Endevco also have submitted separate waiver petitions, which are considered subsequently in this order, together with a number of other pending waiver requests.

Sections 284.105 and 284.223(g)(1) of the regulations adopted in Order No. 436 provide transitional or "grandfathered"[2] treatment for transportation arrangements that were both authorized and commenced prior to October 9, 1985. No waiver is necessary in such cases. In *CLARCO* we held that if gas had started to flow by that date pursuant to such an agreement, the fact that the agreement was oral rather than written did not bar transitional treatment, as long as all the applicable reporting requirements have been met.[3]

Earlier, in *Judel Glassware Co., Inc., et al.*, 33 FERC ¶ 61,386 (1985), we had held that a waiver of the regulations would be granted even though the transportation had not commenced by October 9, 1985, where the moving party demonstrated that there was genuine "economic substance" to the transaction prior to that date. That order held that "To demonstrate economic substance, the purchaser, seller or end user must show that, in reliance of a transportation contract, it constructed significant facilities for delivery of gas prior to October 9, or expended substantial funds prior to October 9."[4] In further defining this standard, *CLARCO* held that if the gas transportation had not commenced by the October 9 date, a waiver of the restrictions in the transitional provisions would be granted if the parties could show not only that they had executed a written transportation agreement prior to October 9, 1985, but, in addition, that the expenditure of funds or construction of facilities had been undertaken *in reliance on that agreement* after its execution and prior to October 9, 1985.

The *CLARCO* order further held that:

> Oral agreements will not meet the standard if, on or before October 9, 1985, gas was not actually transported pursuant to that agreement. The existence of a written transportation agreement prior to October 9, 1985, will not by itself satisfy the standard.[5]

The order explained that these requirements comprised essentially the standard enunciated in *Judel* "but defined more precisely so as to provide a clear line of demarcation."[6]

In its rehearing application, Moody contends that the *CLARCO* order constituted a departure from the waiver standard established in *Judel* and that the latter order erred in altering the standard. It requests that transitional treatment be approved in all situations where the parties can show that one or both expended significant funds or constructed significant facilities in reliance on an oral transportation agreement. Endevco's filing is similar in claiming that we erred in denying transitional treatment to oral agreements where the gas did not flow prior to October 9, 1985, and the construction of facilities or expenditure of funds occurred before the execution of a written transportation agreement.

The *Judel* order was among the Commission's earliest efforts to implement the standard for transitional arrangements under the regulations. Thereafter, additional factual situations were brought to the Commission's attention which showed that the *Judel* ruling was not fully satisfactory in its explanation of the circumstances when transitional treatment would and would not be allowed. Consequently, the further standard was developed in *CLARCO*. We stated that we would not go back and disturb any waiver orders previously issued in which relief had been granted. We further stated, however, that we would use the opportunity presented by CLARCO's petition "to restate, in a more comprehensive manner, the principles that have evolved and the standards that the Commission will follow prospectively in this area."[7]

Since issuance of the *CLARCO* order, additional considerations have been brought to our attention, in the rehearing applications as well as through requests for waivers, which have led us to conclude that the standards formulated in *CLARCO* are too narrow. Although those standards serve the purpose of providing readily verifiable indicia that a tranportation transaction in fact existed prior to the issuance of Order No. 436 even if actual transportation has not commenced prior to October 9, 1985, and thus qualified for grandfathering, further reflection has convinced us that other objective measures can be relied on to demonstrate that transportation arrangements had actual economic substance prior to the issuance of Order No. 436.

Waivers will continue to be granted where the test enunciated in *CLARCO* is met. In addition, a showing of economic substance sufficient to justify granting a waiver may be evidenced by (1) an agreement (either oral or written) entered into prior to October 9, 1985, between two or more parties (*e.g.*, a transporter and a shipper, or a buyer and a seller) that commits the parties to an element of the transaction (*e.g.*, the transportation of the gas, the sale of the gas to be transported, or storage of the gas before or after transportation), (2) the construction of significant facilities or the expenditure of substantial funds prior to October 9, 1985 in reliance on that agreement, and (3) if the agreement relied upon was oral, execution of the ageement in writing prior to October 9, 1985.

As has been true in past waiver cases we will continue to require a showing that the transaction for which waiver is sought is of a type which qualifies for transitional treatment, *i.e.*, that the gas is destined for the system supply of an interstate or intrastate pipeline (including a "Hinshaw" pipeline) or local distribution company, or is for a high priority end-user.[8] Such a showing must be evidenced by a written agreement (*e.g.*, for either the sale or transportation of the gas to that destination) executed on or before October 9, 1985.

We now proceed to a review of several of the requests for waiver which are before the Commission, beginning with a re-examination of the earlier *CLARCO* order. Other pending petitions, including some for which adequate facts are not now available, will be considered in a separate order or orders.

CLARCO Gas Company, Inc.

As set out in the March 28, 1986 order denying CLARCO's waiver request, prior to May 8, 1985 CLARCO entered into an agreement to purchase and gather gas from a well owned by MIDCO Exploration, Inc. On May 8, 1985, it entered into a written agreement to sell this gas to Northern Gas Marketing, Inc. Northern Natural Gas Company agreed to transport the gas from its interconnection with CLARCO to or for the account of Northern Illinois Gas Company. The agreement between CLARCO and Northern Natural was not reduced to writing prior to October 9, 1985. CLARCO acquired a right-of-way and constructed a gathering system costing approximately $80,000 in order

[2] A transaction eligible for grandfathering is transportation that met the regulatory requirements applicable prior to October 9, 1985, including, with respect to NGPA section 311 transportation, the system supply test.

[3] 34 FERC at 61,718 (1986).

[4] 33 FERC ¶ 61,386 at 61,750.

[5] 34 FERC ¶ 61,386 at 61,718.

[6] *Id.*

[7] *Id.*

[8] See Regulation of Natural Gas After Partial Wellhead Decontrol, Technical Corrections issued October 24, 1985 mimeo at 1-2.

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