

and examine witnesses in a mandatory injunction proceeding, and the rejection of a request for an evidentiary hearing on objections to a compromise settlement can all significantly affect the presentation of the charging party's appeal. Professor Jaffe notes that the NLRA "is almost alone in committing to the sole enforcement of a public agency a policy which is universally recognized as vindicating individual and group interests."⁴⁶ The realization that victims of unfair labor practices are largely dependent upon the adequacy of Board proceedings for the protection of their interests demands that courts closely examine any circumscription of procedural rights which would reduce the one safeguard available to the charging party—judicial review of administrative actions.

V. REFUND POWERS

FPC REFUND POWERS UNDER THE NATURAL GAS ACT

The "refund power" is the equitable power of a regulatory agency to order the return of rate charges improperly assessed.¹ The most retroactive and effective application of the refund power is the "reparation order," defined as the assessment of damages caused by the unreasonableness of past rates.² Although some federal agencies have

C.F.R. § 101.4 (1971); AMERICAN BAR ASSOCIATION, SECTION OF LABOR RELATIONS, THE DEVELOPING LABOR LAW 833 (1971); 1 J. JENKINS, LABOR LAW § 2.53, at 135 (1968). The charging party is expected to cooperate with the Board officer, but may participate in the investigation only to the extent of furnishing facts and informally presenting his theories of applicable law. DEVELOPING LABOR LAW, *supra*, at 833-34. If the investigating officer feels that the charge is without merit he may formally refuse to issue a complaint. 29 C.F.R. § 101.6 (1971); DEVELOPING LABOR LAW, *supra*, at 834; *see* 29 C.F.R. § 102.19 (1971). Although this refusal is appealable to the General Counsel, 29 C.F.R. §§ 101.6, 102.19 (1971), DEVELOPING LABOR LAW, *supra*, at 834, if the determination of the investigating officer is affirmed, the charging party has no further avenue of appeal. *Contractors' Ass'n v. NLRB*, 295 F.2d 526 (3d Cir. 1961), *cert. denied*, 369 U.S. 813 (1962); J. JENKINS, *supra*; DEVELOPING LABOR LAW, *supra*, at 834.

46. Jaffe, *supra* note 2, at 726.

1. The refund power is effectuated through use of the "refund order," which may be fashioned in a variety of forms. One common use, for example, is the return of a portion of increased rate charges which are allowed to take effect pending final administrative approval. *See Note, Use of the Refund Device in Rate Regulation*, 63 HARV. L. REV. 1023, 1024 (1950); notes 38-39 *infra* and accompanying text.

2. *See Clark, Protection of the Consumer Under the Natural Gas Act—Refunds and Reparations*, 14 GEO. WASH. L. REV. 261, 270 (1945). This broad definition of "reparation"

been expressly granted power to award damages and reparations,³ the Federal Power Commission was implicitly denied any such broad retroactive rate-making powers under the Natural Gas and Federal Power Acts.⁴ For many years, this prohibition against FPC reparation power was given a broad construction. Consequently, the ability of the FPC to effectively police the pricing of interstate gas and electric power was seriously restricted.

Expansion of Federal Jurisdiction and Lagging Response of FPC Rate-Making Machinery

Under the Natural Gas Act, the refund power could theoretically be used by the FPC in three major rate regulatory situations: rate-change proceedings,⁵ rate-fixing proceedings,⁶ and permanent certification proceedings.⁷ The FPC has expressly been granted a refund

is used, for example, under Part I of the Interstate Commerce Act, note 3 *infra*, granting the ICC the power to regulate railroad and pipeline carriers. See Meiklejohn, *Reparations and Overcharges Under Part II Under the Interstate Commerce Act*, 19 AD. L. REV. 203, 210 (1967). A narrowed definition, however, has been legislatively provided in Part II of that Act for motor carrier regulation. See Meiklejohn, *supra*, at 210.

3. Department of Agriculture, under the Packers and Stockyards Act of 1921, § 309(e), 7 U.S.C. § 210(e) (1970); see Bowman, *Reparations Claims Under the Packers and Stockyards Act*, 22 FED. B.J. 92 (1962); Department of Agriculture, under the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(a) (1970); see Endres, *Reparations Procedure Under the Perishable Agricultural Commodities Act of 1930*, 28 GEO. WASH. L. REV. 719 (1960); FCC, under the Communications Act of 1934, § 209, 47 U.S.C. § 209 (1970); ICC, under the Interstate Commerce Act Part I, § 16(1), 49 U.S.C. § 16(1) (1970) (against railroad and oil pipeline carriers); and under the Interstate Commerce Act Part III, § 308(d), 49 U.S.C. § 908(d) (1970) (against water carriers).

Traditionally, where administrative imposition of reparation awards is expressly authorized by statute, retroactive recovery has been allowed when the original rate was set privately, *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F.2d 443, 445 (5th Cir. 1931), but denied when the improper rate was fixed or approved formally by a commission. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 389 (1932); *Texas Co. v. Chicago & Alton R. Co.*, 117 F.2d 210, 215 (7th Cir. 1940); see Hardman, *Administrative Finality in Claims for Overcharges*, 51 W. VA. L.Q. 77, 79-80, 105 (1948).

4. See notes 24, 32-33 *infra* and accompanying text. The Natural Gas Act, 15 U.S.C. § 717-17w (1970), applies to the transportation and sale for resale of natural gas in interstate commerce. *Id.* § 717(b). The analogous regulatory scheme in the Federal Power Act is Part II of that Act, 16 U.S.C. §§ 824-28c (1970), which extends to the transmission and wholesale sale of electric energy in interstate commerce. *Id.* § 824(b). Part I of the Federal Power Act, *id.* §§ 791a-823, is the old Federal Water Power Act, ch. 285, 41 Stat. 1077 (1920), and applies to the licensing of hydro-electric facilities along waters which are within congressional jurisdiction. 16 U.S.C. § 797(e) (1970).

5. Natural Gas Act § 4, 15 U.S.C. § 717c (1970).

6. *Id.* § 5, 15 U.S.C. § 717d.

7. *Id.* § 7, 15 U.S.C. § 717f.

power for use in rate-change proceedings, but the Natural Gas Act is silent with regard to refund powers in the latter two situations. In the rate-change situation, any jurisdictional seller⁸ who desires to raise his rates is required by section 4 of the Act to file with the FPC a 30-day notice of his proposed rate change. The proposed rate becomes subject to an expressly granted section 4 refund power should the new rate be given effect by the FPC and later found to be excessive.⁹ In the rate-fixing situation, a natural gas seller might be operating with costs low enough to justify an FPC reduction of rates. To accomplish this reduction, the FPC is empowered under section 5 of the Act to initiate formal proceedings, upon its own motion or the complaint of a private party, investigate the existing rates of jurisdictional sellers, and establish a "just and reasonable" rate to be charged in the future.¹⁰ Since any rate fixed by the FPC is expressly limited by section 5 to prospective operation, the courts have by implication denied the Commission retroactive refund power in this formal rate-fixing situation.¹¹

The above rate-change and rate-fixing situations apply to all jurisdictional parties, which includes those sellers who are already operating under an FPC certificate of public convenience and necessity as required by the Natural Gas Act.¹² The third potential rate-setting situation, the section 7 permanent certification proceeding,¹³ applies, on the other hand, to sellers who are temporarily certified or uncertified. Because of its increasing importance the permanent certificate proceeding will be the major focus of this section. Expansive FPC interpretation of its own jurisdiction imposes the obligation to obtain certification upon many previously uncertified sellers. These FPC jurisdictional decisions, however, are often appealed. In such cases, many affected sellers await a final judicial resolution of the jurisdictional issue before seeking certification,¹⁴ and in the interim continue

8. A jurisdictional seller is one who engages in "the transportation of natural gas in interstate commerce [or] . . . the sale in interstate commerce of natural gas for resale for ultimate public consumption . . ." The Act does not apply "to the local distribution of . . . or to the production or gathering of natural gas." 15 U.S.C. § 717(b) (1970). See note 17 *infra*.

9. Natural Gas Act § 4, 15 U.S.C. § 717c(d), (e).

10. *Id.* § 5, 15 U.S.C. § 717d(a).

11. See note 27 *infra* and accompanying text.

12. Natural Gas Act § 7, 15 U.S.C. § 717f(c) (1970).

13. *Id.*, 15 U.S.C. § 717f.

14. See, e.g., *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334 (D.C. Cir. 1971), where "[v]irtually all of the companies involved in the approximately one thousand natural gas sales contracts over which the Commission had asserted jurisdiction in 1961 waited until after the

collecting unreviewed and unregulated rate charges established by private contract. Due to long delays often encountered in appealing FPC jurisdictional decisions,¹⁵ it might be many years before certification is voluntarily sought by these jurisdictional sellers or forcefully initiated by the FPC. Furthermore, since it may be time consuming to set formal section 5 rate-fixing machinery in motion,¹⁶ it might be several years more before these new sellers are finally subjected to rate review and price control. To avoid any permanent injury to the ultimate consumer, it becomes imperative, therefore, for the FPC to submit such sellers to prospective price control at the time of permanent certification and to require retroactive refund of excessive charges collected from the time jurisdictional status originally attached. Prior to the developments discussed herein, however, the FPC failed to use its certification powers as a means of either prospective or retroactive rate control.

In 1954 the Supreme Court approved the assertion of FPC jurisdiction over the wholesale interstate transactions of independent natural gas producers.¹⁷ The subsequent increase in the number of sellers within the FPC's jurisdiction caused such extensive delays in normal section 5 rate-fixing proceedings that the FPC's failure to assert rate-regulatory controls in certification proceedings became increasingly

Supreme Court decision in 1965 [California v. Lo-Vaca Gathering Co., see note 83 *infra*] to apply to the Commission for certification." *Id.* at 1335.

15. Compare, e.g., Lo-Vaca Gathering Co., 26 F.P.C. 606 (1961) with California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965) (4-year appeal period).

16. See notes 52-53 *infra* and accompanying text.

17. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 677 (1954). An "independent" natural gas producer is a party who produces and sells natural gas for resale in interstate commerce but does not engage in the interstate transmission of gas and is not affiliated with any interstate natural gas pipeline company. *Id.* at 675; 18 C.F.R. § 154.91(a) (1971). Before the Phillips decision, the wholesale interstate transactions of independent producers were believed to be within the "production or gathering" exception to Natural Gas Act jurisdiction, 15 U.S.C. § 717(b) (1970). Many commentators have, in fact, argued that the Phillips decision was wrong and that Congress did not intend to regulate these transactions. See Flittie & Armour, *The Natural Gas Experience—A Study in Regulatory Aggression and Congressional Failure to Control the Legislative Process*, 19 Sw. L.J. 448, 453 (1965); Swift, *Federal Power Commission Regulation of Interstate Sales by Independent Natural Gas Producers*, 10 S. TEX. L.J. 183, 189-90 (1968); Note, *Legislative History of the Natural Gas Act*, 44 GEO. L.J. 695, 721-22 (1956).

The interstate natural gas industry consists also of pipeline companies and wholesale distributors. The bulk of the developments discussed in this section have evolved from FPC regulation of producers, but their impact is felt by the other members of the industry. See notes 114-15 *infra* and accompanying text.

detrimental to its ability to protect the public from excessive rates.¹⁸ To cope with this problem, the Supreme Court in 1959¹⁹ tapped the FPC's "certificate conditioning" provision as a new source of prospective power for regulating producers' rates. During the subsequent decade, the FPC's exploitation of this power led to the assertion of implied, retroactive refund power in the FPC under the Natural Gas Act,²⁰ and culminated in two 1971 cases, *Mesa Petroleum Co. v. FPC*²¹ and *Plaquemines Oil & Gas Co. v. FPC*.²² The development of this new source of power has expanded the reach of the FPC refund power and, inevitably, narrowed the "no reparations" restriction imposed on the FPC by the original enactments of the Natural Gas and Federal Power Acts. It is now settled that in spite of the lack of express reparation power, the FPC has the power to order refunds for excessive charges and other rate-based damages caused by the statutory violations of a seller occurring between the time he is put on notice of his jurisdictional status and the time of final, permanent certification. This section will analyze the evolution and impact of these recent developments under the Natural Gas Act.²³

Presumption Against Implied Retroactive Rate-Making Power

The early failure of the FPC to fashion retroactive refund powers can be attributed to consistent court holdings that the FPC had no general reparation powers, express or implied, under either the Natural Gas Act²⁴ or the Federal Power Act.²⁵ These decisions can be rationalized by applying three canons of statutory construction to the legislative history of both acts. The first canon is that there is an "almost conclusive presumption against [administrative] power to

18. See notes 52-54 *infra* and accompanying text.

19. *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 391-92 (1959).

20. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968); *United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223 (1965); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (10th Cir. 1968).

21. 441 F.2d 182 (5th Cir. 1971).

22. 450 F.2d 1334 (D.C. Cir. 1971).

23. See note 127 *infra* for a discussion of the possibility of extending these developments to activities regulated by the FPC under the Federal Power Act.

24. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223, 229 (1965); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *State Corp. Comm'n v. FPC*, 215 F.2d 176, 184 (8th Cir. 1954); *Willmut Gas & Oil Co. v. United Gas Pipe Line Co.*, 12 F.P.C. 132, 146 (1953); see *Administrative Law—Reparations Under the Natural Gas Act*, 29 Miss. L.J. 331, 332 (1958).

25. *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 260 (1951).

take retroactive action unless Congress plainly specifies such power."²⁶ Thus, if agency rate-fixing orders are expressly limited to prospective operation, it should not be *implied* that the agency is also authorized to adjust rates and charges retroactively from the date of its final order.²⁷ Second, where Congress has consistently made express the delegation of a particular power in other statutes, its silence in any analogous act is strong evidence that it did not intend to grant that power.²⁸ Third, the deletion of express provisions prior to a bill's enactment must be given weight in order to avoid "reading into the Act by implication what the Legislature seemingly rejected."²⁹

Applying these principles to the legislative history of both FPC statutes, one finds that the FPC is empowered after its formal section 5 rate hearings to fix a just and reasonable rate "to be *thereafter* observed and in force."³⁰ Furthermore, whereas several analogous statutes for regulation of industries in interstate commerce expressly grant administrative power to make damage and reparation orders,³¹ the FPC acts are silent in this regard. Finally, while a specific agency reparations provision was carried over from the Interstate Commerce Act and placed in the original drafts of both the Natural Gas and Federal Power Acts,³² objections were raised in the hearings and the

26. *Transcontinental & W. Air, Inc. v. CAB*, 169 F.2d 893, 894 (D.C. Cir. 1948), *aff'd*, 336 U.S. 601 (1949); see Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371, 395-97 (1967).

27. See *Public Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 464 (1943); *Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 62 Cal. 2d 634, 650-52, 401 P.2d 353, 363 (1965); *Michigan Bell Tel. Co. v. Michigan Pub. Serv. Comm'n*, 315 Mich. 533, 545-47, 24 N.W.2d 200, 205 (1946); cf. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

28. *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471 (1959); *Alcoa S.S. Co. v. Federal Maritime Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965); *Alaska Airlines, Inc. v. CAB*, 257 F.2d 229, 230 (D.C. Cir.), *cert. denied*, 358 U.S. 881 (1958).

29. *Alaska v. American Can Co.*, 358 U.S. 224, 227 (1959); *accord*, *Commonwealth v. Benoit*, 347 Mass. 1, 6-7, 196 N.E.2d 228, 232 (1964); cf. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-7 (1941). *But see* *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947).

30. *Natural Gas Act* § 5(a), 15 U.S.C. § 717d(a) (1970) (emphasis added); *Federal Power Act* § 206(a), 16 U.S.C. § 824e(a) (1970) (emphasis added).

31. See note 3 *supra*.

32. The *Natural Gas and Federal Power Acts* were drafted originally as Titles III and II, respectively, of the *Public Utility Act of 1935*, H.R. 5423, 74th Cong., 1st Sess. *Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 43, 57 (1935). The original reparations provision in the *Natural Gas Act* provided that:

When complaint has been made to the Commission concerning any rate or charge for any service performed by any distributor, and the Commission has found after investigation that the distributor has charged an unreasonable, excessive, or discriminatory amount for such service in violation of any provision of this title, the Commission may

provision was deleted from both acts during committee redrafting.³³ Under both the Natural Gas and Federal Power Acts, therefore, the legislative history provides a strong presumption against implying FPC authority to award reparations or fix rates retroactively from the date of its final rate order.

The underlying rationale for the deletion of express reparation powers from the Natural Gas and Federal Power Acts was a perceived need for a willingness to rely on arms-length bargaining and private contracting for the establishment of initial rates in the interstate natural gas and electric utility industries.³⁴ Recognizing a need “for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permit[ted] the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts.”³⁵ This was not deemed an appropriate regulatory area for agency reparation power. During the congressional hearings, for example, the FPC reparation provisions were assailed on the grounds that it would be unreasonable for a wholesale buyer to receive services at a bargained-for rate and later be allowed to complain, retroactively, of the rate’s unreasonableness.³⁶ As stated in the Federal Power Act committee report, the agency reparation provisions were “appropriate sections for a State utility law [where the buyer is the individual consumer], but the committee does not consider them applicable to one governing wholesale transactions.”³⁷

order that the distributor make due reparation to the complainant, thereunder, with interest from the date of collection. No such order shall be issued unless the complaint is filed with the Commission within two years from the date of payment. H.R. 5423, *supra* § 314; *see 1935 Hearings, supra* at 47-48.

The original Federal Power Act contained the identical provision except the words “public utility” were substituted for “distributor.” H.R. 5423, *supra* § 213; *see 1935 Hearings, supra*, at 36.

33. S. REP. NO. 621, 74th Cong., 1st Sess. 20 (1935) (deletion from Federal Power Act).

34. Formulators of the Natural Gas Act “recognize[d] the need for private contracts of varying terms,” *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 345 (1956), and sought to preserve “the ‘integrity’ of private contractual arrangements.” *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103, 114 (1958).

35. *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 339 (1956).

36. *See 1935 Hearings, supra* note 32, at 1684-85. This argument was introduced originally in connection with the Federal Power Act by the General Solicitor of the National Association of Railroad and Utility Commissioners. *Id.* It was incorporated by reference when identical amendments were proposed under the Natural Gas Act. *Id.* at 1690.

37. S. REP. NO. 621, 74th Cong., 1st Sess. 20 (1935). This committee report has been given weight by courts in construing a lack of FPC reparation power under the Natural Gas Act. *See, e.g., Hope Natural Gas Co. v. FPC*, 134 F.2d 287, 310 (4th Cir. 1943), *rev’d on other grounds*, 320 U.S. 591 (1944).

Use of the Express Section 4 Refund Power

Despite the clear legislative intent to limit the retroactive rate-making powers of the FPC by withholding the power to assess reparations, the Commission began to fortify its arsenal of refund remedies through use of the limited refund power expressly granted in the rate-change provisions of section 4 of the Natural Gas Act.³⁸ Pursuant to this section, after any proposed rate change has been filed with the FPC, the Commission may suspend the increased rate for five months and hold a hearing on its lawfulness. If after five months no determination has been made, the new rate takes effect automatically, subject to a refund order should the final decision determine any portion of the rate change to be unjustified.³⁹ The issuance of such a quasi-retroactive refund order is not inconsistent with the prohibition against FPC reparation power. Rather, the section 4 refund is merely an administrative technique for allowing a proposed rate to take effect without the risk of permanent damage to the public in cases where FPC review is delayed.

Although its express refund power is limited in scope, the FPC has exploited it as a flexible and equitable means of fulfilling the Act's underlying purpose of protecting "consumers against exploitation at the hands of natural gas companies."⁴⁰ In *FPC v. Interstate Natural Gas Co.*,⁴¹ for example, the Supreme Court established the authority of a reviewing court of appeals to "flow through" to the ultimate consumer the rate-increase refunds collected when an FPC rate order is stayed pending judicial review.⁴² It is now settled that the Commission also has this flow-through power for section 4 refunds.⁴³ In fact,

38. 15 U.S.C. § 717c(e) (1970). Part II of the Federal Power Act has an identical provision, 16 U.S.C. § 824d(e) (1970).

39. 15 U.S.C. § 717c(e) (1970).

40. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *accord*, *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 402 (1965); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962); *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954); *FPC v. Interstate Natural Gas Co.*, 336 U.S. 577, 581 (1949).

41. 336 U.S. 577 (1949).

42. *Id.* at 584; *see* Flittie & Armour, *supra* note 17, at 499-501 (1965). Courts have similarly "flowed through" refund benefits under the Federal Power Act, recognizing that the intended beneficiary of rate reductions under that act is also the ultimate consumer. *Pennsylvania Water & Power Co. v. FPC*, 203 F.2d 219, 222 (D.C. Cir. 1953). *See generally* *Utility Rate Refunds in Federal Courts*, 6 STAN. L. REV. 492-512 (1954).

43. *Texas E. Transmission Corp. v. FPC*, 414 F.2d 344, 347-49 (5th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970).

the FPC can flow through refunds even when the burden of the unlawful rate increase has been absorbed by the immediate buyer and not passed on to the consumer, as long as the buyer is given an opportunity to show his entitlement to the refunds.⁴⁴

Expanding Role of Certificate-Conditioning Power

An active arsenal of retroactive refund powers was originally deemed inappropriate for effective FPC regulation of the natural gas industry. This legislative intent became somewhat outmoded, however, by developments in the late 1950's which led to an aggressive use by the FPC of its express statutory power to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require"⁴⁵—the "certificate-conditioning" power. This power is expressly granted by the section 7 certification provisions of the Natural Gas Act, which require that jurisdictional facilities be operated or extended only after FPC issuance of a certificate of public convenience and necessity⁴⁶ and that no jurisdictional facilities or services be abandoned without prior FPC approval.⁴⁷ The legislative history of the certificate-conditioning provision, which was added to the Act in a 1942 amendment,⁴⁸ indicates that Congress envisioned its use for FPC regulation of many general economic and operational factors such as a seller's financial stability, adequacy of gas reserves and adequacy of proposed service.⁴⁹ But Congress was largely unaware of the potential rate-regulating uses of the certificate-condi-

44. 414 F.2d at 348. See *Texas Gas Transmission Corp. v. FPC*, 441 F.2d 1392, 1393-94 (6th Cir. 1971). Another flexible use of the section 4 refund power is demonstrated by the FPC's authority to order interim rate reductions and refunds during section 4 rate-change proceedings when a seller's overall rate of return is found excessive and the decision allocating that rate of return among separate zones of operation is deferred. See *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 146-47 (1962). The broad reach of the consumer-oriented purpose of the Natural Gas Act is demonstrated further by recent decisions allowing the FPC to require natural gas companies to flow through to consumers, in the form of reduced rates, the tax benefits resulting from liberalized depreciation treatment. *Chicago v. FPC*, 385 F.2d 629, 634 (D.C. Cir. 1967); *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318, 323 (5th Cir. 1966).

45. Natural Gas Act § 7(e), 15 U.S.C. § 717f(e) (1970). There are no FPC certification powers under the analogous interstate wholesale regulatory scheme of Part II of the Federal Power Act. S. REP. NO. 621, 74th Cong., 1st Sess. 20 (1935); 79 CONG. REC. 8431 (1935) (remarks of Senator Wheeler).

46. 15 U.S.C. § 717f(c) (1970).

47. *Id.* § f(b).

48. Act of Feb. 7, 1942, ch. 49, 56 Stat. 83.

49. See H. REP. NO. 1290, 77th Cong., 1st Sess. 3 (1941).

tioning power.⁵⁰ This potential source of rate regulation power remained untapped for well over a decade.

The 1954 Supreme Court decision in *Phillips Petroleum Co. v. Wisconsin*⁵¹ brought a wave of independent natural gas producers within the FPC's jurisdiction, causing "inordinate delay" in the formal rate-fixing proceedings under section 5 of the Act and "unprecedented regulatory problems of great complexity."⁵² As warned by the Supreme Court, "[t]his long delay, without the protection of refund, as is possible in a section 4 [rate-change] proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers."⁵³ The FPC, however, originally took a narrow view of its certification power and field prices began to soar as producers set rates without initial review.⁵⁴

The Supreme Court came to the rescue in 1959 by holding in *Atlantic Refining Co. v. Public Service Commission*⁵⁵ (*CATCO*) that the FPC should use its certificate-conditioning power to regulate prospectively the initial rates of certified producers' sales "[w]here the proposed price is not in keeping with the public interest"⁵⁶ The FPC implemented the *CATCO* decision in producer certification proceedings by conditioning the issuance of permanent certificates upon the producer's use of a price which was "in-line"⁵⁷ with gas prices under contemporaneous certificates already in force in the area of the proposed sale.⁵⁸

50. *Administrative Regulation by Conditions in Certificates of Public Convenience and Necessity*, 21 STAN. L. REV. 188, 190 (1968).

51. 347 U.S. 672 (1954); see note 17 *supra*.

52. *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 391 (1959); Scott, *Federal Certificate Regulation of Producer Gas Sales: Initial Rates and Related Problems*, 18 SW. L.J. 570, 573 (1964); *Administrative Regulation*, 21 STAN. L. REV., *supra* note 50, at 189-90.

53. 360 U.S. at 390.

54. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 17 (1968); see E. NEUNER, *THE NATURAL GAS INDUSTRY* 281-82 (1960). By 1960 FPC regulation of producers' sales "was described as the outstanding example in the federal government of the breakdown of the administrative process." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968).

55. 360 U.S. 378 (1959). This case is commonly referred to, and will be referred to hereinafter, as *CATCO*, which is derived from the names of the producers involved. Scott, 18 SW. L.J., *supra* note 52, at 574 n.34.

56. 360 U.S. at 391.

57. The "in-line" price is a technical term defined as the price at which "substantial amounts of gas have been certified to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect.'" *United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223, 227 (1965).

58. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 18-19 (1968); Scott, 18 SW. L.J., *supra* note 52, at 638-39; see C.F.R. § 2.56 (1971).

Since the in-line rate was traditionally given effect only prospectively from the date of certificate issuance, it was not used to implement any retroactive rate adjustments. Nevertheless, the *CATCO* decision made both the FPC and the judiciary aware of the potential breadth of the certificate-conditioning power of an agency as implied authority for fashioning new sanctions, especially where needed to avoid breakdowns in the regulatory process.⁵⁹ Used in combination with the FPC's housekeeping power to issue orders and regulations as "necessary or appropriate" to carry out the provisions of its statutes,⁶⁰ it was not long before the certificate-conditioning power became a powerful tool for creating retroactive sanctions in order to enforce compliance with the FPC's regulatory statutes. This retroactive use of the certificate-conditioning power was commissioned in *Niagara Mohawk Power Corp. v. FPC*.⁶¹ In *Niagara Mohawk* a hydroelectric utility had violated the Federal Power Act by failing to file promptly for a license after being put on notice of its jurisdictional status under the Act by virtue of an earlier FPC decision of river navigability. The FPC was held to have the power to respond to this situation by back-dating the issuance of the license and imposing, retroactively, the statutory assessment of license fees and the obligation to establish amortization reserves for excess earnings.⁶² Although

59. See *Administrative Regulation*, 21 STAN. L. REV., *supra* note 50, at 195. "*CATCO* is a *fait accompli* which must be dealt with as a significant amendment of the act." Scott, *supra* note 52, at 649. Early commentators, on the other hand, had viewed the certificate-conditioning power as not being an enlargement of the express statutory authority of the FPC. Wheat, *Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act*, 14 GEO. WASH. L. REV. 194, 214-15 (1945).

60. 15 U.S.C. § 717o (1970); 16 U.S.C. § 825h (1970). The "necessary or appropriate" ("housekeeping") provision has been given a broad construction under both the Natural Gas and Federal Power Acts. "[T]here is no dearth of decisions making clear that [the 'necessary or appropriate' provisions] 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." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967); *accord*, *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 187 (5th Cir. 1971); *Jupiter Corp. v. FPC*, 424 F.2d 783, 791-92 (D.C. Cir. 1969); see *Public Serv. Comm'n v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964). *But see* *Murphy Oil Corp. v. FPC*, 431 F.2d 805 (8th Cir. 1970) (where the Court of Appeals for the Eighth Circuit has given a more narrow construction to the "necessary or appropriate" provision). "[T]he Commission can utilize [the 'necessary or appropriate'] authority to effectuate its orders lawfully entered, but [this provision] is not an enlargement of the specific authority granted the Commission under §§ 4, 5 and 7 of the [Natural Gas] Act." *Id.* at 810.

61. 379 F.2d 153 (D.C. Cir. 1967).

62. *Id.* at 157; see *Bangor Hydro-Elec. Co. v. FPC*, 355 F.2d 13, 14 (1st Cir. 1966); *Central Maine Power Co. v. FPC*, 345 F.2d 875, 876 (1st Cir. 1965).

providing no direct precedent for FPC assertion of refund powers, *Niagara Mohawk* made it clear that the certification-conditioning power could be used to correct *retroactively* a statutory violation.

The certification and licensing developments begun by *CATCO* laid the foundation for FPC assertion of refund power not only by exposing the potential use of the certificate-conditioning provision as an implied source for general FPC retroactive remedies, but also by shifting the regulatory posture of the Natural Gas Act toward a higher degree of rate uniformity and more affirmative FPC price control. The use of in-line price regulation during producer certification proceedings inaugurated a trend towards rate uniformity and has undoubtedly eroded the importance of private bargaining in the establishment of rates for initial natural gas transactions. Having de-emphasized private rate bargaining, these certification developments have thereby undercut a premise upon which retroactive FPC rate-making was legislatively withheld.⁶³ Consequently, the FPC should now be more free than ever to manufacture retroactive refund powers from within its general statutory framework. Moreover, the trend toward rate uniformity seems to be accelerating. The Supreme Court has recently approved the FPC practice of setting maximum "just and reasonable" field rates in section 5 proceedings for an entire area rather than on a case by case basis for each producer.⁶⁴ These area rates can also be used as the initial certification rates for producer sales which are commenced during pendency of the area rate proceedings, as opposed to using the less accurate, less uniform in-line price.⁶⁵ FPC regulations achieve further uniformity by greatly limiting the scope of price-changing provisions which will be allowed in natural gas producer contracts filed for rate change acceptance or certification.⁶⁶ In short, the developments since private contracts were initially espoused⁶⁷ indicate that the natural gas supply "contract and continued operation under it is seldom free from the closest scrutiny and

63. See notes 34-37 *supra* and accompanying text.

64. *In re Permian Basin Area Cases*, 390 U.S. 747, 768-77 (1968). The *Permian* case has brought formal price control to the field market for natural gas. Kitch, *Regulation of the Field Market for Natural Gas by the Federal Power Commission*, 11 J. LAW & ECON., 243 (1968).

65. *In re Permian Basin Area Rate Cases* 390 U.S. 747, 822 n.114 (1968); see *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 39 n.25 (1968); *Hunt Oil Co. v. FPC*, 424 F.2d 982, 986 (5th Cir. 1970).

66. 18 C.F.R. § 154.93 (1971) (rate-change filings); *id.* § 157.25 (certification filings).

67. *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 339, 345 (1956).

regulatory power of the FPC.”⁶⁸ The groundwork for using the certificate-conditioning power as implied authority for FPC refunds was laid, therefore, not only by expanding the use of this power for other general retroactive sanctions, but also by diminishing the need for reliance on private bargaining.

Extension of Certificate-Conditioning Power to Refund Orders

After the Supreme Court in *CATCO* introduced the certificate-conditioning provision as authority for prospective regulation of natural gas producer rates, it was not long before the FPC began to adopt this provision as implied authority for the use of retroactive refund power in certification proceedings. The refund power was initially used to redress the overcharges caused by sellers who operated under certificates which lacked final approval and hence were still subject to the FPC’s certificate-conditioning power. Without purporting to disturb the traditional prohibition against FPC reparation orders, the Supreme Court approved FPC refund orders in two significant cases. In *United Gas Improvement Co. v. Callery Properties, Inc.*⁶⁹ it was held that when an unconditioned permanent certificate is overturned on judicial review the FPC can condition the new permanent certificate upon refund of charges received under the old certificate in excess of the subsequently determined in-line price.⁷⁰ The Court justified its decision on the grounds that “[w]hile the Commission ‘has no power to make reparation orders,’ . . . it is not so restricted where its [certification] order, which never became final, has been overturned by a reviewing court.”⁷¹ Two rationalizations for the decision are presented. First, an agency, like a court, can later undo what has been wrongfully done by virtue of its own original order.⁷² Second, when a petition for rehearing or review is allowed, the seller

68. *Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84, 90 (5th Cir. 1966).

69. 382 U.S. 223 (1965).

70. This power has been subsequently extended to permit the assessment of a refund after an unconditioned permanent certificate is overturned on FPC rehearing. *Skelly Oil Co. v. FPC*, 401 F.2d 726, 729 (10th Cir. 1968).

71. 382 U.S. at 229.

72. *Id.*

73. A “suspect” certificate is one which is still subject to judicial review or FPC rehearing and is, therefore, not “final,” even though it may be permanent. Under the analogous “suspect order” rule, the rates associated with a “suspect” certification order are automatically excluded from consideration in arriving at the local in-line price. Morris, *Recent Independent Producer Certificate Cases: The “Suspect Order” Rule*, 32 GEO. WASH. L. REV. 489, 496 (1964); Scott,

is on notice of the "suspect"⁷³ nature of his rate and "no inequity results" by subjecting him to refund liability.⁷⁴

In *FPC v. Sunray DX Oil Co.*⁷⁵ the Supreme Court held that the FPC can exercise its certificate-conditioning power to require the refund of charges collected under *temporary* certificates⁷⁶ in excess of the finally established in-line price, even where the original temporary certificate had been free of an express refund condition.⁷⁷ The Court reasoned that if the producer-seller's expectations created by a permanent certificate of the type present in *Callery* "may thus be overridden by the public interest, then the surely lesser reliance induced by an 'unconditioned' temporary certificate issued on the producer's own representations should not bar a later refund requirement."⁷⁸ The unreliable, *ex parte* nature of the temporary certificate gives the natural gas producer sufficient notice to justify refund liability.⁷⁹

Development of Additional Refund Powers By "Constructive" Certification

The FPC certificate-conditioning refund power as authorized by the *Callery* and *Sunray* cases was limited in application to the redress of overcharges of parties already operating under a certificate of public convenience and necessity which had not yet become permanent and nonreviewable. The most significant plateau in the evolution of FPC refunds, however, was reached by two recent 1971 cases⁸⁰ which, considered together, have (1) extended the FPC certificate-conditioning refund power to cover not only overcharges, but other

supra note 52, at 653-54; see note 57 *supra*. *Callery* has in essence extended this rule to encompass refund orders. Hence a "suspect" certificate is not only excluded from the calculation of in-line prices, but after *Callery*, the apparent taint in its rate schedule is sufficient reason to justify refund liability also.

74. *Skelly Oil Co. v. FPC*, 401 F.2d 726, 729 (10th Cir. 1968).

75. 391 U.S. 9 (1968).

76. The FPC is empowered to issue temporary certificates "in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . ." 15 U.S.C. § 717f(c) (1970).

77. 391 U.S. at 45; *accord*, *Continental Oil Co. v. FPC*, 378 F.2d 510, 531 (5th Cir. 1967), *cert. denied*, 391 U.S. 917, 918, 919 (1968); *Public Serv. Comm'n v. FPC*, 329 F.2d 242, 250 (D.C. Cir.), *cert. denied*, 377 U.S. 963 (1964).

78. 391 U.S. at 45.

79. See *Continental Oil Co. v. FPC*, 378 F.2d 510, 532 (5th Cir. 1967), *cert. denied*, 391 U.S. 917, 918, 919 (1968).

80. *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334 (D.C. Cir. 1971); *Mesa Petroleum Co. v. FPC*, 441 F.2d 182 (5th Cir. 1971).

rate-based statutory violations; and (2) have applied this power to sellers who have no certificate at all, but who are within FPC jurisdiction and have a duty to obtain a certificate. In essence these sellers are “constructively” certified back to the date of their initial jurisdictional status and then brought within the purview of the *Callery* and *Sunray* doctrines.

In *Mesa Petroleum Co. v. FPC*⁸¹ the Court of Appeals for the Fifth Circuit allowed the FPC to order the refund of overcharges and the payment of abandonment damages by a producer-seller who had failed to file for a certificate and had illegally abandoned a jurisdictional transaction in violation of the Natural Gas Act. A natural gas producer had been placed on notice of his jurisdictional status when the FPC asserted jurisdiction over an identical sales transaction.⁸² Instead of submitting to an FPC in-line rate review by filing for a certificate, the producer continued to operate without certification and waited for a Supreme Court determination of the highly questionable jurisdictional issue. Four years later the Supreme Court in *California v. Lo-Vaca Gathering Co.*⁸³ affirmed the FPC’s assertion of jurisdiction, and the producer immediately abandoned the transaction without FPC approval. Subsequently, the FPC denied the seller’s request for abandonment approval and ordered the seller to take a certificate for the abandoned transaction.⁸⁴ The Court of Appeals for the Fifth Circuit held that the Commission was empowered to condition the issuance of the “mandatory” certificate on (1) payment of refunds for charges collected in excess of a proper in-line price from the time the seller had originally been on notice of its jurisdictional status, and (2) payment for abandonment damages incurred by the buyer in obtaining more expensive replacement gas.⁸⁵

The result in *Mesa Petroleum* appears to conflict with the traditional ban against FPC reparation power⁸⁶ and the presumption

81. 441 F.2d 182 (5th Cir. 1971).

82. Hugoton Production Company, the original producer-seller in *Mesa Petroleum*, owned gas leases in Kansas and contracted with its parent corporation for the sale of natural gas to be commingled in buyer’s interstate pipeline but to be restricted in use to buyer’s compressor stations within the same state. *Id.* at 183-84. The FPC asserted jurisdiction over this type of sale in *Lo-Vaca Gathering Co.*, 26 F.P.C. 606 (1961).

83. 379 U.S. 366, 368-70 (1965).

84. Hugoton Production Co., 41 F.P.C. 490, 501, 80 P.U.R.3d 170, 179 (1969).

85. 441 F.2d at 186-89.

86. See note 24 *supra* and accompanying text.

against FPC retroactive rate-making power⁸⁷ since the FPC was allowed not only to order a producer to obtain a certificate, but to condition the "acceptance" of that certificate upon retroactive refund of overcharges assessed and damages caused during a time when the jurisdictional nature of the sale was in serious doubt.⁸⁸ The court seemed to be aware of the lack of FPC reparation power⁸⁹ but it failed to draw or develop a clear line of distinction between lawful "refund" powers and unlawful "reparations." There are three considerations, however, which lend support to the outcome in *Mesa Petroleum* and help distinguish those situations in which a retroactive remedy will be deemed an authorized "refund" and not a forbidden "reparation."

First, the underlying consumer-benefit purpose of the Act justifies the equitable utilization of the certificate-conditioning powers of the Commission. In using its certification powers equitably, the FPC should be able to place the consumer in as good a position as if the supplier had complied with the Act.⁹⁰ If the seller in *Mesa Petroleum* had applied for a certificate immediately upon the FPC's assertion of jurisdiction, its rates would have been quickly established at the in-line level and there would have been no excessive charges nor abandonment damages. Having violated the Act by failing to file for certification and by abandonment, however, the seller caused prolonged injury to his immediate buyer, much of which was undoubtedly passed on to the consumer. Since it is now settled that FPC refunds can be flowed through to the consumer,⁹¹ the certificate-conditioning refund

87. See notes 30-33 *supra* and accompanying text.

88. The FPC's jurisdictional decision, see note 82 *supra*, had first been reversed by the Court of Appeals for the Fifth Circuit. *Lo-Vaca Gathering Co. v. FPC*, 323 F.2d 190 (5th Cir. 1963), *rev'd*, 379 U.S. 366 (1965). Because the jurisdictional issue was unclear until the final Supreme Court resolution, the FPC took a reasonably soft stand in all cases prior to *Hugoton Production Co.*, by agreeing to settle for refunds of only 62.5% of excess charges collected during jurisdictional periods (the "Mobil" formula). See *George Despot et al.*, 39 F.P.C. 232-37, 237-40, 472-75, 555-59 (1968); 38 F.P.C. 1041-46 (1967). *Hugoton Production Company*, the producer in *Mesa Petroleum*, offered a similar settlement, 441 F.2d at 185. The FPC denied this settlement offer on the ground that *Hugoton* was the only seller of the group who had abandoned its sale after the Supreme Court's jurisdictional decision. However, the Court of Appeals for the Fifth Circuit remanded for a more "cogent explanation by the Commission of the different treatment given *Hugoton* and its relevance to the Natural Gas Act." *Id.* at 192. The FPC may have difficulty doing this in view of recent judicial approval of the "Mobil formula" in *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334, 1341 (D.C. Cir. 1971) (discussed in text accompanying notes 103-15 *infra*).

89. See note 100 *infra* and accompanying text.

90. See notes 40 *supra*, 98 *infra*, and accompanying texts.

91. See notes 43-44 *supra* and accompanying text. In apparent anticipation of investigating the equity of flowing through the refund award in *Mesa Petroleum*, the FPC ordered the *Mesa*

is the most effective weapon for compensating the consumer and thereby achieving the underlying purpose of the Act. Regardless of the balance of the equities between the FPC, the wholesale buyer, and the producer-seller, therefore, this refund power should always be mobilized in situations like *Mesa Petroleum* wherever injury to the ultimate consumer is probable.

A second consideration which justifies the holding in *Mesa Petroleum* is that the express FPC power to prevent abandonment includes an appurtenant power to require a previously uncertified seller to take a certificate on a jurisdictional sale which he has already abandoned.⁹² Once it is accepted that a certificate may be issued in such a situation, the versatile FPC power to condition certificates will apply and refunds can be ordered.

A third underlying consideration in *Mesa Petroleum* is that the increasingly aggressive and uniform rate regulation of natural gas producers under the Natural Gas Act⁹³ requires relaxation of the judicial unwillingness to allow FPC retroactive rate remedies. While the original legislative intent was that natural gas ratemaking should be based primarily on private contracting, the advent of FPC rate regulation by in-line pricing and maximum area rates for field markets indicates a trend toward uniformity of rates and more affirmative FPC rate control. Fairness requires that those who evade the increasingly uniform controls should not benefit in comparison to those who abide by the Act. Therefore, the need for FPC refund powers to achieve equitable administration of the Natural Gas Act is greater than in earlier years.

Petroleum seller to hold the refunds "subject to further order of the Commission directing the disposition of the amount." Hugoton Production Co., 41 F.P.C. 490, 501, 80 P.U.R.3d 170, 180 (1969).

92. The authority for this proposition is, admittedly, nowhere established by the court in *Mesa Petroleum*, but seems to follow from *J.M. Huber Corp. v. FPC*, 236 F.2d 550 (3d Cir.), cert. denied, 352 U.S. 971 (1956). In that case, an uncertified, independent natural gas producer brought into the Act's jurisdiction by the Supreme Court's *Phillips* decision, see note 17 *supra*, applied for certification under protest. The producer later withdraw its application, stated that it was unwilling to accept a certificate, and advised the FPC that it was terminating natural gas deliveries. In response to this, the FPC denied abandonment and issued a certificate. The Court of Appeals for the Third Circuit upheld the FPC's authority to order a certificate. 236 F.2d at 556. "[U]nder the law and facts petitioner's unwillingness to accept its certificate offers no real problem In Section 7(c) as amended there is nothing about the need of a gas company accepting a certificate. As we see it, with the certificate properly issued, Huber's attempted defiance of the Commission's rightful exercise of its authority is of no importance." *Id.* at 557.

93. See notes 63-68 *supra* and accompanying text.

When the above considerations are combined, the extraordinary retroactive remedies authorized in *Mesa Petroleum* can be justified. The analysis starts at the point where the transaction becomes jurisdictional and the natural gas seller has a duty to seek certification.⁹⁴ By failing to submit promptly to FPC jurisdiction, the *Niagara Mohawk* line of cases⁹⁵ dictates that the seller later becomes subject to a back-dated certificate. Hence the producer can be deemed to have a "constructive" certificate from the date jurisdiction originally attached. A refusal to submit to FPC jurisdiction will also, after the *CATCO* decision,⁹⁶ deprive the Commission of an opportunity to review the contract rate to assure that an in-line price is assessed. Consequently, the lawfulness of the seller's present rate is immediately questionable, and the seller's "constructive" certificate can be equated to a "suspect" or "temporary" certificate under the *Callery* and *Sunray* rationales.⁹⁷ When certification is finally granted (or ordered), therefore, such a characterization will permit the assessment of retroactive refunds for charges collected in excess of the final, in-line price.

The award of damages for the illegal abandonment can be justified as an equitable remedy collateral to the authorized assessment of the retroactive refunds and a necessary expedient to enable the FPC to fulfill the underlying consumer-oriented purpose of the Natural Gas Act. Under equitable principles,⁹⁸ the Commission should have the authority to require the wrongdoer to make amends for other injuries, such as abandonment damages, which were proximately caused by his statutory violations prior to final certification. It would be inequitable to permit the abandoner to flaunt the Act's provisions and thereby cause injury to the public or gain advantage for himself over other similarly situated sellers who file for certification promptly and continue operation. The abandonment damages award in *Mesa Petroleum* is justified, then, as a necessary and equitable means of avoiding these undesirable results.

Limited to its facts, *Mesa Petroleum* holds that the FPC is em-

94. 15 U.S.C. § 717f(e) (1970).

95. See notes 61-62 *supra* and accompanying text.

96. See notes 56, 58 *supra* and accompanying text.

97. See notes 73-74, 78-79 *supra* and accompanying text.

98. "The principles of equity are not to be isolated as a special province of the courts" and are available to administrative agencies. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 (D.C. Cir. 1967); *accord*, *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 188 (5th Cir. 1971).

powered to use its certificate-conditioning refunds to redress rate-based damages caused by failure to file for certification and by illegal abandonment. There is language in the opinion, however, which supports the policing of other types of wrongful conduct by use of this refund power. Various interpretations of the case lead to the application of the certificate-conditioning refund power to three different echelons of pecuniary injury. The narrowest interpretation indicates that certificate-conditioning refunds are authorized to correct rate-based⁹⁹ violations of only the *certification provisions* of the Act. This view follows from express language in the court's opinion:

There is . . . no basis for [petitioner's] claim that, since the Commission lacks authority to award reparations, it is also without [the] authority to correct a failure to comply with the *certification provisions* of the Natural Gas Act by an unauthorized abandonment.¹⁰⁰

The broadest interpretation of *Mesa Petroleum* is solicited from other statements of the court to the effect that the Commission has authority to correct "*abuses preceding the final certification*" and "*improper actions occurring prior to a permanent certificate . . .*"¹⁰¹ This language infers that the FPC can fashion its certification refunds to correct rate-based damages caused by *any wrongful conduct*, presumably including common-law as well as statutory violations. Finally, an intermediate and more reasonable interpretation is that the FPC refund power extends to rate-based damages for any *statutory* violation of the Natural Gas Act occurring during periods of "constructive" certification.¹⁰²

The Court of Appeals for the District of Columbia in *Plaquemines Oil & Gas Co. v. FPC*¹⁰³ gave additional support to the doctrine implied in *Mesa Petroleum* that the FPC has equitable power to order refunds by constructive certification. The *Plaquemines* court also adopted the intermediate interpretation of the reach of *Mesa Petroleum* and set standards for equitable application of the FPC

99. As a preface to further discussion, it should be noted that the certificate-conditioning refund remedy, at least as developed thus far in the law, applies only to injuries resulting from transactions which are in some way related to rates and prices. See text preceding note 1 *supra* and following note 113 *infra*. The refund power in regulated industries is primarily, if not exclusively, a rate-regulation sanction. See generally, Note, *Use of Refund Device in Rate Regulation*, 63 HARV. L. REV. 1023-32 (1950).

100. 441 F.2d at 189 (emphasis added).

101. *Id.* at 189 & n.15 (emphasis added).

102. See notes 94-97 *supra* and accompanying text.

103. 450 F.2d 1334 (D.C. Cir. 1971).

certificate-conditioning refunds. The court in *Plaquemines* considered an FPC refund order fashioned against a pipeline company who, like the producer in *Mesa Petroleum*, had awaited the outcome of the Supreme Court's *Lo-Vaca* decision¹⁰⁴ before seeking certification of a jurisdictional sale. In approving the FPC's refund authority, the court pronounced:

[T]he Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted (in this case about 5 years), has the equitable power "to regard as being done that which should [be] done" by *recreating the past*, insofar as is reasonably possible, to reflect *compliance with the Act* and to order refunds to be paid if necessary to achieve that goal.¹⁰⁵

Hence the refund power is deemed broad enough to reconstruct and correct any rate-based violation of the Natural Gas Act, and the intermediate interpretation of *Mesa Petroleum*¹⁰⁶ has become the present state of the law.

In *Plaquemines*, a rate increase took effect during a pipeline company's jurisdictional and uncertified status pursuant to an escalation clause in its sales contract which had been privately negotiated prior to assertion of jurisdiction by the FPC. When the pipeline company finally filed for a long-overdue certificate, the Commission found that the original rate had been in-line with contemporaneous producer rates and therefore was exempt from refund.¹⁰⁷ The later rate increase, however, was declared invalid because it was not filed with the FPC before taking effect.¹⁰⁸ The Commission then subjected the seller to automatic refund liability without reviewing the validity of the rate increase.¹⁰⁹ The court of appeals reversed and remanded the FPC's refund order on the grounds that

having started out to reconstruct [the seller's] sales to reflect compliance with the Act, the Commission was bound to carry that purpose through in regard to all transactions that would have been subjects of filings had [the seller] been complying with the Act in the [jurisdictional period].¹¹⁰

Hence, for refund purposes, the mere act of changing an uncertified

104. See note 83 *supra* and accompanying text.

105. 450 F.2d 1334, 1337-38 (D.C. Cir. 1971) (emphasis added).

106. See text accompanying note 102 *supra*.

107. 450 F.2d at 1336-37.

108. Such filing is required by the Natural Gas Act § 4(d), 15 U.S.C. § 717c(d) (1970). See note 8 *supra* and accompanying text.

109. 450 F.2d at 1335.

110. *Id.* at 1338.

rate is not *per se* a violation of the Act. The FPC must make a retroactive determination of the validity of the increased rate before assessing a refund.

The *Plaquemines* case supports the premises and implications of the *Mesa Petroleum* decision and pronounces a standard for equitable application of this refund power. Before ordering refunds, the FPC is admonished to use "reasoned retroactive application of [the] statute" by "reconstructing . . . jurisdictional sales . . . to reflect compliance with the Act."¹¹¹ What is envisioned is a step-by-step process in which (1) a seller is "constructively" certified by an FPC jurisdictional decision; (2) his compliance with the Act is monitored, retroactively, by using alternative standards of measurement where primary standards are unavailing¹¹² and by "resolv[ing] any doubts regarding compliance against the wrongdoer;"¹¹³ and (3) refunds are ordered only where actual rate-based damage is caused by statutory violations.

Plaquemines is significant also because it applies the certificate-conditioning refund power in a situation involving a *pipeline company*. Although the previous refund developments had all evolved from the regulation of natural gas producers, there is nothing in *CATCO*, *Callery*, *Sunray*, or *Mesa Petroleum* which inherently limits their applicability to that segment of the industry. *Plaquemines* makes it clear that the in-line price doctrines and certificate-conditioning refund power can be extended to the pipeline company and wholesale distributor¹¹⁴ segments of the natural gas industry.¹¹⁵

Future Refund Developments Under the Natural Gas Act

As a result of *Mesa Petroleum*, *Plaquemines*, *Callery* and *Sunray*, the FPC may use its certificate-conditioning refunds to correct any rate-based injury caused the ultimate consumer by violations of the

111. *Id.* at 1338, 1339 n.15 (emphasis by the court).

112. Although cost of service data, which was normally used to review pipeline company rates, was unavailable, the FPC was reprimanded for failing to use contemporaneous producer in-line prices as an alternative standard. *Id.* at 1339-41.

113. *Id.* at 1338 n.13.

114. The interstate natural gas industry traditionally has been viewed as being divided into three functions: (1) production of the gas and sale for resale in interstate commerce, *see* note 17 *supra*; (2) transmission of the gas in interstate commerce (performed by "pipeline companies"); and (3) wholesale distribution to retail sellers. *See* A. LEESTON, J. CRICHTON, J. JACOBS, *THE DYNAMIC NATURAL GAS INDUSTRY* 93 (1963). Of course, any two, or all of these functions may in practice be performed by the same corporate entity.

115. *See* *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334, 1339-40 (D.C. Cir. 1971).

Act occurring when a seller has a "suspect,"¹¹⁶ temporary,¹¹⁷ or "constructive"¹¹⁸ certificate. Although such broad use of refund orders seems to indicate possession of traditional reparation powers, each decision has expressed a cognizance of the lack of such power by the FPC.¹¹⁹ It is the thesis of this section, therefore, that as a result of expanding judicial construction and more aggressive FPC use of the certificate-conditioning authority, the scope of the traditional ban on FPC reparation power has been narrowed and the general presumption against FPC retroactive rate-making authority has been rebutted by the judicial recognition of this broad certificate-conditioning refund power in the FPC for use in permanent certification proceedings. The end result of these developments, therefore, appears to be a judicial broadening of the definition of "refund" and narrowing of the definition of "reparation." Two possible distinctions between authorized "refunds" and unauthorized "repairs" are offered which might conform to the implications of the cases discussed. First, the distinction which adheres more realistically to the case law suggests that the prohibition against FPC repairs is altogether inapplicable to the regulation of rates through certification powers. *Callery*, *Sunray*, *Plaquemines*, and *Mesa Petroleum* can be read as having exempted certificate-conditioning refunds from the definition of "repairs" as long as (1) the retroactive refund order reaches back no further than the time when the duty to become certified first attached and hence the seller became "constructively" certified, and (2) prospective refund liability is halted when permanent, non-reviewable certification is finally achieved.¹²⁰ Pursuant to this ration-

116. The *Callery* rationale, see notes 69-74 *supra* and accompanying text.

117. The *Sunray* rationale, see notes 75-79 *supra* and accompanying text.

118. The *Mesa Petroleum* rationale, see notes 94-97 *supra* and accompanying text; and the *Plaquemines* rationale, see notes 103-06, 111-113 *supra* and accompanying text.

119. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223, 229 (1965); *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334, 1338 n.13 (D.C. Cir. 1971); *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 189 (5th Cir. 1971).

120. The *Sunray* decision lends support to the establishment of this second cut-off point for the scope of FPC certification refund orders:

It seems incontestable that if a producer consistently sells gas at a price specified in a final, permanent certificate . . . , the Commission may not order it to make refunds simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power We therefore . . . hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit

ale, any damage award premised on conduct occurring before a party has a duty to become certified or after his certificate is approved “finally” would be defined as a “reparation order” and would be beyond the reach of the FPC.

An alternative and more far-reaching distinction would be one which turns on a notice factor and would not depend on the proper exercise of certificate-conditioning authority. According to this distinction, whenever a seller is on notice of the suspect nature of his rate schedule, even if he is already operating under a permanent, non-reviewable certificate, any rate-based damages awarded thereafter might be seen as “refunds” and be within FPC cognizance. “Reparations” would then be confined to retroactive damages occurring before the seller is given the requisite notice or resulting from other than rate-making transactions. As developed earlier, this notice factor is present in all of the cases where certificate-conditioning refunds have been judicially authorized. Thus, the appeal or rehearing of a permanent certificate, the mere issuance of a temporary certificate, or the constructive certification of a seller by virtue of an FPC jurisdictional decision are each deemed a sufficient event to place the jurisdictional seller on notice of the questionable validity of his present rate.¹²¹ In each situation, therefore, the “notice” theory would justify imposition of FPC refund orders retroactively back to the time at which notice was imparted. This is the identical result which the courts have reached in the same factual situations under conventional certificate-conditioning analysis.

The “notice” distinction of the refund/reparation dichotomy is equally capable of justifying the statutory section 4 refund order. During the course of section 4 rate-change proceedings, a seller whose proposed rate is suspended and then given automatic effect is put on constructive notice of potential refund liability by the express provisions of the statute.¹²² Consequently, the notice prerequisite is satisfied and the subsequent FPC “refund” order is lawful and justified. The most radical application of this alternate refund/reparation distinction would be in section 5 rate-fixing proceedings, where FPC deci-

below which a refund cannot be ordered under section 4(e) [the rate-change provision].

FPC v. Sunray DX Oil Co., 391 U.S. 9, 24 (1968).

121. See, e.g., *Callery*, notes 73-74 *supra*, *Sunray*, notes 78-79 *supra*, *Mesa Petroleum*, notes 95-97 *supra*, and *Plaquemines*, notes 103, 105-06 *supra* and accompanying texts.

122. See note 39 *supra* and accompanying text.

sions are "to be *thereafter* observed and in force"¹²³ and have traditionally been prospective from the date of the final order.¹²⁴ By applying the "notice" distinction, however, when a complaint is filed with the FPC and a formal, rate-fixing proceeding begun, the seller would be put on actual notice of his suspect rate schedule. Hence the final rate-fixing order would not be limited to absolute prospectivity but would entail a *quasi*-retroactive "refund" back to the time the complaint was filed.¹²⁵ Although such an approach violates traditional practices of FPC prospective ratemaking in section 5 proceedings, the "notice" theory of authorized refunds offers a potential route for expansion if the FPC envisions more aggressive rate regulation in the future.

Under either theory, the *Mesa Petroleum* and *Plaquemines* decisions offer great incentive for the FPC use of refund orders during certification proceedings to alleviate any harmful effects of overcharges or damages caused by delayed filing, abandonment, or any other analogous rate-based violations of the Natural Gas Act.

Conclusion

The expansion of FPC certificate-conditioning refund orders into the realm of what have been traditionally considered reparations powers illustrates the extent to which courts and an agency will go to develop sanctions which are necessary to fill a changing regulatory role.¹²⁶ The original concept that parties to wholesale natural gas transactions needed a competitive market with minimal regulation has been supplanted by consumer-oriented, uniform rate regulation for newly certified natural gas producers. A natural consequence has been the expansion of the scope of certification powers and refund orders, and it must be concluded that with further consumer orienta-

123. Natural Gas Act § 5(a), 15 U.S.C. § 717d(a) (1970) (emphasis supplied).

124. See notes 10-11, 27, 30 *supra* and accompanying text.

125. See *Transcontinental W. Air, Inc. v. CAB*, 336 U.S. 601 (1949), where the CAB's express statutory power to make its airmail carrier rates "effective from such date as it shall determine to be proper," *id.* at 602, was deemed sufficient to permit the CAB to back-date a rate-fixing order to the date of complaint. *Id.* at 603. "[T]he rates of carriers and other utilities fixed by public authorities, while usually prospective, are sometimes made retroactive to the date of the commencement of the rate-making proceeding." *Id.* at 605.

126. See generally McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 446 (1964).

tion and the necessity to protect scarce natural resources, further extension of equitable retroactive sanctions can be expected.¹²⁷

VI. JUDICIAL REVIEW—FEDERAL COURT JURISDICTION

A. THE APA AS A STATUTORY GRANT OF JURISDICTION

The federal courts are courts of limited jurisdiction and can hear cases only under a specific jurisdictional grant from Congress.¹ Jurisdiction to hear claims involving federal agencies is most often con-

127. Since the Natural Gas Act was patterned after the regulatory scheme of its sister statute, the Federal Power Act, *Hearings on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 10, 46 (1936)*; Flittie & Armour, *supra* note 17, at 448, 453, it might be expected that the developments discussed herein would also be applicable to activities regulated under the Federal Power Act. However, no such analogous developments are evident. Furthermore, immediate extension of *Callery, Sunray, Plaquemines*, and *Mesa Petroleum* to such activities is doubtful because the use of a certificate-conditioning refund order has been predicated on the FPC's simultaneous licensing and rate-regulating jurisdiction under the Natural Gas Act. The problem under the Federal Power Act is that the FPC has no certification powers under Part II of the Act, 16 U.S.C. §§ 824-28c (1970), which grants its primary rate-regulatory power through jurisdiction over interstate electric utilities. See note 4 *supra*. The FPC does have license-conditioning authority under Part I of the Act, 16 U.S.C. §§ 799, 803 (1970), but its jurisdiction to regulate rates under that part, 16 U.S.C. §§ 812-13 (1970), is extremely limited and seldom exercised. See R. BAUM, *THE FEDERAL POWER COMMISSION AND STATE UTILITY REGULATION* 176-77, 180 (1942); note 4 *supra*.

A jurisdictional overlap, on the other hand, could theoretically be construed by attempting to bridge the separate parts of the Act. When a hydro-electric utility sells or transmits electricity in interstate commerce, the FPC has jurisdiction under both parts of the Federal Power Act. In this situation it has been held that provisions of Part I are repealed by implication by inconsistent or conflicting provisions of the later enacted Part II, *Safe Harbor Water Power Co. v. FPC*, 179 F.2d 179, 185 n.10 (3d Cir.), *cert. denied*, 339 U.S. 957 (1949); *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 804 (3d Cir.), *cert. denied*, 316 U.S. 663 (1942), and provisions not conflicting or inconsistent can be read together, *see* 179 F.2d at 186-88. If the license-conditioning powers of Part I, therefore, can be construed together with the rate-regulating powers of Part II, refund powers could presumably be implied from the two. The problem with the above analysis, however, is that the legislative history indicates that a certification provision was placed in the original draft of Part II of the Federal Power Act and eliminated upon redrafting, *see* note 45 *supra*. Where Congress has thus intended that there be no licensing powers under Part II of the Federal Power Act, it would be inconsistent to create implied refunds by interposing the licensing powers of Part I into the rate-regulating provisions of Part II. See note 29 *supra* and accompanying text.

1. WRIGHT 15.