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ENFORCEMENT POLICIES AND PROCEDURES OF THE FEDERAL ENERGY REGULATORY COMMISSION

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and
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I. INTRODUCTION

On February 25, 1980, the Federal Energy Regulatory Commission (FERC or Commission)[1] named Theodore Sonde Director of its Office of Enforcement.[2] The appointment of Sonde to head the enforcement arm of the federal agency responsible for regulating the natural gas industry in the United States represents the latest in a series of moves by FERC to bolster its enforcement efforts. Prior to assuming his responsibilities at the Commission, Sonde had been associate director of the Securities and Exchange Commission's ("SEC") Office of Enforcement. Sonde gained extensive litigation experience at the SEC. He represented the government in prosecuting a number of cases involving charges against lawyers and accountants in addition to his general enforcement duties.

In announcing Sonde's selection, FERC Chairman Charles B. Curtis said:

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1. On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1978 pamph.) and Exec. Order No. 12,009, 42 Fed. Reg. 46,267 (September 15, 1977), the Federal Power Commission ceased to exist, and its functions and regulatory responsibilities were transferred to the Secretary of Energy and to the Federal Energy Regulatory Commission, an independent commission within the Department of Energy. With respect to all actions taken prior to October 1, 1977, "Commission" refers to the Federal Power Commission. With respect to all actions taken on or after October 1, 1977, "Commission" refers to the Federal Energy Regulatory Commission (FERC).

2. FERC, News Release No. FE-797 (February 25, 1980).

> Mr. Sonde's appointment is a major step forward for the FERC's Office of Enforcement. The Commission is dedicated to vigorously administering and enforcing the laws for which we are responsible. Mr. Sonde's excellent legal and management skills, combined with the existing talent in the Office of Enforcement, will give the FERC the capability to fully protect the interests of the public.[3]

Chairman Curtis' comments serve to emphasize the Commission's commitment to pursuing its enforcement responsibilities. Such has not always been the case.

Traditionally, the Commission enforced the statutes and the regulations under its purview in an irresolute fashion. In fact, the Commission itself described its enforcement efforts as "virtual nullities."[4] Since October of 1977, however, FERC has evidenced a growing enthusiasm for exercising its enforcement authority. The period from October of 1977 to the present has been a watershed for federal regulation of the natural gas industry.

This period is significant for three principal reasons. First, on October 1, 1977, Congress enacted the Department of Energy Reorganization Act (DOE Reorganization Act).[5] This act transformed the existing Federal Power Commission (FPC) into FERC and vested FERC with most of the powers which the FPC possessed. In addition, the DOE Reorganization Act transferred to FERC the Interstate Commerce Commission's (ICC) authority over oil pipeline rates and valuation. The consequence of the DOE Reorganization Act was to consolidate in FERC diverse powers of enforcement over various segments of the oil and natural gas industries.

The past two and one-half years are also significant as a result of a concentration of regulatory responsibility at FERC. In November of 1977, the Commission established an Office of Enforcement to seek compliance with its newly expanded powers.[6] For the first time in its existence, FERC had a specific internal department to perform enforcement functions. As a consequence of the Commission's more deter-

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3. *Id.*

4. Tenneco, Inc., 17 FED. POWER SERV. 5-1013, 5-1021 (June 13, 1979) (Opinion No. 41, Nos. CI77-298, IN79-3).

5. 42 U.S.C. § 7101-7352 (Supp. I 1977).

6. The Commission released an organization chart on November 11, 1977 which included the new Office of Enforcement. The chart described the Office of Enforcement as responsible for (1) administrative proceedings to assure Commission authorized compliance with and enforcement of statutes and FERC rules, orders and regulations; (2) judicial enforcement litigation with General Counsel approval; and (3) special investigations and examinations.

mined enforcement attitude, the Office of Enforcement was established "[f]or the purpose of early warning and rapid correction."[7] The creation of the Office of Enforcement and the promulgation of a series of enforcement regulations in 1978 breathed new life into the Commission's enforcement programs. By mid-1978, the Commission clearly had embarked on a new, more zealous course of enforcement under the Natural Gas Act of 1935 (NGA).[8]

The final principal event which makes the period following October, 1977, a watershed, occurred with enactment of President Carter's Natural Gas Policy Act on November 9, 1978 (NGPA).[9] A new era had emerged in the federal control of the natural gas industry. The NGPA involved gas producers and gas purchasers in a massive struggle to comply with the new law's requirements as well as with a mystifying myriad of rules and regulations spawned by FERC. On the administrative side, the Commission mustered its forces in an attempt to grapple with the burdens imposed on it by the NGPA. One of the most important and least defined burdens is that of enforcement.

This article will consider the makeup of the Office of Enforcement itself and will analyze its authority under the NGPA and the Commission's regulations implementing the statute.

II. THE OFFICE OF ENFORCEMENT

Under its new director, the Office of Enforcement has a force of approximately fifty people, including more than thirty attorneys. Nearly eighty percent of the enforcement personnel are assigned to natural gas matters since this area is the primary concern of the staff under the NGA and the NGPA.

The brief history of the Office of Enforcement has been stormy. Sheila Hollis was tapped as the first director of the Office of Enforcement when it was established in 1977. Faced with monumental organizational problems, Hollis created an enforcement structure, staffed the Enforcement Office, began work on various enforcement regulations, and, perhaps most importantly, fostered a new attitude toward enforcement at the Commission.

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7. Texaco, Inc.-Sabine Pipeline Co., CP77-304 and CP64-67 (February 10, 1978). *See also* Tenneco, Inc., 17 FED. POWER SERV. at 5-1022, where the Commission said the Office of Enforcement was created "[t]o give the public that 'active and affirmative protection' " called for in Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

8. NGA, §§ 1-24, 15 U.S.C. §§ 717-717z (1976 & Supp. II 1978).

9. 15 U.S.C. §§ 3301-3432 (Supp. II 1978).

A. *Natural Gas Act Enforcement Activities*

Under the NGA, FERC's approach to enforcement had been a passive one. The NGA provides the Commission with the choice of enforcing its provisions by designing administrative remedies,[10] by seeking injunctive relief in federal district court,[11] or by referring the matter to the Department of Justice for possible criminal prosecution.[12] Congress also established in the NGA general penalties for violations of its provisions or of Commission rules, regulations, or orders.[13] A willful and knowing standard is prescribed by the NGA against which to judge potential criminal violations.[14]

Despite this panoply of enforcement options, the Commission traditionally demonstrated a decided preference for fashioning its own sanctions,[15] rather than referring violations of the NGA to the Department of Justice for possible criminal action.[16] Although the Commission was vested with comprehensive powers to support enforcement actions,[17] the staff tended to carry out investigations on an ad hoc basis,[18] and the Commission ordered a show cause proceeding when it suspected a regulated company of violating the NGA. The Commission recently has criticized this process as "overjudicialization" of administrative processes, saying FERC had become "a kind of utility court that devoted itself to the passive decision of cases" rather than

10. NGA, § 16, 15 U.S.C. § 7170 (1976). *See also* Mesa Petroleum Co. v. FPC, 441 F.2d 182 (5th Cir. 1971), where the court construed section 16 as giving the Commission power to order refunds.

11. § 20(a), 15 U.S.C. § 717s (1976).

12. *Id.*

13. *Id.* § 21, 15 U.S.C. § 717t (1976).

14. *Id.*

15. *See, e.g.*, Jupiter Corp. v. FPC, 424 F.2d 783 (D.C. Cir. 1969), where, in a contract dispute, a pipeline company refused to pay a seller the Commission-ordered rate. The circuit court upheld the Commission's right to order the pipeline's customer to pay the producer directly. The court said:

> [T]he remedy chosen is 'somewhat unusual,' but we find that in the circumstances of this case, the order was reasonably calculated to prevent further aggregation of sums owed to [the producer] under the outstanding orders, and conformed to the purposes of the Act by enforcing the lawful filed rate as to all parties.

Id. at 792.

16. During the entire period from 1938 until 1978, the Commission referred only one case to the Department of Justice for possible prosecution. Two cases have been referred by the Commission since 1978. All of these cases were referred on a confidential basis.

17. The Commission receives broad investigative power from sections 5(b), 6(a) and 14(a), 15 U.S.C. §§ 717d, 717e, 717m (1976), of the NGA. Also, section 307(a) of the Federal Power Act, 16 U.S.C. § 825f (1976), and section 12(i) of the Interstate Commerce Act, 49 U.S.C.A. § 12 (West Supp. 1979), provides a basis for the Commission's investigation activities.

18. Rules Relating to Investigations, 15 FED. POWER SERV. 5-46, 5-47 (June 14, 1978) (Order No. 8, No. RM78-15); *see*, discussion in text at notes 107-20 *infra*.

"an aggressive guardian of the public interest."[19]

Black Marlin Pipeline Co.[20] represents an example of the Commission's traditional *modus operandi* in response to a suspected violation. The case began in 1974, when the Black Marlin Pipeline Company filed an application with the Commission for authority to operate previously constructed facilities and to construct new facilities. Thereafter, the Commission suspected that Black Marlin was transporting gas which was not covered by a certificate. Two years later, the Commission ordered a formal hearing before an administrative law judge in which Black Marlin was to show cause why it was not in violation of the NGA.[21]

The administrative law judge issued his opinion in which he found that Black Marlin had willfully and knowingly violated Section 7(c) of the NGA.[22] He ordered Black Marlin to cease further transportation and ordered the case referred to the Justice Department for possible criminal prosecution.[23]

The Commission, *thirteen* months later, affirmed the judge's findings but chose *not* to refer the case for criminal prosecution.[24] Instead, the Commission took the position that requiring repayment of like quantities of the gas illegally transported was a more appropriate solution. The Commission referred the case to the administrative law judge to determine the proper terms of the repayment. By remanding, the Commission demonstrated reluctance to design the appropriate sanction itself, which may explain why the case has not yet reached final resolution.[25]

The Commission occasionally has demonstrated an inclination toward broadening its compliance efforts. For instance, in 1976, the

19. Tenneco, Inc., 17 FED. POWER SERV. at 5-1021.

20. Order Requiring Respondents and Applicants to Show Cause and Setting Formal Hearing, 9 FED. POWER SERV. 5-834 (June 7, 1976) (No. CP75-93); Order Denying Motion for Severance and Clarifying Order, No. CP75-93 (August 26, 1976).

21. *Id.* No explanation for the delay in ordering a hearing was given by the Commission. The Commission itself did not conduct an investigation.

22. Black Marlin Pipeline Co., Administrative Law Judge Initial Decision, 15 FED. POWER SERV. 5-452, 5-478 (June 2, 1977) (No. CP75-93) [hereinafter cited as Black Marlin, Initial Decision]. Section 7(c), 15 U.S.C. § 717f(c) (1)(A) (1976), provides that no natural gas company under the Commission's jurisdiction shall engage in the transportation or sale of natural gas without a certificate of public convenience and necessity issued by the Commission.

23. Black Marlin, Initial Decision, 15 FED. POWER SERV., at 5-452.

24. Black Marlin Pipeline Co., Opinion and Order, 15 FED. POWER SERV. 5-444, 5-451 (July 12, 1978) (No. CP75-93).

25. Black Marlin was denied a rehearing by the Commission and has sought a review of the Commission order in the District of Columbia Court of Appeals. *Appeal docketed*, No. 78-2306 (D.C. Cir. December 21, 1978).

Commission expanded its scrutiny of producer wellhead sales to include the pipeline which purchased the gas. In *Gulf Oil Corp. v. FPC*,[26] a producer had failed to deliver as much gas as was required by its certificate and its pipeline purchaser had failed to demand full delivery. The Commission found both parties liable for administrative sanctions and ordered the producer to refund the dollar difference between the pipeline's demands for gas and the certificated maximum amount of gas. It further ordered the pipeline to prepare and to implement a plan to flow-through the refund to its customers.[27] It should be noted that this did not impose any serious burden on the pipeline.

B. *Settlements—Preferred Alternatives*

Historically, the Commission has displayed readiness to adopt settlements offered by suspected violators of the NGA.[28] However, subsequent to the establishment of the Office of Enforcement, the Commission began to show a reluctance to acquiesce in such settlements.[29] In *Florida Gas Transmission Co.*,[30] for example, FERC rejected a proposed settlement and left open the possibility of referring the case to the Justice Department. The Commission stated, "While we

26. Gulf Oil and Texas Eastern Transmission Corp., 11 FED. POWER SERV. 5-201 (December 9, 1976) (Opinion No. 780-A, No. CI64-26); Gulf Oil and Texas Eastern Transmission Corp., 10 FED. POWER SERV. 5-761 (October 15, 1976) (Opinion No. 780, No. CI64-26). The administrative law judge, in his Initial Decision, had noted that the pipeline's "inaction concerning [the producer] smacks of a conspiracy between the two of them to withhold gas from the interstate market." 10 FED. POWER SERV. at 5-765 (citing Initial Decision).

27. Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977), *aff'g*, 11 FED. POWER SERV. 5-201 (December 9, 1976) and 10 FED. POWER SERV. 5-761 (October 15, 1976).

28. In Texaco, Inc.-Sabine Pipeline Co., Nos. C177-329, CP77-304, CP64-67 (February 10, 1978) the Commission stated,

> [t]he integrity of the regulatory process depends upon effective sanctions. The question for reasoned judgment is: What solutions are most likely to be most productive in a given situation? Referral to the Department of Justice might be an option and [FERC] has given consideration to that option. While there might be symbolic value in such referral, we conclude that the public interest would be better served by the adoption and implementation of a settlement producing major tangible benefits for gas users in large portions of the country. . . . On the condition that Texaco accept the modification made herein, it would no longer be essential to probe the specific violations of the Natural Gas Act that the former Commission found and these present dockets would be terminated.

Id. at 13-14.

29. Although the Office of Enforcement already had been established when the Commission accepted the Texaco-Sabine settlement, the Commission therein noted that its decision to settle was due to the fact that activities leading up to the proceedings in that case had begun ten years earlier. The Commission declared its determination not to continue the "administrative lassitude that may permit such large scale violations to go on for so long a period of time without discovery and correction, or to have the discovery take place only by processes outside the Commission." *Id.* at 14.

30. 15 FED. POWER SERV. 5-837 (August 21, 1978) (No. CP74-192).

are not yet prepared to rule definitively upon the purported violations of the Natural Gas Act and our regulations, serious questions have been raised which require further investigation in light of the several aspects of the settlement we find unacceptable."[31]

More recently, the Commission has stated expressly its intention to scrutinize settlements closely. In *Tenneco, Inc.*, the Commission said it will use its new-found investigative powers in evaluating settlements. "[W]e think it plain that the Commission could not possibly place its stamp of approval on *any* settlement (even if unanimous) unless and until it knew enough about the case to arrive at an informed judgment on the merits of the proposal."[32] This change in FERC's view over a six month span can be attributed in large part to the rapid development of the Office of Enforcement which was, at best, in an embryonic stage in February, 1978.

C. *The Enforcement Pace Picks Up*

Further evidence of FERC's enforcement fervor can be found in a lawsuit brought by the Commission against Triton Oil and Gas Corporation.[33] In *Triton*, FERC seeks to have the court enjoin Triton from not making refund disbursements in violation of the NGA and of the Commission's rules, regulations, and orders.[34] The Office of Enforcement claims that Triton willfully and knowingly has refused to refund an estimated $400,000 in principal and interest.[35]

Two significant actions by the Office of Enforcement in 1979 erased most doubt that FERC was serious about its enforcement role. *Tenneco Inc.*,[36] and *FERC v. Mobil Oil Corp.*,[37] indicated that FERC had altered dramatically its passive posture toward enforcement.

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31. *Id.* at 5-842. The Commission summarily dismissed Florida Gas' argument that Commission precedents compelled acceptance of the settlement in lieu of referral to the Department of Justice. "Apart from the fact that those other cases are distinguishable, FGT's argument of discriminatory enforcement (by referring only this case) is totally at odds with the concept of prosecutorial discretion." *Id.* at 5-848.

32. 17 FED. POWER SERV. 5-1013, 5-1035 (June 13, 1979) (Opinion No. 41, Nos. I77-298, IN79-3).

33. FERC v. Triton Oil & Gas Corp., No. 79-1004 (D.D.C., filed April 6, 1979).

34. *Id.*

35. *Id. See also* FERC v. Energy Reserves Group, No. 78-2266 (D.D.C., filed Dec. 12, 1978), in which, for the first time, FERC sought civil injunctive relief against a regulated natural gas company for failing to file annual reports under the NGA. *Energy Reserves* is particularly noteworthy in that the defendant is a small producer. This case recently was resolved through settlement.

36. 17 FED. POWER SERV. at 5-1013. *See* discussion in text at notes 128-132 *infra*.

37. No. 79-1638 (D.D.C., filed June 22, 1979). *See* discussion in text at notes 133-138 *infra*.

Apparently, however, certain factions within and without the Commission were not satisfied that the Office of Enforcement was aggressive enough. While most people, particularly members of the natural gas industry, felt that the Office of Enforcement was performing admirably, an inchoate attack was launched against the Office of Enforcement and particularly against its director, Sheila Hollis.

This behind-the-scenes attack blossomed into public view in December of 1979, when rumors began circulating that the Office of Enforcement was under scrutiny for watering down its criminal prosecution efforts against certain industry targets. Most of the charges were aimed at Hollis and became so acute that FERC Congressional and Public Affairs Director Kenneth Levine issued a statement saying, "The chairman of the FERC is not forcing [Hollis] out or telling her to leave, and the chairman has confidence in her abilities."[38]

The Commission's statement was issued in response to ill-defined calls for Hollis' dismissal from FERC staffers, from Ohio Senator Howard M. Metzenbaum, and from the General Accounting Office (GAO). The controversy centered on the *Tenneco*, *Mobil*, and *Florida Gas Transmission* cases. Essentially, Hollis' critics claimed that fines and refunds levied against the *companies* are not as effective as prosecuting corporate *officers* for criminal actions.[39]

Despite the Commission's denials that Hollis' job was in jeopardy, she resigned her post at the end of 1979. Hollis stayed on at the Commission, however, to begin a policy analysis to determine a plan for FERC's future enforcement program.

III. THE NGPA AND A NEW SLANT TO FERC ENFORCEMENT

The NGPA eliminated much of FERC's NGA price setting authority and part of its NGA certificate jurisdiction. Rather than delegating price regulation to the Commission, Congress itself prescribed a series of pricing categories for the first sale of natural gas.[40] While it no

38. FERC Unit Investigated as Watering Down Bid for Justice Action, Washington Star, December 7, 1979, § E, at 1, col. 5.

39. *Id.*

40. §§ 102, 103, 105, 107, 108, 15 U.S.C. §§ 3312, 3313, 3315, 3317, 3318 (Supp. II 1978). By reserving price setting duties for itself, Congress eliminated a potential area of judicial controversy over the question of whether or not prices set by FERC were just and reasonable. Unless a constitutional infirmity exists in the pricing structure set by Congress, the prices cannot be challenged in the courts. With the need for judicial review of Commission-established price determinations largely obviated, Congress removed a substantial administrative burden from FERC and lifted the cloud of uncertainty which had afflicted earlier Commission pricing decisions. No longer will

longer has the power to set rates for interstate sales,[41] the Commission works in conjunction with other jurisdictional agencies in determining whether or not interstate and intrastate gas qualifies for the statutorily established price categories.

The jurisdiction over intrastate sales which the Commission obtained through the NGPA serves to distinguish further the Commission's present regulatory role from what it had been under the NGA. In the past, wellhead sales of intrastate gas had been beyond the Commission's jurisdictional reach.[42] FERC Chairman Charles B. Curtis recently noted that, by enacting the NGPA, Congress created a unique regulatory scheme in which FERC possesses greatly expanded responsibility to regulate natural gas prices in the entire national market—both interstate and intrastate.[43] As a result of the spread of its authority to the intrastate market, FERC has drawn into its regulatory embrace many independent gas producers who previously had not had to deal with federal control of their natural gas sales. Such producers can be expected to find compliance with NGPA and FERC requirements an onerous task. In fact, interstate independent small producers[44] as well as intrastate producers may find NGPA pricing and filing requirements so burdensome that they simply ignore them.

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the situation arise in which nearly ten years elapse before final judicial approval is obtained for a five cent per Mcf price increase. *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974). Although certain administrative burdens have been eased by the NGPA, the Commission still faces heroic regulatory tasks which will no doubt test the mettle of the staunchest FERC administrator.

41. Congress instilled in FERC the discretion to establish prices for some limited categories of natural gas. FERC's pricing authority applies to gas dedicated to interstate commerce on November 8, 1978, § 104(b)(2), 15 U.S.C. § 3314 (Supp. II 1978), gas sold pursuant to rollover contracts, § 106(c), 15 U.S.C. § 3316(c) (Supp. II 1978), and other gas, § 109(b)(2), 15 U.S.C. § 3313(b)(2) (Supp. II 1978). Any prices established under these sections must be just and reasonable. FERC also has authority under section 107(b), 15 U.S.C. § 3317(b) (Supp. II 1978), to prescribe special incentive prices for certain high-cost gas and these gas prices need not be based on a just and reasonable standard. Finally, FERC has the authority under section 502(c) to adjust any wellhead price on the basis of "special hardship, inequity or unfair distribution of burdens." 15 U.S.C. § 3412(c) (Supp. II 1978).

42. NGA § 1(c), 15 U.S.C. § 717c (1976).

43. *Hearings on Natural Gas Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 98th Cong., 1st Sess. (June 5, 1979) [hereinafter cited as *Hearings on Natural Gas*].

44. "Independent producers" and "small producers" are terms of art defining certain types of natural gas producers. 18 C.F.R. § 157.40(a) (1979) defines a "small producer" as "an independent producer of natural gas . . . who is not affiliated with a Class A natural gas pipeline company and whose total 'jurisdictional sales' on a nation-wide basis, together with such sales by 'affiliated producers,' were not in excess of 10,000,000 Mcf at 14.73 psia during the preceding calendar year." "Independent producer" is defined in 18 C.F.R. § 154.91(a) (1979) as "any person . . . who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce."

Those who do attempt to comply may encounter difficulties as a result of their inexperience in dealing with FERC. In response to producer recalcitrance and in order to obtain producer compliance, FERC may turn to the enforcement powers granted to it by section 504 of the NGPA.[45] "From an operational point of view," Chairman Curtis declared, "the new regulatory approach will result in a shift of emphasis and personnel to the compliance area."[46] According to Curtis, the Commission has established a Division of NGPA Compliance which will work closely with jurisdictional agencies "in an effort to assure that the process works and . . . to monitor the various filings, determinations and reports for compliance with the statute and regulations."[47]

A thorough understanding of FERC's enforcement authority under the NGPA requires consideration of the overall structure of the Act. In particular, examination of the various components and provisions which most likely will form the basis of FERC's enforcement efforts will bring into focus the nature and scope of the Commission's newfound regulatory responsibilities.

The NGPA consists of six titles. Part A of Title I establishes eight pricing categories which set ceiling prices for wellhead sales of natural gas.[48] Part B of Title I provides for the elimination of price controls on certain categories of gas on a staggered schedule by January 1, 1985.[49] Title II utilizes incremental pricing to pass on to industrial facilities a significant portion of first sale price increases resulting from the NGPA. The higher costs of certain categories must be passed through to large industrial boiler fuel users which generate steam or electricity.[50] The incremental pricing provisions allocate high-priced natural gas to industrial users and low-priced gas to residential and small business consumers.[51] Title III deals with presidential emergency powers and essentially is a recodification of the Emergency Natural Gas Act of 1977.[52] Title III also regulates pipeline sales and establishes certain

45. 15 U.S.C. § 3414 (Supp. II 1978). This provision makes available civil and criminal penalties for enforcement efforts.

46. *Hearings on Natural Gas*, *supra* note 43.

47. *Id.*

48. 15 U.S.C. §§ 3312-3319 (Supp. II 1978).

49. *Id.* § 3331. Section 122 authorizes the President or Congress to reimpose maximum ceiling prices for certain gas for an eighteen month period. If price controls are to be reinstated, reimposition must occur by June 30, 1987. *Id.* at § 3332.

50. *Id.* §§ 3341-3342.

51. *Id.* §§ 3341-3346.

52. *Id.* §§ 3361-3364 (basically recodifying 15 U.S.C.A. § 717nt (West Supp. 1980)).

contract duration requirements.[53] Natural gas curtailment policies and end-use priorities are set forth in Title IV. Most of the authority for prescribing curtailment priorities is vested in the Secretary of Energy, although FERC does have limited discretion in implementing the Secretary's determinations and in enforcing compliance.[54] Title V provides for general administration and enforcement of the NGPA and defines the procedures for obtaining judicial review of actions taken pursuant to the NGPA.[55] Finally, Title VI coordinates the NGPA with certain nonprice provisions of the NGA. Pursuant to Title VI, the Commission lost its NGA jurisdiction over certain categories of natural gas, emergency sales, intrastate pipeline sales and assignments, and emergency transportation.[56]

IV. SECTION 504 OF THE NGPA: THE SOURCE OF FERC ENFORCEMENT POWERS

Section 504 of the NGPA provides FERC with the means to enforce the NGPA and to assess or to seek penalties for noncompliance. Essentially, section 504(a)(1) makes it unlawful for any person to sell natural gas at a first sale price which exceeds the applicable ceiling price. Furthermore, section 504(a)(2) makes it illegal to violate any provision of the NGPA or any rule or order issued pursuant to the Act.[57]

A. *General Enforcement Authority*

Section 504(b)(1) grants to the Commission general enforcement authority to obtain compliance with the NGPA. The Commission has the discretion to bring an action in district court to enjoin an unlawful act or to enforce compliance with the NGPA or with any rule or order issued under the Act. The Commission may exercise its discretion and initiate an action when it appears that any person is engaged in or about to engage in an act which constitutes or will constitute a violation of the NGPA.[58]

The President is authorized by section 504(b)(2)[59] to seek an in-

53. 15 U.S.C. §§ 3371-3375 (Supp. II 1978).
54. *Id.* §§ 3391-3394.
55. *Id.* §§ 3411-3418.
56. *Id.* § 3431.
57. *Id.* § 3413(a)(1)-(2).
58. *Id.* § 3414(b)(1).
59. *Id.* § 3414(b)(2).

junction in federal court against violations of emergency orders issued pursuant to sections 302 or 303. Sections 302 and 303[60] grant certain emergency gas purchase and allocation powers, respectively, to the President in times of a national gas supply emergency. This authority with respect to the NGPA's emergency provisions in Title III is vested exclusively in the President.[61]

The Secretary of Energy, the Commission, or the Attorney General has the discretionary power under section 504(b)(3)[62] to obtain compliance in equity with regard to the incremental pricing provisions of sections 204 and 205. These provisions require the passthrough of surcharges paid by any local distribution company with respect to natural gas delivered to incrementally priced industrial facilities.[63]

B. *Civil Compliance Remedies*

Section 504(b)(4) details the relief which is available in any action brought pursuant to the general, the emergency, or the incremental pricing provisions of the NGPA. In response to a proper showing in such enforcement actions, the appropriate district court may issue a temporary restraining order, a preliminary injunction, or a permanent injunction. In addition, the court may issue other legal or equitable relief it deems appropriate, including refund or restitution.[64] However, while section 504 does *not* give FERC the specific power to order refund payments, the NGPA Conference Report says FERC does have such powers.[65] Also, section 501 authorizes FERC to perform "[a]ny and all acts . . . as it may find necessary or appropriate to carry out its functions under this chapter."[66]

Civil penalties may be assessed when any person knowingly commits a NGPA violation. For violations of provisions which FERC is charged with enforcing, the Commission may assess up to $5,000 for any one violation.[67] For violations of the NGPA's emergency provisions,[68] however, the President may assess penalties of not more than

60. *Id.* §§ 3363, 3363.
61. *Id.*
62. *Id.* § 3414(b)(3).
63. *Id.* §§ 3344, 3345.
64. *Id.* § 3414(b)(4).
65. *Joint Explanatory Statement of the Commission Conference on H.R. 5289*, 95th Cong., 2d Sess. 116 (1978) [hereinafter cited as *Conference on H.R. 5289*].
66. 15 U.S.C. § 3411(a) (Supp. II 1978).
67. Section 504(b)(6)(A)(i), 15 U.S.C. § 3414(b)(6)(A)(i) (Supp. II 1978).
68. Sections 302 and 303, 15 U.S.C. §§ 3362 and 3363 (Supp. II 1978).

$25,000.[69] In either of the above cases, each day of a violation constitutes a separate violation.[70]

Section 504(b)(6)(B) defines "knowing" for purposes of determining whether or not a person is liable for civil penalties. "Knowing" means having "actual knowledge" or "the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances."[71] In the NGPA Conference Report, the conferees noted that they intended that every person should be presumed to have constructive knowledge of the specific provisions of the NGPA.[72] However, the conferees pointed out that every person should not necessarily be presumed to have constructive knowledge of regulations promulgated by the Commission pursuant to the Act.[73] Whether or not a person had knowledge of Commission regulations would be a question of fact based on a reasonable man test.[74] In other words, a violation would not be a knowing violation if it rested on information not in the possession of a reasonable person acting in similar circumstances. Although the term "knowing" is somewhat nebulous, the burden will be on the Commission to give substance to the word and to prove that a violation was, in fact, "knowing."

A three-year statute of limitations for civil penalties is included in section 504(b)(6)(D).[75] This statute of limitations applies to any violation occurring more than three years before the date on which a person receives notice of a proposed penalty. However, the statute does not apply in cases in which an untrue statement of material fact to the Commission (or to a state or federal agency) was made, or acquiesced in, by a violator. Furthermore, the three year limitation does not apply in situations where a material fact was omitted. NGPA determinations of maximum lawful prices are always subject to being reopened when based on untrue statements or on material omissions.[76]

The Commission is given the authority under the NGPA to assess and collect civil penalties. Before assessing such penalties, however, the Commission must provide notice of proposed penalties to suspected

69. Section 504(b)(6)(A)(ii), 15 U.S.C. § 3414(b)(6)(A)(ii) (Supp. II 1978).
70. *Id.* § 504(b)(6)(C), 15 U.S.C. § 3414(b)(6)(C) (Supp. II 1978).
71. *Id.* § 504(b)(6)(B)(i)-(ii), 15 U.S.C. § 3414(b)(6)(B)(i)-(ii) (Supp. II 1978).
72. *Conference on H.R. 5289*, *supra* note 65, at 121.
73. *Id.*
74. *Id.*
75. 15 U.S.C. § 3414(b)(6)(D) (Supp. II 1978).
76. *Id.*

violators.[77] If violators fail to pay an assessed penalty within sixty days of final assessment orders, the Commission must bring actions seeking to enforce its assessments in a federal district court. At this stage, the court may order de novo trials. Absent de novo review, violators are not provided an opportunity to challenge directly any such assessments.[78]

C. *Criminal Sanctions*

Section 504(b)(5) provides that the Commission may refer to the Department of Justice any evidence which may constitute violations of federal antitrust laws.[79] In addition, the final subsection of section 504 sets out criminal penalties similar to those provided in section 21 of the NGA.[80]

Any person who knowingly and willfully violates any provision of the NGPA is subject to a fine of not more than $5,000 or not more than two years imprisonment, or both. Any person who knowingly and willfully violates any rule or order issued under the NGPA shall be subject to a fine of not more than $500 for each violation. Any person who knowingly and willfully violates an emergency order of the President[81] shall be fined not more than $50,000 for each violation.[82]

As with civil violations, each day of continuing violation constitutes a separate violation.[83] "Knowingly," when used with respect to any criminal act or omission, means actual knowledge or constructive knowledge deemed to be possessed by a reasonable individual acting under similar circumstances.[84]

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77. Section 504(b)(6)(E), 15 U.S.C. § 3414(b)(6)(E) (Supp. II 1978). For a consideration of the potential for abuse of the notice requirement, see the discussion in the text of Civil Penalties Rulemaking at notes 122-27 *infra*.

78. *Id.* at § 504(b)(6)(F), 15 U.S.C § 3414(b)(6)(F) (Supp. II 1978). The Commission may be relaxing this strict statutory provision by regulation. *See*, discussion in text, Civil Penalties Rulemaking, at notes 125-26 *infra*.

79. 15 U.S.C. § 3414(b)(5) (Supp. II 1978).

80. Section 504(c), 15 U.S.C. § 3414(c) (Supp. II 1978). The fine and imprisonment provisions in section 21 of the NGA are identical. 15 U.S.C. § 717t(a) (1976). Unlike the NGA, the NGPA does not contain specific language requiring referral of all criminal violations of its provisions to the Department of Justice. The NGPA only addresses referral of criminal antitrust violations. Section 504(b)(5), 15 U.S.C. § 3414(b)(5) (Supp. II 1978). However, under the authority of U.S. CONST. art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States. *See*, 28 U.S.C. § 516 (1976). Therefore, FERC must refer to the Department of Justice all cases which may invole criminal violations.

81. Sections 302 and 303, 15 U.S.C. §§ 3363 and 3363 (Supp. II 1978).

82. Section 504(c)(1)-(3), 15 U.S.C. § 3314(c)(1)-(3) (Supp. II 1978).

83. *Id.* § 504(c)(4), 15 U.S.C. § 3414(c)(4) (Supp. II 1978).

84. *Id.* § 504(c)(5)(A)-(B), 15 U.S.C. § 3414(c)(5)(A)-(B) (Supp. II 1978).

V. OTHER ENFORCEMENT PROVISIONS IN THE NGPA

The NGPA provides several other areas of authority which constitute less direct means of FERC enforcement. Congress vested the Commission with broad administrative authority in section 501 of the NGPA to perform any and all acts and to prescribe such rules and orders as are necessary to carry out FERC's functions under the NGPA.[85] As noted in the NGPA Conference Report, section 501 authority to prescribe rules and orders necessary to carry out the provisions of the NGPA is designed to vest the Commission with the authority to "prevent the circumvention of the Act."[86] This expansive grant of authority has the potential of providing the Commission with virtually unrestrained power to obtain compliance with the NGPA.

Section 503(d) grants authority to the Commission to reopen "final" determinations made by jurisdictional agencies.[87] These determinations can be reopened for further consideration if, in making such determinations, the Commission or a federal or state agency relied on any untrue statement of material fact, or if a statement of material fact was omitted.[88] Section 503(d) further extends the Commission's authority and increases compliance liability by providing that any untrue statement or omission of a material fact to a federal or state agency upon which the Commission relied shall be deemed to be a statement in violation of the federal criminal statute prohibiting perjury.[89]

As a result of the operation of section 503(d), persons filing untrue statements or omitting material facts with any jurisdictional agency or with the Commission face multiple liability. Such persons may be exposed to possible criminal perjury charges and may also be liable for violating applicable ceiling price determinatons. Such determinations are always subject to being reopened where they were based on untrue statements or on material omissions.

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85. 15 U.S.C. § 3411 (Supp. II 1978).

86. *Conference on H.R. 5289*, *supra* note 65.

87. 15 U.S.C. § 3413(d). The agencies would include such state authorities as corporation commissions, public utility commissions, and other agencies that can make orders affecting natural gas.

88. The language of section 503(d) is patterned on Rule 10b-5 of the Securities and Exchange Commission. 17 C.F.R. § 240.10b-5. Use of this standard will allow the Commission to rely on a well-developed body of court decisions regarding such misstatements and omissions. The 10b-5 standard generally is applied expansively. Essentially, courts consider whether a reasonable man might have relied upon material omitted or could have relied upon material provided. *See, e.g.*, Superintendent of Ins. v. Bankers Life and Cas. Co., 404 U.S. 6 (1971), SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

89. 18 U.S.C. § 1001 (1976).

In addition to the substantial filing requirements which apply to various parties, including producers, pipelines, and state agencies, all of whom provide the Commission with a great deal of information about the natural gas industry, section 508 gives the Commission additional, broad information-gathering authority.[90] This authority surpasses even that which the Commission possessed as a result of the NGA. The Commission can be expected to use the various filings required from all parties as well as its own investigative and information-gathering authority to review conduct for purposes of finding NGPA violations.[91] For instance, section 311(b)(6) gives the Commission the power to terminate any authorized sale of natural gas by an intrastate pipeline to any interstate pipeline or to any local distribution company.[92] By forcing termination of such sales, the Commission is, in fact, imposing a penalty on the interstate pipeline either for alleged violations of the Act or simply as a result of the occurrence of certain circumstances delineated in section 311(b)(6)(i-iv).[93]

The reach of the Commission's investigatory and enforcement authority also is enhanced by section 315(c) which requires first sale *purchasers* of natural gas under a new contract, a successor to an existing contract, or a rollover contract to file with FERC copies of such contracts together with any ancillary agreements or any existing contracts applicable to such natural gas.[94] This provision gives the Commission yet another tool by which it can develop information of possible noncompliance with the various pricing provisions of the NGPA.

One final compliance and enforcement tool which FERC has as a result of the NGPA is found in the guaranteed pass through provision of section 601(c).[95] This provision allows the Commission to deny recovery of purchased gas costs to interstate pipelines in cases where costs were made excessive as a result of "fraud, abuse, or similar grounds."[96] Whether or not fraud or abuse existed is to be determined solely by the Commission. This section leaves open the question of which party to a transaction commits fraud or abuse. It also is not clear whether or not

90. 15 U.S.C. § 3418 (Supp. II 1978).

91. *See* FERC v. Energy Reserves Group, No. 78-2226 (D.D.C., filed Dec. 12, 1978), which demonstrates that the Commission intends to employ its enforcement powers to combat filing violations as well as against more obvious violations such as wrongful diversion of gas.

92. 15 U.S.C. § 3371(b)(6) (Supp. II 1978).

93. *Id.* § 3371(b)(6)(i)-(iv) (Supp. II 1978). The NGPA states in § 3371(b)(6)(A)(iii)-(iv) that termination can occur for any of these reasons.

94. 15 U.S.C. § 3375(c) (Supp. II 1978).

95. *Id.* § 3431(c).

96. *Id.* § 3431(c)(2).

Congress intended section 601(c) to work in conjunction with or to replace the prudent pipeline standard.[97] In Order No. 23-A,[98] the Commission refused to define "fraud" or "abuse." Instead, FERC will make case by case determinations.

Clearly, the NGPA provides the Commission with both direct and indirect statutory authority to seek compliance with the various provisions of the Act. The full extent of these powers and the nature in which the Commission will exercise them will not be apparent until more experience is gained under the NGPA. In addition to the statutory powers accorded FERC, the Commission has taken steps, through the issuance of regulations and orders, to stockpile additional enforcement weapons.

VI. ENFORCEMENT REGULATIONS

Since June of 1978, the Commission has promulgated a series of regulations and orders to develop investigative procedures and enforcement policies in order to strengthen its enforcement functions. These orders and proposed regulations signal a new beginning in the use of the Commission's investigative and enforcement procedures.

A. *Order No. 8*

In most instances, investigations represent the first step of enforcement. The Commission issued Order No. 8 on June 14, 1978, to define the Commission's policies and procedures for investigations conducted under all the statutes which it administers.[99] The regulations promulgated by Order No. 8 are similar to investigatory rules used by other federal agencies. They are of concern because of the potential power of FERC which they indicate.

In summary, Order No. 8 provides that at its discretion, the Commission may conduct preliminary or formal investigations. These investigations may be private or public. Although undefined, private investigations are designed to be used in situations where evidence of

97. The prudent pipeline standard is utilized by the Commission in reviewing purchase gas adjustment filings which pipelines must make in order to pass through increase purchase costs. This five-pronged standard was defined by the Commission in Transcontinental Gas Pipeline Corp., Order on Rehearing, (November 12, 1975) (No. RP76-2). The standard includes the following elements: (1) the pipeline's need for gas; (2) the availability of other gas supplies; (3) the amount of gas dedicated to the purchase; (4) comparison of the price with appropriate market prices in the same or nearby areas; and (5) the relationship between the purchaser and the seller.

98. 17 FED. POWER SERV. 5-1086 (June 12, 1979) (No. RM79-22).

99. 43 Fed. Reg. 27,174 (June 23, 1978).

possible violations or of knowing and willful violations, if made public before the investigation is completed, may prejudice the rights of witnesses or potential defendants.[100] Probably the most important reason for the Commission wanting to utilize preliminary or private investigations is to preserve the secrecy of its own efforts and to avoid delays or obstructions of its investigations. This particular provision[101] has prompted the sharpest criticism from regulated companies; the potential for abuse and for denial of due process is obvious.

The Commission has the discretion to order a formal investigation by the issuance of an Order of Investigation. The Commission uses formal investigations when preliminary inquiries indicate that compulsory process may be necessary to obtain information.[102] Further indication of the Commission's latitude in launching investigations of the natural gas industry is indicated by the fact that either the Commission or its staff may, at its discretion, conduct preliminary investigations without a formal order of the Commission.[103]

Order No. 8 seeks to complement the Commission's own investigation efforts by providing that any person may request an investigation and that no formalities exist for making such requests.[104] This obviously is designed to encourage as wide as possible a flow of information to the Commission from the public about matters regulated by the various statutes administered by the Commission. Unfortunately, this provision also opens the door for individuals to vent personal grievances by requesting investigations.

It should be stressed that during the informal or preliminary investigations conducted by either the Commission or its staff, the targets of those investigations need not be given notice that inquiries are being made. Targets of informal investigations are not presented with an opportunity to respond or to contest the subject matter of the investigations.[105] Subjects of investigations are not granted basic due process rights until the nature of the investigations takes on more formal aspects. Administrative investigations, such as those of FERC, traditionally have been held not to require the full spectrum of judicial

100. 18 C.F.R. §§ 1b.4-1b.6 (1979); 43 Fed. Reg. 27,174, 27,175 (June 23, 1978).
101. 18 C.F.R. § 1b.6 (1979); 18 C.F.R. § 1b.9 (1979).
102. 18 C.F.R. § 1b.5 (1979).
103. *Id.* § 1b.6. The broad investigative powers of FERC also include subpoena power. Subpoenas necessary to compel the appearance of parties or the production of documents may be enforced with both civil and criminal sanctions. *Id.* § 1b.15.
104. *Id.* § 1b.8.
105. *See id.* § 1b.6.

procedures such as the right to participate or to cross-examine.[106]

With the establishment of the Office of Enforcement and through the promulgation of Order No. 8, the Commission clearly signaled its intention to play a much stronger role in the fields of investigation and enforcement of its regulatory authority. The passage of the NGPA in November 1978, furthered the Commission's regulatory power of the natural gas industry. Many members of the industry, realizing the potential impact of the Commission's enforcement and investigation powers, raised their voices in opposition to Order No. 8.

B. *Proposed Rulemaking to Amend Order No. 8*

In response to criticism and in defense of its right to conduct broad-based investigations, the Commission issued a Notice of Proposed Rulemaking on March 20, 1979, which was intended to amend and to clarify Order No. 8.[107] With regard to its right to limit procedural due process and to restrict its public investigations, the Commission likened its investigatory role to that of the operation of a grand jury. The Commission stated in its proposed rulemaking, "It has long been settled that an administrative agency's investigative function . . . is essentially the same as the grand jury's . . . ."[108]

The Commission explained in its proposed Rulemaking that its investigations are designed to determine whether any persons or entities have violated laws, regulations, or orders administered or issued by the Commission. Furthermore, the Commission thinks that investigations should be used to determine what formal enforcement action it will take. The Commission has emphasized that its investigations are "nonadversary" inquiries or interrogations designed to develop facts and to enable the Commission to ascertain whether grounds exist for the institution of formal adversary proceedings.[109] The Commission rationalizes the absence of more formal procedures during its investigations with the protection afforded in subsequent adversary proceedings. In the opinion of the Commission there is no need to transform investigations into adjudicative proceedings which would in effect be a "steril-

106. Hannah v. Larche, 363 U.S. 420 (1960).

107. On March 25, 1980, the Commission issued a Notice of Public Hearing on Order No. 8 and the Proposed Rulemaking to Amend Order No. 8, No. RM78-15. 44 Fed. Reg. 21,586-596 (April 10, 1979). A hearing in the matter was held on April 15, 1980.

108. 44 Fed. Reg. 21,586 (April 10, 1979) (citing United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

109. 44 Fed. Reg. at 21,587.

ization of investigations by burdening them with trial-like procedures."[110]

In its Proposed Rulemaking, the Commission emphasized that the Office of Enforcement has the principal responsibility for conducting preliminary informal investigations. Preliminary investigations are proper when no compulsory process is required, no testimony is compelled, and no oaths are administered. On the other hand, the Commission contends that formal investigations would be appropriate when such actions are taken and must be conducted pursuant to a Commission Order of Investigation.[111]

Under the Commission practice, three types of investigations actually exist. Initially, the Commission may conduct a threshold investigation to determine whether or not certain questioned activities or facts come within its jurisdiction. Next, the Commission may conduct a preliminary investigation, and, finally, a formal investigation may be launched pursuant to a Commission Order of Investigation. It is only during this latter stage that more formal due process rights are accorded to targets of such investigations.[112]

In issuing a formal Order of Investigation, the Commission delineates the scope of the investigation, citing the statutes, rules, and regulations which may have been violated. The Commission also names the subjects of the investigation and designates the members of the Commission or its staff authorized to issue subpoenas and interrogatories and to question persons under oath. Any person may be subpoenaed to testify or to produce his own records as long as such testimony or records are relevant to the investigation.[113]

Of particular concern to individuals who fall under the jurisdiction of FERC, is the Commission's refusal to implement a procedure under which targets of a formal investigation would be notified that the investigation has been concluded. The Commission maintains the position that it is often difficult to determine whether an investigation has in fact been concluded or whether it merely has been suspended. Furthermore, as the Commission has noted, an investigation which for all intents and purposes has been concluded may eventually be reopened or reactivated as a result of unforeseen developments.[114] The Commis-

110. *Id.* (citing Hannah v. Larche, 363 U.S. 420, 448 (1960)).
111. 44 Fed. Reg. at 21,587.
112. *Id.*
113. *Id.*
114. *Id.* at 21,588.

sion's refusal to notify parties of a termination of investigation or to reach any kind of conclusive determination that an investigation has ended casts a pall over investigation targets. This chilling effect of perpetual investigation and scrutiny may haunt the regulated entity throughout its existence.

The Proposed Notice of Rulemaking does contain one modification of Order No. 8 which softens the impact of the Commission's investigative powers. It provides that a witness in preliminary investigations would be afforded the right to counsel. A witness would have the right to be accompanied, represented, and advised by legal counsel whether or not the witness's appearance was a result of a subpoena or was voluntary. Attorneys would be permitted to advise witnesses during an examination and to make summary notes solely for their use and that of their witness client. At the conclusion of an examination, the witness would be permitted to make a statement on the record to clarify any previous answers or otherwise to explain his position. However, a witness' counsel would be restricted from engaging in cross-examination.[115]

In detailing its investigative authority in the Notice of Proposed Rulemaking the Commission addressed the issue of ex parte communications. The Commission noted that its regulations proscribe ex parte communications only in "on-the-record proceedings." The Notice of Proposed Rulemaking makes it clear that the ex parte provisions of the Commission's regulations do not apply to Commission investigations which are not on-the-record proceedings.[116]

The language in the preamble to the Notice of Proposed Rulemaking modifying Order No. 8 provides insight into the Commission's perception of its enforcement and compliance responsibilites. The Commission has delineated a number of factors which it considers in determining whether or not additional action is warranted based upon evidence of a possible violation developed during an investigation or through other means. The Commission will consider the character, nature, and scope of the alleged violation and the apparent need for immediate action. Furthermore, the Commission will analyze whether the alleged violation involves facts or circumstances which would provide an opportunity for the Commission to develop new theories or

115. *Id.* at 21,589.
116. *Id.*

interpretations of its regulatory laws.[117]

In determining whether additional action is warranted, the Commission will also consider the availability of other suitable remedies, the number of consumers affected, and the amount of harm which they have suffered. The Commission also will look to see whether the enforcement target of the investigation has taken any steps to comply with the applicable law and whether it has made restitution to injured parties. On a broader note, the Commission has indicated that enforcement proceedings serve the important function of alerting the industry and the public to the fact that the Commission has taken action with respect to certain practices. In this vein, the Commission will weigh the effect of the case on its compliance and enforcement programs.[118]

As could be expected, members of the natural gas industry reacted strongly to the Proposed Rulemaking for Order No. 8. The consensus of those filing comments was that the proposed regulations, as well as Order No. 8, do not offer adequate administrative due process.[119]

Among the issues raised in the comments was the contention that a separate investigatory team should be established by FERC which would be barred from making ex parte contacts with the Commission. If investigations and ex parte contacts are not kept separate, the commenters noted, the investigatory staff would possess an unreasonable amount of power. To monitor this potentially unfair power, some comments called for a file record of ex parte contacts to be maintained.

Several comments argued for not permitting investigations into matters which are being adjudicated in other proceedings before FERC. The need for keeping preliminary investigations private also was expressed by several of the commenting parties. The comments were unanimous in requesting that parties be given notice of termination of investigations. Finally, the commenters called for protection against unreasonable agency searches and urged that the Commission provide a means to challenge or to seek administrative review of subpoenas issued in formal FERC investigations.[120]

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117. *Id.* at 21,590.

118. *Id.*

119. *Id.* at 21,591. Until the procedure modifying Order No. 8 is completed and until the Commission issues its amended regulations, Order No. 8 continues to apply and remains the vehicle by which FERC will implement its enforcement powers. No date has been set for final action on the Order No. 8 Proposed Rulemaking.

120. *See id.* at 21,586-591. FERC has obtained limited access to grand jury documents and transcripts regarding antitrust indictments of J.R. McDermott & Co. and Brown & Root regarding charges of bid rigging. Access to this information is limited to use only in connection with or

C. *Civil Penalties Rulemaking*

In another rulemaking proceeding, the Commission addressed procedures it intends to follow with respect to the assessment of civil penalties.[121] Under the procedures which would be established as a result of this rulemaking, the Commission would initiate a civil penalty proceeding by issuing and serving upon an alleged violator a Notice of Proposed Assessment Order. This Order would name the respondent, describe briefly the violations for which the penalty is assessed, and fix the amount to be paid within 60 days following receipt of the Order.[122]

The Notice provides for informing the respondent that he may submit factual information or legal arguments to the Commission within thirty days following receipt of the Notice. By permitting the violator to respond to an assessment order, the Commission has gone beyond the mandates of section 504(b)(6)(E), which does not afford an alleged violator an opportunity to respond.[123] It is an open question whether this opportunity is really substantive or merely cosmetic. In his submission, the respondent would attempt to show why no penalty should be imposed or why the amount of the penalty should be reduced. Within another thirty days after receiving the respondent's submission, the Commission would act either by issuing an assessment order or by concluding that no further action will be taken.[124]

Pursuant to section 504(b)(6)(F) of the NGPA, if the penalty has not been paid within sixty days following receipt of the Notice, the Commission must institute an enforcement action in the appropriate federal district court for an order affirming and enforcing the penalty assessment.[125] However, in the Notice of Proposed Rulemaking, the Commission has treated the initiation of an enforcement action in district court as a discretionary power.[126] This is in direct conflict with the statutory provision which *requires* the Commission to initiate an enforcement proceeding. Despite the statute, the Commission's language in its Notice of Proposed Rulemaking may indicate it intends to apply a degree of flexibility in assessing civil penalties.

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preliminary to a formal adjudicatory or judicial proceedings. *See* J. Ray McDermott & Co., Inc. v. FERC, No. 79-2843 (5th Cir.).

121. Notice of Proposed Rulemaking, Procedures Governing the Assessment of Civil Penalties Under the NGPA, No. RM79-42 (May 15, 1979). 44 Fed. Reg. 29,101 (May 18, 1979).

122. *Id.*

123. *See* discussion in text of 15 U.S.C. § 3414(b)(6)(E) (Supp. II 1978), *supra* at note 77.

124. 44 Fed. Reg. 29,101 (May 18, 1979).

125. 15 U.S.C. § 3414(b)(6)(F) (Supp. II 1978).

126. 44 Fed. Reg. 29,101 (May 18, 1979).

In response to the Notice of Proposed Rulemaking, major gas producers and pipelines have blasted FERC's planned civil penalties rule. These parties contend that the new procedures deny targets of enforcement actions a reasonable chance to answer the charges and fail to take into account the severity of the violations. Comments which have been filed with respect to the civil penalty rulemaking by and large assert that the rulemaking procedures which would be established are far too sparse and leave too much discretion in the hands of the Commission and the Commission's staff.

One commenter has recommended that the Rulemaking be amended to require that the initial Notice of Assessment be nonpublic and confidential. The commenter expressed concern that the notice procedures may be used by the Commission or by its staff to initiate civil penalty actions on unsubstantiated or tenuous information or for political or policy reasons.

Some commenters asserted that the civil penalties rule does not provide alleged violators with a meaningful opportunity to be heard. One party argued that alleged violators should be given the right to be heard at an oral argument and insisted that any Notice of Violation must include a detailed statement of the alleged violation. Other commenters called for the Commission to flesh out its rulemaking to provide an indication as to how it will exercise its discretion in setting civil penalties. One party requested that the Commission establish a schedule or standard for assessing penalties.

Finally, one party asked the Commission to define what constitutes a "knowing violation." It was pointed out that the Commission's interpretation and a regulated entity's interpretation may differ as to what is a "knowing violation."[127] Yet, those regulated by the Commission have no opportunity to evaluate their conduct against an objective standard of what is a "knowing violation."

Despite the heated challenges to the Commission's rulemaking, the Commission is not expected to make any major adjustments in its civil penalty procedures prescribed in the rulemaking. Rather, the Commission will most likely take an experimental approach to the exercise of its enforcement and investigatory powers under the NGPA

127. The statutory language of § 504(b)(6)(A)-(B), 15 U.S.C.A. § 3414(b)(6)(A)-(B) (Supp. II 1978), provides a requirement of a "knowing violation" before civil penalties can be sought yet no accompanying regulation has been forthcoming.

and to fine tune its enforcement procedures after it has developed more of a history with their utilization.

VII. RECENT FERC ENFORCEMENT CASES

A. *Tenneco, Inc.*

An indication that the Commission intends to pursue its regulatory responsibilities under the NGPA and the NGA with a new found vigor appears in an administrative opinion issued in *Tenneco, Inc.*[128] Both the decision in that proceeding and the tone in which the opinion was written attest to the Commission's intention to assume a more active role in pursuing its enforcement responsibilities.

In *Tenneco*, the Commission took the forceful steps of staying a two year old adjudicatory proceeding and launching a comprehensive investigative proceeding. The original proceeding was initiated by Tenneco itself in February of 1977, and involved a determination of whether or not certain gas which should have gone to Tenneco's regulated interstate pipeline was directed to its unregulated intrastate system. Despite the fact that the Commission staff and Tenneco were on the verge of an amicable settlement in January of 1979, the Commission stayed the adjudicative proceeding at the insistence of the Office of Enforcement.[129]

In granting the stay and in ordering an investigation, the Commission concluded that the staff had not had sufficient opportunity to develop information needed to pursue its case thoroughly. The Commission noted that "[t]o redress this imbalance, [the] staff needs a fair opportunity to investigate. Procedures that compel it to investigate in public while it litigates do not serve that end."[130]

The *Tenneco* decision is perhaps even more remarkable for the virulent tone in which it was written than for the fact that it reflects the Commission's desire to utilize its enforcement powers more vigorously. In a strenuous attempt at erudition, the Commission not only casti-

128. 17 FED. POWER SERV. 5-1013 (June 13, 1978) (Opinion No. 41, Nos. CI77-298, IN79-3).

129. The manner in which the Office of Enforcement injected itself into the original proceeding raised the issue of an impermissible ex parte communication, *see* 18 C.F.R. § 1.4(d) (1979), between the Office of Enforcement and the Commission. The Commission has dismissed this contention on the grounds that ex parte communications are barred only when they relate to the merits of an on-the-record proceeding before the Commission. The Commission maintains that the communication by the Office of Enforcement did not go to the merits of the case. 17 FED. POWER SERV. at 5-1017 n.11.

130. *Id.* at 5-1020.

gated the old Federal Power Commission and its attitudes toward enforcement but heralded a more belligerent attitude in relation to its current regulatory responsibilities. Coupled with the broad powers with which it is vested by the NGA and the NGPA and concomitant regulations, the Commission's new commitment to a vigorous enforcement policy represents a significant factor with which parties who fall under FERC's jurisdiction must deal.

On July 27, 1979, Tenneco was convicted in federal court of violating the NGA and was fined over $1 million.[131] This case marks the first time any company has been convicted of criminal violations of any statute administered by FERC or its predecessor, the FPC. Tenneco, and a subsidiary pled guilty to a series of abandonment violations of the NGA. All the charges involved activities in the interstate market that occurred without the authorization of the Commission.

The importance of the *Tenneco* decision cannot be underestimated for it is the harbinger of a much more intense enforcement campaign by the Commission. FERC Chairman Curtis has said of the *Tenneco* case, "When the FERC was established it created an Office of Enforcement to develop the capability to vigorously administer and to enforce the laws for which it is responsible. The *Tenneco* action means that the Commission has developed that capability, which it will continue to use to carry out its responsibilities to the American people."[132]

B. FERC v. Mobil Oil Corp.: *FERC Uses Its NGPA Powers*

FERC called on its specific enforcement powers under the NGPA to file a complaint in federal district court against Mobil Oil Corporation.[133] In *Mobil*, the Commission is seeking an injunction to prevent Mobil from continuing to sell gas at rates allegedly in excess of NGPA maximum lawful prices for section 104 gas.[134] FERC also has requested that Mobil refund any excess amounts of money it may have collected illegally.

In January of 1974, Mobil applied to the Commission pursuant to section 7(c) of the NGA[135] for permission to abandon certain wells in Texas which were no longer productive. Specifically, Mobil sought to remove acreage below 7,000 feet from the interstate market. On Sep-

131. Tenneco, Inc., No. CI77-298 (July 27, 1979).
132. FERC, News Release No. FE-681 (July 27, 1979).
133. FERC v. Mobil Oil Corp., No. 79-1638 (D.D.C., filed June 22, 1979).
134. 15 U.S.C. § 3314 (Supp. II 1978). This is gas dedicated to interstate commerce.
135. 15 U.S.C. § 717f(c) (1976).

tember 26, 1974, the Commission released the subject acreage from interstate dedication, relying on a statement by Mobil that it had no plans for drilling a well into the acreage. The Commission now asserts that during the period in which its abandonment application was pending at the Commission, Mobil developed plans to drill below 7,000 feet and to sell the gas produced from such drilling at the unregulated intrastate price. FERC alleges that Mobil not only planned to drill below 7,000 feet but failed to inform the Commission of its intentions.

Deliveries from these wells were begun in August of 1978 and are continuing today. In the instant action, FERC maintains that Mobil must be barred from relying on the Commission's September 1974 Order granting abandonment because Mobil's representations to the Commission were false and misleading.[136] Therefore, the Commission asserts, the gas still was subject to the NGPA section 104 price and Mobil's sales in excess of that price violate section 504 of the NGPA.[137] FERC also claims Mobil's sales between August 1978 and December 1, 1978 (the effective date of the NGPA), violated section 4(a) of the NGA.[138]

On November 6, 1979, Mobil entered into a court-sanctioned settlement with FERC in which Mobil agreed to refund $18.5 million to interstate consumers and to pay a $500,000 civil penalty. The settlement also resolved another FERC investigation of Mobil for alleged diversion of gas from interstate commerce. However, recent filings by Tenneco in this case may delay the settlement between FERC and Mobil.

C. *National Fuel Gas Supply Corporation*

The FERC Staff has urged the prosecution of National Fuel Gas Supply Corporation (National Fuels) for unauthorized work. In an initial brief, after almost two years of proceedings on a complaint filed by a citizens group, the FERC staff has called for criminal prosecution of National Fuels for allegedly doing unauthorized work on gas storage facilities near Buffalo, New York, and for filing a false map with the Commission.

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136. This case may present an issue of whether or not a corporate entity is responsible for knowledge possessed by one of its employees. Did Mobil make a representation when it requested abandonment while one or several of its employees were exploring the possibility of drilling a well below 7,000 feet?

137. 15 U.S.C. §§ 3314, 3414 (Supp. II 1978).

138. 15 U.S.C. § 717c (1976).

On January 11, 1980, a FERC administrative law judge found that National Fuels deliberately, knowingly, and willfully had violated the NGA. The judge also found that the company had violated the federal perjury statute by filing a false map with FERC. He recommended that the violations be referred to the Department of Justice for criminal prosecution.. The decision is subject to Commission review.

In *National Fuels*, The administrative law judge also recommended that the president of the company be referred to Justice for criminal prosecution. His decision was no doubt influenced by recent criticism from certain Congressmen, among others, that FERC had failed to refer several individual corporate officers for prosecution.

D. *Atlantic Richfield Co., et al, Opinion No. 56*

In *Atlantic Richfield Co., et al*,[139] the Commission affirmed an initial administrative law judge decision that certain NGA violations occurred with respect to the abandonment of sales by Atlantic Richfield Company and six other producers in the 1960s and 1970s. The Commission has directed certain other producers to file production data to permit a determination of appropriate remedies, and, in other cases, directed the repayment of gas diverted to the intrastate market.[140] This case involves a series of complicated transactions among a variety of parties. In some instances, FERC has alleged violations in connection with prior abandonments which may have occurred sixteen years ago. The producers applied for abandonment in 1974. Atlantic Richfield claimed no sales had been made since 1963 and that the contract had expired in 1970. FERC wants to know why no sales were made when abandonment has not been granted. The case serves as further evidence of the Commission's newfound enforcement zeal (in cases involving prior conduct).

E. *City of Perryton, Texas*

City of Perryton, Texas,[141] was a proceeding concerning diversion of gas from the interstate to the intrastate market. The proceeding involved a well in Lipscomb County, Texas. Amoco was the original (50 percent) interest holder in the well and sold gas under a FERC certificate to Northern Natural. Amoco discontinued the sales in December

139. 18 FED. POWER SERV. 5-767 (August 3, 1979) (Opinion No. 56, No. CI75-201).
140. *Id.* at 5-781.
141. 18 FED. POWER SERV. 5-598 (August 8, 1979) (No. CI77-701).

of 1975. Amoco's ultimate successor sold to Perryton, Texas, and sought a declaratory order from FERC for approval of the discontinuance of sales to Northern. FERC treated the declaratory order petitions as abandonment applications.

The Commission approved a settlement agreement in August, 1979, which settled the abandonment questions and established the section 104 price as the maximum price for the gas as the staff urged.[142] Falcon wanted the section 109 price.[143] Price was the big issue here, but the Commission did order Enforcement to determine whether enforcement actions should be brought against Amoco for section seven violations.[144] Falcon is appealing the price issue in the United States Court of Appeals in the Fifth Circuit.

F. Belco Petroleum Corp.

In a November 26, 1979, letter, the Enforcement Office criticized Belco Petroleum Corporation for submitting an inaccurate statement under oath with regard to an NGPA section 103 well determination.[145] In its oath statement, Belco asserted that the drilling of its Chapita Wells Unit in Utah began after February 19, 1977, and, thus was eligible for the section 103 price as a new, onshore production well. The FERC NGPA Compliance Office discovered through United States Geological Survey and State Oil and Gas Board records that the actual spud date was February 18, 1977. What a difference a day makes!

The Office of Enforcement's letter requested Belco to file information concerning its internal compliance procedures and corporate management controls over well determination filings. Belco also was told to submit plans to avoid such occurrences in the future.

G. Texaco, Inc.

On January 17 of 1980, FERC announced the initiation of a *formal, private* investigation into what it believes may be a wrongful claim by Texaco for the section 108[146] price for gas from two wells in New Mexico. The potential NGPA violation was uncovered by the FERC NGPA Compliance office in the course of a review of the production

142. *Id.* at 5-602.
143. *Id.* at 5-600 to 5-602.
144. *Id.* at 5-607.
145. 15 U.S.C. § 3313 (Supp. II 1978). This section deals with new, onshore production wells.
146. *Id.* § 3318 (Supp. II 1978). This section governs the price allowed for stripper well production.

records supporting the application. FERC claims it is clear that the two wells do not qualify under section 108, and it wants to know why Texaco sought stripper status for the wells.

Texaco's claim to the stripper price reportedly is based on partial production from each well. FERC asserts its regulations clearly state the basis for determining the rate of production shall be the total volume of gas produced from all producing intervals in the well. Both wells are completed dually into two reservoirs, but production from only one reservoir is reported in each application. Total production from each well allegedly exceeds NGPA stripper limits of up to 60,000 cubic feet of gas and one barrel of oil per day.

Chairman Curtis noted with respect to the enforcement investigation:

> The NGPA well determination process depends first on the diligence of the applicant in informing himself on the criteria necessary to qualify for the price for which he is applying. Second . . . the process depends on the veracity of the statement made under oath attesting that the applicant himself believes the well to qualify. For the process to work, the Commission . . . must be vigilant in following up on apparent violations. Producers should be on full notice that this is our intention.[147]

H. *Amoco Pipeline Company*

In the first proceeding involving oil pipeline prorationing practices (prorationing is the method by which an oil pipeline allocates capacity when shippers seek transportation for more oil than the pipeline can carry), FERC announced on January 26, 1980, the launching of a formal investigation into whether Amoco Pipeline Company acted unfairly in allocating space to shippers seeking to use the pipeline's facilities.[148]

The enforcement investigation grew from a complaint filed by The Crude Company and its affiliate, Powder River Pipeline Corporation, which alleged Amoco unreasonably favored Western Oil Transportation Company. FERC has jurisdiction over oil pipeline rates pursuant to the Interstate Commerce Act.[149]

147. FERC, News Release No. FE-776 (January 18, 1980).
148. FERC, News Release No. FE-781 (January 26, 1980).
149. 42 U.S.C.A. §§ 7155, 7172(b) (West 1978 Pamph.) (transferring to FERC the ICC's jurisdiction over pipeline rates).

The parties have reached a settlement agreement, approved by the Commission on January 15, 1980, which effectively resolves Powder River's problems with Amoco's prorationing policies. Amoco agreed, as part of the settlement, to publish a prorationing policy applicable to all shippers in its tariff. Nevertheless, because Powder River may have suffered significant harm as a result of the alleged discrimination and because Amoco's prorationing practices may constitute a *criminal violation* of its common carrier obligations, the Commission will conduct a formal investigation of Amoco's prorationing practices. If the Commission determines that Amoco, Permian, or Western Oil Transportation Company has knowingly violated the applicable statutes, the violations could be referred to the Attorney General for criminal prosecution.

VIII. CONCLUSION

The enforcement activities of FERC are in a tempestuous, transitional stage. However, it is apparent that the natural gas industry will be regulated in a manner in which it never has been before. With the Commission's new emphasis on enforcement and with the complexities of the NGPA and the Commission's regulations, more and more regulated entities can expect to feel the full force of FERC's enforcement powers.