CHAPTER 19

Section 311 of the Natural Gas Policy Act, Its History and Its Potential Future Role in Natural Gas Transportation

J. Gordon Pennington(1)
The Coastal Corporation
Washington, D.C.

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§ 19.01. Introduction.

Energy issues are receiving considerable national attention, once again, in 1991. The latest Middle Eastern crisis has contributed to a renewed interest in the issue of domestic energy self-sufficiency, including the increased use of domestic fossil fuels. Further, the environmental movement, and such issues as acid rain and global warming, have focused attention on the proper use and mix of available fossil fuels.

The current debate in Washington, D.C., over federal government involvement in energy matters includes a number of issues related to the appropriate role of domestic natural gas. This debate is taking place at the Federal Energy Regulatory Commission (FERC or Commission), the federal agency responsible for regulating interstate natural gas pipeline companies. The FERC has before it currently a number of policy and regulatory issues which may change the future regulatory environment for interstate natural gas pipelines. These issues include matters related to continued implementation by interstate pipelines of competitive "open access" transportation, as introduced in 1985. The FERC review includes issues of
pipeline rate design, particularly with respect to transportation of third party gas, and issues of comparability between pipeline sales and transportation services. The FERC is also reviewing its rules dealing with authorization for pipeline transportation services, and related pipeline facilities construction, which is the main focus of this Chapter.

Several major bills have also been introduced in the United States Congress, in early 1991, containing natural gas provisions as part of much broader energy legislative proposals. These bills address many of the same topics as the FERC is currently reviewing. They include, among others, a bill introduced by Senators Johnston and Wallop, (the Johnston-Wallop Bill), and one introduced by Congressman Sharp, with several cosponsors, (the Sharp Bill). Also, the National Energy Strategy unveiled by the Bush Administration in February 1991, with its related legislative proposals (NES), includes several natural gas policy proposals.

Part of the focus of these initiatives involves proposals to speed up the FERC regulatory process related to pipeline construction, so that additional interstate natural gas pipeline capacity can be approved and built expeditiously to allow for increased domestic natural gas transportation and use. Recently concerns have been expressed by many parties that additional interstate pipeline capacity is needed in certain areas of the country. For example, the various elements that make up the market for natural gas in the Northeast United States have, in recent years, stated to the FERC that substantial new quantities of natural gas, and related pipeline capacity, are needed in that region to meet environmental requirements and the demand for conversions to natural gas from other fuel sources.

In the context of this ongoing policy debate over rules for pipeline construction, there is an existing statutory provision, Section 311 of the Natural Gas Policy Act of 1978 (NGPA), which is receiving considerable attention. This provision already has certain features which provide for both expeditious pipeline transportation service and related facilities construction. Section 311, and the FERC's regulations thereunder, are being evaluated in Congress and at the FERC, to determine whether additional statutory or regulatory changes, or both, should be implemented. The current review at the FERC of Section 311 has also been precipitated in large part by a recent court order. In light of the possible changes to Section 311 and its implementing regulations and the related impacts of those changes on all the parties interested in the issue of increased natural gas use in the United States – namely producers, pipelines, and gas consumers, this Chapter examines Section 311, its history, some of the current proposals for change, and its possible future role in the transportation of natural gas.

§ 19.02. Overview of Section 311 of the Natural Gas Policy Act.

Since passage of the NGPA in 1978, Section 311(a), as implemented through FERC regulations, has provided for a largely self-implementing program of transportation services and related construction activity by interstate natural gas pipelines "on behalf of" local distribution companies (LDCs) and intrastate pipelines. The term "self-implementing" refers to the ability of a FERC regulated interstate natural gas pipeline to proceed with specific transportation transactions, and any related pipeline construction, without acquiring individual certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act (NGA), before building necessary facilities or beginning each transaction. Thus, Section 311 is a vehicle which can be used by interstate pipelines without many of the regulatory requirements and delays otherwise associated with traditional FERC jurisdictional transportation services and construction authorization, as long as the transportation service will be "on behalf of" an LDC or intrastate pipeline. While the FERC also provides other self-implementing transportation and construction authorization to
interstate pipelines under NGA Section 7(c) "blanket" certificates, those blanket certificates currently have certain limitations which are not applicable to Section 311 services and related pipeline construction. (13)

Section 311(b) of the NGPA (14) provides similar self-implementing authorizations for intrastate pipelines that perform transportation service "on behalf of" interstate pipelines and LDCs. This Chapter, though, will focus on Section 311(a), which provides authority for actions by interstate natural gas pipelines. Section 311(a) provides, in part:

[(a)(1)](A) In General. – The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of –

(i) any intrastate pipeline; and
(ii) any local distribution company.

(B) Just And Reasonable Rates. – The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act). (15)

Section 601(a)(2) of the NGPA further provides, in part:

[(a)(2)](A) Jurisdiction Of The Commission. – For purposes of Section 1(b) of the Natural Gas Act the provisions of such Act and jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is –

. . .

(ii) authorized by the Commission under Section 3371(a) of this Act.

Pursuant to Sections 311(a) and 601(a)(2) (16) of the NGPA, the FERC has established in its regulations that "any interstate pipeline is authorized without prior Commission approval, to transport natural gas on behalf of: (1) Any intrastate pipeline; or (2) Any local distribution company." (17) Further, the Commission has provided: "The Natural Gas Act shall not apply to facilities utilized solely for transportation authorized by Section 311(a) of the NGPA." (18) These statutory and regulatory provisions represent exemptions for interstate gas pipelines from the normal NGA certification requirements associated with pipeline services and pipeline construction.

The Commission has also established in its regulations that "[a]ny authorization granted under [Section 284.102] that involves construction . . . is subject to the terms and conditions of Section 157.206(d) of this chapter." (19) This additional requirement, namely compliance with Section 157.206(d), which is a FERC regulation applicable to NGA Section 7 blanket certificate facilities construction, means that, before interstate pipelines can undertake construction of facilities for Section 311 service, they must comply with an extensive array of specific federal environmental statutes, as well as all other applicable federal, state, and local laws. (20) As a final matter, pipelines which choose to build facilities to perform Section 311 transportation service do not have the benefit of an NGA Section 7 certificate, which grants the right of eminent domain under the NGA. (21)

To summarize, under the FERC's implementation of Section 311, interstate natural gas pipelines are able to perform transportation services and build related facilities without the otherwise applicable regulatory delay associated with obtaining FERC jurisdictional certificates. Any delay in building Section 311 facilities is
associated with obtaining rights-of-way without the benefit of eminent domain and all the environmental and other necessary clearances required by the FERC's regulations.


On August 2, 1990, the FERC issued two rulemaking proposals which involve, *inter alia*, proposed changes to its regulations implementing Section 311. The first proposes changes to the "on behalf of" requirement for Section 311 transportation services, as well as certain changes to the FERC's blanket transportation rules. Entitled *Revisions to Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates* (Transportation NOPR), this NOPR is a direct result of the decision in *Associated Gas Distributors v. FERC* (*AGD-Hadson*).

In *AGD-Hadson*, the court held that, even though the term "on behalf of" has never been defined, the FERC's interpretation of the Section 311 "on behalf of" requirement is overly broad, inconsistent with the NGPA and, consequently, invalid. The court vacated and remanded to the FERC for further action certain FERC cases involving interpretation of the "on behalf of" standard. The FERC issued the Transportation NOPR to address that remand.

The FERC also issued Order No. 526 on August 2, 1990.* Order No. 526 promulgated certain interim regulations which immediately revised the "on behalf of" requirement for Section 311 transportation service to require that the "on behalf of" entity (LDC or intrastate pipeline), at some point during the transaction, either have physical custody of and transport, or hold title to, the natural gas for a purpose related to its status and functions as an intrastate pipeline or LDC. These interim regulations took effect August 2, 1990, and will remain in effect until the FERC adopts final rules as part of the Transportation NOPR. Under the interim regulations, the FERC also provided that, by November 1, 1990, any Section 311 transportation service which did not qualify under the test established by new Section 284.102(d)(1) and (2) of the FERC's regulations be either terminated, or converted to blanket transportation service.

In the Transportation NOPR, the FERC specifically invites public comment on expanding the "on behalf of" test beyond what is provided in Order No. 526 so that additional types of transactions can be authorized beyond those where a strict physical nexus exists between the gas being transported and the "on behalf of" party.

The second rulemaking proposal, issued by the FERC on August 2, 1990, has a potential impact on Section 311 construction activity. Entitled *Revisions to Regulations Governing Certificates for Construction* (Construction NOPR), it proposes changes to the Commission's regulations to expedite review of pipeline facility proposals under traditional NGA Section 7 and blanket certificate applications. The Construction NOPR also invites comment on whether the Commission's regulatory provisions governing Section 311 construction by interstate pipelines should be modified.

On August 2, 1990, the Commission also issued Order No. 525.* Order No. 525 promulgated certain interim rules related to pipeline construction. These interim rules include provisions requiring interstate pipelines undertaking Section 311 construction to provide the FERC with thirty days advance notice of construction, as well as certain information related to the proposed construction. Prior to these interim rules on August 2, 1990, interstate pipelines could undertake construction projects necessary to provide Section 311 transportation services without any advance notification to the FERC, as long as the environmental conditions set forth in Section 157.206(d) of the FERC's regulations were met before
initial and Reply Comments have been filed by interested parties to both the Transportation and Construction NOPRs, and the matters addressed therein are pending at the FERC. The final outcome of these proposed rulemakings, including FERC rehearing, related legislative impacts, and further judicial action, is impossible to predict at this time. What is clear is that there is considerable interest at the FERC, and in Congress, in having Section 311 continue to play a role in the new world of open access transportation of natural gas. Certainly, the expeditious aspects of Section 311 transportation service and related pipeline construction appeal to all parties interested in promoting more natural gas transportation and consumption.

Since it is likely that Section 311 and related FERC regulations will exist, in some fashion, after all of the legislative, regulatory, and judicial review is complete, the following sections of this Chapter examine the historical background and use of Section 311 by interstate pipelines. This background provides context for the current ongoing review of Section 311, and provides some insight into the possible future role of Section 311 in the transportation of natural gas.

§ 19.04. A Brief Review of Interstate Natural Gas Pipeline Regulation and Their Interaction With Section 311 of the NGPA.

[1]--Interstate Natural Gas Pipelines - What They Are and How They Operate.

The natural gas industry has traditionally involved three main segments – producers, pipelines, and LDCs/end-users. The natural gas producers explore for and develop natural gas reserves. Interstate natural gas pipelines in the U.S. have traditionally served as aggregators of natural gas supplies from multiple producers, which supplies are then transported by the pipelines to market. The market has historically been dominated by state-regulated LDCs which purchase gas from pipelines for resale to end-users, i.e. businesses, factories, and homeowners, although interstate pipelines can and do make sales directly to end-users.

This traditional framework is still in place to some extent, although a fourth segment, namely independent "brokers," has become a major factor in the process of aggregating and marketing natural gas. LDCs and end-users have also assumed more responsibility for buying their own gas supplies directly from producers. Thus, while the relative balance of pipeline activity is shifting from traditional merchant functions toward the function of simply transporting gas owned by third parties – brokers, LDCs, and end-users – most pipelines still serve both functions.

Prior to passage of the NGA in 1938, the interstate transportation and sale of natural gas was not regulated to any significant degree by the federal government. In 1938, after an investigation was conducted by the Federal Trade Commission regarding the business activities of interstate natural gas pipelines, the NGA was adopted, providing for federal regulation of interstate natural gas pipelines. As stated in Section 1(b) of the NGA:

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.\(^{(32)}\)

Under Section 4 of the NGA, the transportation and sales activities of interstate pipelines must be performed under rates, terms, and conditions set forth in regulated tariffs approved by the FERC.\(^{(33)}\) Section 4 further requires that all pipeline rates and charges be "just and reasonable;" no undue preference may be granted by the pipeline to any person in the performance of any service; and changes to pipeline rates, terms, and conditions are to be made only after notice by the pipeline to the Commission and affected parties, and the opportunity for a public hearing on the matter.

The FERC implements these rate review provisions of the NGA through a basic utility cost of service analysis. This means that reasonable pipeline operating costs, taxes, depreciation, and return on shareholder equity are recoverable through pipeline rates if supported by substantial evidence. In *Federal Power Commission v. Hope Natural Gas Co.*,\(^{(34)}\) it was established that judicial review of Commission rate orders is limited in scope. Under the *Hope* test, the validity of a Commission rate order is to be determined on judicial review by an "end result" test, whether the impact of the order is just and reasonable, rather than whether particular Commission methods of developing rates are reasonable.\(^{(35)}\)

Under the NGPA, rates for Section 311 transportation service must be just and reasonable within the meaning of the NGA. Thus, under the Commission's regulations implementing Section 311 of the NGPA, the rates, terms, and conditions for transportation services by interstate pipelines under Section 311 must be filed with, and approved by, the FERC, with notice to the public.\(^{(36)}\) From this standpoint, interstate pipelines are subject to traditional NGA rate jurisdiction for Section 311 service.

However, pipelines are allowed to charge negotiated rates to their transportation shippers for open access transportation services, including Section 311 transportation. These negotiated rates must be within the stated minimum and maximum rates in the pipeline's tariff.\(^{(37)}\)

**[2]--Legal Requirements Governing Commencement of**

**Pipeline Services and Construction.**

The main Section 311 regulatory exemptions for interstate pipelines are in the ability to begin individual transactions, and undertake related pipeline construction, without advance FERC approval. The traditional framework established by Section 7 of the NGA for approval of pipeline services and related facilities construction provides:

No natural gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.\(^{(38)}\)

The Commission has defined public convenience and necessity to mean a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both – without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated.\(^{(39)}\)

In *Kansas Pipe Line*, the Commission set forth the basic criteria which must be met before a certificate of
public convenience and necessity will be issued to a pipeline:

[A]pplicants must show that (1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; and (6) the rates proposed to be charged are reasonable.\(^{(40)}\)

These criteria are still generally applicable today to NGA Section 7(c) certificate applications.\(^{(41)}\)

Section 311 of the NGPA represents a significant departure from the certificate requirements of Section 7(c) because a certificate, and the underlying finding of public convenience and necessity, are not required before Section 311 transportation service or related pipeline construction begins. The original reasons why Congress granted these exemptions lie in the era of federal natural gas wellhead regulation.

[3]--Producer Wellhead Regulation and the NGPA.

Section 311 was promulgated as part of the NGPA, a statute which was intended to deregulate significant amounts of natural gas at the wellhead, and make more gas available to the interstate market.\(^{(42)}\) The NGPA was a statutory response to the interstate gas supply crisis of the 1970s. This crisis was due in part to the previous federal framework established to regulate natural gas producer wellhead prices.

Initially after passage of the NGA, the federal government did not attempt to regulate producer prices, since as set forth in Section 1(b) of the NGA: "The provisions of this act shall . . . not apply . . . to the production or gathering of natural gas."\(^{(43)}\) However, in *Phillips Petroleum Co. v. Wisconsin*,\(^{(44)}\) the Supreme Court held that producer sales of gas for resale in interstate commerce were not exempt from NGA jurisdiction under the Section 1(b) "production and gathering" exemption. Thus, following *Phillips*, the FERC's predecessor, the Federal Power Commission (FPC), undertook producer ratemaking responsibilities through a variety of methods.

Initially, the FPC attempted to develop a utility cost of service approach for individual producers. This proved to be so burdensome and time-consuming that the FPC moved to an "area rate" approach. Under that approach, the nation was divided into geographical areas, with different cost-of-service based rates developed for all producers in each area.\(^{(45)}\) In 1974, the FPC shifted from the adjudicatory area rate approach to a rulemaking approach to develop producer wellhead rates for all producers in the lower forty-eight states.\(^{(46)}\)

While the Commission labored with these methods of producer wellhead regulation from the 1950s to the mid-1970s, the supply of natural gas dedicated to interstate commerce declined. This decline became evident in the early 1970s when interstate pipelines were forced to curtail deliveries of gas to their LDC customers; the FPC was forced to approve curtailment plans which the pipelines were required to follow in the allocation of their available gas supply.\(^{(47)}\) The interstate gas supply decline reached crisis proportions in the late 1970s when harsh winters and inadequate pipeline supplies forced the closing of many factories and other facilities in the United States which were dependent upon natural gas.

In order to address this interstate natural gas supply problem, and to stimulate the development of new natural gas supplies for the interstate market, the Congress enacted the NGPA in 1978. The NGPA introduced a number of new concepts, designed to stimulate gas production, including new incentive wellhead pricing categories outside of the Commission's traditional NGA jurisdiction and provisions for
either the immediate, or gradual decontrol of prices altogether for many new categories of gas.

The NGPA also introduced Section 311, which was intended to operate outside of the normal Commission regulatory procedure to facilitate and expedite additional movements of natural gas between available supply sources and markets with unmet demand for additional gas. In 1978, interstate pipeline transportation of gas owned by third parties, as contemplated by the Section 311 program, was not a major part of most pipelines' business. However, after implementation of the FERC's Order No. 436, the significance of transportation service generally, and Section 311 transportation by interstate pipelines, increased.

§ 19.05. Pipeline Regulation Following the NGPA - Order

No. 436 and Open Access Transportation.

The partial deregulation of wellhead controls under the NGPA, and its intended purpose of promoting development of new gas supplies for the interstate market, initially had to operate within the existing framework of pipeline regulation. Thus, while additional supplies of gas became available at the wellhead following passage of the NGPA, the FERC became concerned in the early 1980s that these new supplies might not be reaching end-use markets in the most expeditious and economic fashion, and that LDCs and end-users might not have adequate flexibility to transport gas bought directly from producers on interstate pipelines. One of the major steps that the Commission took to address these concerns was to issue Order No. 436 on October 9, 1985.\(^{(49)}\)

Prior to Order No. 436, transportation of third party owned gas was primarily performed under traditional certificates of public convenience and necessity issued under Section 7 of the NGA. These certificates were generally sought and approved on an individual, transaction-specific basis, and involved cumbersome applications containing all of the material required under the Kansas Pipe Line\(^{(50)}\) criteria. The Commission had also established various programs in the 1970s and early 1980s to provide for self-implementing transportation which did not require a full Section 7 review. Those programs were limited in scope, and were not generally available for widespread pipeline transportation service. In addition, Section 311 of the NGPA, which provided for self-implementing transportation services by interstate pipelines, was limited in its actual operation prior to Order No. 436 by FERC requirements that the gas be delivered to an LDC or intrastate pipeline for its system supply for resale, and also by a two year time limit on each transaction.

Order No. 436 addressed all of these issues, and established significant changes in the regulation of interstate natural gas pipeline transportation services. First, the FERC established a general blanket transportation certificate program through which a pipeline could obtain a blanket certificate and then begin individual transportation transactions for any type of shipper without obtaining a separate NGA Section 7 certificate for each transaction.\(^{(51)}\) The Commission also simplified and coordinated the Section 311 transportation program with the blanket transportation program, by eliminating the Section 311 system supply requirement and two year time limitation.\(^{(52)}\) The Commission also introduced in Order No. 436 the concept of rate discounting, whereby pipelines could charge transportation customers any negotiated rate between the stated maximum and minimum rates set forth in the pipeline's tariff.\(^{(53)}\)

The overriding principle of the Commission as set forth in Order No. 436, though, is that all self-implementing transportation service under a blanket certificate, or under Section 311, must be performed by pipelines on a nondiscriminatory, "open access" basis.\(^{(54)}\) In Associated Gas Distributors v. FERC,\(^{(55)}\) Order No. 436 was vacated and remanded primarily because of the FERC's failure to address the issue of pipeline take-or-pay exposure to natural gas producers adequately, which issue is aggravated as pipelines move from being merchants of gas to being simply transporters of third party owned gas.
The FERC essentially repromulgated the Order No. 436 program as Order No. 500, which included new provisions intended to address the pipeline take-or-pay issue.\(^{56}\)

Order No. 500 has now essentially been upheld in *American Gas Association v. FERC*.\(^{57}\) However, the open access transportation environment introduced by Order Nos. 436 and 500 has produced other issues involving the interpretation of open access requirements and other matters related to interstate pipeline transportation of third party gas. The Commission is currently reviewing, *inter alia*, issues as to comparability of pipeline sales and transportation services, and pipeline rate design, particularly with respect to the design of transportation rates. Furthermore, the Commission is continuing to refine the general guidelines for both Section 311 and blanket transportation service. The Transportation and Construction NOPRs address these latter issues. The combination of these various initiatives indicates a clear Commission policy of promoting pipeline open access transportation of third party gas.

[1]-The Role of Section 311 in Open Access Transportation.

Part of the role of Section 311 transportation in the open access environment has related to its differences from blanket transportation. The major initial differences between blanket transportation and Section 311 transportation established by Order No. 436 are that, under a blanket certificate, individual transactions can only proceed on a self-implementing basis for 120 days.\(^{58}\) During that period, notice has to be provided to the public, with opportunity for protest. If protested, a blanket transaction cannot continue beyond 120 days. Absent a protest, the service can continue indefinitely.\(^{59}\)

Unlike blanket transportation, which can be performed for any shipper, Section 311 transportation needs to be performed "on behalf of" an LDC or intrastate pipeline. The Commission provided in Order No. 436, though, that the "on behalf of" test was not a physical test. Rather there only needed to be some nexus between the shipper and the "on behalf of" party. Thus, the lack of notice and protest, and a liberal "on behalf of" test, has provided some advantages for parties willing to participate in Section 311 transportation service under the Order No. 436 guidelines. Further, the lack of a certificate requirement for Section 311 pipeline construction has provided certain advantages for parties desiring expedited service. Even though Section 311 transportation provided these advantages, and Section 311 transportation took on new significance for many parties after implementation of Order No. 436, some parties were not clear on what the Commission really intended as the guidelines for Section 311 transportation service. This confusion is shown in the three cases reviewed in *AGD-Hadson*.

For example, in *Hadson Gas Systems, Inc.*\(^{60}\) one of the three cases reviewed in *AGD-Hadson*, a petition for declaratory order was filed by Hadson Gas Systems, Inc. at the FERC, which requested clarification of the FERC's Section 311 "on behalf of" standard. Hadson, an independent broker and gas marketing company interested in participating in Section 311 transportation activities on various pipelines, was concerned that certain interstate gas pipelines were imposing what Hadson considered to be overly restrictive interpretations of the "on behalf of" standard, and Hadson felt that transportation service was being unreasonably denied certain parties desiring "open access" transportation service.

In Hadson's view, Order No. 436 clearly established that the "on behalf of" standard could be satisfied by either (1) an agency agreement between the transporter pipeline and the "on behalf of" party or (2) through a more restrictive physical test where title to the gas would reside with the "on behalf of" party or the "on behalf of party" would transport the gas at some point in the transaction. Hadson contended that many pipelines were imposing the more restrictive physical nexus approach, without recognizing that an agency arrangement could be sufficient in Section 311 transactions.\(^{61}\)
The Commission agreed with Hadson's position that an agency arrangement would satisfy the "on behalf of" test. The Commission amplified on this conclusion and held that some economic benefit had to be provided to the LDC or intrastate pipeline by the transporting interstate pipeline under a Section 311 agency arrangement. The Commission held that a restrictive physical nexus between the transporter pipeline and "on behalf of" party would not promote the competitive "open access" goals of the Commission as set forth in Order No. 436.

Similarly, in *Texas Eastern Transmission Corp.* a request was filed at the FERC by Tejas Power Corporation, a gas marketer and shipper, for clarification of Texas Eastern Transmission Corporation's application of an "on behalf of" provision contained in Texas Eastern's FERC transportation tariff. Tejas contended that Texas Eastern was imposing a restrictive interpretation of the "on behalf of" test, such that a physical nexus between the gas being transported and the "on behalf of" party was required by Texas Eastern before it would perform a Section 311 transportation service. In *Texas Eastern*, the Commission applied its Hadson policy, and ordered Texas Eastern to modify its tariff to incorporate the broad Hadson "on behalf of" test.

In *Cascade Natural Gas Corp. v. Northwest Pipeline Corp.*, the third case reviewed in *AGD-Hadson*, an LDC, Cascade Natural Gas Corporation, filed a complaint at the Commission alleging, *inter alia*, that Northwest Pipeline Corporation, an interstate pipeline, was illegally transporting natural gas to Chevron Chemical Company (Chevron), an end-user and customer within Cascade's service territory. Cascade asserted that Northwest's transportation service for Chevron was being illegally performed under the color of Section 311 of the NGPA. In point of fact, Northwest performed the transportation service for Chevron with the assistance of various "on behalf of" parties, none of whom were actually physically involved in the transaction. For this reason, Cascade asserted that the "on behalf of" arrangements for the Chevron transportation service were improper.

The Commission dismissed Cascade's allegations for two reasons. First, the Commission concluded that its policy, as set forth in Hadson, was controlling and that the agency arrangements between Northwest and the various "on behalf of" parties fit the Hadson test. Further, by the time the case was decided, Northwest had accepted an Order No. 436 blanket certificate and was performing the transportation service for Chevron under that certificate, without need of an "on behalf of" party, rendering the case moot.

In *AGD-Hadson*, the court concluded that the FERC's interpretation of the "on behalf of" standard in the underlying agency cases was overly broad. The court expressed concern that the FERC's interpretation would potentially undermine Section 7 of the NGA, because under the FERC's policy, simple agency relationships could accommodate a large number of transportation transactions and, thus, serve as an almost total exemption from the certificate requirements of the NGA. The court stated:

The difficulty with the FERC's interpretation of § 311 is its potential wholly to undermine the regime created by § 7 of the NGA. We think that all the indications — § 311's language, its history and its purpose — show that the section is a limited exception to the requirements of § 7, and was never intended to work a sweeping change in the requirement that gas transportation be authorized by a certificate issued prior to the transportation. We therefore find the FERC's interpretation to be unreasonable.

The court did not elaborate a specific "on behalf of" test which would be acceptable, but did indicate that the FERC could permissibly allow transactions where the "on behalf of" entity in the transaction is related to the transportation of gas in a way that reflects on its status as an intrastate pipeline or LDC.

The Hadson and Texas Eastern cases were remanded proceedings, while Northwest was dismissed as moot.
The Transportation NOPR was issued by the FERC in light of the AGD-Hadson remand. In addition to reviewing the "on behalf of" test to address the court's concerns, the Commission is also considering whether it should increase the similarity between blanket transportation and Section 311 transportation service so that Section 311 transportation service would not reflect a "sweeping" change from the blanket certificate transportation requirements. Thus, the Commission is proposing, in the Transportation NOPR, to eliminate the notice and protest aspect of blanket certificate service, thereby reducing the preference for Section 311 service, which does not require public notice before transportation service commences. (71)

The final outcome on this matter is uncertain at this time; however, it appears that Section 311 transportation service has a good chance of staying alive as a discrete type of transportation service, even though it may prospectively have many similarities with blanket transportation service. One possible reason for keeping Section 311 service available as a discrete service would be to retain some form of the expedited construction procedures currently available for Section 311 service.

[2]--Pipeline Construction Related to Section 311 Transportation.

The Construction NOPR, issued simultaneously with the Transportation NOPR, addresses some of the construction issues related to Section 311 transportation service and NGA Section 7 blanket transportation service. New issues have arisen in the era of open access transportation and an environment where many parties are advocating expedited procedures to move more gas into the marketplace. Before turning to Section 311 construction issues, it should be noted that any new facilities related to blanket transportation service must generally be certificated under Section 7(c) of the NGA. These facilities may be constructed by the pipeline, in many instances, under the Commission's blanket construction procedures. (72) Those procedures allow for either automatic authorization for certain "eligible" facilities, or require notice and opportunity for protest for other types of "eligible" facilities. (73) One of the major current limitations on facilities which can be constructed as "eligible" facilities under the blanket facilities certificate is that no mainline facilities, or facilities which alter the capacity of mainlines, can be constructed. (74) Further, there is a maximum dollar limit on facilities which can be constructed under the blanket certificate. (75) These blanket facilities certificate limitations are being evaluated as part of the Construction NOPR. The FERC may change the types of facilities and applicable dollar limits for blanket certificates.

Because of the existing limitations noted above for blanket facilities construction, Section 311 construction has historically offered certain advantages to pipelines. To date, neither the Congress, nor the FERC, have placed specific restrictions on the type and cost of uncertificated facilities which can be constructed by pipelines for Section 311 transportation service as long as the facility is used exclusively for Section 311 transportation service (76) and the Commission's environmental requirements have been met. (77) Because of this historically open-ended construction authorization for Section 311 related pipeline facilities, the Construction NOPR is evaluating whether the Commission should place certain pre-construction restrictions on Section 311 pipeline facilities. It is already clear that the Commission will step in and invoke its authority if it believes that pipelines are not properly complying with the self-implementing environmental requirements now in effect for Section 311 construction activity. (78) However, the FERC is evaluating whether additional specific restrictions on Section 311 pipeline construction are needed. The Commission summarized the issue in the Construction NOPR as follows:

Based on the Environmental Assessment prepared in conjunction with Order No. 436, the Commission concluded that any adverse impacts of Section 311 construction could be sufficiently mitigated by incorporating environmental conditions into its regulations authorizing the self-implementing transactions. Accordingly, § 284.11 subjects any authorization under section 311 to the terms and conditions of
The conclusion that these conditions were sufficient to meet our obligations under the various statutes listed above was based on the assumption that only minor facilities would be constructed under section 311 authorization. However, as section 311 transactions have grown and multiplied in recent years, interstate pipelines have used this authorization for the construction of extensive facilities. In many cases, the current requirements may be sufficient even for more extensive facilities. However, the question has arisen whether these requirements are, in fact, sufficient where extensive pipeline projects are involved.  

The Commission states in the Construction NOPR that it has several options with regard to Section 311 construction. First, it could do nothing to change its current procedures. Alternatively, it could eliminate automatic authorization for Section 311 construction, leaving pipelines with traditional NGA Section 7 certificate or blanket certificate requirements. A variation of that option would be to apply the blanket certificate dollar and facility-type limitations to Section 311 construction. Finally, the Commission could simply continue the Order No. 525 interim rule pre-construction notification requirement.

The final outcome of the issue of Section 311 facilities authorization is uncertain at this time, but in all likelihood, that issue will also be resolved as part of the other initiatives pending at the FERC and in Congress which are designed to promote open access transportation.

§ 19.06. Conclusion.

Section 311 transportation service by interstate pipelines has played an integral role in the development of open access transportation service, and Section 311 self-implementing transportation and facilities authorization has traditionally served a function which is different from what is provided by NGA certificates. Given the apparent national interest in promoting additional natural gas usage and expediting related pipeline construction, and the FERC's interest in continuing to promote open access transportation, Section 311 will probably continue to play a role.

A reasonable Section 311 program which allows for expedited natural gas usage can benefit all segments of the natural gas industry, including producers, pipelines and LDCs/consumers. It remains to be seen how Section 311 will emerge after the Congress, the FERC, and the courts finish their review. However, given the historical role Section 311 has provided in the growth and development of open access natural gas transportation service, one must hope that it will continue to serve a distinct and useful purpose in the future.

1. *The views expressed here are solely those of the author.

2. 1. See text, infra, at § 19.05.

3. 2. See Interstate Natural Gas Pipeline Rate Design, 47 FERC ¶ 61,295, order on reh'g, 48 FERC ¶ 61,122 (1989).


10. See text, infra, at § 19.03 n.2.


13. See text, infra, at § 19.05[2].


17. 18 C.F.R. § 284.102(a) (1990) (emphasis added).

18. 18 C.F.R. § 284.3(c).

19. 18 C.F.R. § 284.11.


23. 899 F.2d 1250 (D.C. Cir. 1990).


27. Section 284.223(h), FERC Regs. (1990).

28. Similarly, certain of the recent Congressional natural gas legislative proposals involve a loosening, rather than a tightening, of the "on behalf of" standard in Section 311. Both the Johnston-Wallop and Sharp Bills, as well as the NES, provide that Section 311 transportation can be performed by an interstate pipeline essentially
on behalf of" any shipper.


34. 320 U.S. 591 (1944).

35. Id. at 602.

36. 18 C.F.R. § 284.7.

37. 18 C.F.R. § 284.7.


40. Id. at 40-54.

41. See, e.g., the FERC's regulations dealing with filing requirements for traditional Section 7(c) certificates at 18 C.F.R. § 157.14.


43. NGA § 1(b), 15 U.S.C. § 717(b).

44. 347 U.S. 672 (1954).


34 FERC ¶ 61,404 (1986), reh'g denied, Order No. 436-D, 34 FERC ¶ 61,405 (1986), reconsid. denied, Order No. 436-E, 34 FERC ¶ 61,403 (1986).

50. 2. 2 F.P.C. 29 (1939).
51. 3. 18 C.F.R. § 284.221.
52. 4. 18 C.F.R. § 284.102 (1990).
53. 5. 18 C.F.R. § 284.7.
54. 6. 18 C.F.R. §§ 284.8 and 284.9.


57. 9. 912 F.2d 1496 (D.C. Cir. 1990), although certain limited issues have been remanded to the FERC. The FERC has issued further orders on remand, Order No. 500-J, FERC Stats. and Regs., Regulations Preambles ¶ 30,915 (1991), and Order No. 500-K, 56 Fed. Reg. 14,848 (April 12, 1991).

58. 10. 18 C.F.R. § 284.223.
59. 11. 18 C.F.R. § 284.223.

61. 13. 44 FERC at ¶ 61,247.
62. 14. Id. at ¶ 61,250.
63. 15. Id.
64. 16. Id. at ¶ 61,251.
66. 18. 44 FERC at ¶ 61,242.
68. 20. 44 FERC at ¶ 61,246.

69. 21. As an aside, Cascade also presents an issue of pipeline "bypass" of an LDC, an issue that has been raised by LDCs as an area of concern related to pipeline transportation of gas for end-users, at least since the time of the FERC's initial consideration of Order No. 436. Cascade pursued its bypass allegations against Northwest in separate litigation, and the FERC ultimately dismissed its claims. Cascade Natural Gas Corp. v. Northwest Pipeline Corp., 46 FERC ¶ 61,077 (1989), reh'g denied, 48 FERC ¶ 61,234 (1989). In that case, FERC stated its position that regardless of whether pipeline bypass of an LDC results from a pipeline's transportation
under a blanket certificate, a traditional NGA § 7 case-specific certificate, or NGPA § 311, FERC’s focus is to determine whether the bypass is the product of a fairly competitive market or the result of unfair competition or undue discrimination. *Id.*, at ¶ 61,342. Bypass issues will undoubtedly continue to arise in the further development of open access transportation rules.

70. 22. 899 F.2d at 1261.

71. 23. As noted earlier, Congress has gotten involved in the "on behalf of" issue, and certain legislative proposals would basically allow Section 311 transportation service "on behalf of" any party.


75. 27. The limit in 1990 was $16 million per project. 18 C.F.R. § 157.208(d). This limit increases each year.

76. 28. 18 C.F.R. § 284.3(c).

77. 29. 18 C.F.R. § 284.11.


80. 32. Of note, the Johnston-Wallop and Sharp bills provide that the Commission may, by rule or order, authorize interstate pipelines to construct necessary facilities to perform Section 311 transportation service, without a limitation as to type and cost of such facilities. Under the provisions of those bills, FERC would have the latitude to establish additional conditions related to the construction of Section 311 pipeline facilities, if it chose to do so.