

Administrative Law — Contract Law — FPC Summary Action In Natural Gas Pipeline Interim Curtailment Practice — *Consolidated Edison Co. v. FPC*¹—Since 1970, the chronic, nationwide natural gas shortage has left interstate pipeline companies increasingly unable to fulfill supply commitments, necessitating the curtailment of supplies to certain customers during peak demand periods.² As a result of the shortage, the Federal Power Commission (FPC) has sought to develop a regulatory scheme through which to shape pipeline curtailment practices. In *Consolidated Edison*, the United States Court of Appeals for the District of Columbia Circuit reviewed³ petitions filed by customers of three major interstate gas pipelines,⁴ against recent FPC initiatives in implementing Order No. 467⁵ "governing the 'utilization and conservation of natural gas resources.'"⁶ Order No. 467 provides that the public interest will best be served by assigning delivery priorities based on the ultimate consumer use made of gas (end use), rather than on the basis of contractual commitments (pro rata).⁷ To effectuate this determination, the Commission established nine "priority of service" categories based on the end use criteria.⁸ The Commission indicated that allocation or tariff schedules not in conformity with 467 priorities would be subject to suspension and final disapproval as "preferential or discriminatory,"⁹ even though the order purports to be only a general statement of policy and not a binding rule.¹⁰

The authority of the FPC to impose a 467-type plan on the pipelines after evidentiary Commission hearings and a decision on the record was not contested in *Consolidated Edison*.¹¹ Rather, at issue was

¹ 512 F.2d 1332 (D.C. Cir. 1975).

² *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 626-27 (1972). See generally FPC, STAFF REPORT NO. 2 ON NATIONAL GAS SUPPLY AND DEMAND 1971-1990, at xi (1972); 1974 FPC ANN. REP. 34-35; 1973 FPC ANN. REP. 34. An early history of the emerging natural gas shortage and attendant conflicts is contained in Comment, *FPC Natural Gas Allocation: Curtailment in Context*, 50 TEXAS L. REV. 1370 (1972).

³ The Natural Gas Act, 15 U.S.C. § 717r(b) (1970), provides for review of Commission orders by "the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." Such review, however, is only available "within sixty days after the order of the Commission upon the application for rehearing . . ." pursuant to 15 U.S.C. § 717r(a) (1970).

⁴ 512 F.2d at 1336 nn. 1-3.

⁵ 18 C.F.R. § 2.78 (1975). Order No. 467 was earlier amended by Order No. 467-A, 38 Fed. Reg. 2171 (1973) and again in Order No. 467-B, 38 Fed. Reg. 6384 (1973). These orders will be referred to collectively as Order No. 467, or simply 467, unless otherwise necessary for clarity.

⁶ 512 F.2d at 1336.

⁷ 38 Fed. Reg. 1503, 1503-04 (1973).

⁸ 18 C.F.R. § 2.78. Order No. 467 delivery priorities are discussed by the court in *Consolidated Edison*. 512 F.2d at 1336-37. See text at notes 65-67 *infra*.

⁹ 38 Fed. Reg. 6384, 6385 (1973).

¹⁰ 38 Fed. Reg. 1503 (1973). See also, Order No. 467-B, 38 Fed. Reg. 6384, 6384-85 (1973).

¹¹ 512 F.2d at 1338.

NOTES

the Commission's use of summary action¹² in shaping the allocation practices of pipelines during the *interim* period pending hearings on permanent curtailment plans.¹³ The petitioners argued that the Commission's summary effectuation of the various interim curtailment plans filed by pipelines in conformity with Order No. 467,¹⁴ and its admonitory rejection of alternative allocation schemes previously negotiated between the pipelines and petitioners were *ultra vires* actions.¹⁵ Specifically, petitioners contended that the FPC had exceeded its power by seeking to implement Order No. 467 under the summary procedures provided in section 4 of the Natural Gas Act,¹⁶ instead of under the more formal and extensive hearing requirements of section 5 of that Act.¹⁷

Following the Commission's refusal to extend the expiring negotiated plans, appeals were filed in which the pipeline customers contested the legality of 467-type curtailment plans submitted by pipelines to the FPC, and sought stays to prevent the implementation of these plans.¹⁸ The court granted stays in cases involving two of the pipelines, since the negotiated plans were found to be as protective of customers as alternative 467 plans filed for the 1973-74 winter heating season.¹⁹ These stays remained in effect through the winter of 1974-75, although one of the non-467 plans was renegotiated to avoid customer injury.²⁰ A stay was denied to customers of the remaining pipeline. The court instead permitted a 467 filing to take effect, after finding that existing negotiated plans would no longer provide adequate customer protection.²¹ As the Commission subsequently completed hearings on permanent curtailment plans for each of the pipelines, the disposition of these cases had the practical effect of determining the interim phase of the allocation controversy.²² Since there was no way of knowing whether the FPC would issue its final decision on permanent curtailment plans in time for the 1975-76 heating season, the court sought to resolve the uncertainty under which

¹² "Summary action," sometimes called emergency or temporary action, is an informal procedure utilized by both federal and state administrative agencies, pending an adjudicatory hearing. The primary justification for summary action lies in the necessity for the government to act immediately if public policy is to be enforced at all. Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 1-2 (1972).

¹³ 512 F.2d at 1338.

¹⁴ See *id.* at 1337-38 for a description of pipeline filings pursuant to Order No. 467.

¹⁵ *Id.* at 1338-39.

¹⁶ 15 U.S.C. § 717c (1970). Section 4 procedures are discussed in text at notes 111-14 *infra*.

¹⁷ 15 U.S.C. § 717d (1970). Section 5 procedures are discussed in text at notes 115-18 *infra*.

¹⁸ Consolidated Edison Co. v. FPC, 511 F.2d 372, 376 (D.C. Cir. 1974) (*per curiam*).

¹⁹ *Id.*

²⁰ *Id.* at 376-81.

²¹ *Id.* at 376 n.4.

²² 512 F.2d at 1338.

both the Commission and the parties labored with respect to the interim curtailment plans, and proceeded to the merits.²³

The United States Court of Appeals for the District of Columbia Circuit upheld the FPC's summary implementation of 467-type plans. Specifically, the court HELD: In view of shortages necessitating curtailment and prompt FPC action, (1) the Commission may properly take into account the end use of indirect customers²⁴ for curtailment purposes;²⁵ and (2) the Commission practice of allowing interim pipeline schedules to go into effect without a preliminary finding that the schedules were non-discriminatory was not arbitrary.²⁶

The court in *Consolidated Edison* concluded that the FPC had properly exercised its authority to shape pipeline curtailment practices pending the final determination of allocation plans after hearings.²⁷ Three findings by the court provided the factual basis supporting this conclusion: (1) that pipelines retained considerable freedom to choose among alternative schemes in filing curtailment plans;²⁸ (2) that Order No. 467 did not govern all aspects of natural gas allocation;²⁹ and (3) that FPC action in shaping curtailment policies under 467 did not appear to be unduly oriented toward the interests of the regulated pipelines.³⁰ The court's recognition of Commission summary action in implementing curtailment powers was coupled, however, with an awareness that the effects of curtailment "can be irrevocable."³¹ Consequently, the court found that the Commission had a separate responsibility—quite apart from its efforts to guarantee emergency relief pursuant to Order No. 467-A³²—to monitor interim curtailment plans in operation pending adoption of permanent allocation schemes.³³ Finally, the court acknowledged that the power to make such gas allocation adjustments as may appear warranted was a necessary adjunct to the FPC's monitoring and "oversight function."³⁴

This note will initially explore the impact of *Consolidated Edison* on the development of curtailment regulation by the FPC in response

²³ *Id.*

²⁴ Natural gas customers include: "industrial 'direct sales' customers, purchasing gas for their own consumption, and 'resale' customers, purchasing gas for distribution to ultimate consumers." *FPC v. Louisiana Power & Light*, 406 U.S. 621, 623 (1972). "Indirect" customers are those ultimate consumers who purchase gas from "resale" customers. *Consolidated Edison*, 512 F.2d at 1345.

²⁵ 512 F.2d at 1345-46.

²⁶ *Id.* at 1344-45.

²⁷ *Id.* at 1342.

²⁸ *Id.* at 1341.

²⁹ *Id.*

³⁰ *Id.* at 1342.

³¹ *Id.* at 1343.

³² The Commission has indicated that curtailment schedules should provide for emergency supplemental deliveries where required to forestall irreparable injury to life or property. 18 C.F.R. § 2.78(a)(4) (1975).

³³ 512 F.2d at 1343.

³⁴ *Id.*

NOTES

to the current natural gas shortage. Next, the implementation of Commission curtailment practices through summary action under section 4 of the Natural Gas Act will be discussed. The FPC's "oversight function," posited by the District of Columbia Circuit as a check on the exercise of Commission summary action, will then be evaluated and improvement through public involvement suggested. Finally, an observation will be offered as to the effect of Order No. 467 on the question of pipeline liability for failure to meet contract supply requirements.

I. THE CHALLENGE TO FPC CURTAILMENT POWER

The prospect of an inadequate supply of natural gas has been anticipated since the early 1950's,³⁵ with the classic formulation of the problem expressed even earlier in Justice Jackson's now famous dissent in *FPC v. Hope Natural Gas Co.*³⁶ The heart of the problem, as he saw it, is "the elusive, exhaustible, and irreplaceable nature of natural gas itself."³⁷ Yet, the emergence of actual shortages in 1970 came with a suddenness and severity which the FPC had failed to anticipate.³⁸ In 1971, as a result of these shortages, the Commission moved to reverse the negative effects of past regulatory practices,³⁹ which were thought to have contributed to the current scarcity of natural gas.⁴⁰ This initial response to the shortage included the promulgation of a series of measures authorizing emergency purchases by pipelines facing shortages, in order to avoid major disruptions of power supplies.⁴¹ When these measures proved inadequate, the FPC promulgated Order No. 431⁴² in an attempt to promote uniform curtailment practices. Order No. 431 directed "jurisdictional" pipeline companies⁴³ expecting periods of shortage to file revised tariff schedules containing a curtailment plan and impliedly suggested that curtailment priorities in those schedules should be based on the end use made of the gas.⁴⁴ The Commission indicated that such tariffs and plans, if approved,

³⁵ Williams, *Some Ingredients of a National Oil and Gas Policy*, 27 STAN L. REV. 969 n.1 (1975).

³⁶ 320 U.S. 591, 628-60 (1944) (Jackson, J., dissenting).

³⁷ *Id.* at 629.

³⁸ *Consolidated Edison*, 512 F.2d at 1342.

³⁹ 1972 FPC ANN. REP. 37.

⁴⁰ See, e.g., Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941, 943-85 (1973) for a discussion of the negative impact that the FPC's regulation of wellhead prices had upon production.

⁴¹ Each of these orders is summarized by the Court in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 628 (1972).

⁴² 18 Fed. Reg. 7505 (1971).

⁴³ "A 'jurisdictional' pipeline transports natural gas in interstate commerce and for that reason is subject to FPC certification jurisdiction. The 'jurisdictional' label is also sometimes used to apply to sales, in which case it refers to interstate sales for resale, which are subject to Commission rate regulation." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 626 n.1 (1972).

⁴⁴ See 18 C.F.R. § 2.70(b)(2)(i)(ii) (1974); cf. 38 Fed. Reg. 1503, 1503-04 (1973).

would in all respects be controlling as to gas allocation "notwithstanding inconsistent provisions in [prior] sales contracts."⁴⁵

A jurisdictional attack on the FPC's authority to promulgate Order No. 431 has provided the principal challenge to Commission curtailment power. In *FPC v. Louisiana Power & Light Co.*,⁴⁶ pipeline customers contested curtailment plans filed by pipelines pursuant to Order No. 431 covering direct interstate sales of natural gas.⁴⁷ The Supreme Court held that the FPC has power to regulate curtailment by pipeline companies of such sales.⁴⁸ The Commission's curtailment powers, the Court found, arise out of both the FPC's transportation jurisdiction⁴⁹ and section 16 of the Natural Gas Act,⁵⁰ which empowers the agency to take necessary or appropriate steps to carry out provisions of the Act.⁵¹

The Supreme Court's holding in *Louisiana Power & Light* was based upon the "attractive gap" theory, originally advanced in *FPC v. Transcontinental Gas Pipe Line Corp.*⁵² Under this theory, federal regulation is to broadly complement that provided by the states, "so that there would be no 'gaps' for private interests to subvert the public welfare."⁵³ The theory does not admit to the possible creation of a "no man's land" in disputes over the scope of regulatory authority.⁵⁴ Thus, in examining areas in which Congressional authority is not explicit, courts ask whether the reserved powers of the states can practically regulate a situation. If they cannot, then the courts are "impelled to decide that federal authority governs."⁵⁵ Reasoning that curtailment power over direct interstate sales was beyond the competence of state regulatory agencies, the Court in *Louisiana Power & Light* found that grant of such power to be within the Congressional intent in framing a broad and complementary federal regulatory scheme under the Natural Gas Act.⁵⁶ The Commission, the Court declared,

⁴⁵ 18 C.F.R. § 2.70(b)(7).

⁴⁶ 406 U.S. 621 (1972).

⁴⁷ *Id.* at 631-32.

⁴⁸ *Id.* at 647.

⁴⁹ Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1970) provides: The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

⁵⁰ 15 U.S.C. § 717o (1970).

⁵¹ *Louisiana Power & Light*, 406 U.S. at 642.

⁵² 365 U.S. 1, 19-22 (1961).

⁵³ 406 U.S. at 631.

⁵⁴ 365 U.S. at 19-20.

⁵⁵ *Id.*

⁵⁶ See 406 U.S. at 632-33. But see Note, 61 Geo. L. J. 833, 840-41 (1973) for the proposition that "[n]othing in the legislative history [of the Natural Gas Act] indicates

NOTES

"must possess broad powers to devise effective means to meet [its] responsibilities . . . [and] "to make the pragmatic adjustments which may be called for by particular circumstances.'" ⁵⁷ These broad powers, then, are available to the FPC to fill any gaps affecting the public interest in the federal regulation of curtailment.

The scope of the Commission's power to shape interim curtailment plans under Order No. 431 was further elucidated in *American Smelting & Refining Co. v. FPC*.⁵⁸ There, the District of Columbia Circuit examined the precise basis and extent of the Commission's authority to issue interim orders.⁵⁹ Declaring that "the Commission's power to promulgate an interim curtailment plan is not born of emergency," the court found that the Commission's power is based upon "the statutory authorization to perform any and all acts necessary or appropriate for the implementation of the Natural Gas Act."⁶⁰ The court reasoned that the exigent circumstances of the natural gas shortage neither create special powers in the Commission, nor abrogate procedural requirements for valid administrative action.⁶¹ It thus appears that the existence of the gas shortage is only one of several factors to be considered by the FPC in determining initially whether an interim curtailment order is necessary, and if found to be so, whether the proposed order is just and reasonable.⁶² At the same time, the significance of the "emergency" factor seems to have been acknowledged in *Louisiana Power & Light*, where the Supreme Court indicated that a shortage of marked proportions should be considered in defining the FPC's discretion to choose among available procedures in its curtailment practices.⁶³

The fact that curtailment plans filed by pipelines pursuant to Order No. 431 continued to reflect conflicting views as to the appropriate priorities applicable in supplying customers impelled the FPC to issue more specific policy guidelines in Order No. 467.⁶⁴ Under Order No. 467, a preferential curtailment system based on ultimate

that Congress thought that any direct user of gas would be reached by the Act" Still, it is clear that Congress did not desire that any important aspect of control over the distribution of natural gas be left unregulated. *Transcontinental Gas Corp.*, 365 U.S. at 19. Authority for Federal curtailment jurisdiction over direct sales may be derived in principle, then, from Congress' broad motivation of attempting to create a comprehensive and effective regulatory scheme to protect natural gas consumers. *Cf. id.* at 19-22.

⁵⁷ 406 U.S. at 642, quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

⁵⁸ 494 F.2d 925, 932-33 (D.C. Cir. 1974).

⁵⁹ *Id.* at 933.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See 406 U.S. at 642-45; accord, *Consolidated Edison*, 512 F.2d at 1342.

⁶⁴ 38 Fed. Reg. 6384 (1973). See Muys, *FPC Allocation of Natural Gas Supply Shortages: Prorationing, Priorities and Perplexity*, 20 ROCKY MT. M. L. INST. 301, 307-09 (1975) for a description of plans filed pursuant to Order No. 431.

consumer use emerged;⁶⁵ it ranged from highest priority for residential, small commercial, and other "human needs" uses, through moderate priority for industrial processing use, down to lowest priority for boiler use.⁶⁶ This preferential scheme further required the full curtailment of the lower priority customers to be accomplished, before curtailment of any higher priority customers could be commenced.⁶⁷ In Order No. 467-A, the FPC directed pipeline companies to incorporate procedures into their schedules permitting an immediate response to emergency situations arising during periods of shortage.⁶⁸ Order No. 467-B provided a final clarification of the Commission's plain intent that "end use of natural gas [be the] controlling [factor] in curtailment situations."⁶⁹ Since these orders purported to be general policy statements, the Commission did not direct the pipelines to file conforming tariffs.⁷⁰ However, while the FPC acknowledged that pipelines were free to file curtailment schemes of their own choice,⁷¹ this recognition was accompanied by a warning that those filings not in accordance with 467 would be subject to possible suspension as "preferential or discriminatory."⁷² Plans deviating from the FPC's priority scheme could only gain the Commission's endorsement in "appropriate circumstances;" that is, upon an evidentiary showing by the pipeline that its plan better served the public interest than a 467-type plan.⁷³

An initial procedural challenge to FPC curtailment practices under Order No. 467 was brought before the Court of Appeals for the District of Columbia Circuit in *Pacific Gas & Electric Co. v. FPC*.⁷⁴ On review of Order No. 467, the court concluded that the order was properly couched as a statement of policy, rejecting petitioner's claim that the order was in effect a substantive rule.⁷⁵ As a statement of policy, 467 was exempt from the rulemaking requirement of the Adminis-

⁶⁵ For a discussion of the background of Order No. 467, see *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 36 (D.C. Cir. 1974).

⁶⁶ 18 C.F.R. § 2.78(a)(1)(i)-(ix) (1975).

⁶⁷ 18 C.F.R. § 2.78(a)(3) (1975).

⁶⁸ 38 Fed. Reg. 2171, 2171-72 (1973), amending 18 C.F.R. § 2.78 (1975).

⁶⁹ 38 Fed. Reg. 6384, 6385 (1973) amending 18 C.F.R. § 2.78 (1975). See also 49 F.P.C. 1036, 1037 (1973) (order denying motions for reconsideration, clarification or modification of Order No. 467-B).

⁷⁰ While the court in *Consolidated Edison* indicated only that the FPC "declined" to direct pipelines to file conforming tariffs, 512 F.2d at 1337, such "direction" would clearly have been beyond Commission powers since it would have necessitated treatment of 467 as a substantive order, in violation of the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). See *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 37-40 (D.C. Cir. 1974).

⁷¹ 38 Fed. Reg. 6384, 6385 (1973).

⁷² *Id.*

⁷³ See *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 36 (D.C. Cir. 1974); 49 F.P.C. 1036, 1037 (1973) (order denying motions for reconsideration, clarification or modification of Order No. 467-B); Muys, *supra* note 64, at 323.

⁷⁴ 506 F.2d 33 (D.C. Cir. 1974).

⁷⁵ *Id.* at 45.

NOTES

trative Procedure Act⁷⁶ that a hearing or opportunity to comment be provided.⁷⁷ The court found that Order No. 467 was not a binding norm, since its practical effect was not finally determinative of the issues or rights to which it was addressed, but merely provided initial guidelines for pipelines as a means of facilitating curtailment planning.⁷⁸ Despite this expansive attitude toward the FPC's curtailment regulation, the District of Columbia Circuit pointed out that the courts are charged with the duty of policing agency action to insure that such guidelines are not, in fact, treated as substantive rules.⁷⁹

The court in *Consolidated Edison* exercised the policing function contemplated in *Pacific Gas* through its review of FPC initiatives in implementing Order No. 467.⁸⁰ In both *Consolidated Edison* and *Pacific Gas*, pipeline customers alleged procedural infirmities in contesting the FPC's end use priority scheme. In *Pacific Gas*, petitioners argued that the FPC had not satisfied the hearing requirements of the Administrative Procedure Act in promulgating Order No. 467,⁸¹ while in *Consolidated Edison*, the claim was made that hearing requirements under the Natural Gas Act were not met in implementing the order.⁸² *American Smelting* had appeared to open the doors to precisely such procedural challenges.⁸³ However, in *Pacific Gas* and *Consolidated Edison* these doors were rapidly shut as Commission action, both in promulgating and implementing the order was upheld upon judicial review.⁸⁴ Indeed, the court's affirmance in *Consolidated Edison* of FPC implementation of Order No. 467 through "raised eyebrow techniques"⁸⁵ followed logically from the Supreme Court's acknowledgement in *Louisiana Power & Light* that the Commission must possess broad powers to devise effective means to meet its responsibilities.⁸⁶

FPC curtailment practice under Order No. 467 was also contested⁸⁷ on jurisdictional grounds in *Consolidated Edison*.⁸⁸ The

⁷⁶ 5 U.S.C. § 553 (1970).

⁷⁷ 506 F.2d at 45.

⁷⁸ See *id.* at 41. See also 38 Fed. Reg. 6384, 6384-85 (1973).

⁷⁹ 506 F.2d at 41.

⁸⁰ See 512 F.2d at 1339-42.

⁸¹ 506 F.2d at 36.

⁸² 512 F.2d at 1339.

⁸³ See text at note 61 *supra*.

⁸⁴ See text at notes 25-27, 75-77.

⁸⁵ While the court in *Consolidated Edison* referred to "raised eyebrow techniques," 512 F.2d at 1341, it failed to specify what kind of agency action comprised this regulatory technique. It appears, however, that such techniques are similar to agency "speaking orders," differing principally with respect to the degree of discretion remaining available to regulated concerns in shaping their future activities. A "speaking order" is an order that indicates, with more or less specificity, what kind of proposal will be deemed acceptable by an agency, and allowed to go into effect without suspension. W. GELLHORNE & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS*, 685 (6th ed. 1974).

⁸⁶ See 512 F.2d at 1341-42.

⁸⁷ This argument was primarily advanced by petitioner Battle Creek Gas Co. 512 F.2d at 1345 n.76.

⁸⁸ 512 F.2d at 1345.

court's response well illustrates the expansive nature of the "attractive gap" approach to FPC regulatory authority. In developing its priority scheme based on ultimate consumer use,⁸⁹ the FPC scrutinized the use made of gas by nonjurisdictional pipeline customers. Consumers of natural gas acquire the gas either in purchases directly from the pipelines, or indirectly from a customer of the pipeline. Although the Commission has acknowledged that some gas sales to indirect consumers do not fall within its jurisdiction,⁹⁰ Order No. 467 placed all direct and indirect customers in the same priority of service category where their use of gas was comparable.⁹¹ In *Consolidated Edison* it was alleged that this arrangement was impermissible on the ground that the FPC lacked jurisdiction to prevent discrimination by pipelines between direct and indirect customers.⁹²

Congress defined the FPC's jurisdiction in section 1(b) of the Natural Gas Act.⁹³ Section 1(b) grants to the Commission jurisdiction over all sales and resales of natural gas in interstate commerce.⁹⁴ In *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*,⁹⁵ the Supreme Court delineated the scope of this jurisdictional grant:

Three things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) [the regulation of natural gas companies engaged in such transportation or sale].⁹⁶

In upholding Order No. 431 in *Louisiana Power & Light*, the Supreme Court brought FPC responsibilities in curtailment practice under the umbrella of the Commission's transportation jurisdiction.⁹⁷ In so doing, the Court acknowledged that the FPC possesses broad power to devise effective means to meet its responsibilities.⁹⁸ In light of this acknowledgment, the court in *Consolidated Edison* held that the FPC may consider end use, even by indirect customers, where such consideration is germane to the meaningful execution of the Commission's curtailment function.⁹⁹ Thus, while the Commission may not exercise jurisdiction over certain customers, scrutiny of the

⁸⁹ *Id.*

⁹⁰ 38 Fed. Reg. 1503, 1504 (1973).

⁹¹ 18 C.F.R. § 2.78(a)(3). The Commission's rationale for this action was that customers with similar usages for the fuels should be accorded the same treatment to avoid any undue discrimination or preference among them. 38 Fed. Reg. 1503, 1504 (1973).

⁹² 512 F.2d at 1345.

⁹³ 15 U.S.C. § 717(b) (1970).

⁹⁴ See *id.* See note 49 *supra* for text of statute.

⁹⁵ 332 U.S. 507 (1947).

⁹⁶ *Id.* at 516.

⁹⁷ 406 U.S. at 642.

⁹⁸ *Id.*

⁹⁹ 512 F.2d at 1345-46.

use of gas by such customers is not precluded, since it is a necessary adjunct to the FPC's power to fashion effective curtailment practices.¹⁰⁰

This expansion of the Commission's powers by the court in *Consolidated Edison* is consistent with the Supreme Court's interpretation of congressional intent in framing the FPC's duties under the Natural Gas Act; namely, that there be no "gaps" in federal regulatory power through which the public interest could be subverted.¹⁰¹ Thus, where a court finds a particular duty for the FPC set forth by Congress under the Natural Gas Act, that court is, in effect, required to find that Congress has also delegated to the Commission ample power to discharge that duty, even though such authority may not be explicit.¹⁰² The District of Columbia Circuit's holding in *Consolidated Edison*—that the Commission may consider the end use of non-jurisdictional indirect customers—is indicative of the operative impact of the Supreme Court's "attractive gap" rationale in the very real setting of the current natural gas shortage. It appears, then, that the FPC has ample authority to evaluate all factors bearing on the public interest in its curtailment practices, where such consideration facilitates the discharge of Commission responsibilities under the Natural Gas Act.¹⁰³

II. SUMMARY ACTION UNDER SECTION 4: EVALUATION AND A PROPOSAL FOR IMPROVEMENT

A. Challenges to FPC Actions under Section 4

Having acknowledged FPC power to implement 467 type orders in general, the court in *Consolidated Edison* turned to the question of whether the FPC had properly implemented 467-type plans under the summary procedures provided in section 4¹⁰⁴ rather than under the more extensive procedures of section 5¹⁰⁵ of the Natural Gas Act.¹⁰⁶ Sections 4 and 5 are the principal procedural mechanisms through which the Commission fashions curtailment practices. These

¹⁰⁰ See *id.*

¹⁰¹ See text at notes 53-55 *supra*.

¹⁰² See *Louisiana Power & Light*, 406 U.S. at 631-42; *Transcontinental Gas*, 365 U.S. at 19-20; *cf.* *Continental Oil Co. v. FPC*, 519 F.2d 31, 33-34 (5th Cir. 1975); *Consolidated Edison*, 512 F.2d at 1346 n.79.

¹⁰³ See 512 F.2d at 1345-46. In *Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975), the court held that the Commission could require regulated pipeline companies to furnish information about their nonregulable intrastate activity to facilitate the discharge of the agency's curtailment responsibilities. *Id.* at 32. *Cf.* *Transcontinental Gas*, 365 U.S. at 8, where the Supreme Court acknowledged that under section 7(a) of the Natural Gas Act, 15 U.S.C. § 717(b) (1970) which grants the FPC the power to issue certificates of convenience and necessity, the Commission has the authority "to evaluate all factors bearing on the public interest" (emphasis in original).

¹⁰⁴ 15 U.S.C. § 717c (1970).

¹⁰⁵ 15 U.S.C. § 717d (1970).

¹⁰⁶ See 512 F.2d at 1338-39.

mechanisms were not, however, designed with curtailment regulation in mind.¹⁰⁷ They were designed to give the Commission sufficient power to check the threats of monopolistic market control by a "handful of holding companies."¹⁰⁸ As a result, Congress specifically granted the FPC in these procedural sections broad powers "to protect consumers against exploitation at the hands of natural gas companies."¹⁰⁹ The central purpose behind the enactment of the Natural Gas Act, then, was not curtailment regulation; rather, it was one of consumer protection through the guarantee of just and reasonable gas prices to the public.¹¹⁰

Section 4 of the Natural Gas Act provides for just and reasonable rates through *industry* rate-making by requiring natural gas companies to file new schedules for any "rate, charge, classification or service" with the FPC thirty days prior to their effective date.¹¹¹ Absent a challenge by the Commission, such schedules become effective automatically after the expiration of a thirty day period.¹¹² If the Commission objects, it is empowered to suspend the proposed schedule for an additional five months.¹¹³ During this period, hearings are held to determine whether the rates are just and reasonable, with the company bearing the burden of proof.¹¹⁴

Section 5, on the other hand, is the procedural mechanism through which *agency* rate-making is to be accomplished. Under this section, the FPC is granted the discretion to hold investigatory hearings to determine whether an existing or proposed schedule is "unjust, unreasonable, unduly discriminatory, or preferential."¹¹⁵ Such hearings may also be granted upon complaint by pipeline customers.¹¹⁶ In section 5 proceedings, "the FPC must afford interested parties a full hearing on the reasonableness of the tariff schedule before taking any remedial action."¹¹⁷ In contrast to section 4, if a schedule is found to be unlawful under this standard, the Commission may impose a reasonable and fair alternative.¹¹⁸

In *Consolidated Edison*, the basic issue was whether implementation of 467-type interim curtailment plans under section 4 actually

¹⁰⁷ Comment, *Conservation and the Commission: The Growth of Regulation of the End Use of Natural Gas by the FPC*, 3 ENV. AFF. 527, 530 (1974).

¹⁰⁸ See *Hope Natural Gas*, 320 U.S. at 610-11.

¹⁰⁹ *Id.* at 610.

¹¹⁰ See, *Louisiana Power & Light*, 406 U.S. at 638; *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 143 (1960). See generally Dellane, *Highlights of Legislative History of the Federal Power Act of 1935 and The Natural Gas Act of 1938*, 14 GEO. WASH. L. REV. 30 (1945).

¹¹¹ 15 U.S.C. § 717c(d) (1970).

¹¹² *Id.*

¹¹³ 15 U.S.C. § 717c(e) (1970).

¹¹⁴ *Id.*

¹¹⁵ 15 U.S.C. § 717d(a) (1970).

¹¹⁶ *Id.*

¹¹⁷ *Louisiana Power & Light*, 406 U.S. at 643.

¹¹⁸ Compare Section 4 of the Natural Gas Act, 15 U.S.C. § 717c (1970), with Section 5 of that Act, 15 U.S.C. § 717d(a) (1970).

NOTES

constituted agency rather than industry rate-making.¹¹⁹ Petitioners alleged that these plans had not been voluntarily filed by the pipelines, but were the result of strong suggestion—de facto rate-making—by the FPC.¹²⁰ They argued that Order No. 467—nominally a nonbinding policy directive—had been treated by the Commission as a substantive rule for regulating gas allocation.¹²¹ Petitioners in this respect pointed to the coercive language in Order No. 467-B itself,¹²² as well as to admonitions voiced by the Commission in orders denying requested extensions of operative non-467 schedules.¹²³ They contended that the Commission's alleged practice of giving summary effectuation only to 467-type plans amounted to an agency-imposed change in pipeline filings, from the non-467 plans then in operation. This practice was illegal, petitioners argued, since the FPC cannot impose a change in existing tariff schedules without complying with the hearing requirements contained in section 5 of the Natural Gas Act.¹²⁴

According to the FPC, the purpose of Order No. 467 and supplementary amendments was merely to inform the public of those types of curtailment plans that would most likely receive Commission approval.¹²⁵ Yet, while the FPC suggested that it would remain flexible in implementing its priority of delivery policies,¹²⁶ it consistently refused at the outset to permit the extension of any interim non-467 curtailment plan negotiated by pipelines and their customers.¹²⁷ Nevertheless, in *Consolidated Edison*, the Commission maintained that its actions in implementing Order No. 467 did not constitute de facto rate-making.¹²⁸

Petitioner's section 5 claim was advanced in the face of *Louisiana Power & Light*, where the Supreme Court upheld Order No. 431's reliance on pipeline-initiated filings under section 4.¹²⁹ In *Louisiana Power & Light*, the Court endorsed the application of section 4 procedures in situations requiring prompt Commission action, to avoid the disadvantageous effects of any delay that might attend the hearings

¹¹⁹ See 512 F.2d at 1339.

¹²⁰ *Id.* at 1339-40.

¹²¹ See *id.*

¹²² See 38 Fed. Reg. 6384, 6385 (1973), where the FPC indicated that filings not in accord with the terms of 467 would be suspended and investigated and subject to final disapproval as "preferential or discriminatory."

¹²³ See *Consolidated Edison*, 512 F.2d at 1340 & nn.39, 40.

¹²⁴ *Id.* at 1338-39.

¹²⁵ 38 Fed. Reg. 6384, 6385 (1973).

¹²⁶ See *id.*

¹²⁷ Muys, *FPC Allocation of Natural Gas Supply Shortages: Prorating, Priorities and Perplexity*, 20 ROCKY MT. M. L. INST. 301, 351 (1975). However, from subsequent showings made by the FPC in *Consolidated Edison* demonstrating acceptance of some pro rata interim curtailment plans, it appears that the Commission demonstrated at least a limited flexibility as promised in Order No. 467-A. See *Consolidated Edison*, 512 F.2d at 1341 n.47; Muys, *supra*, at 351-54.

¹²⁸ See 512 F.2d at 1342.

¹²⁹ See 406 U.S. at 644-47.

required under section 5.¹³⁰ Petitioners in *Consolidated Edison* contested the FPC's initiatives in implementing Order No. 467 under section 4, however, in the belief that the District of Columbia Circuit's decision in *Moss v. CAB*¹³¹ provided a basis for their claim.¹³² Specifically, they alleged that the FPC's actions with respect to 467 were analogous to the Civil Aeronautics Board's (CAB) "speaking order"¹³³ which the court in *Moss*, under a similar statutory scheme,¹³⁴ had invalidated as illegal agency rather than legitimate industry rate-making.¹³⁵

In *Moss*, a CAB order had outlined a price formula for domestic airlines.¹³⁶ The CAB subsequently permitted tariff schedules embodying this formula to be filed without suspension, while making it clear that only rates conforming to its model would be accepted.¹³⁷ As the carriers were in urgent need of an immediate increase in revenue, each filed fare increases consistent with the Board's formula.¹³⁸ The court held that tariffs filed pursuant to the CAB's "speaking order" were unlawful.¹³⁹ It found that the Board's tariff acceptance practice amounted to agency rate-making, since the airlines had no option to choose among alternatives in fashioning their rates.¹⁴⁰ The court concluded¹⁴¹ that the CAB, in implementing its formula as a substantive order, had failed to comply with the public notice and hearing requirements of the Federal Aviation Act.¹⁴²

The court in *Consolidated Edison* found *Moss* inapposite.¹⁴³ In contrast to *Moss*, where the discretion of the airlines was "so circumscribed as to have been almost nonexistent,"¹⁴⁴ there was considerable evidence in *Consolidated Edison* that the pipelines continued to possess a high degree of independence and flexibility in fashioning

¹³⁰ *Id.* at 645.

¹³¹ 430 F.2d 891 (D.C. Cir. 1970).

¹³² 512 F.2d at 1339.

¹³³ The CAB's actions in *Moss* have been characterized as illustrative of an agency "speaking order" in W. GELLHORNE & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS*, 685-90 (6th ed. 1974), and in Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 42, 77 (1971).

¹³⁴ As acknowledged by the court in *Consolidated Edison*, 512 F.2d at 1339, the procedures for summary agency action set forth in the statutes involved in *Moss* and *Consolidated Edison* are very similar. Compare Federal Aviation Act, 49 U.S.C. § 1482(d)-(e) (1970), with Natural Gas Act, 15 U.S.C. §§ 717c-d (1970).

¹³⁵ 430 F.2d at 900-02.

¹³⁶ See *id.* at 896 n.25, 897 n.26 for a description of the CAB formula.

¹³⁷ *Id.* at 896-97.

¹³⁸ *Id.* at 895.

¹³⁹ *Id.* at 902.

¹⁴⁰ *Id.* at 897.

¹⁴¹ *Id.* at 900.

¹⁴² 49 U.S.C. § 1482(d)-(e) (1970).

¹⁴³ 512 F.2d at 1342.

¹⁴⁴ *National Ass'n of Motor Bus Carriers v. FCC*, 460 F.2d 561, 567 (2d Cir. 1972). See *Moss*, 430 F.2d at 897.

curtailment plans despite the existence of Order No. 467.¹⁴⁵ The court found that several major pipelines had either non-467 type plans in operation, or plans which, while in substantial compliance with Order No. 467, included significant modifications of the end use priority scheme.¹⁴⁶ The crucial fact distinguishing *Moss*, then, was the practical scope of discretion retained by the pipelines in fashioning their curtailment plans.

This factual distinction was buttressed by two additional findings. First, Order No. 467 did not cover all aspects of curtailment policy; indeed, significant elements of petitioner's own filings were outside the purview of 467.¹⁴⁷ In *Moss*, on the other hand, the CAB's rate-making formula had been all-encompassing, since it covered in detail all aspects of airline pricing.¹⁴⁸ Second, the court in *Consolidated Edison* did not find abuses of the sort faced by the court in *Moss*,¹⁴⁹ where the agency's price formula seemed to be unduly oriented toward the interests of the industry it was designed to regulate, at the expense of consumers.¹⁵⁰ In contrast, the court's analysis in *Consolidated Edison* revealed that the FPC's selection of end use priorities did not favor the regulated concerns.¹⁵¹ An additional aspect of this distinction was that in *Moss*, the CAB's rate formula appeared to be the product of "behind-the-scenes" bartering between the agency and the airlines.¹⁵² Also, tariffs filed in conformity with the formula were not subject to investigation after they became effective.¹⁵³ As such, public scrutiny of those tariffs had been effectively circumscribed by the CAB. Order No. 467, however, envisions further investigatory proceedings by the FPC,¹⁵⁴ and extensive hearings on the pipeline filings were in fact held in the present cases.¹⁵⁵ While the FPC's choice of summary curtailment procedures under section 4, in effect, favored "rapid implementation over prior hearing, [it did not attempt] to avoid public scrutiny entirely."¹⁵⁶ Accordingly, the court in *Consolidated Edison* concluded that the FPC had properly exercised its authority to shape pipeline curtailment practices, and petitioners' *Moss* claim failed on the merits.¹⁵⁷

¹⁴⁵ 512 F.2d at 1341.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* "These included a ceiling on [the] demands of priority customers based on contract requirements . . . and the definition of central terms such as 'gas supply deficiency.'" *Id.*

¹⁴⁸ 430 F.2d at 900-02.

¹⁴⁹ 512 F.2d at 1342.

¹⁵⁰ See *Moss*, 430 F.2d at 901-02.

¹⁵¹ See 512 F.2d at 1342.

¹⁵² See *Moss*, 430 F.2d at 900. In *Consolidated Edison*, the court characterized the agency-oriented ratemaking in *Moss* as "behind the scenes" bartering. 512 F.2d at 1342.

¹⁵³ 430 F.2d at 900.

¹⁵⁴ 38 Fed. Reg. 6384, 6385 (1973).

¹⁵⁵ 512 F.2d at 1338, 1342.

¹⁵⁶ *Id.* at 1342.

¹⁵⁷ See *id.* at 1342.

The court in *Consolidated Edison* did acknowledge, however, that FPC pressure was "clearly on" the pipelines to file curtailment schedules conforming to published priorities.¹⁵⁸ While the amount and type of pressure generated by 467 was not found to be so great as to constitute an illegal "speaking order" of the sort condemned in *Moss*, the court did recognize this pressure as a manifestation of agency regulation through "raised eyebrow techniques."¹⁵⁹ In upholding the validity of such techniques, which combine both agency policy-making and adjudicative functions, the District of Columbia Circuit has thus endorsed the Commission's summary exercise of regulatory power over the allocation of a major energy resource in a period of serious national shortage. In so doing, the court has permitted the Commission to implement its regulatory authority in a manner which in less exigent circumstances would probably have been found to be invalid.¹⁶⁰ The court's conclusion that the Commission did not exceed its statutory authority in implementing the end use priorities of Order No. 467 under section 4 rather than section 5 proceedings is consistent with the Supreme Court's observation in *Louisiana Power & Light* that a shortage of marked proportions should properly be considered by the courts in defining the FPC's discretion to choose among available procedures in its curtailment practices.¹⁶¹ The court's decision in *Consolidated Edison* on the *Moss* claim therefore favors expediency in the continued expansion of FPC influence over the curtailment process under the exigent circumstances of the current natural gas shortage.¹⁶² The expanding role of the Commission which emerges is that of a caretaker safeguarding the public interest, which might otherwise be subverted if allocation decisions were left to the dictates of private economic interests.¹⁶³

In *Consolidated Edison*, petitioner mounted a final challenge to Commission practice under section 4 which was a more modest formulation of the *Moss* claim. They contended that even though the FPC need not hold full-blown hearings under section 5, the Commission was obligated to undertake a threshold investigation for weaknesses or inequities in 467-type filings prior to their being effectuated automatically under the thirty day provision in section 4.¹⁶⁴ A similar argument had been advanced and rejected in *Atlanta Gas Light Co. v. FPC*,¹⁶⁵ where the Fifth Circuit held that the FPC was not required to conduct a hearing before giving interim approval to a pipeline curtailment plan filed pursuant to Order No. 431.¹⁶⁶ The court in *Atlanta*

¹⁵⁸ *Id.* at 1341.

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* at 1342; cf. *American Smelting*, 494 F.2d at 933.

¹⁶¹ See discussion in text at note 63 *supra*.

¹⁶² See also *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 148-49 (5th Cir. 1973).

¹⁶³ See 512 F.2d at 1342.

¹⁶⁴ 512 F.2d at 1344.

¹⁶⁵ 476 F.2d 142 (5th Cir. 1973).

¹⁶⁶ *Id.* at 149.

NOTES

Gas emphasized that the use of section 4 summary procedures facilitated effective agency action in meeting the exigencies presented by the natural gas shortage.¹⁶⁷ In light of this general state of "emergency," the Fifth Circuit construed the *Louisiana Power & Light* decision as encouraging the Commission, in particular cases, "to act 'now' and find facts later."¹⁶⁸

The court in *Consolidated Edison* similarly rejected petitioners' contention that the Commission's action under section 4 was arbitrary for want of a preliminary finding that the 467-type schedules were non-discriminatory.¹⁶⁹ The District of Columbia Circuit followed the court in *Atlanta Gas* and noted that section 4 does not explicitly require the Commission to undertake a preliminary review before allowing pipeline filings to take effect.¹⁷⁰ Moreover, the court in *Consolidated Edison* refused to infer such a duty under emergency conditions.¹⁷¹ By refusing to encumber section 4 proceedings with a preliminary finding requirement, the District of Columbia Circuit appears to have construed the Court's decision in *Louisiana Power & Light* as a broad mandate, granting the FPC maximum latitude for shaping interim curtailment practices.¹⁷²

Thus the court in *Consolidated Edison* rejected both of petitioners' main arguments;¹⁷³ namely, that the FPC should have implemented Order No. 467 under section 5, or alternatively, that if the Commission was permitted to proceed under section 4, it should have held a threshold investigation before giving automatic effectuation to the proposed schedules. This judicial deference to FPC summary action under section 4 proceedings was not, however, granted without some uneasiness.¹⁷⁴ The court recognized that while due process requirements could be satisfied by a subsequent hearing,¹⁷⁵ irrevocable effects were likely to flow from the implementation of curtailment plans on an interim basis.¹⁷⁶ Coupled with this recognition was an awareness that utilization of section 4 procedures for curtailment is heavily de-

¹⁶⁷ *Id.* at 148-49.

¹⁶⁸ *Id.* at 148.

¹⁶⁹ 512 F.2d at 1344-45.

¹⁷⁰ *See id.* at 1344.

¹⁷¹ *Id.* n.71.

¹⁷² *Id.*

¹⁷³ *Id.* at 1342, 1344-45.

¹⁷⁴ *Id.* at 1342-43, 1344-45.

¹⁷⁵ *Id.* at 1344 n.71.

¹⁷⁶ *Id.* at 1343.

Curtailments have resulted in severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with resultant upward price pressures.

38 Fed. Reg. 27606 (1973). For further discussion of the irrevocable effects likely to arise from curtailment, with specific reference to the 1973-74 winter heating season, *see id.* at 27607-10.

pendent upon "each pipeline's unique knowledge of its customers' needs, [and] ability to substitute other fuel sources. . . ." ¹⁷⁷ The District of Columbia Circuit noted with concern that where a pipeline's plan is shaped, at least in part, by Commission policy, "that unique knowledge may play a diminished role," ¹⁷⁸ with the risk of customer injury increased according. In an effort to forestall this possibility of irreparable injury, the court in *Consolidated Edison* placed heavy reliance on the Commission's "conscientious discharge of its oversight function" in monitoring interim curtailment plans in operation. ¹⁷⁹

While judicial reliance on continued self-monitoring activity by the FPC does not eliminate the policing function of the courts contemplated in *Pacific Gas*, ¹⁸⁰ it does represent a substantial retreat from judicial scrutiny of agency abuses in the curtailment process during periods of shortage. Judicial deference to such agency action springs, in part, out of a desire to avoid the "kind of ad hoc second guessing that would demoralize conscientious agency officials and undermine the reliability of agency judgments." ¹⁸¹ In any event, the courts have now upheld the Commission's promulgation, ¹⁸² implementation, ¹⁸³ and application of Order No. 467. ¹⁸⁴ There would seem, therefore, to be little likelihood that Commission curtailment practice under that order, with the possible exception of its application, ¹⁸⁵ will continue to command judicial scrutiny. ¹⁸⁶

¹⁷⁷ 512 F.2d at 1343, quoting *Louisiana Power & Light*, 406 U.S. at 645.

¹⁷⁸ 512 F.2d at 1342-43.

¹⁷⁹ *Id.* at 1343.

¹⁸⁰ See text at note 79 *supra*.

¹⁸¹ Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 *Ad. L. Rev.* 199, 207 (1974).

¹⁸² *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 45 (D.C. Cir. 1974).

¹⁸³ *Consolidated Edison*, 512 F.2d at 1344-45.

¹⁸⁴ *Id.* at 1342.

¹⁸⁵ *Cf. Greater Boston Television Corp. v. FCC*, 444 F.2d 841, (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1972), where the District of Columbia Circuit suggested that [i]ts supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

Id. at 851.

¹⁸⁶ Petitions for certiorari have been filed in two companion cases: *Pacific Lighting Service Co. v. FPC*, 518 F.2d 718 (9th Cir. 1975) (per curiam), *petition for cert. filed*, 44 U.S.L.W. 3132 (U.S. Sept. 5, 1975) (No. 350), and *California v. FPC*, 518 F.2d 718 (9th Cir. 1975) (per curiam), *petition for cert. filed*, 44 U.S.L.W. 3133 (U.S. Sept. 6, 1975) (No. 359). While due process considerations are applicable to Commission actions under section 4, the existence of exigent circumstances is a recognized factor in making a determination of hearing requirements. Deferral of hearings under section 4 interim actions would seem appropriate in view of emergency conditions necessitating the Commission's prompt response. It would seem unlikely, therefore, that due process challenges to section 4 summary action will prove successful. See 512 F.2d at 1344-45 n.71 and cases cited therein.

NOTES

Nevertheless, the broad latitude permitted the FPC in implementing curtailment schedules through summary proceedings is an invitation to abuse, for the risk of arbitrary action is surely increased where an agency acts without "the moderating constraint that the prospect of a prior hearing typically imposes on administrative initiatives."¹⁸⁷ The court in *Consolidated Edison* noted as an example of such agency abuse the fact that the interim plan of at least one of the pipelines involved in the case was explicitly rejected by the Commission because it did "not conform to the standards for priorities of deliveries as enunciated by Order Nos. 467, 467-A and 467-B."¹⁸⁸ This adherence to the priorities of 467 therefore suggests that the FPC, at least in one instance, did arbitrarily treat the order as a binding rule. The result of this Commission action was that the proposed curtailment plan did not receive consideration on its merits, thereby increasing the possibility of customer injury.¹⁸⁹

B. *Proposed Amendment to Section 4 Summary Action*

In seeking to facilitate Commission responses to the exigencies of the natural gas shortage, the courts have refused to encumber section 4 curtailment proceedings with a preliminary hearing requirement.¹⁹⁰ Doubtless prompt agency action during periods of shortage could be crucial to the welfare of the Nation. However, summary action in and of itself cannot substitute for effective and responsible agency action. In this respect, the "continued monitoring function" of the Commission, posited in *Consolidated Edison*¹⁹¹ as a check on its own summary action has two significant shortcomings: (1) it does not provide an effective restraint on agency misuse of summary power, since the Commission may still elect to treat Order No. 467, sub silentio, as a substantive rule in reviewing pipeline initiated curtailment filings,¹⁹² and (2) it does not sufficiently encourage development of more standardized guidelines, through which existing inequities in pipeline curtailment filings might be gradually eliminated.¹⁹³

Section 4 of the Natural Gas Act provides that a decision to *suspend* a company's filing must be accompanied "by a statement in writing of [the Commission's] reasons for such suspension."¹⁹⁴ No

¹⁸⁷ Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 28 (1972).

¹⁸⁸ 512 F.2d at 1343-44 n.67.

¹⁸⁹ See *id.* The court avoided resolution of this issue on the merits because the alternative plans no longer appeared viable. *Id.* at 1343-44.

¹⁹⁰ See, e.g., *Consolidated Edison*, 512 F.2d at 1344-45; *Atlanta Gas*, 476 F.2d at 149.

¹⁹¹ 512 F.2d at 1343.

¹⁹² See *id.* at 1344 n.67.

¹⁹³ One author suggests that inconsistent commission actions on various pipeline filings, particularly with respect to the extension of interim non-467-B curtailment plans, may afford the basis for challenges to these actions as discriminatory or arbitrary. See Muys, *FPC Allocation of Natural Gas Supply Shortages: Prorating, Priorities and Perplexity*, 20 ROCKY MT. M. L. INST. 301, 358 (1975).

¹⁹⁴ 15 U.S.C. § 717c(e) (1970).

similar requirement is placed on the Commission where it summarily *permits* an industry-proposed curtailment schedule to go into effect. The Commission practice of allowing 467-type curtailment schedules to take effect, without giving any reasons for its application in the particular circumstances, permits both the pipelines and the FPC alike to effectively treat Order No. 467 as a substantive rule.¹⁹⁵ At present, there is little impetus for a pipeline to file schedules deviating from the priorities established by Order No. 467.¹⁹⁶

Yet experience has proven that 467-type plans are not always best suited to the protection of "human needs" users,¹⁹⁷ for whose benefit the 467 allocation scheme was designed.¹⁹⁸ Where a 467 plan is filed and accepted, although unsuited to protect such high priority users in the given circumstances,¹⁹⁹ the opportunity to offset the disruptive economic impact incident to curtailment²⁰⁰ is reduced. Under existing guidelines a pipeline customer's sole recourse is to appeal for emergency relief through the hearings process.²⁰¹ During this time-consuming process,²⁰² in which the FPC may or may not perform its "oversight function," the likelihood of such disruptive economic injury increases.²⁰³

To say that section 4 summary action has pervasive implications,

¹⁹⁵ As noted in *Pacific Gas*, "[t]he pipelines sell all the gas they can during periods of shortage and consequently are not overly concerned with which customers receive it." 506 F.2d at 36. Pipelines are, however, concerned with the possibility of civil liability for failing to meet contract requirements. The court in *Consolidated Edison* recognized that "pipelines may reasonably estimate their risks to be less if they curtail under a plan which is likely to be upheld by the FPC, rather than a plan which is likely to be rejected as unlawful and replaced with another." 512 F.2d at 1340. With this recognition arises the danger that the pipelines will be apt to treat Order No. 467 as a substantive rule.

The prospect of the Commission treating Order No. 467 as a substantive rule was recognized early as a result of Order No. 467-B, where the FPC voiced its general intention to accept 467-type filings, and to permit such filings to take effect without suspension. 38 Fed. Reg. 6384, 6385 (1973). That the Commission has, in fact, treated Order No. 467 as a substantive rule was acknowledged by the court in *Consolidated Edison*, 512 F.2d at 1343-44 n.67.

¹⁹⁶ See note 195 *supra*. As the Commission itself has pointed out, pipelines "undoubtedly recognize the risks attendant to curtailing under any plan which does not conform to Order No. 467-B." *Consolidated Edison*, 512 F.2d at 1340.

¹⁹⁷ See *Consolidated Edison Co. v. FPC*, 511 F.2d 372, 379-81 (D.C. Cir. 1974) (per curiam).

¹⁹⁸ See text at notes 65-66 *supra*.

¹⁹⁹ See note 197 *supra*.

²⁰⁰ See notes 176 *supra* and 203 *infra* for a description of the potential disruptive impact of curtailment upon natural gas consumers.

²⁰¹ 18 C.F.R. § 2.78(a)(4)-(b) (1975).

²⁰² Delays seem inherent in the process, as the FPC has struggled to keep up with what one author has characterized as a "deluge" of petitions for extraordinary relief. Muys, *supra* note 193, at 352.

²⁰³ Although unnecessary curtailments may be remedied by adjustments in gas allocation, other effects flowing from such action may not be so easily cured, for "in addition to its immediate effects, which may themselves be harsh, summary action often generates [unfavorable] publicity that causes damage more enduring and extensive than do the terms of the summary order itself." Freedman, *supra* note 187, at 93.

NOTES

both for the legality of conduct by the Commission and regulated pipelines,²⁰⁴ as well as for the economic dislocation of pipeline customers,²⁰⁵ is not, however, to suggest that its exercise should be subject to greater judicial scrutiny. An attempt must be made to strike a balance between the danger that summary power would be abused, or that it would wrongfully injure, and the benefit derived from it in permitting prompt FPC responses to the natural gas shortage.²⁰⁶ Such a balance may be struck, it is submitted, by providing for greater public disclosure by the Commission of the reasons behind its summary action in all section 4 curtailment proceedings.

Public scrutiny of the reasons for Commission decisions in section 4 curtailment proceedings is compelled principally by summary action's capacity to wrongfully impose serious injury.²⁰⁷ The factual basis for a particular exercise of Commission summary authority may be erroneous;²⁰⁸ or the likelihood of error may be compounded by a Commission tendency to adopt schedules that may prove, in retrospect, unnecessarily broad to protect the public interest.²⁰⁹ The bounds of error resulting from this tendency may be narrowed by public surveillance and the FPC's prompt corrective response.²¹⁰ A "policing function" performed by the private sector is especially warranted since judicial review has been largely unavailable to date.²¹¹ Disclosure, then, would serve to increase the ability of the public to discern any discrepancy between Commission premises in summarily permitting curtailment schedules to go into effect, and the actual conditions toward which those schedules are directed.²¹²

Significant benefits should flow from a requirement that the

²⁰⁴ See note 195 *supra*.

²⁰⁵ See notes 176 and 203 *supra*.

²⁰⁶ Cf. Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 40 (1971).

²⁰⁷ See notes 176, 197 and 203.

²⁰⁸ While the FPC has sought to compile and appropriately categorize reliable end use data—indeed, such a process is at the heart of its 467 curtailment policy—"[t]he control over efficient, accurate development of end-use data has been nonexistent." Muys, *supra* note 193, at 327. One author has viewed this less-than-successful Commission fact gathering process as the "Achilles heel of its program." *Id.*

²⁰⁹ See, e.g., *Consolidated Edison Co. v. FPC*, 511 F.2d 372, 379-81 (D.C. Cir. 1974) (*per curiam*).

²¹⁰ One author suggests that "an administrative agency has an obligation in fairness to hold an adjudicatory hearing promptly so that the adverse impact of its summary order on the individual will be confined to the shortest possible period." Freedman, *supra* note 187, at 52.

²¹¹ At present, considerable difficulties may be encountered in compiling a sufficient record to permit meaningful judicial review. *Louisiana v. FPC*, 503 F.2d 844, 871-72 (5th Cir. 1973); see *Pacific Gas*, 506 F.2d at 49.

²¹² Cf. *Citizens Ass'n v. Zoning Commission*, 477 F.2d 402, 408-09 (D.C. Cir. 1973) ("The articulation of reasons by an agency—for itself and for the public—does afford a safeguard against arbitrary and careless action and is apt to result in greater consistency in an agency's decision-making." *Id.* at 408.). See also *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

FPC disclose the reasons behind its summary action. First, a Commission disclosure practice would serve to check potential FPC abuse of section 4 proceedings, since the reasoning employed and adopted by it for *not* challenging pipeline curtailment filings would now be subject to public scrutiny.²¹³ By providing the public with relevant information and the criteria utilized in the decision-making process, a more complete record for review could be presented to a court examining customer petitions which sought to compel the Commission to conscientiously discharge its oversight function.²¹⁴ In addition, a reviewing court could analyze the disclosed information to ensure itself that the Commission was tailoring its actions to the proposed plan before it, instead of attempting to enforce a general rule such as 467 without any data to rationally support its application in the given circumstances.²¹⁵ The courts, then, would be better equipped to perform the "policing function" suggested in *Pacific Gas* in checking agency abuses.²¹⁶

A disclosure policy would also benefit the FPC by increasing public confidence in the Commission's curtailment practices. Such confidence in the curtailment process is essential if FPC summary action is to be perceived as legitimate, both by those who are directly affected by Commission decisions, and by the general public as well.²¹⁷

²¹³ Apart from a formal disclosure process under section 4, it is quite possible that agency memoranda of final decisions not to suspend pipeline filings would be discoverable under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970). However, the process of securing access to such documentation of agency action under the FOIA can be quite time consuming, *see* W. GELLHORNE & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 572 (6th ed. 1974), especially where a suit must be filed to compel production of required documents. In instances where exemptions are involved, as for example, the exemption for intra-agency memoranda, 5 U.S.C. § 552(b)(5) (1970), an agency may contest public disclosure. Such a process, then, is not suited to the exigencies of the gas shortage, since delay increases the prospects of irreparable injury. For this reason, a formal disclosure mechanism with respect to decisions in section 4 summary action would more effectively facilitate public scrutiny than citizen requests under the FOIA.

²¹⁴ See note 211 *supra*.

²¹⁵ *Cf.* *Louisiana v. FPC*, 503 F.2d 844, 872-73 (5th Cir. 1973).

²¹⁶ *Cf.* *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), where the Supreme Court indicated that "[j]udicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the . . . purposes for which it has chosen to act . . ." *Id.* at 792. In *Citizens Ass'n v. Zoning Commission*, 447 F.2d 402 (D.C. Cir. 1973), the court acknowledged that

[t]he case for requiring a statement of reasons from an administrative agency is a persuasive one. Those reasons may be crucial in order for the court to know what the agency has really determined, hence, what to review. Courts ought not to have to speculate as to the basis for an administrative agency's conclusions; nor can a court 'assume without explanation that proper standards are implicit in every act of agency discretion.'

And when faced with a complex problem, having widespread ramifications, like that before us today, a court should surely have the benefit of the agency's expertise.

Id. at 408.

²¹⁷ *Cf.* Boyer, *Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111, 146-50 (1972).

NOTES

For this reason, the criteria articulated by the FPC in taking summary action should be the same as those which were, in fact, employed by it in making the actual decision. This would serve to help dispel negative impressions of FPC activity, caused by procedures that have made the Commission seem increasingly remote and secretive.²¹⁸

A further benefit to be derived from Commission disclosure is that it would facilitate the refinement of FPC decision-theory²¹⁹ as experience and the public recommend.²²⁰ More standardized curtailment guidelines could then emerge from principles garnered in particular exercises of Commission summary action.²²¹ Such standardization would, in turn, promote consistency in the treatment accorded lower priority, similarly situated customers, by the pipelines in their curtailment filings.²²² In this way, inequities in proposed plans might gradually be eliminated, thereby lessening the tremendous pressure presently on the Commission to grant petitions for emergency relief.²²³ Additionally, this would ease the burden of monitoring interim plans imposed in *Consolidated Edison*,²²⁴ by mitigating the likelihood that the Commission would need to make dramatic adjustments in a pipeline's gas allocation practices. Thus, a disclosure requirement might ultimately result in increased consistency and effectiveness in the curtailment process, while preserving the Commission's ability to take prompt action during times of shortage.²²⁵ At the same time,

²¹⁸ Such agency action creates the appearance of what Senator Dirksen once called "anonymous Neros fiddling away at their own tunes." Gilliam, *Recent Developments in Regulation of Natural Gas Sales*, 19 ROCKY MT. M. L. INST. 171, 203 (1974).

²¹⁹ See Boyer, *supra* note 217, at 159.

Decision theory seeks to provide scientific methods for dealing with uncertainty. It builds upon the "subjective theory" or probability, which seeks to analyze the degree of belief that a rational, coherent decision maker would possess in varying factual circumstances, including a situation in which probabilities are continuously re-evaluated as new data becomes available.

Id. See also Cullison, *Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of the Subjective Approach*, 1 U. TOLEDO L. REV. 538, 551-53 (1969).

²²⁰ Recent FPC monitoring of alternative fuel demand and supply is illustrative of this process. See Reporting Form 69, Alternative Fuel Demand of Direct End Use Customers of Interstate Pipeline Companies due to Natural Gas Curtailments, 40 Fed. Reg. 27645, 27647-48 (1975).

²²¹ A practical method by which an administrative agency can lay a foundation for the eventual promulgation of rules or guidelines is to provide a statement of reasons whenever it takes summary action. This would permit an agency gradually to develop generalized criteria out of particular fact situations . . . [and to promulgate regulations accordingly].

Freedman, *supra* note 187, at 28. Freedman, however, acknowledged arguments contrary to this position. *Id.* at 45.

²²² With regard to an impetus to promote consistent treatment, see note 193 *supra*.

²²³ The Commission has been "deluged" with petitions for such relief. See Muys, *supra* note 193, at 352.

²²⁴ 512 F.2d at 1343.

²²⁵ The Commission would not be forced to hold a preliminary hearing under section 4, in order to acquire sufficient data to articulate its reasoning in summarily permitting a particular curtailment plan to take effect. Under the Natural Gas Act, 15

benefits derived from disclosure would complement the Commission's curtailment "oversight function" in such a way as to fill existing regulatory "gaps" which threaten the public interest; namely, the danger of agency abuse of summary action, and the problem of inequity in gas allocation among customers similarly situated.

The principal countervailing considerations to public disclosure of the FPC's reasons for summary action include: (1) the practicability of endorsing and releasing staff recommendations which may have predicated Commission action;²²⁶ (2) the practicability of preparing an independent opinion or memorandum stating reasons for permitting a curtailment schedule to take effect without objection; and (3) the extent to which preparation and issuance of reasons would delay Commission disposition of matters.²²⁷ To date, the principal concern of the judiciary has been to insure efficiency and expediency in the FPC's response to the exigencies of the natural gas shortage.²²⁸ Yet courts have also repeatedly acknowledged the need to facilitate *effective* interim action by the Commission,²²⁹ while lengthy section 5 hearings proceed on permanent curtailment plans. The effectiveness of the FPC's interim response to conditions of shortage is, however, contingent upon a balancing of efficiency considerations against the impact of summary action on social and economic interests, the adequacy of subsequent hearings or emergency relief to protect these interests, and the threat of misuse of such power. When the countervailing considerations to requiring the FPC's explanation of its summary action are balanced against benefits to be derived from such a practice, disclosure will surely emerge as ultimately serving the public interest.

It remains an open question whether the judiciary or the legisla-

U.S.C. § 717i(a) (1970) (periodic and special reports), the FPC may compel specific answers from jurisdictional pipeline companies to all questions upon which the Commission may have a need for information, and such has been the Commission's practice during the natural gas shortage. Indeed, "data verification committees [of the FPC] generally draft elaborate questionnaires which are sent to the pipeline's customers in an effort to elicit information on the most critical issues." Muys, *supra* note 193, at 329. For an exploration of problems in the end-use data collection and verification areas, see *id.* at 326-31.

²²⁶ Exemption from public disclosure of such information may be required under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)-(5) (1970). See *Continental Oil Co. v. FPC*, 519 F.2d 31, 33-36 (5th Cir. 1975) where the court held that public disclosure of information filed pursuant to an FPC order contravened exemption (b)(4) of the FOIA (confidential commercial or financial information). While FOIA exemption requirements may narrow the scope of disclosure by the FPC, they do not otherwise prevent disclosure of non-privileged reasons for agency action. See 5 U.S.C. § 552(a)-(b) (1970).

²²⁷ Cf. Committee on Informal Action of the Administrative Conference of the United States, *Guidelines for Study of Informal Action in Federal Agencies*, 24 AD. L. REV. 173, 199-200 (1972).

²²⁸ See, e.g., *Louisiana Power & Light*, 406 U.S. at 643-46; *Atlantic Gas Light*, 476 F.2d at 148-49.

²²⁹ See, e.g., *Louisiana Power & Light*, 406 U.S. at 645; *Consolidated Edison*, 512 F.2d at 1344-46; *Atlanta Gas Light*, 476 F.2d at 149.

ture is better suited and inclined to strike this balance in favor of disclosure, and thereby permit a greater participation by the public in defining what is in its own interest. In other regulatory contexts, the courts seem, in an accelerating degree, to be imposing the requirement that informal action be explained by the agency.²³⁰ Indeed, the Supreme Court has stated as a "simple but fundamental rule of administrative law" that an agency must set forth clearly the grounds on which it acts.²³¹ However, in view of the recent reluctance of courts to in any way encumber section 4 proceedings,²³² a disclosure amendment by Congress would be the likely and appropriate means by which to effectuate a change in FPC curtailment practice.²³³

III. PIPELINE LIABILITY FOR BREACH OF CONTRACT

During this period of increasing energy scarcity, the courts have moved to define the bounds of FPC curtailment authority, and the summary manner in which it is to be exercised.²³⁴ Yet the question remains as to what effect these decisions will have on the civil liability of the pipelines for their failure to supply contract requirements to their customers. One of the most persistent objections to FPC curtailment policy has been that it disrupts contractual relations.²³⁵ Decisions such as *Consolidated Edison*, affirming FPC power to summarily implement non-contractual allocation orders, raise the question of whether this disruption amounts to a supervening governmental order. Resolution of this issue will, in large part, fix the burden of and determine who may profit from the shortage of natural gas,²³⁶ since under general contract principles, a contractual duty will be discharged where performance is prevented by a supervening government regulation or administrative order.²³⁷

²³⁰ See, e.g., *Atchison v. Board of Trade*, 412 U.S. 800, 807-09 (1973) (agency's duty to explain its departure from prior norms); *Brooks v. AEC*, 476 F.2d 924, 926-27 (D.C. Cir. 1973) (per curiam) (administrative agencies must provide a statement of reasons, especially in cases where public interest demands close scrutiny of agency actions); *Citizens Ass'n v. Zoning Commission*, 477 F.2d 402, 408-09 (D.C. Cir. 1972) (requirement of reasons should not be limited to formal proceedings, but should extend to all determinations); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971) (courts should require administrative officers to articulate in as much detail as possible, standards and principles that govern their discretionary decisions touching upon fundamental personal interests of life, health and liberty).

²³¹ *Atchison v. Board of Trade*, 412 U.S. 800, 807 (1973), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

²³² See text at notes 170-72 *supra*.

²³³ For a recent listing of legislative action affecting FPC functions and jurisdiction, see 1974 FPC ANN. REP. 63-71.

²³⁴ See, e.g., *Louisiana Power & Light*, 406 U.S. 631-47; *Pacific Gas*, 506 F.2d at 40-45; *American Smelting and Refining*, 494 F.2d at 932-36; and *Atlanta Gas Light*, 476 F.2d at 148-49.

²³⁵ See *American Smelting and Refining*, 494 F.2d at 933.

²³⁶ See Note, *Liability of Natural Gas Pipeline Companies For Breach of Contract Due to FPC-Ordered Curtailment*, DUKE L. J. 867, 871 (1973).

²³⁷ See 6 A. CORBIN, CONTRACTS § 1346, at 433 (rev. ed. 1962); 6 S. WILLISTON, A

The FPC initially took the position that its curtailment orders would in all cases constitute an absolute defense on the theory of impossibility of performance. due to an intervening governmental order.²³⁸ The courts, however, have not agreed with the Commission.²³⁹ In *International Paper Co. v. FPC*,²⁴⁰ the Fifth Circuit declined to affirm Commission opinions declaring liability insulation to be an "automatic concomitant" of curtailment orders.²⁴¹ Subsequent FPC pronouncements²⁴² were shaped by Judge Brown's concurring opinion in *International Paper*, which suggested that liability would be imposed if a pipeline's need to curtail resulted from its own negligence, bad faith, or other wrongful conduct.²⁴³ While courts have continued to identify this problem of liability,²⁴⁴ the matter has not yet been fully litigated.²⁴⁵ In both *Pacific Gas* and *Consolidated Edison*, the Court of Appeals for the District of Columbia Circuit acknowledged concern of pipeline companies that withholding gas due under existing contracts may subject them to civil liability.²⁴⁶ Although the liability issue was not raised in either case, the reasoning employed by the court in upholding Order No. 467 is not without implication to a resolution of this question.

It has been suggested that determination of whether an action for breach of contract will lie, where Commission regulation has hindered performance, will depend in part upon the degree of control the FPC is held to have over the contracts.²⁴⁷ To date, curtailment has progressed along the guidelines established under Order No. 467. In upholding this order, the court in *Pacific Gas* concluded that the order was merely a statement of policy, without the "force of law."²⁴⁸ Again, in *Consolidated Edison*, the basis of the court's decision lay in the degree of practical discretion left open to the pipelines in filing their curtailment plans.²⁴⁹ The critical unresolved question emerging from cases delineating FPC summary action, then, is whether judicial emphasis on the practical alternatives open to curtailing pipelines will be sufficient to mitigate defense claims of intervening governmental

TREATISE ON THE LAW OF CONTRACTS § 1939, at 5432-34 (rev. ed. 1938); RESTATEMENT OF CONTRACTS § 458(b), at 852 (1932).

²³⁸ See *International Paper Co. v. FPC*, 476 F.2d 121,125 (5th Cir. 1973).

²³⁹ *International Paper Co. v. FPC*, 476 F.2d 121,125 (5th Cir. 1973); see *Monsanto Co. v. FPC*, 463 F.2d 799, 808 (D.C. Cir. 1972).

²⁴⁰ 476 F.2d 121 (5th Cir. 1973).

²⁴¹ *Id.* at 129; *Louisiana v. FPC*, 503 F.2d 844, 866 (5th Cir. 1974) (so construing *International Paper*).

²⁴² See, e.g., *United Gas Pipeline Co.*, 50 FPC 1348, 1368 (1973); *United Gas Pipeline Co.*, 49 FPC 1211, 1220-21 (1973).

²⁴³ 476 F.2d at 131-32 (concurring opinion).

²⁴⁴ See, e.g., *Consolidated Edison*, 512 F.2d at 1340; *Pacific Gas*, 506 F.2d at 35-36 n.8.

²⁴⁵ 512 F.2d at 1340.

²⁴⁶ See *Pacific Gas*, 506 F.2d at 35-36 n.8.; *Consolidated Edison*, 512 F.2d at 1340.

²⁴⁷ See, Note, *supra* note 237, at 871.

²⁴⁸ 506 F.2d at 42-43.

²⁴⁹ See 512 F.2d at 1341-42.

NOTES

order. Final resolution of this question will depend upon a myriad of factors,²⁵⁰ and there is no real basis for forecasting an answer at this time. Nevertheless, two approaches now appear to be open to customers seeking damages²⁵¹ from pipelines failing to meet contract requirements: (1) pipelines will continue to be vulnerable to arguments based on their own complicity in necessitating curtailment;²⁵² and (2) rationales employed by the courts in upholding summary section 4 proceedings appear to have eroded pipeline defenses based on "intervening governmental order."²⁵³ With the question of who shall receive the available supply of natural gas virtually resolved,²⁵⁴ the next curtailment question for the courts will in all likelihood be, "who shall pay for it?"²⁵⁵

IV. CONCLUSION

As this country moves from a posture of energy abundance to one of relative scarcity, discussion over the distribution of existing resources permeates both the private and public sectors. Even as the debate continues, the decreasing natural gas supply has compelled an immediate response by the Federal Power Commission, which has, as a result, employed summary procedures for curtailment purposes. Procedural mechanisms originally designed to insure competitive market conditions have been utilized in meeting the exigencies of our era of shortage. This transformation in function has been fully endorsed by the courts.²⁵⁶ Yet, while expediting Commission use of summary power, the judiciary is now voicing an increased concern over the danger of irreparable injury incident to such practice.²⁵⁷

In upholding FPC summary action in *Consolidated Edison*, the District of Columbia Circuit charged the Commission with the responsibility to mitigate the threat of economic hardship incurred in the curtailment process.²⁵⁸ It is submitted that solitary reliance on the

²⁵⁰ For a brief discussion of the interests to be balanced, see Note, *supra* note 237, at 893-96; Comment, *FPC Natural Gas Allocation: Curtailment in Context*, 50 TEXAS L. REV. 1370, 1403-04 (1972).

²⁵¹ Damages might include extra substitute fuel costs and expenses incident to the location of such fuel; expenses involved in accommodating heating processes to burning fuels other than natural gas; and potentially special damages, subject of course to general contract law governing such awards. See *Consolidated Edison*, 512 F.2d at 1343; *Mississippi Public Serv. Comm'n v. FPC*, 522 F.2d 1345, 1347-50 (5th Cir. 1975).

²⁵² *International Paper*, 476 F.2d at 131-32 (concurring opinion).

²⁵³ See text at notes 248-49 *supra*.

²⁵⁴ See text at notes 182-86 and note 186 *supra*.

²⁵⁵ See e.g., *Mississippi Public Serv. Comm'n v. FPC*, 522 F.2d 1345 (5th Cir. 1975) (The imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce.).

²⁵⁶ See cases cited at note 234 *supra*.

²⁵⁷ *Consolidated Edison*, 512 F.2d at 1342-43.

²⁵⁸ *Id.* at 1343.

FPC's "continued monitoring function" is both inappropriate and insufficient to provide an effective check against dangers associated with summary actions. Increased public scrutiny of such Commission action is suggested, facilitated through disclosure of the FPC's reasons for summarily permitting pipeline curtailment plans to take effect without challenge. At this juncture, guidelines to FPC summary action have not been fully developed. The need for formulation of such guidelines, either by the legislature or by the courts, is imperative if sensible and fair domestic energy policy is to prevail.

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