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**NATURAL GAS
REGULATION**

**Ex Parte Communications
During FERC's Iroquois
Pipeline Proceeding**

**Statement of Martin J. Fitzgerald, Special Assistant to the
General Counsel**



Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to discuss the opinion we issued in response to the Subcommittee's December 19, 1991 request for our views on whether there were improper ex parte communications during the Federal Energy Regulatory Commission's (FERC) Iroquois natural gas pipeline proceeding. Specifically, you asked that we determine whether FERC officials participated in prohibited ex parte communications during a March 15, 1990 meeting with representatives of the companies sponsoring the Iroquois pipeline. As explained more thoroughly in our opinion, we believe there were prohibited ex parte communications during this meeting.

The Iroquois pipeline is a multi-million dollar project that will transport natural gas from Canada to Long Island, New York, along the way supplying gas to parts of New England. First proposed in 1986, the pipeline is sponsored by the Iroquois Gas Transmission Company (Iroquois), Tennessee Gas Transmission Company (Tennessee), and Algonquin Gas Transmission Company (Algonquin). FERC approved construction of the pipeline in November, 1990.

An ex parte communication is a "communication not on the public record with respect to which reasonable prior notice to all parties is not given." Ex parte communications that relate to the merits of an agency

proceeding are generally prohibited by statute. Communications that purely concern status, scheduling, or other procedural matters unrelated to the merits are not prohibited.

FERC regulations prohibit its employees from requesting or entertaining prohibited ex parte communications, and require FERC employees to dissuade anyone attempting to make an ex parte communication. If unsuccessful, FERC employees are required to complete a sworn statement setting forth the substance and circumstances of the communication within 48 hours and file the statement with the Secretary for inclusion in the public file and distribution to the parties in the matter. This disclosure helps to protect the public's right to participate meaningfully in agency decisionmaking, and assure that agencies do not rely on secret evidence.

FERC announced as early as March of 1989 that it intended to act on Iroquois by June 1990. In late 1989 and early 1990, however, the Iroquois sponsors filed amended applications expanding the project to include additional gas volumes and facilities. FERC's Office of Pipeline and Producer Regulation (OPPR) invited senior representatives of the pipeline sponsors to a March 15, 1990 meeting to discuss problems associated with the amendments to the applications. The meeting lasted between 1 and 2 hours. OPPR officials

explained that although it could complete the required environmental impact statement for the pre-amendment volumes by June, it could not study the facilities associated with the new volumes in time to meet FERC's timetable. The staff asked the sponsors to respond to a proposal that Iroquois transport initially a lower volume of gas than specified in the amended applications, at the same rates as specified in the amended applications. This lower volume reflected the facilities OPFR could include in an environmental impact statement by June. The remainder of the project would be approved in a second phase, and service to some markets would begin later. The sponsors acquiesced to this proposal.

FERC must determine that an applicant is "able and willing" to construct a pipeline and perform the service it proposed before issuing a certificate permitting construction. FERC officials learned during the meeting that Iroquois was "able and willing" to transport a volume lower than it proposed in its amended application. In our view, this goes to the heart of what FERC needed to determine in this proceeding. We believe that it was improper for FERC officials to request and entertain this information about the merits of an application in a meeting that was not open to all interested parties. In addition, we believe that the communications during the March 15

meeting were tantamount to a request for expedited treatment which should have been treated as an ex parte communication. Further, FERC officials at the meeting failed to prepare and file sworn statements about the prohibited communications as required by FERC's regulations.

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Mr. Chairman, this concludes my prepared statement. We would be pleased to respond to any questions you or members of the Subcommittee may have.