

rates remain within the zone of reasonableness required by the NGA.⁶⁴

92. In order to find the market based sales service to be in the public convenience and necessity the Commission finds that the conditions herein must be met. Once the sales service is so conditioned, in the Commission's view adequate safeguards are in place so that the Commission may grant market based sales authority to jurisdictional sellers of natural gas. In so conditioning this service, the Commission is not prohibiting a jurisdictional seller of natural gas from requesting a certificate for a different form of service or filing pursuant to Section 4 of the NGA for a different rate or conditions of service. Neither does the Commission prohibit a customer of such a seller from raising objections under Section 5 of the NGA.

93. Moreover, if the conditions of service are not met, the Commission has the authority to impose the appropriate remedy for the violation.⁶⁵ In particular, the Commission does not agree with the comments that a violation of an existing condition of service may not be remedied by the Commission from the time the violation occurred. The Commission has the authority to remedy violations of certificate conditions.⁶⁶ Moreover, the courts have held that the Commission has a great deal of discretion when imposing remedies devised to arrive at maximum reinforcement of Congressional objectives in the NGA.⁶⁷ In devising its remedy the Commission is required to exercise its discretion to arrive at an appropriate remedy,⁶⁸ and to explore all

the equitable considerations, and practical consequences of its action and the purposes of the NGA.⁶⁹

94. This action of remedying a violation of a certificate condition is not the same as the Commission's action in finding an existing rate unjust and unreasonable after hearing under Section 5 of the NGA. At the initiation of an NGA Section 5 proceeding the existing condition has not yet been found to be unjust and unreasonable. In contrast, in a remedial proceeding the issue is whether the entity has violated an existing condition of the tariff or the regulations. Therefore, in a remedial proceeding, unlike an NGA section 5 proceeding, the regulated entity has notice of the conditions required for service at the time of the implementation of the service condition and the Commission may, at its discretion, fashion an appropriate remedy.

95. In appropriate circumstances these remedies may include disgorgement of unjust profits, suspension or revocation of the blanket sales provision or other appropriate non-monetary remedies. Which of these remedies is appropriate will depend on the circumstances of the case before it and the Commission will not determine here which remedy or remedies it will utilize.⁷⁰

2. 90-Day Time Limit on Complaints

96. Several commenters raise concerns about the 60-day time limit on complaints proposed in the June 26 NOPR.⁷¹ Most of the commenters argue that the 60-day time period is unreasonably too short. Some commenters suggest a limit of six months.⁷² Many commenters suggest modification of the provision's discovery exception, by adopting a "reasonableness" standard, *i.e.*, a reasonable person exercising due diligence could not have known of the wrongful conduct.

97. Several commenters argue that the Commission errs in not applying the 60-day deadline to itself. They argue that

if the Commission is allowed to initiate unlimited retroactive investigations, this vitiates any time constraints the rule otherwise places on private complainants. Commenters recommend that the scope of any investigation that might stem from a complaint, or the Commission's own motion, be narrowly defined, and require the demonstration and quantification of the individual harm resulting from the prohibited conduct.⁷³ These commenters are concerned about the lack of finality for transactions under the proposed discovery exception to the 60-day requirement. Merrill Lynch and Morgan Stanley suggest either a hard and fast deadline of 60 days from the event with no exceptions or a rebuttable presumption the complainant knew about the alleged violation within the 60-day time period.

98. Upon consideration of the comments received concerning our 60-day proposal, in the Commission's view the 60-day time period may be insufficient time for parties to discover and act upon violations of these regulations. Accordingly, the Commission will modify its original proposal to allow 90 days from the end of the quarter from which a violation occurred for a party to bring a complaint based on these regulations. A 90-day time period provides a reasonable balance between encouraging due diligence in protecting one's rights, discouraging stale claims, and encouraging finality in transactions. Furthermore, the Commission clarifies that the language in Sections 284.288(e) and 284.403(e), "unless that person could not have known of the alleged violation", incorporates a reasonableness standard, *i.e.*, the 90-day time period to file a complaint does not begin to run until a reasonable person exercising due diligence should have known of the alleged wrongful conduct. Rather than being impermissibly vague, this safeguard ensures a sufficient time-period for complainants to discover hidden wrongful conduct and submit a claim.

99. We will also place a time limitation on Commission enforcement action for potential violations of these regulations. The Commission, unlike the market participants who may be buyers or otherwise directly affected by a transaction, may not be aware of actions or transactions that potentially may violate our rules. Thus, the Commission will act within 90 days from the date it knew of an alleged violation of these

⁶⁴ The Court of Appeals for the D.C. Circuit has held that, while the Commission "enjoys substantial discretion in ratemaking determinations * * * by the same token, this discretion must be bridled in accordance with the statutory mandate that the resulting rates be 'just and reasonable.'" *Farmers Union Cent. Exch. Inc. v. FERC*, 734 F.2d 1486 at 1501 (D.C. Cir. 1984). In addition, the regulatory regime itself must contain some form of monitoring to ensure that rates remain within a zone of reasonableness and to check rates that depart from this zone. *Id.* at 1509. See also *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993).

⁶⁵ See *e.g.*, *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (1986).

⁶⁶ *Consolidated Gas Transmission Corp., et al.*, 771 F.2d 1536 (D.C. Cir. 1985) (holding that the Commission has the authority under section 16 of the Natural Gas Act to order retroactive refunds to enforce conditions in certificates).

⁶⁷ The courts have held that "the breadth of agency discretion is, if anything, at its zenith when the action assailed relates * * * to the fashioning of policies, remedies and sanctions." *Columbia Gas Transmission Corp., v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984), quoting, *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁶⁸ *Gulf Oil Corp. v. FPC*, 536 F.2d 588 (3rd. Cir. 1977), cert. denied, 4344 U.S. 1062 (1978), reh'g denied, 435 U.S. 981 (1978).

⁶⁹ See *Continental Oil Co. v. FPC*, 378 F.2d 510 (5th Cir. 1967) and *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

⁷⁰ Moreover, if Congress grants the Commission additional remedial power, including the authority to levy civil penalties, the Commission will, in addition to the remedies set forth herein, implement such authority and utilize it when appropriate for violations of these code of conduct regulations.

⁷¹ The Oversight Board, Mirant, NiSource, Cinergy, Semptra, Reliant, EMIT, EnCana, Hess, Coral, NGSA, CPUC, NASUCA, PG&E, Merrill Lynch and Morgan Stanley, ProLiance.

⁷² See the Oversight Board, EMIT, Coral, NASUCA (suggesting 6 months), and ProLiance (suggesting a two-year limit).

⁷³ See also EPSA (arguing that the Commission should clarify that it will act quickly to review and discourage frivolous complaints).