a) Every public utility shall file with the Commission . . . full and complete rate schedules, . . . clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates and charges and all contracts which in any manner affect or relate to such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)) . . . .

Section 35.2 reads as follows:

(a) *Electric service.* The term "electric service" as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. "Electric service" shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, "electric service" is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule.* The term "rate schedule" as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of factilities, tariff or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

See, e.g., Michigan-Wisconsin Pipeline Co., 34 F.P.C. 621, 626 (1965) (interpreting parallel NGA regulation 18 C.F.R. § 154.38(b) (1980).

128. Florida Power & Light Co., No. ER78-19 (FERC Order issued Dec. 21, 1979), slip op. at 4-6.

mission noted that incorporation of these criteria into existing schedules not only would ease administrative burdens,[129] but would facilitate transmission availability and thus promote competition.[130] Finally, the Commission held that since the inclusion of FP&L's transmission availability criteria in the filed tariff did nothing more than set forth the company's own policy, there would be no expansion of FP&L's transmission obligation and hence no compulsion to wheel.[131]

On appeal, the Fifth Circuit rejected the Commission's arguments that its order would not compel wheeling. Electric utilities, the court reasoned, were not common carriers under the Federal Power Act,[132] nor had the Commission made any findings that by adoption of its wheeling policies FP&L had assumed such status as a matter of common law.[133] The court found persuasive, moreover, FP&L's contention that the Commission's order did expand the company's transmission obligation:

> We agree with FP&L that the Commission's order does in effect impose common carrier status upon FP&L. While the tariff is on file, FP&L would be obligated to provide the tariff service to all customers. In a significant sense, its duties and liabilities have changed. Although FP&L had a policy regarding the availability of wheeling, FP&L, nevertheless, negotiated interchange transmission serv-

129. *Id.* at 7.
130. *Id.* at 4.
131. *Id.* at 6. The Commission did note however that it was reserving for later consideration any decision regarding the reasonableness of FP&L's availability policy. *Id.* at 5.
132. 660 F.2d at 672-3.
133. *Id.* at 674. The court's implicit but unstated assumption here appears to be that an electric utility might assume common carrier status by its actions, thus imposing upon itself the obligations of a common carrier at common law. Where the regulatory agency specifically regulates entities as common carriers, a finding of common carrier status is requisite to the very exercise of jurisdiction. *See* Semon v. Royal Indem. Co., 279 F.2d 737 (5th Cir. 1960). Since, by the court's reasoning electric utilities are not common carriers, the FERC's jurisdiction does not hinge upon the utility's common law status. However, the Commission's authority over rates and practices permits it to enforce common carrier regulations imposed by other statutes. *See* Montana-Dakota Utilities Co. v. FPC, 169 F.2d 392 (8th Cir. 1948), *cert. denied*, 335 U.S. 853 (1948) (common carrier obligations imposed upon gas pipeline by Mineral Leasing Act enforceable under Natural Gas Act). This authority would logically extend to cases where common carrier status was voluntarily assumed or where it was imposed by a court (as an antitrust remedy, for example).

> ice agreements on an individual basis with each municipal utility when approached. There is no indication in the record that FP&L has voluntarily agreed to become a common carrier. There is no indication that FP&L has voluntarily agreed that any change in the terms of its policy, or any interpretation thereof, should be submitted to the Commission for its approval. The imposition of common carrier status on FP&L, which the orders at issue accomplish, is precisely the authority which the FPA denies the Commission. The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request. Accordingly, we conclude that the Commission lacked statutory authority to issue the orders in question.[134]

The Common Carrier and the Private Carrier Under the Gas and Power Acts

The invalidity of the FERC's orders in the *NYSEG* and *FP&L* cases turns upon determinations by the courts in both instances that the Commission had attempted to regulate beyond its authority. In particular, the courts found that the Commission impermissibly sought to impose common carrier duties upon electric utilities. These decisions are troubling both for their potential impact upon FERC authority to regulate anticompetitive, discriminatory or otherwise unreasonable practices, and for their failure to draw workable distinctions between permissible regulation and the imposition of common carrier status. Examination of the concepts of common and private carriage, both at common

134. 660 F.2d at 676 (footnote omitted). In addition, the court rejected the Commission's argument that its interpretation of "practice" under its own regulations was entitled to deference by the court pursuant to the court's ruling in ECEE v. FERC, 611 F.2d 554, 563 (5th Cir. 1980). The court acknowledged that pursuant to the Commission's long standing interpretation of the Natural Gas Act, a policy of availability had been held to be a "practice" subject to filing requirements comparable to those imposed upon electric utilities under the FPA. 660 F.2d at 677. However, it held "[i]n the context of wheeling, the FPA's legislative history is a compelling reason why we may not defer to the Commission's interpretation." *Id.* To the extent that the court would draw a distinction between wheeling and all other availability provisions under the NGA and FPA, its reasoning rests on the erroneous assumption that Congress intended to treat transmission differently from all other services governed by the two statutes. *See infra* notes 201-234 and accompanying text. Absent such a distinction, the Commission's filing requirements under the NGA are vulnerable to challenges similar to those raised by FP&L.

law and pursuant to statute, will help illustrate the inherent difficulties and inadequacies in the courts' analyses.

The fundamental characteristic of the common carrier at common law, as explained by the Fifth Circuit in *FP&L*, is its undertaking "to carry for all people indifferently."[135] By holding itself out to serve the public at large it is considered to take on a "quasi-public character" and a greater duty of care to its customers.[136]

Statutory control over common carriers in the nature of price and service regulation had its advent in this country in the late 1800's. In *Munn v. Illinois*[137] the Supreme Court upheld a state law regulating the charges of grain elevator operators, ruling that grain storage was a business "affected with a public interest." With passage of the Interstate Commerce Act in 1887,[138] Congress brought the nation's railroad systems under a detailed scheme of federal regulation. Early interpretations of the Constitutional basis for common carrier regulation by the states, now discredited, rested upon the assumption, articulated by the Supreme Court in *New State Ice Co. v. Liebmann*,[139] that the validity of state regulation lay with the monopolistic or public utility nature of the business being regulated.[140] In the federal sphere, the premise for regulation was broad from the beginning. Common carrier regulation has been applied to motor carriers,[141] airlines,[142] and communications industries[143] — businesses which were either unknown to the common law, or in the

135. 660 F.2d 674; *See* National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640 (D.C. Cir. 1976). *See also* Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960); Home Ins. Co. v. Riddell, 252 F.2d 1, 3 (5th Cir. 1958).
136. National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d at 640 (D.C. Cir. 1976).
137. 94 U.S. 113 (1877).
138. 49 U.S.C. §§ 1-27 (1887).
139. 285 U.S. 262 (1932).
140. *Nebbia v. New York* put this notion to rest. 291 U.S. 502 (1934). There the Court upheld state regulation of milk prices as a valid exercise of state authority, concluding that "'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'." *Id.* at 533. The Court in *Nebbia* thus implicitly adopted Justice Brandeis' famous dissent in *New State Ice Co. v. Liebmann*.
141. Interstate Commerce Act, Pt. II; Motor Carriers, 49 U.S.C. §§ 301-327 (1976).
142. Federal Aviation Act, 49 U.S.C. §§ 1301-1552 (1980).

cases of motor carriage and air travel, clearly lacking in monopoly characteristics. The validity of federal regulation of economic activity is based upon the "well settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become a means of promoting or spreading evil, whether of a physical, moral or economic nature."[144]

A 1976 decision of the D.C. Circuit Court of Appeals provides a thoughtful treatment, pertinent to the inquiry here, of the common carrier concept as applied to the communications industry. *National Association of Regulatory Utility Commissioners v. FCC*[145] (NARUC) attempts to draw a distinction between private and common carriers where the underlying premise for federal regulation is the common carrier nature of the service being regulated. An order of the FCC issued in 1975 had exempted certain specialized mobile radio communications systems ("SMRS") from the common carrier provisions of the Communications Act, reasoning that the SMRS did not meet the statutory definition of common carriers contained in the Act. The court found that the Act did little to define the common carrier and resorted to common law concepts. Based upon these concepts, however, the court concluded that the Commission had acted properly in excluding the SMRS carriers. Of particular significance, the court noted, was the nature of a carrier's undertaking:

> Moreover, the characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers. The cases make clear that common carriers need not serve the whole public, and that private carriers may serve a significant clientele, apart from the carrier himself. Since given private and common carriers may therefore

143. Federal Communications Act, 47 U.S.C. §§ 151-609 (1976).
144. North American Co. v. SEC, 327 U.S. 687, 750 (1946) (citing Brooks v. United States, 267 U.S. 432, 436-37 (1925)). *See also*, Hope Natural Gas Co. v. FPC, 320 U.S. 591 (1944).
145. 525 F.2d 630 (D.C. Cir. 1976).

be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers.[146]

The court's "logical and sensible line" is a useful means of ascertaining those carriers covered by applicable common carrier regulation. Yet it is essential to recognize the limits of the court's holding, which draws a distinction solely between exempt and regulated carriers. The determination of common or private carrier status thus was critical to the agency's authority under the governing statute to regulate altogether.[147]

An understandable but inherently dangerous confusion exists in the *FP&L* and *NYSEG* decisions between the permissible scope of private carrier regulation on the one hand, and the exemption of private carriers from common carrier regulation on the other. The Second and Fifth Circuits are correct in their conclusions that Congress rejected proposals which would have imposed common carrier status on electric utilities.[148] Congress also rejected similar proposals to

146. *Id.* at 642 (footnotes omitted).
147. This is the similar import of cases arising under the Interstate Commerce Act. *See, e.g.*, Semon v. Royal Indem. Co., 279 F.2d 737 (5th Cir. 1960). (Status as private or common carrier critical since different statutory provisions applied to contract versus common carriers.); Home Ins. Co. v. Riddell, 252 F.2d 1 (5th Cir. 1958) (Carrier found to be contract, not common carrier, hence exempt from statute applicable to interstate common carriers).
148. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).
The *FP&L* and *NYSEG* decisions focus solely upon the common carrier issue as it relates to transmission. They rely for their conclusions upon those passages from Section 202(a) of the original House version of the Federal Power Act which would have imposed upon electric utilities a duty to transmit for any person upon reasonable request. These are the identical passages cited by the Supreme Court in *Otter Tail Power Co.*, and by the Court of Appeals for the District of Columbia in Richmond Power & Light Co. v. FERC, 574 F.2d 610 (D.C. Cir. 1978). The full provision however, would have imposed an obligation not only to transmit for others upon reasonable request, but to sell or exchange power as well:

> 202(a) It shall be the duty of every public utility to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request therefor; and to furnish and maintain such services as shall promote the safety, comfort and con-

regulate the natural gas industry.[149] Instead, Congress enacted statutes which gave the Commission broad regulatory power over the interstate sale and transmission of electric power and natural gas,[150] but which recognized the need for "individualized arrangements . . . established initially by contract. . . ."[151]

Court decisions touching upon the scope of Commission jurisdiction under the NGA and FPA do little to clarify the distinction between common carrier regulation and the contract carrier regulatory schemes under which the FERC operates. The Supreme Court in *United Gas Pipeline v. Mobile Gas Corp.*[152] noted, for example, the "marked contrast" between the Natural Gas Act and the Interstate Commerce Act, apparently arising out of "the differing nature of the industries which gave rise to it [the Natural Gas Act]."[153] Hence, the Court emphasized, the impossibility of policing the vast number of railroad carrier transactions explained the need for uniform tariffs under the ICA and the consequent lack of contract filing requirements such as those imposed upon gas pipelines. On the other hand, the NGA has been described by the Court as a "far more comprehensive Act" than the ICA insofar as it regulates common carrier oil pipelines.[154]

---

venience of all its customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable.

H.R. 5423, S. 1725, 74th Cong., 1st Sess. (1935).

Thus, applying the rationale expressed in these various court opinions, Congress rejected common carrier obligations for utilities both with respect to transmission *and* sales for resale. As discussed at note 221 and the accompanying text below, the extension of the *FP&L* and *NYSEG* holdings to the area of wholesaling would have substantial ramifications.

149. The February 6, 1935 draft of the Public Utility Holding Company Act submitted by Congressman Rayburn, and later revised by the House Interstate and Foreign Commerce Committee (June 22, 1935), H.R. 5423, 74th Cong., 1st Sess., contained a similar common carrier provision for gas pipelines. *See infra* notes 215-16.

150. *See* Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); FPC v. East Ohio Gas Co., 338 U.S. 464, 471 (1950); Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

151. United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956). In a case decided the same day, the Court held that analogous provisions of the Natural Gas and Federal Power Acts were to be read in *para materia.* Sierra Pac. Power Co. v. FPC, 350 U.S. 348, 350 (1956).

152. 350 U.S. 332 (1956).

153. *Id.* at 338.

154. FPC v. East Ohio Gas Co., 338 U.S. 464, 469 n.9 (1950). *See also* Farmers Union Central Exch. v. FERC, 584 F2d 408 (D.C. Cir. 1978), *cert. denied sub nom.*, Williams Pipe Line Co. v. FERC, 439 U.S. 995 (1978).

The Fourth Circuit's observation that the Federal Power Act, "is closely modeled on the Interstate Commerce Act,"[155] further muddles the distinction between common carrier regulation and the FPA. Conventional rules of statutory construction would require similar interpretation and application of parallel provisions.[156] To add to the confusion, the Natural Gas Act's provisions have been described as "regulation along recognized and more or less standardized lines" of a public utility nature.[157]

Reference to private carrier regulation of other businesses is of little assistance, other than to confirm the permissible breadth and scope of private carrier regulation. Like the NGA and FPA, many statutes regulating traditionally private carriers were enacted in the 1920's and 1930's. For the most part, however, these statutes were intended to limit the entry into commerce of private carriers and to regulate their minimum charges.[158] Regulation of private motor carriers at the state and federal level was primarily aimed at protecting the business of common carriers by assuring that private carriers would not undercut the regulated common carriers in their more profitable areas of

155. St. Michaels Utilities Comm'n v. FPC, 377 F.2d 912, 915 (4th Cir. 1967). The NGA closely follows the Federal Power Act's provisions. Sierra Pac. Power Co. v. FPC, 350 U.S. 348 (1956).

156. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428 (1973). This is particularly true where the relevant statutory phrase has been developed over a long history of government regulation. ICC v. Parker, 326 U.S. 60, 65 (1945) (interpretation of the phrase "public convenience and necessity").

157. H.R. REP. 709, H.R. 6586, 75th Cong., 1st Sess., CONG. REC., S. 9316 (Aug. 19, 1937); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1277-78 (S.D. Fla. 1980).

The dissenting opinion of Justice Jackson in *Hope* makes the same observation, noting that "while not a conventional common-carrier undertaking" the business of a natural gas pipeline company "is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine operation not differing substantially from many other utility operations." 320 U.S. at 647. Such descriptions further cloud distinctions one may attempt to draw since public utility regulation is a form of common carrier regulation at common law under the doctrine of Munn v. Illinois, 94 U.S. 113 (1877).

158. This was characteristic of a number of state statutes regulating private motor carriers. ICC v. J-T. Transp. Co., Inc., 368 U.S. 81, 95 (1961) (dissenting opinion of Justice Frankfurter). *See, e.g.*, ILL. REV. STAT. ch. 95½, §§ 18-301, 18-302, 18-501, 18-506 (1980); Stephenson v. Binford, 287 U.S. 251, 274 (1932); Baker v. Glenn, 2 F. Supp. 880, 882 (E.D. Ky. 1933); Anderson v. Thomas, 26 P.2d 60, 68 (Or. 1933); State v. Grimshaw, 53 P.2d 13, 15 (Wyo. 1935).

service.[159] Price competition from private carriers, it was often viewed, could threaten the overall stability of common carrier service to the public at large.[160]

The numerous constitutional challenges to state regulation of contract or private carriers were generally unsuccessful.[161] The did help firmly establish, however, that private carrier regulation, if based upon a valid state purpose, could be coextensive with regulation of comomn carriers.[162] The broadest statement of this principle is found in the Supreme Court's decision in *Stephenson v. Binford.*[163] There the Court upheld the constitutionality of a Texas statute regulating private motor carriers as a valid exercise of the state's power to control use of its highways, stating:

> It is difficult to see how the Legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. *It is true that the regulations imposed by the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of*

159. This was the motivation behind passage of the Motor Carrier Act of 1935. 49 U.S.C. §§ 301-327 (1976) (currently referred to as the Interstate Commerce Act, Part II; Motor Carriers). As the Supreme Court explained, the Act was passed at a time when:

> The industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved to be unable to satisfy even the most minimal standards of safety or financial responsibility. So Congress felt compelled to require authorization for all interstate operations to preserve the motor carrier system from overcompetition. . . .

ICC v. J-T Transp., 368 U.S. 81, 94-95 (1961) (quoting American Trucking Ass'ns v. United States, 344 U.S. 298, 312-13 (1953)).
In particular, the common carrier, with more extensive regulations and with greater obligations to the public at large, was to be afforded protection against significant encroachment on its business by the private carrier. ICC v. J-T Transp., 368 U.S. at 95-98 (1961).

160. *Id.*

161. *Frost Trucking Co. v. Railroad Comm'n* was a Supreme Court decision striking down a California statute regulating private carriers on grounds that the state had failed to articulate a basis for regulation distinct from the justification for common carrier regulation, is an anomaly. 271 U.S. 583 (1926). Its vitality was severly eroded by the Court's subsequent decisions in Stephenson v. Binford, 287 U.S. 251 (1932), and Nebbia v. New York, 291 U.S. 502 (1933).

162. Stephenson v. Binford, 287 U.S. 251 (1932). *See* Note, *State Regulation of Contract Motor Carriers*, 33 COLUM. L. REV. 156 (1933).

163. 287 U.S. 251 (1932).

> *a common carrier, may not also be appropriate to the business of a contract carrier.*[164]

The Supreme Court's decision in *Champlin Refining Co. v. United States,*[165] provides similar support for broad, if not virtually identical, federal regulation of both private and common carriers. Champlin, a company engaged in the business of oil refining, owned and operated its own pipelines extending from the firm's refinery in Kansas to various points of distribution in the states of Kansas, Nebraska, South Dakota and Iowa. In 1944, the ICC had ordered Champlin to file various data concerning the operation of its pipelines. Champlin challenged the order, urging that since it carried exclusively its own oil, it was not an interstate pipeline subject to the Interstate Commerce Act.[166] A contrary interpretation, Champlin contended, would exceed the commerce power of Congress and violate Champlin's fifth amendment rights by converting "a private pipeline into a public utility and requir[ing] a private carrier to become a common carrier."[167] The Court rejected this contention, upholding the ICC's order as a valid exercise of power under the commerce clause. Moveover, the Court did not base its holding upon any distinction between private and common carriers:

> But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. This power has yet been invoked only to the extent of requiring Champlin to furnish certain information as to facilities being used in interstate marketing of its

164. *Id.* at 266 (emphasis added). To similar effect are a number of state court decisions. Morel v. Railroad Comm'n of Cal., 11 Cal.2d 488, 81 P.2d 144 (1938) (duty not to give undue preference or advantage imposed on contract carrier); Anderson v. Thomas, 144 Or. 572, 26 P.2d 60 (1933) (duty of contract carier not to unduly discriminate against passengers of common carriers). *See also* Baker v. Glenn, 2 F. Supp. 880 (E.D. Ky. 1933); Deppman v. Murray, 5 F. Supp. 661 (W.D. Wash. 1934) (authority of state to regulate companies as private carirers although regulations imposed were "of the nature of those frequently imposed on common carriers.")
165. 329 U.S. 29 (1946).
166. *Id.* at 33-34.
167. *Id.* at 34-35.

Land & Water Law Review, Vol. 18 [1983], Iss. 1, Art. 1

products. The commerce power is adequate to support this requirement whether appellant be concidered a private carrier or a common carrier.[168]

As stated earlier, historic regulation of private carriers, though potentially and permissibly broad in scope, tended to have as its primary objective the protection of common carriers and the general public dependent upon the services of stable and reliable carriers. Federal regulation of electric power companies and natural gas pipeline companies, by contrast, had all the trappings of conventional public utility regulation.[169] Indeed the Natural Gas and Federal Power Acts were aimed, in part, at eliminating the gap in regulation left by the inability of state commissions to regulate the interstate activities of gas and electric companies.[170]

It is the public utility form of these regulatory schemes which distinguishes the NGA and FPA from other private carrier regulation and which further serves to cloud the dis-

168. *Id.* at 35. The Fifth Circuit's holding in *Florida Power & Light Co.* would seem to conflict squarely with the Court's ruling in *Champlin.* As the Court noted in *Champlin,* the I.C.C. "made no order which changes the appellant's obligations to any other company or person," holding that Champlin's concerns to the contrary were "premature and hypothetical." 329 U.S. at 35.

169. To be sure, the certification process itself presents an entry barrier shielding existing carriers. The power of the FERC to certify natural gas pipelines pursuant to section 7 of the Act, only upon the requisite showing of "public convenience and necessity," may protect existing gas pipelines from the entry of new competitors. The certification of a new pipeline, however, subjects it to the same regulation as the existing facility. Indeed, certification may be granted precisely because lower rates are anticipated from the new carrier. *See* Schwartz, *supra* note 13, at 579. *See also* Cincinnati Gas & Elec. Co. v. FPC, 389 F.2d 272 (6th Cir. 1968), *cert. denied,* 393 U.S. 826 (1968); Chatanooga Gas Co. v. East Tennessee Natural Gas Co., 35 F.P.C. 917 (1966). Alfred Kahn, in his noted work *The Economics of Regulation,* observes this distinction between federal regulation of gas pipelines and electric utilities and other contract carrier legislation:

> Since these extensions of regulation [electric power and transmission and gas pipeline transportation] were clearly necessary to close off newly developed avenues for the monopolistic exploitation of consumers, (i.e., large interstate utility systems), their necessity has not seriously been questioned by impartial observers. For the same reasons, they are, at least in retrospect, far less controversial than extensions of regulation whose purpose has been to forestall or to restrict newly emergent *competition.*

Kahn, *supra* note 37, at 30, 105-6 (Vol. II).

170. FPC v. Transcontinental Gas Corp., 365 U.S. 1, 27-28 (1961); FPC v. East Ohio Gas Co., 338 U.S. 464, 466-74 (1950); Curtis Report, *supra* note 18, at 34. The limits of state jurisdiction created what has come to be known as the "Attelboro gap," taking its name from the Supreme Court's decision in Public Util. Comm'n of R.I. v. Attelboro Steam and Elec. Co., 273 U.S. 83 (1926). Curtis Report, *supra* note 18, at 34.

tinction between common carriage and contract carriage, as the latter is envisioned under the FPA and NGA. Nevertheless, workable and practical distinctions can be drawn between those regulatory schemes.

The FPA and the NGA take as their basic model the Interstate Commerce Act.[171] Thus, it is not surprising to find, *inter alia*, prohibitions against 1) unreasonable rates, charges, and classifications;[172] 2) prohibitions against undue preferences or discriminations in rates or services;[173] 3) rate schedule filing requirements;[174] and 4) the grant of agency authority to prescribe systems of accounts and to conduct inspections of acounts and records.[175] Comparable construction of similar provisions found in the three acts is wholly consonant with sound rules of statutory construction favoring consistent interpretations.[176] More importantly, adherence to those rules and recognition of distinctions between common and contract carriers need not lead to conflicting results.

In a very real sense, the common carrier duty under the statute imposing it is nearly absolute;[177] prior resort to administrative proceedings is not required of a customer seeking to enforce the carrier's obligations.[178] Section 1(4)

171. *See* FPC v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956); St. Michaels Utilities Comm'n v. FPC, 377 F.2d 912, 915 (4th Cir. 1967).
172. *Compare* 49 U.S.C. § 10702(b) (Supp. IV 1980); 49 U.S.C. § 10741 (Supp. IV 1980); 49 U.S.C. § 10726 (Supp. IV 1980); 49 U.S.C. §§ 10324 *and* 10761 (Supp. IV 1980) *with* 16 U.S.C. § 824d(a) (1976), 16 U.S.C. § 824e (1976) *and* 15 U.S.C. § 717d(a) (1976); 15 U.S.C. § 717e (1976). (The cited provisions of the ICA are applicable solely to oil pipelines). The Interstate Commerce Act as applied to other carriers has been recodified. *See infra* note 179.
173. *Compare* 49 U.S.C. § 10741 (Supp. IV 1980) *with* 16 U.S.C. § 824d(b) (1976) *and* 15 U.S.C. § 717d(b) (1976).
174. *Compare* 49 U.S.C. § 10741 (Supp. IV 1980) *and* 10761 (Supp. IV 1980) *with* 16 U.S.C. § 825c(b) (1976) *and* 15 U.S.C. § 717d(c) (1976).
175. *Compare* 49 U.S.C. § 11145 (Supp. IV 1980) *with* 16 U.S.C. § 825(c) (1976) *and* 15 U.S.C. § 717g (1976).
176. *Cf.* United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Commissioner of Internal Revenue v. Estate of Ridgeway, 291 F.2d 257 (3rd Cir. 1961). This is to be distinguished from cases where broad statutory terms such as "public interest" have been held to take their content from the basic statutory scheme there involved—e.g., public interest references in a regulatory statute are not an open invitation to examine civil rights questions. NAACP v. FPC, 425 U.S. 662, 669 (1976). Here the statutory schemes are similar; they are regulatory in nature.
177. Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Colo. 1969).
178. *Id.* at 302-03; Pennsylvania R.R. v. Sonman Coal Co., 242 U.S. 120, 125-26 (1916). The courts in both *Denver Petroleum Corp.* and *Pennsylvania R.R.*

of the ICA imposes upon oil pipelines that are common carriers a duty to provide transportation and related services "on reasonable request."[179] Similar common carrier obligations are found in the Federal Communications Act[180] and the Federal Aviation Act.[181] It is this duty to provide service upon reasonable request which seems to be declarative of the common carrier's distinctive duty;[182] indeed it is precisely this duty that was embodied in the common carrier provisions which were originally proposed for inclusion in the Federal Power and Natural Gas Acts and later rejected. In virtually all other material respects the bills as originally proposed remained intact.[183]

Within the ICA, the scope of common carrier regulation varies markedly between oil pipelines and all other common carriers regulated under the Act.[184] Unlike other ICA common carriers, oil pipelines are not barred from carrying their own commodities,[185] nor are they subject to the same requirements regarding mergers, corporate affiliations, uniform cost and revenue accounting or issuance of securities.[186] It is reasonable to conclude that the general duty to serve "upon reasonable request" is the only provi-

concluded that where the common carrier's obligation to serve on reasonable request under normal conditions is involved, no administrative question is presented and there is nothing to be passed upon by the agency prior to judicial action.

179. 49 U.S.C. §§ 10701-10703, 11101 (Supp. IV 1980). Enforcement of ICA provisions relating to the regulation of oil pipelines is the responsibility of the FERC which was assigned those former ICC functions upon the FERC's creation in 1977. *See* Department of Energy Organization Act, 91 Stat. 581, 584 (1977); 42 U.S.C. § 7155 (Supp. IV 1980); 42 U.S.C. § 7172(b) (Supp. IV 1980); DOE Delegation Order No. 0204-1. In 1978 the ICA was amended to modernize certain of its terminology and to eliminate redundancy in its provisions. *See* Pub. L. No. 95-473, 92 Stat. 1337 (1978). No substantive changes in the law were intended. *See* Historical and Revision Notes, 49 U.S.C.A. § 10101 (1982); H.R. No. 1395, 95th Cong., 2d Sess. (1978). Interestingly, the common carrier provisions, as they applied solely to oil pipelines remain in effect unamended. Pub. L. No. 95-473, § 4(c), 92 Stat. 1470 (1978) codified at 49 U.S.C.A. § 10101 notes.
180. 47 U.S.C. § 201(a) (1976).
181. 49 U.S.C. § 1374 (Supp. IV 1980) *amended by* The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1704 (1978).
182. *See* Lucking v. Detroit & Cleveland Navigation Co., 265 U.S. 346 (1924).
183. *Compare* H.R. 5423, 74th Cong., 1st Sess. (1935) *with* the Act as finally enacted. 16 U.S.C. §§ 824-824(h), 825-825r (1976 & Supp. IV 1980).
184. Farmer's Union Central Exch. v. FERC, 584 F.2d 408, 412 (D.C. Cir. 1978), *cert. denied sub nom.*, Williams Pipe Line Co. v FERC, 439 U.S. 995 (1978).
185. 49 U.S.C. § 1(8) (1976) recodified as Pub. L. No. 95-473 (1978), 92 Stat. 1393, 49 U.S.C. § 10746 (1978)
186. Farmer's Union Central Exch. v. FERC, 584 F.2d at 413 (D.C. Cir. 1978).

sion of the ICA which can accurately be described as uniquely characteristic of statutory common carriers.[187]

Expansion of the Voluntary Commitment

Commission authority to remove unreasonable restraints placed upon the customers of regulated pipelines or utilities or to order elimination of undue preference in rates and service has engendered little historic debate. Rulings of this nature, in fact, have been quite common.

The argument that such actions somehow thrust upon the regulated entity impermissible common carrier duties is of relatively recent vintage and can probably be traced to the more frequent interjection of antitrust issues into cases before the Commission.[188] Past Commission decisions dealt with minor extensions of various wholesale services to new customers, both gas and electric. For the most part those decisions did not rest upon considerations of antitrust policy.[189] None addressed the reasonableness of filed transmission schedules or whether they were unduly discriminatory. In contrast, cases arising since the early 1970's have focused more frequently upon the relationship between company and customer-as-competitor. In this context, issues of group boycott and exclusionary practices by the monopolist, for example, have surfaced and have prompted response from the agency.[190]

187. The Federal Aviation Act, 49 U.S.C. § 1374(a)(1) (Supp. IV 1980) and the Federal Communications Act, 47 U.S.C. § 201(a) (1976), similarly are modeled upon section 1(4) of the ICA. *See also* BREYER, *supra* note 1, at 6.

188. With the rise in oil prices following the Arab oil embargo of 1973, what had been historically decreasing or modestly increasing cost patterns in the industry changed drastically. No doubt this has placed greater pressure on smaller utilities to seek lower cost alternate supply sources. As the FERC noted in *Florida Power & Light Co.*, self generation on a small scale is no longer a viable option and municipal electric systems unable to contain costs are increasingly susceptible to acquisition by their larger competitors at retail. No. ER78-19 (FERC Order issued Aug. 3, 1979), slip op. at 24, 32 PUB. UTIL. REP. 4th 313, 339 (1979).

189. *See, e.g.*, Indiana & Michigan Elec. Co., 59 F.P.C. 1383 (1977) (extending electric service to previously excluded systems on grounds of undue discrimination without addressing competition as an issue); Willmut Gas & Oil Co., 12 F.P.C. 132 (1953); Northern Natural Gas Co., 11 F.P.C. 174 (1952). To date, in fact, the FERC has not addressed the issue of undue discrimination in any reported case as it relates to third party gas transportation agreements which are offered to some customers but denied to others.

190. *See, e.g.*, Mid-Continent Area Power Pool Agreement, 58 F.P.C. 2622 (1977), *aff'd sub nom.*, Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C.

The injection of competition issues into cases before the Commission, particularly questions of access to transmission, has met with considerable resistance from the regulated utilities.[191] Their objections to Commission action in this area have introduced considerable uncertainty into what had been fairly settled and accepted norms of construction, at least as applied under the FPA and NGA to rates and charges.[192]

That the reaction of regulated entities to agency actions which are perceived to stimulate competition would be strong is not surprising. Unlike adjustments to rates for captive customers, agency actions which increase the purchase options of customers or which facilitate the development of their own supplies do not merely constrain the earnings of regulated utilities but may threaten previously stable markets.[193] Nevertheless, it would be wrong to vary interpretations of statutory terms between those cases raising traditional rate issues and cases with broader structural implications for the industry involved. The D.C. Court of Appeals noted the close relationship between the Commission's traditional rate regulation responsibilities and its duty to examine the competitive practices of electric utilities:

> [O]ne would be hard put to think of a matter of more direct and proper concern to the Commission

Cir. 1979) (restrictive power pool membership provisions modified to extend pool membership to smaller utilities); Florida Power & Light Co., Opinion No. 57 (FERC issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313 (1979) (refusal to sell wholesale power found unreasonable exercise of monopoly power).

191. *See, e.g.*, Cleveland Elec. Illuminating Co., 11 F.E.R.C. ¶ 61,114 (1980); Town of Massena v. Niagara Mohawk Power Corp., 13 F.E.R.C. ¶ 63,036 (1980) (Initial Decision) *complaint withdrawn and decision vacated as moot*, 20 F.E.R.C. ¶ 61,406 (1982).

192. Commission references to ICA and common law standards of justness and reasonableness date back to the FPC's earliest rate cases under the Gas and Power Acts. *See, e.g.*, Willmut Gas & Oil Co. v. United Gas Pipe Line Co., 12 F.P.C. 132 (1953); Otter Tail Power Co., 2 F.P.C. 132 (1940). The courts have also relied upon ICA precedents to review Commission rulings. *See* FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961); St. Michaels Utilities Comm'n v. FPC, 377 F.2d 912 (4th Cir. 1967).

193. This is not to suggest that rate regulation carries no competitive consequences. The price squeeze cases in particular address claims that a wholesale supplier has raised rates to its wholesale customers in order to disadvantage them in competing for retail customers which both the supplier and the wholesale customer wish to serve. Conway Corp. v. FPC, 426 U.S. 271 (1976). Price squeeze claims have been the focus of numerous recent Commission proceedings.

> than the state of competition in the regulated industry. By doing whatever is within its power to enhance that competition, the Commission serves the same objective as it does by direct regulation of price; indeed, Commission decisions affecting the structure of the power industry could scarcely be made rationally without regard to the impact they will have on the competitive climate.[194]

To the extent that requested agency actions can be characterized as the impermissible imposition of common carrier obligations on contract carriers, the battleground tends to shift from a traditional assessment of "wrongdoing" to a determination of what, if anything, the agency can do about it.

The *NYSEG* and *FP&L* decisions, in particular, illustrate this issue. In both cases the courts vacated Commission actions but indicated that the Commission remained free to consider competitive issues and to modify transmission agreements, provided that its orders did not expand a pre-existing voluntary wheeling commitment.[195] The difficulties in applying this standard are readily apparent. While the decisions suggest that modification may be appropriate, they do not explain when a modification is acceptable and when it impermissibly "expands" a voluntary undertaking.

Presumably, in the courts' view, an adjustment to the utility's rate is permissible, although this is not explicitly addressed in the *NYSEG* and *FP&L* decisions.[196] To require

194. NAACP v. FPC, 520 F.2d 432, 441 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976).

195. Florida Power & Light Co. v. FERC, 660 F.2d at 676 (5th Cir. 1981); New York State Elec. & Gas Corp. v. FERC, 638 F.2d at 402-03 (1980).

196. The Fifth Circuit distinguishes *FP&L* from Town of Norwood v. FERC (587 F.2d 1306 (D.C. Cir. 1978)), where only the question of rate discrimination between wheeling customers was at issue. FP&L, the court noted, had not contested Commission authority to remove undue rate discrimination. Florida Power & Light Co. v. FERC, 660 F.2d at 675 (5th Cir. 1981). It is at least arguable that a utility's voluntary decision to wheel is premised upon *all* the conditions underlying that decision, including the rate which it finds acceptable. If one is to apply the common law distinction between common and private carriage in this context, it is necessary to recognize that the contract carrier not only can choose its customers, but serve them "on terms and *at rates satisfactory to him* at the time." Home Ins. Co. v. Riddell, 252 F.2d 1, 4 (5th Cir. 1958) (emphasis added). Thus agency action to adjust the utility's rate downward, below a level satisfactory to the utility may force the utility to "expand" its wheeling commitment beyond that originally contemplated and voluntarily undertaken.

additional wheeling to a given customer is not.[197] Neither is an order requiring the utility to file its voluntary wheeling policy with the agency.[198] In *FP&L* the Fifth Circuit left little doubt, moreover, that Commission orders extending transmission service to previously excluded customers, in the absence of a tariff, are not appropriate remedies for undue discrimination,[199] although it specifically pretermitted decision on that question, at least insofar as the alleged discrimination could be shown to have anticompetitive effects.[200]

Services versus Rates and Transmission versus Wholesale Service

The *NYSEG* and *FP&L* decisions suggest that distinctions can be drawn (1) between Commission jurisdiction over rates and service and (2) between transmission service and other services subject to Commission regulation. Neither distinction is logically tenable.

The necessary connection between rates and services was clearly articulated by the Third Circuit in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*[201] There the court rejected arguments that Commission jurisdiction over a pipeline's rates and charges would not permit it to regulate the pipeline's practices with respect to the extension of services to various customers. The court stated:

> We are not required and do not decide that the Commission has power to enforce contractual obligations. We do hold that *adequacy and impartiality of service, in the light of existing circumstances, is*

197. New York State Elec. & Gas Corp. v. FERC, 638 F.2d at 402-03 (1980).
198. Florida Power & Light Co. v. FERC, 660 F.2d at 677 (5th Cir. 1981).
199. The court expresses "serious doubts" that a petition seeking such relief would be successful. *Id.* at 675. Its further explanation that no cases raising similar discrimination claims for wheeling or any other services were cited where there was not a tariff already on file, appears to be in error. Richmond Power & Light Co. v. FERC, (574 F.2d 610 (D.C. Cir. 1978)), cited by the court at p. 678, is just such a case. Moreover, there are a number of cases decided by the Commission in which discrimination complaints about the availability of service have been raised in the absence of a filed tariff.
200. 660 F.2d at 679.
201. 173 F.2d 784 (6th Cir. 1949).

> *within Commission control. This must be so if control over rates means anything, since adequate service is a necessary concomitant in the fixing of reasonable rates.* If this is so in respect to private utilities it must be even more important in the case of utilities which are affected with a public interest. If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service.[202]

There is no sound basis, moreover, for applying different interpretations to the Commission's filing requirements[203] or to its standards for measuring the lawfulness of rates and services, based on whether the rate schedules in question involve electric transmission or other jurisdictional electric and gas services. The reasons for rejecting this distinction are two-fold.

First, sections 205 and 206 of the Federal Power Act do not distinguish between transmission and sales for resale, insofar as the statutes are intended to reach unjust, unreasonable or unduly discriminatory rates, classifications and practices.[204] Moreover, nothing in the legislative history suggests that Congress intended to limit the Commission's remedial authority to revise unreasonable or unduly dis-

202. *Id.* at 789. (emphasis added). The Commission has long taken a similar view of its jurisdiction. *See* United Gas Pipeline Co., 46 F.P.C. 786, 800 (1971) (NGA interpreted as extending to protect against undue discrimination in rates and services); Willmut Gas & Oil Co., 12 F.P.C. 132 (1953) (NGA applies equally to rates and services).

203. The court in *Florida Power & Light* for example, notes that the Commission has long required gas pipelines to file statements of their service availability policies and that this requirement is similar to the one impermissibly imposed on FP&L. 660 F.2d at 677 (citing Michigan-Wisconsin Pipeline Co., 34 F.P.C. 621, 626 (1965)).

204. This is a point recognized in the Commission's regulations. For purposes of its filing regulations under section 205(c) of the Federal Power Act, the Commission requires utilities to file "full and complete rate schedules" for all jurisdictional electric services they render. 18 C.F.R. § 35.1(a) (1981). The FERC regulations define "electric services" to include transmission of power in interstate commerce. 18 C.F.R. § 35.2 (1981).

criminatory power resale contracts.[205] An elementary rule of statutory construction is that effect must be given, to the extent possible, to every word, clause, and sentence of a statute.[206] Consequently judicial attempts to limit a statute to less than all of the applications reasonably called for by its own terms are considered invalid attempts at judicial legislation.[207]

Section 201 of the Federal Power Act is itself quite clear. It declares that [f]ederal regulation . . . of the *transmission* of electric energy in interstate commerce *and* the sale of such energy at wholesale in interstate commerce is necessary in the public interest. . . ."[208] The reference is carried over into section 206, which authorizes the Commission to modify jurisdictional contracts for the "transmission or sale" of electric energy.[209] In *Federal Power Commission v. East Ohio Gas Co.*,[210] the Supreme Court rejected a claim by the respondent that the Commission could exercise jurisdiction over the transportation of natural gas only where the company was engaged in both the transportation *and* sale for resale of natural gas in interstate commerce. Construing provisions of the Natural Gas Act which are analogous to the Federal Power Act's references to "transmission" and "sales for resale,"[211] the Court reasoned:

> Respondents contend, however, that the word "transportation" in § 1(b) must be construed as applying only to companies engaged in the business of transporting gas in interstate commerce for hire or for sales to be followed by resales, whereas East Ohio does neither. The short answer is that the Act's language did not express any such limitation. Despite the unqualified language of § 1(b) making the Act apply to "transportation of natural gas in interstate commerce," respondents ask us to

205. Parker v. United States, 448 F.2d 793, 797 (10th Cir. 1971).
206. United States v. Menasche, 348 U.S. 528 (1955); American Radio Relay League v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980).
207. Trade Mark Cases, 100 U.S. 82, 99 (1879).
208. 16 U.S.C. § 824(a) (1978) (emphasis added).
209. 16 U.S.C. § 824e (1978).
210. 338 U.S. 464 (1950).
211. Parallel provisions of the Natural Gas and Federal Power Acts are to be read in *pari materia*. Federal Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956).

> qualify that language by applying it only to businesses which both transport and sell natural gas for resale. They rely on a sentence in the declaration of policy, § 1(a), referring to "the business of transporting and selling natural gas." But their contention that the word "and" in the policy provision creates an unseverable bond is completely refuted by the clearly disjunctive phrasing of § 1(b) itself. As we pointed out in *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507, 516, § 1(b) made the Natural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act.* Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act.[212]

Second, to the extent that the distinctions between transmission and sales for resale suggested by the courts in *FP&L* and *NYSEG* rest upon the premise that Congress rejected common carrier status for utilities, those distinctions are vulnerable to criticism. While it is true that utilities are not transmission common carriers under the FPA,[213] they are no more so with respect to sales for resale. The oft-cited[214] common carrier provision included in Congressman Rayburn's bill proposing the Public Utility Holding Company Act, which was rejected by Congress in favor of a more limited version in 1935, would have imposed an obligation not only to transmit for others upon reasonable request, but to sell or exchange power as well.[215] The same bill would have granted the FTC identical powers with re-

212. 338 U.S. at 468 (emphasis added).
213. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973); Richmond Power & Light v. FERC, 574 F.2d 610, 619 (D.C. Cir. 1978).
214. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. at 375-76 (1973); Richmond Power & Light v. FERC, 574 F.2d at 619-20 (D.C. Cir. 1978); Sunflower Elec. Coop. v. Kansas Power & Light Co., 603 F.2d 791, 798-801 (10th Cir. 1979).
215. Section 202(a), H.R. 5423, S. 1725, 74th Cong., 1st Sess. (1935). *See supra* note 149.

spect to the transportation and sale for resale of natural gas.[216]

Thus, under the Federal Power Act, the power to compel not only wheeling, but any "coordination of facilities is left to the voluntary action of the utilities."[217] Wholesale contracts, as a consequence, are also essentially voluntary, and with the exception of compulsory interconnection under section 202(b), the Commission cannot compel sales for resale either.[218] Nor can it compel pooling.[219] All of these services result from voluntary commercial relationships governed *"in the first instance* by business judgment and not regulatory coercion. . . ."[220] Given the Natural Gas Act's parallel legislative history, the same can forcefully be said for gas pipeline services.

The implications of Congress's choice to reject common carrier regulation of gas pipelines and electric utilities cannot logically be limited solely to those cases involving the transmission of electric power.[221] As a consequence, the *FP&L* and *NYSEG* decisions may have ramifications far

216. *Id.* Section 303(a) of that bill provided:

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

A later bill, introduced in the House of Representatives as H.R. 5711 by Ohio Congressman Crosser and as S. 1919 by Senator Brown of Michigan, (also not adopted) would have obligated a pipeline if it elected "to act as a common carrier," to accept for transportation, at a "fair rate" and without "unjust discrimination" gas tendered by shippers in the pipeline's vicinity. H.R. 5711, 75th Cong., 1st Sess. (1937); S. 1919 75th Cong., 1st Sess .(1937).

217. H.R. REP. 1318, 74th Cong., 1st Sess. 27 (1935).

218. Otter Tail Power Co. v. United States, 410 U.S. at 373-74 (1973). Note that a similar provision authorizing direct interconnections between a gas pipeline and a distributor is contained in section 7(a) of the Natural Gas Act. 15 U.S.C. § 717f(a) (1976).

219. Central Iowa Power Coop. v. FERC, 606 F.2d 1156, 1162 (D.C. Cir. 1979).

220. Otter Tail Power Co. v. United States, 410 U.S. at 374 (1973) (emphasis added).

221. In a recent case before an administrative law judge of the FERC, for example, it was argued by the company that the Commission had no authority to modify the utility's availability clause for wholesale power. The company cited *New York State Elec. & Gas Co. v. FERC* for this proposition. Northern States Power Co. (Wisc.) 18 F.E.R.C. ¶ 63,022, 65,089 (1982). The judge, finding the proposed clause reasonable, did not reach the issue. *Id.*

beyond those ever contemplated by the Fifth or the Second Circuits. Support for the above proposition can be inferred from the otherwise unexplained failure of either court to discuss the D.C. Circuit Court's decision in *Central Iowa Power Cooperative v. FERC*[222] or to distinguish it from their respective holdings.

Central Iowa involved a challenge to certain provisions in the Mid-Continent Area Power Pool (MAPP), a coordination agreement between several midwestern utilities providing for the sale and exchange of various electric services, including economy, maintenance, emergency, and transmission services, among others. The complaining systems argued that the pool agreement was exclusionary and anticompetitive. Therefore, they contended, membership in the pool should be opened.[223]

The Commission held that the pool was indeed exclusionary and that it unreasonably discriminated against smaller utilities. However, it rejected the complainants' argument that the pool was inadequate unless more services were added. The Commission concluded that while membership provisions could and would be modified to eliminate discrimination,[224] the agency was powerless to order an expansion in the scope of pool services beyond those voluntarily initiated by the members, unless the absence of such services rendered the pool agreement unreasonable or unduly discriminatory.[225]

Both the existing pool members and the complainants appealed. Citing Congressional rejection of the common carrier provision in the original draft of the Federal Power Act,[226] the MAPP defendants argued that the Commission's "determination with respect to the pool membership provisions . . . constitute[d] a directive to the pool 'to offer more

222. 606 F.2d 1159 (D.C. Cir. 1979).
223. *Id.* at 1166-67.
224. *Id.*
225. *Id.* at 1167-68.
226. *See supra* notes 214, 215 and acompanying text.

services' and to expand the scope and objectives of the pool.'"[227]

That argument is strikingly like the one advanced by NYSEG and accepted by the Second Circuit in *NYSEG*. The D.C. Circuit however, affirmed the Commission's decision and, citing the Commission's opinion, ruled that while the decision to pool is "in the first instance a matter for the utilities involved," once entered into, the pool agreement had to meet the standards imposed by the Federal Power Act.[228] As the court explained, Congress anticipated that " 'enlightened self-interest' " of utilities would lead to voluntary coordination, but that if arrangements developed which did not comport with the public interest, they could be modified.[229] The Commission recently offered a similar explanation of its authority: "The freedom to voluntarily coordinate is not an absolute license"[230] and, though initially voluntary, "*any* rate schedule" must comply with sections 205 and 206 of the Act.[231]

The *Central Iowa* decision is significant in several respects. Most important, it supports the Commission's authority to remedy undue discrimination not only by equalizing services among existing wholesale customers, but also by extending those services to previously excluded systems. Second, it establishes the principle that this power exists even where the Commission has no authority to compel a utility to provide the service initially. Third, it attempts to draw a meaningful distinction between the initial voluntary undertaking over which the agency exerts little or limited control, and the activity once undertaken, when the utility becomes subject to the full panoply of the agency's regulatory powers. In all the respects set out above, the *Central Iowa* decision takes a more expansive view of the

227. Brief for Petitioners at 28, Central Iowa Power Coop. v. FERC, 606 F.2d 1159 (D.C. Cir. 1979).
228. 606 F.2d at 1167, 1170-71 n.46.
229. *Id.* at 1168.
230. City of Frankfort v. Kentucky Utilities Co., 12 F.E.R.C. at ¶ 61,004, 61,010 (1980), *vacated in part on other grounds*, 20 F.E.R.C. ¶ 61,173 (1982).
231. *Id.* (emphasis added).

Commission's powers than that taken by the courts in the *NYSEG* and *FP&L* decisions.

The *Central Iowa* decision itself was foreshadowed by the D.C. Circuit Court's decision a year earlier in *Richmond Power & Light v. FERC.*[232] There the court was faced with a claim by a municipal utility that certain wheeling agreements entered into between Indiana and Michigan Electric Company (I&M) and several other utilities were discriminatory. The gravamen of the muncipality's complaint was that I&M's decision to wheel power for other utilities and its consequent refusal to do so for Richmond was unduly discriminatory and in violation of the Federal Power Act.

The court rejected Richmond's claim on the facts presented, but did not rule out the possibility that relief similar to that requested might be available where the complaining utility could demonstrate that the discrimination was undue:

> [R]ichmond spurned the opportunity to demonstrate that particular activities were unreasonably anticompetitive or discriminatory and claimed instead that the mere failure to wheel energy to and from Richmond while wheeling for any other utility was unlawful discrimination. With the issue thus narrowed, the Commission correctly ruled that since Congress made wheeling voluntary an individual decision to wheel for one customer but not for another is not automatically discriminatory. This rejection of a per se rule follows logically from the congressional refusal to impose common-carrier duties on electric utilities. Thus Richmond had an obligation, which it failed to meet, of presenting a *prima facie* case that I&M's actions were the result of anticompetitive intentions or, perhaps, were at least unreasonable.[233]

The *Central Iowa* decision did not specifically address the Commission's authority to compel wheeling[234] as a remedy

232. 574 F.2d 610 (D.C. Cir. 1978).
233. *Id.* at 623-24 (footnotes omitted).
234. The Commission in *Mid-Continent Area Power Pool Agreement*, did not directly refer to expansion of the wheeling obligation. 58 F.P.C. 2632 (1977). It is clear enough that its order requiring the existing MAPP

for undue discrimination. Its underlying rationale, nevertheless, represents a logical extension of the *Richmond* case. While *Richmond* suggests that electric services can be extended to new customers as a remedy for undue discrimination upon a proper showing, *Central Iowa* confirms the availability of that remedy.

Dealing as they do with undue discrimination, the court's decisions in *Central Iowa* and *Richmond* possess additional significance. They touch, albeit indirectly, upon the distinction between indiscriminate, absolute common carriage obligations and the qualified right of the contract carrier under the FPA and NGA to choose customers individually. Because the claim of undue discrimination is likely to be the excluded customer's most potent claim to pipeline or transmission access, the breadth of Commission authority to remedy undue discrimination is a critical issue. The next section deals with the concept of undue discrimination as applied to contract carriers under the Natural Gas and Federal Power Acts. It further attempts to fashion workable distinctions between discrimination remedies and common carrier duties.

Service Discrimination: The Problem of Access to Essential Facilities

Basically, the Commission's duty when presented with claims of undue discrimination, is to assure that rates and terms of service do not differ significantly or unreasonably for similarly situated customers.[235] The Commission is ob-

---

pool members to establish a rate schedule for transmission services for the benefit of those new members too small to reciprocate for pool transmission services by making their own transmission facilities available in kind for use by other pool members, did indeed extend transmission or wheeling services to new customers. Section 19.08 of the Agreement originally provided that nothing was "to 'be construed as obligating any of the Participants to wheel power and energy for others not Participants under this Agreement.'" Fairman and Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 HASTINGS L.J. 1159, 1179 n.89 (1977). New participants, by definition, would receive wheeling as one of the pool services to which they would be entitled, i.e., at least the limited wheeling provided by the pool agreement.

235. Public Service Co. of Ind. v. FERC, 575 F.2d 1204, 1213 (7th Cir. 1978); Sebring Utilities Comm'n v. FERC, 591 F.2d 1003 (5th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979); St. Michaels Utilities Comm'n v. FPC, 377 F.2d 912 (4th Cir. 1967). This standard is essentially the test employed under the Interstate Commerce Act for unjust discrimination. St. Michaels Utilities Comm'n v. FPC, 377 F.2d at 915 (4th Cir. 1967).

liged moreover, to make "every effort" to eliminate undue preference demonstrated to exist.[236] Not all discrimination is undue, but the absence of a "reasonable basis for distinction" among customers will constitute grounds for the finding of a violation.[237]

The courts have characteristically described the Commission's authority to remedy violations of the Natural Gas and Power Acts in broad and sweeping terms. The Commission's powers, the D.C. Circuit has held, are at their "zenith" in fashioning remedies and sanctions for violations of statutes it administers.[238] Its broad statutory responsibilities, the Supreme Court observed, "demand a generous construction of its statutory authority."[239] Moreover, once a matter is found to be a proper subject of concern for the Commission, it is empowered, according to the Third Circuit, "to exercise wide discretion in selecting the tools with which to safeguard the public interest."[240] Where the claim involves undue discrimination, the Sixth Circuit maintains that Commission remedial authority is in fact, "without limitation."[241]

The Supreme Court has held that an action under the ICA to enforce the duty to serve on reasonable demand will lie against a common carrier independent of any claim that the carrier has been unjustly discriminatory.[242] Lacking authority under a common carrier statute, the Commission is bound by the familiar principle that it is prohibited from doing indirectly, that which it has no power to achieve directly.[243] Thus, as the D.C. Circuit Court admonished in *Richmond*, utilities do not "bootstrap themselves into common-carrier status by filing rates for voluntary service. . . ."[244] However, that court pointed out, they may be subject

236. Town of Norwood v. FERC, 587 F.2d 1306, 1313 (D.C. Cir. 1978).
237. Sebring Utilities Comm'n v. FERC, 591 F.2d at 1009 (5th Cir. 1979).
238. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).
239. Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968).
240. Gulf Oil Corp. v. FPC, 563 F.2d 588, 606 (3d Cir. 1977).
241. Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 173 F.2d 784, 789 (6th Cir. 1949). *But see* Panhandle Eastern Pipeline Co. v. FPC, 204 F.2d 675 (3d Cir. 1953).
242. Pennsylvania R.R. Co. v. Sonman Shaft Coal Co., 242 U.S. 120, 125 (1916).
243. Northern Cal. Power Agency v. FPC, 514 F.2d 184 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 863 (1975); California v. FPC 369 U.S. 482 (1962); City of Paris v. FPC, 399 F.2d 983 (D.C. Cir. 1968).
244. 574 F.2d at 620.

to claims raising the "analytically separate" issue of undue discrimination.[245]

The concept of an analytical distinction between the duty of a common carrier and the duty to serve without undue discrimination is not inconsistent with a broad Commission mandate to protect the public against anticompetitive practices by NGA and FPA contract carriers. Where statutory schemes are aimed, not at the protection of common carriers,[246] but at "abusive practices"[247] and "monopolistic forces,"[248] the duty to consider antitrust policy entrusted to the agency would seem to demand the "generous construction of its statutory authority,"[249] particularly when discriminatory practices threaten competitive injury.

The FERC has stated that the "prohibitions against undue discrimination protect not only existing customers against unfair differences in rates and terms, but also those being denied service altogether."[250] There is little reason to conclude that where the protection of competitive interests is so clearly an agency mandate, the mere absence of common carrier authority necessarily limits the protections of antidiscrimination provisions to existing customers.

Montana-Dakota Utilities Co. v. FPC,[251] is a useful case in point. In 1920, Congress enacted the Mineral Leasing Act,[252] requiring, among other things, that oil and gas pipelines traversing federal lands accept as a condition of any right-of-way granted by the Secretary of the Interior

245. *Id.* at 622.
246. This, as discussed earlier, is the primary thrust of traditional contract carrier regulation. *See supra* notes 158 and 159.
247. Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758 (1973).
248. FPC v. Texaco, Inc., 417 U.S. 380, 397-98 (1974).
249. Permian Basin Area Rate Cases, 390 U.S. at 776 (1968).
250. City of Frankfort v. Kentucky Utilities Co., 12 F.E.RC. ¶ 61,004, 61,012 n.9 (1980), *vacated in part on other grounds*, 20 F.E.R.C. ¶ 61,173 (1982) (citing Central Iowa Power Coop., Inc. v. FERC, 606 F.2d 1159 (D.C. Cir. 1979), and Town of Massena v. Niagara Mohawk Power Corp., No. E-9565 (FERC Order issued Aug. 1, 1979). *Compare* Texas Deepwater Port Authority, 6 F.E.R.C. ¶ 61,211 (Mar. 7, 1979) (interpreting Interstate Commerce Act, FERC held that oil pipeline service could not be offered to some customers and denied to others similarly situated).
251. 169 F.2d 392 (8th Cir. 1948), *cert. denied*, 335 U.S. 853 (1948).
252. 30 U.S.C. §§ 181-194, 201-209, 211-214, 221, 223-229, 229a, 241, 251, 261-263 (1976 & Supp IV 1980).

the duty to transport as common carriers. The Mondakota Gas Company, a corporation formed for the purpose of distributing gas, had complained to the FPC in 1941 that the refusal of Montana-Dakota Utilities Company to transport its gas supplies or to file rates for the transportation of gas violated both the pipeline's common carrier duties under the Mineral Leasing Act and the NGA's prohibition against undue discrimination. The FPC agreed, and, in an order issued March 22, 1946,[253] directed the pipeline to file a transportation tariff and to offer transportation services over its entire pipeline system at non-discriminatory rates no higher than it charged for transportation of its own gas supplies sold at wholesale.[254]

On appeal to the Eighth Circuit, the defendant pipeline raised two arguments which the court quickly rejected: (1) that the pipeline fulfilled its obligations as a common carrier under the Mineral Leasing Act by acting as a common purchaser, and (2) that since it had no rates on file with the Commission, the FPC, limited by statute to reviewing existing rates, was without authority to act.[255] In addition, the pipeline raised two other arguments. It urged that Mondakota, not then an operating gas distributor, lacked standing to complain of discrimination.[256] Finally, the pipeline contended, the Commission's orders extended a duty to transport over the Company's entire system rather than simply those of the Company's pipelines subject to the Mineral Leasing Act.[257]

253. Mondakota Gas Co. v. Montana-Dakota Utilities Co., 5 F.P.C. 64 (1946).
254. *Id.* at 77-82.
255. 169 F.2d at 396-98. The Court observed that Montana-Dakota, having accepted a common carrier grant and an obligation to serve, fell within the Commission's powers under section 4(c) of the Natural Gas Act, requiring pipelines to file rate schedules for gas transportation service. A question exists as to whether this obligation distinguishes *Montana-Dakota* from *Florida Power & Light*, which exempts corporate wheeling policies from the Commission's filing requirements where such policies are the result of "voluntary" undertakings. This question was presented in Pacific Gas & Elec. Co. v. FERC (No. 79-1882, D.C. Cir., filed May 17, 1982), an appeal of an order of the FERC directing the utility to file certain nuclear power plant license conditions (where license conditions required utility to wheel power for neighboring systems). The Commission's order, Pacific Gas and Elec. Co., (11 F.E.R.C. ¶ 61,246 (1980)), was affirmed per curiam without opinion. Pacific Gas and Elec. Co. v. FERC, 679 F.2d 262 (D.C. Cir. 1982).
256. 169 F.2d at 398-99.
257. *Id.*

On the issue of standing, the court upheld the Commission's determination that the complainant had a valid interest under the statute.[258] The court found equally unpersuasive Montana-Dakota's argument that any Commission remedy for undue discrimination could extend only to those portions of the company's system traversing public lands. An effective remedy for undue discrimination, the court held, could not be so limited. The court's words are instructive:

> Under these circumstances no feasible plan is suggested to eliminate discrimination, and it does not appear that any effective regulatory rate order could be entered to achieve that result, without including the entire system. Moreover, section 5(a) of the Natural Gas Act does not prescribe an exclusive means or method to be applied by the Commission for removing a discriminatory rate or practice. On the other hand, section 5(a) of the Natural Gas Act provides that when discrimination is found to exist the Commission "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. . . ." We hold that the Commission's powers are adequate under the circumstances shown here to enter its order prescribing a rate schedule for petitioner's entire connected interstate system.[259]

The Mineral Leasing Act itself draws a distinction between common carriage and discrimination. As originally enacted, section 28 of the statute provided in relevant part:

258. *Id.* The Commission observed that Mondakota was a bona fide entity fully capable of entering the gas distribution business, if provided access to defendant's pipeline system which was the only feasible means of transporting gas to markets in the area. It held that the law clearly was intended to protect would-be producers and distributors and that imposing a requirement upon complainants that they be presently operating as producers or suppliers "would establish a vicious circle out of which the complainant could not successfully break." Mondakota Gas Co. v. Montana-Dakota Utilities Co., 5 F.P.C. at 71 (1946). This view is consistent with the antitrust law protections afforded potential entrants denied access to "bottleneck" or essential facilities. *See, e.g.*, Gamco, Inc. v. Providence Fruit and Produce Bldg., 194 F.2d 484, 488 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); Associated Press v. United States, 326 U.S. 1, 13 (1945); United States v. Otter Tail Power Co., 331 F. Supp. 54, 60 (D.C. Minn. 1971), *aff'd in part and vacated and remanded in part*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

259. 169 F.2d at 399. Several years after the court's decision, the common carrier provision of the Mineral Leasing Act was repealed. *See infra*

> [R]ights of way through the public lands . . . of the United States are hereby granted for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section [181 of this title] . . . *upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers. . . .*[260]

In 1935, the Act was amended, (1) by substituting "may be granted by the Secretary of the Interior" for "are granted," (2) by adding "and conditions" following "regulations," and (3) by adding to the language following "maintained as common carriers":

> and shall accept, convey, transport, or purchase *without discrimination*, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable. . . .[261]

Prompted by the D.C. Circuit Court's decision in *Chapman v. El Paso Natural Gas Co.*,[262] Congress in 1953

note 263. Montana-Dakota subsequently sought and received release from its common carrier status. Mondakota Gas Co. v. FPC, 232 F.2d 358 (D.C. Cir. 1956).

260. 30 U.S.C. § 185 (1920), 41 Stat. 449 (emphasis added).

261. 49 Stat. 678-79 (1935) (emphasis added).

262. 204 F.2d 46 (D.C. Cir. 1953). The essential facts in *Chapman* are these. The El Paso Natural Gas Pipeline Company had received a certificate of public convenience and necessity from the FPC to construct a pipeline from eastern New Mexico, across northern Arizona and to the San Francisco Bay area. Since the pipeline's route crossed federal lands, it was required to and did secure right-of-way permits from the Secretary of the Interior, which permits obligated the Company to operate the pipeline as a common carrier. In March 1951, the Secretary indicated to the Company that no further right-of-way permits would be issued unless the Company agreed to the additional condition that it would upon request and within such time prescribed by the Secretary, increase the lines capacity to accommodate additional gas shipments in accordance with detailed regulations spelled out by the Secretary. El Paso, then within 32 miles of the line's completion, sought and secured an injunction from the district court, (Chapman v. El Paso Natural Gas Co., 192 F.2d 402 (D.C. Cir. 1951)) which held that the Secretary had exhausted his authority by requiring the pipeline to act as a common carrier. 204 F.2d at 53.

On appeal by the Secretary, the D.C. Court of Appeals upheld the lower court ruling, holding that conditions required by the Secretary amounted to detailed regulation of the pipeline's operation, the authority for which rested solely with the Federal Power Commission. *Id.* at 52. *But cf.* Utah Power & Light Co. v. Morton, 504 F.2d 728 (9th Cir. 1974) (hold-

amended section 28 of the Mineral Leasing Act by exempting gas pipelines from common carrier obligations under the statute.[263] Although the 1953 amendment refers to exemption from the common carrier "provisions," it is unlikely that use of the plural "provisions" was intended to include the 1935 amendment prohibiting discrimination in the transportation of gas produced on federal lands.[264] The 1935 amendment was included not to enforce the common carrier requirements of the 1920 legislation,[265] but in response to the problem existing at that time, "that pipelines serving gas producers on private lands refused to buy or transport gas produced from leases on Federal lands being drained from the adjacent private lands."[266]

---

ing that regulations imposing detailed wheeling requirements upon utility seeking right-of-way did not exceed Interior Secretary's authority).

Interestingly, the court did not conclude that common carrier operation was inappropriate for the gas pipeline industry, as is suggested in the legislative history of the Mineral Leasing Act Amendments of 1953. *See infra* note 263. On the contrary, the court described the Natural Gas Act and the Mineral Leasing Act's common carrier provisions as "fully compatible," and specifically rejected the proposition advanced by El Paso, that the Natural Gas Act impliedly repealed the Mineral Leasing Act's common carrier requirements. 204 F.2d at 52.

263. 30 U.S.C. § 185 (1953). Apparently Congress was concerned that strict application of the Act's common carrier provisions could disrupt contractual relations and interfere with regulation under the Natural Gas Act, particularly since gas pipelines might not have sufficient capacity to provide common carrier service to the public. *See* S. 2220, S. REP. No. 578, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2357-58.

264. Adherents to the view that the Natural Gas Act gives FERC no authority to compel transportation of gas as a remedy for undue discrimination have pointed to the 1953 amendment as evidence supporting this proposition. *See, e.g.*, Brief for High Island Offshore System and U-T Offshore System Opposing Exceptions at 13-23, High Island Offshore System, No. CP75-104, *et al.* (filed Apr. 8, 1981).

265. *See* S. 1081, Trans-Alaska Pipeline Authorization Act, S. REP. NO. 207, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2417, 2469 (letter from Secretary of Interior).

266. *Id.* at 2440, 2468-69. The report itself is somewhat confusing on this point. While distinguishing between 1) the discrimination protections for gas produced on federal lands and 2) the common carrier requirements of the 1920 Act (*Id.* at 2440), it states at page 2441 that the 1953 amendments removed "any requirement in federal statute that interstate natural gas pipelines subject to the Natural Gas Act accept gas without unreasonable discrimination—whether for transportation or for purchase."

Arguably such language suggests a substantial limitation on the Commission's Gas Act authority. A more logical construction would preserve the Commission's authority to act where the pipeline had undertaken to transport for some shippers, but would not obligate a pipeline transporting only its own gas to take on *any* shippers without discrimination. Indeed the former interpretation cannot be reconciled with the protections afforded government leaseholders who retain a right to ship gas produced in the vicinity of the pipeline without discrimination pursuant to the 1935 amendments now found in 30 U.S.C. § 185(r)(2)(A) and (B) (1973). Under the Act's prorationing provisions in section (r)(2)(B), government leaseholders, moreover, would seem to retain rights to secure transportation over the pipeline, even where the pipeline is otherwise transport-

Revisions to the Mineral Leasing Act included in the Trans-Alaska Pipeline Authorization Act of 1973,[267] retained these distinctions;[268] the 1920 common carrier provisions and the 1935 amendment are now codified as separate successive sentences (r)(1) and (r)(2)(A) and (B) in the statute. According to the Senate report on the 1973 amendment, the common carrier exemption for gas pipelines retained from the 1953 amendment refers only to the first of the two sentences.[269]

ing only its own gas. Such an interpretation follows logically from the purpose of the 1935 amendment noted in the 1973 Senate Report "to protect the Federal government's interest in both oil and gas as the resource owner in such instances." *Id.* at 2440. A pipeline which transported its own gas could drain leaseholds on adjacent federal lands if not required to transport gas from these properties.

The shipper's access rights to pipeline facilities traversing federal land where it is also a government leaseholder could be a key means of pipeline access in the future. A great proportion of new gas discoveries are being made in the western United States. The federal government has enormous land holdings in the west. *See* Note, *The Sagebrush Rebellion: Who Should Own Public Lands?* 1980 UTAH L. REV. 505 (1980). Use of the Mineral Leasing Act as a means to facilitate pipeline access is discussed later in this article.

267. 30 U.S.C. § 185 (1976), *amended by* Pub. L. No. 93-153, 87 Stat. 576 (1973).

268. 30 U.S.C. §§ 185(r)(2)(A), (r)(2)(B) (1976). Indeed, subsection (r)(2)(A) requires pipelines to "accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline *without regard to whether such oil or gas was produced on Federal or non-federal lands.*" (emphasis added). The next sentence, subsection (r)(2)(B), requires the Secretary of the Interior to apportion pipeline capacity to accommodate gas produced on *federal* lands.

Again, the Senate report is confusing. In discussing the provisions of subsection (r)(2), the report discusses not two sentences, but one sentence dealing with both the non-discrimination and prorationing requirements. S. REP. No. 207, *supra* note 265, at 2440. It appears thus to be describing provisions in S.1041 rather than the similar provisions of S.1081. Nevertheless, the report indicates that the non-discrimination provision of (r)(2) is "in addition to the common carrier requirements described . . . in the first sentence of the subsection," is not intended to limit the non-discrimination requirement to oil and gas produced on federal land and is not intended to be limited "in any way by the *qualified* exemption of natural gas pipelines . . . from the general common carrier requirements of the first sentence." *Id.* at 2440. (emphasis added). The report here would appear to support the obvious import of the statutory language—i.e., that the 1973 amendment *broadened* the non-discrimination protections for those seeking gas transportation but granted prorationing protection from the Interior Department only to federal leaseholders. The pertinent Interior Department regulations are unhelpful in shedding any further light however. Standard right-of-way conditions make no reference to common carrier or non-discriminatory access requirements and draw no distinction between oil and gas pipelines. *See* 43 C.F.R. § 2881.2 (1981).

The amendments to section 28 of the Act also adopted common purchaser requirements for gas pipelines traversing federal lands, extending protection to gas producers not (1) covered by state common purchaser or carrier regulations or (2) producing on federal leaseholds. 30 U.S.C. § 185(r)(3)(B) (1973). The primary impetus for the amendment however was that under prevailing court interpretations of the Act, the Secretary of the Interior had insufficient authority to grant rights-of-way adequate to accommodate newer, larger pipelines within the width limitations imposed by the statute. S. REP. No. 207, *supra* note 265, at 2417.

269. S. REP. No. 207, *supra* note 265, at 2441.

The Outer Continental Shelf Lands Act[270] (OCSLA) and the Alaska Natural Gas Transportation Act[271] (ANGTA) likewise reflect statutory distinctions drawn between regulation obligating gas pipelines to transport gas without discrimination and the imposition of common carrier status upon the affected pipelines. Section 5(c) of the OCSLA, as enacted in 1953, authorized oil and gas pipeline rights-of-way across the submerged lands of the Outer Continental Shelf upon the express condition that the pipelines granted such rights-of-way would "transport or purchase without discrimination, oil or natural gas produced from said submerged lands [or Outer Continental Shelf lands] in the vicinity of the pipeline . . . ."[272] The 1978 amendments to the Act[273] recodified section 5(c) as 5(e) and added new section 5(f) which required OCS pipelines to "provide open and nondiscriminatory access to both owner and non-owner shippers."[274]

Section 5(f)(1), according to the House Conference Committee's report on the bill, was enacted to prevent, *inter alia*, " 'bottleneck monopolies' and other anticompetitive situations involving OCS pipelines"[275] and was intended as a

270. 43 U.S.C. §§ 1331-1334, 1337, 1340, 1343-1356 (Supp. IV 1980).
271. 15 U.S.C. §§ 719-719o (1976).
272. 43 U.S.C. § 1334(c) (1953).
273. Pub. L. No. 95-372, 92 Stat. 629 (1978).
274. 43 U.S.C. § 1334(e), (f) (1973). These sections of the Act also authorized the FPC to prorate inadequate capacity. This provision is retained in the 1978 Act and authority is transferred to the FERC. New sections 5(e) and 5(f) provide in relevant part:

> (e) Rights-of-way through the submerged lands of the outer Continental Shelf, . . . may be granted for the transportation of oil, natural gas, sulphur, or other minerals . . . upon the express condidition that oil or gas pipelines shall transport or purchase without discrimination, oil or gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste.
> (f) (1) Except as provided in paragraph (2), [exemption for gathering lines] every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:
> (A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers. . . .

275. H. REP. No. 1474, 95th Cong., 2nd Sess. 87 (1978).

"reaffirmation and strengthening of subsection 5(e)."[276] Amendments proposed by Representatives Seiberling and Udall, which would have required OCS pipelines to be operated as common carriers, were not adopted however.[277]

Section 13(a) of ANGTA[278] was likewise enacted to assure various shippers of access to the Alaska Natural Gas Transportation System [ANGTS] and to prevent access discrimination on the basis of ownership or non-ownership in the pipeline facilities.[279] The Senate joint committee report[280] indicates that federal leaseholders would retain their rights under the Mineral Leasing Act to non-discriminatory access to the pipeline and that, "in the event adequate capacity is not available," the Secretary of the Interior is authorized to apportion shipments of other shippers in order to accomodate the production from Federal lands [in the vicinity of ANGTS]."[281] While ANGTA does not by its terms extend prorationing protection to shipments from non-federal lands,[282] it does extend clear access rights to those shippers. The legislative history and the FERC's interpretation of ANGTA[283] support the view that, like OCSLA, ANGTA does

276. *Id.*
277. *Id.;* H. REP. No. 590, 95th Cong., 1st Sess. (1977).
278. 15 U.S.C. § 719k (1976). Section 13(a) provides:

> There shall be included in the terms of any certificate, permit, right-of-way, lease, or other authorization issued or granted pursuant to the directions contained in section 719g of this title, a provision that no person seeking to transport natural gas in the Alaska natural gas transportation system shall be prevented from doing so or be discriminated against in the terms and conditions of service on the basis of degree of ownership, or lack thereof, of the Alaska natural gas transportation system.

279. The Joint Report of the Senate Committees on Commerce and Interior and Insular Affairs concluded that section 13 requires equal tariff treatment for owner and non-owner shippers of "similar quantities of gas for similar distances." S. REP. No. 1020, 94th Cong., 2nd Sess. 23 (1976). "This," the Report notes, "is to assure that pipelines or distributors who are able to purchase additional quantities of Alaska natural gas are able to transport such natural gas to their own system upon non-discriminatory terms." *Id.* at 23. *See also* H. REP. No. 1658 Part I, 94th Cong., 2nd Sess. 32 (1976).
280. S. REP. No. 1020, *supra* note 279.
281. *Id.*
282. In its 1978 order granting intervention and establishing intervention procedures for the Alaska Natural Gas Transportation System certification proceeding, the FERC took the view that the non-discriminatory access requirements of the statute could be satisfied by treating equally all shippers on a first-come-first-serve basis. Prorationing, it held, would only be required to accommodate additional gas volumes from federal lands entitled to such protection under the Mineral Leasing Act. Northwest Alaska Pipeline Co., 3 F.E.R.C. ¶ 61,226, 61,605 (1978).
283. *Id.* at 4-5; 3 F.E.R.C. at 61,606-07. Neither the House nor Senate reports refer to common carrier status regarding section 13(a), nor does the Act

not impose common carrier obligations upon affected gas pipelines.

In marked contrast to the statutory schemes prohibiting undue discrimination in the transmission and sale of both gas and electricity, are prohibitions against discrimination in prices and services imposed by the Robinson-Patman Act. Sections 2(a) and (e) of the Robinson-Patman Act[284] extend that Act's protections only to a supplier's existing customers,[285] and it is well settled that refusals to deal with new customers are not actionable as discrimination under the statute.[286]

The Robinson-Patman Act itself does not regulate prices nor is it intended to restrict the unregulated trader's com-

---

itself use this term. As the FERC pointed out in its June 7, 1978 order *supra* note 282, the FPC (predecessor to FERC) in its *Recommendation to the President*, had construed section 13(a) as a common carrier provision, while the Justice Department took the contrary view, recommending in fact, that prorationing authority over all pipeline shipments be added to the Act. *Id.* at 2; 3 F.E.R.C. at 61,606. The Commission persuasively argued, in addition, that reliance in the Senate Report upon the Mineral Leasing Act for prorationing protection to shippers from Federal leaseholds indicates that revocation of the common carrier exemption contained in that Act was not likely intended by passage of ANGTA. *Id.* at 4. This reasoning is consistent with the principle disfavoring repeals by implication. *See* Morton v. Mancari, 417 U.S. 535 (1974).

284. 15 U.S.C. § 13(a), (e) (1976). Section 2(a) provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

Section 2(e) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting or furnishing or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms.

285. *See* Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974); Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202 (10th Cir. 1954); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3rd Cir. 1939); H.A.B. Chemical Co. Inc. v. Eastman Kodak Co., 1981-1 Trade Cas. (CCH) ¶ 63,912 (C.D. Calif. 1980).

286. Mullis v. Arco Petroleum Corp., 502 F.2d at 294 (7th Cir. 1974); H.A.B. Chemical Co., Inc. v. Eastman Kodak Co., 1981-1 Trade Cas. (CCH) at 75,748 (C.D. Calif. 1980). As the FTC held in *Bird & Son, Inc.*:

> [T]he act does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is a discrimination in price among those chosen does Section 2(a) of the act have any application.

25 F.T.C. 548,553 (1937).

mon law right to deal with whom he chooses, where his actions are not intended to preserve or create a monopoly.[287] This limitation on the scope of the Act follows naturally from the specific proviso of section 2(a) preserving the rights of sellers to "select their own customers in bona fide transactions and not in restraint of trade."[288]

No comparable limitation is to be found in the NGA or the FPA, nor is one logically implied. While the Robinson-Patman Act will protect the buyer disadvantaged or squeezed by a vertically integrated supplier who favors his own affiliated distributors,[289] and while there is no doubt that some underlying notion of equity is involved, the Act's primary purpose is to protect buyers against their competitors' receiving preferable treatment.[290] Gas and electric distributors are far more likely to be competing with their vertically integrated suppliers than the typical customer entitled to Robinson-Patman Act protection. More important, termination[291] or denial of service to a gas or electric distributor is likely to have disastrous consequences for the distributor's customers who cannot readily switch suppliers. Financially sound distributors (and indirectly their ultimate customers) in unregulated, unconcentrated markets, by definition, have practical choices among competing suppliers who will deal. Thus, equal treatment among customers in the gas and electric industries preserves not only fairness and competitive equality between customers, but protects customers in their

287. *See* Parke, Davis & Co. v. United States, 362 U.S. 29 (1960); United States v. Colgate & Co., 250 U.S. 300 (1919); Bay City Abrahams, Inc. v. Estee Lauder, Inc., 1974-1 Trade Cas. (CCH) ¶ 75,095 (S.D.N.Y. 1974) ('Colgate Doctrine' "permeates the entire Robinson Patman Act").

288. 15 U.S.C. § 13(a) (1936). The proviso reads in relevant part: "[N]othing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; . . ."

289. Danko v. Shell Oil Co., 115 F. Supp. 886 (E.D.N.Y. 1953); Thomas v. Amerada Hess Corp., 393 F. Supp. 58 (M.D. Penn. 1975). The Eighth Circuit has recently held that electricity is a "commodity" within the meaning of the Robinson-Patman Act and that electric distributors have a cause of action against their vertically integrated wholesale supplier that the supplier is offering lower prices to its affiliated retail business. City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1181 (8th Cir. 1982).

290. H.A.B. Chemical Co. v. Eastman Kodak Co., 1981-1 Trade Cas. (CCH) ¶ 63,912 at 75,748.

291. Electric utilities and natural gas pipelines are not permitted to abandon service to existing customers without approval from the Commission. Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414, 422-24 (1952); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 156 (1960).

status as competitors of the supplier. Limiting the anti-discrimination protections of the FPA and NGA to existing customers of pipelines or utilities would severely undercut antitrust policies favoring that competition.[292]

CONTRACT CARRIAGE SOLUTIONS TO ANTICOMPETITIVE ACCESS LIMITATIONS: A PROPOSAL FOR DRAWING THE LINE

At the risk of some criticism, both from those who believe that neither the NGA nor the FPA was intended to address broad access issues and from those who believe that nothing short of common carrier regulation can provide disadvantaged competitors effective redress, the author offers the following proposals for consideration. Access to gas transportation and electric transmission factilities can be ordered in a manner consistent with the concept of contract carriage. Minimum prerequisites to any access claim should be established that are consistent with the retention of contract-common carrier distinctions. Finally, where prerequisites are met, various avenues for effective relief exist under the relevant statutory provisions. The outlines for this proposal follow below.

Prerequisites for Access

A. *Essential Facilities*

It is proposed that a reasonable starting point for analysis of an access claim is the determination whether any competitive interest is at stake. The bottleneck nature of transmission networks and gas pipelines has been discussed previously. Where those in possession of bottleneck monopolies are vertically integrated, the potential for anticompetitive mischief is ever present. The "essential facility" doctrine

292. The Supreme Court's decision in *Otter Tail* clearly protects electric distribution systems against unreasonable actions, like refusals to wheel, which limit their choice among competing power suppliers. 410 U.S. 366. Section 603 of the OCSLA Amendments expresses a similar concern. 43 U.S.C. § 1862 (1978). Pursuant to section 603(h), it is the FERC's responsibility "to encourage expanded participation by local distribution companies in acquisition of leases and development of natural gas resources on the Outer Continental Shelf by facilitating the transportation" of distributors' OCS gas. *See supra* notes 64 and 65.

comes into play here. It is described by the D.C. Circuit Court of Appeals in *Hecht v. Pro-Football, Inc.*[293] as follows:

> The essential facility doctrine, also called the 'bottleneck principle', states that 'where facilities cannot be practically duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. . . . To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.[294]

Unlike the common carrier obligation to serve, the essential facility doctrine is not self-enforcing.[295] It requires at least some minimal showing that the facilities in question are, in fact, "essential."[296] Moreover, consumers, not competitors are the intended primary beneficiaries of common

293. 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).
294. *Id.* at 992 (footnotes omitted). *See also* Associated Press v. United States, 326 U.S. 1 (1945) (membership in news service held essential to competitive viability); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) (railroad switching facilities held essential facility); Gamco v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952) (warehouse distribution facility held essential). The bottleneck or essential facilities doctrine has been applied in a number of electric utility cases. *See, e.g.*, United States v. Otter Tail Power Co., 331 F. Supp. 54, 59-61 (D. Minn. 1971), *aff'd*, 410 U.S. 366, 377-78 (1973) (transmission network of utility held bottleneck facility); Town of Massena v Niagara Mohawk Power Corp., 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,799-801 (N.D.N.Y. 1980); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (transmission dominance evidence of defendant's monopoly power); Florida Power & Light Co., No. ER78-19 (FERC Order issued Aug. 3, 1979), 32 PUB. UTIL. REP. 4th 313 (1979) (utility's control of transmission network gave it "strategic dominance" over competitors); Cities of Anaheim v. Southern Cal. Edison So., No. CV78-810-MML, (S.D. Calif.) (May 18, 1981) (unpublished) (partial summary judgment finding transmission facility owned by defendant was essential to transmission of power from Pacific Northwest to plaintiffs' systems); Alabama Power Co., 13 N.R.C. 1027, 1069-71, 1108-09 (1981), *aff'd sub. nom*, Alabama Power Co. v. NRC, No. 81-7547 *et al.* (11th Cir. 1982) (nuclear license applicant's denial to competitors of access to its nuclear plant and to its transmission system held exercise of monopoly power).
295. *See supra* note 177.
296. Given the well recognized natural monopoly aspects of gas pipeline transportation and electric transmission, proof of bottleneck monopoly need not inevitably become bogged down in long, drawn out evidentiary proceedings. It would be quite feasible, for example, to adopt over time, certain legal presumptions on a case-by-case basis or perhaps to establish "regional" market definitions through rulemaking proceedings where generic findings could be made regarding the existence of monopoly power in certain pipeline or electric transmission markets.

carrier regulation.[297] Antitrust principles which underlie the essential facilities doctrine, although intended in large part to protect consumer welfare, do so by preserving competitive opportunities. Access, in the antitrust context, thus vindicates a competitive interest and, while those claiming access rights to essential facilities need not be existing competitors,[298] they clearly must assert something beyond the consumers' right to be served. Finally, the right to access under antitrust principles is itself significantly limited—sharing of an essential facility is not required where either impractical or injurious to adequacy of service to existing customers of the facility's owner(s).[299] Nor is absolute parity required.[300]

B. *Public Interest Factors*

Adoption of the essential facilities doctrine as a threshhold test for NGA and FPA access claims, this author suggests, represents a significantly different approach than that which would be dictated by a common carrier scheme of regulation. In addition, the recognition of various public interests which are entitled to protection under the Natural Gas and Federal Power Acts may require the FERC to limit

297. *See, e.g.*, Essential Communications Sys., Inc. v. American Tel. & Tel. Co., 610 F.2d 1114, 1122 (3d Cir. 1979); City of Kirkwood v. Union Elec. Co., 671 F.2d at 1179 (8th Cir. 1982); Litton Sys. Inc. v. American Tel. & Tel. Co., 487 F. Supp. 942, 951 (S.D. N.Y. 1980).

298. It is generally sufficient that the complaining party "has manifested an intention to enter the business and has demonstrated his preparedness to do so." Hecht v. Pro-Football, Inc., 570 F.2d at 987 (D.C. Cir. 1977) (citing Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1966)).

299. Hecht v. Pro-Football, Inc., 570 F.2d at 992-93; Gamco v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952). Of course injury to the owner's existing customers is not synonymous with higher costs to serve them; the owner of the bottleneck facility is not permitted to claim loss of its unlawful monopoly advantage as injury. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 375 (1973). Rather, the limitations contemplated are that "reasonable criteria of selection" e.g., "lack of available space, financial unsoundness, or possibly low business or ethical standards" might justify access restrictions in given instances. Gamco v. Providence Fruit and Produce Bldg., Inc., 194 F.2d at 487 (1st Cir. 1952).

300. *See* United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1360-61 (D.D.C. 1981) (rejecting defendant's motion for summary judgment against government's claim that defendant telephone company had denied competitors reasonable access to essential facilities).

even those access conditions which might otherwise be required on strictly antitrust principles.[301]

For example, in the gas industry context, the FERC and its predecessor, the FPC have long recognized a hierarchy of beneficial uses for natural gas; domestic uses for the gas have generally been favored over industrial consumption of gas as boiler fuel.[302] Under these circumstances, the Commission, recognizing the gas pipeline's broader mix of customers, might validly conclude that access to the pipeline, where limited, need not be made available to an industrial customer on the same terms as the pipeline supplies its wholesale customers.[303] By the same token, there would be little apparent justification for the pipeline to favor wholesale load over direct transportation service to gas distribution systems with customer mixes comparable to that of the pipeline as gas supplier.[304] The equitable claim of each to pipeline capacity would be placed on the same footing.

301. *See, e.g.*, Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968). The Commission in *Florida Power & Light Co.*, adopted a least anticompetitive alternatives test. 32 PUB. UTIL. REP. 4th 313 (1979). Although such a test attempts to minimize competitive restraints, the Commission recognizes by this test that there may be circumstances where other overriding public policy objectives require some compromise with pro-competitive principles.

302. *See, e.g.*, FPC v. Transcontinental Gas Pipeline Co., 365 U.S. 1 (1961) (end use, preemption of pipeline facilities and price are factors in evaluating certificate applications; conservation of gas is an underlying purpose of the original Act); Consol. Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975) (end-uses of gas are factors in establishing gas curtailment scheme). *See also supra* note 61.

303. FPC v. Transcontinental Gas Pipeline Co., 365 U.S. 1 (1961); El Paso Natural Gas Co., 47 F.P.C. 1318 (1972), *rev'd and rem'd on other grounds*, Arizona Pub. Serv. Co. v. FPC, 483 F.2d 1275 (D.C. Cir. 1973) (denial of transportation certificate to transport direct sale of gas to electric utility). *See also* Cerro Wire & Cable Co. v. Transcontinental Gas Pipeline Co., 677 F.2d 124 (1980) (Dismissing complaint of industrial gas user that transportation of its supplies under the pipeline's certificate were being unreasonably interrupted on grounds that industrial user had only contracted for interruptible transportation service and that pipeline was entitled to give priority to wholesale customers). One might query whether Cerro Wire's complaint would have raised a question had rate or service discrimination been alleged. The Appellant had argued for the first time on appeal that the pipeline [Transco] was imposing a "de facto tying arrangement, under which users cannot obtain transportation service from Transco unless they purchase their gas from Transco." Cerro Wire & Cable Co. v. FERC, 677 F.2d at 131. The court however, was precluded from considering this issue, which had not been raised before the Commission. *Id.*

304. Section 603 of the Outer Continental Shelf Lands Act Amendments of 1978, in fact encourages distributor access to gas produced on the Outer Continental Shelf. 43 U.S.C. § 1862 (1978). *See supra* note 64 and accompanying text. By contrast, the Commission has noted that many direct sale industrial users would not have "as compelling an equitable claim to the traditional sources of interstate system supply" as high priority users.

Access claims might similarly be affected by legitimate public interests in contract stability[305] or capacity constraints which may exist on the pipeline or the utility.[306]. All this is not to emphasize that limitations on access may be justified, but that the existence of these limitations itself underscores the distinction between common carriage and the access guidelines here proposed. If one accepts the principle that the scope of competitive interests protected under the NGA and FPA includes the rights of competitors to access to essential facilities, the Acts themselves support several avenues of relief for those with legitimate access claims.

Avenues for Relief

A. *Unreasonable Conditions of Service*

Section 4(a)[307] of the NGA and parallel section 205(a)[308] of the FPA require that jurisdictional services be provided on terms and at rates which are "just and reasonable." Several cases before the FERC (none of which have at the date of this writing been reviewed in the courts) have addressed a variety of claims that transmission service arrangements violated that statutory standard. Generally applicable tests of justness and reasonableness have been applied to determine variously that a utility's ability to terminate service at its sole discretion was arbitrary, overbroad and hence unreasonable;[309] that a minimum service reservation of one year for all transactions inhibited short term transactions and was unduly lengthy and unreasonable;[310] that a maximum service reservation period of one year was inadequate to secure long term supplies and was similarly

See Preamble to FERC Order No. 27, 7 F.E.R.C. ¶ 61,076, 44 Fed. Reg. 24,825, *remanded on other grounds*, First Miss. Corp. v. FERC, No. 79-1765 (D.C. Cir. Oct. 1, 1982).

305. *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (assured fuel supply is necessary for a public utility, hence a long-term arrangement may be critical to avoid service failure); United Gas Pipe Line Co. v. Mobil Gas Serv. Corp., 350 U.S. 332 (1956) (gas industry characterized by need for stable contract relations).
306. *See* Panhandle Eastern Pipeline Co. v. FPC, 204 F.2d 675, 681 (3d Cir. 1953).
307. 15 U.S.C. § 717d(a) (1976).
308. 16 U.S.C. § 824d(a) (1976).
309. *See* Cleveland Elec. Illuminating Co., 11 F.E.R.C. ¶ 61,114 (1980); Florida Power & Light Co., (Initial Decision) 12 F.E.R.C. ¶ 63,014 (1980), *vacated as part of settlement*, 19 F.E.R.C. ¶ 61,269 (1982).
310. Cleveland Elec. Illuminating Co., 11 F.E.R.C. ¶ 61,114 (1980).

unreasonable;[311] that terms of service limiting the delivery points available to the customer would reduce the customer's reliability and hence place it at a competitive disadvantage vis-a-vis the transmitting utility in efforts to attract and retain customers;[312] and that the insistence of the wheeling utility upon individually negotiated rates for transmission, rather than a generally available rate schedule was anti-competitive and unjustified even in the absence of refusals to serve.[313]

Transmission or transportation service offered at rates so high that the customer would be unable to take advantage of alternative supply opportunities can similarly be considered as tantamount to the denial of access,[314] or as a form of "price squeeze."[315] Likewise, offers of interruptible service might be considered inadequate bases upon which distributors or other transmission customers could adequately plan supply alternatives to wholesale service by the pipeline or the utility. Arguably, an access claim may lie against the pipeline or utility which refuses to "unbundle" wholesale service to its customers—i.e., refuses to offer the transmission or transportation component of its service separately.[316] This list is not meant to be exhaustive but merely to suggest the range of transmission or transportation constraints, the remedy for which might be the modification or expansion of access.

311. Florida Power & Light Co., 12 F.E.R.C. ¶ 63,014 (1980).
312. Town of Massena v. Niagara Mohawk Power Co., (Initial Decision) 13 F.E.R.C. ¶ 63,036 (1980). *See supra* note 81.
313. *See supra* note 309.
314. Offers to serve only at impractical terms and prices have been construed as unlawful refusals to deal, when done to further monopoly power. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).
315. Under a price squeeze theory, the vertically integrated supplier sells to its competitor-customer one of the customer's necesary inputs, here transmission, at a price higher than it "charges" itself for the same input. This theory has been applied to the production input where the wholesale customer charges that its supplier is selling power at retail at a lower price than it charges the squeezed wholesale distributor. *See* FPC v. Conway Corp., 426 U.S. 271 (1976).
316. Essentially, this theory analogizes wholesale service to a tying arrangement under which the supplier offers the tying product—transportation (or transmission) only on condition that the customer purchase its gas (or electric) supply from the supplier as well. A critical element of any tying agreement is the existence of two distinct products or services. Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

B. *Undue Discrimination*

This article has explored at some length the existence of a distinction between common carrier obligations and the duties imposed upon utilities and gas pipelines to avoid unjust discrimination. Like the prohibition against unreasonable rates, terms and conditions of service, the protection afforded customers against undue discrimination represents a logical and legitimate vehicle to vindicate meritorious access claims. Its most significant value is its applicability to those situations where competitors are denied service offered others.

Apart from proof that the claimant is a bona fide potential entrant and that the utility or pipeline is in possession of an essential facility, undue discrimination claims can be reasonably limited in other ways. For example, the FERC, in addressing a municipal electric distribution system's claim that the neighboring larger utility had denied it various electric services necessary to enter the generating business, stated that discrimination claims must involve "reasonable possibilities of exclusion" and that "reasonable criteria of selection are certainly permissible." Reasonable criteria are those which "relate to existing generating and capacity limitations, the willingness of a customer to meet fair and mutual obligations, or the prior existence of lawful contracts taking precedence with the would-be purchasers."[317]

Other limitations, relating to equity (such as curtailment priorities mentioned above), or differences in circumstance (i.e., the service specifically offered others cannot be used by the excluded system without changing the nature of

317. City of Frankfort v. Kentucky Utilities Co., 12 F.E.R.C. ¶ 61,004, at 61,011 (1980). The Commission later vacated its opinion, finding that Frankfort had not proved itself a potential entrant and that the Commission's earlier decision was therefore premature. 20 F.E.R.C. ¶ 61,173 (1982). The FERC's reference to prior lawful contracts would not seem to preclude any contract modification; for example, where the customer wished to change suppliers but was precluded by an unreasonable long-term exclusive dealing arrangement, modification might be justified. Similarly, the Commission has the authority to prorate capacity to eliminate undue discrimination even where existing contracts must be modified as a result. Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675 (3d Cir. 1953). *See also* Texas Eastern Transmission Corp., 8 F.P.C. 139, 149 (1949) (available capacity "must be apportioned equitably and fairly notwithstanding contract provisions").

the service) might also justify differences in treatment. Recognizing limits to the scope of undue discrimination remedies may help the Commission avoid blurring the distinction between common carrier remedies and those available to the class of undue discrimination complainants. Litigants with valid discrimination claims, keeping such a framework in mind, can better heed the *Richmond* court's admonition that bare discrimination claims not act as a "bootstrap" whereby a utility's isolated undertaking foists on it a general duty to serve.

C. *Certificates and Licenses*

The Commission's certificatory authority under section 7 of the Natural Gas Act offers largely untested[318] but potentially significant opportunities to address pipeline access claims. Section 7(e) of the statute permits the Commission to grant certificates for the construction and operation of pipeline facilities upon such terms and conditions as may be required by public convenience and necessity.[319] The Commission has no comparable certificatory authority over the

318. The Commission itself has never ruled whether it has the authority to condition a certificate upon the applicant's willingness to transport gas purchased directly by distributors or others from the gas producer or supplier. The only case to touch upon the issue left the question open. In *Pacific Gas Transmision Co.*, the FPC approved separate proposals by Pacific Gas Transmission Company and El Paso Natural Gas Company to construct large scale gas pipelines to serve the California market, rejecting the Presiding Examiner's recommendation that a single 42 inch diameter pipeline be constructed instead. 40 F.P.C. 1147 (1968). FPC Chairman White, dissenting, would have approved a single, more efficient project subject to the condition that the certificate holder could be required by the FPC to transport its competitors' gas in future periods, thereby reducing El Paso's market dominance in California. *Id.* at 1173-75. The majority did not reject Chairman White's proposal on grounds that it lacked any such authority, but rather because the competing pipelines themselves had sought no such condition, the record did not support it as competitively beneficial and such a condition would somehow reduce the Commission's future flexibility by departing from traditional principles of natural gas regulation. *Id.* at 1162-64.

Whatever the merits of the FPC's reasoning, its apparent reluctance to embrace the concept of a transportation condition is to be contrasted with the FERC's current policy respecting OCS gas supplies secured by distributors. Although the Commission to date has not required that pipelines located onshore transport OCS gas purchased or produced by distributors, sections 284.243, 284.244 and 284.245 of the Commission's regulations authorize distributors to petition the Commission for amendments to a *pipeline's* certificate where the pipeline has refused to transport the gas. 18 C.F.R. §§ 284.243, 284.244 and 284.245 (1980). These sections clearly indicate that the Commission contemplates, if not encourages, such filings and the consequent tests of its certificate authority to compel transportation of distributor-owned gas.

319. 15 U.S.C. § 717f(e) (1976).

electric utility industry, but it does have substantial power to condition licenses granted applicants to operate hydroelctric projects under part I of the Federal Power Act.[320]

Two potentially significant sources of new gas discoveries, the Outer Continental Shelf and federal lands in the Overthrust Belt leased for gas production can significantly enhance competition in the natural gas industry. Here, the access protections afforded by the Mineral Leasing Act and the Outer Continental Shelf Lands Act afford the Commission a unique opportunity, through its certificate authority, to facilitate distributor, intrastate pipeline and producer access to markets often controlled by major interstate pipeline systems. To some extent, this has already occurred. Since 1980, the Commission has included an express condition in certificates issued to pipelines operating on the Outer Continental Shelf, requiring that they transport gas in accordance with the provisions of the Outer Continental Shelf Lands Act.[321]

The Mineral Leasing Act provisions, discussed previously,[322] provide potentially an even greater opportunity to facilitate interstate pipeline access for producers, distributors and other pipelines. To the extent that gas pipelines located on federal lands are required to transport without discrimination gas delivered to them for shipment, the implications in some markets would be dramatic. In eleven western states the federal government owns land, ranging from 33.5% of the state in New Mexico to 87.6% in Nevada.[323] In Alaska, the U.S. Government owns over 90% of the acreage in the state.[324] A presumption of essentiality or monopoly power might appropriately be applied to lines located in

320. A condition requiring the applicant to wheel government power over the licensed project's primary lines has been upheld by the Supreme Court. FPC v. Idaho Power Co., 344 U.S. 17 (1952).
321. *See, e.g.*, Columbia Gulf Transmission Co., 17 F.E.R.C. ¶ 61,158 (1981); Southern Natural Gas Co., 17 F.E.R.C. ¶ 61,077 (1981); Transcontinental Gas Pipe Line Corp., 17 F.E.R.C. ¶ 61,044 (1971).
(1981).
322. *See supra* notes 260-70 and acompanying text.
323. *See* Note, *supra* note 266, at 507 (citing DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 10 (1977)).
324. *Id.*

these areas, justifying a simplified certification procedure under which access conditions might readily attach.

Aside from the conditions discussed above, the permissible limits of contract carriage conditions that may be imposed on a gas pipeline are suggested by the decision in *Chapman v. El Paso Natural Gas Co.*,[325] noted earlier. In *Chapman*, the court rejected the Secretary of the Interior's proposed conditions for the grant of a right-of-way to El Paso on the grounds that they exceeded his bare authority to require the gas pipeline to operate as a common carrier. Interestingly, the court noted that the Secretary's proposed right-of-way conditions were more properly described as terms of contract, rather than common, carriage.[326] So construed, the conditions merit examination as a basis for defining reasonable contract carriage conditions on a section 7 certificate.

Under the conditions imposed by the Secretary in *Chapman*, the pipeline would have been required (1) to provide firm transportation service to shippers, whether or not the gas shipped was produced from federal lands, (2) to make available any unused capacity for this purpose, and (3) to file rates, terms, and conditions for the service and, where necessary, file appropriate certificate applications with the regulatory authority having jurisdiction over the matter.[327] In addition, where there was no unused capacity, the pipeline would have been required to seek authorization from the pertinent regulatory agency to expand capacity provided (1) that expansion would be limited to no greater amount than had been devoted to private carriage, and (2) that the pipeline could demand assurance from the prospective shipper that it had adequate markets and would agree to transport its gas over the pipeline's facilities in such amounts and for such periods as would "be sufficient to pay the construction and operation costs allocable to his shipments plus a reasonable return on the investment allocable to such shipments."[328]

325. 204 F.2d 46 (D.C. Cir. 1953); *See supra* note 262.
326. *Id.* at 51-52.
327. *Id* at 49 n.4.
328. *Id.* at 50.

Regarding the latter requirements for pipeline expansion, the court noted that while the stipulations urged by the Secretary were intended to enforce common carriage, they would actually defeat the asserted purpose because they provide for *contractual* arrangements between shipper and pipeline, in advance of construction, which immediately remove any new capacity from availability for common carriage.[329] The reliance placed by the court upon *contractual* relations is significant. It supports, indirectly at least, the proposition that gas certificates may be conditioned to require the certified pipeline to transport for others, provided that contractual arrangements are recognized and permitted.

The limitations of section 7 of the Natural Gas Act on expansion of pipeline capacity,[330] moreover, need not pre-

329. *Id.* at 52.
330. 15 U.S.C. § 717f provides in relevant part:

> (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necesary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or muncipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

The Third Circuit in *Panhandle Eastern Pipeline Co. v. FPC,* held that the Section 7(a) limitations on the expansion of pipeline capacity carried over into other provisions of the Act. 204 F.2d 675 (3d Cir. 1953). *But see,* Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 173 F.2d 784 (6th Cir. 1949). Section 7(a) itself addresses compulsory interconnections between a pipeline and new wholesale customers. It has been interpreted not to authorize the Commission to compel the pipeline to purchase or to transport gas for others. *See* Chandeleur Pipe Line Co., 44 F.P.C. 1747 (1970), *aff'd sub nom.,* Public Serv. Comm'n of N.Y. v. FPC, 463 F.2d 824 (D.C. Cir. 1972); Tarpon Oil Corp., 26 F.P.C. 635 (1961). *Tarpon Oil* however, presented an interesting factual situation. There, certain producers sought to acquire an existing pipeline in order to facilitate the transportation of their gas to market. The presiding examiner had found that the producers only sought to acquire the pipeline because they had been refused transportation service by its existing owners. He also noted that under the acquisition proposal the pipeline's former owners would get a discount on transportation service from the new owners. As a consequence he denied the certificate, but suggested that the applicants could obtain transportation service by filing a Section 7(a) application. The Commission reversed the initial decision, holding that Section 7(a)

sent insuperable obstacles to providing broader access for the pipeline's competitors. So long as the stability of contractual relationships is protected, the Commission may prorate pipeline capacity.[331] More importantly, it would seem intuitive that to the extent existing or proposed pipeline capacity is adequate to serve the supply needs of a given market, the grant of access to a new shipper for that market results in a substitution of suppliers, not in the need to expand existing pipeline capacity.[332] Where there is already excess capacity, the issue does not even arise.

Gas pipeline certification proceedings provide an important forum for addressing access issues. Given the frequency of requests for certificate amendments and the need for approval of new pipeline facilities, there are numerous opportunities to examine those issues. Hydroelectric licensing, by contrast, does not involve every jurisdictional electric utility. Many have no hydroelectric resources. Still, there exist significant opportunities to examine the licensing conditions of new licenses as well as opportunities to reexamine existing license conditions as old licenses come up for renewal.[333]

The key question in such cases would seem to be the extent of the Commission's authority to impose access conditions extending beyond the scope of the licensed project itself. It is, for example, firmly established that the Commission may require wheeling over those of the licensee's transmission lines that extend from the licensed project.[334]

---

did not authorize an order to compel transportation and that, under the circumstances approval of the certificate was the best alternative. *Id.* at 639. The Commission did not appear to consider any of the other alternatives suggested in this article.

331. *See supra* note 306.

332. Arguably, there may be circumstances under which the supplying pipeline has contractual obligations to take gas from producers or pay anyway, which circumstances may force the pipeline to store such gas in the pipeline itself if no other adequate storage exists. A competitive solution to this problem may be for the pipeline to reduce its price for the gas it sells (e.g., accept a lower return), inducing the customer to change its mind about switching gas suppliers.

333. Licenses under the Federal Power Act may be granted for a maximum of fifty years. 16 U.S.C. § 799 (1976). Many of the licenses granted in the two decades after the Act's passage are only now coming up for renewal.

334. FPC v. Idaho Power Co., 344 U.S. 17 (1952) (holding that the FPC's authority under Section 4(g), 10(a) or 6 of the Federal Power Act would justify such conditions).

Whether the licensing power would permit wheeling conditions to attach to the licensee's entire transmission network is uncertain.[335] That question however, is currently being litigated in a case before the Commission, where the intervenors and Commission staff have urged attachment of license conditions, including wheeling requirements, to restrict the licensee's alleged monopoly power.[336]

D. *Imprudent or inefficient practices*

Public utilities have an obligation to operate their business in a reasonable, prudent and efficient manner for the benefit of their customers.[337] This well established principle may have practical application to access questions in those cases where electric utilities or gas pipelines have significant unused capacity. The question in such cases is whether the utility's or pipeline's failure to seek the business of willing, would-be customers constitutes imprudence or inefficiency.

The cases suggest that management imprudence or inefficiency is a broad concept. Thus, clearly excessive payments for various inputs can be disallowed.[338] The cases likewise suggest that while management decisions, prudent when made, will not be judged by hindsight,[339] the failure to make

335. Western Mass. Elec. Co. 39 F.P.C. 723 (1968), *aff'd sub nom.*, Municipal Elec. Ass'n v FPC, 414 F.2d 1206 (D.C. Cir. 1979); Pacific Gas & Elec. Co., 55 F.P.C. 1543, 1552 n.26 (1976).
336. On April 1, 1976, the Commission granted intervention to the Northern California Power Agency (NCPA) in a license proceeding involving Pacific Gas and Electric Company's license to operate a pumped storage project. NCPA, an organization of municipal electric systems, had charged PG&E with acting to maintain and increase its monopoly over transmission and generation in northern and central California by means of various contractual arrangements and refusals to deal. The Commission held that while a license would be granted to PG&E, it would be issued subject to any conditions within the FPC's power deemed necessary to restrict the Company's monopoly power, if, after hearing it were determined that a "situation inconsistent with the antitrust laws or the policies clearly underlying those laws" were found to exist. Pacific Gas & Elec. Co., 55 F.P.C. 1543 (1976). At the time of this writing both the NCPA and the FERC trial staff, of which the author is a member, had filed briefs in the case urging the imposition of broad license conditions. NCPA's Initial Brief, FERC Project Nos. 2735, 233 and 1988 (filed March 2, 1982); FERC Staff's Initial Brief (filed March 2, 1982).
337. West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63 (1935); Transworld Airlines v. CAB, 385 F.2d 648 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 944 (1967); Midwestern Gas Transmission Co. v. FPC, 388 F.2d 444 (7th Cir. 1968); *cert. denied*, 392 U.S. 928 (1968).
338. Acker v. United States, 298 U.S. 426 (1936).
339. West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63 (1935); Metzenbaum v. Columbia Gas Transmission Co., 4 F.E.R.C. ¶ 61,277 (1978).

cost efficient decisions may be reflected in reduced rate allowances.[340] In that sense, lost savings opportunities as well as unnecessary expenditures can be attributed to the utility.[341]

It is through the concept of foregone savings that prudent management principles may affect the availability of pipeline and transmission facilities. In *Public Service Co. of Indiana*,[342] the Commission stated that prudent management obligations might require public utilities to seek cost-saving power pooling opportunities, and hinted that the failure to seek reasonably available savings might be examined in future rate cases.[343] The reasonable implication to be drawn from the Commission's statements is that underutilization of pipeline and transmission capacity may also be open to examination.[344] Full utilization of facilities, to the extent that revenues from new customers can cover variable costs and defray fixed ones, may be deemed the prudent course, with foregone revenues attributed to the pipeline or utility involved.

This is not to suggest that claims of imprudence will always be successful. There may be legitimate reasons for maintaining unused capacity, for example. Or, the utility or pipeline may simply accept the rate penalty rather than provide access to a competitor.[345] Moreover, whether or not a

340. NAACP v. FPC, 425 U.S. 662 (1976).
341. *Id.* The Court suggests for example, that reduced productivity of minority employees resulting from low morale due to racial discrimination could be imputed to the utility, as could revenues forfeited by loss of government contracts.
342. 10 F.E.R.C. ¶ 61,236 (1980).
343. *Id.* at 61,434.
344. The Commission has hinted at such an approach in the preamble to its rule on Certification of Pipeline Transportation for Certain High Priority Uses, FERC Order No. 27, noting that where pipelines have excess capacity not being utilized to meet current customer needs, transportation arrangements offer the pipelines a chance to use such capacity and reduce ratepayer burden. *See supra* note 304. As the Commission stated:

> If an interstate pipeline is unwilling to avail itself of such opportunities, it becomes difficult to see why the ratepayer should continue to bear this burden. However, if necessary, such considerations are best addressed in individual rate proceedings where all the facts can be developed.

FERC Regulations Preambles, 1977-81, ¶ 30,049, 30,348 (1979).
345. The existence of this option argues against the contention that might be made that an imprudent remedy would be compelling indirectly that which the Commission could not order directly. *See, e.g.*, NAACP v. FPC,

bottleneck exists should have some bearing on the obligation to provide access. Thus, absent monopoly power, the refusal to deal may simply be a reasonable election by the pipeline or utility involved. On the other hand, where the essential nature of the facility is demonstrated, the refusal to serve for anticompetitive reasons, and the loss of revenues suffered as a result, might indeed support a rate reduction based on a finding of imprudence.

A WORD ABOUT OTHER ACCESS OPTIONS

Electric or gas systems denied access to transmission or transportation networks are not confined to the access options discussed on the previous pages. In the author's opinion, the NGA and FPA provisions cited previously are likely to be the most important vehicles for addressing access claims. However, legislative solutions aside, several other alternatives may be viable.

Antitrust actions are a clear possibility. The *Otter Tail* litigation is a prime example of the successful application of the Sherman Act to remedy refusals to wheel power. The negative implications of this approach, however, are the considerable expense and protracted nature of antitrust proceedings (although litigants before administrative agencies may not always fare much better in this regard). Moreover, particularly in gas cases, the complications arising out of primary jurisdiction claims may put the issue right back in the administrative setting in any event.[346]

Two other options may also be available to electric utilities. Under the provisions of the Public Utilities Regulatory

425 U.S. 662 (1976) (suggesting that although the FPC had no direct mandate to enforce public policies against racial discrimination, it could reduce utility rates which were excessive due to discrimination suit back pay awards, lost government contracts attributable to racially discriminatory policies, etc.)

346. *See, e.g.*, Interstate Natural Gas Co. v. Southern Cal. Gas Co., 209 F.2d 380 (9th Cir. 1953) (Plaintiff's allegation that defendant unlawfully refused to transport its gas in violation of Sherman Act, Mineral Leasing Act and Natural Gas Act dismissed for plaintiff's failure to exhaust remedies befores the FPC). *But see* City of Mishawaka v. Indiana & Michigan Elec. Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) (suggesting that, at least with respect to electric utilities, there may be no primary jurisdiction issue to delay the antitrust action).

Policies Act of 1978 (PURPA), the FERC was given certain authority to compel wheeling by a utility upon the application of any other electric utility, a geothermal power producer, or a federal power marketing agency, including the authority to order enlargement of existing transmission capacity.[347] The requirements for approval of a wheeling order, however, are formidable; an application must demonstrate, *inter alia*, proof of significant energy conservation,[348] improved reliability for any affected system,[349] reasonable preservation of "existing competitive relationships,"[350] and that no affected party will suffer "a reasonably ascertainable uncompensated economic loss."[351]

To date, only two PURPA applications have been filed.[352] The American Public Power Association, an organization representing many of the nation's municipally-owned electric utilities—those entities most likely to seek wheeling orders—reportedly regards present PURPA language as making wheeling orders under PURPA virtually "impossible to secure."[353] Moreover, under the statute's terms, the FERC can act only upon application. Indeed, when the court vacated the FERC's order in *NYSEG* and instructed the Commission that any relief to Penn Yan could only come after a PURPA wheeling order, the Commission had no option but to invite Penn Yan to file a PURPA request for wheeling to the thirty excluded customers.[354] The PURPA wheeling option, to the extent that it was intended

347. Pub. L. No. 95-617 (1978), *amended by* Pub. L. No. 96-294 (1980); 16 U.S.C. § 824j, k (1980).

348. 16 U.S.C. § 824j(a)(2)(A) (Supp. IV 1980).

349. 16 U.S.C. § 824j(a)(2)(C) (Supp. IV 1980).

350. 16 U.S.C. § 824j(b)(2)(c)(1) (Supp. IV 1980).

351. 16 U.S.C. § 824k(a)(1) (Supp. IV 1980).

352. Central Power & Light Co., No. EL79-8, (settled in 1981) 17 F.E.R.C. ¶ 61,078 (Oct. 28, 1981) and Southeastern Power Admin. v. Kentucky Utilities Co., No. EL80-7, 16 F.E.R.C. ¶ 63,051 (1981) (Initial Decision denying application, appeal pending).

353. *APPA Priorities: Clarify Water Act, Limit Use of CWIP, Broaden Wheeling*, ELEC. WK., Mar. 8, 1982, at 7.

354. Village of Penn Yan, 18 F.E.R.C. ¶ 61,105 (1982). An interesting sidelight to the case is that the wheeling limitations which the Commission had originally stricken (but were later reinstated by the Second Circuit's decision) were deleted by NYSEG in its revised contracts with PASNY, which contracts had been entered into one week prior to the FERC's order on remand. Comments of NYSEG on the Commission's Order on Remand, FERC No. EL78-29 (filed Mar. 10, 1982).

to encourage and facilitate transmission access, is so far largely a failure.

Finally, mention needs to be made of the Nuclear Regulatory Commission (NRC) licensing process. Under section 105(c) of the Atomic Energy Act, virtually all nuclear power plant license applicants are subject to pre-licensing antitrust review by the NRC and the Attorney General.[355] When a hearing is actually held by the NRC, the agency must determine whether "the activities under the license will create or maintain a situation inconsistent with the antitrust laws."[356] There can be little doubt that the pre-licensing review process has had a substantial impact on transmission access conditions for smaller systems. Since 1970, ninety such license applications have been reviewed by the Justice Department and the NRC.[357] As a result of the review process, over thirty utilities have accepted or had imposed by order license conditions,[358] most of these requiring some form of licensee wheeling obligation for neighboring systems.[359] The utilities reviewed account for over 80 percent of the industry's kilowatt-hour sales.[360]

Despite these impressive statistics, the likelihood that the NRC will continue to serve as a significant forum for the litigation of transmission access issues is small, at least for the foreseeable future. NRC authority necessarily hinges on license applications.[361] No utilities have placed orders for new nuclear power plants in the United States since 1978.[362]

355. 42 U.S.C. § 2135(c)(1) (1970). For a discussion of the procedures developed by the Justice Department, see Saunders, *Antitrust and Nuclear Power Supply: A Resume of Twenty-one Months' Activities Under the Preliminary Review Provisions of the Atomic Energy Act*, 14 ATOM. ENERGY L.J. 204 (1972).

356. 42 U.S.C. § 2135(c)(5) (1970).

357. THE NUCLEAR REGULATORY COMMN'S ANTITRUST REVIEW PROCESS: AN ANALYSIS OF THE IMPACTS 8 (Transcomm, Inc. Prepared for the Department of Energy, DOE Contract No. DE-AC01-79PE-70025, June, 1981).

358. *Id.*

359. *Id.* at 9.

360. II NATIONAL POWER GRID STUDY ch. 14 at 375 (Technical Study Reports, DOE-ERA-0056-2, September, 1979).

361. It does have continuing authority to enforce its license conditions. For a discussion of the NRC's enforcement activities see THE NUCLEAR REGULATORY COMM'NS ANTITRUST REVIEW PROCESS, *supra* note 357, at 46-49.

362. Chrysler, *When a Nuclear Plant Strangles in Red Tape*, U.S. NEWS & WORLD REP. 59 (Apr. 6, 1981).

In 1980, in fact, there were sixteen cancellations; one utility cancelled its order in 1981.[303] General Electric reportedly expects no new domestic reactor orders for ten years; the company's two major U.S. competitors, Westinghouse and Combustion Engineering, foresee none for the next four to five years.[304] Under these circumstances, the opportunities for NRC antitrust review and for redress of transmission access claims are virtually non-existent.

CONCLUSION

Rapidly escalating prices for natural gas and electric energy charged by major gas pipelines and electric utilities have forced consumers, particularly gas and electric distribution systems, to increasingly seek a means to contain their costs. Competitive solutions, i.e., reliance on market forces, depend upon the availability of supply options. Access to the wholesale supplier's gas pipeline system or electric transmission network is often essential to any customer plan for the development or acquisition of alternative gas or energy sources.

The ability of the FERC to cope with the many and complicated issues arising out of customer attempts to reduce their traditional reliance upon neighboring wholesale suppliers is sure to be tested in the coming years. This will be no simple task, for utilities and pipelines with a competitive stake in the retention of customer loads are just as sure to resist inroads into their market positions.

The extent to which decisions such as *NYSEG* and *FP&L* may serve to constrain the Commission's flexibility in these matters remains uncertain, as does the possibility that severe constraints may lead to legislative solutions. Both the Fifth and Second Circuit decisions rest upon mistaken notions about the permissible scope of contract carriage regulation of electric utilities and gas pipelines under the Natural Gas and Federal Power Acts. A judicious,

303. Francis, *Nuclear-Power Advocates See a Real Need for New Plants by 1990's*, CHRIST. SCI. MON. 11 (Sept. 9, 1981).
304. *Nuclear Engineering—Shock Therapy*, 4 THE ECONOMIST 89 (Jan. 8, 1982).

reasoned application of traditional antitrust and public utility regulatory principles can provide the framework for litigation of access claims and can preserve the FERC as an important forum in which pipeline transportation arrangements and wheeling agreements can be fostered to encourage competition.