IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 91-1489

GEORGIA PACIFIC CORPORATION,
PETITIONER,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

NO. 91-1490

CONSOLIDATED MINERALS, INC.,
PETITIONER,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Whether the Commission's rejection of the Florida Gas Transmission Company's April 1991 tariff proposal in this case was a lawful exercise of its authority under Section 4 of the Natural Gas Act, and in accord with established principles of res judicata.

STATUTES AND REGULATIONS

All applicable statutes and regulations are attached to this brief in the Statutory Appendix.

STATEMENT OF THE CASE

Florida Gas Transmission Company (FGT) is a natural gas pipeline engaged in the transportation and the sale for resale of natural gas in interstate commerce, and thus is subject to Commission jurisdiction under Section 2(6) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717a(6). The petitioner in D.C. Cir. Docket No. 91-1489, Georgia Pacific Corporation (GaPac), is the owner and operator of a paper mill located in Palatka, Florida, and is a direct sale customer of FGT. The petitioner in D.C. Cir. Docket No. 91-1490, Consolidated Minerals, Inc., is a manufacturer of animal feed supplements located in Plant City, Florida, and is also a direct sale customer of FGT.

Petitioners' claim is that the Commission's rejection of an April 1991 tariff filed by FGT elevates pro rata scheduling of capacity for FGT's preferred interruptible service over historical end-use curtailment priority, in violation of Section 5 of the NGA and Title IV of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3391-94, and exceeds the limits of the Commission's jurisdiction over direct sales customers established by Section 1(b) of the NGA, 15 U.S.C. § 717(b). On these grounds, petitioners in this case are challenging two Commission orders rejecting FGT's April 1991 tariff filing. These orders are: 1) Florida Gas Transmission Corp., "Order Rejecting Tariff Sheet," 55 FERC ¶ 61,337 (May 31, 1991); and 2) Florida Gas Transmission Co., "Order Denying Rehearing," 56 FERC ¶ 61,264 (August 8, 1991). FGT has not sought review of these orders.

STATEMENT OF THE FACTS

A. Background: The October 1989 Settlement Proposal Submitted To The Commission In Docket No. RP89-50

1. FGT provides the sole access for transportation of natural gas into the peninsular Florida market area. Prior to August 1990, FGT had been a natural gas merchant that transported its system supply gas in connection with its own sales, but provided no third party-supplier transportation services on the Florida peninsula. See Florida Gas Transmission Co., 51 FERC ¶ 61,309 at p. 62,006 (1990).

Historically, FGT served sales customers under (1) firm; (2) preferred interruptible; and (3) primary interruptible, rate schedules. 1/ FGT's customers' rights to quantities of FGT gas supply were determined by annual volumetric entitlements (AVEs) in pipeline supply agreements with individual customers. 2/ Since 1980, FGT has also had an end-use curtailment plan in effect which provides the highest priority to residential customers, and the next highest priorities to agricultural and

---

1/ Preferred interruptible service is unique to FGT, and can be described as an interruptible service that is second in priority only to firm service, i.e., it is allocated capacity after firm service but before other interruptible service. R. 149 n.5; J.A. 27 n.5; 55 FERC at p. 61,994 n.5. The customer paid more for preferred service than primary interruptible service. Primary interruptible service, on the other hand, could be interrupted on short notice at the option of FGT, and carried the lowest rates. See Houston Texas Gas & Oil Corp., et al., 16 FPC 118, 126 n.5 (1956).

2/ AVEs are contractually authorized quantities barring FGT customers from purchases exceeding a set amount of gas at any one delivery point. See Lehigh Portland Cement Co. v. Florida Gas Transmission Co., 13 FERC ¶ 61,041 at p. 61,074 (1980) ("Lehigh").

industrial process end-users, respectively. The curtailment plan assigned the lowest priorities to certain boiler-fuel end-users, i.e., electric utilities which were fuel-switchable and consumed gas in the generation of electric power only when it was economically advantageous to do so. During the 1980s, FGT's preferred interruptible customers consisted of both lower priority end-users (that would be curtailed first under FGT's curtailment procedures) and higher priority end-users (curtailed last under FGT's plan).

FGT's system of AVEs and its end-use curtailment plan did not distinguish between the firm and interruptible nature of services. Because there had been little curtailment of preferred services throughout the 1980s, the quality of preferred interruptible service had approached the quality of firm service. See 51 FERC at p. 62,002.

2.a. On October 17, 1989, FGT filed with the Commission a proposed settlement to resolve a variety of issues, including system expansion, service restructuring, capacity allocation, curtailment procedures, and FGT's conversion to an open access pipeline under Commission Order No. 436. 3/ The settlement

---

3/ Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985), order on reh'g, Order No. 436-A, FERC Stats. & Regs., Regulations Preambles ¶ 30,675 (1985), vacated and remanded, Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), readopted on an interim basis, Order No. 500, 52 Fed. Reg. 30,334 (Aug. 14, 1987), FERC Stats. & Regs., Regulations Preambles, 1986-1990 ¶ 30,761 (1987), remanded, American Gas Distributors v.
(continued...)

proposal for the first time allocated firm capacity to transporting customers and provided for a permanent reallocation of FGT's system capacity across the board for all FGT customers. 51 FERC at p. 62,001. 4/ By virtue of increased subscriptions for firm service (and a revised curtailment procedure that would interrupt firm customers last regardless of their priority level under FGT's end-use curtailment plan), FGT's service structure would be transformed from one without any clear distinction between firm and interruptible service into a structure in which total nominations for firm daily contract service matched FGT's system capacity. 51 FERC at p. 62,004.

b. The October 17, 1989 proposed settlement also retained the preferred interruptible service category. 5/ To preserve the quality of this service, the settlement proposed to establish

---

3/(...continued)
FERC, 888 F.2d 136 (D.C. Cir. 1989), readopted, Order No. 500-H, 54 Fed. Reg. 52,344 (Dec. 21, 1989), FERC Stats. & Regs., Regulations Preambles, 1986-1990 ¶ 30,867 (1989), reh'g granted in part and denied in part, Order No. 500-I, 55 Fed. Reg. 6605 (Feb. 26, 1990), FERC Stats. & Regs., Regulations Preambles, 1986-1990 ¶ 30,880 (1990), aff'd in part and remanded in part, American Gas Association v. FERC, 912 F.2d 1496 (D.C. Cir. 1990), cert. denied, 111 S.Ct. 957 (1991).

4/ From January 13, 1989 through March 15, 1989, FGT held an "open season" for the purposes of accepting nominations for firm service from existing as well as new sales and transportation customers. See Florida Gas Transmission Co., 46 FERC ¶ 61,149 at p. 61,525 (1989).

5/ Preferred interruptible, formerly only a sales service, was proposed to be offered both as a sales and transportation service. In addition, the October 1989 settlement added a new lowest-priority class of interruptible service, simply called "interruptible."

limits on the availability of this service by imposing a "volumetric cap." This cap would limit the total quantity of gas to be sold to or transported for preferred interruptible customers, and to the extent of this volume limitation, the cap reserved or "allocated" capacity on the pipeline which was subject to interruption by firm services, but which had priority over other interruptible services. With the restructuring and expansion effected by the settlement, the availability of preferred service would decline because various customers opted to receive firm transportation and sales service.

c. The proposed settlement also contained curtailment procedures virtually identical to those which had existed prior to the system restructuring. In Section 9 of the proposed settlement, entitled "Priority of Service--Gas Supply," FGT proposed a curtailment plan for firm and preferred interruptible service, administered through end-use priorities, to be invoked when FGT, as seller, encountered gas supply constraints. In Section 9A, entitled "Priorities of Service--Pipeline Capacity," FGT specifically provided for curtailment priorities, also based on end-use, to be invoked during periods of "capacity limitation" which FGT defined to include all capacity constraints caused by "force majeure and operating conditions." 51 FERC at p. 61,998. The 10-step end-use priority categories for both of the proposed gas supply and capacity curtailment plans were identical to the categories in effect under a preexisting curtailment plan that had been in effect since 1980. Id.

d. In Section 9B of the proposed settlement, entitled "Priorities of Service--Scheduling," FGT also included new procedures to schedule preferred interruptible service in a manner that would essentially preserve the end-use priorities that had existed before the settlement. Under this proposal, after FGT had received sales estimates and transportation nominations for preferred service from both high priority and low priority end-users, it would have been allowed to schedule preferred service on an end-use basis applicable in the curtailment context -- i.e., by using the same 10-step priority categories detailed in the proposed gas supply and capacity curtailment plans, discussed supra. 51 FERC at p. 61,998. 6/

B. The Commission's June 15, 1990 Order Accepting The Settlement With Modifications

1. By order issued June 15, 1990, the Commission approved most of the features of FGT's proposed settlement. Florida Gas Transmission Co., 51 FERC ¶ 61,309 (1990). 7/ Initially, the June 15 settlement order accepted FGT's gas supply and capacity curtailment proposals. 8/ The Commission also accepted on an

---

6/ Similarly, if capacity limitations precluded FGT from delivering the requirements of its preferred interruptible customers, Section 9A1 of the proposed settlement provided that deliveries would be allocated according to FGT's end-use curtailment procedures. 51 FERC at p. 62,011.

7/ Both petitioners had previously intervened in these proceedings, and were parties to the October 1989 settlement. See 47 FERC ¶ 61,253 at p. 61,897.

8/ The Commission's acceptance of FGT's capacity curtailment proposal was consistent with Order No. 436-A, which permitted pipelines during gas supply and capacity

(continued...)

interim basis FGT's proposal to establish a volumetric cap on the total quantity of gas eligible for preferred interruptible service, and thereby preserve the quality of this service. 9/

2. While the Commission did not reject FGT's end-use based curtailment procedures or its proposed volumetric cap for preferred interruptible service, the June 15 settlement order did explicitly reject FGT's proposal to schedule preferred interruptible service on an end-use curtailment priority basis.

8/(...continued)
curtailments "to allocate the limited capacity of their systems among firm and interruptible customers 'on the same basis that they allocated capacity prior to the rule.'" 51 FERC at 62,010-11. The Commission cautioned that FGT's capacity curtailment provisions were applicable only after scheduling occurred and after an unexpected loss of capacity developed. 51 FERC at 62,011 n.67.

9/ While the volumetric cap established limits on preferred interruptible service as a whole, it did not establish or recognize any priorities as among preferred interruptible customers based on end-use. The Commission acknowledged that to the extent that the volumetric cap would restrict quantities of open access transportation available to shippers, it was inconsistent with the nondiscriminatory access condition of Sections 284.8(b) and 284.9(b) of the Commission's regulations. 51 FERC at p. 62,005. Nonetheless, the Commission did not reject the cap because many parties assented to the settlement on the condition that the quality of the preferred interruptible service be preserved, and because removal of the cap would dilute the quality and value of the preferred service.

For these reasons, the Commission granted FGT a temporary, limited waiver of the open access conditions of Order No. 436 solely for the purpose of maintaining the volumetric cap, 51 FERC at p. 62,005, and stated in a subsequent order that FGT must replace the cap with a more efficient means of rationing preferred interruptible capacity in an upcoming rate case due to commence in mid-1991. See Florida Gas Transmission Co., 53 FERC ¶ 61,396 at 62,377 (1990).

Instead, the Commission expressly required that preferred interruptible service be scheduled on a first-come, first served basis "to ensure that late-comers [would] not wrest away the services and capacity of customers" already receiving that service. 51 FERC at p. 62,011.

Because existing customers had already participated in an unrestricted and "uncontested nomination process for defining capacity allocation rights" in FGT's settlement proceeding, and FGT had already accepted nominations from preferred interruptible service, the Commission assigned an October 17, 1989 priority date for determining their priority over subsequent requests for service. 51 FERC at p. 62,011 and n.69. 10/

The Commission went on to rule that when capacity was insufficient to satisfy the demand of all customers with this priority date, it must be allocated by FGT through scheduling customers on a pro rata basis, and not on the end-use basis that FGT had originally proposed. As the Commission stated:

> In the event available capacity is insufficient to meet all of the October 17, 1989, preferred service customers' nominations, FGT should schedule services within this group on a pro rata basis using current nominations from the transportation customers and the current estimates of service from the sales customers. To the extent any post-October 17, 1989, preferred customers are to be scheduled for service, FGT should comply with the first-come, first served principle and time stamp the requests

---

10/ As a result, all preexisting preferred interruptible customers were assigned this priority date, and not some earlier date corresponding to when each customer respectively had commenced service from FGT.

> for service received on the same day. Most critical, however, is the removal of all references to the scheduling of preferred services through the application of end-use data.

51 FERC at pp. 62,011-12 (emphasis added.)

3. Finally, the June 15, 1990 order required FGT to clarify when its end-use based curtailment provisions would be in effect, as opposed to the first-come, first served/pro rata scheduling provisions required by that order. To that end, the Commission noted that, as proposed, Section 9A1 of the settlement would permit FGT to invoke its curtailment procedures, and thereby allocate capacity on an end-use basis, whenever capacity limitations prevented FGT "from delivering the requirements of all of its customers." 51 FERC at p. 62,011. Recognizing the potential conflict between this proposal and the Commission's pro rata scheduling requirement, the Commission directed FGT to change the language of Section 9A1 to provide "that its capacity curtailment provisions will be in force only after scheduling had taken place, and only after an unexpected loss of capacity has occurred." 51 FERC at p. 62,011.

FGT accepted the modifications to its settlement required by the Commission's June 15 order. On July 13, 1990, FGT issued tariff sheets to implement scheduling procedures and restrictions on curtailment conforming to that order. Section 9B1 of FGT's July 13, 1990 tariff stated "Florida Gas Transmission Company (Seller or Transporter) shall schedule deliveries . . . of natural gas based upon customer nominations and according to the

following categories." Following the first scheduling priority assigned to firm service, Section 9B1 explicitly stated:

> If capacity is available after first satisfying the nominations of its firm service customers, Seller will schedule deliveries . . . of natural gas for customers receiving preferred natural gas service from Seller . . . . In the event nominations for preferred service exceed the capacity available for such service, Seller will schedule such preferred service on a first-come, first-served basis, based on the Priority Date . . . of the customers nominating such service . . . . In the event capacity is insufficient to meet all of the October 17, 1989 preferred customers' nominations, Transporter will schedule service on a pro rata basis using current nominations.

R. 114; J.A. 24. 11/

No party requested rehearing or judicial review of these rulings, 12/ or objected to FGT's July 13, 1990 tariff filing.

11/ Similarly, Section 9A1 of FGT's July 13, 1990 tariff adopted the capacity curtailment restrictions imposed by the June 15 settlement order. It provides that "[i]f unexpected capacity limitations, including without limitation capacity constraints caused by operating conditions or force majeure, causes Seller to be unable to deliver the services already scheduled . . .," FGT's end-use priority curtailment procedures will apply. R. 120.

12/ Georgia Pacific and some other parties (but not Consolidated Minerals) filed for rehearing of the June 15 settlement order raising issues that had nothing to do with the pro rata scheduling procedure and the restrictions on curtailment procedure imposed by that order. See Florida Gas Transmission Co., 53 FERC ¶ 61,396 (1990). Specifically, Georgia Pacific sought rehearing only of that part of the June 15 settlement order which had rejected a proposal to defer application of the Commission's Rate Design Policy Statement to reserved rate design issues until FGT's next rate case. Because FGT subsequently submitted revised rates that reasonably complied with the rate design objectives of the Policy Statement, the Commission dismissed

(continued...)

FGT commenced operations under the tariff as an open access transporter on August 1, 1990.

C. The Ensuing Complaints Of Certain Preferred Interruptible Customers

In the fall of 1990, two of FGT's preferred interruptible customers, the Fort Pierce Utilities Authority ("Ft. Pierce") and the City of Vero Beach ("Vero Beach"), complained to the Commission's Enforcement Task Force that FGT had improperly invoked the curtailment procedures of its tariff to allocate insufficient capacity among preferred interruptible customers with the October 17, 1989, priority date. In response, the General Counsel's Office, acting through the Assistant General Counsel for Enforcement, suggested by letter dated March 1, 1991, that FGT seek clarification from the Commission of its right to invoke these procedures. 13/ Shortly thereafter, FGT filed its tariff which is the subject of this proceeding.

D. The Proceeding Before The Commission In This Case

1. FGT's April 17, 1991 Tariff Filing

The proceeding in this case commenced before the Commission on April 17, 1991, when FGT filed tariff sheets that would modify the procedures by which FGT scheduled service among its preferred interruptible customers within the same priority date. FGT's

---

12/(...continued)
Georgia Pacific's rehearing request as moot. 53 FERC at p. 62,375.

13/ A copy of this letter appears as an appendix to this brief, at pp. B1-B4.

tariff filing provided that once capacity was determined to be insufficient within a priority date it would be allocated on the basis of end-use curtailment priority, and not pro rata scheduling as its existing tariff (as derived from the June 15 settlement) provides. 14/ In support of the filing, FGT asserted that the proposed tariff modification was needed because of problems it had encountered after scheduling had taken place during August and September 1989, its first two months of operation as an open access transporter. FGT explained that after it had received sales estimates and transportation nominations for preferred service for those months, and had scheduled service based on those estimates and nominations, customer overtakes of gas exceeded available capacity, which caused a delivery shortfall.

FGT also pointed out that its existing tariff did not provide for the imposition of effective scheduling penalties against sales customers, 15/ and that absent stringent scheduling penalties or revisions to the scheduling procedures, FGT could not prevent overtakes of this nature. R.5; J.A. 5.

14/ The procedures proposed in the tariff filed in this case differed slightly from those originally rejected by the Commission in the June 15 order, since FGT had originally proposed end-use scheduling priorities regardless of priority date, and did not provide for any first-come, first served priority scheduling.

15/ FGT's existing tariff provides for the imposition of scheduling penalties only against transportation customers. According to FGT, these penalties were inadequate because they are only applicable to amounts scheduled at receipt points on an aggregate monthly basis, and do not apply to delivery points. R. 105.

FGT also stated that even if scheduling penalties at delivery points had been in fact made a part of its tariff, the existence of such penalties might not have deterred the overtakes because FGT lacked the capability to monitor deliveries to a large segment of its customer base on a daily basis, and was also unable to physically restrict deliveries to its customer base. R. 5; J.A. 5.

Ft. Pierce and Vero Beach, two of the October 17, 1989 priority date customers (both fuel-switchable boiler-fuel end-users that had an historically low priority for curtailment purposes), intervened in this proceeding and filed a motion requesting the Commission to reject FGT's April 17 tariff filing as contrary to the June 15, 1990 settlement order. R. 62; J.A. 12. Petitioners Georgia Pacific and Consolidated Minerals, two industrial process customers that had a high end-use priority for curtailment purposes, intervened in support of FGT's filing asserting that the proposed tariff conforms to the intent of the October 1989 proposed settlement, and complaining that the pro rata scheduling procedure in FGT's existing tariff would, at their expense, dramatically upgrade the quality of preferred interruptible service to existing customers that historically had been low priority end-users.

2. The Commission's May 31, 1991 Order Rejecting FGT's Tariff Filing

On May 31, 1991, the Commission issued an order rejecting FGT's tariff filing. R. 148, J.A. 26. Initially, the Commission acknowledged that although the June 1990 settlement order had

authorized FGT to continue using end-use priorities as the basis for implementing its capacity curtailment procedures, that order had specifically rejected FGT's proposal to schedule service on the basis of end-use priority when sales estimates and transportation nominations for preferred service exceeded available capacity. R. 149; J.A. 27.

The Commission also stated that the June 15 settlement order required the pro rata scheduling change to enforce compliance with open access principles. See R. 149, 158; J.A. 27, 36. To that end, the June 15 settlement order made clear that, with the advent of open access transportation on the FGT system, the use of curtailment procedures for capacity shortages would be restricted to circumstances in which the pipeline scheduling had already taken place and there had been an unexpected loss of capacity. R. 149; J.A. 27. Although FGT had contended that curtailment had been necessary to maintain the integrity of its system during the August-September 1990 overtakes, the Commission found that it was the system's scheduling and allocation procedures that apparently were not working and that the capacity problems caused by overtakes were foreseeable circumstances. R. 158; J.A. 36.

The Commission was also unwilling to authorize FGT to depart from the capacity allocation scheme established by the June 15 order because FGT had failed to demonstrate that the pro rata scheduling procedure did not award meaningful capacity. R. 155;

J.A. 33. 16/ The Commission noted that FGT did not indicate how the pro rata method has been applied to allocate capacity since August 1, 1990, and had not specified what measures, if any, it had taken to ensure implementation of scheduling consistent with the June 15 order and Commission policy. Id. The Commission further reasoned that FGT had offered no explanation of how it had attempted to discipline scheduling overruns through the imposition of existing scheduling penalties. R. 156; J.A. 34. In short, in the Commission's view, FGT had made no showing that it had ever sought to implement the pro rata scheduling provisions of its existing tariff. 17/ Accordingly, the Commission advised FGT to enforce its pro rata scheduling provisions, as required by the June 15 settlement order, and to deter overtakes and inaccurate nominations through the implementation of existing or revised scheduling penalties. R. 157; J.A. 35.

16/ The Commission also rejected FGT's argument that the revised tariff was necessary to preserve the historical method by which customers assigned the October 17, 1989 priority date had previously been assigned capacity. The Commission stated that all preexisting customers (regardless of end-use priority) were assigned the October 17 priority date because all customers had signed new contracts entered into as part of the settlement and filed on that date. R. 157-58; J.A. 35-36; 55 FERC at p. 61,998. The Commission stated that "any further breakdown of priority within that group is not appropriate." Id.

17/ The Commission also concluded that FGT's proposal to replace the pro rata scheduling procedure for preferred customers with an October 17, 1989 priority date with an end-use procedure would not address any future problem of customer overtakes as it would not prevent preferred customers from disregarding FGT's scheduling orders. R. 157; J.A. 35.

3. The Requests For Rehearing

Georgia Pacific and Consolidated Minerals (the petitioners here) filed requests for rehearing of the Commission's May 31, 1991 order. 18/ These two parties argued on rehearing that the Commission's June 15 settlement order was in error because it granted the same priority to all customers who been assigned the October 17, 1989 priority date. Petitioners also asserted that a major premise underlying the preferred interruptible service as proposed in the settlement was that it would continue to be allocated on an end-use basis just as it had been for years. Without this assurance, petitioners argued, the firm gas entitlements reflected in the settlement would have been allocated differently, or they would not have agreed to the settlement at all. R. 190; J.A. 43.

Petitioners also argued on rehearing that the Commission's May 31, 1991 order rejecting FGT's tariff filing violated Section 5 of the NGA, because it altered the preferred interruptible service priorities (i.e., from end-use scheduling to pro rata scheduling) without conducting a hearing, or bearing the burden of proof on the need for this change in scheduling procedure; that pro rata scheduling violates Title IV of the NGPA by departing from FGT's existing end-use curtailment plan; and that the May 1991 order constitutes an unlawful assertion of

---

18/ FGT and the Industrial Gas Users of Florida both filed rehearing requests as well. Inasmuch as they have not appealed from the Commission's order denying rehearing, discussion of their rehearing claims has been omitted as not relevant to this appeal.

jurisdiction, not authorized under Section 1(b) of the NGA, because it required FGT to file a revised tariff imposing scheduling penalties applicable to direct sales customers.

4. The Commission's Order Denying Rehearing

On August 8, 1991, the Commission denied rehearing. At the outset, the Commission found that it was the June 15, 1990 settlement order in Docket No. 88-50, and not the subsequent May 1991 order rejecting FGT's tariff filing in this proceeding, that established the pro rata scheduling scheme that petitioners were challenging on rehearing:

> While the settlement as filed provided for the curtailment and scheduling of preferred services on an end-use basis, the Commission specifically rejected the proposed end-use scheduling provision and required [FGT] to modify the settlement to reflect the pro rata provision. In permitting [FGT] to continue its historic end-use curtailment plan, the settlement order clearly distinguished the curtailment provisions from the scheduling provisions for preferred services. It emphasized that all references to the scheduling of preferred services through the application of end-use data must be removed.

R. 262; J.A. 106. 19/ The Commission concluded that

19/ Elaborating on the June 15 settlement order's distinction between pro rata-based capacity allocation on the one hand and the end-use-based curtailment priorities on the other, the Commission stated:

> [T]he settlement order does not permit FGT to use the historical method of allocating capacity on an end-use basis, as it provides in unmistakable terms that the end-use curtailment provision is appropriate only for those situations where FGT is unable to deliver all nominated volumes (after

(continued...)

petitioners were time-barred from challenging the pro rata capacity allocation scheme established by the June 15 settlement order because:

> [n]o party requested rehearing of the [June 15] settlement order's decision on the pro rata scheduling provision. FGT and the applicants may not now seek to reverse that decision in this proceeding by submission of a tariff proposal identical to the one rejected in the settlement order.

R. 262; J.A. 106.

The Commission also rejected petitioners' assertion that each preferred interruptible customer's previous priority status under the historical end-use curtailment procedures had been retained after the June 15 settlement order issued. The Commission found that all of the customers that were assigned the October 17, 1989 priority date had been existing FGT customers served under a preexisting rate schedule. As the Commission found, these customers had been assigned the same priority date because, as the June 15 settlement order acknowledged, all had revised their preexisting service agreements pursuant to the settlement. Id.

The Commission further rejected petitioners' claims that the May 31 order violated Section 5 of the NGA. The Commission disagreed that its May 1991 order declared FGT's existing tariff

---

19/(...continued)
deliveries have been scheduled) as a result of unforeseen circumstances, such as a burst pipe or other facility failure.

R. 262; J.A. 106.

to be unlawful because it did not contain effective scheduling penalties. The Commission stated that its May 1991 order simply interpreted FGT's existing tariff as consistent with the Commission's June 15 settlement order, and rejected the proposed tariff filing because curtailment procedures and FGT's renewed end-use scheduling proposal were inappropriate methods of dealing with overtakes. R. 263; J.A. 107.

The Commission further explained that while the May 1991 order discussed the possibility of FGT's implementation of scheduling penalties as a potential solution to the problem of overtakes, it did not order FGT to file any new tariff containing such penalties. Rather, as the Commission stated, FGT "may file for approval of any different or additional penalties or not, as it chooses." R. 263; J.A. 107.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission's rejection of FGT's tariff filing was a proper exercise of its authority under Section 4 of the NGA. By filing a tariff that would have instituted capacity scheduling procedures based on end-use curtailment priorities for FGT's preferred interruptible service, FGT was simply seeking to reverse the Commission's pro rata scheduling determination, made in its June 15 settlement order in Docket No. RP89-50, without having ever undertaken a serious effort to comply with the pro rata scheduling requirement of that order. The pro rata scheduling procedure required by the June 15 order was consistent with the Commission's nondiscriminatory access policy of Order No. 436. FGT has not justified any departure from this policy by citing problems it had encountered as a result of customer overtakes.

The Commission reasonably concluded that end-use priority scheduling was not justified by the overtakes involved here. The record in this case suggests that immediately upon discovering the overtake abuses, FGT proceeded immediately to its end-use curtailment procedures and curtailed service to low end-use priority customers that were entitled to a pro rata allocation of capacity. And the Commission's determinations that customer overtakes are a foreseeable event that is not unexpected, and that FGT had not shown that it attempted to discipline customer overtakes through existing or revised scheduling penalties, are unchallenged by petitioners in this case.

The only issues raised by petitioners in this appeal revolve around their erroneous claim that the orders in this case elevate pro rata scheduling over end-use priority scheduling, and thereby significantly alter the historical end-use priority scheme for allocating capacity among preferred interruptible customers. All of these claims, however, are barred by res judicata because the alteration of FGT's historic end-use capacity allocation scheme was first clearly established by the Commission's June 15, 1990 settlement order in Docket No. RP89-50. Since no party requested rehearing or appealed from the June 1990 settlement order, that order became final long ago. In these circumstances, the Commission correctly concluded that petitioners are barred from relitigating issues in this case that they could have and should have raised on rehearing and appeal from the June 1990 order.

Nor can petitioners' claim that the June 1990 order did not put them on notice that end-use priority scheduling had been rejected in favor of pro rata scheduling. The Commission's rejection of end-use scheduling sought by the settlement proposal was couched in explicit language in the June 15 order, unequivocally directing FGT to remove all references to the scheduling of preferred services through the application of end-use data. FGT had no difficulty understanding the import of the June 15 settlement order, as evidenced by its issuance of tariff sheets imposing pro rata scheduling and restricting end-use capacity curtailment procedures to unexpected events arising after scheduling, and FGT has not appealed the orders under

review. In sum, all of their claims that the pro rata scheduling procedure, initially imposed in the June 15 settlement order, violates Section 5 of the NGA and Title IV of the NGPA, and exceeds the limits of Commission jurisdiction, are all barred by well-established res judicata principles.

ARGUMENT

THE COMMISSION CORRECTLY REJECTED FGT'S APRIL 1991 TARIFF FILING BECAUSE IT WAS INCONSISTENT WITH COMMISSION POLICY AND RAISED CLAIMS PRECLUDED BY PRINCIPLES OF RES JUDICATA

A. The Commission's Rejection Of FGT's April 1991 Tariff Comported With Commission Policy And Was A Proper Exercise Of Its Authority Under Section 4 Of The NGA

1. It is well-established that the Commission has authority to summarily reject tariff filings that are a substantive nullity or in violation of valid and explicit policy. See Southern Natural Gas Co. v. FERC, 813 F.2d 1111, 1112 (11th Cir. 1987); United Gas Pipe Line Co. v. FERC, 707 F.2d 1507, 1511-12 (D.C. Cir. 1983); Municipal Light Boards v. FPC, 450 F.2d 1341, 1345 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972). FGT's April 1991 tariff filing involved in this proceeding was properly rejected in light of these precedents because it stood in direct contravention of the Commission's policy as explicitly expressed in the June 15, 1990 settlement order.

Thus, the Commission rejected FGT's tariff filing because FGT was simply seeking to reverse in this proceeding a final determination made in the June 15 settlement order "by submission of a tariff proposal identical to the one rejected in the settlement order." R. 262; J.A. 106. 20/ Specifically, FGT proposed to alter the scheduling procedures for preferred interruptible service in its existing tariff from pro rata

---

20/ As noted, FGT's April 1991 tariff proposal and its October 1989 settlement proposal were essentially identical to the extent that both would have imposed end-use priority scheduling for FGT preferred customers within the same priority date.

scheduling to end-use priority scheduling, when less than ten months earlier in its June 1990 order the Commission had explicitly rejected end-use scheduling in favor of pro rata scheduling. Because the Commission found that FGT had made no showing that it had ever attempted to implement pro rata scheduling or to discipline customer overtakes, it reasonably concluded that there was no legal or policy basis upon which to accept FGT's April 1991 proposal. Indeed, the acceptance of the present tariff filing by the Commission would have allowed petitioners to disregard the open access policies of Commission Order No. 436 and negate the capacity allocation procedure established by the June 1990 settlement order--that FGT should allocate capacity among preferred interruptible service customers within the same October 17, 1989 priority date on a pro rata scheduling basis--by reverting to a scheduling provision governed by end use curtailment procedures. There was simply no basis for FGT to so ignore the plain meaning of the June 1990 settlement order. 21/

21/ It should be noted, moreover, that the Commission has never interpreted NGPA Title IV's system of end-use curtailment priorities as applying to curtailments that arise from a shortage of transportation capacity. See Order No. 636, Pipeline Service Obligations and Revisions To Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (Apr. 16, 1992), III FERC Stats. & Regs. Preambles ¶ 30,939 (Apr. 8, 1992), at pp. 30,429-31; order on reh'g, Order No. 636-A, 57 Fed. Reg. 36, 128 (Aug. 12, 1992), III FERC Stats. Regs. Preambles ¶ 30,950 at pp. 30,586-93, appeal pending sub nom., Atlanta Gas Light Co. v. FERC, No. 92-8272 (11th Cir.); see also Order No. 436-A, (continued...)

Nor can it be said that the Commission's orders in this case are the product of arbitrary or irrational agency action. On the contrary, the Commission's express rejection of FGT's end-use scheduling provision in the parties' October 1989 settlement proposal in Docket No. RP89-50 was grounded upon the nondiscriminatory access policies of Order No. 436. Under Order No. 436, pipelines, as open access transporters, are required to accept requests for service on a first-come, first-served basis, and may not favor sales customers over transportation customers, or vice versa, with respect to priority to pipeline capacity. See, e.g., Texas Eastern Transmission Corp., 37 FERC ¶ 61,260 at p. 61,695-96 (1986).

In this case, the overriding policy of nondiscriminatory service would not have been achieved on FGT's system simply by

---

21/(...continued)
supra n.3, at pp. 61,351-53; Order No. 436, supra n.3, at pp. 31,514-515.

While the Commission has, on occasion, permitted pipelines' preexisting end-use priority plans for capacity curtailments to continue after commencing service as open access transporters, as it did in FGT's open access proceeding (Docket No. RP 89-50), the Commission has always made clear that grandfathered end-use capacity curtailment procedures are restricted to cases in which there has been an unexpected loss of capacity, such as a force majeure event. See Order No. 436-A, supra note 3, at p. 31,653; see also United Gas Pipe Line Co., 49 FERC ¶ 61,096 at p. 61,444. The Commission has never extended grandfathering of end-use capacity curtailment procedures to "scheduling" situations in which a pipeline has received nominations for more interruptible service than it has available capacity. Indeed, the Commission has rejected Order No. 436 settlement provisions that fail to distinguish between "scheduling" and "curtailment." See Texas Eastern Transmission Corp., 37 FERC ¶ 61,260 at p. 61,696 (1986).

rejecting end-use priority scheduling in favor of a first-come, first-served priority because the Commission was still faced with resolving the priority of existing customers who had already received nominations for preferred service. With respect to determining priority among existing customers and others who have requested service shortly before the pipeline becomes an open access transporter, the Commission's policy has been to allow the pipeline to hold an "open season" prior to commencement of open access service, and to treat all requests for service received during the open season period as having been received simultaneously, or on the same priority date. See Consolidated Gas Transmission Corp., 42 FERC ¶ 61,060 at pp. 61,297-98 (1988); Tennessee Gas Pipeline Co., 40 FERC ¶ 61,194 at p. 61,639 (1987). In these cases, the Commission has required capacity to be scheduled on a pro rata basis. 22/

In this case, however, FGT did not hold an open season for preferred interruptible service because it bypassed the first-come, first-served process entirely, and proposed scheduling

---

22/ In another case, Pacific Gas Transmission Co., 40 FERC ¶ 61,193 (1987), the Commission approved the use of an open season, but permitted the pipeline to determine priority to capacity by way of a lottery for all customers with the same priority date, instead of by pro rata scheduling. In the orders below, the Commission took note of the few cases in which it has approved the use of a lottery, but adhered in this case to the pro rata scheduling procedure required by the June 15 settlement order because FGT has never proposed allocating capacity for preferred interruptible service on the basis of a lottery, and because FGT had never demonstrated the pro rata scheduling would not award meaningful capacity. R. 260; J.A. 104.

based solely on end-use priorities. 23/ In invalidating FGT's end-use scheduling proposal, the Commission did not require FGT to return to the drawing board and hold an open season. Rather, the Commission assigned a priority date of October 17, 1989, the date of the settlement, to all customers who had received nominations for preferred service because FGT had "gone through an uncontested nomination process for defining capacity allocation rights in which all parties were free to participate." 51 FERC at 62,011 n.69. 24/

2. Neither FGT nor any one else ever sought rehearing or appealed from the assignment of this priority date or from the pro rata capacity allocation procedures established by the June 15 settlement order. 25/ Instead, FGT accepted the settlement as modified and filed a tariff conforming to the pro rata scheduling procedure imposed by the June 15 order. See p. 11,

---

23/ As noted, FGT did hold an open season for nominations for firm service in early 1989. See note 4, supra. Thus, petitioners had an opportunity to subscribe for firm service at that time, which they failed to do.

24/ As the Commission recognized in the orders under review, see R. 157, 262; J.A. 35, 106 and in the June 1990 settlement order in Docket No. RP89-50, see 51 FERC at p. 62,009 and nn. 50-51, all of FGT's preexisting customers negotiated new service agreements in which "each customer chose the length of its sales service agreement as well as the level of service it desired." Id. at p. 62,009 n.51. Thus, all existing customers were treated as having the same priority date, October 17, 1989.

25/ See n.12, supra.

supra. 26/ Almost immediately upon commencing open access service in August 1990, FGT encountered capacity-related problems stemming from some retail customers deliberately taking more gas than they estimated or nominated. These problems were the primary justification offered by FGT for the revised tariff proposal. 27/

As the Commission correctly found, there was no valid policy reason or legal justification for accepting FGT's April 1991 tariff proposal. The record in this proceeding contains nothing to suggest that FGT ever attempted to implement the pro rata scheduling procedures contained in its tariff. Moreover, deliberate customer overtakes were not the kind of unexpected "force majeure" events that would justify end-use curtailment under Sections 9A and 9A1 of FGT's existing tariff. And the record does not indicate that FGT ever attempted to discipline customers for the overtakes. Rather, the record suggests that immediately upon detecting the overtake abuses, FGT proceeded

---

26/ FGT also conformed its tariff to the requirements of the June 15 settlement order restricting end-use curtailment to unexpected capacity losses that arose only after scheduling had taken place. See n.11, supra.

27/ FGT also had complained that the pro rata scheduling procedure in its existing tariff, if enforced, would upset the historical priority to preferred tariff service that high priority end-users had enjoyed prior to August 1990. R. 101-02. As the Commission correctly found, however, the pro rata scheduling provision was an issue decided in the June 15, 1990 settlement proceeding and that none of the parties had sought rehearing of the Commission's rejection of end-use scheduling. Therefore, they could not seek to reverse that decision in this proceeding. See discussion infra pp. 31-39.

directly to its end-use curtailment procedures, and curtailed service to low end-use priority customers that were entitled to a pro rata allocation of capacity.

Consequently, in April 1991, when FGT made its tariff filing, FGT's pro rata scheduling procedures remained essentially untested, and FGT simply filed a revised tariff proposal which would return FGT to essentially the same end-use priority scheduling procedure for customers within the same priority date that it had originally proposed in October 1989, and which the Commission had rejected in its June 15 settlement order. Since it has been the Commission's policy to allow pipelines to impose scheduling and imbalance penalties to remedy capacity problems created by overtakes, see Iroquois Gas Transmission System, 52 FERC ¶ 61,091, at p. 61,427 (1990); Pelican Interstate Gas System, 51 FERC ¶ 61,215 at p. 61,605 (1990); see also, R. 156, 263; J.A. 34, 107, the Commission properly concluded that FGT should not be permitted to depart from the pro rata scheduling procedures in its existing tariff in favor of end-use scheduling, where the latter violates the first-come, first served principles of Order No. 436. As noted, only petitioners, and not FGT, have appealed from these Commission orders. 28/

28/ There is absolutely no support in the record for petitioners assertion (Pet. Br. 20-21) that the Commission or its staff, in violation of Section 5 of the NGA, has "coerced" FGT into making a tariff filing. To the contrary, the Commission's order on rehearing makes it quite clear that in rejecting FGT's tariff filing, the Commission simply preserved the status quo, and that FGT "may file for approval of any different or additional penalties or not, as it chooses." R. 263, J.A. 107.

B. All of Petitioners' Challenges Relating To The Pro Rata Scheduling Procedures In FGT's Existing Tariff Are Barred From Relitigation By Principles Of Res Judicata

1. In their opening brief, petitioners contend that the Commission, in rejecting the tariff filed by FGT in this case, has elevated pro rata scheduling of capacity for PGT's preferred interruptible service over historic end-use curtailment priority, in violation of the NGA and Title IV of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3391-94 (Pet. Br. 15-23; 23-28); that the Commission-imposed pro rata scheduling procedure exceeds the bounds of Commission jurisdiction over deliveries of gas to direct sale customers; and that (Pet. Br. 31-35) the Commission's alleged determination here to elevate pro rata scheduling over end-use curtailment was arbitrary and capricious, and unsupported by substantial evidence.

Without addressing each of these claims individually, the Commission found that they could have and should have been raised on rehearing of the June 15 settlement order in Docket No. 89-50:

> The June 15 settlement order required [FGT] to schedule the nominations of its preferred interruptible customers on a pro rata basis where demand exceeds capacity. While the settlement as filed provided for the curtailment and scheduling of preferred services on an end-use basis, the Commission specifically rejected the proposed end-use scheduling provision and required [FGT] to modify the settlement to reflect the pro rata provision . . . . No party requested rehearing of the settlement order's decision on the pro rata scheduling provision. [FGT] and the applicants may not now seek to reverse that decision in this proceeding on a tariff proposal identical to the one rejected in the settlement order.

(R. 262; J.A. 106.)

The Commission's ruling reflects a correct application of the doctrine of res judicata. It is well-established that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties and their privies. Montana v. United States, 440 U.S. 147, 153 (1979). The doctrine of res judicata holds that "when a final judgment has been entered on the merits of a case, it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose." Nevada v. United States, 463 U.S. 110, 129-30 (1983).

Subsumed within the res judicata doctrine is the concept of "claim preclusion," which refers to the "preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier case." Migra v. Warren City School District Board of Education, 465 U.S. 75, 77, n.1 (1984). As this Court has recognized, "the principle underlying claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (quoting, Restatement (Second) Judgments at 6 (1991); see also North v.

Walsh, 881 F.2d 1088, 1095 (D.C. Cir. 1989) (claim preclusion applies to issues litigant could have raised in earlier action); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 383 F.2d 225, 227 (D.C. Cir. 1967) (parties foreclosed from later seeking relief on the basis of issues they might have raised in the prior proceeding to support the original claim). The same rules apply in the administrative agency context. E.g., Kremer v. Chemical Construction Corp., 456 U.S. 461, 484-85 n.26 (1982); United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-423 (1966) ("Utah Construction").

2.a. In light of these principles, it should be clear that all of the elements of claim preclusion are present in this case, and therefore res judicata should operate to bar petitioners from raising any challenges to the pro rata scheduling determination made initially in the June 15 settlement order. First of all, the "right" or "question" of end-use priority scheduling, as opposed to pro rata scheduling, was "distinctly put in issue" and distinctly determined by an administrative tribunal of competent jurisdiction. See Montana v. United States, 440 U.S. at 153-154; Utah Construction, 384 U.S. at 422.

Here, the issue of end-use priority scheduling was presented by FGT to the Commission in the form of a proposed settlement term. In response to that settlement proposal, the Commission in its June 15, 1990 order explicitly rejected end-use priority scheduling and, instead, specifically instructed FGT to schedule preferred interruptible service on a first-come, first served

basis. Even where customers were assigned the same priority date in terms of a first-come, first served priority, the Commission also explicitly refused to allow scheduling to be done on an end-use priority basis. Rather, when preferred service customers had the same priority date, the Commission specifically required ordered FGT to schedule service on a pro rata basis. Thus, the June 15 settlement order made clear in no uncertain terms that, for scheduling purposes, "[m]ost critical . . . is the removal of all references to the scheduling of preferred services through the application of end-use data." 51 FERC at p. 61,012. (Emphasis added.) 29/ In light of this Commission ruling, there can be no question that petitioners had notice from the altered scheduling procedures imposed by the June 15 settlement

---

29/ The Commission made its rejection of end-use scheduling even clearer when it required FGT to amend Section 9A1 of FGT's proposed tariff, which would have permitted FGT to invoke its end-use capacity curtailment procedures whenever capacity limitations prevented FGT from delivering the requirements of all of its customers. Recognizing the potential conflict between this proposal and its pro rata scheduling requirement, the Commission directed FGT to change the language of Section 9A1 to provide that its capacity curtailment provisions will be in force only after scheduling has taken place, and then only after an unexpected loss of capacity. 51 FERC at p. 61,011.

In view of this background, petitioners claim (Pet. Br. 15) that because the Commission expressly approved the continuance of end-use curtailment procedures for gas supply shortages and force majeure capacity constraints, they did not understand the June 15 settlement order to have altered end-use capacity allocation must be rejected.

order that capacity would no longer be allocated on the historical end-use priority basis. 30/

Accordingly, the claims that petitioners have raised in this appeal could and should have been raised on rehearing of the June 15 settlement order to preserve the right to judicial review. See Section 19(b) of the NGA, 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection to the order shall have been urged before the Commission in an application for rehearing.") To be sure, petitioners claim that the orders here under review, not the June 15 settlement order, elevate pro rata scheduling over end-use curtailment priorities as a capacity allocation mechanism. But, as demonstrated above, it is quite clear that this departure from historical practice was announced directly in the Commission's June 15 settlement order. Thus, petitioners' claims actually surfaced when the Commission issued the June 15 order and therefore, the pro rata scheduling procedure should have been challenged on review in that case. Having not proceeded in required fashion, petitioners should not be allowed to resurrect those claims in this case.

b. Nor can petitioners characterize (see Pet. Br. 16) the Commission's reference to a "burst pipe" in the orders under

---

30/ FGT had no difficulty understanding the import of the June 15 settlement order, as evidenced by its issuance of tariff sheets imposing pro rata scheduling for customers with the same priority date, see p. 11, supra, and restricting capacity curtailment procedures to unexpected events after scheduling.

review as a "newly imposed constraint" on FGT's historic end-use curtailment procedures, i.e., the first time the Commission made clear that a force majeure event was the only circumstance that could justify FGT's invocation of the end-use priority capacity curtailment procedure authorized by Section 9A of its tariff. Once again, petitioners ignore the fact that the Commission had already expressed the same view in its June 15 settlement order:

> We note that the curtailment provisions are applicable only to instances in which the pipeline is unable to deliver all nominated volumes after deliveries have been scheduled for the day . . . . It follows that service will be only cut off for unforeseen circumstances such as a burst pipe or facility failure. We believe that curtailment based on the end-use priority is appropriate for such situations.

51 FERC at p. 62,011 n.67.

c. Petitioners also claim that certain statements in the June 15 settlement order, i.e., that the Commission was "preserving" the "same quality" of preferred interruptible service, and that without receiving assurances that the preferred service would be retained many customers would not have assented to the settlement, misled them into believing that capacity would continue to be allocated on the basis of end-use curtailment priorities. But this contention can only rest on a plain misreading of the June 15 settlement order, and therefore must be rejected.

By acknowledging that preferred customers were entitled to the same quality of service that previously existed, and that many customers would not have assented to the settlement without

retaining the preferred service, see 51 FERC at p. 61,005, the Commission was only justifying its temporary authorization of the proposed volumetric cap to preserve the preferred interruptible service category as a whole, in light of concerns that the cap might contravene the nondiscriminatory access requirements of Order No. 436. 31/ Simply put, these reasons for authorizing the volumetric cap were never advanced in connection with the Commission's modification of FGT's scheduling provisions, its assignment of the same October 17, 1989 priority date to all existing FGT customers (regardless of end-use curtailment priority), and its prohibition against the use of end-use curtailment priorities except in unexpected, force majeure situations after service had been scheduled. Accordingly, these justifications for retaining the volumetric cap were wholly unrelated to the scheduling and capacity allocation within the preferred interruptible customer class.

d. Finally, petitioners suggest that they had no notice from the June 15 settlement order that the Commission had altered FGT's method of allocating capacity because the Commission's June 15 order approved a settlement in which scheduling notices had "no teeth"--that is, FGT's scheduling penalties were inadequate to deter overtakes. Because it appears from the record that the problem of overtakes did not arise until after the settlement

---

31/ As noted, see note 9, supra, the volumetric cap did not establish or recognize any priorities as among preferred interruptible customers based on end-use, but was created simply to establish a volume limit on preferred service overall.

order issued, and because no party in the settlement case had raised any objection that FGT's existing penalties were inadequate to deter customer overtakes that might occur in the future, 32/ the Commission had no occasion to address the subject of scheduling penalties in the June 15 settlement order. Thus, petitioners cannot seriously claim that they relied on the absence of adequate scheduling penalties as proof that the Commission did not intend to alter FGT's capacity allocation scheme to a pro rata method in the June 15 order.

3. In sum, petitioners have no basis upon which to claim that the June 15 settlement order conveyed insufficient notice that the end-use curtailment scheduling priorities that FGT originally proposed in the October 1989 settlement as filed with the Commission were not explicitly rejected, or that the June 15 order failed to alert them that the historic end-use priority allocation method still allowed for capacity curtailments would be available only after pro rata scheduling had taken place and then only after an unexpected loss of capacity--such as a burst

---

32/ Two parties to the October 1989 settlement did file comments on the settlement proposal requesting the Commission to require FGT to specify in its tariff how unauthorized sales overruns would be treated during periods of capacity constraints. The Commission did not require FGT to address unauthorized sales overruns in its tariff stating that

> By definition, unauthorized overrun volumes are not scheduled by the pipeline. Because taking unauthorized overrun volumes is a prohibited act by the customer and not in control of the pipeline, specific language is unnecessary and meaningless.

51 FERC at p. 62,012.

pipe or force majeure loss of facilities. Accordingly, as the Commission here found, petitioners' claims must be rejected in accord under settled principles of res judicata. 33/

CONCLUSION

For the foregoing reasons, the orders of the Commission should be affirmed.

Respectfully submitted,

William S. Scherman
General Counsel

Jerome M. Feit
Solicitor

Edward S. Geldermann
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
(202) 208-0177

October 26, 1992

33/ Although petitioners have argued (Pet. Br. 30) that the orders under review "go outside FGT's curtailment plan to allocate natural gas to nonjurisdictional customers" and thereby exceed the limits of the Commission's jurisdiction over direct sales customers, it is clear from their discussion of this issue that they are simply objecting to the pro rata scheduling mechanism established by the June 15 settlement order. Thus, this claim, too, is barred by res judicata. As the Supreme Court has recognized: "It has long been the rule that principles of res judicata apply to jurisdictional determinations--both subject matter and personal." Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982).