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NOTES

Administrative Law—Natural Gas Regulation: FERC Must Consider Actual Impact of Curtailment Plans

Since the beginning of the current shortage of natural gas,¹ the Federal Power Commission (FPC and now the Federal Energy Regulatory Commission (FERC))² has regulated not only the price of natural gas sold in interstate commerce, but also the allocation of scarce supplies of interstate gas.³ The Commission has not allocated interstate

1. See M. Willrich, Administration of Energy Shortages 11-14 (1976) for a statistical description of the shortage. For a discussion of the causes of the shortage, see Harrison & Formby, Regional Distortions in Natural Gas Allocations: A Legal and Economic Analysis, 57 N.C.L. Rev. 57 (1978). In the last year or so, however, the shortage has abated somewhat, as industrial users have switched to other fuels, and as additions to reserves, prompted by higher prices for new discoveries, have increased. Berry, Whatever Happened to that Shortage of Natural Gas?, FORBES, Sept. 4, 1978, at 32. Gas is still less plentiful on the interstate market than on the intrastate market though, since most of the new gas was intended for the intrastate markets in which prices are not controlled. Id. at 33.


3. A brief description of the structure and operation of the natural gas industry is helpful. The process by which natural gas comes from the ground to the consumer's burner tip is divided into three stages: production, transmission, and local distribution. Producers in the fields sell gas to pipelines according to long-term contracts. Interstate pipelines then transmit the gas to various parts of the country and sell most of it to local distributors, who, in turn, deliver and sell the gas to ultimate consumers. See Harrison & Formby, supra note 1, at 59-62. About 10% of interstate pipeline sales, however, are made directly from pipelines to ultimate industrial consumers. M. Willrich, supra note 1, at 19. Depending on “the density of population and the industrial structure of regional economies,” some areas are served by two or more pipelines, while others are entirely dependent on a single pipeline. Harrison & Formby, supra, at 60.

The scope of the Commission's jurisdiction over the natural gas industry is defined by § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1976):

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. Id. § 1(c), 15 U.S.C. § 717(c), expressly limiting the Commission's jurisdiction, provides in part:

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States.
gas on a nationwide basis, but has chosen instead to treat each interstate pipeline as a separate unit,\textsuperscript{4} and to regulate the distribution of each pipeline's supplies through the use of "curtailment plans"\textsuperscript{5} filed by the pipeline and approved by the FPC. Since 1973, the Commission has followed a policy of favoring "end-use" curtailment plans, which allocate each pipeline's supplies according to priorities based on the ultimate or end use to which the gas is put.\textsuperscript{6} The implementation of

\textsuperscript{4} Harrison & Formby, \textit{supra} note 1, at 82.

\textsuperscript{5} A "curtailment plan" is a scheme for allocating a pipeline's supply of natural gas during times of shortage. Despite the prospect of increased supplies presented by recently enacted legislation that "deregulates" prices of newly discovered natural gas, shortages, and the accompanying need for curtailment plans, are not likely to disappear altogether.

\textsuperscript{6} See \textit{North Carolina v. FERC}, 584 F.2d 1003, 1007 (D.C. Cir. 1978). Theoretically, as the pipeline's supply decreases, service to successively higher-priority uses is curtailed. \textit{Id.} Curtailment into a given priority category does not begin until service to all lower categories has been completely curtailed. \textit{Id.} at 1008.

The Commission's ability to ensure that curtailment of service to ultimate users actually proceeds in conformity with the priorities set forth in an end-use plan, however, is significantly circumscribed by the limitations on the Commission's jurisdiction. Since its jurisdiction extends only to the sale and transportation of natural gas in interstate commerce, see 15 U.S.C. § 717(b) (1976), \textit{quoted in} note 3 \textit{supra}, the Commission has no authority to regulate the allocation of gas by local distributors to ultimate or end users. M. \textit{Willrich}, \textit{supra} note 1, at 46-47. Instead, the Commis-
end-use curtailment plans on a strictly pipeline-by-pipeline basis has caused much more severe curtailment in some regions (most notably the Southeast, and North Carolina and South Carolina in particular) than in others.\(^7\) In *North Carolina v. FERC*,\(^8\) however, the United States Court of Appeals for the District of Columbia Circuit determined that two major features of an end-use curtailment plan were defective because they tended to result in regionally discriminatory allocation and because they rendered an accurate assessment of the plan's actual impact impossible.\(^9\) The court held that in drawing the curtailment plans the Commission must determine and consider the actual impact of the plans on ultimate consumers.\(^10\) To assess a plan's actual impact, the Commission must collect and consider information about recent changes in the end uses to which gas supplied to the pipeline's customers\(^11\) is put by ultimate consumers\(^12\) and in the relative supplies available to each customer from other pipelines.\(^13\) This decision may mean that in the future, supplies of natural gas will be more

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\(^7\) Harrison & Formby, *supra* note 1, at 85-86.

\(^8\) 584 F.2d 1003 (D.C. Cir. 1978).

\(^9\) Id. at 1012-14, 1014 n.22; *North Carolina v. FERC*, No. 76-2102 (D.C. Cir. Aug. 29, 1978) (order amending opinion of July 13, 1978, by adding footnote 20). The court's order of Aug. 29, 1978, amended *North Carolina v. FERC*, No. 76-2102 (D.C. Cir. July 13, 1978) by ordering the addition of new footnote 20 on page 21 of the slip opinion and renumbering old footnotes 20-34 as 21-35. The slip opinion was reprinted in 584 F.2d at 1003 prior to this renumbering. In this Note citations to *North Carolina v. FERC* notes 20-34 reprinted in 584 F.2d are to the notes as designated before renumbering. New note 20 is hereinafter cited as Slip op. at 21 n.20 (as amended Aug. 29, 1978).

\(^10\) 584 F.2d at 1015.

\(^11\) Throughout this Note, the term "customer," unless otherwise indicated, is intended to refer either to local distributors or to industrial end-users who purchase their gas directly from an interstate pipeline.

\(^12\) Slip op. at 21 n.20 (as amended Aug. 29, 1978).

\(^13\) 584 F.2d at 1013-15.
evenly allocated among the various regions of the country than at present. Nevertheless, regional distortions are likely to remain.

_North Carolina v. FERC_ arose when certain customers of Transcontinental Pipe Line Corporation (Transco)\(^{14}\) sought judicial review of a permanent curtailment plan for the Transco system ordered into effect by FPC Opinion No. 778.\(^{15}\) Opinion 778 established nine priority categories of end use, ranging from residential and small commercial use (first in priority and last to be curtailed) to use of large amounts of gas as boiler fuel (last in priority and first to be curtailed).\(^{16}\) The

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**14.** Transco buys natural gas from producers in the Gulf states and transmits it by pipeline to customers in Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, New Jersey, and New York. All but one of Transco's customers "are wholesale customers—public utilities and municipalities which purchase the gas for resale to ultimate customers." _Id._ at 1008. As a company engaged in the transportation and sale for resale of gas in interstate commerce, Transco is subject to the jurisdiction of the Commission under § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1976), _quoted in note 3 supra._


The proceedings leading to Opinion 778 began in 1971 when, in response to growing shortages and to FPC Order No. 431, 45 _F.P.C._ 570 (1971), Transco filed a permanent curtailment plan with the FPC. 584 F.2d at 1009. Following the Commission's direction, Transco filed another permanent plan in 1973 that was consistent with the end-use guideline set forth in FPC Order No. 467, 49 _F.P.C._ 85 (1973). 584 F.2d at 1009. Final decision on a permanent plan was delayed for several years, however. During the intervening period the short supplies of Transco's system were distributed according to a series of interim settlement agreements arrived at by negotiation among Transco and its customers, and either approved by the FPC or ordered into effect by the Court of Appeals for the District of Columbia Circuit. _Id._ at 1008. The first two interim settlement agreements were based on pro rata curtailment, the third on 50% pro rata and 50% end-use curtailment, and the fourth and final on an end-use plan with two priority categories. _Id._ at 1008-09.

**16.** The priority categories set forth in Opinion 778 are:

1. Residential and small commercial requirements less than 50 Mcf on a peak day.
2. Large commercial requirements of 50 Mcf or more on a peak day, except for commercial boiler fuel requirements above 300 Mcf/d; industrial requirement for plant protection, feedstock and process needs; and storage injection requirements.
3. All other industrial requirements below 300 Mcf/d.
4. Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 300 Mcf/d but less than 3000 Mcf/d.
5. Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 3000 Mcf/d.
6. Boiler fuel requirements of more than 300 Mcf/d but less than 1500 Mcf/d.
7. Boiler fuel requirements of 1500 Mcf/d or more but less than 3000 Mcf/d.
8. Boiler fuel requirements of 3000 Mcf/d or more but less than 10,000 Mcf/d.
9. Boiler fuel requirements of 10,000 Mcf/d or more.

10 _FED. POWER SERV._ (M-B) at 5-1091 n.63. "Mcf/d" means one thousand cubic feet per day. Opinion 778 defined "process," "feedstock," and "plant protection" as follows:

- Process refers to those industrial uses for which alternate fuels are not technically feasible. In general, this means those uses requiring the precise temperature controls and flame characteristics of gas (including propane and other gaseous fuels). Feedstock refers to the industrial use of gas as a raw material, that is, for its chemical not thermal, properties. Plant protection refers to the industrial use of gas needed to prevent physical
amount of gas available to each resale distributor is determined by the “end-use profile” or “mix” of end uses to which gas purchased by the distributor’s customers is put. This profile is, however, not derived from current uses, but rather from customer uses during the “base period,” May 1, 1972, through April 30, 1973. According to the plan, Transco customers who are served by one or more other pipelines are allocated an amount of gas for each of their priority uses that is proportionately equal to the amount of gas supplied to them by Transco out of their total supply during the base period. In other words, if local distributor Company A received 40% of its total supply from Transco and 60% from another pipeline during 1972-1973, 40% of each of Company A’s priorities would be assigned to Transco. Thus, if at some point in the future the available supply on the Transco system were sufficient to allow service to only the first three priorities, Company A would be entitled to receive from Transco 40% of its requirements for those three priorities.

The primary issue before the court of appeals in *North Carolina v. FERC* was whether the plan ordered into effect by Opinion 778 resulted in undue or unreasonable discrimination against certain localities or classes of service, thereby violating section 4(b) of the Natural Gas Act. The court explained this feature of an end-use plan as follows:

> [T]he extent to which a pipeline’s distributor customers are curtailed depends on the “mix” of each distributor’s own customers. Distributors who have a large percentage of high priority customers theoretically will not be curtailed as deeply as those who have a small percentage of such customers, and distributors who have a large percentage of low priority customers will be curtailed more sharply than those who have a small percentage of such customers.

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harm to plant facilities and/or danger to plant personnel, but it is limited to protection which cannot be attained through the use of alternate fuels (again propane and other gaseous fuels are not considered alternate fuels).

*Id.* at 5-1084. Use of gas for “boiler fuel” “[is] considered to be natural gas used as a fuel for the generation of steam or electricity, including utilization of gas turbines for the generation of electricity.” 18 C.F.R. § 2.78 (1977).

17. 10 *FED. POWER SERV. (M-B)* at 5-1067. The court in *North Carolina v. FERC* explained this feature of an end-use plan as follows:

> [T]he extent to which a pipeline’s distributor customers are curtailed depends on the “mix” of each distributor’s own customers. Distributors who have a large percentage of high priority customers theoretically will not be curtailed as deeply as those who have a small percentage of such customers, and distributors who have a large percentage of low priority customers will be curtailed more sharply than those who have a small percentage of such customers.

584 F.2d at 1007.

18. 10 *FED. POWER SERV. (M-B)* at 5-1067.

19. See 584 F.2d at 1010, 1013-14.

20. See *id.*

21. Two additional elements of Opinion 778 should be noted. First, the Commission refused to consider the merits of a provision by which those customers curtailed less than the average level of curtailment for the Transco system would pay monetary compensation to those customers curtailed more than the average level. 10 *FED. POWER SERV. (M-B)* at 5-1073, 5-1103. The Commission maintained that it had no authority to enforce such a provision. *Id.* at 5-1103; see 584 F.2d at 1015-16. Second, Opinion 778 included an “emergency high priority exemption from curtailment,” available to distributors under certain conditions. 10 *FED. POWER SERV. (M-B)* at 5-1093 to 94.
Gas Act.\textsuperscript{22} Since the record demonstrated that the plan wrought regionally discriminatory results,\textsuperscript{23} the legality of Opinion 778 depended on whether there was sufficient justification for those results.\textsuperscript{24} Declaring that the "discrimination resulting from an end-use plan can be justified only to the extent that the plan \textit{actually does protect high-priority uses from curtailment ahead of low-priority uses}," the court held that the plan adopted in Opinion 778 could not be said to be just and reasonable, "\textit{in light of the Commission's failure to make findings as to the impact the plan would actually have on ultimate consumers}."\textsuperscript{25} According to the court, two features of the plan precluded an accurate assessment of the plan's impact: first, the end-use data on which the plan was based was approximately six years old,\textsuperscript{26} and second, the plan failed to take into account the "partial/full requirements phenomenon"\textsuperscript{27}—a situation resulting from the fact that some of Transco's customers ("partial-requirements customers") are served by one or more additional pipelines that have experienced considerably less severe shortages than Transco in the years since the 1972-1973 base period, while those customers ("full-requirements customers") supplied exclusively by Transco have borne the full weight of the Transco system's deep curtailment.\textsuperscript{28}

\textsuperscript{22} 584 F.2d at 1010-12. Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b)(1976) provides:

\textbf{No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.}

\textsuperscript{23} The court stated:

A study showed that if an Opinion 778-type plan had been implemented in 1974-1975 it would have resulted in levels of curtailment among Transco's distributors ranging from 9.6% to 39.5% on a state-by-state basis \ldots . On a regional basis, curtailment levels would have ranged from 20.3% in the Northeast [District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York] to 38.4% in the Southeast [South Carolina, North Carolina, Virginia]. \ldots

\textsuperscript{24} 584 F.2d at 1011 (footnote omitted).

In the 1976-1977 heating season, during which the Opinion 778 plan was in effect on the Transco system, regional distortions were pronounced. Curtailment of total natural gas requirements was at the level of 66.9% in South Carolina and 52.9% in North Carolina, while the corresponding figures for New York and Pennsylvania were 9.5% and 11.9%. Harrison & Formby, supra note 1, at 84.

\textsuperscript{25} 584 F.2d at 1012.

\textsuperscript{26} Id. (emphasis in original).

\textsuperscript{27} Id. at 1012-13.

\textsuperscript{28} The court did not vacate Opinion 778. Instead, it allowed the Opinion 778 plan to remain in effect on a temporary basis until the Commission has had a reasonable time to consider the issues remanded to it by the court of appeals. Id. at 1017.
Development of the FPC's policies of curtailment began in 1971 with the promulgation of Order No. 431, directing pipelines expecting shortages during the upcoming winter to submit curtailment plans to the Commission. Judicial approval of the FPC's authority to regulate curtailment by interstate pipelines came soon thereafter in *FPC v. Louisiana Power & Light Co.*, in which the Supreme Court held that the Commission's power over curtailment derives from its jurisdiction over the transportation of natural gas in interstate commerce. The Court went on to say that the Commission must have broad powers over curtailment programs in order to carry out the duties associated with its jurisdiction over transportation of interstate gas. The standard by which curtailment plans are to be evaluated, the Court said, is section 4(b) of the Natural Gas Act.

Its power to regulate curtailment thus established, the Commission proceeded to formulate a policy, announced in Order No. 467, of favoring curtailment plans based on end use rather than on contractual entitlements. The major premise behind Order No. 467 (and behind all

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Additionally, the court ordered the Commission to consider the inclusion of a compensation feature in the permanent plan. *Id.* Despite the Commission's contention to the contrary, the court expressly held that the Commission does have the power to order, as part of a curtailment plan, that those customers whose services are curtailed less than the system-wide average compensate those whose services are curtailed more than the system-wide average. *Id.* at 1015-17.

29. 45 F.P.C. 570 (1971).
31. *Id.* at 636-41.
32. *Id.* at 642.
33. *Id.* at 642-43. *FPC v. Louisiana Power & Light Co.* also included a discussion of the procedures available to the Commission for implementing curtailment plans. *Id.* at 643-45. As the Court pointed out, the Commission could have chosen to proceed in accordance with § 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a) (1976), which authorizes the Commission to establish on its own initiative "the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force," after the Commission has held a hearing and has determined that the existing rate, charge, classification, etc. is "unjust, unreasonable, unduly discriminatory, or preferential." Since hearings can be lengthy, the use of § 5(a) for curtailment proceedings can be cumbersome. Consequently, the Court approved the FPC's decision to proceed under § 4(c)-(e) of the Act, 15 U.S.C. § 717c(c)-(e) (1976). Under § 4, a pipeline submits its own curtailment plan which can be accepted immediately or suspended for as long as five months pending hearings. The burden of proving the reasonableness and fairness of the plan is on the pipeline. See M. Willrich, *supra* note 1, at 49-54.

end-use curtailment plans) is that in times of shortage the supply of gas should be allocated according to a hierarchy of priorities. The priorities set forth in Order 467 represent the Commission’s attempt to ensure the safety of residential and small commercial customers and to prevent gas from being put to inefficient uses or to uses for which alternate fuels could be substituted relatively easily.

Not long after the promulgation of Order No. 467 the FPC indicated a further preference for “fixed-base periods” over “rolling-base periods” for relief from curtailment. Unless otherwise indicated, all of the above orders will hereinafter be referred to collectively as Order No. 467.

The priority categories set forth in Order No. 467-B were:

1. Residential, small commercial (less than 50 Mcf on a peak day).
2. Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.
3. All industrial requirements not specified in paragraph (a) (2), (4), (5), (6), (7), (8), or (9) of this section.
4. Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.
5. Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.
6. Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.
7. Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.
8. Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.
9. Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.


"Firm" service is “[s]ervice from schedules or contracts under which seller is expressly obligated to deliver specific volumes within a given time period and which anticipates no interruptions, but which may permit unexpected interruption in case the supply to higher priority customers is threatened.” 18 C.F.R. § 2.78 (1977). “Interruptible” service is “[s]ervice from schedules or contracts under which seller is not expressly obligated to deliver specific volumes within a given time period, and which anticipates and permits interruption on short notice, or service under schedules or contracts which expressly or impliedly require installation of alternate fuel capability.” Id.

The curtailment plan prescribed by Opinion 778 did not distinguish between firm and interruptible service. 10 Fed. Power Serv. (M-B) at 5-1189, 5-1091.

35. “We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection.”


36. For list of priorities, see note 34 supra.
A plan that uses a fixed-base period allocates gas according to each distributor's end-use profile during a fixed historical period, whereas a plan using a rolling-base period allocates gas according to data that is periodically updated to reflect changes in the distributor's end-use profile.

Although the employment of end-use principles in curtailment plans has received favorable judicial response, courts have refused to allow the Commission automatically to apply the priorities set forth in Order No. 467 to individual pipelines. Instead, courts have required the Commission to demonstrate in each curtailment proceeding the reasons why the priorities set forth in Order No. 467 should be applied to the particular pipeline under consideration. In *Arkansas Power & Light Co. v. FPC*, for example, the court rejected the Commission's decision to place firm service in a higher priority category than interruptible service. Although Order No. 467 embodied the distinction between firm and interruptible service, the court disapproved the employment of the distinction where the validity of its application to the curtailment plan under consideration was not supported by substantial evidence in the record.

In *Consolidated Edison Co. v. FPC (Con Ed I)*, a case which foreshadowed the decision in *North Carolina v. FERC*, the same court of

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40. *Id.* at 1233.
41. *See* note 34 *supra*.
42. 517 F.2d at 1233. Similarly, in *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925, 945-46 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974), the court refused to accept the unsupported proposition that "boiler fuel uses of natural gas are per se inferior to all other uses, for purposes of curtailment, regardless of the particular circumstances." Accordingly, the court remanded the case so that the Commission could state its reasons for assigning boiler fuel use on this particular pipeline to the lowest priority categories. *Id.* American Smelting and *Arkansas Power* are consistent with the holding in *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974), that Order No. 467 is a general statement of policy—not a binding rule—and that it is not a replacement for the process of pipeline-by-pipeline adjudication of curtailment plans. *See* M. WILLRICH, *supra* note 1, at 88-92, 105 n.51.

Order No. 467 has strongly influenced curtailment plans, however. Technically, pipelines are free to file curtailment plans that do not conform to Order No. 467. *Id.* at 90. By expressing a strong preference for plans modeled after Order No. 467, though, the Commission has exerted considerable pressure on the pipelines to file conforming plans. *Id.* Furthermore, the threat of liability for breach of contract with their customers may be an incentive for pipelines to file plans consistent with Order No. 467, since "Commission approval of necessary curtailments is an effective barrier to liability where the pipeline was not in some way responsible for the shortage." *Id.*
43. 511 F.2d 372 (D.C. Cir. 1974) (per curiam).
appeals imposed on the Transco system a temporary negotiated settlement agreement instead of a plan modeled on Order 467. The court gave as one of its reasons: "the 467 plan does not take into account the fact that some customers are totally dependent on Transco while others purchase substantial quantities from pipelines supplying a much higher percentage of contract demand." The opinion in Con Ed I thus cursorily raised the partial/full requirements issue central to North Carolina v. FERC.

Except for Con Ed I, most of the cases criticizing the Commission's curtailment policy directed their criticism primarily at the FPC's choice of certain end-use priorities for the particular pipeline under consideration. North Carolina v. FERC, however, cast doubt on the whole of the Commission's curtailment policy by demonstrating that the end-use plans approved by the Commission are likely to fail to accomplish their purpose: the protection of high-priority users ahead of low-priority users. Since the opinion questions the legality of any end-use plan that does not achieve results consistent with end-use theory, North Carolina v. FERC will no doubt require the Commission to engage in a thorough reevaluation of its curtailment policy. Two well-established features of that policy—the use of fixed-base periods and the disregard of the partial/full requirements phenomenon—are now particularly suspect, since the court determined that these features, when incorporated into an end-use plan, are very likely to produce results inconsistent with end-use theory.

As the court observed in North Carolina v. FERC, the vice inherent in a plan that employs a fixed-base period is easily perceived. The achievement of true end-use allocation in 1978 is highly unlikely if gas is allocated, as required by Opinion 778, according to data from 1972-

44. Id. at 381.
45. Id. at 380.
46. In Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975) (Con Ed II), the court reinforced, indirectly, its earlier criticism of the Commission's failure to take into account the partial/full requirements phenomenon. Citing that portion of Con Ed I in which it had raised the partial/full requirements issue, the court stated that before a 467-type plan went into effect on the Transco system, the Commission should consider the problems raised in recent judicial evaluation of the application of 467 priorities to individual problems. Id. at 1347 & n.90.
48. 584 F.2d at 1012-14.
49. Id.
50. Id. at 1012.
51. Id.
Since each distributor's mix of end uses has probably changed in the past six years, the use of such a distant fixed-base period would constitute a serious impediment to an accurate assessment of the curtailment plan's actual impact at adoption.\textsuperscript{53}

The significance of \textit{North Carolina v. FERC}'s criticism of fixed-base periods lies not in the court's express statements on the subject, but in the implications of its reasoning. The court expressly stated that plans using fixed-base periods are not illegal per se.\textsuperscript{54} Furthermore, the court did not order the Commission to employ rolling-base periods in its end-use plans. Instead, the court required the Commission simply to collect and examine relatively current end-use data.\textsuperscript{55} In explaining the reason why this current data must be made available, though, the court implied that, while plans using fixed-base periods were not illegal per se, most such curtailment plans would indeed be found illegal. The Commission must have relatively current end-use data available, said the court, so that the Commission can determine whether an end-use plan, regardless of the type of base period it employs, would actually produce true end-use results at the time of its adoption.\textsuperscript{56} This determination of the plan's actual impact is necessary, in turn, for the final determination of the plan's legality, because, the court declared, the discrimination resulting from an end-use plan is justified only insofar as the plan produces true end-use results.\textsuperscript{57} The implication of the court's reasoning is that if current end-use data shows that the use of a fixed-base period would create anti-end-use discrimination (that is, a situation in which, contrary to the principles of end use, some of the pipeline's customers were forced to curtail higher priority uses while other customers of the same pipeline were still serving lower priority uses), then the plan must be rejected, and a plan based on current end-use data, or a plan not based on end-use at all, adopted instead. Since the use of fixed-base periods is likely to produce results contrary to end-use principles,\textsuperscript{58} end-use plans employing fixed-base periods are likely to be illegal.

One loophole through which such plans might nevertheless escape invalidation is found in the court's intimation that if other policies

\textsuperscript{52} Id. at 1012-13.
\textsuperscript{53} Id. at 1012-13 & slip op. at 21 n.20 (as amended Aug. 29, 1978).
\textsuperscript{54} Slip op. at 21 n.20 (as amended Aug. 29, 1978).
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} 584 F.2d at 1012 & slip op. at 21 n.20 (as amended Aug. 29, 1978).
\textsuperscript{58} See 584 F.2d at 1012 & slip op. at 21 n.20.
which the Commission seeks to further by way of a curtailment plan to outweigh the need to eliminate the discriminatory anti-end-use impact of a plan that employs a fixed-base period, the fixed-base period may be retained as part of the plan. The other or "collateral" policies to which the Commission wishes to accommodate its end-use plans, include "(1) encouraging conservation, (2) discouraging load growth, and (3) stimulating supplemental supplies." The court offered no guidance, however, about the weight to be accorded each of these policies. Furthermore, the court left some question about the manner in which the "accommodation" or "balancing" process is to be carried out. Presumably, the degree of anti-end-use discrimination (determined from

59. 584 F.2d at 1014 n.27. These other policies, though, are to be considered only after the actual impact of the plan, has been assessed. Id.

60. Id. The term "supplemental supplies" as used in Opinions 778 and 778-A refers not to supplies of natural gas from other interstate pipelines, but to substitute supplies—liquid natural gas (LNG), synthetic natural gas (SNG) storage, or propane-air injection—procured by local distributors through their own efforts. Transcontinental Pipe Line Corp., Opinion No. 778-A, 11 Fed. Power Serv. (M-B) 5-177, 5-190 (1976).

The idea that a fixed-base period might further the Commission's policy of "stimulating supplemental supplies" rests on the Commission's concern that a rolling-base period "would act as a disincentive to Transco's resale customers [distributors] attaching new supplemental supplies and as a penalty to those resale customers which have already attached supplemental supplies." Id. The argument is based on the assumption that, if a rolling-base period were used, some distributors would "upgrade their requirements," id., presumably by extending service to more ultimate consumers in higher priority categories. These distributors would then be entitled to a proportionately greater share of the pipeline's supply, even though they had not made any efforts on their own to obtain supplemental supplies. Id. Since a proportionately smaller amount of gas would then be available to the rest of the pipeline system, those distributors who had obtained supplemental supplies would then be forced to use those supplies to make up the shortfall. The result, the Commission contends, would be to shift supplemental supplies from the more industrious and innovative distributors to those distributors who had made no efforts to obtain such supplies on their own. Id.

The Commission also believes that the use of a rolling-base period, by allowing distributors to take on more high priority consumers (thereby upgrading the distributors' requirements) without securing additional supplies from sources other than Transco, would cause the limited supply on the Transco system to be spread over a growing number of high priority consumers. Id. The result, the Commission fears, would be increased curtailment into high priorities and perhaps into priority one. Id. Although persuasive when considered alone, this argument is fundamentally inconsistent with end-use theory.

For example, the Commission has made it clear that the objective of its end-use policy is to drive low priority industrial uses to alternative fuels. It would seem to follow that a distribution customer ought to be able to reallocate the gas used by the low priority industrial customers to the preferred higher priority uses. This cannot happen, however, if future deliveries are forever locked in to the historic end-use pattern of the base period existing before the effect of curtailment was felt.

Muys, supra note 37, at 333-34. In view of the FPC's opposition to the use of rolling-base periods, it appears that the objective of the Commission's end-use policy is to drive lower priority industrial users to alternate fuels and to discourage distributors from reallocating the gas saved thereby. By seeking to accomplish such multiple objectives, the Commission, as the court of appeals explained, attempts to accommodate its end-use curtailment plans to the collateral policies of encouraging conservation and discouraging load growth. 584 F.2d at 1014 n.27.
an assessment of actual impact on ultimate consumers) resulting from a plan with a fixed-base period is to be weighed, in each case, against the potential benefit to collateral policies from the use of the same plan. Language in the opinion, however, suggests that rather than permitting a plan’s anti-end-use discrimination to be justified in some instances by collateral policies, the court would not allow such discrimination to be so justified if the collateral policies sought to be effectuated by the plan could be carried out by a nondiscriminatory plan. If this language is controlling, then the balancing of collateral policies against anti-end-use discrimination never comes into play. This closes the loophole of collateral policies and makes it all the more unlikely that end-use plans incorporating discriminatory features (such as fixed-base periods) would survive judicial scrutiny.

Prior to *North Carolina v. FERC*, and except for brief mention in *Con Ed I*, the issue whether the Commission should take into account post-base period changes in the relative levels of curtailment on other pipelines in order to avoid the partial/full requirements phenomenon had been given little judicial consideration. The issue arose in *North Carolina v. FERC* because North Carolina customers (full-requirements customers) are served only by Transco, a pipeline that has encountered very severe shortages since the 1972-1973 base period. Most of Transco’s other customers (partial-requirements customers), in contrast, are served by one or more other pipelines that have experienced shortages of far less severity in the last several years than has Transco. As the court found, a plan for one pipeline that does not take into account post-base period changes in the relative levels of

61. "The practical effect of the Commission’s actions is to convert what it has labeled an ‘end-use’ plan into a conservation, supply-incentive plan; hence, the discriminatory end-use features of the plan become arbitrary because the conservation, supply-incentive policies can be achieved through a non-discriminatory plan.” 584 F.2d at 1014 n.27.
62. This analysis was suggested in Letter from Jeffrey L. Harrison, Associate Professor, Bates College of Law, The University of Houston, to Christopher Moore (Sept. 19, 1978) (copy on file in office of *North Carolina Law Review*).
63. See text accompanying notes 43-50 supra.
64. 584 F.2d at 1013-14.
65. Only the relative levels of curtailment on different pipelines in the years since the 1972-1973 base period are in issue. The amounts of gas supplied to each partial-requirements customer
curtailment on other pipelines serving the pipeline’s partial-requirements customers can have the result of forcing its full-requirements customers to curtail into high priorities, while partial-requirements customers are still serving lower priorities.\textsuperscript{66} Such a result is obviously contrary to the principles of end-use curtailment.\textsuperscript{57}

The impact the court’s decision will have on the partial/full requirements issue is only implicit in the court’s reasoning. The court claimed that it was not requiring that the Commission “actually allocate supplies to partial-requirements customers in relation to the levels of curtailment on alternative pipelines,” but was merely directing the Commission to consider the partial/full requirements phenomenon in order to assess the actual impact of the plan.\textsuperscript{68} The implication of the court’s reasoning, however, is that if an allocation plan that does not account for curtailment on other pipelines causes discrimination among members of the same class of end-users, then the plan will be declared invalid. Nevertheless, the court suggested that the discrimination resulting from disregard of the partial/full requirements phenomenon might be justified in some cases by the same collateral policies that might also justify the use of fixed-base periods.\textsuperscript{69} As with the base pe-

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\item[66.] The anti-end-use vice inherent in the Commission’s failure to take account of the fact that some of Transco’s customers are served by more than one pipeline can be illustrated by the following hypothetical. Company A and Company B have identical requirements by priority. If Company A obtained half of its gas from Transco during the 1972-1973 base period and half from Pipeline X, Transco would be assigned half of each of Company A’s priorities. If Transco curtailed at 40% and Pipeline X at 20%, Company A’s curtailment would be 30% of its total supply. If Company B were supplied entirely by Transco, it would be curtailed 40%. If the priority 1 and 2 requirements to each were 65% of its total requirements, Company A would be able to supply all of its demand for priority 1 and 2 needs and have 5% of its total supply available for lower priorities. Company B, on the other hand, would have to curtail its priority 2 market by 5% of its total supply (which may be substantially more than 5% of just its priority 2 market). The effect then is that Company B must curtail a portion of its priority 2 market in order that Company A can sell inexpensive pipeline gas to its priority 3 market. Clearly in such a situation the whole concept of protecting high priority end users is violated.

\item[67.] For a list of collateral policies, see text accompanying note 60 supra.

\item[68.] The court’s suggestion that the Commission sought to justify its failure to take into account supplies from other pipelines by invoking collateral policies, 584 F.2d at 1014 n.27, is somewhat misleading. The Commission had these policies in mind when it decided not to use a rolling-base period, Transcontinental Gas Pipe Line Corp., Opinion No. 778, 10 Fed. Power Serv. (M-B) at
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rior period issue, however, there remains some uncertainty about the weight that these collateral policies are to be accorded when balanced against the discrimination resulting from a plan that fails to consider levels of curtailment on other pipelines.70

Conspicuously absent from the opinion is any discussion of the "inter-pipeline supply allocation" that may result from a curtailment plan that allocates a particular pipeline's gas to its partial-requirements customers in relation to the levels of curtailment on other pipelines serving those customers.71 There is a question whether the Commission has the authority, in the context of a single adjudicatory proceeding directly involving only one pipeline, to order into effect a curtailment plan when inter-pipeline supply allocation results.72 The Commission contends that a partial/full requirements adjustment on the Transco system would have a highly complex impact on the allocation of the supplies of other pipelines that serve Transco's partial-requirements customers.73 Furthermore, the Commission maintains, such an adjustment would effectively shift gas from those other pipeline systems to the Transco system,74 and since those pipelines are not parties to the Transco proceeding, would deprive them of their due process rights.75 Accordingly, the Commission decided that the proper vehicle for consideration of the partial/full requirements phenomenon is not a proceeding for curtailment on a single pipeline, but rather a general rulemaking proceeding.

A proceeding directly involving only one pipeline is an appropri-
ate forum for the consideration of the partial/full requirements phenomenon if one accepts the view that a partial/full requirements adjustment does not constitute inter-pipeline supply allocation, but affects only the allocation of that single pipeline's gas among its customers.\(^76\) This view is easily supportable on the basis that a partial/full requirements adjustment does not involve any physical interconnection between pipelines.\(^77\) The Commission claims, however, that other pipelines are affected by such plans through the process of "displacement."\(^78\) According to the Commission's argument, taking into account the partial/full requirements phenomenon in formulating Transco's curtailment plan would have negative effects on other pipeline systems through a two-stage process. First, although discrimination against the full-requirements customers on the Transco system would be eliminated, discrimination against Transco's partial-requirements customers, "\textit{vis-a-vis} their fellow customers of the other pipeline supplier," would result.\(^79\) A partial/full requirements adjustment would cause the proportionate supply of Transco's gas available to Transco's partial-requirements customers to decrease as the supplies to full-requirements customers were increased. Given a constant level of supply from their other pipeline sources, Transco's partial-requirements customers would then have a total supply of gas lower than the total available before the adjustment of the Transco system, causing them to curtail into higher priorities than before the adjustment. Since other multi-pipeline customers who are not served by Transco would be receiving an amount of gas unaffected by the adjustment on the Transco system, the result would be discrimination against Transco's partial-requirements customers in comparison to their fellow customers on non-Transco systems.

The second effect of a partial/full requirements adjustment which the Commission contends involves inter-pipeline supply allocation, occurs as follows. If other pipelines attempted to eliminate the discrimination against Transco's partial-requirements customers by "reducing their deliveries systemwide so as to increase deliveries to the partial requirements customers affected by Transco's full/partial requirements adjustment," the result would be inter-pipeline supply allocation by displacement.\(^80\) The effect, according to the Commission, is to shift gas

\(^76.\) See Initial Brief for Petitioner Piedmont Natural Gas Co. at 35.
\(^77.\) Id.
\(^78.\) 11 FED. POWER SERV. (M-B) at 5-190.
\(^79.\) Brief for Respondent Federal Power Commission at 27.
\(^80.\) Id.
from other pipelines to the Transco system without according the other pipelines their due process rights.\textsuperscript{81}

Even if the due process problem can be solved by a general rulemaking procedure in which all affected parties are represented, there remains the question whether the Natural Gas Act\textsuperscript{82} grants the Commission the requisite authority to order into effect curtailment plans that result in indirect inter-pipeline supply allocation.\textsuperscript{83} Such plans might violate section 7(a) of the Natural Gas Act,\textsuperscript{84} which provides that "the Commission shall have no authority . . . to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." Whether the indirect inter-pipeline supply allocation anticipated by the Commission would violate section 7(a) would depend on whether such allocation were deemed to constitute "physical connection," and on the reviewing court's definition of "adequate service."\textsuperscript{85}

Implicit in the court of appeals' failure to discuss the issue of inter-pipeline supply allocation could be a conclusion that allocation to partial-requirements customers according to the levels of curtailment on alternate pipelines simply does not constitute inter-pipeline supply allocation.\textsuperscript{86} Or, the absence of discussion of the issue might be read to imply that the due process problems anticipated by the Commission are nonexistent, and that the Commission does in fact have the authority to order indirect inter-pipeline supply allocation. It is more likely, though, that the court's reticence on the issue of inter-pipeline supply allocation is a product of the court's decision to restrict the scope of its opinion. The express holding in North Carolina v. FERC is limited to a requirement that the Commission "first, determine, and, second,

\textsuperscript{81} See 10 FED. POWER SERV. (M-B) at 5-1093. Contrary to the Commission's argument, the real effect of a partial/full requirements adjustment does not appear to be a shift of gas to Transco from other pipelines. The other pipelines continue to transport and sell the same amount of gas as before the adjustment. The real shift seems to be from the customers of the other pipelines that serve Transco's partial-requirements customers to Transco's full-requirements customers. The parties whose due process rights are denied, then, are those customers who are not served by Transco, but who are served by other pipelines that serve Transco's partial-requirements customers.


\textsuperscript{84} 15 U.S.C. § 717f(a) (1976); see M. Willrich, supra note 1, at 48.

\textsuperscript{85} See M. Willrich, supra note 1, at 48.

\textsuperscript{86} The court could have followed the reasoning in text accompanying notes 76 & 77 supra.
consider the impact of its opinion on ultimate users in the implementation of a curtailment plan for the Transco system." The court did not actually order the Commission to allocate gas to partial-requirements customers in relation to the levels of curtailment on alternate pipelines; it was therefore technically unnecessary to consider the issue of inter-pipeline supply allocation and the potential problems associated therewith. Nevertheless, the court should have considered the issue since the natural implication of the court's reasoning is indeed that (absent the influence of a sufficiently strong collateral policy) the Commission should in fact allocate gas according to the relative levels of curtailment on other pipelines.

North Carolina v. FERC constitutes long-awaited recognition that the Commission's application of end-use theory does not always produce results consistent with end-use principles. In requiring the Commission to consider the actual impact of end-use plans at the time of their adoption, and in declaring that the discrimination resulting from end-use plans is justified only to the extent that such plans actually protect high priority users from curtailment ahead of lower priority users, the court made significant progress toward reducing existing regional distortions in the allocation of natural gas supplies. The court's opinion suffers, however, from a lack of clarity in its discussion of the possibility that certain collateral policies might justify the discrimination resulting from end-use plans. Furthermore, the court ignored the potential legal infirmities of a plan that allocates gas to partial-requirements customers according to the relative levels of curtailment on other pipelines. The questions whether such a plan would violate the due process rights of indirectly affected pipelines and whether the Commission would have the authority under the Natural Gas Act to adopt such a plan will no doubt arise in the process of interpreting and applying the opinion. By failing to discuss these issues, the court contributed uncertainty to future curtailment proceedings.

Although it leaves a number of issues unresolved, North Carolina v. FERC serves the useful function of illustrating the problems that inevitably result from the allocation of natural gas on a pipeline-by-pipeline basis. Even if each pipeline's gas were allocated in such a way as to eliminate the discrimination resulting from the partial/full re-

87. 584 F.2d at 1015 (emphasis in original).
88. Slip op. at 21 n.20 (as amended Aug. 29, 1978).
89. 584 F.2d at 1012.
90. See text accompanying notes 59-62 supra.
requirements phenomenon, the vastly different levels of supply on different pipelines would preclude the achievement of true end-use results. Only if the Commission can allocate gas on a nationwide inter-pipeline basis can it prevent lower priority users from being served in some areas while higher priority users are being curtailed elsewhere. Allocation on a nationwide basis would, of course, require physical interconnection between pipelines, which would in turn require reform of the Natural Gas Act. Achievement of true end-use results would also require federal regulation of local distributors, since under present law the states are free to ignore end-use policy in regulating the allocation of gas from local distributors to ultimate consumers. Finally, Congress could choose to deregulate the field price of all natural gas in

91. See Harrison & Formby, supra note 1, at 79-86.
92. M. WILLRICH, supra note 1, at 233-34.
93. See M. WILLRICH, supra note 1, at 233-34, 275-76.
hopes of increasing supplies and thereby reducing the need for regulation of curtailment.\textsuperscript{4} Even if deregulation of prices were to increase supplies dramatically, however, shortages would most likely remain sufficiently serious to require some form of regulation over curtailment.\textsuperscript{5} While it is difficult to predict with any accuracy the future form that natural gas allocation will take, \textit{North Carolina v. FERC} demonstrates that future end-use curtailment plans will be subjected to close judicial scrutiny designed to ensure that such plans produce true end-use results.

\textbf{CHRISTOPHER WHITMAN MOORE}

\textbf{Attorney-Client Privilege—\textit{Diversified Industries, Inc. v. Meredith}: New Rules for Applying the Privilege When the Client Is a Corporation}

The attorney-client privilege protects from disclosure confidential communications between an attorney and his client.\textsuperscript{1} The privilege applies in both individual and corporate client contexts; when the client is a corporation, however, application of the privilege may prove more complex than when the client is an individual. Two questions must be answered in determining the applicability of the privilege in the corporate client context: first, what types of activity constitute legal services by the attorney and, second, which employees of a corporation may be deemed to so represent the corporation as to be the corporate client.\textsuperscript{2} In \textit{Diversified Industries, Inc. v. Meredith},\textsuperscript{3} the United States Court of

\textsuperscript{4} The Natural Gas Policy Act of 1978, does not deregulate prices on all natural gas, but "gradually ends controls on the price of newly discovered gas until the price ceiling is lifted in 1985." 36 CONG. Q. WEEKLY REP. 2615-16 (1978); see note 5 supra.

\textsuperscript{5} See M. Willrich, supra note 1, at 13-14.

\textsuperscript{1} A number of criteria must be satisfied in order for the attorney-client privilege to apply. "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure . . . , (8) except the protection be waived." 8 J. WIGMORE, EVIDENCE § 2291 (J. McNaughton rev. 1961).


\textsuperscript{3} 572 F.2d 596 (8th Cir. 1978).