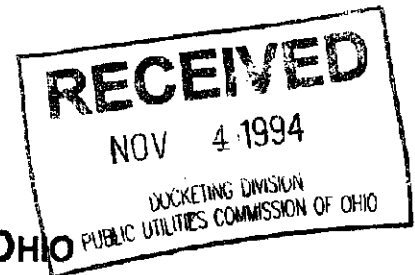


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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission  
Implementation of FERC Order 636  
and Related Matters.

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Case No. 93-1636-GA-UNC

In the Matter of the Commission  
Ordered Investigation of the Availability  
of Gas Transportation Service Provided  
by Ohio Gas Distribution Utilities to  
End-User Customers.

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Case No. 85-800-GA-COI

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**INDUSTRIAL ENERGY USERS-OHIO'S  
COMMENTS**

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November 4, 1994

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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Implementation of FERC Order 636	)	Case No. 93-1636-GA-UNC
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**INDUSTRIAL ENERGY USERS-OHIO'S  
COMMENTS**

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The Industrial Energy Users-Ohio ("IEU-OH") offers the following comments in response to the entry issued in this proceeding on October 13, 1994. Since May, 1992, IEU-OH has been an active participant in the Public Utilities Commission of Ohio's ("Commission") innovative and successful roundtable process. IEU-OH is a trade association of 19 Ohio manufacturers that employ more than 90,000 people at their Ohio plants and pay about \$500,000,000 each year for natural gas and electricity to operate these plants. The development and implementation of natural gas curtailment and interruption rules (including standards of compensation) are important to Ohio's industries.

The policy preface for the Federal Energy Regulatory Commission's ("FERC") Order 636 includes a fundamental shift in emphasis from command and control regulation to regulation that favors bilateral contracts between willing buyers and willing sellers. This system of commerce is not new; it is an essential ingredient of our economic system and the hallmark of the competitive sector of the economy. Reliance on bilateral contracts to define commercial relationships imposes an obligation on government to honor contracts which do not violate public policy or are not otherwise unlawful.

Since the very beginning of the Commission's roundtable process, interested parties have agreed that the restructuring associated with FERC Order 636 marked a significant change. Pipelines have been stripped of a gas merchant function and the gas procurement function has been lodged in the hands of ultimate customers, their agents or local distribution companies ("LDC"). In addition, the rate design features associated with FERC

Order 636 shifted the pipelines' fixed costs to the demand component of transportation rates. Thus, customers that require firm service have monthly firm transportation costs which are now less affected by the customers' monthly throughput. Additionally, FERC's Order 636, as implemented, also included balancing requirements that impose much more stringent monitoring and operating controls with daily horizons.

Since May, 1992, IEU-OH and others have urged all parties to recognize the importance of curtailment and interruption rules in the context of the fundamentally different policies embedded in FERC Order 636 and the relative natural gas property rights of all parties moving gas on the pipelines or the LDCs. If the natural gas property rights of ultimate customer transporters are subordinated to the rights of other transporters such as LDCs, the comparability and bilateral commerce objectives (which are the heart of FERC Order 636) cannot be obtained. From a practical perspective, subordination of ultimate customer transporters' rights increases the uncertainty that firm gas supply and transport arrangements will be honored when they are most needed. For those transporters that rely upon an LDC for a portion of the transportation function, broad subordination rights create the type of uncertainty that will, at some point, encourage direct pipeline service arrangements or reliance upon user friendly LDCs. Subordination also discourages ultimate consumers from making firm supply and transport arrangements with upstream suppliers. The practical effect of all of this is that the transportation capacity and commodity safety net that public policy wants to have available to meet the requirements of human needs customers in an emergency may be unavailable because the risk created by the curtailment rules made firm upstream arrangements imprudent from the transport customers' perspective. The policy embedded in FERC Order 636 can be reversed or honored depending on the curtailment and interruption policy of Ohio.

## PROCESS ABUSE

***IEU-OH is concerned that the introduction of new compensation proposals and the failure to incorporate features of the consensus position will encourage delayed future participation and disclosure by parties and detract from the announced efficiency objectives of the roundtable.***

In most important respects, the Staff's proposed revisions to the Commission's natural gas transportation guidelines (which were first issued in 1973) honor the policies embedded in FERC Order 636 and the expressed consensus of the roundtable parties. However, some of the most important work is undone through the proposed bifurcated compensation feature that ignores one element of the consensus position regarding the

compensation formula and the introduction of a completely new concept which has not heretofore been proposed by the Staff or any of the numerous parties<sup>1</sup>.

In addition, interested parties have been asked (in Paragraph 7 of the entry) to identify the specific factual circumstances which make compensation for curtailment of transport gas appropriate. This question was the subject of extensive working group and roundtable discussion. LDCs made presentations, questions were solicited and answered and sales customers, transporters and marketers offered their views and proposals. Asking this question at this juncture says more than any answer that may be offered. The answer to the question is a simple one. Compelled compensation is appropriate (and mandated by law) anytime a taking of private commodity or capacity rights occurs. No further factual analysis is required.

IEU-OH is concerned that the question raised by the entry and the new and forgotten compensation wrinkles in the Staff proposal will encourage delayed future participation and disclosure by parties and detract from the announced efficiency objectives of the roundtable. It is particular irksome that these conditions arise with regard to the subjects of curtailment and compensation; two of the most extensively discussed roundtable subjects. For industrial customers that pay their own participation cost and are accountable to the market, the net effect is that they pay for both new and old wave regulation.

IEU-OH's process concerns raise questions about the role of regulation. All stakeholders are hard at work attempting to adapt to the changes associated with the implementation of FERC Order 636. Give and take has been encouraged and in this spirit two major LDC rate cases, transition cost sharing and other important issues have been resolved through negotiated settlements. IEU-OH and others participating in the roundtable process believed that their consensus position on curtailment would be honored. This expectation has been rejected for now in favor of a breach; a breach which implies that regulation is going to insert itself to upset a balanced state of interests that has worked for over two years to articulate an acceptable policy. The acceptable policy has been vetoed implicitly with words that offend both the compromise and the spirit with which the compromise was perused. The problem here has not been created by transportation customers, marketers, local distribution companies, residential representatives or any other direct stakeholder. This is not the lasting lesson that roundtable participants should take with them as many of them begin the task of addressing similar fundamental issues in electricity industry.

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<sup>1</sup>The Commission will understand if IEU-OH asks why such a fundamental matter has not been introduced in the working group discussions in the hope that another round of comments and their associated expense might be avoided. Having invested substantial resources in the informal roundtable process, it seems that the roundtable parties are ultimately required to also gear up to submit formal comments which are in part required because some matters were not raised during the "collaborative" process.

## SUBSTANCE ABUSE

***The Staff recommendations that permit a taking to occur in "force majeure" conditions and reduce the measure of compensation to the commodity cost of the gas must be eliminated. Additionally, the market factor must be reinserted in the compensation formula.***

As indicated above, the Staff's recommendations (with two exceptions) follow the position supported by IEU-OH and by most of the active roundtable parties. The Staff's natural gas transportation guideline recommendations include:

- ▶ A statement that system supply planning shall not assume that transportation gas or transportation capacity entitlements will or can be used to meet system supply customers' design requirements unless a transportation customer has agreed otherwise;
- ▶ A statement that the gas supply of a transportation customer will be accepted and redelivered by an LDC according to the applicable tariff or contract absent a condition that creates a clear and present danger to human needs and public welfare customers;
- ▶ A statement that any curtailment of a service entitlement of a transportation customer must be remedied as quickly as possible and must be preceded by the exhaustion of other reasonable alternatives (explained in paragraph 6 of the entry) to avoid involuntary curtailment; and,
- ▶ A statement requiring compensation for the involuntary curtailment of a transportation customer's capacity or commodity entitlement with different compensation formulas expressed for "clear and present danger" and *force majeure* conditions.

Much of what the Staff recommends represents good work and should be adopted by the Commission. However, some changes must be made.

In a "clear and present danger" condition, the proposed compensation formula includes a consideration of the cost of interstate and intrastate pipeline capacity, commodity cost, and the substitute fuel cost. For the first time, the Staff's recommendation fails to include the market premium factor which was included in the industrial and working group consensus position. It is unclear why, at this late hour, the Staff's proposed compensation formula excludes a factor that is designed to permit the compensation to be determined, in part, by the marketplace. From a legal perspective, it is important to recognize that the seizure of private commodity or capacity rights is a taking of property and the exclusion of a market reference is likely to conflict with the

constitutional standard applicable to "takings". From a practical perspective, the proposed compensation standard will sanction property seizures at a price that is less than what the market would require to release the property on a voluntary basis. IEU-OH believes that the retention of a market factor in the compensation formula will reinforce economically and in real time what the Staff has recommended from a planning perspective. The market factor must be reinserted in the compensation formula.

The Staff's recommendations also include an opportunity to take a private party's commodity or capacity in a *force majeure* condition. A compensation formula variance that applies to *force majeure* conditions is also introduced.

Where a taking occurs as a result of a *force majeure* condition, the victim is only entitled to be reimbursed for the cost of the commodity. Again, these features were never discussed in the working group or the roundtable meetings and arrive unexpectedly and late. The term *force majeure* is not defined in the Staff proposal. However, within the industry, the term is generally broadly defined so as to include most of the conditions that might create a clear and present danger to public welfare or human needs customers. Accordingly, the proposed guidelines effectively broaden the opportunities for an LDC to take a private party's commodity or capacity beyond the range contemplated by the existing guidelines. This is obviously contrary to the FERC's emphasis upon bilateral arrangements (in conjunction with comparable and unbundled services) as the means to create effective competition.

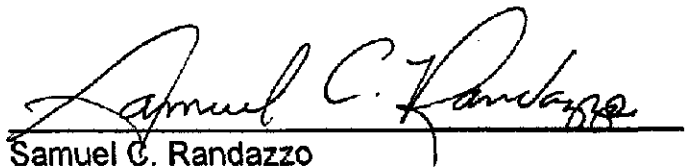
The Staff's recommendations also introduce a different compensation formula for *force majeure* takings. Because the term *force majeure* may well subsume the conditions that may qualify as clear and present danger conditions, the compensation formula driven by the clear and present danger condition may be "trumped" by the compensation formula driven by the *force majeure* condition. The net effect of the compensation formula clash appears to limit compensation in every case to the cost of the commodity taken by the LDC. Even assuming this standard did not run afoul of constitutional requirements, this result is wildly at odds with the principles embraced by the FERC and, to date, the Commission's roundtable parties.

## IEU-OH's RECOMMENDATIONS

IEU-OH strongly recommends that the transportation guidelines limit taking of transportation commodity or capacity to clear and present danger conditions which place human needs customers in imminent peril and which can not reasonably be addressed through voluntary measures. IEU-OH also strongly recommends that the compensation formula include a market factor as was recommended by the working group. IEU-OH supports the balance of the recommendations offered by the Staff; recommendations which are consistent with those supported by the working group. IEU-OH also urges the Commission to strongly state that its judgment regarding reasonable alternatives to involuntary curtailment and interruption will be based on the conditions that exist at the

planning stage and not the conditions that exist in the midst of a crisis. Involuntary interruption or curtailment must not be viewed as a tool to balance supply and demand absent extraordinary conditions that place human needs customers in peril. In addition, the Commission should be urging further evolution that will narrow the range of conditions that will qualify as extraordinary. By these efforts the Commission will encourage the use of voluntary arrangements (customer to LDC arrangements and marketer to customer, marketer to LDC or customer to customer arrangements<sup>2</sup>), encourage innovation, encourage the introduction of cost effective metering and monitoring practices and empower the market to respond with solutions that reward performance. Curtailment rights excuse and reward failed performance and this is a bounty that the public interest can not afford to pay.

Respectfully submitted,



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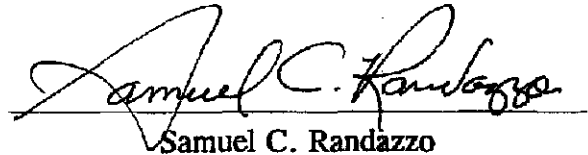
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<sup>2</sup>IEU-OH has supported options that permit commodity and capacity swaps among a broader range of parties. Expanding the list of parties to include all parties in the supply, transportation and distribution chain expands the diversity in the portfolio that can be created to respond to ordinary and extraordinary demands. Ancillary services such as back up services or balancing services should be available from as many source as may be willing to supply these services. The Commission should act to assure suppliers of these services that their participation will not cause them to become "public utilities" much the same way that gas producers have been protected from public utility status where their services are provided through the system of a regulated utility.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Industrial Energy Users-Ohio's Comments was served upon the following parties of record this 4th day of November, 1994, via electronic transmission, hand-delivery or ordinary U.S. mail, postage prepaid.



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