School of Law
Case Western Reserve University

Case Western Reserve Law Review

Volume 33
Issue 3 *combined issue 3 & 4*

1983

# The Federal Energy Regulatory Commission's Authority to Order in Kind Refunds of Natural Gas

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# THE FEDERAL ENERGY REGULATORY COMMISSION'S AUTHORITY TO ORDER IN KIND REFUNDS OF NATURAL GAS

*To ensure consumers a reliable supply of natural gas, the Federal Energy Regulatory Commission is granted broad enforcement powers under the Natural Gas Act. Where a gas producer or pipeline company has illegally abandoned interstate service, the Commission may seek any "necessary or appropriate" remedy. Federal courts have disagreed about the scope of Commission authority and the propriety of Commission enforcement techniques. This Note examines a conflict between the Fifth and Tenth Circuits regarding Commission authority to order in kind paybacks of natural gas to remedy illegal abandonments. In assessing the validity of these refunds, the Note analyzes judicial interpretations of Commission authority, identifies the standards governing Commission discretion, and discusses alternative remedies. The Note concludes that the rationales supporting in kind refunds in other contexts do not apply to abandonments, and that the Commission may fruitfully pursue alternative remedies without overreaching its authority.*

## INTRODUCTION

REGULATING THE NATURAL GAS industry has always been a difficult and controversial proposition.[1] The Natural Gas Act[2] granted broad discretion to the Federal Power Commission (FPC) and its successor, the Federal Energy Regulatory Commission (FERC),[3] to regulate the interstate movement of natural gas. Over the years, federal court interpretations of the Act have expanded the Commission's authority and jurisdiction to include independent producers of natural gas.[4]

The Commission's primary responsibility under the Act is to ensure that natural gas producers charge "just and reasonable" rates to consumers.[5] The Commission also enforces contracts to supply natural gas. When a natural gas producer seeks to contract for the interstate sale of gas, the producer must apply to the Com-

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1. *See* ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL 56-76 (R. Stobaugh & D. Yergin ed. 1979) [hereinafter cited as ENERGY FUTURE].

2. 15 U.S.C. §§ 717–717w (1976) [hereinafter referred to as the Act].

3. The Federal Energy Regulatory Commission replaced the Federal Power Commission when Congress enacted the Department of Energy Organizations Act, Pub. L. No. 95–91, 91 Stat. 565 (1977) (codified at scattered sections of 3, 5, 7, 12, 15 & 42 U.S.C.). 42 U.S.C. §§ 7171–72 (Supp. V. 1981). Both agencies are hereinafter referred to as the Commission.

4. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 685 (1954).

5. 15 U.S.C. §§ 717c-717d (1976).

mission for a certificate of public convenience and necessity authorizing the sale.[6] After the certificate is issued, the producer must continue to supply the gas to that particular purchaser and cannot abandon the service without the Commission's express prior approval.[7]

Strict enforcement of natural gas supply contracts ensures a reliable source of gas for consumers.[8] When FERC determines that a producer or pipeline company has illegally abandoned interstate service, it seeks to restore the injured customer to its previolation position and deter future abandonments.[9] One enforcement technique requires the producer to pay back the volume of gas to the customer from whom it was illegally diverted.[10]

This Note inquires whether FERC possesses authority under the Act to order paybacks of natural gas to remedy illegal abandonments.[11] Because the Act does not specifically mention this power, the Commission and the courts have found such authority in the general grant of power contained in section 16 of the Act.[12] To determine the validity of in kind refunds, this Note analyzes the different judicial interpretations of section 16,[13] the Commission's previous use of both monetary and in kind refunds,[14] and situations where section 16 has served to authorize other actions by the Commission.[15] This Note asserts that previous interpretations of section 16 authorizing other types of refunds do not sup-

6. *Id.* § 717f(c). This subsection provides in pertinent 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 . . . ."

7. *Id.* § 717f(b). This subsection 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.

8. *See infra* notes 22–37 and accompanying text.

9. *See infra* notes 88–89 and accompanying text.

10. *See infra* notes 103–26 and accompanying text.

11. *See infra* notes 38–67 & 103–43 and accompanying text.

12. 15 U.S.C. § 717o (1976). This section provides in pertinent part: "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

13. *See infra* notes 38–56 and accompanying text.

14. *See infra* notes 71–139 and accompanying text.

15. *See infra* notes 144–67 and accompanying text.

port FERC's authority to order in kind paybacks in the abandonment context.[16] Finally, this Note examines alternative remedial and deterrent devices available to the Commission, demonstrating that in kind paybacks are neither necessary nor appropriate.[17]

## I. PREVENTING ABANDONMENTS

The Act grants the Commission authority to regulate only *interstate* transportation and sales of natural gas, and not transactions wholly within one state.[18] Thus, intrastate shipments were beyond the Commission's regulatory authority. Since the Act did not require intrastate producers to charge "just and reasonable" rates,[19] the price of intrastate gas, unlike regulated interstate gas, increased with demand.[20] This potential price differential gave producers an incentive to switch to intrastate markets.[21] Thus, producers developed larger intrastate markets during the latter part of the 1960's.[22] The rapid development of these markets caused greater demand in the producing states, triggering higher intrastate prices.[23] Now producers could increase their revenues by diverting gas under interstate contracts to new intrastate markets.[24] Since this gas was committed to interstate commerce under a certificate of public convenience and necessity, and permission for abandonment was highly unlikely,[25] many producers illegally abandoned their interstate service.[26] To guard against shortages

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16. *See infra* notes 140–43 and accompanying text.

17. *See infra* notes 168–76 and accompanying text.

18. 15 U.S.C. § 717(b) (1976). This subsection provides:

> The provisions of this chapter shall apply to the transportation of natural gas in *interstate* commerce, to the sale in *interstate* commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*

(Emphasis added.)

19. *See* 15 U.S.C. §§ 717c-717d (1976).

20. ENERGY FUTURE, *supra* note 1, at 62.

21. *See* Comment, *Natural Gas Policy Act of 1978: Will It Alleviate the Natural Gas Shortage?*, 11 ST. MARY'S L.J. 140, 141–46 (1979).

22. Marston & Hollis, *A Review and Assessment of the FERC Natural Gas Enforcement Program*, 16 HOUS. L. REV. 1105, 1107 (1979).

23. *Id.*

24. *Id.* at 1107–08.

25. Note, *Federal Regulation of the Dedication and Abandonment of Natural Gas in Interstate Commerce*, 24 LOY. L. REV. 678, 691 (1978).

26. *See, e.g.*, Cox v. FERC, 581 F.2d 449, 450 (5th Cir. 1978).

in nonproducing states, the Commission strictly enforced all certificates for interstate gas contracts.[27]

Demand for natural gas continued to increase sharply during the early 1970's, primarily because interstate supplies lagged behind demand.[28] Regulation kept interstate prices artificially low, leaving producers with no incentive to develop new supplies of more remote natural gas.[29] Instead, the absence of price ceilings on intrastate gas encouraged producers to develop new production for intrastate customers.[30] To alleviate the problem of interstate supply and demand, President Carter proposed the National Energy Plan.[31] Congress endorsed his recommendation by enacting the National Energy Act, which included the Natural Gas Policy Act.[32]

The NGPA established a complex regulatory structure to effect a gradual deregulation of natural gas.[33] It destroyed most distinctions between interstate and intrastate gas by including both types in the basic categories of new and high-cost gas.[34] As a result, intrastate natural gas is subject to the same price ceilings as new or high-cost interstate gas. Only gas dedicated to interstate commerce as of November 8, 1978 remains within the Act's jurisdiction.[35] Ostensibly, then, the incentive no longer exists for producers to abandon their interstate gas contracts in favor of intrastate agreements. But a producer of old certificated gas could

27. *See, e.g.*, Gulf Oil Corp. v. FPC, 563 F.2d 588, 596–97 (3d Cir. 1977).

28. Comment, *supra* note 21, at 143–44.

29. ENERGY FUTURE, *supra* note 1, at 64.

30. *Id.*

31. EXECUTIVE OFFICE OF THE PRESIDENT, ENERGY POLICY AND PLANNING, THE NATIONAL ENERGY PLAN 2 (1977), *reprinted in* SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 1ST SESS., THE PRESIDENT'S ENERGY PROGRAM 16 (Comm. Print 1977). The National Energy Plan sought to reduce the United States' dependence on foreign oil by instituting conservation and research and development programs. The Plan required the conversion of industry and utilities from oil and natural gas to coal, and the development of renewable and inexhaustable energy resources. Comment, *supra* note 21, at 146 n.35.

32. Pub. L. No. 95–621, 92 Stat. 3351 (codified at scattered sections of 15 & 42 U.S.C.) [hereinafter referred to as the NGPA].

33. *See* Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 86–99 (1982). Although the NGPA provided separate formulas for price calculation of more than thirty categories of gas, it created three basic categories of gas: (1) "high-cost gas," deregulated in November 1979; (2) "new gas," subject to price ceilings which increase over time in constant dollars, with deregulation scheduled sometime between 1985 and 1988; and (3) "old gas," subject to the same kind of price ceilings as new gas but not scheduled for deregulation. *Id.* at 87–89.

34. 15 U.S.C. §§ 3315(b)(3), 3316(b) (Supp. V 1981).

35. *Id.* § 3431(a)(1).

claim a depletion of reserves to receive permission for a legal abandonment from the Commission. Later, the same producer or his successor in interest could drill new wells on a nearby tract of land and tap into the same supply of gas. Since this "discovery" would have occurred after November 8, 1978, it would be subject to the price ceilings for new gas—which exceed the price allowed under the old certificate. Thus, an incentive still exists for producers to circumvent the regulatory scheme and sell their gas at a higher price. This scenario is analogous to the abandonment of interstate production in favor of an intrastate contract; as before, a remedy is needed to compensate customers and deter future violations.

Since the Act "does not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978,"[36] contracts certificated after that date cannot be enforced through section 16 refunds. Though most new natural gas production lies beyond the jurisdiction of the Act, the success of deregulation under the NGPA depends on the enforcement of old gas contracts.[37] To deter future abandonments, the Commission must continue to enforce the certificates of public convenience and necessity by actively pursuing violations of the Act.

## II. CONFLICTING INTERPRETATIONS OF SECTION 16

The language of section 16 appears to grant broad authority to the Commission,[38] yet no consensus exists on the proper interpretation of this section. The legislative history of the Act contains little reference to section 16 and offers no guidance on its correct interpretation.[39] As a result, federal courts have failed to provide a consistent reading of section 16.

### A. *Broad Judicial Interpretation*

Section 16 of the Act and section 309 of the Federal Power

36. *Id.*

37. The NGPA was a compromise between continued, complete regulation of prices under the Act and total price deregulation. Congress adopted the middle ground to prevent the skyrocketing natural gas prices that might result from total deregulation. Comment, *supra* note 21, at 157. Under the adopted plan, the lower prices of old gas offset the higher prices of new and high-cost gas so that the overall market price is lower than it would be under complete price deregulation. *See id.* at 146–48. To prevent large increases in the overall market price of natural gas, the Commission must ensure that old gas remains at the certificated price.

38. *See supra* note 12.

39. *See, e.g.*, H.R. REP. No. 709, 75th Cong., 1st Sess. (1937).

Act[40] contain identical language and are often interpreted similarly by federal courts.[41] The D.C. Circuit provided a broad interpretation of section 309 in *Niagara Mohawk Power Corp. v. FPC*,[42] which many courts have cited when interpreting section 16.[43] The court stated:

> While such "necessary or appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.[44]

The Third Circuit gave a similar reading to section 16 in *Gulf Oil Corp. v. FPC*.[45] In *Gulf Oil*, the court viewed section 16 "as a grant of remedial power to the Commission which, in keeping with the Commission's duty to serve the public interest, [cannot] be limited to the express remedies provided by other sections of the Act."[46]

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40. 16 U.S.C. § 825h (1976).

41. *See infra* text accompanying notes 54–55.

42. 379 F.2d 153 (D.C. Cir. 1967). Niagara Mohawk operated four hydroelectric projects which the FPC had licensed in 1963 and 1964. The license orders specified effective dates of 1941 and 1949. Section 10(d) of the Federal Power Act, 16 U.S.C. § 803(d) (1976), requires the operator of a hydroelectric project to establish amortization reserves from excess profits earned after 20 years of project operation. *Id.* Years of operation are measured from the effective date of the license. Niagara Mohawk claimed that the Commission lacked authority to set an effective date predating the issuance date of the license. 379 F.2d at 154–56. The court held that the Commission had authority to set retroactive effective dates, and supported its holding by referring to the broad grant of authority in § 309 of the Federal Power Act. *Id.* at 158–59.

43. *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1255 (D.C. Cir. 1973); New England Power Co. v. FPC, 467 F.2d 425, 430 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); Mesa Petroleum Co. v. FPC, 441 F.2d 182, 187 (5th Cir. 1971).

44. 379 F.2d at 158.

45. 563 F.2d 588 (3d Cir. 1977). For a discussion of the facts of this case, see *infra* notes 79-82 and accompanying text.

46. *Id.* at 606 (following Mesa Petroleum Co. v. FPC, 441 F.2d 182 (5th Cir. 1971)). In *Mesa*, the petitioner (successor in interest to Hugoton Production Company) sought review of an FPC order denying Hugoton's request for abandonment of a contract to sell natural gas to Panhandle Eastern Pipe Line Company. The Commission had also ordered Hugoton to refund amounts collected in excess of a reasonable "in-line" price of 13 cents per Mcf during the entire contract period. *Id.* at 182–85. (Mcf is the abbreviation for million cubic feet, a standard unit of measurement for natural gas volumes.) The Fifth Circuit held that the Commission possessed authority to order the refund of the price differential. *Id.* at 186. The court addressed the authority issue by referring to § 16 of the Act and "its counterpart, § 309 of the Federal Power Act." *Id.* at 187. The court stated that "[b]oth provisions have received broad interpretations to enable the Commission to effectively regulate the gas and power industries," and referred to the D.C. Circuit's interpreta-

These interpretations do not restrict the power granted in section 16 either to the framing of procedural details for Commission orders and regulations or to the powers expressly provided in other sections of the Act. The courts do require the exercise of authority to conform to both the purposes and express provisions of the Act.[47] Finally, the authority provided by section 16 is narrower than that provided by the necessary and proper clause of the United States Constitution.[48]

At first glance, these broad interpretations of section 16 seem reasonable in light of the large and complex industry the Commission is entrusted to regulate. Upon closer inspection, however, the scope of power conferred by these opinions appears too broad to apply in all situations. While the Commission must be afforded sufficient authority to perform its duties, the scope of section 16 should be defined with a view toward protecting the market mechanisms of the industry—which means that the concerns of both consumers *and* producers must be weighed.[49]

### B. *Narrow Judicial Interpretation*

There is no shortage of court opinions endorsing narrower interpretations of section 16. The D.C. Circuit has vacillated between broad and narrow interpretations, demonstrating that even one circuit cannot agree on a single meaning.[50] The court applied

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tions of these sections in *Niagara Mohawk*. *Id.* at 187–88. For a discussion of the *Niagara Mohawk* interpretation, see *supra* text accompanying notes 42–44.

47. *See Niagara Mohawk*, 379 F.2d at 158; *Mesa*, 441 F.2d at 187; *Gulf Oil*, 563 F.2d at 606.

48. The Supreme Court articulated the preeminent interpretation of the necessary and proper clause of Article I, § 8 in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

49. *See infra* notes 57–63 and accompanying text.

50. *See supra* notes 42–44 and accompanying text. The D.C. Circuit has gone to great lengths to reconcile its more recent, narrow interpretations with precedent. In Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), the court cited with approval its *Niagara Mohawk* interpretation, though stating that "[a] more tempered and balanced approach [than the one proposed by the Commission in the instant case] would accord reasonable significance to section 16, without making it a *carte blanche*." 483 F.2d at 1255. Thus, the court employed an interpretation normally identified with expansive readings of § 16, *see, e.g.*, *Mesa*, 441 F.2d at 187, to support a narrow reading of the section.

The Third Circuit took a more honest approach to reconciling the two interpretations of § 16 in Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977). The court examined the differences between the two approaches of *Mesa* and *Mobil*, and asserted that the broad interpretation in *Mesa* was more persuasive. *Id.* at 606–07.

a narrow reading in *Mobil Oil Corp. v. FPC*,[51] declaring that section 16 "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined."[52] Quoting an earlier D.C. Circuit case, the *Mobil* court concluded that " 'Congress did not give the FPC *carte blanche* to take whatever action it might consider appropriate in furtherance of' the objectives of the Act."[53]

Section 16 and section 309 were also accorded a narrow scope in *New England Power Co. v. FPC*.[54] "Both sections," declared the court, "are of an implementary rather than substantive character. . . . These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act."[55]

According to this line of cases, the scope of section 16 authority is grounded in the express provisions of the Act. Any order or regulation must derive its authority from another section of the Act. Thus, the limits of Commission power are more clearly defined under narrow interpretations of section 16. Ultimately, though, both the narrow and broad interpretations of the provision agree that section 16 does not confer absolute discretion upon the Commission.[56]

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51. 483 F.2d 1238 (D.C. Cir. 1973). For a discussion of the *Mobil* facts, see *infra* notes 157–63 and accompanying text.

52. 483 F.2d at 1257.

53. *Id.* at 1248 (quoting Mobil Oil Corp. v. FPC, 463 F.2d 256, 263 (D.C. Cir. 1971)). The earlier *Mobil* case did not involve the scope of the Commission's authority under § 16, but rather the scope of its jurisdiction. The court held that royalty provisions in oil and gas leases did not constitute sales of natural gas for resale in interstate commerce subject to the Act, and thus lessor landowners were not subject to regulation as natural gas companies. 463 F.2d at 259. The court noted that the congressional purpose behind the language of the Act—to protect consumers—was not sufficient reason for expanding the Commission's jurisdiction to include the petitioners. *Id.* at 263.

54. 467 F.2d 425 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974). In this case, representatives of the natural gas pipeline and electric industries claimed that the FPC lacked authority to issue an order revising fee schedules for filing applications under the Natural Gas and Federal Power Acts, or to assess the costs of administering these programs against companies within its jurisdiction. 467 F.2d at 426. The Commission asserted that § 309 and § 16 authorized its order. *Id.* at 430.

55. *Id.* at 430–31.

56. *See, e.g.*, *Gulf Oil*, 563 F.2d at 606 (broad interpretation) (FPC actions must conform to both the purposes and express provisions of the Act); *Mobil*, 483 F.2d at 1248 (narrow interpretation) (Congress did not give the FPC "*carte blanche*").

### C. *Suggested Interpretation of Section 16*

Neither the legislative history nor the decisions of the various courts of appeals provide a definitive interpretation of section 16. As a result, common methods of statutory interpretation must be employed to derive the correct meaning of the statute.

Inspection of statutory purpose is often employed to determine the scope of statutory authority.[57] According to its legislative history, the basic purpose of the Act was "to occupy this field in which the Supreme Court has held that the states may not act."[58] This terse statement of purpose was expanded by numerous federal court opinions. The Supreme Court found that the "overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies"[59] and "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[60] By the early 1970's, most federal courts had come to agree that "[t]he Commission's primary purpose under the Natural Gas Act is to protect the consumer."[61]

While judicial assessments of statutory purpose must be kept in mind when analyzing the language of section 16, the interests of producers and intermediate parties cannot be ignored. The natural gas shortage of the early 1970's demonstrates the necessity of balancing consumer and producer interests. During this period, the Commission concentrated on protecting consumers by ensuring that producers charged just and reasonable rates. But the FPC ignored the fact that the small return on investment deterred producers from developing new reserves. As a direct result, demand at the prevailing price level greatly exceeded the stagnant supply and a severe shortage ensued.[62] Thus, the Fifth Circuit has stressed that the Commission must "strive to reach a balance between the consumer, producer, and those whose interests fall in

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57. The Supreme Court "has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred." Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968); *see* American Trucking Ass'ns v. United States, 344 U.S. 298, 311 (1953); NBC v. United States, 319 U.S. 190, 225–26 (1943); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193–94 (1941); Piedmont & Northern Ry. v. ICC, 286 U.S. 299, 311–12 (1932).

58. H.R. REP. No. 709, 75th Cong. 1st Sess. 2 (1937).

59. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682 (1954).

60. Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378, 388 (1959).

61. *See, e.g.*, *Mesa*, 441 F.2d at 186 (5th Cir. 1971); California Gas Producers Ass'n v. FPC, 421 F.2d 422, 428 (9th Cir. 1970); Cincinnati Gas & Elec. Co. v. FPC, 389 F.2d 272 (6th Cir. 1968).

62. Pierce, *supra* note 33, at 67–68.

between."[63]

Section 16 authorizes the Commission to perform all "necessary or appropriate" acts.[64] These two words have very different meanings: necessary means essential or indispensible,[65] while appropriate connotes fit, proper, or suitable.[66] By using the disjunctive "or" instead of the conjunctive "and," Congress validated any exercise of authority which satisfies *either* definition.

The federal courts, however, have misapplied the "necessary or appropriate" test. The opinions concentrate on "necessary" and neglect to inquire whether a Commission action is "appropriate" before invalidating it.[67] To be faithful to the plain statutory language, the Commission and the courts must employ a necessary *or* appropriate test before deciding that an exercise of authority is invalid under section 16.

While little guidance can be derived from either the legislative history of the Act or federal court decisions construing it, several basic conclusions can be reached. First, both the narrow and broad interpretations of the statute agree that section 16 does not confer absolute discretion upon the Commission.[68] Second, both precedent and industry experience mandate that Commission actions be analyzed in light of their impact on consumers *and* producers.[69] Finally, the validity of Commission enforcement techniques—including in kind refunds—must be determined through faithful adherence to a necessary *or* appropriate standard.[70]

## III. Previous Use of Refunds

The Commission employs cash and in kind refunds to remedy and deter several different types of violations. Cash refunds have been ordered in excessive rate and illegal abandonment cases, while in kind refunds have been used to remedy illegal curtailments and abandonments. Although federal courts have upheld

63. *Mesa*, 441 F.2d at 186.

64. *See supra* note 12.

65. Webster's Third New International Dictionary of the English Language Unabridged 1511 (P. Gove ed. 1970).

66. *Id.* at 106.

67. *See, e.g.*, *Mobil*, 483 F.2d at 1255 (FPC has no authority to act in "whatever manner it deems necessary or expeditious"). *But see Gulf Oil*, 563 F.2d at 605 ("In order to affirm the order, we need find only that it is appropriate . . . .").

68. *See supra* note 56 and accompanying text.

69. *See supra* notes 62–63 and accompanying text.

70. *See supra* notes 65–67 and accompanying text.

cash refunds in both contexts and in kind paybacks in curtailment cases, the validity of in kind refunds in the abandonment context does not necessarily follow.

## A. *Cash Refunds*

Over the years, the Commission has employed monetary refunds in a variety of contexts. The courts have upheld refunds for excessive rates as well as for illegal abandonments.[71]

### 1. *Refunds for Excessive Rates*

In *United Gas Improvement Co. v. Callery Properties, Inc.*,[72] the Commission had imposed new conditions on existing certificates of public convenience and necessity. Producers were required to provide gas at 18.5 cents per Mcf initially, and to refund amounts collected under the old certificate in excess of the newly established price.[73] Upholding the refund, the Supreme Court stated:

> While the Commission "has no power to make reparation orders," its power to fix rates under section 5 of the Act being prospective only, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here, the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. An agency, like a court, can undo what is wrongfully done by virtue of its order.[74]

Three years later, the Supreme Court decided *FPC v. Sunray DX Oil Co.*,[75] a case similar to *Callery*. In *Sunray*, the Commission determined an appropriate price for service under permanent

71. *See infra* notes 72–82 and accompanying text.

72. 382 U.S. 223 (1965). In *Callery*, the FPC issued certificates of public convenience and necessity to several gas producers who entered into sales contracts calling for initial prices of 21.4 to 23.8 cents per Mcf. Consumer interests challenged the orders in court after deliveries commenced. Pending the outcome of an area rate proceeding, the Commission advised the producers that they might be required to refund amounts found to be inconsistent with the public interest. *Id.* at 225–26.

73. *Id.* at 226. The order also provided that until the Commission determined "just and reasonable" rates for southern Louisiana, or until July 1, 1967, whichever occurred first, the producers could not increase their rates above 23.55 cents. *Id.*

74. *Id.* at 229 (quoting FPC v. Hope Natural Gas Co., 320 U.S. 591, 618 (1944)).

75. 391 U.S. 9 (1968). In this rate case, the FPC issued temporary certificates of public convenience and necessity under § 7(c) of the Act, 15 U.S.C. § 717f(c) (1976), authorizing producers to sell gas at or below the guideline price of 18 cents per Mcf. Some of the certificates contained an express condition that refunds could be ordered if the eventual in-line price was set at a lower level. The other certificates simply contained general cautionary language that the certificates should not be treated as final. *Id.* at 40–41.

certificates which was lower than that currently in force under temporary certificates. Giving the permanent price retroactive effect, the Commission ordered the producers to refund to consumers amounts reflecting the difference between the new price and the one established by the temporary certificate.[76] The producers claimed the refund order was improper because the temporary certificate was "retroactively unmodifiable."[77] Rejecting this argument, the Supreme Court concluded that when the Commission exercises "its power to condition permanent certificates under § 7(e), [it] may require producers to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price."[78]

### 2. *Refunds for Illegal Abandonments*

In *Gulf Oil Corp. v. FPC*,[79] the FPC had found that Gulf Oil Corporation (Gulf) violated the Act by delivering less than the required contractual amount to Texas Eastern Transmission Company (Texas Eastern).[80] The Commission ordered Gulf to refund to Texas Eastern "a sum equal to 'the difference between [Texas Eastern's] request for gas and Gulf's deliveries [multiplied by] the difference between the contract price and the otherwise applicable area or national rate[s]' and interest."[81] The refund order also contained a recoupment provision whereby Gulf would recover the entire contract price and lose only the deferred value of its money for the default.[82]

The *Gulf Oil* approach to illegal abandonments is well reasoned because the cash refund was a necessary remedy under the circumstances. The inadequacy of the other sanctions available to the Commission supports the necessity of the order. Imposition of

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76. *Id.* at 40.

77. *Id.* at 44.

78. *Id.* at 45.

79. 563 F.2d 588 (3d Cir. 1977).

80. *Id.* at 593. Gulf delivered gas to Texas Eastern under a contract authorized by a certificate of public convenience and necessity issued by the Commission. Gulf greatly overestimated the reserves in the field from which it was producing the gas; consequently, it delivered less than the contract amount to Texas Eastern. *Id.*

81. *Id.* at 603 (quoting FPC Opinion No. 780, 56 F.P.C. 2293, 2300 (1976)).

82. 563 F.2d at 603–04. Under the recoupment provision, the total contract amount of 4.4 trillion cubic feet (Tcf) remained in effect. When Gulf delivered an amount of gas equal to the contract quantity less the amount of gas for which it paid refunds, it could charge the contract price plus the amount of refunds previously paid on an equivalent amount of gas. *Id.* at 604.

a fine or jail term on the producer,[83] for example, would not have redressed the injury to Texas Eastern.

### 3. *Differences Between the Use of Refunds for Illegal Abandonments and Excessive Rates*

Using refunds to remedy excessive prices differs distinctly from using them to remedy illegal abandonments. To control excessive prices, the Commission has relied not only on its authority under section 16, but also on its section 7 power[84] to impose conditions on certificates of public convenience and necessity.[85] But the Commission cannot rely on section 7 to remedy abandonments because section 7 does not attach refunds to the issuance of a certificate.[86]

The object of the remedy also differs in the two contexts. The cash refund in *Callery* was intended to rectify improper price setting by the producer.[87] In *Gulf Oil*, the Commission ordered a monetary refund to return the injured customer to the position it occupied before the illegal abandonment[88] and to prevent future illegal abandonments.[89] Because of these differences between remedying excessive rates and remedying abandonments, reference to remedies in excessive rate cases cannot support the validity of in kind refunds in the abandonment context.

## B. *In Kind Refunds*

The courts disagree as to whether the Commission has authority under section 16 to order in kind refunds of natural gas for unlawful abandonment of certificated production. While the Commission has employed in kind refunds to remedy violations of curtailment plans, such use does not justify in kind refunds for abandonments.[90]

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83. *See infra* text accompanying notes 172–73.

84. 15 U.S.C. § 717f(e) (1976). This subsection provides in pertinent part: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

85. *See Sunray*, 391 U.S. at 45.

86. Although refunds relate to a certificate of public convenience and necessity, they are not part of the certification process required under section 7. *See supra* note 84.

87. *See supra* notes 72–74 and accompanying text.

88. *Gulf Oil*, 563 F.2d at 603.

89. *Id.* at 608.

90. *See infra* notes 127–37 and accompanying text.

1. *Violations of Curtailment Plans*

The critical shortage of natural gas in the early 1970's made it "necessary to promulgate procedures that would maximize high priority of usage for [natural gas]."[91] In response to this need, the Commission established natural gas priorities based on end use,[92] and requested producers who were unable to meet their contract delivery requirements to submit curtailment plans for Commission approval.[93]

In *Texas Gulf, Inc. v. FPC*,[94] the Fifth Circuit addressed the validity of in kind refunds in the curtailment context. The United Gas Pipe Line Company (United) had adopted a curtailment plan which apportioned its decreased gas supply among its customers, including Texas Gulf, according to priority of uses.[95] United petitioned for an order enforcing the curtailment plan, which the Commission temporarily granted pending determination of the plan on its merits.[96] Texas Gulf protested the decrease of its supply under the plan, initiated legal proceedings, and began to overtake its curtailed entitlement.[97] The FPC objected to this flagrant violation and ordered Texas Gulf to "pay back that overtake to United by United limiting Texas Gulf to 1,500 Mcf per day until full repayment of the overtake has been made."[98]

The Fifth Circuit upheld the FPC's order of in kind refunds, stating: "The Commission was within its sound discretion as implementor and controller of our national fuel supplies in requiring Texas Gulf to repay its overtakes from its allotment under United's curtailment program. . . . Permitting a customer to disregard a supplier's curtailment program would completely destroy compliance with the reduced allotments."[99]

In another curtailment case, *United States Steel Corp. v. FPC*,[100] the D.C. Circuit espoused a similar view:

91. FPC Order No. 467, 49 F.P.C. 85, 85 (1973), *reprinted in* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 50 app. (D.C. Cir. 1974).

92. *Id.* at 86–87, 506 F.2d at 50–51.

93. For a description of the Commission's actions relating to curtailments, see *Pacific Gas*, 506 F.2d at 35–36.

94. 494 F.2d 789 (5th Cir. 1974).

95. Texas Gulf had contracted with United to supply Texas Gulf with natural gas for use in its sulphur mine. The Commission issued a certificate of public convenience and necessity for this interstate sale of gas. *Id* at 790.

96. *Id.*

97. *Id.* at 790–91.

98. *Id.* at 791.

99. *Id.* at 792.

100. 533 F.2d 1217 (D.C. Cir. 1976).

> Not only does "common sense," as the Fifth Circuit states in *Texas Gulf*, support a payback but common honesty commands it. . . . Carnegie [Natural Gas Company, who violated the plan,] says this is a "penalty," but to us it is but simple restitution due those who were rightfully entitled to the use of the gas.[101]

The courts of appeals in *Texas Gulf* and *United States Steel* properly upheld the validity of in kind refunds for curtailment plan violations. The payback order satisfied the necessary or appropriate test because of the lack of another adequate remedy or deterrent. Moreover, the willfulness of the violations warranted a drastic sanction.[102]

### 2. *Illegal Abandonment of Interstate Service*

The Fifth and Tenth Circuits are in direct conflict over the validity of in kind refunds in the abandonment context. The Fifth Circuit upheld their validity in *Cox v. FERC*.[103] The producer, Cox, formed a natural gas production unit with 80% of its reserves committed to interstate sales to Texas Gas Transmission Corporation (Texas Gas), which the Commission duly certificated.[104] For six years Cox delivered 100% of the gas to Texas Gas, distributing the profits to owners of both the 80% and 20% shares.[105] When Cox entered into an intrastate contract for the sale of the 20% share, Texas Gulf petitioned the Commission for a declaratory judgment barring the sale until Cox obtained an abandonment from the Commission.[106]

The Fifth Circuit agreed with the Commission that Cox had

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101. *Id.* at 1223–24.

102. *See infra* notes 127–37 and accompanying text.

103. 581 F.2d 449 (5th Cir. 1978).

104. *Id.* at 450. Normally, the producer commits 100% of a field's reserves to one customer or divides 100% of the known reserves among several customers; e.g., 25% to customer *A*, 30% to *B*, and 45% to *C*. As the producer extracts gas from the well, the volumes are divided proportionally among the respective purchasers. In *Cox*, however, the producer committed 80% of the reserves to Texas Gas, but did not commit the remaining 20% to another customer. Since this 20% was not committed to a gas sales contract, it was not subject to a certificate of public convenience and necessity. *Id.*

105. *Id.*

106. *Id.* Texas Gulf alleged it was entitled to 100% of production since it had received 100% of production during the first six years. Cox maintained that because the 20% share was not committed to interstate commerce, no illegal abandonment occurred when it was sold in intrastate commerce. Cox argued that it had produced the unit "out of balance"; i.e., the 80% share was withdrawn from the well first, leaving the 20% share in reserve under ground, or "banked," until it was later committed to commerce under a different contract. FERC refused to accept this analysis because Cox had engaged for so long in out of balance production, and had distributed the proceeds from the 80% sale to owners of the

sold uncertificated gas (the 20% share) in interstate commerce in violation of the Act. The court and the Commission further agreed that Cox's subsequent diversion of gas to intrastate commerce constituted an unauthorized abandonment.[107] FERC ordered the appellants to refund the supply of diverted gas to Texas Gas and its interstate customers;[108] in upholding the order, the Fifth Circuit concluded: "[T]he payback in kind similarly prevents unjust enrichment and also requires petitioners, who violated the Act, to bear the burden of post-violation increases in the price of natural gas. Accordingly, the payback in kind remedy is equitable, reasonable, and within the authority of FERC."[109]

In another illegal abandonment case, *McCombs v. FERC*,[110] the Tenth Circuit contradicted the Fifth by denying the Commission the authority to order in kind refunds of natural gas.[111] In 1953, Bee Quin, owner of the "Butler B" tract of land, contracted for the sale of gas to United Gas Pipe Line Company (United).[112] In 1966, wells drilled to a maximum depth of 2960 feet stopped producing, suspending deliveries to United even though the gas purchase contract remained in effect.[113] The McCombs Group succeeded to Quin's interest in Butler B, unitized it with the Butler

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20% shares. *Id.* Cox's explanation might have been plausible to the Commission if proceeds from the 80% sale had been distributed only to owners of the 80% shares.

107. *Id.* at 450–51. Dedication of natural gas to interstate commerce occurs as soon as deliveries commence—with or without Commission certification. Therefore, an illegal abandonment can occur without a certificate being in effect. *See* J.M. Huber Corp. v. FPC, 236 F.2d 550, 557 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957) (noted in Note, *supra* note 25, at 688). Thus, Cox violated the Act twice: first, when it sold 100% of current production to Texas Gas, which should only have received 80% under the certificate; and second, when it diverted the 20% to intrastate commerce.

108. 581 F.2d at 451.

109. *Id.*

110. 705 F.2d 1177 (10th Cir. 1980), *vacated and withdrawn on other grounds*, *appeal dismissed per stipulation*, 710 F.2d 611 (10th Cir. 1983). The withdrawal of the opinion by the Tenth Circuit was a condition imposed by FERC on the settlement of the case. Letter from Stanley L. Cunningham, counsel for petitioners, McCombs Group to the author (Nov. 21, 1983) (on file with the *Case Western Reserve Law Review*).

111. In an earlier decision resolving the same controversy, United Gas Pipe Line Company v. McCombs, 442 U.S. 529 (1979), the Supreme Court held that McCombs had violated the Act by diverting gas committed to a certificated interstate contract without the Commission's express approval for abandonment. *Id.* at 531.

112. *McCombs*, 705 F.2d at 1179. The Commission certificated the contract in 1954. In 1963 it issued new certificates requiring Quin's successors in interest to continue service. *Id.*

113. *United Gas*, 442 U.S. at 532. McCombs' predecessor in interest notified United of the depletion of existing wells but never sought the Commission's permission to abandon service to United. *Id.* at 532–33; *see supra* note 7 and accompanying text.

A tract,[114] and drilled wells to 8700 to 9700 feet. The group discovered new reserves which it contracted to sell to E.I. du Pont de Nemours & Company (du Pont) in intrastate commerce.[115] When United discovered that the gas delivered to du Pont was the same as the reserves committed to it under the 1953 certificate, it filed a complaint with the Commission.[116]

In this proceeding, FERC ruled that McCombs had violated the Act by illegally abandoning the interstate sales contract with United and selling to du Pont.[117] As a result, it ordered McCombs to pay back to United the volume of gas wrongfully delivered to du Pont.[118] The Tenth Circuit agreed with McCombs' contention that FERC lacked authority under the Act to order such refunds in this context.[119] Endorsing the narrow interpretation of section 16 in *New England Power*,[120] the *McCombs* court stated: "[Section] 16 allows the Commission to carry out [only those] specific functions which Congress assigned to it in the Act . . . ."[121]

In similar fact settings, the Fifth and Tenth Circuits reached opposite conclusions on FERC's authority to order in kind refunds. In both cases, the Commission ordered refunds to remedy

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114. *McCombs*, 705 F.2d at 1179.

115. *United Gas*, 442 U.S. at 533.

116. *McCombs*, 705 F.2d at 1179.

117. *Id.* Since McCombs had unitized the Butler tracts, the Commission determined that some of the gas produced on A was attributable to B's reserves and therefore had been dedicated to interstate commerce under the 1963 certificate. *Id.* "Unitized" gas refers to two or more tracts overlaying a common field of gas operated as a single production unit. *Id.* at n.1.

McCombs claimed to have dissolved its unitized operation of A and B, and asserted that the dissolution was retroactive in effect. *Id.* at 1180. The court postponed consideration of this issue, but stated that if it later found the two tracts to have been de-unitized, the volume of refunds ordered would be proportionally reduced. *Id.*

In *United Gas*, McCombs argued that its sale of certificated interstate gas to a new customer did not violate the Act since the old contract was legally abandoned when Quin's shallower wells ceased producing. McCombs based its argument on the fact that the 1954 and 1963 certificates did not include well depth specifications. 442 U.S. at 534, 541-42. The Commission ruled that the group violated the Act because the certificates encompassed reserves under the property at *all* depths and neither McCombs nor its predecessor, Quin, had obtained prior approval for the abandonment. *Id.* at 534. While the Tenth Circuit did not disagree with the Commission's finding that the certificates included gas at any depth, it held that § 7(b) approval for the abandonment was unnecessary in this case. *McCombs*, 570 F.2d at 1381-82. The Supreme Court agreed with the Commission's interpretation of the certificates' scope and reversed, holding that express prior abandonment approval was required in this case. *United Gas*, 442 U.S. at 534.

118. *McCombs*, 705 F.2d at 1180.

119. *Id.* at 1184-85.

120. 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); *see supra* text accompanying notes 54-55.

121. *McCombs*, 705 F.2d at 1184.

unwillful and unknowing abandonments of interstate service.[122] In *Cox*, the producer believed that it could produce gas out of balance and later sell the uncommitted share under a different contract. It was unaware that selling the uncommitted share constituted abandoned service for which Commission approval was required.[123] Likewise, the petitioner in *McCombs* did not realize it had abandoned service by selling gas discovered through deeper drilling. McCombs believed that the certificate for sales to United had pertained only to gas found at shallower depths and thus had been effectively abandoned by Quin.[124] Since neither Cox nor McCombs intended to commit a violation, the two circuits should have reached the same conclusion.

The Tenth Circuit's analysis of section 16 authority is more comprehensive and persuasive than the Fifth's. The *Cox* court neglected to examine the different interpretations of the statute, and failed to make a detailed application of the necessary or appropriate test. Instead, the Fifth Circuit simply noted the approval of cash refunds in other contexts and concluded that the remedy is equitable and reasonable and prevents unjust enrichment.[125] The Tenth Circuit provided a more sophisticated analysis of the validity of the section 16 order. The *McCombs* court examined and distinguished cases where refunds were approved.[126]

The court did not explain, however, why in kind refunds failed to meet the necessary or appropriate test under its facts. Nevertheless, the superficiality of *Cox* undercuts its precedential value as a mandate for the validity of in kind refunds.

3. *Comparison of In Kind Refunds in the Abandonment and Curtailment Contexts*

The Tenth Circuit in *McCombs* compared the use of in kind refunds in abandonment and curtailment situations.[127] The court noted that actual refunds never occur in curtailment cases since

122. The federal courts have not inquired into culpability when considering remedies for violations of the Act. Nevertheless, culpability is an important factor to consider because it is specifically mentioned in § 7 of the Act: "Any person who willfully and knowingly does . . . any act . . . in this chapter prohibited or declared to be unlawful . . . shall be punished by a fine . . . or by imprisonment . . . or both." 15 U.S.C. § 717t (1976).

123. *See supra* notes 103–07 and accompanying text.

124. *See supra* notes 113–17 and accompanying text.

125. *Cox*, 581 F.2d at 451.

126. *McCombs*, 705 F.2d at 1184–85.

127. *Id.* at 1184 n.5.

paybacks are implemented by reducing the customer's future allocation under the curtailment plan.[128]

The Tenth Circuit's comparison of the two situations was only a cursory examination of existing differences. The court failed to mention, for example, that the culpability[129] of violators in the curtailment context greatly exceeds that in the abandonment cases. The petitioners in *United States Steel* and *Texas Gulf* knew their allotment under the curtailment plan but nevertheless took delivery of a larger quantity of gas.[130] In *Cox*, the violator did not recognize the wrongfulness of using 100% of its production to satisfy an interstate contract for 80% of reserves.[131] Likewise in *McCombs*, there was disagreement on the scope of the interstate certificate and the existence of a legal abandonment. McCombs believed that the certificate did not cover its newly discovered gas and that its predecessor in interest had legally abandoned the certificate.[132]

Another difference between the two situations is the element of emergency in the institution of curtailment plans. In the face of a severe natural gas shortage, the Commission established curtailment plans[133] to protect high priority users from termination and prevent any consequent harm to the nation's economy and citizens. The same degree of emergency does not exist in the abandonment context; the injured customers in *Cox* and *McCombs* did not depend on the production and received a windfall when the Commission ordered refunds.[134] Since violations in the curtailment context pose a more significant threat to the public, they warrant a more serious sanction.

The import of these differences directly relates to the necessary or appropriate test under section 16. To determine whether a refund or some lesser sanction is the proper remedy, culpability of the wrongdoer must be examined.[135] In addition, the propriety of a remedy can be determined by inquiring whether it is necessary

128. *Id.*

129. *See supra* note 122.

130. *See supra* text accompanying notes 94–102

131. *Cox*, 581 F.2d at 450.

132. *McCombs*, 705 F.2d at 1179–80.

133. *See supra* text accompanying notes 91–92.

134. In *Cox*, the Commission ordered the producer to deliver 100% of the field's production to Texas Gas, who had contracted to purchase only 80% of production. 581 F.2d at 450-51. In *McCombs*, United had been notified by McCombs' predecessor that the gas supply was exhausted. Thus, United was not expecting the new supply ordered by the Commission. 705 F.2d at 1181.

135. *See supra* note 122.

to prevent total breakdown of the regulatory system.[136] The remedy should relate to the scope and severity of the harm caused by the violation. Thus, the in kind refunds in *Cox* and *McCombs* were inappropriate because the producers were unaware of their wrongdoing. Moreover, the in kind refunds were unnecessary because enforcement of the Act and resolution of any emergency could have been achieved through less drastic remedies.[137]

### C. *Monetary Versus In Kind Refunds*

In the abandonment context, the economics of in kind and monetary refunds differ profoundly. In cases upholding refunds—both cash and in kind—the abandonments were not willful.[138] But in kind refunds impose a greater economic burden upon producers than do cash refunds.[139] Since the producer cannot retract the gas wrongfully sold to new customers, it must somehow procure additional supplies—often by purchasing gas on the open market. This is a particularly onerous sanction where gas prices have increased substantially since the illegal sales. If producers do not violate the Act intentionally, it is inequitable to order cash refunds from one producer, as in *Gulf Oil*, while requiring in kind refunds from another, as in *Cox*.

While the Commission has employed monetary and in kind refunds in a variety of contexts, the propriety of these remedies should be determined by careful attention to the factual circumstances and regulatory goals peculiar to each context—not by vague analogies. Cash refunds in the excessive rate context, for example, depend on authority not available in the abandonment context.[140] Moreover, they are ordered for an entirely different purpose. In excessive rate cases, the Commission orders cash refunds to return *profits* earned by a producer from charging excessive prices. In abandonment cases, cash refunds are imposed to compensate the customer for lost *volumes* of gas, and to *deter* fu-

136. In *Texas Gulf*, for example, in kind refunds were the only means of ensuring compliance with curtailment plans. *See supra* text accompanying note 99.

137. *See infra* text accompanying notes 168–71 & 176.

138. *See supra* notes 122–24 and accompanying text. In *Gulf Oil*, the producer did not willfully abandon service; it mistakenly overestimated its reserves. 563 F.2d at 593.

139. In *Mesa*, 441 F.2d at 188, a cash refund case, the court noted that the producer "never established that it would be in a worse economic position after paying the refunds—a relevant consideration, since after the abandonment [the producer] possessed quantities of gas available for sale elsewhere and from all indications, at a higher rate."

140. *See supra* notes 84–86 and accompanying text.

ture abandonments.[141] Because of these differences in purpose, cash refunds in the excessive rate context do not justify cash refunds in the abandonment context. And since cash refunds are a less onerous burden than in kind refunds,[142] they neither support in kind refunds nor serve as a reasonable alternative. Finally, in kind refunds for curtailments, because they address a more significant public threat, do not support refunds for abandonments.[143]

## IV. Section 16 Authority for Other Commission Actions

The Commission has utilized section 16 authority not only to order refunds but also to perform a variety of discretionary actions. While the federal courts generally uphold its authority, some Commission actions have been prohibited for exceeding the scope of section 16. To determine the validity of in kind refund orders, cases involving similar exercises of Commission authority must be examined.

In *Public Service Commission of New York v. FPC*,[144] the appellant contended that the FPC lacked authority to issue temporary certificates of public convenience and necessity to independent producers in cases of drainage, threatened loss of lease, flaring, or economic hardship from payment of shut-in royalties.[145] Since the FPC could no longer refuse to exercise jurisdiction over independent producers,[146] the D.C. Circuit reasoned that the Commission had appropriately readjusted its administrative process in developing a procedure for independent producer certificates.[147]

In light of these considerations, the court interpreted section 16 in the following manner:

> While the Natural Gas Act is a statute and is not to be construed as a "constitution," nevertheless the problems placed under Commission administration, with consequent Commission responsibilities, call upon the courts to give the Act a scope reasonably necessary to permit the agency to perform its tasks consistently with the provisions and purposes of the legislation. The broad grant of implementing authority conferred by Sec-

141. *See supra* notes 84–89 and accompanying text.
142. *See supra* note 139 and accompanying text.
143. *See supra* text accompanying notes 133–34.
144. 327 F.2d 893 (D.C. Cir. 1964).
145. *Id.* at 895.
146. *See supra* note 4 and accompanying text.
147. 327 F.2d at 896.

> tion 16 is not confined to procedural regulations, [but] demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation.[148]

The Supreme Court embraced a similar view of Commission authority in *Permian Basin Area Rate Cases*.[149] After its jurisdiction was expanded to include independent producers,[150] the Commission continued to inquire into individual production costs in determining whether a producer's prices were just and reasonable.[151] When this technique proved unduly laborious,[152] the Commission announced it would institute proceedings to determine maximum producer rates for each of the country's major producing areas.[153] Pursuant to this policy, the FPC devised two area maximum prices for all natural gas produced in the Permian Basin.[154]

The Supreme Court held that the Commission possessed authority to institute a system of area rate regulation.[155] Although the Court did not specifically base the authority for this action upon section 16, its interpretation of the Commission's general powers illustrates how section 16 should be interpreted: "The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods. . . . '[C]onsiderations of feasibility and practicality are certainly germane' to the issues before us."[156]

In *Mobil Oil Corp. v. FPC*,[157] the D.C. Circuit found that the Commission's contemplated action fell beyond the scope of section 16 authority. Through informal rulemaking procedures, the FPC had established nationwide rates for the transportation of

148. *Id.* at 896–97.

149. 390 U.S. 747 (1968).

150. *See supra* note 4 and accompanying text.

151. 390 U.S. at 756.

152. The Court noted that "the Commission's regulation of the producers' sales became increasingly laborious, until, in 1960, it was described as the 'outstanding example in the federal government of the breakdown of the administrative process.' " *Id.* at 758.

153. *Id.*

154. *Id.* at 759–60.

155. *Id.* at 768–90.

156. *Id.* at 777 (quoting Bowles v. Willingham, 321 U.S. 503, 517 (1944)).

157. 483 F.2d 1238 (D.C. Cir. 1973).

liquid and liquifiable hydrocarbons.[158] Mobil argued that the Commission's ratemaking was defective since both the Act and the Administrative Procedure Act (APA) require rates to be promulgated through formal rulemaking procedures.[159] The FPC contended that its section 16 authority allowed it to follow the informal rulemaking requirements of the APA—public notice and the opportunity to comment.[160] It asserted that, in light of the burden imposed by more elaborate procedures, informal proceedings were "necessary and appropriate."[161]

The D.C. Circuit held that section 16 does not provide authority for employing informal procedures in setting rates.[162] The court elaborated:

> The substantive provisions of the Act contemplate certain procedures, as incident to the functions provided. The range of permissible procedures must be derived from these sections . . . and the functions they describe. Section 16 . . . cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.[163]

The holdings in *Mobil*, *Permian Basin*, and *Public Service Commission* all rely on the same underlying notion of necessity that is central to an analysis of authority for in kind abandonment refunds. In *Public Service Commission*, it was absolutely necessary for the FPC to establish new criteria for temporary certificates to effectively regulate independent producers.[164] In *Permian Basin*, potential collapse of the regulatory system made it equally crucial for the Commission to establish area rate ceilings.[165] In *Mobil*, however, the FPC invoked section 16 to engage in informal rulemaking, not because of necessity but merely to make more *convenient* the performance of its statutory duties.[166] Indeed, informal rulemaking was inappropriate as well, since the Act specifies procedures to be followed for establishing rates.

Use of in kind refunds to remedy illegal abandonments more closely resembles the *Mobil* situation. The availability of other remedies to compensate victims and deter future violators in the

158. *Id.* at 1243–45.
159. *Id.* at 1246, 1249.
160. *Id.* at 1249.
161. *Id.* at 1255.
162. *Id.* at 1257.
163. *Id.*
164. *See supra* notes 144–48 and accompanying text.
165. *See supra* notes 149–56 and accompanying text.
166. *See supra* notes 157–63 and accompanying text.

abandonment context[167] indicates that the degree of necessity involved in *Public Service Commission* and *Permian Basin* is not present. Therefore, the latter two cases do not lend support to the use of in kind refunds for illegal abandonments.

## V. ALTERNATIVE REMEDIES AVAILABLE TO THE COMMISSION

The availability of other means to enforce the Act's provisions makes in kind refunds unnecessary in remedying illegal abandonments.[168] Section 20(a)[169] allows the Commission to bring an action for injunctive relief in federal district court when it believes that a regulated party is violating or is about to violate the Act.[170] This remedy would be useful in preventing illegal abandonments.[171]

Substantial civil and criminal sanctions are available to the Commission under section 21.[172] The courts can impose criminal penalties of up to $5000 and two years imprisonment, and civil fines of up to $500 for each day the offense continues.[173] The statutory provisions for civil and criminal sanctions require that the acts or omissions leading to the violation be willfully and knowingly committed.[174] Thus, unintentional violations like those in *Cox* and *McCombs* may not be covered by these provisions. Even so, the Commission can still seek injunctive relief under section 20.[175]

Cash refunds like those ordered in *Gulf Oil* are also adequate

167. *See infra* notes 168-76 and accompanying text.

168. *See generally* Marston & Hollis, *supra* note 22, at 1106-25.

169. 15 U.S.C. § 717s(a) (1976).

170. *Id.* This section provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.

171. In rejecting the use of in kind refunds, the *McCombs* court noted the availability of this remedy. 705 F.2d at 1183. Nevertheless, the Commission has not often employed this enforcement procedure, and commentators have noted several drawbacks to it: "(1) the cumbersome and time-consuming factfinding procedures utilized in cases where violations of the law were suspected or apparent; (2) the lack of a realistic and viable deterrent to violations; and (3) the inadequacy of the FPC institutional framework." Marston & Hollis, *supra* note 22, at 1110-11.

172. 15 U.S.C. § 717t (1976).

173. *Id.*

174. *Id.*

175. *See supra* notes 168-69 and accompanying text.

to remedy illegal abandonments.[176] This type of order forces the violator to return its wrongful gain and makes the injured customer whole. Producers who calculate the risks and choose to abandon, however, may not be deterred by monetary refunds. While the threat of in kind refunds may provide greater deterrence than monetary refunds alone, the most effective weapon is a combination of criminal and civil sanctions and cash refunds. This combined remedy not only redresses the customer's injuries but also deters future intentional violations by holding out the prospect of fines and jail terms.

The availability of these remedies makes in kind paybacks unnecessary and inappropriate in all abandonment scenarios. For knowing and willful violators, the prospect of criminal and civil penalties together with cash refunds makes in kind restitution unnecessary. Moreover, in kind refunds will not deter violators with access to reserves of uncommitted gas. Finally, if the violator has not acted willfully, in kind refunds impose a burden out of proportion to culpability, while cash refunds suffice to redress the customer's loss.

## VI. CONCLUSION

Section 16 of the Natural Gas Act requires simply that Commission orders, regulations, and rules be "necessary or appropriate."[177] Federal courts, however, have placed undue stress on necessity; they should employ a necessary *or* appropriate standard which adequately considers both consumer and producer interests.[178] The decisions upholding cash refunds for abandonments and excessive rates, and in kind refunds for curtailments, do not justify in kind refunds in the abandonment context.[179] Moreover, in kind refunds are not supported by cases upholding section 16 authority for other Commission actions since the requisite degree of necessity does not exist in the abandonment context.[180] Finally, in kind refunds for abandonments do not meet the necessary or appropriate test because viable alternative remedies are available to the Commission.[181] Thus, the conflict between the Tenth and

176. *See supra* notes 79-83 and accompanying text.
177. *See supra* note 12.
178. *See supra* notes 57-67 and accompanying text.
179. *See supra* notes 71-102 and accompanying text.
180. *See supra* notes 144-67 and accompanying text.
181. *See supra* notes 168-76 and accompanying text.

Fifth Circuits[182] should be resolved in favor of the Tenth Circuit's position, so that in kind refunds for illegal abandonments are deemed an invalid exercise of authority under section 16.

ROBERT D. HORVATH, JR.

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182. *See supra* notes 103–37 and accompanying text.