DRAFT REPORT

Evaluating the Institutional Impact of the Special Oil & Gas Panel of the U.S. Court of Appeals For the Fifth Circuit

by

David E. Pierce

Professor of Law
Washburn University School of Law
Topeka, Kansas

June 24, 1992

Pursuant to Federal Judicial Center
Contract No. 91-092800-JXXXXXC-84454-2501

FEDERAL JUDICIAL CENTER
Thurgood Marshall Federal Judiciary Building
Information Services Office
One Columbus Circle, N.E.
Washington, DC 20002-8003

DRAFT REPORT

Evaluating the Institutional Impact of the Special Oil & Gas Panel of the U.S. Court of Appeals For the Fifth Circuit

by

David E. Pierce

Professor of Law
Washburn University School of Law
Topeka, Kansas

TABLE OF CONTENTS

		Page
I.	Summary of Conclusions	1
II.	Research Technique	3
III.	Producer Rate Regulation Cases	5
	A. The Relevant Case Law	6
	B. Analysis of the Cases	17
IV.	Curtailment Cases	19
	A. The Relevant Case Law	20
	B. Analysis of the Cases	24
V.	Natural Gas Act Jurisdiction Over Producers	27
	A. The Relevant Case Law	27
	B. Analysis of the Cases	41
VI.	Deregulation and Restructuring	42
	A. The Relevant Case Law	42
	B. Analysis of the Cases	46

DRAFT REPORT

Evaluating the Institutional Impact of the Special Oil & Gas Panel of the U.S. Court of Appeals For the Fifth Circuit

by

David E. Pierce

Professor of Law
Washburn University School of Law
Topeka, Kansas

I. Summary of Conclusions.

From my review of the relevant cases decided by the U.S. Court of Appeals for the Tenth Circuit and the special oil and gas panel of the Court of Appeals for the Fifth Circuit, I have arrived at the following conclusions:

(1) The special panel played a significant role in the development of the law governing producer prices and pipeline curtailment plans.

(2) From 1972 through 1979 the special panel created a very cooperative and unique reviewing court/agency relationship with the

Federal Power Commission, and later the Federal Energy Regulatory Commission, to effectively address major natural gas regulatory issues.

(3) The decisions of the special panel more accurately and consistently reflected the underlying programmatic goals of the Natural Gas Act and the Natural Gas Policy Act and were less influenced by non-programmatic considerations. Decisions from the Tenth Circuit often pursued non-programmatic goals, such as the equitable treatment of producers, while subordinating programmatic goals, such as federal jurisdiction over an activity.

(4) The special panel has a positive institutional impact on the judicial decision-making process. Although the makeup of the panel membership changed on an annual basis, the panel's approach to basic substantive and procedural issues appeared to remain fairly constant.

(5) Throughout the special panel's existence, it has accorded the Federal Power Commission, and later the Federal Energy Regulatory Commission, the appropriate level of deference to allow the agency to perform its administrative role. Cases from the Tenth Circuit during the same time frame indicate a failure to respect the agency's role in many situations.

(6) The special panel reduces the possibility that decisions will be influenced by regional considerations that may be inconsistent with statutory program goals. Regardless of the actual situation, litigants place great significance on perceived regional bias among the U.S. Courts of Appeal. Although there are several decisions from the Tenth Circuit that appear to be the product of regional institutional bias, the special panel decisions do not exhibit regional institutional bias.

II. Research Technique.

Beginning on July 1, 1972 the United States Court of Appeals for the Fifth Circuit designated a panel of judges to be responsible for hearing "oil and gas" cases in the Fifth Circuit. The phrase "oil and gas" cases refers primarily to cases concerning federal regulation of natural gas. As a result of the United States Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin*,[1] natural gas producers were subjected to comprehensive public utility-like regulation under the Natural Gas Act of 1938.[2] As the Federal Power Commission struggled to impose cost-of-service rate regulation on thousands of independent gas producers, the work load of the U.S. Courts of Appeals increased dramatically as disappointed consumer, industry, pipeline, local distribution, and producer interests attempted to maximize their constituency's position before the Commission and in the courts.[3]

The cases addressed by the special panel deal primarily with four general categories of natural gas topics:

(1) Producer rate regulation under the Natural Gas Act.

(2) Curtailment of natural gas service under the Natural Gas

---

[1] 347 U.S. 674 (1954).

[2] 15 U.S.C. §§ 717 to 717z (19??).

[3] 15 U.S.C. § 717r(b) (1988) provides the United States Courts of Appeals will have the authority to review Commission orders stating:

> Any party to a proceeding under this [Natural Gas] Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . .

Act.

(3) Scope of Natural Gas Act jurisdiction over natural gas producers.

(4) Issues arising out of deregulation under the Natural Gas Policy Act and the Federal Energy Regulatory Agency's efforts to restructure the natural gas industry.

By placing the cases in these general substantive categories, the activities of the courts can be evaluated over a period of time as they deal with disputes within a substantive category. This also permits analysis of the relationships created between the administrative agency and the reviewing court. The relationships between the Federal Power (Energy Regulatory) Commission[4] and the special panel, are best examined in the producer rate regulation and curtailment cases. Categorizing the cases also permits comparison of panel decisions with those from the United States Court of Appeals for the Tenth Circuit. This comparative analysis is most effective in considering jurisdictional issues under category (3) because there is an abundance of cases from the Fifth and Tenth Circuits for comparison. Cases that do not come within the listed categories have been evaluated but are not discussed in this Report.[5]

The research process consisted of reviewing panel decisions to evaluate the panel's decision-making process, with a particular

---

[4]Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (Aug. 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46,267 (Sept. 13, 1977), the functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission effective October 1, 1977.

[5]The issues in the unreported cases are more sporadic and have less of a programmatic impact. Since these cases were not susceptible to defining a trend for analysis, nor comparable among Courts of Appeals, they are not discussed in this Report.

focus on the interaction that takes place between the panel, as a reviewing court, and the Federal Power (Energy Regulatory) Commission. Comparing decisions from the Fifth Circuit's special panel with decisions addressing the same subject matter from the Tenth Circuit, which does not employ any sort of special panel, offered insight concerning the institutional impact of the special panel.

III. Producer Rate Regulation Cases.

After the United States Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin*,[6] the Federal Power Commission (FPC) began the difficult task of regulating the price at which natural gas producers could sell their gas to interstate pipelines. After unsuccessful attempts to apply traditional cost-of-service ratemaking to a large and diverse group of natural gas producers on an individual basis,[7] the FPC instituted "area" rate proceedings to define gas prices. The first area rate case to reach the Supreme Court was an appeal from the Court of Appeals for the Tenth Circuit.[8] The Supreme Court, in *In Re Permian Basin Area Rate Cases*,[9] offered the Courts of Appeal early guidance on the proper deference due the FPC as it engaged in regulatory experimentation

---

[6] 347 U.S. 674 (1954).

[7] As a consequence of the *Phillips* decision the regulated entities subject to the FPC's ratemaking authority increased from 200 to over 3000. The Commission estimated that if it could triple its staff it would take it over eighty-two years to complete its existing producer rate work. *See* In Re Permian Basin Area Rate Cases, 390 U.S. 747, 757-58, n.13. (1968).

[8] In Re Permian Basin Area Rate Cases, 375 F.2d 6 (10th Cir. 1967), *aff'd in part, rev'd in part*, 390 U.S. 747 (1968). Although the Tenth Circuit upheld most of the FPC's order, certain portions were set aside. To the extent the Tenth Circuit set aside the FPC's order the Supreme Court reversed, sustaining the FPC's order in its entirety. *Permian*, 390 U.S. at 755.

[9] 390 U.S. 747 (1968).

to deal with the aftermath of the Court's *Phillips* decision. The *Permian* decision becomes the touchstone relied upon by the special panel of the Fifth Circuit Court of Appeals as the panel judges immersed themselves in the review of subsequent FPC area and national rate proceedings.

A. The Relevant Case Law.

Other than the Supreme Court's opinion in *Permian*, the single case that had the most impact on the development of "area rate" law was the panel's[10] decision in *Placid Oil Company v. Federal Power Comm'n.*,[11] also known as the Southern Louisiana Area Rate Proceedings.[12] The panel upholds the Commission's rates applying what Judge Brown refers to as "the standard of review . . . in the post-*Permian* era."[13] The Fifth Circuit's articulation of the post-*Permian* standard of review provides:

> '[T]he Commission has broad discretion that is not to be ineffectuated by either theoretical disagreement with its methods or by discovery of inadequacies that are caused mainly by the difficulty of the regulatory undertaking. The Commission is to be affirmed if it has followed the

---

[10]Composed of Judges Brown, Bell, and Morgan. Chief Judge John R. Brown wrote the opinion.

[11]483 F.2d 880 (5th Cir. 1973).

[12]Judge Brown begins his opinion with what might be considered a narrative of the essence of administrative law:

> Today we must decide if what the FPC has said--in response to what we said about what the FPC said about what the Supreme Court said--is supported by 'substantial evidence on the record as a whole.'

Placid, 483 F.2d at 885.

[13]Placid Oil Company v. Federal Power Comm'n, 483 F.2d 880, 888 (5th Cir. 1973).

correct legal standards and acted on the basis of substantial evidence, and under any fair interpretation of *Permian* it appears that the legal standards themselves are to be construed liberally when applied to a regulatory effort still in the experimental stage. This 'experiment' doctrine, together with the substantial evidence rule, is background for our consideration of most of the issues presented on this appeal.'[14]

Although the court advocates substantial deference to the Commission's approach, the panel's review of the FPC's actions and the underlying facts in *Placid* is painstaking. Nevertheless, the panel affirms the FPC's actions in full and notes: "We are very impressed by the pragmatic and flexible manner in which FPC has approached natural gas rate regulation as a whole."[15]

The Fifth Circuit Court of Appeals' decision in *In Re Other Southwest Area Rate Case (OSWA I)*,[16] offers further evidence of the panel's[17] willingness to defer to the FPC's judgment following a searching review of the agency's action. The panel, instead of using the court's remand powers, addresses flaws in the FPC's decision through a new form of "judicial counseling." For example, with regard to rates for "flowing gas" the panel was puzzled at why the Commission authorized only a 10.5% rate of return when the Commission had successfully proposed rates of return of 12% in *Permian* and 15% in *Placid*.[18] The panel expressed "much

---

[14]*Id.* at 888.

[15]*Id.* at 913, n.40.

[16]484 F.2d 469 (5th Cir. 1973).

[17]Composed of Judges Brown, Bell, and Morgan.

[18]At the time of *OSWA I* the interstate market continued to experience a serious and escalating gas shortage--a shortage the Fifth Circuit Court of Appeals had predicted in its earlier

bewilderment" with the Commission's actions and its "absence of explanation;" particularly since the FPC's opinion was issued several months after the panel's *Placid* decision.[19] The panel was also concerned with the Commission's unexplained change in approach to allocating dry hole costs.[20]

Nevertheless, instead of remanding the matter back to the FPC, the court, miffed at the Commission's unexplained change in approach, asks rhetorically: "But what are we to do?"[21] The court decides to use the label "enforced" at the end of the opinion and suggests the court is employing its "flexible powers of equity to enable FPC to deal effectively with the public interest as it may see the need."[22] The court then invites the FPC "to alter or

---

opinions. The panel consistently stressed the need for the FPC to stimulate the supply-side of its gas equation and that this part of the public interest equation be reflected in appropriate incentives to attract gas into the interstate market. For example, Judge Brown observed in *Placid*:

> Given a system which depends on private stewardship and marshalling of natural resources, there is a supply shortage if producers do not produce. FPC has the statutory duty, not only to guard the consumers against super-profits reaped from artificially inflated prices, but also to protect consumer interests by making sure that the rate schedule is high enough to elicit an adequate supply. It is a delicate balancing test. FPC must fix its course to attain the utopian 'optimum' rate schedule. Given the current shortage of available supply FPC must swing the pendulum towards the incentive, supply-eliciting side of rates. And so it has done.

Placid Oil Company v. Federal Power Comm'n, 483 F.2d 880, 895 (5th Cir. 1973).

[19] In Re Other Southwest Area Rate Case (OSWA I), 484 F.2d 469, 481 (5th Cir. 1973).

[20] *OSWA I*, 484 F.2d at 481-82.

[21] *Id.* at 482.

[22] *Id.*

modify the maximum rates prospectively or retroactively . . . for flowing . . . gas if it believes that such a change would be in the public interest."[23] Instead of sending the matter back to the Commission, which would cause further delay and injury to the "public interest," the panel agrees to "enforce" the rates and counsels the Commission to do better next time.

Three things factor into the panel's unique approach to reviewing the FPC's opinion in *OSWA I*. First, the *Permian* deference standard, augmented by the Fifth Circuit's deference standard for regulatory experimentation.[24] Second, since the issues concern rates, the agency merely needs to arrive at an "end-result" that is within an acceptable "zone of reasonableness."[25]

---

[23] *Id.*

[24] In *Placid Oil Company v. Federal Power Comm'n*, 483 F.2d 880, 889 (5th Cir. 1973), the court observed:

> Cast in the perspective of the human travail, some might say that the dozen year experience with area rate regulation should arguably justify a holding that the experimental phase has passed. In 1971 . . . however, FPC had only twice been the beneficiary of the judicial function to declare 'what the law is.' No one can honestly say that judges have been any more sure than commissioners, as all struggle with a problem that grows out of the peculiar mixture of a simultaneous service and exhaustion of a depletable asset. All have been groping. The day for groping is not yet over. And it does not denigrate what FPC has done to say that much may yet be imperfect and much remains to be done or redone. So we can find that FPC has conscientiously attempted to establish 'just and reasonable' rates within the framework allowed by judicial precedent, yet, it is still experimenting.

Affirming the Fifth Circuit's decision in *Placid*, the Supreme Court in *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 283, 331 (1974), quotes with approval the panel's observations in *Placid*.

[25] The "zone of reasonableness" and "end-result" tests were developed by the Supreme Court in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). However, in applying the "zone of reasonableness" test the panel specifically noted:

Third, the panel appears to be concerned with the practical impact of their orders, even though they may be "legal" and "defensible" as a matter of administrative law.

This third factor may actually be a product of the panel's special status. After immersing themselves in monumental problems arising out of interstate gas shortages,[26] judges on the panel may begin to develop a desire to do things that will "fix" problems instead of merely "adjudicating" issues. So long as the panel perceives the agency as pursuing the same ultimate goal as the panel, a unique partnership may arise between agency and reviewing court in an effort to achieve their common goals. This "partnership" will most likely flourish when the agency is entitled to substantial deference in pursuing its regulatory mission. The court's holdings in *Placid* and *OSWA I* may be a product of this phenomenon.

In *Mobil Oil Corp. v. Federal Power Comm'n*,[27] the Supreme

---

> We recognized and sanctioned FPC's administrative discretion in fixing a particular rate which falls within the 'zone of reasonableness' of the entire matrix of cost components. But in focusing on the 'end result' and according appropriate deference to the administrative choice in light of the great flux in cost determinations, *we will not allow our scrutinizing of the whole to eclipse a consideration of the parts*. Administrative discretion is not tantamount to synergistic legerdemain. We must decide whether FPC has erred in including, excluding, or evaluating components of the rate structure to determine if the particular error washes out in the 'zone of reasonableness,' or has such significance that the result is unacceptable.

OSWA I, 484 F.2d at 478. Apparently the panel thought the problems concerning rate-of-return and dry hole cost-allocation on flowing gas were errors that wash-out in the zone of reasonableness.

[26]The same problems being addressed by FPC's experts.

[27]417 U.S. 283 (1974).

court, in reviewing the panel's actions in *Placid*, acknowledges and approves the unique reviewing court/agency relationship structured by the Fifth Circuit Court of Appeals. When the Fifth Circuit "affirmed" the Commission's first Southern Louisiana Area Rate order in *Austral Oil Co. v. Federal Power Comm'n*,[28] it made it clear that the Commission was free to reopen any part of its order as the Commission may find appropriate.[29] The Commission took the Fifth Circuit's hint and reopened its proceeding resulting in the order reviewed by the panel in *Placid*. The litigants in *Mobil* asserted that the FPC's original order had been "affirmed" and the Fifth Circuit lacked authority under § 19(b) of the Natural Gas Act to do anything but "affirm, modify, or set aside" the FPC's order.[30] Therefore, the Commission could not "reopen" its original order to address, among other things, the supply-incentive concerns raised by the Fifth Circuit in "affirming" the FPC's order.

The Supreme Court rejects this argument stating: "This jurisdiction to review the orders of the Commission is vested in a court with equity powers . . . and we cannot say that the Court improperly exercised those powers in the circumstances."[31] The Supreme Court in *Mobil* affirms the panel's actions in *Placid* and relies upon the panel's reasoning, quoting extensively from the panel's opinion, to support the Court's holdings.[32]

---

[28]428 F.2d 407 (5th Cir. 1970).

[29]The Supreme Court focuses on this part of the Fifth Circuit's opinion in *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 308, 310-11 (1974).

[30]Mobil Oil Corp. v. Federal Power Comm'n, 417 U.S. 283, 311 (1974).

[31]*Id.*

[32]The Court in *Mobil* quotes the panel's opinion with approval at pages 313, 315, 321, 323-24, 326, 328, 329, and 331 of the *Mobil* opinion.

The panel,[33] in *Shell Oil Co. v. Federal Power Comm'n*,[34] reviews the FPC's refusal to commence new area rate proceedings for the Appalachian and Illinois Basin Area, after the Commission acknowledged the existing area rates were obsolete.[35] The Commission concluded the area rate process was not working so it initiated an informal rulemaking in which it refused to amend area rates.[36] Instead, the Commission provided for individual producer applications for rate adjustments and elimination of the old/new gas-price dichotomy as existing contracts expired.[37]

In affirming the Commission's actions, the panel stated:

> We see no reason to force the Commission to continue using a regulatory tool that has proven to be unwieldy and unproductive. The wiser course is to allow the Commission to experiment further, in hopes that eventually it will find an acceptable method of pricing gas.[38]

The panel also noted that "[s]hould this latest venture prove administratively unworkable, the Commission is free to try yet another method, *perhaps uniform national rates*."[39]

---

[33]Composed of Judges Gewin, Thornberry, and Coleman.

[34]491 F.2d 82 (5th Cir. 1974).

[35]Shell Oil Co. v. Federal Power Comm'n, 491 F.2d 82, 84 (5th Cir. 1974).

[36]*Id*. at 85.

[37]*Id*. at 86, 87.

[38]*Id*. at 87.

[39]*Id*.

In *Shell Oil Co. v. F.P.C.*,[40] also known as *In Re National Rate Cases for New Gas*, the panel[41] reviews the Commission's shift from area to national rates. Although the court upholds the Commission's actions in all respects, Judge Roney acknowledges their decision is the product of a unique "kid glove" approach toward judicial review of FPC rate orders. Judge Roney candidly observed:

> In the review of area rate cases . . . our already narrow scope of review has been tempered even further by recognition of the experimental nature of area regulation. [Citations omitted.] The 'kid glove' review resulting from the 'experiment rationale' has led this Court and the Supreme Court to accept findings and reasoning by the Commission as adequate, even though both courts have expressed serious misgivings about the ultimate accuracy of the FPC's conclusions.[42] Accordingly, on at least two occasions we have 'affirmed' or 'enforced' FPC orders while expressing our concern about the marginal adequacy of the FPC orders. We have specifically reserved to the Commission the authority to make retroactive changes to the very orders we 'affirmed' as being supported by substantial evidence. [Citations omitted.] The FPC responded to our admonition with a more extensive study of the problem in the Southern Louisiana Area, and the resultant area rate order was affirmed by both this Court and the Supreme Court.

---

[40] 520 F.2d 1061 (5th Cir. 1975).

[41] Composed of Judges Bell, Clark, and Roney.

[42] Judge Roney notes elsewhere in his opinion: "We must express our regret, however, that the FPC continues to issue orders which would be inadequate but for our 'kid glove' treatment." In Re National Rate Cases for New Gas, 520 F.2d 1061, 1072 (5th Cir. 1975).

[Citations omitted].

> To affirm the action of the Commission on review here requires continuation of the heightened deference to the Commission's 'experiment doctrine.' Opinions 699 and 699-H assert many factual conclusions and regulatory justifications without explicating for this Court the factual predicates or assumptions upon which decisions are based.[43] We have concluded, however, that national rate regulation is still experimental and we must apply a standard of review requiring heightened deference to the Commission's expertise in such experimental regulations.[44]

However, the court serves notice on the FPC that the "experiment" may be coming to an end and the Commission should be prepared to fully justify its policies in future orders.[45]

The court approves the Commission's national rate order even though the court found it impossible to determine whether the order would achieve the "end result" of maintaining an adequate supply

---

[43]However, in evaluating the issues and the Commission's actions, the court does not highlight the areas where it believes the Commission's actions would be overturned but-for the court's "heightened deference."

[44]In Re National Rate Cases for New Gas, 520 F.2d 1061, 1071-72 (5th Cir. 1975).

[45]Judge Roney cautioned:

> [A]s experiment lapses into experience, the courts may well expect the Commission to justify its policies with reasoned projections of that once-proto-typic policy's probable net effect. The principle of *stare decisis* may only lightly touch the standard of subsequent review.

In Re National Rate Cases for New Gas, 520 F.2d 1061, 1072 (5th Cir. 1975).

of gas.[46] The court acknowledges the "practical requirements of the circumstances" noting "[l]ittle would be accomplished" by prolonging or complicating "the task of the Commission."[47] The court holds: "we are constrained to uphold the Commission's action."[48]

The Fifth Circuit reviews the FPC's national rates for "flowing" gas in *Tenneco Oil Co. v. Federal Energy Regulatory Comm'n.*[49] The panel[50] again applies a "heightened deference" standard of review noting: "The other requirements, while not inconsistent with general principles of administrative law, have taken on a special gloss in Natural Gas Act review."[51] As in previous cases, the court carefully reviews the Commission's actions to ensure "the Commission has 'given reasoned consideration to each of the pertinent factors'" that comprise the rate order.[52]

Although the court upholds the base components of the Commission's order, it rejects one aspect that would change a program, created by previous orders, to encourage producers to dedicate new reserves to the interstate market. The panel accepts part of the blame for the Commission's action stating it "misapplied" language in one of the panel's previous opinions.[53]

---

[46]*Id.* at 1073-74.

[47]*Id.* at 1074.

[48]*Id.* at 1084.

[49]571 F.2d 834 (5th Cir. 1978).

[50]Composed of Judges Clark, Roney, and Tjoflat.

[51]Tenneco Oil Co. v. Federal Energy Regulatory Comm'n, 571 F.2d 834, 839 (5th Cir. 1978).

[52]*Id.*

[53]*Id.* at 849.

The Tenth Circuit Court of Appeals entered the area ratemaking process early with its review of the FPC's Permian Basin area rates. The Tenth Circuit sustained and set aside parts of the Commission's orders.[54] The Supreme Court sustained the Commission's orders in their entirety.[55] After the Supreme Court's guidance in *Permian*, the Tenth Circuit did not have the opportunity to pass on any of the FPC's area or national rate orders. Instead, the lead was taken by the Fifth Circuit, and to a lesser extent, the D.C. Circuit.[56] However, the Tenth Circuit, subsequent to the *Permian* decision, addressed one major issue that impacted the area and national ratemaking process.

In *Phillips Petroleum Co. v. Federal Power Comm'n*,[57] the Tenth Circuit reviews the Commission's use of rulemaking procedures instead of adjudicatory proceedings to adopt rates for the Rocky Mountain Area. Although this was a drastic change from prior practices, a *majority*[58] of the court upheld the FPC's new approach. The court was primarily guided by what it perceived to be the

---

[54]In Re Permian Basin Area Rate Cases, 375 F.2d 6 (10th Cir. 1967), *aff'd in part, rev'd in part*, 390 U.S. 747 (1968).

[55]In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[56]The special panel appeared to understand the Supreme Court's "message" in *Permian* and was able to consistently adapt and apply it to the Commission's continuing experiments with producer rates. The Court of Appeals for the District of Columbia required more guidance from the Supreme Court. *Compare* Placid Oil Co. v. Federal Power Comm'n, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom.*, Mobil Oil Corp. v. Federal Power Comm'n, 471 U.S. 283 (1974) (in affirming, the Supreme Court adopts and quotes the panel's analysis of the issues), *with* Public Service Comm'n v. Federal Power Comm'n, 487 F.2d 1043 (D.C. Cir. 1973), *vacated and remanded*, 417 U.S. 964 (1974). (the D.C. Circuit had improperly vacated the FPC's order establishing rates for the Texas Gulf Coast Area).

[57]475 F.2d 842 (10th Cir. 1973).

[58]It is interesting to note that all of the area and national rate decisions of the Fifth Circuit's special panel were unanimous.

message in the Supreme Court's *Permian* opinion.[59]

B. Analysis of the Cases.

Since *Phillips* is the only post-*Permian* producer rate case decided by the Tenth Circuit, it is impossible to draw comparative conclusions between the special panel's approach to these issues and that of the Tenth Circuit. However, several significant observations can be made from an analysis of the panel's decisions, the FPC's actions, and the Supreme Court's response. First, it appears the panel clearly understood the unique problems facing the FPC in attempting to regulate producer rates. It also understood the severe national energy repercussions if the FPC was unable to discover the proper regulatory approach to producer rates. Although the panel had the benefit of early Supreme Court guidance in *Permian*, the panel built upon the Supreme Court's analysis and took the lead in fashioning the unique role the judiciary would play in interacting with the FPC. This is clearly depicted in the Supreme Court's opinion in *Mobil Oil Corp. v. Federal Power Comm'n*[60] where the Court adopts the panel's reasoning and quotes liberally from its prior decisions.[61]

The special panel, particularly during the early years of area rate review, closely scrutinized the factual basis for the Commission's actions. However, this close-scrutiny of the facts was not coupled with any tendency to supplant the Commission's judgment concerning what the facts required. Instead of second-guessing the Commission and using its remand powers, the panel employed its judicial review powers to establish a continuing

---

[59]Phillips Petroleum Co. v. Federal Power Comm'n, 475 F.2d 842, 850 (10th Cir. 1973).

[60]417 U.S. 283 (1974).

[61]*See* n.32 and accompanying text.

dialogue with the Commission by identifying issues on which the Commission's analysis was weak or lacking. Since the ratemaking process was essentially an on-going process, the Commission was able to respond to the panel's opinions and address many of the panel's concerns. In my opinion, this unique relationship between agency and reviewing court worked well and averted a total collapse of the regulatory system. It permitted the regulatory system to evolve, within the confines of the Natural Gas Act, to address rapidly evolving gas market changes.

It appears the panel had an "institutional" impact on the development of producer rates. Although panel membership changed annually,[62] its judicial philosophy and approach did not change. Even though the issues were radically transformed from year-to-year, the panel's response was consistent and the action taken by its members unanimous. This would seem to indicate that the panel, as a separate institution, contributes to a degree of consistency in analysis and approach by the members who serve on the panel.

This may reflect the "special" status of the panel. Since they are, in effect, charged with becoming experts on natural gas regulation, it is reasonable to expect the panel to be guided, in part, by a desire to "make the system work" instead of merely serving as an administrative law backstop. I think the panel recognized that to make the system of producer rate regulation work in the public interest, it had to provide the FPC with sufficient leeway to experiment without having every innovation picked apart by a reviewing court and sent back for fine-tuning. If the panel's only goal was to review agency action in accordance with administrative law principles, it would have been much more inclined to second-guess and pick apart the FPC's orders. Although this probably could have been done in several cases, it would not

[62]With one panel member holding-over and serving on the subsequent panel.

have been consistent with the panel's additional institutional goal of assisting in the development of a workable regulatory system while avoiding a breakdown of the interstate gas market.

The panel also seems to have avoided institutional bias for any of the interest groups who stood to win or lose hundreds of millions of dollars if a rate was adjusted by a fraction of a cent. Producers, pipelines, distribution companies, and consumers each lined-up in every case seeking to maximize their individual interests. At no time was I able to detect any sort of institutional bias by the panel. The decisions as to who would win or lose, and by how much, were left with the FPC. It does not appear that any party was able to better themself through the panel's decisions.[63]

IV. Curtailment Cases.

When gas prices offered by interstate pipelines failed to keep pace with prices offered by intrastate purchasers, producers refrained from selling gas into the interstate market. The lower interstate prices also increased consumer demand for available supplies. Responding to anticipated shortages of gas on the interstate system, the Federal Power Commission (FPC) issued Order No. 431 in April 1971. Order 431 required interstate pipelines to file tariffs addressing how they would curtail gas deliveries to their customers in the event of a supply shortage.

---

[63]The only instance where producers were able to get something from the panel that they were denied by the Commission was in *Tenneco Oil Co. v. Federal Energy Regulatory Comm'n*, 571 F.2d 834 (5th Cir. 1978). However, the panel merely permitted the producers to keep what they had been promised in a previous rate proceeding. The base numerical rates were not adjusted. It is my opinion the panel acted properly in this case.

A. The Relevant Case Law.

The FPC's scope of authority to control gas curtailment issues was addressed initially by the Fifth Circuit Court of Appeals in *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*[64] Louisiana Power & Light Co. (LP&L) generated electricity by burning natural gas which it purchased directly from United Gas Pipe Line Co. (United). LP&L sought to enjoin United from implementing a curtailment plan which would reduce gas available to LP&L and allocate United's gas supply according to United's curtailment plan instead of the terms of the LP&L/United gas sales agreement.

A panel of the Fifth Circuit[65] held the FPC did not have authority to curtail a "direct" sale of gas to an industrial user.[66] The court noted that the mere need for curtailment authority over direct sales did not expand the FPC's jurisdiction under the Natural Gas Act (NGA)--only Congress could act to expand the FPC's jurisdiction. The district judge, as an alternative holding, held it should defer acting on LP&L's request for an injunction until the FPC had an opportunity to address the jurisdictional issue. The Fifth Circuit rejected the district court's approach and held pending FPC proceedings on the issue did not give the FPC primary jurisdiction to hear the LP&L/United dispute.

The United States Supreme Court reverses the Fifth Circuit and holds the FPC can curtail gas deliveries to direct sales customers

---

[64] 456 F.2d 326 (5th Cir. 1972), *rev'd*, 406 U.S. 621 (1972).

[65] Composed of Judges Thornberry, Morgan, and Clark. This decision was issued on January 14, 1972, about six-months before the special oil and gas panel officially was created.

[66] The Commission's jurisdiction over sales only applies to a "sale for resale" where the gas is resold to other consumers. LP&L did not resell the gas it received; it used the gas to generate electricity.

pursuant to its jurisdiction over the "transportation" of natural gas in interstate commerce.[67] The Supreme Court sets the stage for future review of FPC actions stating:

> Since curtailment programs fall within the FPC's responsibilities under the head of its 'transportation' jurisdiction, *the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.'*[68]

The Supreme Court's willingness to offer timely guidance concerning the deference that must be accorded the FPC on curtailment issues may explain the rather consistent approach taken by the Circuit Courts of Appeals following this decision.[69]

Although the Fifth Circuit's decision was reversed, its interpretation of the statute was reasonable. Instead of expanding Commission jurisdiction beyond what had been previously recognized, it chose to leave that task to Congress--or the Supreme Court. Although the Supreme Court's opinion is also a reasonable reading of the statute, it appears its interpretation was impacted more by the current "need" for federal jurisdiction to address what all agree was a national problem. The Fifth Circuit was unwilling to enter into such a policy-driven interpretive analysis.

---

[67]Federal Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 638 (1972).

[68]*Id.* at 642 (emphasis added).

[69]The Supreme Court's early input on the curtailment issue can be contrasted with the Court's reluctance to get involved in equally difficult jurisdictional issues addressed by the Federal Energy Regulatory Commission (FERC) during the 1980s.

In a series of cases decided eight months after the Supreme Court's *Louisiana Power* decision,[70] the special panel for the Fifth Circuit[71] reviewed the validity of FPC Opinion Nos. 606 and 606-A. In Opinions 606 and 606-A the FPC suggests that by adopting a curtailment plan the affected pipeline would be relieved of any liability it may have to its customers for failing to deliver the gas quantities required by their contract. The special panel, in *International Paper Co. v. Federal Power Comm'n*,[72] remands the cases back to the FPC to explain why the contracts are not enforceable under the Natural Gas Act.[73] The court is careful to recognize the FPC's primary jurisdiction to address the issue, but requires the agency to "supply clear findings and reasons supporting the findings."[74] Similarly, in *Atlanta Gas Light Co. v. Federal Power Comm'n*,[75] the court upholds the FPC's ability to issue interim curtailment orders but permits a customer's claim for contract damages to stand pending final action by the FPC concerning the validity of the curtailment plan.[76]

---

[70] *International Paper Co. v. Federal Power Comm'n*, 476 F.2d 121 (5th Cir. 1973); *Louisiana Power & Light Co. v. Federal Power Comm'n*, 476 F.2d 132 (5th Cir. 1973); *Gulf States Utility Co. v. Federal Power Comm'n*, 476 F.2d 135 (5th Cir. 1973); *Mississippi Power & Light Co. v. Federal Power Comm'n*, 476 F.2d 136 (5th Cir. 1973); *Mississippi Valley Gas Co. v. Federal Power Comm'n*, 476 F.2d 138 (5th Cir. 1973); *State of Louisiana v. Federal Power Comm'n*, 476 F.2d 140 (5th Cir. 1973); and *Atlanta Gas Light Co. v. Federal Power Comm'n*, 476 F.2d 142 (5th Cit. 1973).

[71] Composed of Judges Brown, Bell, and Morgan in each case.

[72] 476 F.2d 121 (5th Cir. 1973).

[73] *Id.* at 128.

[74] *Id.*

[75] 476 F.2d 142 (5th Cir. 1973).

[76] *Id.* at 151.

In several subsequent cases, the special panel[77] reviews the FPC's curtailment orders in great detail, deferring to the Commission's expertise and discretion, but demanding that its findings be supported by the evidence.[78] Where the FPC establishes a factual basis for its actions, the panel has affirmed the FPC's policy choices.[79] Where the factual basis is lacking, the panel has made liberal use of its remand power to require further evaluation and explanation from the Commission.[80] The panel, while granting substantial deference to the Commission in its areas of unique expertise, carefully guarded the judicial function in evaluating pipeline liability for damages caused to customers under curtailment plans.[81]

---

[77]Composed of Judges Gewin, Thornberry, and Coleman for cases decided in 1974; Judges Bell, Clark, and Roney for cases decided in 1975; Judges Thornberry, Coleman, and Morgan for cases decided in 1976; and Judges Clark, Roney, and Tjoflat for cases decided in 1977.

[78]For example, in *State of Louisiana v. Federal Power Comm'n*, 503 F.2d 844 (5th Cir. 1974), the court dissects the FPC's curtailment plan and remands it to the FPC for findings justifying its decision to alter the customer priorities established in a previous plan.

[79]For example, in *State of Louisiana v. Federal Power Comm'n*, 503 F.2d 844 (5th Cir. 1974), the court holds the FPC has authority to curtail gas supplies based upon the end-use of the gas.

[80]For example, in *Louisiana Power & Light Co. v. Federal Power Comm'n*, 526 F.2d 898 (5th Cir. 1976), the court held the FPC's finding of irreparable harm to pipeline customers was not supported by substantial evidence and that the FPC had failed to specify its guidelines for determining when an existing curtailment plan has become unduly discriminatory.

[81]For example, in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), the panel carefully balances the judicial role in determining contract liability issues and the Commission's role in determining the extent curtailment plans can exculpate pipelines from customer contract obligations.

B. Analysis of the Cases.

The special panel, in the curtailment cases, seems to have established an effective working relationship with the Commission. After basic jurisdictional lines were defined by the Supreme Court in *Federal Power Comm'n v. Louisiana Power & Light Co.*,[82] the special panel settled into defining the role the courts and Commission would play in dealing with the onslaught of what would become two decades of curtailment litigation. The jurisdiction of the FPC, and later the Federal Energy Regulatory Commission (FERC),[83] to find facts and make policy decisions was respected but effectively used by the panel to ensure the Commission addressed the difficult issues and provided the courts with a complete record for their review.

The give-and-take between the panel and the Commission is demonstrated by the Commission's development of its liability standard for contract damages arising out of curtailment. Beginning with the comments of Judge Brown in *International Paper Co. v. Federal Power Comm'n*, 476 F.2d 121 (5th Cir. 1973),[84] and culminating in FERC Opinions Nos. 237 and 237-A, the liability standard created by FERC reflects the special panel's substantive input and direction over a 15-year exchange with the Commission. In *United Gas Pipe Line Co. v. F.E.R.C.*[85] the special panel[86]

---

[82]406 U.S. 621 (1972).

[83]Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), the functions of the Federal Power Commission were transferred to the newly-created Federal Energy Regulatory Commission effective October 1, 1977. *See* 42 U.S.C. §§ 7171 to 7172 (1988).

[84]The panel builds on the comments of the Court of Appeals for the District of Columbia Circuit in *Monsanto Company v. Federal Power Comm'n*, 463 F.2d 799 (D.C. Cir. 1972).

[85]824 F.2d 417 (5th Cir. 1987).

upholds FERC Opinions Nos. 237 and 237-A which approve tariffs that provide: "United is not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan *unless United, through negligence, bad faith, fault, or willful misconduct, caused the need for curtailments.*"[87] The italicized language, to a large extent, is the product of guidance provided by the special panel. Also, the FERC Opinions leave to the courts the task of defining whether the requisite negligence or fault exists to justify pipeline liability due to curtailment.[88]

One benefit of the special panel approach appears to be the development of a more constructive working relationship between the agency and the reviewing court to address complex problems that impact numerous parties and which cannot be resolved with a single trip to court. The Fifth Circuit's special panel provides the opportunity to develop the expertise and continuity[89] required to address complex issues that may require attention by the courts and the administrative agency for several years.

Comparative analysis with cases decided by the Court of Appeals for the Tenth Circuit is difficult in the curtailment area because the Tenth Circuit addressed the issue only in *General*

---

[86]Composed of Judges Thornberry, Higginbotham, and Davis.

[87]United Gas Pipe Line Co. v. F.E.R.C., 824 F.2d 417, 420 (5th Cir. 1987).

[88]*Id.* at 430-31.

[89]Although the special panel membership has changed on an annual basis since its inception, there does not appear to be any ascertainable variance in result associated with the panel's membership. It appears that each year when the panel membership changes, there is at least one "veteran" member of the panel who holds-over. This may provide some of the continuity. Also, many prior members of the panel have rotated on-and-off the panel through the years.

Motors v. Federal Energy Regulatory Comm'n.[90] In *General Motors* the court, citing the Fifth Circuit's decision in *Louisiana Power & Light Co. v. Federal Power Comm'n*,[91] held various curtailment issues were not ripe for review because proceedings were still pending before the FERC.[92] Quoting from *Louisiana Power*, the court holds the Commission possesses broad powers to structure the proceedings before it.[93] Although not a curtailment case, the Tenth Circuit in *Colorado Interstate Gas v. Natural Gas Pipeline*,[94] adopts the analysis of the Fifth Circuit in *United Gas Pipe Line Co. v. F.E.R.C.*,[95] to determine whether awarding tort damages associated with a gas contract would be preempted by FERC actions.

No conclusions can be drawn from a comparative analysis between Fifth Circuit and Tenth Circuit curtailment cases. However, it is apparent that the special panel for the Fifth Circuit had a major impact on the development of curtailment principles. In my opinion, the decided cases demonstrate the special panel was able to appropriately balance private contract issues with national regulatory exigencies. The special panel achieved these goals by establishing an effective working relationship with the Commission that is probably paralleled only by the relationship, created by statute,[96] between the Court of Appeals for the District of Columbia and the Commission.

---

[90]607 F.2d 330 (10th Cir. 1979).

[91]526 F.2d 898 (5th Cir. 1976).

[92]General Motors v. Federal Energy Regulatory Comm'n, 607 F.2d 330, 333 (10th Cir. 1979).

[93]*Id.*

[94]885 F.2d 683 (10th Cir. 1989).

[95]824 F.2d 417, 421 (5th Cir. 1987).

[96]In all cases, an aggrieved party to a Natural Gas Act proceeding can obtain review of Commission orders in the Court of Appeals for the District of Columbia. 15 U.S.C. § 717r(b) (1988).

V. Natural Gas Act Jurisdiction Over Producers.

Regulating the price producers could receive for gas sold into the interstate market created a substantial incentive for producers to avoid Natural Gas Act (NGA) jurisdiction. At the same time, interstate pipelines, experiencing gas supply shortages requiring curtailment of service to their customers, were attempting to subject as much gas as possible to NGA jurisdiction. This gave rise to two issues, the resolution of which would have monumental economic impact on producers, pipelines, and consumers: (1) When is gas "dedicated" to the interstate market and subject to Federal Power (Energy Regulatory) Commission jurisdiction? and (2) When is dedicated gas released from Commission jurisdiction?

A. The Relevant Case Law.

The Tenth Circuit Court of Appeals, in *McCombs v. Federal Power Comm'n*,[97] reviewed an FPC order finding that gas previously sold by a lessee was still dedicated to interstate service under the Natural Gas Act. In 1948 Quin had obtained an oil and gas lease covering 153 acres in Karnes County, Texas. In 1953 Quin entered into a gas sales contract with United Gas Pipe Line Company, an interstate pipeline. Since Quin's sale constituted a "sale for resale" in interstate commerce, it was subject to FPC jurisdiction under the Natural Gas Act.[98] This meant that before Quin could enter into "service" of this interstate market he had to obtain a "certificate of public convenience and necessity" from

---

[97]542 F.2d 1144 (10th Cir. 1976), *rev'd*, United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1978).

[98]This is the product of the Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S.674 (1954), where the Court held independent producers must comply with the terms of the Natural Gas Act before they can "serve" the interstate market.

the FPC.[99] On December 8, 1954, Quin obtained a certificate from the FPC authorizing the sale.

The Quin lease was assigned and in 1966 the one well on the lease quit producing. When attempts to regain production from the well failed, the lessee notified United that the well was depleted and no more gas was available. United removed its equipment from the well. However, at no time did the lessee seek to obtain Commission authorization to abandon its sale to United.[100] Since producers are regulated under the Natural Gas Act as a public utility, not only do they require FPC approval to "enter" service,[101] they must also obtain FPC approval to "exit" or abandon service.[102]

In 1971 McCombs obtained an assignment of the Quin lease,

---

[99]15 U.S.C. § 717f(c) (1988) provides, in part:

> No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . 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 . . . .

[100]*McCombs*, 542 F.2d at 1146.

[101]By obtaining an FPC-issued certificate of public convenience and necessity. 15 U.S.C. § 717f(c) (1988).

[102]15 U.S.C. § 717f(b) (1988) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

unaware of the Quin/United gas sales contract. In 1971 McCombs completed a producing gas well on part of the 153-acre lease. A second well was drilled in 1972 and a contract to sell the gas from the lease was entered into with E. I. du Pont de Nemours & Company. This sale to du Pont would be an *intra*state transaction and therefore not subject to FPC regulation.[103] United objected to the sale asserting the gas was subject to the 1953 Quin/United gas sales contract and had been dedicated to interstate commerce. In 1973 the producers filed a declaratory judgment action in state district court to clear their title; United filed a complaint with the FPC alleging McCombs was violating the Natural Gas Act. The FPC responded by issuing an order requiring McCombs to appear before it and show cause why they should not be held in violation of the Natural Gas Act.[104]

In 1975 the Commission held that McCombs had violated sections 7(b)[105] and 7(c)[106] of the Natural Gas Act because it had diverted gas that was certificated to the interstate market and never abandoned.[107] On appeal, the Tenth Circuit ignores the express statutory requirements and holds: "as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act."[108] It then follows with the statement: "This being a matter of law, we do not consider it within the expertise of the

---

[103]Which meant that the producers could sell their gas for two or more times what they could obtain for the same gas in the regulated interstate market.

[104]*McCombs*, 542 F.2d at 1147.

[105]Natural Gas Act § 7(b), 15 U.S.C. § 717f(b) (1988).

[106]Natural Gas Act § 7(c), 15 U.S.C. § 717f(c) (1988).

[107]*McCombs*, 542 F.2d at 1147.

[108]*Id.* at 1149.

Commission."[109] The panel initially hearing this case was comprised of Judges Hill, Seth, and Templar. On rehearing,[110] a new panel, consisting of Judges Seth, Holloway, and Barrett, vacate the prior opinion and issue a new opinion which arrives at the same conclusion:

> We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission.[111]

The court equates the facts of cessation of production, depletion of known reserves, and a failure to produce for a five-year period as the functional equivalent of abandonment under section 7(b) of the Natural Gas Act.[112]

Judge Holloway wrote a dissenting opinion in which he stated that "while the equities favor" McCombs and duPont, "contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act . . . ."[113] Judge Holloway felt that the "plain terms of § 7(b)" required McCombs to seek abandonment from the FPC and for the FPC to make the necessary findings and decision regarding abandonment.[114]

---

[109] *Id.*

[110] McCombs v. Federal Energy Regulatory Comm'n, 570 F.2d 1376 (1978).

[111] *Id.* at 1381.

[112] *Id.*

[113] *Id.* at 1382.

[114] *Id.*

In *United Gas Pipe Line Co. v. McCombs*[115] the Supreme Court reverses the Tenth Circuit stating:

> Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandonment of service within its jurisdiction. . . . Not only does the statute require companies to obtain the 'approval of the Commission . . . after due hearing,' but it also prohibits abandonment absent specific findings by the Commission. The language of § 7(b) simply does not admit of any exception to the statutory procedure.[116]

The Supreme Court looks to the Natural Gas Act's "fundamental purpose . . . to assure the public a reliable supply of gas at reasonable prices" as a guide to determine whether the requirements of § 7(b) should be tempered.[117] The Court stated: "we have consistently recognized that the Commission's 'legal control over the continuation of service,' . . . is a fundamental component of the regulatory scheme."[118] Refusing to limit the Commission's abandonment authority, the Court concludes: "To deprive the Commission of this authority, even in limited circumstances, would conflict with basic policies underlying the Act."[119]

In contrast to the Supreme Court's concern for the underlying purpose of the Natural Gas Act, the Tenth Circuit's main concern was the inequitable impact a finding of FPC jurisdiction would have

---

[115]442 U.S. 529 (1978).

[116]*United*, 442 U.S. at 535-36.

[117]*Id.*

[118]*Id.*

[119]*Id.*

on the producer and their new intrastate customer. This could be the product of institutional bias associated with the particular Circuit Court of Appeals' regional constituency. For example, the Tenth Circuit and Fifth Circuit Courts of Appeal have traditionally been viewed by litigants as better places to be litigating producer-oriented issues, particularly when a decision favoring producers will have a corresponding unfavorable impact on pipeline and consumer interests outside the Circuit's region. Similarly, the District of Columbia Circuit and other Circuits in non-producing regions are viewed by litigants as being pro-pipeline and pro-consumer. Although the Fifth Circuit Court of Appeals has been placed in the pro-producer category by litigants, its decisions do not appear to be influenced by regional institutional bias. As noted elsewhere in this Report, it is my opinion that the special panel approach has played a major role in avoiding regional institutional bias when considering oil and gas issues presented to the Fifth Circuit.

At about the same time the Tenth Circuit was considering *McCombs*, the Fifth Circuit's special panel[120] was considering whether a mineral owner's interest had been dedicated to interstate commerce by their lessee's actions. In *Southland Royalty Co. v. Federal Power Comm'n*,[121] a mineral owner entered into a 50-year fixed-term oil and gas lease with a lessee. During the 50-year term the lessee drilled gas wells on the leased land and sold the gas in interstate commerce pursuant to FPC-issued certificates. After the 50-year term lease expired, the development rights reverted to the mineral owner who entered into contracts to sell the gas in *intra*state commerce. The FPC held that the gas was still subject to its jurisdiction and subject to service

---

[120]Composed of Judges Clark, Roney, and Tjoflat.

[121]543 F.2d 1134 (5th Cir. 1976), *rev'd*, California v. Southland Royalty Co., 436 U.S. 519 (1978).

obligations under the Natural Gas Act.[122]

The panel reverses the FPC finding the Commission failed "to appreciate . . . basic distinctions in property law."[123] The court held that the lessee could not commit the mineral owner's reversionary interest to interstate commerce without the mineral owner's consent. As the panel stated:

> Under applicable Texas law, Gulf's [the lessee's] rights were those of a tenant for a term of years; its interest was a limited one which terminated completely when title reverted to Southland [the mineral owner] at the expiration of the 50-year term. It is black letter law that a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest. . . . Since Gulf never was possessed of rights in the gas under the leasehold lands which could survive the termination of its 50-year lease, it never could create rights in a third person to that same gas.[124]

In a 4-3 decision the Supreme Court reverses the Fifth Circuit in *California v. Southland Royalty Co.*[125] The Court begins its analysis noting "[t]he fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices."[126] The Court held:

---

[122]*Southland*, 543 F.2d at 1136.

[123]*Id.* at 1138.

[124]*Id.* at 1137.

[125]436 U.S. 519 (1978).

[126]*Id.* at 523.

> The Commission reasonably concluded that under the statute the obligation to continue service attached to the gas, not as a matter of contract but as a matter of law, and bound all those with dominion and power of sale over the gas, including lessors to whom it reverted.[127]

Responding to the panel's property law rationale the Court notes that by dedicating gas to the interstate market the lessee does not dispose of a property right, "but only changes its regulatory status."[128] The Court concludes noting: "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."[129]

Justice Stevens wrote a dissenting opinion, joined in by two other justices,[130] arguing that the Fifth Circuit properly decided the dedication/abandonment issue noting "[d]espite the Act's flexibility, I would not stretch it to reach this case."[131] The panel's actions in this case appeared to be driven by its focus on traditional property law concepts and an unwillingness, under the facts, to judicially extend the FPC's jurisdiction to passive mineral owners. Unlike the *McCombs* case, where it was clear the gas had been dedicated to the interstate market, in *Southland Royalty* there was substantial doubt[132] concerning whether an oil

---

[127] *Id.* at 526.

[128] *Id.* at 527. However, the "regulatory status" of the gas substantially impacts the value of the property.

[129] *Id.* at 530. The Court also notes: "By tying the concept of dedication to local property law, respondents would cripple the authority of the Commission at a time when the need for decisive action is greatest." *Id.*

[130] Two justices did not participate in the decision.

[131] *Southland Royalty*, 436 U.S. at 546.

[132] Shared by three members of the Supreme Court.

and gas lessee's dedication should apply to the mineral interest owner after the lease had expired. In *Southland Royalty* the panel was concerned with defining the scope of the Natural Gas Act; in *McCombs* the Tenth Circuit was concerned with whether a finding of jurisdiction would be "equitable" under the circumstances.

In considering the dedication/abandonment cases, the Fifth Circuit's special panel recognized and respected the Federal Power (Energy Regulatory) Commission's role as the agency charged by Congress to carry out the mandates of the Natural Gas Act. For example, in *Tenneco Oil Co. v. Federal Energy Regulatory Comm'n*,[133] the panel[134] had to determine whether a certain transaction, denominated a "lease-sale," was actually a "sale for resale" of natural gas in interstate commerce. Although the case had been heard by the trial court, and oral argument heard by the panel in two of the cases, the court held the matter should not be decided until after the Federal Energy Regulatory Commission (FERC) rendered its opinion in pending companion cases.[135] This is also demonstrated by the panel's[136] action in *Columbia Gas Transmission v. Allied Chemical Corp.*[137] where the court vacated the judgment of the district court and instructed it to refer certain Natural Gas Policy Act enforcement issues to the FERC.[138]

In *Texas Oil & Gas Corp. v. Valley Gas Transmission*,[139] the

---

[133]580 F.2d 722 (5th Cir. 1978).

[134]Composed of Judges Brown, Godbold, and Roney.

[135]Tenneco Oil Co. v. Federal Energy Regulatory Comm'n, 580 F.2d F.2d 722, 723 (5th Cir. 1978).

[136]Composed of Judges Henderson, Anderson, and Sam D. Johnson.

[137]652 F.2d 503 (5th Cir. 1981).

[138]*Columbia*, 652 F.2d at 519.

[139]608 F.2d 231 (5th Cir. 1979).

issue was whether the FERC had primary jurisdiction to consider the jurisdictional status of certificated gas properties that had remain unused for fifteen years. The panel[140] holds the matter is within the primary jurisdiction of the FERC stating:

> The present situation is governed by the rules and decisions of the FERC. Such deference not only accedes to the mandates of the statute, but also insures that certainty and reliability will exist in the regulatory scheme.[141]

The Tenth Circuit, in a case factually similar to *Valley Gas*, also deferred to the FERC's primary jurisdiction.[142] However, the same panel of Judges for the Tenth Circuit took a very restrictive view of the FERC's primary jurisdiction in *Wessely Energy Corp. v. Arkansas Louisiana Gas*.[143] In *Wessely* the court had to determine whether a gas purchase contract between Aquitaine and Arkla, covering over one million acres, included a lease covering 160-acres within the one million-acre contract area. Aquitaine obtained the lease covering the 160-acres in June 1971. In October 1971 Aquitaine entered into the gas contract with Arkla. However, Aquitaine never drilled a well on the 160-acre lease and it terminated in 1976 without any production having been associated with the leased land. However, during this time there was apparently[144] production from other acreage that was included in

---

[140]Composed of Judges Charles Clark, Roney, and Garza.

[141]*Id.* at 234.

[142]Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co., 601 F.2d 1144 (10th Cir. 1979).

[143]593 F.2d 917 (10th Cir. 1979).

[144]Though the opinion is curiously silent on this issue.

the 1971 Aquitaine/Arkla gas contract.[145]

The mineral owners entered into a new lease covering the 160-acre tract, which was ultimately assigned to Wessely. The FERC argued that the court should refer the matter to it under the doctrine of primary jurisdiction. The court summarily classifies the issue as "purely one of law" and rejects FERC's argument. Instead, the court finds that the issue is best addressed in its present quiet title context. The court seems to reason that since there was no production from the leased land, the issue is so clear-cut that the FERC need not get involved.[146] Judge Doyle filed a concurring opinion in which he stated:

> [M]y general viewpoint is that the use of this quiet title suit as a means of getting out from under the regulation of the Natural Gas Act is wholly inappropriate. If the Natural Gas Act is obviously not applicable, there is an administrative proceeding which is to be employed to get such an adjudication. It should not be determined in this collateral proceeding.[147]

The Tenth Circuit's decision in *Wessely* demonstrates a reluctance to refer difficult jurisdictional issues to the FERC; perhaps because they fear how the FERC might resolve the matter. The court should have referred this issue to the FERC for its initial action. The court's subsequent decision in *Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co.*[148] is difficult to square with *Wessely*. The court tried to explain its holding in *Wessely* by distinguishing the facts: "Unlike *Wessely*, natural gas was

---

[145]*Wessely*, 593 F.2d at 919.

[146]*Id.* at 920, 921.

[147]*Id.* at 921.

[148]601 F.2d 1144 (10th Cir. 1979).

produced and sold in interstate commerce for seven years from the tract at issue in the instant case."[149] It would appear that it is the FERC's prerogative to weigh these types of factual differences initially--the court never gave it the chance in *Wessely*.[150]

Cases where the courts review the Commission's jurisdictional determinations tend to be more consistent. Where the FERC gets too aggressive at asserting its jurisdiction, the Tenth Circuit and the Fifth Circuit have acted to define jurisdictional limits.[151] For

---

[149]*Id.* at 1146.

[150]It is revealing that the court in *Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line* states "[t]his case is controlled by *California v. Southland Royalty Co.* . . . and *United Gas Pipe Line Co. v. McCombs* . . . ." *Texas Oil*, 601 F.2d at 1146. Since the court feels the Commission has jurisdiction under the facts, the court is willing to defer to its primary jurisdiction--to determine whether it has jurisdiction. *Wessely* presents more challenging jurisdictional issues but instead of referring this more difficult regulatory issue to the FERC, the court decides it as a "matter of law" in a quiet title action.

[151]Although not a dedication case, the panel, composed of Judges Clark, Roney, and Tjoflat, in *Shell Oil Co. v. Federal Energy Regulatory Comm'n*, 566 F.2d 536 (5th Cir. 1978), held that the FERC lacked jurisdiction to regulate how producers conduct their production operations. The panel held that the FERC's regulation fell within the "production or gathering" exemption created by § 1(b) of the Natural Gas Act. Natural Gas Act § 1(b), 15 U.S.C. § 717(b) (1988) provides, in part:

> The provisions of this Act 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 . . . 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* *<u>or to the production or gathering of natural gas</u>*.

An equally divided Supreme Court affirmed the panel in *Federal Energy Regulatory Comm'n v. Shell Oil Co.*, 440 U.S. 192 (1979).

Recently the FERC has been attempting to expand its control

example, in *Vreeland v. Federal Power Comm'n*,[152] the issue required interpretation of a series of gas contracts to determine whether certain depths were excluded from the producer's certificate. The panel,[153] was more apt to overturn the Commission when the issues concerned the interpretation of contracts or other non-regulatory matters. In *Harrison v. Federal Energy Regulatory Comm'n*,[154] the panel[155] reversed the FERC's interpretation of a lessee's application for a certificate of public convenience and necessity. The FERC held six sections referenced in a gas contract had been dedicated, the court held only the two sections specifically mentioned in the certificate application had been dedicated.[156] In *El Paso Natural Gas Co. v. Sun Oil Co.*,[157] the panel[158] reversed the FERC and held that a series of "lease-sale agreements" were not sales subject to the Natural Gas Act.[159]

---

over gas gathering systems which are low pressure pipelines that connect wells to gas processing plants and higher pressure transportation pipelines. The FERC has become concerned that a lack of regulatory control over gathering facilities will create a bottleneck in the gas marketing process. In *EP Operating Co. v. Federal Energy Regulatory Comm'n*, 876 F.2d 46 (5th Cir. 1989) (Judges Clark, Brown, and Johnson), and *Northwest Pipeline Corp. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403 (10th Cir. 1990), the courts reject FERC's determination that certain facilities, serving a gathering function, are subject to FERC regulation.

[152]528 F.2d 1343 (5th Cir. 1976).

[153]Composed of Judges Thornberry, Coleman, and Morgan.

[154]567 F.2d 308 (1978).

[155]Composed of Judges Brown, Godbold, and Roney.

[156]*Harrison*, 567 F.2d at 309.

[157]708 F.2d 1011 (5th Cir. 1983).

[158]Composed of Judges Brown, Roney, and Tjoflat.

[159]The court's conclusion is questionable. The opinion fails to state the precise terms of the agreements, making it difficult to fully evaluate the court's conclusion.

When the issues fall within the ambit of previous Supreme Court decisions, both the Tenth Circuit and the Fifth Circuit have readily affirmed the Commission's dedication and abandonment determinations.[160] However, the Circuits have differed over the Commission's power to fashion remedies to deal with unlawful diversions of gas from the interstate market. For example, in *Louisiana Land & Exploration v. Federal Energy Regulatory Comm'n*,[161] a "royalty sale" was held to be a sale subject to the Natural Gas Act. The FERC ordered the seller to refund the amounts they received in excess of the regulated rates. The panel[162] affirmed the FERC's actions stating: "The power of the Commission to effectuate the purposes of the Natural Gas Act by ordering producers to make refunds is well established."[163] The same panel of judges in *Cox v. Federal Energy Regulatory Comm'n*[164] upheld a FERC order requiring a lessee to "return diverted gas in kind to the interstate market."[165]

---

[160] *E.g.*, Public Service Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir. 1979); Louisiana Land and Exploration Co. v. Federal Energy Regulatory Comm'n, 574 F.2d 204 (5th Cir. 1978); Mitchell Energy Corp. v. Federal Power Comm'n, 533 F.2d 258 (5th Cir. 1976); Walker Operating Corp. v. Federal Energy Regulatory Comm'n, 874 F.2d 1320 (10th Cir. 1989); Amarex, Inc. v. Federal Energy Regulatory Comm'n, 603 F.2d 127 (10th Cir. 1979); Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n, 578 F.2d 289 (10th Cir. 1979); Phillips Petroleum Co. v. Federal Power Comm'n, 556 F.2d 466 (10th Cir. 1977).

[161] 574 F.2d 204 (1978).

[162] Composed of Judges Brown, Godbold, and Roney.

[163] *Louisiana Land*, 574 F.2d at 209.

[164] 581 F.2d 449 (5th Cir. 1978).

[165] *Cox*, 581 F.2d at 451. However, in *Coastal Oil & Gas Corp. v. Federal Energy Regulatory Comm'n*, 782 F.2d 1249 (5th Cir. 1986), the panel, composed of Judges Clark, Brown, and Johnson, reverses the portion of a FERC order which would impose a "penalty" on the party improperly diverting gas from the interstate market. Although the Commission can act to restore the status quo and

The Tenth Circuit takes a different approach in *McCombs v. Federal Energy Regulatory Comm'n*,[166] where the court reverses a FERC order requiring McCombs to deliver into the interstate market volumes of gas equal to those diverted and unlawfully sold to the intrastate market. The court rejects the approach of the Fifth Circuit in *Cox* holding: "it is not a function of the Commission to issue orders remedying past violations of the Natural Gas Act."[167] However, Judge Holloway, in a dissenting opinion, offers the most complete discussion to date concerning the policy issues and the source of the Commission's authority to order paybacks of gas improperly diverted from the interstate market.[168]

B. Analysis of the Cases.

The dedication/abandonment cases indicate that the special panel is more likely to refer jurisdictional issues to the Commission under the doctrine of primary jurisdiction. The Tenth Circuit, as demonstrated in the *Wessely* case,[169] has been less willing to refer matters to the Commission, particularly if the court believes a finding of jurisdiction over the activity would be unfair under the circumstances. The *McCombs* series of cases indicate that the Tenth Circuit at times has been more concerned with the equities of a particular case than with the underlying policies of the regulatory program. This is also demonstrated by the court's reluctance to permit the Commission to enforce its own

---

prevent unjust enrichment, it cannot impose a penalty on the wrongdoer. *Coastal*, 782 F.2d at 1253.

[166] 705 F.2d 1177 (10th Cir. 1980).

[167] *McCombs*, 705 F.2d at 1184.

[168] *McCombs*, 705 F.2d at 1189-90.

[169] Wessely Energy Corp. v. Arkansas Louisiana Gas, 593 F.2d 917 (10th Cir. 1979).

orders to require cash refunds and in-kind paybacks to compensate for past gas diversions from the interstate market. In contrast, the special panel's decisions are more consistent in approach with greater concern for the workings of the regulatory system.

VI. Deregulation and Restructuring.

This section reviews cases decided under the Natural Gas Policy Act of 1978 (NGPA)[170] and cases in the post-NGPA era as the Federal Energy Regulatory Commission attempts to adjust the industry to a "deregulated" regulatory system. In 1978, after enactment of the NGPA, gas sold into the interstate market *and* *intrastate* markets became subject to price regulation. However, certain categories of gas would become deregulated in 1979, 1985, and 1987. In the 1980s, as major categories of became deregulated, market prices, for the first time in 50 years, began to fall below regulated prices. Gas sales contracts often provided for payment of the maximum NGPA price but also provided for renegotiation or the payment of market prices in the event of deregulation.[171]

A. The Relevant Case Law.

In *Martin Exploration Management Co. v. Federal Energy Regulatory Comm'n*[172] the Tenth Circuit reversed a FERC regulation which provided:

> First sales of natural gas that is deregulated natural gas . . . is price deregulated and not subject

[170] 15 U.S.C. §§ 3301 to 3432 (1988).

[171] The basic assumption when many of these contracts were made was that a deregulated price would exceed a regulated price.

[172] 813 F.2d 1059 (10th Cir. 1987), *rev'd*, Federal Energy Regulatory Comm'n v. Martin Exploration Management Co., 486 U.S. 204 (1988).

> to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under . . . the NGPA.[173]

NGPA § 101(b)(5) provides:

> If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, *the provision which could result in the highest price shall be applicable.*[174]

Producers in *Martin* argued that they could elect to either sell their gas under an applicable regulated price category, or treat it as deregulated--whichever would result in the highest price at the moment. The Tenth Circuit agreed. This meant that if the deregulated market price for gas was $1.00 per unit, but the gas also qualified under a regulated category set at $5.00 per unit, the producer could elect to sell their gas under the regulated category and, if their contract was properly drawn, force the pipeline purchaser to pay $5.00 per unit.

The Supreme Court reverses the Tenth Circuit noting a deregulated price "could" always exceed a regulated price so once gas qualifies for a deregulated category, it is deemed deregulated under NGPA § 101(b)(5).[175] In addition to applying the "plain meaning" of the statute, the Court also considers the underlying

---

[173] 18 C.F.R. § 272.208 (1986).

[174] Natural Gas Policy Act § 101(b)(5), 15 U.S.C. § 3311(b) (1988).

[175] Federal Energy Regulatory Comm'n v. Martin Exploration Management Co., 486 U.S. 204, 209-10 (1988).

policy of the NGPA and notes that the Court of Appeals' reading of the statute would have the effect of "turning a statutory scheme of price ceilings and deregulation into a system of price supports for producers."[176]

Although the Tenth Circuit in *Martin* cited all the proper cases concerning deference to agency interpretation of statutes it is charged with administering, the court rejects the FERC's interpretation holding it was "contrary to the clear intent of Congress as expressed in the unambiguous language of the NGPA."[177] In most cases the FERC will probably select an interpretation that comports with the spirit of the statute and represent the underlying public policy that motivated its enactment. In fairness to the Tenth Circuit, I think this was a close issue. When the issues are close, however, it would appear deference to the agency would be the proper course of action. It is possible an element of regional institutional bias may enter into these close calls to tip the scales away from agency deference.[178]

Since the early 1980s FERC has altered many of its regulatory programs in an attempt to restructure the gas industry through deregulation. Although most of these programs have been reviewed by the Court of Appeals for the District of Columbia, a few matters have been addressed by the Fifth and Tenth Circuits. Both Circuits have addressed issues concerning FERC's elimination of a pipeline's minimum bill charged to its customers, regardless of the amount of service they use. In each case, the courts have affirmed the

---

[176]*Id.* at 210.

[177]Martin Exploration Management Co. v. Federal Energy Regulatory Comm'n, 813 F.2d 1059, 1065 (10th Cir. 1987).

[178]Contrast the Fifth Circuit's approach to several NGPA issues addressed by FERC in *ECEE, Inc. v. Federal Energy Regulatory Comm'n*, 654 F.2d 339 (5th Cir. 1981) where the panel, composed of Judges Henderson, Anderson, and Sam D. Johnson, defers to several FERC NGPA interpretations.

FERC's orders eliminating pipeline minimum bills as being anticompetitive.[179]

One of the most significant cases to date concerning FERC's restructuring was decided by the Fifth Circuit's special panel[180] in *Mobil Oil v. Federal Energy Regulatory Comm'n.*[181] The panel reviewed FERC Order Nos. 451 and 451-A designed to spur the renegotiation of certain gas contracts or, if renegotiation failed, authorize the gas to be released from existing contract and service obligations and require the pipeline to transport the gas. Two members of the panel, Judges Clark and Johnson, held the Commission had exceeded its authority and vacated the FERC's orders. In stark contrast to the approach taken under the Area Rate, National Rate, and curtailment orders, the court took a restrictive view of the Commission's authority under the NGA and NGPA and concluded stating: "Congress alone has the power to do--or authorize the Commission to do--what the Commission has done . . . ."[182]

However, Judge John R. Brown, a veteran of the panel since its inception, filed a dissenting opinion in which he reminds the court that they are reviewing what is in essence a rate order which requires a high degree of deference to the administrative agency.[183] Recounting the teachings of the Supreme Court in *Permian Basin*,

---

[179]Colorado Interstate Gas Co. v. Federal Energy Regulatory Comm'n, 904 F.2d 1456 (10th Cir. 1990); Natural Gas Pipeline Co. v. Federal Energy Regulatory Comm'n, 904 F.2d 1469 (10th Cir. 1990); Texas Eastern Transmission Corp. v. Federal Energy Regulatory Comm'n, 893 F.2d 767 (5th Cir. 1990); Transwestern Pipeline Co. v. Federal Energy Regulatory Comm'n, 820 F.2d 733 (5th Cir. 1987).

[180]Composed of Judges Clark, Brown, and Johnson.

[181]885 F.2d 209 (5th Cir. 1989), *rev'd*, Mobil Oil Exploration v. United Distribution Co., 111 S.Ct. 615 (1991).

[182]*Id.* at 226.

[183]*Id.* at 226.

Judge Brown notes: "the Commission must be free 'to make the pragmatic adjustments which may be called for by particular circumstances.'"[184] Judge Brown concludes his opinion stating:

> Committed, as we are, to the Commission's necessitous right of experimentation in a matter so complex and nearly beyond congressional solution, this Court's action in nullifying the 451 Orders is an unauthorized intrusion into a field which neither Article III nor legislation commands.[185]

In *Mobil Oil Exploration v. United Distribution Co.*[186] the Supreme Court reverses the Fifth Circuit and sustains the Commission's orders in their entirety. The Court's reasoning parallels that of Judge Brown's dissent and concludes noting: "We are neither inclined nor prepared to second-guess the agency's reasoned determination in this complex area."[187]

B. Analysis of the Cases.

As noted in the previous section, the decisions during the NGPA and restructuring era offer insight regarding the concept of regional institutional bias. Section 19 of the Natural Gas Act provides for review of Commission orders either in the United States Court of Appeals for the District of Columbia or the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of

---

[184] *Id.* at 231.

[185] *Id.* at 235.

[186] 111 S.Ct. 615 (1991).

[187] *Mobil Oil*, 111 S.Ct. at 628.

business."[188] Through the years litigants have attempted to seek review in the court of appeals which offers them the greatest hope for success.

Whether such beliefs are justified, litigants have gone to great efforts to secure the appellate venue they believe will be the most sympathetic to their client. In *Shell Oil Co. v. Federal Power Comm'n*[189] the court chronicles the elaborate efforts of the pipeline and consumer interests to seek review of the FPC's National Rates for New Gas in the D.C. Circuit while producer interests employ equally elaborate efforts to gain review in the Fifth Circuit.[190]

Although the Fifth Circuit has been perceived by some as a "pro-producer" forum,[191] the decisions of the court do not justify the label.[192] For example, in *State of Louisiana v. Federal Power Comm'n*,[193] the panel flatly rejects the idea that the State of Louisiana should receive any special consideration in curtailment actions simply because of its status as a major gas-producing state. The court, responding to the State's argument, holds:

> This claim by Louisiana is essentially an argument for a preference. The FPC is a federal agency charged with evenhandedly supervising power matters on a national

---

[188]15 U.S.C. § 717r(b) (1988).

[189]509 F.2d 176 (5th Cir. 1975).

[190]*Shell Oil*, 509 F.2d at 179.

[191]Many perceive the Court of Appeals for the District of Columbia as a "pro-consumer" forum.

[192]I believe this can be attributed, in large part, to the role of the special panel in hearing the cases in which such tendencies could be realized.

[193]476 F.2d 140 (5th Cir. 1973).

basis once jurisdiction is established. *A major purpose was to prevent the 'haves' from being unfair to the 'have nots.' Therefore, we do not find it an abuse of discretion for the FPC to refuse to consider a claim of preference based on the fortuitous location of gas reserves in a certain area.*[194]

However, since § 19 of the Act provides for multiple venues for judicial review, forum shopping for what are perceived to be judges sympathetic to a cause is inevitable. The most recent "surprise" in this process was when appeals from the Commission's Order 451 were simultaneously filed in the Fifth and D.C. Circuit Courts of Appeal and venue was determined by a coin-toss. The Fifth Circuit "lost" the toss and "won" venue over the appeal. However, the special panel hearing the case again surprised its self-declared constituency by striking down Order 451--a very pro-producer order.

---

[194] State of Louisiana v. Federal Power Comm'n, 476 F.2d 140, 142 (5th Cir. 1973) (emphasis added).