

**ORAL ARGUMENT IS SCHEDULED FOR NOVEMBER 19, 2009**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Nos. 07-1533 & 08-1062  
(consolidated)**

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**FLORIDA GAS TRANSMISSION COMPANY, ET AL.,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITIONS FOR REVIEW OF ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF OF RESPONDENT FEDERAL  
ENERGY REGULATORY COMMISSION**

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COMMISSION  
WASHINGTON, D.C. 20426**

**AUGUST 14, 2009**

**FINAL BRIEF: OCTOBER 2, 2009**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties

The parties and amici are as stated in the briefs of Petitioners Florida Gas Transmission Company, LLC (“Florida Gas”) and Florida Power & Light Company (“Florida Power”).

### B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *AES Ocean Express LLC v. Florida Gas Transmission Company*, “Opinion and Order on Initial Decision,” 119 FERC ¶ 61,075 (April 20, 2007) (“Opinion No. 495”), R 529, JA 1;
2. *AES Ocean Express LLC v. Florida Gas Transmission Company*, “Order on Rehearing,” 121 FERC ¶ 61,267 (Dec. 20, 2007) (“Order No. 495-A”), R 601, JA 66;
3. *Florida Gas Transmission Company*, 119 FERC ¶ 61,185 (May 25, 2007) (“First Compliance Order”), R 552, JA 59;
4. *Florida Gas Transmission Company*, 120 FERC ¶ 61,128 (Aug. 2, 2007) (“Second Compliance Order”), R 575, JA 62 and;
5. *Florida Gas Transmission Company*, Letter Order (unpublished, Sept. 11, 2007) (“Third Compliance Order”), R 581, JA 64.

### C. Related Cases:

The orders on review have never been before this Court or any other court. Counsel is aware of no other related cases pending in this or in any other court.

/s/Judith A. Albert  
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October 2, 2009

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## GLOSSARY

Complaint Order	<i>AES Ocean Express LLC v. Florida Gas Transm. Co.</i> , 107 FERC 61,276 (2004)
FERC or Commission	Federal Energy Regulatory Commission
First Compliance Order	<i>Florida Gas Transm. Co.</i> , 119 FERC ¶ 61,185 (2007)
Florida Gas	Petitioner Florida Gas Transmission Company, LLC
Florida Power	Petitioner Florida Power & Light Company
Initial Decision	<i>AES Ocean Express LLC v. Florida Gas Transm. Co.</i> , 115 FERC ¶ 63,009 (2006)
LNG	liquefied natural gas
Market Area	the part of Florida Gas's service area located in Florida
Opinion No. 495	<i>AES Ocean Express LLC v. Florida Gas Transm. Co.</i> , 119 FERC ¶ 61,075 (2007)
Opinion No. 495-A	<i>AES Ocean Express LLC v. Florida Gas Transm. Co.</i> , 121 FERC ¶ 61,267 (2007)
Second Compliance Order	<i>Florida Gas Transm. Co.</i> , 120 FERC ¶ 61,128 (Aug. 2, 2007)
Third Compliance Order	<i>Florida Gas Transm. Co.</i> , Letter Order (unpublished, Sept. 11, 2007)
Western Division	the part of Florida Gas's service area located west of the Alabama-Florida state line

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUES**

Two petitioners filed separate petitions for review of orders of the Federal Energy Regulatory Commission (“Commission” or “FERC”), approving natural gas quality and interchangeability tariff standards for gas entering Florida Gas Transmission Company’s (“Florida Gas”) Market Area. The petitioners, in separate briefs, raise the following issues:

1. Whether the Commission properly found the proposed standards just and reasonable, when manufacturers’ specifications for electric generator turbines

demonstrated that Market Area generating facilities can operate safely and reliably with gas meeting this standard, although generating companies may incur costs, which will not be excessive, for upgrades of some turbines. [Raised by Florida Power & Light Company (“Florida Power”).]

2. Whether the Commission reasonably concluded that the proposed standards should apply to natural gas entering the Market Area from Florida Gas’s Western Division, not just to gas entering from connecting pipelines, when Market Area users must receive gas satisfying this standard in order to operate their turbines safely, and when gas entering the Market Area from all other sources must meet the same standard. [Raised by Florida Gas.]

3. Whether the Commission properly declined to require suppliers of re-vaporized liquefied natural gas (“LNG”) to reimburse owners of downstream electric generator turbines for costs incurred to enable their equipment to use re-vaporized LNG, when the Commission does not regulate the LNG suppliers and thus lacks jurisdiction to order reimbursement, and when, in any case, the costs are speculative and not so excessive as to render unreasonable the gas interchangeability standards the re-vaporized LNG must meet. [Raised by Florida Power.]

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set out in the Addendum to this brief.

## INTRODUCTION

Imported natural gas may differ chemically from domestic gas because of its origins and because of the processing (liquefaction for transportation by ship and then re-vaporization) it undergoes. These differences may affect pipeline facilities and end-user equipment. Consequently, pipeline tariffs contain standards that gas entering the pipeline must meet. As LNG use has increased, gas quality concerns have also increased. *See, e.g., Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008) (addressing expansion of LNG facilities and effect on safety of connecting distribution system); *Natural Gas Interchangeability*, “Policy Statement on Provisions Governing Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs,” 115 FERC ¶ 61,325 (2006) (“Gas Quality Policy Statement”).

The orders challenged here decided numerous issues involving natural gas quality and interchangeability standards necessary to accommodate introduction of imported LNG into the Florida Gas system. *AES Ocean Express LLC v. Florida Gas Transmission Company*, “Opinion and Order on Initial Decision,” 119 FERC ¶ 61,075 (April 20, 2007) (“Opinion No. 495”), R 529, JA 1, and “Order on Rehearing,” 121 FERC ¶ 61,267 (Dec. 20, 2007) (“Order No. 495-A”), R 601, JA 66; *Florida Gas Transmission Company*, 119 FERC ¶ 61,185 (May 25, 2007) (“First Compliance Order”), R 552, JA 59; 120 FERC ¶ 61,128 (Aug. 2, 2007)

(“Second Compliance Order”), R 575, JA 62; Letter Order (unpublished, Sept. 11, 2007) (“Third Compliance Order”), R 581, JA 64.

Only gas interchangeability issues remain. “Interchangeability” is the extent to which a substitute gas can safely and efficiently replace gas normally used in a combustion application (here, electric generators). Florida Gas proposed a “Wobbe Index” range (measuring natural gas interchangeability) of 1,340 to 1,396. LNG suppliers advocated a broader standard (1,302 to 1,400) to permit the greatest LNG supply diversity at least cost to suppliers for processing. Generator owners (including Florida Power) advocated a far narrower standard (1,345 to 1,371) so they would not have to modify their turbines. The generators also asked FERC to require LNG suppliers (or other third parties) to provide reimbursement for the cost of any needed modifications.

After evaluating all of the evidence, including the witness testimony, test results, and the manufacturers’ turbine specifications, the Commission approved the Florida Gas proposal (1,340 to 1,396) as protecting generator turbines and allowing a reasonable diversity of LNG supply. The standard is to apply to all gas entering the Market Area, including domestic gas and gas coming from Florida Gas’s Western Division. FERC also concluded that it has no authority to order non-jurisdictional LNG suppliers to pay for generator modifications, and that reimbursement would not be warranted here in any case.

Of the generators, only Florida Power sought review of the Wobbe Index range and the denial of reimbursement. Florida Gas seeks review of the requirement that gas entering the Market Area from the Western Division must meet the same standards as other gas transported into that Area.

## **STATEMENT OF FACTS**

### **I. REGULATORY FRAMEWORK**

#### **A. Statutory Background**

The Natural Gas Act (“NGA”) confers upon the Commission authority over companies that engage in the transportation or sale for resale of natural gas in interstate commerce. To assure the orderly development of natural gas supplies, NGA § 7(c)(1)(A) prohibits any “natural-gas company or person” from constructing or operating pipeline facilities prior to obtaining a “certificate of public convenience and necessity” from the Commission. 15 U.S.C.

§ 717f(c)(1)(A). NGA § 7(e) directs FERC to issue such certificates to qualified applicants once it determines that the proposed service “is or will be required by the present or future public convenience or necessity,” and authorizes it to attach to certificates “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e).

Under NGA § 4(a), 15 U.S.C. § 717c(a), all rates and charges (and all rules and regulations pertaining to such rates or charges) for the transportation or sale of



natural gas subject to the Commission's jurisdiction must be just and reasonable. NGA § 4(b), 15 U.S.C. § 717c(b), prohibits undue preferences. NGA § 4(c), 15 U.S.C. § 717c(c), requires interstate natural gas pipelines to file rates and contracts with the Commission. The pipeline has the burden of proof to demonstrate that the proposed rate and related provisions are just and reasonable. NGA § 4(e), 15 U.S.C. § 717c(e). FERC, on its own motion or upon complaint, may investigate an existing rate. NGA § 5, 15 U.S.C. § 717d. In an NGA § 5 proceeding, the complainant has the burden to demonstrate that the existing rate is unlawful. *Id.*

### **B. Natural Gas Quality And Interchangeability**

Natural gas is principally the hydrocarbon methane, but is commonly found in nature mixed with other hydrocarbons. Gas Quality Policy Statement P 4. "Gas quality" is concerned with the impact of non-methane hydrocarbons on pipeline facilities and end-user equipment. *Id.* P 5. Gas quality is one of the many terms and conditions of service stated in a pipeline tariff. *Id.* P 3.

Interchangeability is a significant aspect of "pipeline quality" gas. *Id.* P 7 (defining interchangeability). The "Wobbe Index," based on energy input and specific gravity, is a widely accepted measure of the interchangeability of different natural gases. *Id.* P 8; *see also AES Ocean Express LLC v. Florida Gas Transmission Co.*, "Initial Decision," 115 FERC ¶ 63,009 at P 119 (2004) ("Initial Decision"), R 404, JA 240 (describing Wobbe Index calculation).

Due in part to an expected rise in LNG imports, FERC in 2004 initiated the proceeding resulting in the Gas Quality Policy Statement. Among the principles embodied in the Statement are: (1) pipeline tariff provisions on gas quality and interchangeability need to be flexible to allow balancing safety and reliability concerns with maximizing supply, and (2) in negotiating technically based solutions, pipelines and their customers are strongly encouraged to use the Natural Gas Council Plus (NGC+) interim guidelines (“Gas Council Guidelines”). Gas Quality Policy Statement P 1.

The Gas Council Guidelines resulted from a collaborative industry effort to seek industry consensus on industry-wide standards for gas quality and interchangeability. *Id.* P 14. Pending further study, the interim interchangeability guidelines provide for, *inter alia*, use of the local historical Wobbe Index average, with an allowable range of variation of plus or minus four percent, subject to a maximum Wobbe Index level of 1,400. Opinion No. 495 P 33, JA 10.

## **II. FACTUAL BACKGROUND**

### **A. Events Leading To The Challenged Orders**

Historically, Florida Gas has transported natural gas from onshore producers or from sources in the Gulf of Mexico to facilities in its two divisions, the “Market Area” (*i.e.*, Florida) and the “Western Division” (*i.e.*, areas west of the Alabama-

Florida state line). Electric generation customers receive about 80 percent of the Florida Gas throughput. Opinion No. 495 P 2, JA 3.

On January 29, 2004, the Commission authorized AES Ocean Express, LLC (“Ocean Express”) to construct, own, operate, and maintain approximately 54 miles of pipeline to transport re-vaporized LNG. *See* Opinion No. 495 P 3, JA 3. The proposed pipeline would transport LNG from an offshore receipt point at the boundary between the Exclusive Economic Zone of the United States and the Commonwealth of the Bahamas to interconnections with Florida Gas in the latter’s Market Area. *Id.* Ocean Express and Florida Gas, however, were unable to reach an agreement on the terms of an Interconnection Agreement. On April 5, 2004, Ocean Express filed a complaint under NGA §§ 5 and 7 alleging that Florida Gas’s proffered terms were unreasonable.

FERC found that standardized, nondiscriminatory tariff gas quality standards were needed for the Florida Gas system because, *inter alia*, there were now four potential LNG projects that would connect with Florida Gas. *AES Ocean Express LLC v. Florida Gas Transmission Co.*, 107 FERC ¶ 61,276 P 26-32 (June 18, 2004) (“Complaint Order”), R 31, JA 197; *see* Opinion No. 495 P 5-7, JA 3-4 (summarizing Complaint Order findings). Exercising its NGA § 5 authority, the Commission ordered Florida Gas to make a tariff filing within 30 days setting out

gas quality and interchangeability standards that would apply to all of its potential interconnection agreements. Complaint Order P 28, JA 197.

On July 23, 2004, Florida Gas filed tariff sheets proposing standards to apply to re-vaporized LNG received into its Market Area. The standards would not apply to domestic gas or gas entering the Market Area from the Western Division. Florida Gas also reserved the right to revise the standards based on continuing testing, analysis, review of data, and factual developments. *See* Initial Decision P 5, JA 221; Opinion 495-A P 122, JA 91. Numerous parties protested. FERC then set the matter for hearing before an Administrative Law Judge (“ALJ”). Initial Decision P 6, JA 221.

The parties filed direct and answering testimony on September 19, 2005, and cross-answering testimony on November 7, 2005. On November 23, 2005, Florida Gas submitted a revised set of standards in its rebuttal testimony. Extensive evidence addressing this and other proposals was submitted at the evidentiary hearing held December 6 through December 16, 2005. *Id.* P 7, JA 222.

## **B. Pertinent Party Positions**

Florida Gas’s rebuttal testimony proposed a Wobbe Index range of 1,340 to 1,396. *See id.* P 13-16, JA 223; Opinion No. 495 P 35, JA 10-11. To derive this, Florida Gas began with the historic Market Area range of 1,346 to 1,371, with an average of 1,356. Applying the Gas Council Guidelines recommended range of

plus or minus four percent from the local historic average results in an upper limit of 1,410, above the maximum 1,400 recommended under the Guidelines and higher than any party had proposed. Florida Gas then considered other evidence, particularly the manufacturers' specifications for the generator turbines most affected by the proposed standards, in arriving at the proposed 1,396 maximum. *See* Opinion No. 495 P 35, JA 10-11. For the minimum, Florida Gas proposed 1,340, its historic low. "The resulting range has a midpoint of 1,368 and permits approximately a plus or minus 2 percent variation above and below the midpoint." *Id.* Florida Gas proposed to apply this standard only in the Market Area, contending that it could blend all LNG imported into the Western Division with domestic gas before it reached customers in the Market Area. *See* Initial Decision P 198-199, JA 249.

The LNG Suppliers<sup>1</sup> proposed a more lenient standard and Florida Power (and other generators) a stricter one. Specifically, the Suppliers advocated the Gas Council Guidelines standard of plus or minus four percent from the historical average of 1,356 for a range of 1,302 to 1,400. *Id.* P 36, JA 227. Florida Power advocated a Wobbe Index range of only plus or minus one percent from the historical mean, for a range of 1,346 to 1,371. *Id.* P 65-66, JA 232.

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<sup>1</sup> BP Energy Company, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Gas & Power Marketing Company, and Shell LNG NA, LLC.

To the extent that any end-user equipment required modification due to the introduction of LNG, Florida Power (and other generators) also argued that the costs should be the responsibility of the project sponsors since they would be earning significant profits from the LNG. *See* Initial Decision P 65, 223, JA 232, 251. The generators also contended that the standard should apply to both the Market Area and the Western Division, asserting that it was unclear whether Florida Gas could meet gas specifications with blending. *See id.* P 69, JA 233.

### **C. The Initial Decision**

#### **(1) The Interchangeability Standard**

The key issue was whether the narrower limits proposed by Florida Power (and other generators) were necessary to protect General Electric (“GE”) and Siemens-Westinghouse DLN turbines, the turbines in Florida most likely to be affected by new gas standards. DLN turbines have restrictive operating fuel requirements because of the technology required to produce very low emissions. “As a result, the DLN combustion systems are not capable of handling large changes in gas composition without changing turbine operating parameters by retuning.” Opinion No. 495 P 46, JA 12. A minority of Florida turbines are DLN turbines. Initial Decision P 143, JA 243.

The ALJ found the Florida Gas proposed 1,340 to 1,396 standard just and reasonable. *Id.* P 171, JA 246. This standard will permit safe operation of the

generation turbines, compliance with emission and turbine warranty requirements standards (with modification to some turbines at minimal cost), and importation of a substantial amount of LNG. Initial Decision P 171, JA 246. The ALJ rejected the higher Wobbe Index limit proposed by the LNG Suppliers because gas at that limit could pose a risk to the safety and emissions compliance of some turbines, might void their warranties unless they were upgraded at significant cost, and would not substantially increase LNG availability. *Id.* P 172, JA 246. He also rejected the narrower limits proposed by Florida Power because these limits would bar importation of LNG that could otherwise be imported without jeopardizing safety and the environment or voiding turbine warranties. *Id.* P 173, JA 246.

The ALJ found that the witnesses sponsored by the generators in support of narrower limits lacked credibility. *Id.* P 131-132, 141-166, JA 242, 243-46. The manufacturers' specifications, on the other hand, were the most reliable evidence of record. *Id.* P 141, JA 243. The GE and Siemens-Westinghouse specifications showed that the turbines can operate safely under the proposed standards, although some turbines may require retuning. *Id.* P 144-150, JA 243-44.

## **(2) Application To The Western Division**

The ALJ declined to require the proposed standards to apply to domestic gas, reasoning that domestic producers had not received adequate notice that this might occur. *Id.* P 197, JA 248. He concluded, however, that the proposed

standards should apply to re-vaporized LNG in the Western Division, not just to re-vaporized LNG in the Market Area, as Florida Gas had proposed. Initial Decision P 200, JA 249. The ALJ found unconvincing Florida Gas's proposition that all LNG delivered to the Western Division could be successfully blended to meet the new standards prior to being transported into the Market Area. *Id.*

### **(3) Cost Allocation**

The ALJ denied allocation to third parties of costs that might result from upgrading turbines to accommodate re-vaporized LNG. *Id.* P 223-225, JA 251. Such claims were "not now ripe for adjudication." *Id.* P 225, JA 251. The costs were "highly speculative with regard to need, amount or cause." *Id.* P 224, JA 251. They may also "be unnecessary or the contractual responsibility of others" and "may have multiple benefits, including some not related to [LNG]." *Id.* P 225, JA 251. The ALJ suggested parties make NGA § 5 filings in the future to recover costs they attributed to LNG importation, but stated that he made no determination as to the "propriety or merits" of such a filing. *Id.*

### **D. The Challenged Orders**

Various parties filed with the Commission exceptions to the Initial Decision. In Opinion No. 495, the Commission affirmed the ALJ with respect to his approval of Florida Gas's proposed Wobbe Index standard. Opinion No. 495 P 48-130, JA 13-28. FERC agreed that turbine manufacturers' specifications were the most



reliable evidence of record, and that contrary evidence proffered by the generators lacked credibility. Opinion No. 495 P 43-115 , JA 12-25.

The Commission, however, reversed the ALJ's findings regarding scope of application of the new standards. Since the objective of the proceeding was to establish interchangeability standards, the standards must apply to both domestic gas and re-vaporized LNG, the gases that will be interchanged. *Id.* P 212, JA 40. FERC also reversed the ALJ's finding that the new standard should apply to the Western Division, concluding that the record did not support a finding that current Division gas standards are unjust and unreasonable. *Id.* P 227-29, JA 42-43. The Commission, however, required the new standard to apply to gas entering the Market Area from the Western Division, for the same reasons that all other gas entering the Market Area must comply with them. *Id.* P 230, JA 43.

With regard to possible generator upgrade costs, the Commission fully agreed with the ALJ that such costs are speculative and indefinite. *Id.* P 266, JA 50. The fundamental question, however, was whether the Commission had jurisdiction to assign cost responsibility to entities it did not regulate. *Id.* FERC concluded that it did not. *Id.* P 267-294, JA 50-55.

Opinion No. 495 also directed Florida Gas to file tariff sheets to implement the interchangeability standards prior to the in-service date of Southern Natural Gas Company's Cypress Pipeline interconnection with Florida Gas. Opinion No.

495, Ordering Paragraph (B), JA 56. The interconnection and related facilities allow Southern, for the first time, to deliver re-vaporized LNG from a facility in Georgia directly into Florida. *Id.* P 9, JA 4-5.

Florida Gas's first compliance filing, made April 30, 2007, applied the Market Area standards, *inter alia*, to Western Division receipt points. *See* First Compliance Order P 4, JA 60. LNG Suppliers protested, contending that Opinion No. 495 did not authorize modification of Western Division gas standards. FERC agreed, rejected the provision applying the standards to the Western Division, accepted the remainder of the filing, and required Florida Gas to file revised tariff sheets. *Id.* P 8-9, JA 61.

Florida Gas's second compliance filing, made June 7, 2007, eliminated language applying the new standards to gas entering the Market Area from the Western Division. *See* Second Compliance Order P 4, JA 62. Various generating companies protested. The Commission found the filing inconsistent with Opinion No. 495; informed Florida Gas that if it believed new Western Division standards were necessary, the appropriate vehicle was an NGA § 4 filing, not a compliance filing in this proceeding; and required Florida Gas to re-file. *Id.* P 6-7, JA 63. On August 17, 2007, Florida Gas made its third compliance filing, which the Commission accepted on September 11, 2007. Third Compliance Order, page 1, JA 64.

Several parties (including Petitioners) requested rehearing of Opinion No. 495. Florida Gas requested rehearing of the three Compliance Orders as well. The Commission denied all of the rehearing requests that are relevant here. Opinion No. 495-A P 1, JA 67. The petitions for review followed.

### **SUMMARY OF ARGUMENT**

The Commission's approval of a Wobbe Index range of 1,340 to 1,396 (measuring gas quality and interchangeability) was reasonable and supported by substantial evidence. The standard will permit safe operation of generation turbines such as those operated by Florida Power, albeit with possible moderate turbine upgrade costs, and will allow importation of a substantial amount of LNG.

Manufacturers' specifications for the turbines that would be most affected by the gas standard demonstrated that the turbines could safely receive gas meeting that standard. The specifications were reliable evidence because they are designed to be broad enough to enhance the turbines' marketability and reliable enough to be the basis for manufacturer warranties. The Commission properly declined to rely on contrary witness testimony, as the witnesses lacked turbine expertise, made only general recommendations, and relied upon secret, ambiguous, and inconsistent documentation.

The Commission reasonably concluded that the new standards should apply to all gas entering the Florida Gas Market Area, including gas entering from

Florida Gas's Western Division. The objective of the proceeding was to establish gas interchangeability standards. Western Division gas can affect Market Area generators just like gas from any other source can. Thus, Western Division gas entering the Market Area should be subject to the same standards as all other gas.

The Commission lacks jurisdiction to grant Florida Power's request for LNG suppliers or users to reimburse electric generators (like Florida Power) for costs expended on improving their turbines to meet new gas interchangeability standards. The Natural Gas Act gives FERC jurisdiction only over the transportation or sale of natural gas for resale in interstate commerce, and the companies that engage in such activities. LNG suppliers and users do not engage in these jurisdictional activities. Even if they did, reimbursement would not be warranted. The costs are speculative and not so excessive as to render the tariff gas quality and interchangeability standards unjust and unreasonable.

## ARGUMENT

### I. THE COMMISSION'S CONCLUSION THAT THE PROPOSED GAS INTERCHANGEABILITY STANDARDS ARE JUST AND REASONABLE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The objective in the underlying proceeding was to ensure that the proposed interchangeability standards are just and reasonable. Current users of gas have no contractual right to gas of a specific quality. *See* Opinion 495-A P 92, JA 84.

However, in determining the proposal's reasonableness, the Commission held that one factor it must consider is the effect the standards would have on users, "including whether those standards may impose excessive cost burdens on downstream entities." *Id.* P 80, JA 82. As FERC found, downstream generators (like Florida Power) may incur some upgrade costs, even under the restrictive standards proposed for their benefit (and against the wishes of other parties), but those costs are not so excessive as to render the proposed standards unjust and unreasonable.

#### A. Standard Of Review

This Court reviews "FERC's orders by applying the Administrative Procedure Act's 'arbitrary and capricious' standard." *See* 5 U.S.C. § 706(2)(A); *Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). Under this deferential standard, this Court must affirm the Commission's orders so long as the

agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Wisc. Pub. Power v. FERC*, 493 F.3d at 256.

The Commission’s factual findings are treated as conclusive if they are supported by substantial evidence. *See* NGA § 19(b), 15 U.S.C. § 717r(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). Moreover, “when agency orders involve complex scientific or technical questions,” the Court is “particularly reluctant to interfere with the agency’s reasoned judgments.” *B&J Oil and Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) (“We will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.”)); *Washington Gas Light Co. v. FERC*, 532 F.3d at 930 (same).

**B. The Generator Turbines Can Operate Safely Under The Proposed Standards Without Incurring Excessive Upgrade Costs.**

The evidence submitted on gas interchangeability issue was extensive<sup>2</sup> and the Commission's analysis of it lengthy. *See* Initial Decision P 117-173, JA 240-46; Opinion No. 495 P 34-130, JA 10-28; and Opinion No. 495-A P 13-50, JA 69-76 (containing FERC's analysis). Thus, Florida Power's complaint is essentially that FERC arrived at the wrong conclusion. However, the question before the Court is "not whether record evidence supports [petitioner]'s version of events, but whether it supports FERC's." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citing *Fla. Mun. Power Agency v. FERC*, 315 F.3d at 368). The Commission's findings easily meet this standard.

In brief, after considering the manufacturers' turbine specifications (Opinion No. 495 P 48-63, JA 13-16), other documents related to the specifications (*id.* P 72-88, JA 17-20), witness testimony (*id.* P 89-115, JA 20-25), and the Gas Council Guidelines (*id.* P 116-128, JA 25-28), FERC concluded that the manufacturers' specifications provided the most reliable evidence as to the capabilities of the particular turbines at issue. Opinion No. 495 P 54, JA 14; Opinion No. 495-A P 23-26, JA 71-76. "The manufacturers' specifications are designed to be broad

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<sup>2</sup> More than a dozen parties, including Florida Gas, Florida Power, LNG Suppliers, Ocean Express, Florida Generators, Local Distribution Companies, entities affected by the Cypress Pipeline Project, and Commission trial staff participated in the Commission proceedings.

enough to enhance their turbines' marketability over competing products, but reliable enough for the manufacturers to base warranties on." Initial Decision P 141, JA 243. They "are public documents that customers rely upon for their ordering, operating their equipment, and warranties." Opinion No. 495 P 54, JA 14 (footnote omitted). Relying on manufacturer specifications is reasonable on its face.

Turning to the particular GE specifications, these state that the turbines can burn gas with a Wobbe Index range of plus or minus five percent. *See id.* P 49-51, JA 13; Exh. FGT-4, pp. 4-5 (setting out the specifications), R 653, JA 555; Initial Decision P 144-145, JA 243. The proposed standards are based on the Wobbe Index average historically delivered to Market Area turbines. Thus, "if the generators were built to a center point anywhere near the system's average historic Wobbe Index, the GE [turbines] should be able to manage the proposed Wobbe Index range that will vary by only plus or minus 2 percent." Opinion No. 495 P 49-56, JA 13-14; *see also id.* P 79-81, JA 18-19 (citing another public GE document for same proposition); Initial Decision P 167, JA 246 (citing testimony of generators' own witness for proposition that GE turbines can manage a +4.7 percentage variance) .

For Siemens-Westinghouse turbines, the specifications state that the turbines can operate within a range of plus or minus two percent from the center point. *Id.*



P 148, JA 244; Exh. FGT-5 pp. 6-8, R 654, JA 580-82. The turbines are likely to be tuned to the Market Area historical Wobbe average. This means that if delivered gas were to be at the 1,396 maximum proposed by Florida Gas, the gas would not be within the manufacturers' specifications for satisfying emissions standards. Opinion No. 495 P 55, JA 14. These turbines, however, can be "re-centered." *Id.* (citing Initial Decision P 148-50, 167, JA 243-44, 246). "If the turbines were re-centered to a Wobbe Index of 1,368, Florida Gas's proposed limits of 1,340 to 1,396 would allow them both to operate safely and [to] satisfy the emission standards." Opinion No. 495 P 55, JA 14.

Accordingly, the manufacturers' specifications, which the Commission reasonably found to be reliable, provide substantial evidence supporting FERC's findings that the GE and Siemens-Westinghouse turbines can operate safely under the proposed gas standards. *Cf. Washington Gas Light Co. v. FERC*, 532 F.3d at 930 (declining to second-guess Commission's finding, based upon substantial evidence, that gas line couplings had been made susceptible to multiple leak-inducing factors by company's application of hot tar to pipeline couplings). Those findings, however, were only the first prong of FERC's determination that the proposed gas standards are just and reasonable.

Although the turbines at issue can operate safely with gas meeting the proposed standards, FERC recognized that generators may incur costs to adapt

some turbines to accept gas under the new standards. FERC thus considered the level of the costs to determine whether they would be so high as to render the proposed standards unjust and unreasonable. *See* Opinion No. 495 P 56-62, JA 14-16; Opinion No. 495-A P 28, 112-15, JA 72, 89.

In brief, with the introduction of re-vaporized liquefied natural gas into the gas stream, there is the potential that some generators may have to be “re-tuned” to the new flowing gas Wobbe Index. Opinion No. 495 P 56-63, JA 14-16. However, retuning is relatively inexpensive and is part of normal turbine maintenance. Initial Decision P 168-69, JA 246; Opinion No. 495 P 58, JA 14-15.

The Commission also recognized that for some turbines, not all of the equipment necessary to accommodate a changed gas flow might be in place. None of the potential costs identified in the record, however, is significant. *Id.* P 59-61, JA 15. Moreover, modifications may be unnecessary at all for many turbines. At their locations, there will be no change or only a small change in the Wobbe Index of delivered gas as the gas will still be domestic gas or LNG blended with domestic gas. *Id.* P 61, JA 15; Opinion No. 495-A P 115, JA 89.

Finally, the Commission also considered allegations that the GE turbines were designed and built for a Wobbe Index significantly below Florida Gas’s historical Index. Opinion No. 495 P 54, JA 14. If that were true, the turbines might be unable to use some gas without modifications to the turbines. As

discussed *infra* at 26-27, those allegations were based on “dubious secret documents and other unreliable hearsay.” Initial Decision P 160-166, JA 245-46. In any case, “such discrepancies between what the customers ordered and what the manufacturer allegedly supplied, should not control the outcome of the interchangeability standards for Florida Gas.” Opinion No. 495 P 54, JA 14. That conclusion is not unreasonable and is the kind of policy judgment for which the Commission is entitled deference. *See Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (the Court’s review of the reasonableness of a particular utility practice or rate design is “highly deferential” because the issues “are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission”) (citations omitted).

**C. Florida Power’s Contrary Arguments Are Not Persuasive.**

For its part, Florida Power states that this Court must look at whether FERC’s orders “evinced meaningful consideration of positions advanced by the parties” and whether the orders “offer an adequate explanation for” the decision reached. FPL Br. at 21 (citing *Universal Camera Corp. v. Nat’l Labor Relations Bd.*, 340 U.S. 474, 488 (1951), and other cases). The Commission agrees. However, Florida Power’s corollary argument, that FERC did not meaningfully consider its position, is wholly without merit.

Florida Power's overarching contention (FPL Br. at 21-24) is that FERC erred in relying on turbine manufacturers' written specifications instead of witness opinions when it determined that the turbines at issue could handle gas under the proposed specifications. As demonstrated *supra* at 20-21, the Commission's rationale for relying on manufacturer specifications is reasonable. The evaluation of witness testimony, moreover, is an area in which the Commission is entitled to deference. *Electricity Consumers Resource Council v. FERC*, 407 F.3d at 1236 ("the court defers to the Commission's resolution of factual disputes between expert witnesses") (citation omitted). Finally, as even a superficial reading of the orders demonstrates, FERC "meaningfully considered" the witness testimony, albeit reaching a result with which Florida Power disagrees. *See* Initial Decision P 117-173, JA 240-46; Opinion No. 495 P 43-130, JA 12-28; Opinion No. 495-A P 13-37, JA 69-74.

More specifically, Florida Power contends (FPL Br. at 22-23) that testimony from "turbine operating experts" demonstrated that FPL's "current equipment configuration" cannot accommodate the new standards. That testimony, however, was unreliable. Florida Power's witness Dr. Klassen was not an expert on turbines, made no independent determination based on his own expertise as to the Wobbe range that the turbines could accommodate, was unable to offer any specific recommendations on the permissible variation in gas composition, relied

on documentation on conditions that are unlikely to occur on Florida Gas's system, and admitted that he had not examined publicly-available GE and Siemens-Westinghouse information on their turbines. Initial Decision P 131-32, JA 242; Opinion No. 495 P 94-100, JA 20-22.

Florida Power's witness Mr. Driebe was similarly unpersuasive. Florida Power (FPL Br. at 22) cites Mr. Driebe as authority for the proposition that Florida Power's current equipment configuration cannot accommodate fuel quality changes. However, Mr. Driebe made only general statements about turbine operations. *See e.g.* Exh. No. FPL-1, pp. 8-10, R 666, JA 647-49. Accordingly, his testimony did not provide a basis for adopting specific standards. Opinion No. 495 P 115, JA 25.

Florida Power (FPL Br. at 22) cites for the same proposition "information from the turbine manufacturers themselves." These submissions, however, were unreliable. For example, two documents comprising "other information" were sponsored by Mr. Fitzgerald, testifying for another utility party. Initial Decision P 152-53, JA 244. Both the documents and Mr. Fitzgerald's testimony lacked credibility. Mr. Fitzgerald's prefiled direct testimony supported the proposed standards. *Id.* P 151, JA 244. At the hearing, he changed his testimony, endorsing the narrower generator standard based upon two secret documents prepared specifically for this litigation to contradict the public manufacturer turbine

specifications. *Id.* P 152, JA 244. The documents were hearsay; their creators did not testify. The ALJ found the documents “not reliable or even credible,” self-serving, and ambiguous on their faces. *Id.* P 152-159 JA 244-45. After performing its own analysis, the Commission agreed. Opinion No. 495 P 69-71, JA 17; Opinion No. 495-A P 21-26, JA 71-72.

Mr. Fitzgerald also testified at the hearing (and in contradiction to his filed testimony) that GE and Siemens-Westinghouse turbines had been designed for gas with a Wobbe number lower than the Florida Gas historical average range. Opinion No. 495 P 102-03, JA 22-23. This testimony relied upon oral, anecdotal conversations Mr. Fitzgerald had with persons who were not present to testify. Initial Decision P 160-65, JA 245; Opinion No. 495 P 107-08, JA 23-24. Thus, it lacked credibility. *Id.* Moreover, the proposition that generating companies would buy turbines not designed for the average Wobbe Index level lacks plausibility. Initial Decision P 158, JA 245; Opinion No. 495 P 109 JA 24.

Mr. Fitzgerald’s testimony also lacked analytical support. Opinion No. 495 P 110, JA 24. In contrast, Dr. Santavicca, a witness sponsored by the LNG Suppliers, testified that there are analytical tools to evaluate the impact of changing gas compositions on combustion. *Id.* Applying these modeling tools, Dr. Santavicca found “that the risks for the different gas compositions . . . are

comparable to those operators currently face from component wear, humidity and gas composition.” Opinion No. 495 P 110, JA 24.

Florida Power also asserts (FPL Br. at 22-23) that the Commission misinterpreted the turbine specifications, quoting in support a phrase in the GE specifications stating that “the amount of variation that a specific fuel system design can accommodate is limited.” There is no disagreement, however, that the amount of variation must be limited. That is why the variation is limited to the plus or minus two percent Wobbe Index range set forth elsewhere in the specifications. *Id.* P 78, JA 18.

Florida Power contends (FPL Br. at 24) that the Commission did not reconcile its adoption of the proposed Wobbe Index upper limit with evidence demonstrating that turbine fuel nozzles were designed for gas having a 1,335 Wobbe Index average, which is lower than the Florida Gas historical average. As discussed *supra* at 26-27, however, the contention that generators were designed for a Wobbe Index average lower than the historical average is not plausible and, even if true, would not provide a basis for imposing a narrower Wobbe range. Initial Decision P 151-152, JA 244; Opinion No. 495 P 54, JA 14.

Florida Power’s contention (FPL Br. at 22) that further testing is needed before new standards become effective also lacks merit. “[A]s a practical matter, the point of delivery of [already certificated project] gas onto the Florida Gas

mainline and the effects of blending and the speculative nature of future LNG projects serving the Florida Market means that there will be little to no change in gas composition from domestic levels for most of the Market Area. Opinion No. 495-A P 121, JA 91. Consequently, depriving the Market Area of access to this gas while further testing occurs is not warranted. *Id.*

Finally, Florida Power complains (FPL Br. at 21) that FERC adopted the proposed gas standards despite concerns that end-users would have to make “as-yet-unknown adjustments” to their equipment. That the adjustments were not precisely known is unremarkable, given the different factors involved for each turbine. *See* Opinion No. 495 P 250, JA 47 (citing “the capabilities of individual appliances, their location on the Florida Gas system relative to the point re-vaporized LNG is received, and the likelihood that delivered gas will reach the extremes of the approved interchangeability standards”). As discussed above, the adjustments are likely to be insignificant and, for the most part, no different than the routine re-tuning that turbines periodically undergo. *See* Initial Decision P 169, JA 246; Opinion No. 495 P 56-63, JA 14-16; Opinion No. 495-A P 28, 112-115, JA 72, 89.



**II. THE COMMISSION REASONABLY CONCLUDED THAT WESTERN DIVISION GAS ENTERING THE FLORIDA GAS MARKET AREA MUST COMPLY WITH THE SAME GAS STANDARDS APPLICABLE TO GAS ENTERING FROM ALL OTHER AREAS.**

**A. Applying The Same Receipt Standards To All Gas Entering The Market Area Fosters Interchangeability And Protects Market Area Generator Turbines.**

As an initial matter, FERC concluded that the new standards should apply to both domestic and re-vaporized LNG. Opinion No. 495 P 212-218, JA 40-41.

“The objective of this proceeding was to establish gas *interchangeability* standards.” *Id.* P 212, JA 40 (emphasis in original). Florida Gas’s proposal to limit its new standards to re-vaporized LNG was contrary to this goal. Opinion No. 495-A P 124, JA 91. Because of the way gas flows, Market Area customers could receive anywhere from 100 percent domestic gas to 100 percent re-vaporized LNG. Under these circumstances, dual standards would be meaningless because customers would have to be ready to accept gas that met the outer limits of either standard. Consequently, a single standard should apply to gas entering the Market Area regardless of the geographic source of the gas. *Id.*; Opinion No. 495 P 216-218, JA 41. Neither Florida Gas nor any other party sought agency rehearing or judicial review of this finding.

This reasoning applies as well to gas entering the Market Area from Florida Gas’s Western Division. Opinion No. 495 P 230, JA 43. The existing Western

Division tariff contains, for example, no Wobbe Index constraints for gas entering Division receipt points. Market Area customers receiving gas entering the Market Area from the Western Division could experience swings in gas quality that go beyond the Market Area receipt gas quality standards. *Id.* Those standards exist, however, because the record in this proceeding demonstrated that Market Area shippers “must receive gas satisfying those standards in order to safely operate their end-use appliances.” Opinion No. 495-A P 131, JA 92. Consequently, all gas that enters the Market Area, whether it comes from the Western Division or elsewhere, should have to meet the standard.

**B. Applying The Same Receipt Standards To All Gas Entering The Market Area Does Not Violate NGA § 5.**

Florida Gas contends (FGT Br. at 20-31) that the Commission cannot require application of the proposed standards to gas entering the Market Area from the Western Division because it has made no finding pursuant to NGA § 5, 15 U.S.C. § 717d, that current standards for gas in the Western Division are unjust and unreasonable. This contention is incorrect for the reasons discussed fully in the challenged orders. *See* Opinion No. 495 P 227-30, JA 42-43; Opinion No. 495-A P 127-45, JA 92-95.

In brief, applying receipt standards to gas entering the Market Area from the Western Division is not the same thing as imposing new standards on Western Division gas, as Florida Gas suggests it is (*see* FGT Br. at 20). “The receipt

requirements into the Market Area do not control the receipt requirements upstream.” Opinion No. 495-A P 132, JA 93. Rather, they “control only their delivery gas quality requirements.” *Id.* P 139, JA 94. Southern Natural Gas Company, for example, has not proposed changes in its tariff gas quality standards despite the fact that its Cypress Pipeline extension will be delivering LNG into the Market Area. *Id.* footnote 153, JA 93; Opinion No. 495 P 297, JA 56 ; *see id.* P 9, JA 4 (describing Cypress Pipeline Project).

Moreover, it is not even clear that any changes to Western Division receipt standards are necessary. Florida Gas emphasizes (*see, e.g.*, FGT Br. at 20, 23, 25, 28) that there is no evidence of any past problems with Western Division gas deliveries into the Market Area. The Commission agrees. The record in this case shows that even when receiving high Wobbe Index gas into its Western Division, Florida Gas has been able to deliver gas to the Market Area that did not significantly differ from historical parameters. Opinion No. 495-A P 139, JA 94. Thus, not only has the Commission not imposed new standards on Western Division receipt points, it is not even clear that changes to Western Division tariff receipt point gas quality standards are necessary for Western Division deliveries into the Market Area to satisfy the Market Area receipt standards. *Id.*

Florida Gas nevertheless reiterates (FGT Br. at 21-28) various forms of its basic argument that FERC cannot impose standards on gas entering the Market

Area from the Western Division after finding no basis for finding Western Division standards unjust and unreasonable. Florida Gas argues, for example, (FGT Br. at 21) that the Commission “fails to offer any rational explanation” for its actions. However, the focus of the proceeding was the gas composition necessary to permit the safe operation of Market Area electric generators, not the origin of the gas. Opinion No. 495-A P 130, 133, JA 92, 93. After developing an extensive record, the Commission approved the proposed standards as necessary to protect Market Area generators. If the standards are necessary to protect Market Area generators, there is just as much basis for applying the standards to Western Division gas entering the Market Area as to any other gas entering the Market Area. *Id.*

Finally, Florida Gas’s contention (FGT Br. at 29-30) that the Commission has “mischaracterized” the transportation of gas from the Western Division to the Market Area as a “receipt point into the Market Area” misses the point. There is no Commission policy that gas interchangeability standards apply only where pipeline systems connect. Opinion No. 495-A P 137, 141, JA 94, 94-95. The gas standards issues are relatively new, this was the Commission’s first litigated interchangeability case, and the evidence supported gas quality standards for gas entering the Market Area at all points of entry. *Id.*; *see also id.* P 136 fn 160, JA

93 (disagreeing with Florida Gas's implication that there are no tariff and contractual differences between the Western Division and Market Area).

**C. Florida Gas Is In The Same Situation As Other Pipelines That Must Satisfy Market Area Receipt Standards.**

Florida Gas asserts (FGT Br. at 31-34) that the Commission contradicted policy, the rule against undue discrimination, and practicality by applying a gas quality standard at a point where there is no third party delivering gas into its system. As discussed *supra* at 33, however, there is no Commission policy that gas interchangeability standards apply only at pipeline receipt points. Opinion No. 495-A P 141, JA 94. The gas standard issues are relatively new, and are decided case-by-case on the basis of the facts and circumstances of each case. *Id.* P 137, JA 94.

Florida Gas claims undue discrimination (FGT Br. at 33) on grounds that the Commission “never explains why middle-of-the-pipeline standards are appropriate for [it] but not other pipelines.” To the contrary, FERC did not find that such standards are not appropriate for other pipelines. *See id.* P 141, JA 94 (citing cases where pipelines have different standards in distinct areas of their systems). In the case here (the first to litigate gas quality standards), FERC simply considered the particular facts and circumstances and concluded that the same standards should apply to all gas entering the Market Area.

With regard to practicality, Florida Gas is “in no different posture” than any other pipeline:

The Market Area tariff receipt point gas quality standards must be met by Southern and any other pipeline delivering commingled gas from their systems into Florida Gas’s Market Area. The Commission did not examine and made no finding as how those pipelines must satisfy Florida Gas’s Market Area receipt point standards. Florida Gas is left in the same situation as any other upstream pipeline that must deliver gas to a downstream system which has tariff quality standards different from those on the upstream system. Each upstream pipeline must evaluate whether the differences in those standards require changes in its operations or its own tariff provisions so as to enable it to meet the downstream standards.

Opinion No. 495-A P 138, JA 94. Here, as discussed *supra* at 32, Florida Gas has been able to deliver gas into the Market Area that did not significantly differ from historical parameters even when gas received into the Western Division had a Wobbe Index significantly above the new Market Area maximum. Opinion No. 495-A P 139, JA 94. Thus, it is not clear from this record that any changes to Florida Gas’s operations or Western Division gas receipt standards are necessary. If they are, then Florida Gas, like Southern Natural Gas Company or any other upstream pipeline delivering gas into a downstream system with more stringent gas quality standards, must decide the appropriate response.

Florida Gas complains (FGT Br. at 34) that the Commission rejected the “control mechanism” that it proposed in its April 30, 2007 compliance filing. That “control mechanism” proposed to apply the Market Area gas receipt standards to

Western Division receipt points. The “control mechanism” was thus directly contrary to Order No. 495, which had accepted Florida Gas’s proposal to limit the proposed gas quality standards to the Market Area and which had specifically found that this record lacks sufficient basis to find existing Western Division standards unjust and unreasonable. Order No. 495 P 227-228, JA 42-43; First Compliance Order P 9, JA 61. Such a finding is an NGA § 5 prerequisite, in the absence of an NGA § 4 filing by Florida Gas, to requiring modification of Western Division tariff standards. Opinion No. 495 P 227, JA 42; *see also* NGA § 5, 15 U.S.C. §717d(a) (FERC shall determine a new just and reasonable rate or practice only after finding old rate or practice unjust and unreasonable). If Florida Gas now believes that modification of its Western Division receipt gas standards is necessary, it may make the appropriate NGA § 4 filing.

**III. THE COMMISSION REASONABLY INTERPRETED ITS GOVERNING STATUTES AS DENYING IT JURISDICTION TO REQUIRE PARTIES IT DOES NOT REGULATE TO PAY MITIGATION COSTS HERE.**

**A. Standard Of Review**

Where a court is called upon to review an agency’s construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467

U.S.C. 837, 842-43 (1984). *See also, e.g., Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (FERC interpretation of its own jurisdiction under the Natural Gas Act entitled to *Chevron* deference). “[I]f the statute is silent or ambiguous with respect to the specific issue,” however, the Court must “proceed to step two and defer to any ‘permissible construction of the statute’ offered by the agency.” *HolRail, LLC v. STB*, 515 F.3d 1313, 1316 (D.C. Cir. 2008) (quoting *Chevron*, 467 U.S. at 843).

The Commission submits that Congress has spoken directly to the issue here, *i.e.*, whether FERC has jurisdiction to direct LNG suppliers or end-users to reimburse generators, like Florida Power, for turbine upgrades. (Florida Power does not address the standard of review issue.) No one disputes the fact that Congress has given FERC no direct authority over LNG transactions. NGA § 1, *see* 15 U.S.C. § 717(b), gives FERC jurisdiction only over the transportation or sale of natural gas for resale in interstate commerce – not the sale or purchase of LNG. *Cf. Transm’n Agency of Northern Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (*Chevron* step one finding that FERC lacks authority to order a non-jurisdictional municipality to pay refunds); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (similar finding that FERC lacks authority to order non-jurisdictional government entities to pay refunds). If, however, the Court finds the



statute to be silent or ambiguous on the issue, the Commission submits that its interpretation is permissible and should be affirmed under *Chevron* step two.

In any event, even assuming that the Commission has jurisdiction to order the reimbursement Florida Power seeks, FERC's decision not to do so here is a remedial decision entrusted to the agency's discretion. *See, e.g., ExxonMobil Corp. v. FERC*, Nos. 07-1306, *et al.* (D.C. Cir. July 7, 2009), slip op. at 13 (reviewing court is "particularly deferential" -- indeed, agency discretion is at its "zenith" -- when the agency is "fashioning remedies" or otherwise exercising its remedial authority) (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

**B. Congress Did Not Authorize The Commission To Regulate LNG.**

Florida Power seeks to have FERC "evaluate and assign end-user retrofit costs to parties who benefit from the introduction of LNG into Florida." *See FPL Br.* at 25. The Commission, however, examined its governing statutes and concluded that it lacks jurisdiction to order parties engaging in non-jurisdictional activities to pay the expenses of other parties. *See Opinion No. 495 P 265-294, JA 49-55; Opinion No. 495-A P 83-111, JA 82-89.* As the challenged orders demonstrate, FERC's conclusion is, at least, a permissive one.

In brief, the Commission derives its natural gas jurisdiction from NGA § 1. That provision gives FERC jurisdiction only over the transportation or sale of

natural gas for resale in interstate commerce, and the companies that engage in such transactions. NGA § 1(b), 15 U.S.C. § 717(b). While the NGA elsewhere gives FERC jurisdiction over the importation and exportation of LNG, and the siting and construction of LNG terminals, *see* NGA § 3, 15 U.S.C. § 717b, that jurisdiction does not extend to LNG sales and purchases, and thus to LNG suppliers and users. *See* Opinion No. 495 P 269, JA 50 (“[T]he Commission’s only relevant jurisdiction in the present case is with respect to the rates, terms, and conditions of Florida Gas’s interstate transportation service. The Commission has no NGA jurisdiction with respect to any of the purchases and sales that may bring LNG into the Florida market or the entities that may incur mitigation costs.”). Indeed, Congress has elsewhere exempted LNG suppliers from Commission jurisdiction. *See id.* P 268, JA 50.<sup>3</sup>

Florida Power does not contest FERC’s lack of jurisdiction over LNG suppliers and users. Nevertheless, Florida Power contends that pursuant to its NGA § 7 conditioning authority, FERC may assign costs to entities engaging in non-jurisdictional activities. However, the Commission’s authority under NGA §

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<sup>3</sup> In brief, 15 U.S.C. § 3431(a)(1)(A), as modified by § 3(b)(7)(A) of the Natural Gas Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989), states that the jurisdiction of the Commission under the NGA “shall not apply to any natural gas solely by reason of any first sale of such natural gas.” “First sale” for purposes of this provision is defined in 15 U.S.C. § 3301(21)(A). The Energy Policy Act of 1992, 102 Pub. L. No. 102-486, amended NGA § 3 to provide that the importation of LNG would be treated as a first sale within the meaning of § 3301(21). *See* NGA § 3(b)(1), 15 U.S.C. § 717b(b)(1).

7(e), *see* 15 U.S.C. § 717f(e), to condition the certificates of public convenience and necessity it issues is not as broad as Florida Power submits:

As [this Court] held in [*American Gas Ass'n. v. FERC*], 912 F.2d 1496, 1510-1 (D.C. Cir. 1990), “The Commission may not use its § 7 conditioning power to do indirectly (1) things that it can do only by satisfying specific safeguards not contained in § 7(e) (in the case of reducing previously approved jurisdictional rates, by meeting its burden under § 5), or (2), *a fortiori*, things that it cannot do at all [citations omitted].”

Opinion No. 495 P 291, JA 55. Since Congress did not give direct authority to the Commission to order non-jurisdictional entities to pay monies, the Commission lacks authority to do so indirectly under the guise of an NGA § 7 condition.

**C. Florida Power’s Contrary Arguments Are Not Persuasive.**

Florida Power begins (FPL Br. at 26-30) with the general argument that FERC’s NGA § 7 deliberations failed to consider the economic impacts on downstream users. That argument is without merit. The Commission recognized that it must consider whether the introduction of re-vaporized LNG would impose excessive cost burdens on downstream entities. Opinion No. 495 P 271, JA 51; Opinion No. 495-A P 101, JA 86. Accordingly, FERC conditioned the certificates to require compliance with gas standards to be developed in this proceeding. *Id.* LNG Suppliers wanted broad Wobbe Index standards so that they could import from the widest range of sources with the least cost for processing. The

generators, including Florida Power, wanted more restrictive standards to protect their turbines at the least cost.

The ALJ found the LNG Suppliers' broad standard unjust and unreasonable because turbines would have to be upgraded at substantial cost without substantially increasing the supply of LNG. Initial Decision P 172, JA 246. He found Florida Gas's proposed standards, which were more stringent than would otherwise be permitted by the Gas Council Guidelines, just and reasonable because they would allow the turbines at issue to operate safely with minimal upgrade costs to their owners and while permitting the importation of a substantial amount of LNG. *Id.* P 171, JA 246. After analyzing and weighing the relative costs, advantages, and effects on downstream users of the various proposals, the Commission agreed. *See* Opinion 495 P 43-44, JA 12. In sum, Florida Power's argument that the Commission did not consider the effect on downstream users is wrong.

Florida Power's citation (FPL Br. at 29-35) to various cases is also not persuasive. Florida Power cites, for example, *Assoc. Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). That case held that FERC has authority to condition producer access to transportation on allowing "take-or-pay" relief. Florida Power suggests that the Commission should therefore be able to limit access to the Florida Gas system to entities sharing in downstream mitigation costs. However, that case

is distinguished by the fact that it involved jurisdictional contracts, as the Commission made clear in discussing the related *American Gas Ass'n. v. FERC* decision:

The court stated that “the Commission may not use its § 7 conditioning power to do indirectly . . . things that it cannot do at all.” Therefore, the court stated that, if the certificate condition concerning take-or-pay crediting modified a non-jurisdictional take-or-pay contract, “it would be, as we have just seen, an act the Commission cannot perform at all.” However, the court found that the crediting condition did not modify non-jurisdictional contracts. It simply gave pipelines increased bargaining power to negotiate settlements of take-or-pay liabilities they were incurring as a result of providing the certificate service, and thus was directly related to the open access transportation service being certificated. In short, the Commission can create a condition “with an eye to inducing changes in transactions that are beyond its direct grasp,” but cannot use its conditioning order to directly order actions that are beyond the Commission’s jurisdiction.

Opinion No. 495-A P 103, JA 87 (quoting from *Am. Gas Ass'n. v. FERC*, 912 F.2d at 1510.

In the instant case, the Commission included a condition in the certificates requiring that gas delivered by Southern Natural Gas Company to Florida Gas must satisfy the approved gas standards. Florida Gas can refuse transportation service to any gas that does not meet the standards. This might induce the LNG Suppliers to install additional processing facilities. “However, any condition in the Florida Gas and Southern certificates that directly ordered planned LNG terminals to add processing facilities at the terminal site or ordered LNG importers or

marketers to pay mitigation costs to the [generators] would be ‘an act the Commission cannot perform at all,’ and thus beyond our section 7 conditioning authority.” Opinion No. 495-A P 104, JA 87 (quoting *Am. Gas Ass’n v. FERC*, 912 F.2d at 1510).

The challenged orders also fully distinguished *Columbia Gas Transmission Corp.*,<sup>4</sup> cited by Florida Power at page 31 of its brief. See Opinion No. 495 P 274-284, JA 51-53; Opinion No. 495-A P 83-88, JA 82-84. In short, *Columbia* involved jurisdictional bundled sales and the case here involves open access transportation service:

In *Columbia*, the pipeline had a contractual obligation to supply its jurisdictional sales customers with gas and the pipeline made the decision to purchase LNG to meet those obligations. In those circumstances, the pipeline was responsible for any processing necessary to render the gas of the same quality as that it had previously sold to its customers. It was that nexus between the pipeline’s costs of providing jurisdictional sales service and the shippers’ mitigation costs that made the acceptance of the pipeline’s proposal for mitigating the costs of introducing LNG onto its system reasonable in those circumstances.

Opinion No. 495-A P 84, JA 83. Here there is no such nexus: “Florida Gas does not sell gas, does not need the LNG to render any jurisdictional service, and is not bringing LNG onto its system.” *Id.* P 87, JA 83. Moreover, allocating costs to

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<sup>4</sup> 13 FERC ¶ 61,102 (1980), *reh’g denied*, 14 FERC ¶ 61,073 (1981), *aff’d sub nom.*, *Corning Glass Works v. FERC*, 675 F.2d 392 (D.C. Cir. 1982).

*suppliers* would go well beyond *Columbia*, where costs were paid by the *pipeline*.  
*Id.* P 88, JA 83.

Finally, Florida Power argues (FPL Br. at 33) that NGA § 16, 15 U.S.C. § 717*o*, provides the Commission with authority “to perform any and all acts” as it may find necessary to carry out the provisions of the Act. As this Court has held, however, NGA § 16 “cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions described therein.” *Pub. Serv. Comm. of New York v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989) (citations omitted).

**D. Assuming Jurisdiction, Reimbursement Is Not Warranted Here.**

In any case, even if the Commission had jurisdiction under NGA § 7 or § 16 to order the relief Florida Power seeks, reimbursement would not be warranted. First, the costs will not be so excessive as to render the tariff gas quality and interchangeability standards unjust and unreasonable. *See* discussion *supra* at 23-24; Opinion No. 495-A P 101, 112, JA 86, 89; Opinion No. 495 P 56-62, JA 14-16 (finding, *inter alia*, “that the costs should not be beyond ordinary business costs that could be expected in operating sophisticated equipment with special needs as to the fuel it burns”).

A FERC order requiring such payments, moreover, would require FERC intrusion into areas of state jurisdiction and into areas in which FERC lacks

expertise. Opinion No. 495 P 286-87, JA 53-54. For example, Progress Energy, an electric generator regulated by the Florida Public Service Commission (“Florida Commission”), received approval from the Florida Commission to purchase imported LNG. Opinion No. 495 P 285, JA 53. Ordering reimbursements from Progress Energy “would involve [FERC] in authorizing some state-regulated companies to recover their costs from another state-regulated entity on the grounds that a purchase by the latter entity approved by the [Florida Commission] caused the former entities to incur additional costs.” *Id.* P 286, JA 53. FERC, moreover, would become involved in numerous issues concerning the eligibility of the costs for recovery, including whether the costs were incurred solely because of LNG or provided generation benefits unrelated to LNG. *Id.* P 287, JA 53-54. “These are matters which are completely extraneous to [FERC’s NGA jurisdiction], and are best left to the [Florida Commission] to the extent the generators are subject to its jurisdiction.” *Id.* In sum, the Commission properly exercised its remedial discretion in determining that even if it had jurisdiction to order the relief Florida Power seeks, that relief is not warranted here. *Cf., Exxon Mobil Corp. v. FERC*, slip op. at 13 (agency discretion is at its zenith when agency is fashioning remedies).



## CONCLUSION

For the reasons stated, the petitions for review should be denied, and the Commission's orders affirmed in all respects.

Respectfully submitted,

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August 14, 2009

Final Brief: October 2, 2009

*Florida Gas Transmission Company, et al.*  
v. *FERC*  
D.C. Cir. Nos. 07-1533 & 08-1062

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 10,422 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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**ADDENDUM**

**STATUTES**

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Section 3 of the Natural Gas Act, 15 U.S.C. § 717b(b)(1) provides as follows:

§ 717b. Exportation or importation of natural gas; LNG terminals

**(b) Free trade agreements**

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

- (1) the importation of such natural gas shall be treated as a “first sale” within the meaning of section 3301 (21) of this title; and
- (2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c provides as follows:

**(a) Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

**(b) Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission,

- (1)** make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or
- (2)** maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

**(c) Filing of rates and charges with Commission; public inspection of schedules**

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d) Changes in rates and charges; notice to Commission**

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to

Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) provides as follows:

take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

**(e) Authority of Commission to hold hearings concerning new schedule of rates**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions

preference over other questions pending before it and decide the same as speedily as possible.



Section 5 of the Natural Gas Act, 15 U.S.C. § 717d provides as follows:

§ 717d. Fixing rates and charges; determination of cost of production or transportation

**(a) Decreases in rates**

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

**(b) Costs of production and transportation**

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A) provides as follows:

§ 717f. Construction, extension, or abandonment of facilities

**(c) Certificate of public convenience and necessity**

**(1) (A)** No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(e) provides as follows:

§ 717f. Construction, extension, or abandonment of facilities

**(e) Granting of certificate of public convenience and necessity**

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Section 16 of the Natural Gas Act, 15 U.S.C. § 717*o* provides as follows:

§ 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) provides as follows:

**(b) Review of Commission order**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 2nd day of October 2009, served the following upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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