Take-or-Pay: The D.C. Circuit Forces the FERC's Hand

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COMMENT

Take-Or-Pay: The D.C. Circuit Forces the FERC's Hand

The Federal Energy Regulatory Commission (FERC) responded in part to the recent glut of natural gas supplies by promulgating Order 436 and granting limited-term abandonments on a case-by-case basis. Two panels of the U.S. Court of Appeals for the D.C. Circuit recently remanded these programs. Order 436 was remanded in Associated Gas Distributors v. FERC, and the limited-term abandonment program was remanded in Consolidated Edison Co. v. FERC. Both panels reasoned that FERC failed to explain, in line with the standard of reasoned decision making, why it was not addressing the ongoing take-or-pay problem in the natural gas industry. FERC promulgated an interim rule, Order No. 500, in response to the courts' remands.

This comment will discuss take-or-pay clauses; their development, the problems they have caused in active gas markets, and FERC's attitude toward them. Order 436 and limited term abandonments will be examined, along with the courts' review of Order 436 in Associated Gas and limited term abandonments in Consolidated Edison. A discussion of traditional standards of judicial review of agency actions follows, with an examination of the courts' deviation from normal standards into the new, undefined standard of "reasoned decisionmaking" applied in these cases. FERC's decision to take no action and the policies for this decision will be discussed. Finally, flaws in the courts' advisory opinions, which render these decisions unreasoned, will be examined.


3. Consol. Edison Co. v. FERC, 823 F.2d 630, 632-33 (D.C. Cir. 1987). Limited term abandonment refers to an abandonment for a term limited to a time specified in the abandonment order, along with other limitations not relevant to this discussion. See Consolidated Edison, 823 F.2d at 634 n.4. Gas service is dedicated and certificated under the Natural Gas Act, 15 U.S.C. § 717(f)(b) (1982). As discussed below, this novel program was intended to free up regulatory impediments and allow gas to flow rather than leaving it shut-in. Consolidated Edison, 823 F.2d at 633.

4. 824 F.2d 981 (D.C. Cir. 1987).

5. 823 F.2d 630 (D.C. Cir. 1987).

6. Associated Gas Distrib., 824 F.2d at 1021-30; Consolidated Edison, 823 F.2d at 638-42.

INDUSTRIAL CONTEXT

The natural gas industry is divided into three groups: producers, which prospect for natural gas; pipelines, which traditionally purchase and transport the product; and consumers, which are either industrial users or local distribution companies supplying residential consumers. Each group has different commercial incentives, often antagonistic to the others.

As is true in most commercial settings, producers want a dependable purchaser of their product. Pipelines want sure resale markets for the gas they purchase and the transportation service they provide. Consumers want firm supplies and firm transportation commitments. Producers and pipelines want profitable prices. Consumers want the lowest possible price at which they can contract for an adequate supply.

FERC is charged with overseeing this industry. Its primary purpose is to protect consumers. FERC's jurisdiction over this industry is defined in two statutes, the Natural Gas Act of 1938, (NGA) and the Natural Gas Policy Act of 1978 (NGPA).

The NGA was designed to allow the Federal Power Commission (FPC), FERC's predecessor, to regulate many aspects of interstate natural gas pipelines. The NGPA substantially revised the NGA in several ways. Two aspects of the NGPA revolution are important to this discussion. First, the NGPA replaced the NGA's pricing structure by setting price ceilings on gas discovered and dedicated to interstate commerce. Second, it provided for phased-in deregulation between 1978 and 1985 of natural gas not dedicated to interstate commerce on or before November 8, 1978. This created the distinction between "old gas" or "NGA gas" and "new gas" or "NGPA gas." The distinctions preserved in the legislation are the basis for natural gas pricing today.

The Declining Gas Market and Its Effects

In the mid-1970's shortages of natural gas were commonplace. As a result, the industry and its regulators were convinced that natural gas

15. W. Fox, supra note 8, at 439.
16. Id.
17. Id. at 437-45.
demand would remain high. This led to long-term contracts assuring adequate supplies of gas for both industrial and residential consumers. Congressmen suggested long-term contracts and FERC required that pipelines have long-term available supplies.

This set of circumstances gave the pipelines every reason, including regulatory mandate, to enter into long-term purchase and delivery contracts. Producers were able to extract very favorable contracts for natural gas supplies under these conditions, including contract provisions for payment regardless of whether the product was actually taken. These contract clauses required pipelines to take a stated percentage of gas the producer could deliver, and, if they could not or would not take the gas, they had to pay for it anyway. Hence, the phrase "take-or-pay" was born. These contracts allowed the pipeline to apply take-or-pay payments to subsequent takes of gas within a limited period after those payments.

Pipelines passed on take-or-pay costs, in part at least, to their customers as part of the cost of maintaining a ready supply of gas for delivery on demand. Pipelines contracted with their customers in minimum commodity bills, requiring customers either to take a minimum amount of gas or to pay the variable cost of gas not taken. While gas was in short supply, those terms seemed eminently reasonable.

From 1977 to 1982, however, the natural gas market became glutted, driving down prices. Far more gas than was needed or could be used was readily available. This was brought on by a combination of complex factors. First, many industrial users of natural gas built oil-burning facilities, making them fuel switchable. Fuel oil was cheaper, unregulated, and readily available. As a result, their use of natural gas declined, reducing the demand the industry had foreseen. Second, conservation efforts were successful. Coupled with unusually mild winter weather during the 1980's, this obviated any need for high gas consumption in winter months. Third, that portion of the Carter administration's National Energy Plan implementing the NGPA provided such great incentives through decontrol of wellhead prices that oil companies began producing and marketing natural gas at unexpectedly high levels.

20. See generally M. SANDERS, supra note 18.
21. See, e.g., 18 C.F.R. § 2.61(c) (1987) (deliverability may not be less than twelve years); Associated Gas Distrib., 824 F.2d at 995.
23. Associated Gas Distrib., 824 F.2d at 1020.
26. The factors listed are not exhaustive but merely illustrative. See, W. Fox, supra note 8, at 446; Broadman, supra note 25.
27. W. Fox, supra note 8, at 446.
Market assumptions proved short-lived. As demand fell, the pipelines’ ability to sell gas fell. Pipelines “rolled-in” the high-priced gas with low-priced gas and sold this product at an average price competitive with alternate fuels. Alternate fuels continued to drop in price. Soon the pipelines could not compete. Pipelines were unable to purchase the amounts of gas specified in their contracts with producers. Take-or-pay clauses began to operate in contracts specifying high prices based on old assumptions, prices far in excess of the then current market. Liability under take-or-pay clauses accumulated at an alarming rate, mounting to a predicted $7 billion between 1982 and 1985.

These high contract prices relative to other fuels created a risk that many wells would be shut-in. This carried the long-term possibility that the natural ability of these wells to produce gas would diminish. Shutting-in wells for long periods could decrease the amount of gas which could ultimately be recovered from these reservoirs, thereby incurring waste. Furthermore, producers rely on revenues generated by natural gas sales to finance their ongoing programs of exploration and production of natural gas. Without sales and cash flows, producers would be incapable of discovering more gas. Newly discovered gas, not subject to the price controls of the NGPA, fell in price. However, the pipelines took the more expensive old gas, which was subject to burdensome take-or-pay liability, in order to keep take-or-pay liability to a minimum. Take-or-pay contracts kept natural gas prices high. That gas could not compete with other fuels. New gas was shut-in because pipelines found it uneconomical to buy.

Pipelines began to complain to anyone that would listen. The Reagan administration proposed curative legislation that died because it was politically unacceptable. Pipelines and customers tried to persuade FERC to abrogate or modify contractual take-or-pay clauses. Customers petitioned FERC to disallow the pipelines to pass-through the costs of expensive gas. FERC declined to resolve directly the take-or-pay prob-

28. Associated Gas Distrib., 824 F.2d at 1021. “Rolled-in” gas is old gas which has been combined with new gas and is being sold at the weighted average cost of all the gas. This practice is generally used to bring down the price of gas. Order 436, supra note 2, 50 Fed. Reg. at 42,415.
30. Id.
31. Id. at 996.
32. Id. at 1021.
33. Id. “Shut-in” refers to an oil or gas well from which production is no longer being taken for technical or market reasons, and the well is capped awaiting reopening.
34. Waste is a broad term, generally suggesting the ultimate loss of oil and gas. H. Williams & C. Meyers, Manual of Oil & Gas Terms 955 (6th ed. 1984) (“waste”).
36. Id.
37. Associated Gas Distrib., 824 F.2d at 1021. For additional authority and general background, see the excellent discussion in Comment, Take-or-Pay Provisions: Major Problems for the Natural Gas Industry, 18 St. Mary’s L.J. 251 (1986).
40. Id.
41. Id.
lems.42 FERC recognized the problems of the industry but instead sought to restructure the industry through a series of rules designed to make natural gas prices respond to typical free market forces.43 In order to do this, it was first necessary to open access for producers to transportation facilities, i.e., the pipelines.44 FERC began the process of removing the pipelines from the merchant business and restricting them to the business of transporting gas. Apparently, FERC was reaching for a transportation grid resembling, in theory, the national electrical grid.45

The Regulatory Response

FERC began this process by issuing Order 380.46 Among other things, this eliminated variable costs, specifically take-or-pay costs, from pipeline minimum commodity bills.47 FERC's reasoning was that allowing pipelines and producers to charge customers variable costs had two effects. First, it was unlikely that a customer obligated to pay these costs would be able to find more competitively priced gas. This could restrain competition in the industry and keep gas prices at levels incapable of competing with alternate fuels. Second, this restraint could insulate pipelines and producers from market competition, further hindering price responsiveness.48 Customers had escaped their take-or-pay liabilities to the pipelines, at least in part.

Order 380, however, provided no relief to the pipelines' take-or-pay problems. FERC refused, in Order 380, to recognize any connection between the minimum bill costs between pipelines and their customers, on the one hand, and take-or-pay costs incurred by pipelines in their contracts with producers, on the other.49 This set the stage for a squeezing process, with pipelines in the middle. By disregarding this connection, FERC left the pipelines without the ability to pass take-or-pay costs to customers, those for whom the pipelines had originally incurred take-or-pay obligations.

FERC was not wholly unconcerned about the problem. It issued a notice of inquiry50 into pipeline transportation, rates, and risk allocation. Response to this notice culminated in FERC issuing a Statement of Policy and Interpretive Rule in April, 1985 (April 1985 Policy Statement).51 That

42. Id.
43. Id.
44. Id.
47. Doane, supra note 24, at 20.
48. Id.
49. Id. at 21.
document was FERC's last definitive policy statement on take-or-pay problems until the D.C. Circuit remanded Order 43652 in June, 1987. That policy statement pointed the way to subsequent FERC activity.

The thrust of the April 1985 Policy Statement concerned the pipelines' ability to recover costs incurred in negotiating out of take-or-pay liability, known generally as "buy-out" costs.63 Industry comments responding to FERC's notice of inquiry (NOI) expressed concern whether buy-out costs would be characterized as costs of gas, illegally raising the gas price above NGPA ceilings.44 The policy statement addressed these concerns by characterizing buy-out costs as product acquisition related expenses not covered by the NGPA.45 These costs could be recovered in general rate cases, subject to a customer's ability to protest both the prudence of a pipeline making these agreements and the apportionment of these costs among a pipeline's customers.46 This policy addressed buy-out costs, not, it is to be stressed, the take-or-pay obligations themselves. FERC's implicit policy seemed to be that the only way out of the squeeze was to renegotiate take-or-pay contracts.

Order 436

FERC's only attempt to solve the problem of being able to negotiate out of take-or-pay contracts followed the April 1985 Policy Statement. FERC attempted to address the industry's responses to the NOI.47 These responses asserted that the main obstacle to pipelines becoming common carriers, open access transporters, was their take-or-pay liability to producers. FERC's notice of proposed rulemaking (NOPR) of May 1985,48 which ultimately became Order 436,49 contained a proposal to grant pipelines a rebuttable presumption of prudence in their buy-out costs of negotiating out of take-or-pay liabilities.46 This was widely known as the "safe harbor" presumption.49 It would be available only to pipelines offering open access to transportation for all customers.44 FERC felt this would enable pipelines to buy-out their take-or-pay liabilities, clearing the way for open access transportation and transmission of market pricing signals from the wellhead to the burnertip.63

52. Associated Gas Distrib., 824 F.2d at 1021-23.
53. Doane, supra note 24, at 21. "Buy-out" and "buy-down" costs are expenses which pipelines incur to purchase take-or-pay liabilities. See 18 C.F.R. § 2.76 (1987). Purchases of part of the liability are referred to as buy-down, and of the total liability, buy-out. For clarity, both types of transactions are referred to here as buy-out.
54. Doane, supra note 24, at 21.
56. Id. at 16,078.
58. Id.
59. Id.
60. Id.
62. Id.
63. Id.
The industry did not agree. Pipelines asserted that the safe harbor presumption would worsen take-or-pay liabilities by encouraging producers to hold out for the highest settlements they could obtain.\footnote{Consolidated Edison, 823 F.2d at 639 n.13 (citing Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 103 (1982), and Broadman, Natural Gas Regulation: The Need for Further Reform, 5 J. Pol'y Anal. & Mgmt. 496, 507 (1986)).} During holdouts, pipelines' take-or-pay liability would continue to accrue, giving more leverage and more settlement value to the producers.\footnote{Id.} Local distribution companies and producers felt the proposal was unworkable or inadequate.\footnote{Id. at 42,412.} In response to this negative reaction, FERC withdrew its proposed take-or-pay solution when it issued Order 436.\footnote{Id. at 42,421.}

In Order 436, FERC attempted to separate the transportation services from the gas brokerage services that natural gas pipelines provide to their customers,\footnote{Id. at 42,426.} a process known as "unbundling" services.\footnote{Id.} This unbundling may be viewed as similar to the recent unbundling of telephone services.\footnote{Id. at 42,465.} No longer was a natural gas customer required to accept both gas and transportation services from one pipeline, just as a telephone consumer is no longer required to accept equipment, long distance, and repair services from one telephone company.

Two aspects of Order 436 attempted to achieve this goal. First, consumers could unilaterally modify their purchase contracts. They could convert purchase contracts to transportation only or simply reduce the amount of gas they required the pipeline to have in inventory for immediate delivery. This is known as "contract demand conversion" (CD conversion).\footnote{Id. at 42,408.} This provision was designed to increase both transportation facilities' and consumers' demands for gas, promoting competition in supply and transportation. Under this pricing structure, the price of natural gas was expected to fall to a level competitive with other fuels.\footnote{Id. at 42,412.}

Second, Order 436 required that pipelines opting to participate in the program become open access, nondiscriminatory carriers of natural gas.\footnote{Id. at 42,412.} This provision imposed a duty on pipelines to accept shipments from all producers, on a non discriminatory basis, similar to a common carriage requirement.\footnote{Id. at 42,412.}

FERC indirectly addressed the take-or-pay issue by setting up expedited review procedures for abandonment of service applications resulting from buy-out arrangements by pipelines providing open access transportation under Order 436.\footnote{Id. at 42,408.} FERC would expedite review of these applications in order quickly to bring gas to the spot market. FERC felt

\begin{itemize}
  \item \footnote{Consolidated Edison, 823 F.2d at 639 n.13 (citing Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 103 (1982), and Broadman, Natural Gas Regulation: The Need for Further Reform, 5 J. Pol'y Anal. & Mgmt. 496, 507 (1986)).}
  \item \footnote{Id.}
  \item \footnote{Id. at 42,412.}
  \item \footnote{Id.}
  \item \footnote{Id. at 42,421.}
  \item \footnote{Id. at 42,426.}
  \item \footnote{Id.}
  \item \footnote{Id. at 42,465.}
\end{itemize}
that allowing gas to flow was better than leaving it shut-in.\textsuperscript{76} Shut-in gas generates no revenue for producers and increases take-or-pay liability problems.\textsuperscript{77} This feature resembled special limited term abandonments (LTAs), discussed below.

Order 436, notably, rejected comments from the industry suggesting that access to nondiscriminatory transportation pipelines be conditioned on producers yielding their take-or-pay rights.\textsuperscript{78} This rejection was based on several reasons. First, FERC believed it would be inequitable to allow pipelines to restrict access for some producers under an order designed to open transportation facilities.\textsuperscript{79} Second, FERC doubted its authority to require producers to give up a valid contractual right as a condition to access for transporting gas that was removed from FERC’s NGA jurisdiction by the NGPA.\textsuperscript{80} Third, FERC was not convinced that the take-or-pay problem was as large as asserted.\textsuperscript{81} The final rule noted that take-or-pay prepayments were neither as high nor settled for enough to justify conditioning access.\textsuperscript{82} Fourth, and most importantly, the final rule noted that some commenters to the NOPR pointed out that take-or-pay negotiations were active and that the safe harbor presumption proposed in the NOPR was slowing rather than encouraging progress in these negotiations.\textsuperscript{83} FERC rejected conditioned access because of the industry’s overall negative reaction, the same reason it withdrew the safe harbor presumption.

\textit{Limited Term Abandonments}

A separate program was developed to relieve the industry’s problems with shut-in gas and unused transportation facilities.\textsuperscript{84} This program granted limited term abandonments (LTAs) of service obligations on a case-by-case basis to applicants that could demonstrate that abandonment in a particular instance would have beneficial effects on the market overall, such as increasing competition and causing gas prices to respond to that competition, and the benefits of the abandonment outweigh any adverse effect to the purchaser to whom the gas is presently dedicated, or that purchaser’s customers.\textsuperscript{85}

\begin{itemize}
  \item \textsuperscript{76} Id. at 42,465-66.
  \item \textsuperscript{77} Id. at 42,462.
  \item \textsuperscript{78} See Transcontinental Gas Co., 33 F.E.R.C. \textbf{\$} 61,333 (1985).
  \item \textsuperscript{79} Consolidated Edison, 823 F.2d at 634.
  \item \textsuperscript{80} Id. FERC expressed its lack of confidence in its jurisdiction over some contracts in Order 436. Essentially, this position was based on cases defining the limits of FERC’s authority over natural gas production. Order 436, supra note 2, 50 Fed. Reg. at 42,433 (citing Shell Oil Co. v. FPC, 566 F.2d 536 (6th Cir. 1978) and Pennzoil v. FERC, 645 F.2d 560 (5th Cir. 1981)).
  \item \textsuperscript{81} Order 436, supra note 2, 50 Fed. Reg. at 42,464.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id.
  \item \textsuperscript{85} Consolidated Edison, 823 F.2d at 635.
\end{itemize}
This represented a shift in policy by FERC from its old “comparative needs” test for abandonment to the broader “market test” above. FERC reasoned that granting these abandonments would make low cost gas available to consumers, giving them an opportunity to lower their gas costs. The result would be generally decreasing prices, making gas more competitive with other fuels. On the take-or-pay issue, FERC reasoned that if, through abandonment, cheap gas displaced the expensive gas being taken by pipelines, then both pipelines and producers of high cost gas would have an incentive to renegotiate contracts in attempts to reduce take-or-pay requirements. With a lower, renegotiated gas price, pipelines would purchase shut-in gas. Producers would have an incentive to renegotiate, among other reasons, to avoid being shut-in.

This program has grown rapidly. FERC has granted many LTAs but a study of the effects of this program is as yet unavailable. This is probably due to the program’s youthfulness and the substantial time lags in finding spot market sales. FERC retained reporting requirements in these LTAs which may someday prove valuable in assessing the success of the program.

The Court’s Reactions

Nearly all the interstate pipelines and many local distribution companies joined in appealing Order 436. Judge Williams penned the panel’s decision in Associated Gas, remanding the Order to FERC for reconsideration.

The court considered, at length, the industry problems addressed by the Order. It sustained FERC’s authority to promulgate orders implementing open access transportation, contract demand conversion, and other aspects of Order 436. The court faulted FERC for not solving the take-or-pay problem. It remanded this Order to FERC “to determine . . . to what extent [Order 436’s] policy considerations may justify its inaction on the uneconomical producer-pipeline contracts.”

The court rejected FERC’s reasons for deciding not to attempt a solution of take-or-pay problems in Order 436. It cited FERC’s argument that further action in Order 436 was unnecessary because it would not increase take-or-pay liabilities, and even if it did, that those costs could be passed through to customers. FERC had found that pipelines had been buying-

86. Id.
87. Id. at 635-36.
88. Id. at 636.
89. See, e.g., Colorado Interstate Gas 39 F.E.R.C. at ¶ 61,235.
90. The reporting requirements are uniform and may be found in any of those Limited Term Abandonments cited supra note 84.
91. Associated Gas Distrib., 824 F.2d at 981.
92. Id. at 1030.
93. Id. at 1044.
94. Id.
95. Id. at 1030.
96. Id. at 1025.
out substantial take-or-pay liability for about twenty cents on the dollar. From this, FERC concluded that the buy-outs were reasonable and widespread enough to solve the take-or-pay problem. The court merely mentioned FERC's findings, not addressing them substantively.

The court rejected FERC's statement that the Order was "not intended to affect" negotiations between pipelines and producers on take-or-pay liability. The court responded that the issue was not FERC's intent, but rather the consequences of its Order.101 The court termed the pipelines' suggestion that the Order would have adverse impact on their take-or-pay problems as an "inherently plausible suggestion" and said that FERC had offered nothing to "undermine" that suggestion.102

FERC argued that becoming an open access transporter under Order 436 was voluntary. Therefore, it did not mandate any adverse impact on a particular pipeline.103 The court found two flaws with this analysis. First, a pipeline refusing open access would be deprived of its blanket certificate of public convenience and necessity which allows it to transport gas to industrial end users.104 The Order created a substantial likelihood that a pipeline would go broke under the conditions of the Order. The court referred, in a memorable and much noted metaphor, to the pipelines as a condemned man who was given the choice between the noose and the firing squad.

The second problem the court found with the voluntariness argument was that competition would result between pipelines, reducing their ability to negotiate effectively with producers. The court referred to the choice of adopting open access as "hanging rather than being shot[]."106

FERC argued that competitive pressures would induce pipelines to seek ways to lower their gas prices. The court responded that this "assumes away the problem of the uneconomical contracts to which pipelines are presently bound."107 The court characterized FERC's reasoning as admitting that the consequence of not negotiating out of a take-or-pay obligation would be severe under Order 436. "It [FERC] seems to confuse the pipelines' incentives to renegotiate contracts with their ability to do so." (emphasis in original).108

98. Id.
99. Associated Gas Distrib., 824 F.2d at 1023.
100. Id. at 1024.
101. Id.
102. Id.
103. Id.
104. Id. The Natural Gas Act provides that before gas pipelines can be built, or supplies delivered through them, a certificate of public convenience or necessity must be issued by FERC. 15 U.S.C. § 717f(c) (1982). The certificate is not merely a right; it is also an obligation to perform the service until FERC grants an abandonment application. 15 U.S.C. § 717f(b) (1982).
105. This language quickly found its way into literature. See Doane, supra note 24, at 50.
106. Associated Gas Distrib., 824 F.2d at 1024.
107. Id.
108. Id.
FERC argued that pipelines enjoyed two advantages under Order 436. First, expedited abandonment was available where take-or-pay settlements were reached or where producers suffer reduced takes without payment. FERC pointed out that in the latter case, abandonment would allow pipelines to invoke contract defenses, like damage mitigation and force majeure, against producers reselling gas under this program. The court termed the usefulness of this provision to be unclear, reasoning that the market price would be below the contract price, the differential being the source of pipelines' vulnerability.

Second, FERC suggested that Order 436 did not preclude a customer from negotiating with producers for conditions requiring take-or-pay relief to the customer's pipeline supplier. The court doubted that any such scenario would ever occur, stating there is no reason why a customer would make a sacrifice to gain a benefit for its pipeline supplier.

FERC argued that pipelines would be able to pass through take-or-pay costs to customers under the Order. The court dismissed this argument as an exaggeration. It reasoned that the costs involved would be prohibitive in the market, driving down the amount of gas a pipeline could sell to relieve take-or-pay liability. Furthermore, the court thought this measure would eradicate pipelines as gas merchants. The court reasoned that since most customers would convert their entire contract demand to transportation, the only customers left dependent on pipelines' supplies would be those with unusual costs in obtaining their supply or whose state regulatory commissions required large pipeline supplies.

FERC advanced several policy considerations against take-or-pay intervention. It noted that such action would "raise extremely serious questions regarding the ability of private parties . . . to rely on private contracts." It cited congressional policy inherent in the NGPA mandating movement toward a deregulated gas market. FERC argued that pipelines should be as accountable for their actions as are non-regulated, private industry firms.

The court conceded that these arguments were powerful and grounded in FERC's enabling legislation. Subjecting pipelines to competitive market pressures was within FERC's authority. The court, though, advanced three counterarguments. First, the court advanced the argu-

109. Id. at 1025.
110. Id. at 1026; Order 436, supra note 2, 50 Fed. Reg. at 42,464.
111. Associated Gas Distrib., 824 F.2d at 1025.
112. Id.
113. Id.
114. Id. at 1026.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id. at 1027.
120. Id.
121. Id. at 1027.
ment that all producer access to transportation depends on governmental intervention. Conditioning access to transportation is not the equivalent of the government abrogating take-or-pay contracts. Second, pipelines are in a superior market position to pass on their take-or-pay burden, unlike free market competitors. Third, the pipelines were caught in a transitional era between full regulation in times of shortage and deregulation in times of surplus. Presently uneconomical contracts were entered into under the stress of congressional and regulatory pressure to ensure that shortages like those of the mid-1970’s would never again occur. The court pointed out that pipelines were simply unable to generate profits in a market totally different from that in which the contracts were made. The court thought that a pipeline “being abruptly and retroactively subjected to the downside risk is at least jarring.”

The court proceeded to review FERC’s reasons for rejecting proposals to condition producer access to pipelines on their cooperation in negotiating a solution to take-or-pay issues. FERC argued that imposing that condition on transportation would be unduly discriminatory, not only against the producer but also the buyer. The seller is incapable of transporting his product and the buyer is unable to take it. The court was unpersuaded by that reasoning. The court came down foursquare in favor of conditioning producers’ access to pipelines on their cooperation in resolving take-or-pay matters. Indeed, the panel issued an advisory opinion on how FERC could legally structure such a proposal.

The court reasoned that the argument provided no justification for the Order’s anti-discrimination concept, but merely restated the concept and that conditioned access would violate it. FERC had itself pointed out that the take-or-pay contracts were a primary cause of the problem Order 436 sought to cure. It eluded the court why pipelines denying access to intransigent producers should be viewed as unduly discriminatory.

The court suggested that FERC could require pipelines to designate specific contracts that it found offensive, preventing unlimited pipeline discretion in denying transportation. It further suggested that FERC could apply the access rule to contracts operating during significant times, such as the date the price of gas fell below NGPA ceilings. Finally, the court suggested that FERC explore the possibility of promulgating rules

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122. Id.
123. Id.
124. Id.
126. Associated Gas Distrib., 823 F.2d at 1028.
127. Id.
128. Id. A close reading of the court’s choice of language here demonstrates its advisory nature. The court repeatedly recommends that FERC adopt conditioned access. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 1029.
133. Id.
that identify offensive price and take-or-pay clauses that thwart Order 436’s purposes and tie these to its NGA mandate to protect consumers.\textsuperscript{134}

The court dealt with far more than the take-or-pay issue in its decision.\textsuperscript{135} The court stressed that issue, however, asserting that the parts of the Order are interdependent.\textsuperscript{136} The decision repeatedly asserted that FERC was the expert and that the court should not say what measures FERC should adopt.\textsuperscript{137} The panel’s reasoning was soon to be echoed.

In Consolidated Edison Co. v. FERC,\textsuperscript{138} another panel of the same court considered issues in an appeal of FERC’s LTA program.\textsuperscript{139} The court viewed as legitimate FERC’s change of policy for granting abandonment.\textsuperscript{140} Nevertheless, the court reversed and remanded FERC’s LTA program because of FERC’s reliance on what the court termed an “erroneous factual premise” underlying the new policy.\textsuperscript{141} That premise was the court’s view of the program’s effect on pipelines’ take-or-pay liability.\textsuperscript{142}

The court referred to FERC’s reasoning that take-or-pay problems would be alleviated by the new policy as “highly problematic.”\textsuperscript{143} FERC had reasoned that more cheap gas on the spot market would provide incentives to both the pipelines and the producers to renegotiate take-or-pay contracts.\textsuperscript{144} Cheaper gas would draw pipelines away from expensive take-or-pay gas. Producers would be willing to renegotiate their expensive take-or-pay contracts rather than risk being shut-in.\textsuperscript{145}

The court found this reasoning difficult to understand.

It seems counterintuitive to argue that pipelines will stop taking gas that they have to pay for anyway and that as a result producers will have an incentive to renegotiate contracts in which they are guaranteed high payments whether or not the customers take the gas. On the contrary: The whole purpose of take-or-pay contracts is to give the producers the same benefit whether or not the gas in question actually leaves the ground.\textsuperscript{146}

The court quoted Associated Gas:

This reasoning assumes away the problem of the uneconomical contracts to which pipelines are presently bound. All FERC does here is to admit that Order No. 436 dramatically increases the con-

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1030.
\textsuperscript{138} 823 F.2d 630 (D.C. Cir. 1987).
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 636.
\textsuperscript{141} Id. at 632.
\textsuperscript{142} Id. at 638.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 639-40.
sequences of not getting out from under an uneconomical contract. It seems to confuse the pipelines' incentives to renegotiate contracts with their ability to do so.\textsuperscript{147}

Again, the court had mandated a solution to the take-or-pay problem. The court made pretense of hedging its opinion. It said FERC was bound only to provide an adequate explanation for its "inaction" on the take-or-pay issue.\textsuperscript{148}

\textbf{FERC's Response}

FERC regarded the court's decision in \textit{Associated Gas} as upholding the substance of Order 436.\textsuperscript{149} It took to heart the court's criticism on the take-or-pay matter. In response, it issued an interim rule, Order 500,\textsuperscript{150} dealing temporarily with the situation before the court's mandate issued in \textit{Associated Gas}. That Order governs transportation and take-or-pay problems during the time FERC gathers industry comments and before it passes a final rule on the take-or-pay issue.

FERC essentially adopted the \textit{Associated Gas} decision as a blueprint for Order 500. Order 500 adopted conditioned access to pipelines for producers, directing that quantities of gas transported for a producer must be credited against take-or-pay liability for the transporting pipeline.\textsuperscript{151} This was the court's opinion fully blossoming into regulatory form.

Solutions were not the business of Order 500. Instead, FERC sought to keep Order 436 in place by addressing the court's concerns. FERC explicitly stated that Order 500 was intended to govern during the time necessary to gather industry comments for a take-or-pay policy.\textsuperscript{152}

Why FERC submitted to the court's opinion is open to conjecture. It must have felt that no regulatory initiative would survive appeal.\textsuperscript{153} Perhaps FERC felt that it could not explain its reasons for inaction on the take-or-pay issue to the United States Supreme Court any better than it had to the Court of Appeals. It may have desired to contest the issue, but did not because it doubted its jurisdiction. \textit{Associated Gas} and \textit{Consolidated Edison} answered all doubt in favor of FERC's jurisdiction. With that answer, FERC had the confidence to spend the resources necessary to resolve the take-or-pay problem. Few agencies are likely to appeal an order expanding their scope of influence. Greater power is too precious to be thrown away. On the other hand, maybe the Solicitor's Office of the FERC General Counsel simply lacked the resources to pursue an appeal.

\textsuperscript{147} Id. at 641.
\textsuperscript{148} Id. at 642.
\textsuperscript{149} Order 500, supra note 7, 42 Fed. Reg. at 30,334.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 30,338.
\textsuperscript{152} Id. at 30,334.
\textsuperscript{153} The author was present at FERC's July 28, 1987 meeting, when Commissioner Trabandt reported a prediction he attributed to Commissioner Sousa to the effect that the next hydro project to be appealed to the D.C. Circuit would be remanded for a solution to the natural gas take-or-pay problem.
Probably it will never be known why FERC did not appeal. Its solution for this seven billion dollar problem will very likely receive judicial review. FERC's take-or-pay solution will not likely be so finely balanced as to escape challenge.

It will be difficult to raise the issue of FERC's jurisdiction in such a proceeding after the Associated Gas opinion. The court failed to consider the jurisdiction issue as a question. FERC's authority has, thus, been expanded *sub silentio*, without the benefit of briefing or argument. This unsolicited gift of power should have been more closely considered, not just assumed.

**ANALYSIS**

**The Standard of Review**

The court did not address its standard of review at length in either *Associated Gas*, or *Consolidated Edison*. The latter opinion simply relied on the former. In the take-or-pay discussion of *Associated Gas* the court asserted that FERC failed to reach its conclusions through reasoned decisionmaking.\(^{14}\) The court, however, failed to define what reasoned decisionmaking means. In some sections of the opinion the court cited several cases' discussions of varying standards of review.\(^ {15}\) An examination of those standards will help to understand the standard which the *Associated Gas* court purported to apply.

The court discussed at least four standards of review in its opinion. The first involved interpreting FERC's statutory authority and responsibility to administer the NGA and NGPA. The court referred to *Chevron U.S.A. v. Natural Resources Defense Council*\(^ {16}\) where the United States Supreme Court instructed lower courts to defer to congressional decisions granting agencies primary authority and responsibility to administer statutes.\(^ {17}\) The Supreme Court there explicitly stated that reviewing courts may not substitute their view for an agency's reasonable interpretation of a statute.\(^ {18}\)

Second, the *Associated Gas* court referred to *SEC v. Chenery Corp.*\(^ {19}\) The court was discussing FERC's choice of adjudicating rather than rulemaking to develop regulatory standards under Order 436. Judge Williams quoted the Supreme Court's opinion that the choice "lies primarily in the informed discretion of the administrative agency."\(^ {20}\) The court, there, deferred to FERC's judgment.

Third, the court cited a line of cases interpreting the "substantial evidence" requirements in the NGA\(^ {21}\) and NGPA.\(^ {22}\) "This standard re-

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154. *Associated Gas Distrib.*, 824 F.2d at 1023.
155. *Id.*
158. *Id.* at 1003.
159. 332 U.S. 194 (1947) (cited at *Associated Gas Distrib.*, 824 F.2d at 1006).
160. *Id.*
quires the agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" The court felt that FERC had not developed an adequate rationale to support contract demand reduction in Order 436. Nevertheless, the court chose not to remand on this basis.

Fourth, the court mentioned *Capital Cities Communications, Inc. v. FCC.* The court was discussing FERC's methods of "grandfathering" transportation arrangements. It said, "Although FERC must exercise the power in a reasoned manner, such exercises are 'necessarily arbitrary to some extent.'" Again, the court examined the standard and found deference the best course.

Congress mandated the general standards a reviewing court must apply in section 706(2) of the Administrative Procedure Act (APA). The term "reasoned decisionmaking" does not appear therein. This formulation can only be read into APA section 706(2)(A)'s standard of "otherwise not in accordance with law." The APA's formulation of "arbitrary and capricious" has often been applied to agencies' policy decisions. This standard was defined by the Supreme Court as requiring reviewing courts to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Overlain on the APA is the "substantial evidence" standard found in the NGA and NGPA. This term is usually applied to agency findings of fact. It has received varied interpretation. Some aspects of it are clear. A court is not to weigh the evidence, but only discover whether a reasonable mind might accept it as adequate to support a conclusion. The court must uphold the agency's decision if it is reasonable. This must be done even if the court thinks a different conclusion would have been more reasonable.

The substantial evidence standard gives agency decisions even more flexibility for novel regulatory programs. Such holdings have been

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164. 554 F.2d 1135 (D.C. Cir. 1976) (cited at *Associated Gas Distrib.*, 824 F.2d at 1041).
165. *Associated Gas Distrib.*, 824 F.2d at 1040-41 (citing Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1139 (D.C. Cir. 1976)).
167. Id.
171. Id.
172. Id., at pg. 46-17, n.35 (citing Columbia LNG Corp. v. FPC, 491 F.2d 651, 654 (5th Cir. 1974) quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).
174. Id.
specifically directed at the Federal Power Commission, FERC's predecessor.\textsuperscript{175}

FERC was experimenting when it passed Order 436. It was attempting to allow market conditions to work in a highly regulated area.\textsuperscript{176} This characterization of FERC's activities strongly supports a greater deferential standard of review because of the novelty of Order 436. Nevertheless, the Associated Gas opinion, and its offspring, Consolidated Edison, held FERC to a new and untested \textit{ad hoc} standard of "reasoned decisionmaking."

This conclusion is bolstered by the court's statement: "What is in dispute is the likely consequence of [FERC's] acts. On that, FERC offers nothing to undermine the challengers' inherently plausible suggestion that these conditions will have an adverse impact on the pipelines' take-or-pay problems." Judge Williams here elevates an argument to the heights of "inherent plausibility." Courts are not empowered to displace agency judgments with their own notions of such amorphous, intuitive ideas as "inherent plausibility." Generally accepted notions of judicial review of agency action recognize no such standard.

Which standard is applicable to FERC's take-or-pay decisions is open to scholarly debate. Under a reasonable application of any of them, FERC reached a legitimate conclusion. The actions of the courts in Associated Gas and Consolidated Edison were unjustified in light of the record.

\textit{The Substantive Decision}

The court based its decision to remand on the premise that FERC failed to reach its conclusions through reasoned decisionmaking.\textsuperscript{177} A close reading of the opinion, however, reveals that the court's decisionmaking left much more to be desired than FERC's. Both panels relied on an erroneous argument in deciding these cases.

In the Associated Gas decision, the court stated that FERC was confusing pipeline incentives to renegotiate their uneconomical take-or-pay contracts with their ability to do so.\textsuperscript{178} This statement relies on the premise that pipelines are unable to renegotiate their contracts. Both panels couched their reasoning for this in practical terms.\textsuperscript{179} Neither panel could understand why a producer would renegotiate a contract under which, as they put it, it was being paid for its gas regardless of delivery.\textsuperscript{180}

The court erred in its belief that producers were being paid. As FERC had stated in its promulgation of Order 436, producers were settling for

\begin{footnotesize}
\begin{enumerate}
\item[176.] Order 436, \textit{supra} note 2, 50 Fed. Reg. at 42,436.
\item[177.] \textit{Associated Gas Distr.}, 824 F.2d at 1024.
\item[178.] \textit{Id.} at 1023.
\item[179.] \textit{Id.} at 1024.
\item[180.] \textit{Id.; Consolidated Edison}, 823 F.2d at 641.
\item[181.] \textit{Consolidated Edison}, 823 F.2d at 641.
\end{enumerate}
\end{footnotesize}
twelve cents on the dollar. An examination of settlements revealed that the liabilities had been outstanding for some time. Further examination revealed that some of those liabilities had been successfully challenged in courts. Under those challenges, producers receive nothing. They lose their court costs, legal resources and sales during the time take-or-pay liability is litigated.

An examination of relevant facts makes it easy to understand why producers would renegotiate take-or-pay contracts under the opportunities presented by Order 436. Producers can market their gas for cash if they escape their contractual commitments to the pipelines. To most prudent businessmen, a cash sale is far better than an uncertain take-or-pay contractual right, subject to an eighty percent average settlement loss or to court challenge. Producers are in the business of exploring for and producing natural gas. This business is expensive, requiring a fair cash flow that take-or-pay contract rights do not provide.

Clearly, then, producers have a great incentive to renegotiate these contracts. Take-or-pay obligations are not the equivalent of cash. The April 1985 Policy Statement allowed producers and pipelines to renegotiate their contracts with some certainty as to their relative positions. The court has simply muddied the waters, effectively reversing a reasoned decision.

The court’s decision goes beyond a mere misunderstanding of producers’ incentives. It affects ongoing negotiations that until now were achieving solutions to problem contracts. FERC had specifically addressed this matter in Order 436. FERC stated that as a result of the comments on the safe harbor presumption, it was “persuaded that any attempt to impose a regulatory solution at this time may actually aggravate the situation rather than improve it.” FERC decided that the prudent approach was to retain the April 1985 Policy Statement. Throughout the discussion of the rule, FERC evidenced sensitivity to ongoing negotiations. It published results of some take-or-pay settlements with an analysis of negotiated settlements’ results. It stated: “These arrangements appear to have provided the parties the greatest flexibility to deal with some particularly difficult contractual problems. Accordingly, we have determined that the proven course at the present time is to take no substantive action in this area.” (emphasis supplied).

The court, however, simply disregarded any notion of leaving the industry to negotiate or to litigate its problems. The Associated Gas opinion cursorily noted parts of FERC’s conclusions, failing to address those concerns at all in its opinion. The court’s treatment of the subject was a

183. Id.
184. Id. at 42,436.
185. Id.
186. Id. at 42,464.
187. Id.
188. Id.
189. Id.
190. Associated Gas Distrib., 824 F.2d at 1024.

https://scholarship.law.uwyo.edu/land_water/vol23/iss1/4
glaring error in light of FERC's relatively exhaustive treatment of the subject in Order 436. The court made no finding that the amounts, the means, or the comprehension of these private settlements were unacceptable. It failed to address the issue at all. The court simply arrogated unto itself the authority and wisdom to make the decision. Referring to FERC as the expert in these matters,\textsuperscript{191} while substituting its own uninformed judgment for that of the agency amounts to invoking a judicial for an agency decision. That it cannot legally do.\textsuperscript{192}

In addition, the court's projections were based on its intuitive notions of the effects of Order 436 rather than empirical data or expertise. The Consolidated Edison court brazenly used the term "counterintuitive" after alleging that FERC was simply wishing the problem away.\textsuperscript{193} In essence, the court has substituted its unwise judgment for FERC's experienced decisions. Again, this it may not legitimately do.

FERC used Order 436 to bring about an industry organization more closely resembling a free market.\textsuperscript{194} This policy is implicit in the NGPA and has been recognized by the Supreme Court.\textsuperscript{195} Under the NGPA, Congress vested in FERC the authority to bring about this change.\textsuperscript{196} That grant of authority carries with it the discretion to formulate the means to effectuate the legislatively determined ends.\textsuperscript{197} Associated Gas rejected FERC's choice by substituting the court's policy judgments for those of agency experts. The court went beyond this, overruling even congressional mandate of policy. Congressional mandates are superior to courts' policy judgments. Nevertheless, the court read these matters right out of the problem. In so doing, it effectively recommended a course of action FERC had rejected, namely, conditioning producer access, a solution which clearly is not free market oriented.

To justify its policy judgment, the court invoked Motor Vehicle Mfrs. Ass'n v. State Farm Mut.\textsuperscript{198} as if it were a talisman against reversal.\textsuperscript{199} An examination of State Farm reveals that the court's reliance was misplaced. Indeed, Judge Williams expressly undercut State Farm's applicability.

The State Farm decision involved an agency's reversal of itself on a matter of policy. The National Highway Traffic Safety Administration rescinded a safety standard involving passive restraint requirements.\textsuperscript{200} The Supreme Court held that the agency's action was arbitrary and capricious because it failed to present an adequate basis and explanation for rescinding the requirement. The Court required agencies reversing

\textsuperscript{191} Id. at 1030.
\textsuperscript{193} Consolidated Edison, 823 F.2d at 639.
\textsuperscript{194} Order 436, supra note 2, 50 Fed. Reg. at 42,438.
\textsuperscript{195} Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409 (1986).
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} 463 U.S. 29 (1983).
\textsuperscript{199} Associated Gas Distrib., 824 F.2d at 1016, 1018, 1029, and 1041.
\textsuperscript{200} State Farm, 463 U.S. at 33.
themselves on matters of policy to provide an adequate basis and explanation.\textsuperscript{201}

The take-or-pay issue in \textit{Associated Gas} was not a policy \textit{reversal} in the \textit{State Farm} sense. FERC simply chose not to take any action on the matter. No rule was promulgated. FERC went to great lengths addressing the issue, providing an adequate basis and explanation for its decision. The \textit{Associated Gas} court used an inapposite case to justify substituting its policy judgment for that of FERC.

This court's conduct was ill-considered at best. Under the April 1985 Policy Statement, the industry had begun to solve its problems. Under the court's mandate, all bets are off. Now the industry subjects itself to another round of notice and comment, pending a final rule to replace the interim rule in Order 500. Pipelines and producers have likely stopped renegotiating their take-or-pay contracts. Now they are probably spending their resources trying to secure a better negotiation posture by influencing the outcome of the rulemaking mandated by the court. FERC had earlier anticipated this same possibility when it expressed concern for the future reliability of private contracts.\textsuperscript{202} The court overruled FERC's earlier decision by substituting its judgment in these two cases.

The court ran roughshod over some of FERC's other judgments. First, FERC reasoned that Order 436 was a voluntary program, therefore, pipelines were under no compulsion to comply.\textsuperscript{203} Second, FERC found that take-or-pay costs could be passed on to customers.\textsuperscript{204} In rejecting these arguments, the court looked at the record and decided that it knew better than did FERC the potential effect of Order 436. The court thought voluntariness a sham and pass-through of costs unworkable. Its reasoning supporting those conclusions reveals that it was relying on its own inexpert judgment of market effects and the regulatory impact of Order 436.\textsuperscript{205} This approach amounts to the judiciary substituting its judgment for that of an agency. As expressed before, this is outlawed.\textsuperscript{206}

Furthermore, the court answered FERC's questions regarding its authority to condition access outside the context of a specific challenge.\textsuperscript{207} This, too, strains the prohibition against courts substituting their judgment for that of an agency.\textsuperscript{208} This court boldly went one step further. It took two options rejected by FERC and gave them specific, thorough treatment.\textsuperscript{209} This practice has generally been questioned in administrative law.\textsuperscript{210} In fairness, it should be noted that the court mentioned that FERC

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\textsuperscript{201} \textit{Id.} at 42. \textit{See also} W. Fox, \textit{Understanding Administrative Law} 154 (1986).
\textsuperscript{203} \textit{Id}.
\textsuperscript{204} \textit{Id}.
\textsuperscript{205} \textit{Associated Gas Distrib.}, 824 F.2d 981. Judge Williams' language throughout the opinion seems to reflect his feelings of superiority over the economic analysts at FERC.
\textsuperscript{206} L. Modjeska, \textit{supra} note 192.
\textsuperscript{207} \textit{Associated Gas Distrib.}, 824 F.2d at 1028-30.
\textsuperscript{208} L. Modjeska, \textit{supra} note 192.
\textsuperscript{209} \textit{Associated Gas Distrib.}, 824 F.2d at 1027-30.
\textsuperscript{210} L. Modjeska, \textit{supra} note 192; J. O'Reilly, \textit{Administrative Rulemaking} 280 (1983).
\end{flushleft}
was under no obligation to consider any of the options discussed by the court.\(^\text{211}\) It remains for consideration, however, with what propriety courts may issue opinions seemingly calculated to dictate the course of administrative decisionmaking in the wake of their mandates.

Meanwhile, in its opinion, the court condescendingly accused FERC of failing to act on the problem.\(^\text{212}\) This is simply untrue. The Federal Register reveals a lengthy record of FERC considering all sides of the issue rather than seizing one set of arguments from one industry segment and mandating its adoption, as did the court.\(^\text{213}\) The court did not even pause to consider the arguments advanced by FERC in rejecting conditioned access. Judge Williams used terms which apply more to the court's judgment and opinion than to FERC's rulemaking.\(^\text{214}\) The \textit{Consolidated Edison} opinion cited the \textit{Associated Gas} opinion published twenty-eight days earlier. It said, "the Commission is still confusing pipeline incentives with their ability to renegotiate." (emphasis supplied).\(^\text{215}\) In light of both panels' complete misunderstanding of the industry's circumstances and the effects of the court's decisions, it is quite bold to suggest, as did the \textit{Consolidated Edison} court, that FERC should have resolved the problem in four weeks.

\textbf{Conclusion}

This litigation is but a weigh station on the take-or-pay road. Whatever FERC does to resolve the problem, it cannot please everyone in the industry. Someone will challenge the solution, and the question will again come under judicial scrutiny. It should be noted, at this juncture, that the Court of Appeals took actions which were clearly illegitimate, injecting itself into an area better left to agency expertise.

Both panels of the court employed highly questionable review standards in their decisions remanding FERC's deregulatory initiatives in Order 436 and the LTA program. The effects of these decisions will prolong rather than resolve the problems revolving around the take-or-pay issue. In addition, the court strained its legal limitations beyond the breaking point by repeatedly substituting its judgment for that of FERC.

\textbf{Nathaniel K. Adams}

\begin{footnotes}
\footnote{211. \textit{Associated Gas Distrib.}, 824 F.2d at 1029.}
\footnote{212. Id. (Both courts' repeated use of such terms as "blindness," "insouciance," "confusion," and, in \textit{Consolidated Edison}, "honest and full consideration," must be recognized as at least condescending when thought of in the context of a court addressing an agency's expertise in these matters.).}
\footnote{213. See Order 380, \textit{supra} note 46; April 1985 Policy Statement, \textit{supra} note 51; Order 436, \textit{supra} note 2; Order 451, \textit{supra} note 1.}
\footnote{214. See \textit{supra} note 212.}
\footnote{215. \textit{Consolidated Edison}, 823 F.2d at 641.}
\end{footnotes}