

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 16, 2009

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

No. 09-1029

**PNGTS SHIPPERS' GROUP
(BAY STATE GAS COMPANY; DTE ENERGY TRADING, INC.;
H.Q. ENERGY SERVICES (U.S.) INC.; NEW PAGE CORPORATION;
NORTHERN UTILITIES; AND WAUSAU PAPERS OF NEW
HAMPSHIRE, INC./WAUSAU PAPER PRINTING & WRITING, LLC),
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION**

AUGUST 7, 2009

FINAL BRIEF: OCTOBER 14, 2009

WASHINGTON, D.C. 20426

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. **Parties and Amici**

The parties before this Court are listed in the brief of Petitioners.

B. **Rulings Under Review**

1. Order Granting Petition for Declaratory Order, *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275 (June 18, 2008) (“Declaratory Order”), R. 19, JA 160; and
2. Order Denying Rehearing, *Portland Natural Gas Transmission System*, 125 FERC ¶ 61,198 (November 18, 2008) (“Rehearing Order”), R. 25, JA 233.

C. **Related Cases**

This case has not previously been before this Court or any other courts, and counsel is not aware of any other related cases pending before this or any other court.

Kathrine L. Henry
Attorney

October 14, 2009

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GLOSSARY

Br.	Brief of Petitioner
Certificate Order	Order on Compliance Filing, Issuing Certificates, Section 3 Authorization and Presidential Permit, and on Rehearing, <i>Portland Natural Gas Transmission System</i> , 80 FERC ¶ 61,345 (1997)
Declaratory Order	Order Granting Petition for Declaratory Order, <i>Portland Natural Gas Transmission System</i> , 123 FERC ¶ 61,275 (June 18, 2008), JA 160
FERC or Commission	Federal Energy Regulatory Commission
JA	Joint Appendix
Maritimes	Maritimes and Northeast Pipeline, LLC
Mcf	Thousand cubic feet
NGA	Natural Gas Act
Portland Natural	Portland Natural Gas Transmission System
Preliminary Determination	Order Issuing Preliminary Determination on Nonenvironmental Issues, <i>Portland Natural Gas Transmission System</i> , 80 FERC ¶ 61,134 (1997)
R	Record
Rehearing Order	Order Denying Rehearing, <i>Portland Natural Gas Transmission System</i> , 125 FERC ¶ 61,198 (November 18, 2008), JA 233
Shippers	PNGTS Shippers Group
TransQuebec	TransQuebec & Maritimes Pipeline, Inc.

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**FEDERAL ENERGY REGULATORY COMMISSION,
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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably determined the physical capacity of Portland Natural Gas Transmission System’s (“Portland Natural”) interstate natural gas pipeline system without immediately determining the associated rate impacts, if any.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to consider the appeal of PNGTS Shippers’ Group (“Shippers”). In addition to satisfying the requirements of Section 19(b) of

the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b), for judicial review of Commission rulings, a petitioner must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I of the Argument, *infra*, Shippers lack standing to object to the Commission’s orders. Shippers have not demonstrated that they have suffered, or are in imminent peril of suffering, a definitive and concrete injury. In addition, Shippers’ arguments regarding the rate impact of the Commission’s orders are not yet ripe for review, because the Commission will address concerns about rate issues in Portland Natural’s next rate case.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

This case concerns the shipping capacity of Portland Natural’s natural gas pipeline. Petitioner Shippers continue to argue that the Commission was compelled, as a matter of law, to assure Shippers now that their rates would not increase as a result of the agency establishing, in the orders on review, a capacity for the pipeline lower than that advocated by Shippers. The Commission disagreed, finding that rate impacts were better addressed in the pipeline’s next rate case.

Specifically, Portland Natural submitted a petition for a declaratory order to determine that the physical capacity across Portland Natural's system would be 168,000 thousand cubic feet ("Mcf") per day on a firm year-round basis once the Phase IV Expansion facilities of Maritimes and Northeast Pipeline, LLC ("Maritimes"), which also jointly owns and operates connecting facilities with Portland Natural, were placed in service. Shippers protested Portland Natural's petition, arguing that it was an unsupported request to abandon certificated capacity and should be denied. Shippers further argued that, at a minimum, the Commission should not grant Portland Natural's petition without immediately assuring Shippers that no adverse rate consequences would occur.

In order to remove uncertainty and provide transparency to the market, the Commission granted Portland Natural's petition. *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275 (June 18, 2008) ("Declaratory Order"), R. 19, JA 160, *reh'g denied*, 125 FERC ¶ 61,198 (Nov. 18, 2008) ("Rehearing Order"), R. 25, JA 233. The Commission acknowledged that Portland Natural historically had been able to provide service in excess of 168,000 Mcf per day. However, the Commission disagreed with Shippers that the original certificate order established a certificated level of 210,000 Mcf per day after the first year of operation. The Commission found that adoption of 168,000 Mcf per day as the certificated capacity level for Portland Natural's system would be in the public

convenience and necessity. This finding was supported by engineering information submitted by Portland Natural and Portland Natural's unchallenged assertions concerning its ability to serve current or anticipated firm customers. The Commission deferred consideration of any rate impacts associated with its ruling, including the appropriate billing determinants to use to design Portland Natural's rates, to Portland Natural's next rate case.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

Under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), natural gas companies must obtain a certificate of public convenience and necessity from the Commission before they can construct, acquire or operate interstate natural gas pipeline facilities. Section 7(b) of the NGA, 15 U.S.C. § 717f(b), provides that no facilities subject to the jurisdiction of the Commission or services rendered by means of such facilities may be abandoned without permission of the Commission, based on a finding that the available supply of natural gas has been depleted or that the present or future public convenience and necessity permit such abandonment. The Commission's regulations implementing these statutory provisions appear at 18 C.F.R. Part 157, Subpart A.

The Commission's regulations concerning declaratory orders appear at 18 C.F.R. § 385.207(a)(2). They provide, in relevant part, that a person must file a

petition when seeking a declaratory order “to terminate a controversy or remove uncertainty.”

II. Events Leading Up to the Challenged Orders

A. Portland Natural’s Certificate Authorizations

In 1996, the Commission issued preliminary determinations in two proceedings in which Portland Natural and Maritimes sought separate authorization pursuant to NGA Section 7(c) to construct pipeline facilities in the Northeastern United States. *Portland Natural Gas Transmission System*, 76 FERC ¶ 61,123 (1996); *Maritimes & Ne. Pipeline, L.L.C.*, 76 FERC ¶ 61,124 (1996). In those orders, the Commission urged Portland Natural and Maritimes to consider a jointly-owned pipeline, converging from a point near Westbrook, Maine to a point in Dracut, Massachusetts. Portland Natural subsequently amended its pending application and filed, jointly with Maritimes, an additional application to construct facilities consisting of a 101-mile long, 30-inch diameter pipeline extending from Westbrook to Dracut, as well as various lateral pipeline facilities.

On July 31, 1997, the Commission issued a preliminary determination that, pending favorable environmental review, authorized Portland Natural to construct and operate an individually-owned, 24-inch diameter pipeline that would extend 142 miles from the United States-Canadian border near Pittsburg, New Hampshire to Westbrook, Maine. *Portland Natural Gas Transmission System*, 80 FERC ¶

61,134 (1997) (“Preliminary Determination”). Portland Natural’s facilities would interconnect at the border with facilities of TransQuebec & Maritimes Pipeline, Inc. (“TransQuebec”). The Preliminary Determination also authorized Portland Natural to provide service using its capacity on the joint Portland Natural/Maritimes facilities from Wells, Maine to Dracut, Massachusetts and to construct and operate the remaining joint facilities from Wells, Maine to Westbrook, Maine.

The Preliminary Determination found that, in its first year of service, Portland Natural would have a capacity of 178,000 Mcf per day on its mainline and 169,000 Mcf per day on the joint facilities. *Id.* at 61,448. In subsequent years, the capacity for both would increase to 210,000 Mcf per day. *Id.* The Commission initially required Portland Natural to revise its initial rates to reflect billing determinants based on those volumes. *Id.* The order also noted that Portland Natural had not entered into contracts for the full capacity of its system and placed Portland Natural at risk for the recovery of the costs for the unsubscribed capacity. *Id.*

The Preliminary Determination explained that the increase in capacity on Portland Natural’s system after the first year of service would result from the installation of additional compression by TransQuebec on its facilities in Canada. This additional compression was needed to accommodate Maritimes’ proposal to

construct upstream facilities that would be placed in service one year after Portland Natural began service. *Id.* The Commission conditioned Portland Natural's certificate authorization so that it could not start construction until TransQuebec received the necessary approvals for its Canadian facilities. *Id.* at 61,450.

On September 24, 1997, following environmental review, the Commission issued certificates to Portland Natural authorizing construction and operation of the individually-owned pipeline facilities between Pittsburg, New Hampshire and Westbrook, Maine; construction and operation of the joint Portland Natural/Maritimes facilities between Westbrook, Maine and Wells, Maine; and operation of the joint facilities between Wells, Maine and Dracut, Massachusetts.

Portland Natural Gas Transmission System, 80 FERC ¶ 61,345 (1997)

("Certificate Order"). The Certificate Order also addressed Portland Natural's request for rehearing of the requirements in the Preliminary Determination that Portland Natural revise its rates to reflect 210,000 Mcf/d of capacity after the first year of operation and that Portland Natural be at risk for the increased unsubscribed capacity. The Certificate Order granted Portland Natural's rehearing request, finding that it was "premature to require [Portland Natural] to revise its rates or to be placed at risk for higher capacity after its first year of operation. It is not certain at this time when the additional compression will go into service or the actual amount of increased compression and its effect on the capacity of the

[Portland Natural] system. We will instead review this matter when [Portland Natural] makes its section 4 [general rate] filing.” *Id.* at 62,146. Portland Natural placed its pipeline into service in March 1999.

Subsequently, the Commission approved Maritimes’ application for its Phase IV Expansion, which was proposed to be placed in service on November 1, 2008. *Maritimes & Ne. Pipeline, L.L.C.*, 118 FERC ¶ 61,137 (2007). Portland Natural protested the expansion project; however, the parties reached a settlement which provided for Portland Natural to withdraw its protest. In its order approving the settlement, the Commission noted that the withdrawal of Portland Natural’s protest enabled the Commission to expeditiously process Maritimes’ application. *Maritimes & Ne. Pipeline, L.L.C.*, 118 FERC ¶ 61,193 at P 6 (2007).

B. Petition for Declaratory Order

On January 31, 2008, Portland Natural filed a petition for declaratory order, requesting that the Commission determine that the physical capacity across the Portland Natural system from Pittsburg, New Hampshire to Dracut, Massachusetts would be 168,000 Mcf per day on a firm year-round basis once the Maritimes Phase IV Expansion facilities were placed in service on November 1, 2008. R. 3, JA 8. In addition, Portland Natural requested that the Commission determine that Portland Natural would not be in violation of the Natural Gas Act or other legal obligations by denying firm service requests that, in combination with existing

contracts requiring service after October 31, 2008, would obligate Portland Natural to transport in excess of 168,000 Mcf per day on a firm year-round basis from Pittsburg to Dracut. *Id.*

Portland Natural maintained that the Commission's Certificate Order did not establish a certificated firm level of service and that Portland Natural's most recent NGA Section 4 rate case was settled without resolving the issue of certificated capacity. *Id.* at 14, JA 23. In addition, Portland Natural explained in its petition that, for two reasons, the level of capacity previously available on its system would diminish when the Maritimes Phase IV expansion facilities were placed in service. First, Portland Natural asserted that there was no contractual basis for obligating TransQuebec to construct more compression. *Id.* at 13, JA 22. Second, Portland Natural stated that operation of the Maritimes Phase IV Expansion facilities would increase the pressure within the shared pipeline, which would reduce the firm capacity on Portland Natural's mainline below previous levels. *Id.*

Portland Natural stated that, if the petition were granted, it would have more than sufficient capacity to meet all of its current contractual obligations for service after October 31, 2008. Moreover, it was not aware of any interest in additional firm service that would exceed the 168,000 Mcf per day capacity level. *Id.* at 15, JA 24. Portland Natural also noted that following the in-service date of the Maritimes Phase IV Expansion facilities, the total pipeline capacity serving the

region would increase. *Id.* Portland Natural maintained that it was not seeking to abandon any facilities or any contractual commitment. *Id.* at 2, JA 11. It also asserted that the rate consequences of its petition should be addressed in its next rate case, consistent with Commission precedent. *Id.* at 16, JA 25.

III. The Challenged Orders

A. Declaratory Order

On June 19, 2008, the Commission issued its Order Granting Petition for Declaratory Order. *Portland Natural Gas Transmission System*, 123 FERC ¶ 61,275 (2008) (“Declaratory Order”), R. 19, JA 160. The Commission explained that, in certificating pipeline projects, the Commission’s general practice is to establish a design capacity for the project that represents the pipeline’s firm service obligation. Declaratory Order P 27, JA 169. However, in this instance, because of uncertainty involving the timing and impact of additional compression to be installed by TransQuebec in order to accommodate additional Maritimes supplies, the Commission’s orders authorizing Portland Natural’s facilities ultimately did not establish a system-wide certificated capacity level after the first year of service. *Id.* Instead, the Certificate Order deferred this issue to Portland Natural’s next rate case. That rate case was resolved by an uncontested settlement that also did not establish a certificated capacity for the Portland Natural system. *Id.*

The Commission determined that, under these limited circumstances, it was not necessary for Portland Natural to file an abandonment application, contrary to Shippers' protest, and that a request for declaratory order was an appropriate vehicle for the relief requested by Portland Natural. *Id.* The Commission further determined that it was appropriate to determine the certificated level of service across Portland Natural's system going forward because it would "remove uncertainty and provide transparency to the market," including to Portland Natural and its shippers. *Id.*

Based on a review of the engineering information submitted by Portland Natural, the Commission concluded that, without either additional compression on TransQuebec's system or a lower design delivery pressure from Portland Natural into the joint facilities at Westbrook, Portland Natural would be incapable of transporting natural gas volumes in excess of 168,000 Mcf per day on a firm year-round basis from Pittsburg to Dracut after Maritimes' Phase IV Expansion facilities were placed in service. *Id.* P 28, JA 169-170. The Commission further determined that adopting 168,000 Mcf per day as the certificated capacity was in the public convenience and necessity. *Id.* P 29, JA 170. The Commission stated that its primary focus was whether natural gas service would be jeopardized and that there was no basis to conclude that requiring Portland Natural to operate its system at a greater capacity level was needed to continue to serve current or

anticipated customers. Therefore, it was appropriate to adopt 168,000 Mcf per day as the certificated capacity level going forward. *Id.*

Finally, the Commission stated that its action did not prejudice the impact of its decision on Portland Natural's rates. Consistent with Commission practice, any rate issues associated with the decision would be more appropriately determined in Portland Natural's next rate proceeding. *Id.* P 30, JA 171.

B. Rehearing Order

On November 18, 2008, the Commission issued its Order Denying Rehearing. *Portland Natural Gas Transmission System*, 125 FERC ¶ 61,198 (2008) ("Rehearing Order"), R. 25, JA 233. Shippers asserted that the Declaratory Order granted Portland Natural an abandonment of certificated capacity without requiring compliance with statutory and regulatory abandonment standards. R. 20 at 8-17, JA 179-188. Shippers further argued that the Commission's decision would be detrimental to existing shippers which relied on the Commission's assurances that Portland Natural would not be permitted to shift costs of unused capacity to them. *Id.* at 2, JA 173.

In its Rehearing Order, the Commission disagreed with Shippers' claim that the Certificate Order established a certificated capacity of 210,000 Mcf per day. The Commission stated that the issue of future capacity was deferred to Portland Natural's next rate case, which was resolved by an uncontested settlement that did

not establish a certificated capacity for Portland Natural's system. Rehearing Order P 16, JA 239-240.

In addition, the Commission stated that, while the Declaratory Order did not require Portland Natural to file an abandonment application, the Commission evaluated Portland Natural's petition under similar requirements set forth in section 7(c) of the Natural Gas Act. The Declaratory Order considered all relevant factors in considering whether the petition was consistent with the public convenience and necessity under that provision of the statute. *Id.* P 17, JA 240-241. Those factors included changes in the minimum delivery pressure from Portland Natural to the joint facilities that would occur when the Maritimes Phase IV Expansion was placed in service, which in conjunction with the receipt pressure from TransQuebec at Pittsburg would prevent Portland Natural from transporting volumes in excess of 168,000 Mcf per day. *Id.* In addition, the Commission found that there was no basis to conclude that requiring Portland Natural to operate its system at a greater capacity was needed to continue to serve current or anticipated firm customers. *Id.*

The Commission stated that Shippers did not challenge the finding that Portland Natural would be incapable of transporting gas volumes in excess of 168,000 Mcf per day on a firm year-round basis from Pittsburg to Dracut after Maritimes' Phase IV Expansion facilities were placed in service. *Id.* P 18, JA 241.

Instead, Shippers faulted the agency for not determining whether the reduction in capacity was due to the voluntary actions of Portland Natural of entering into an amended interconnection agreement with TransQuebec and the Phase IV Expansion settlement with Maritimes. *Id.* The Commission found that it was not necessary to rule on this issue, given that the record did not support requiring Portland Natural to maintain its system design capacity at a higher level, and that the issue was more appropriate for Portland Natural's next rate case. Similarly, the Commission stated there was no reason to inquire whether Portland Natural could contract for additional existing compression from its affiliates or whether cheap compression could be built, because the Commission found that there were no pending requests for additional firm service. *Id.*

The Commission also disagreed with Shippers' assertion that it erred because it ignored the impact on interruptible services. *Id.* P 19, JA 241-242. The Commission explained that interruptible shippers have no guarantee that capacity will continue to be available. Moreover, it would not be in the public convenience and necessity to require Portland Natural to incur additional costs to increase its capacity to support interruptible service. *Id.*

Finally, the Commission disagreed with Shippers' assertion that the agency ignored the rate impact on shippers. *Id.* P 20, JA 242. The Commission stated that the Declaratory Order specifically limited its ruling to the certificated capacity of

Portland Natural's system and expressly did not prejudge the impact on Portland Natural's rates, which should be addressed in Portland Natural's next rate proceeding. *Id.* In addition, the Commission stated that the Declaratory Order did not address or change the at-risk condition imposed on Portland Natural in the certificate orders. *Id.*

SUMMARY OF ARGUMENT

1. The Court should dismiss Shippers' appeal for lack of jurisdiction. Shippers argue that the Commission's failure to address immediately the rate impacts of its ruling regarding Portland Natural's certificated capacity exposes Shippers to a potential rate increase. The Commission expressly stated that its ruling did not prejudge the impact of its decision on Portland Natural's rates and deferred any associated rate issues, including appropriate billing determinants, to Portland Natural's next rate case. The Commission's ruling has no immediate impact on Shippers' rates. Thus, Shippers' injury claims are entirely speculative and their standing is entirely unestablished.

Alternatively, Shippers' petition should be dismissed as unripe. The challenged orders have no immediate impact on Shippers' rates, and it is not apparent what the rate impact, if any, will be. Thus, no hardship to Shippers will occur if the petition is dismissed. Moreover, Shippers' claims regarding the rate

impacts, if any, associated with the challenged orders can be reviewed in the context of a specific record in Portland Natural's next rate proceeding.

2. The Commission reasonably determined the physical capacity of Portland Natural's system without immediately determining the rate impacts, if any, associated with its ruling, including the appropriate billing determinants to use to design Portland Natural's rates. The Commission found that, given the lack of establishment of the system's certificated capacity in earlier proceedings, Portland Natural's request for declaratory order was an appropriate vehicle to resolve the issues raised and that determination of the certificated level of capacity across Portland Natural's system going forward would remove uncertainty and provide transparency to the market.

The Commission's order granting Portland Natural's request was supported by substantial evidence. The undisputed evidence in the record demonstrated that Portland Natural would be incapable of transporting gas volumes in excess of 168,000 Mcf per day on a firm annual basis after Maritimes' expansion facilities were placed in service. In addition, the Commission's determination that adopting 168,000 Mcf per day as the certificated capacity level for Portland Natural's system would be in the public convenience and necessity under NGA Section 7(c) was supported by Portland Natural's unchallenged assertions that it would have

more than sufficient capacity to meet its existing contractual obligations and that it was not aware of any interest in additional firm service.

Finally, the Commission reasonably exercised its discretion in finding that any rate issues associated with its decision, including the appropriate billing determinants to use to design Portland Natural's rates, were more appropriately addressed in Portland Natural's next rate case. In addition, the deferral of rate issues to a separate rate proceeding was consistent with Commission practice.

ARGUMENT

I. Shippers Fail to Allege an Injury That Establishes Standing or is Ripe for Immediate Review

A. Shippers Are Not Aggrieved by, and Thus Lack Standing to Challenge, the Declaratory Order

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), allows only “aggrieved” parties to seek judicial review of Commission orders. *E.g.*, *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 45 (D.C. Cir. 2002). A party is aggrieved only “if it can establish both the constitutional and prudential requirements for standing.” *Exxon Mobil Corp. v. FERC*, 571 F.3d 1071, 1219 (D.C. Cir. 2009), *quoting Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). “Common to . . . these thresholds is the requirement that petitioners establish, at a minimum, ‘injury in fact’ to a protected interest.” *Interstate Natural Gas Ass'n*, 285 F.3d at 45, *quoting Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200

(D.C. Cir. 1995). “Injury in fact” requires harm that is both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). Moreover, there must be “a causal connection between the injury and the conduct complained of -- the injury must be fairly . . . traceable to the challenged action of the defendant.” *Id.* at 560-61 (citation omitted); *see also, e.g., North Carolina Util. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981) (to show aggrievement, petitioner must allege facts sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature).

Here, Shippers cannot demonstrate concrete and particularized harm to show they are currently aggrieved by the challenged orders. The orders specifically limited the Commission’s ruling to the certificated capacity of Portland Natural’s system on the date the Maritimes Phase IV Expansion facilities were placed in service. Declaratory Order P 30, JA 171; Rehearing Order P 20, JA 242. In addition, the Commission expressly stated that the ruling neither prejudices the impact of the decision on any rate issues, including the appropriate billing determinants to use to design Portland Natural’s rates, nor addresses (much less changes) the at-risk condition imposed on Portland Natural by the Commission’s certificate orders. Rather, the Commission found that these issues were more appropriately addressed in Portland Natural’s next rate case. *Id.*

Shippers claim that the challenged orders “create an immediate and real prospect of future economic injury” to them. Br. at 29. Specifically, Shippers argue that the Commission’s orders have “set the stage” for capacity-based billing determinants that “could” increase rates by over 22%. *Id.* Thus, Shippers assert, the orders “undermine” any likelihood that the at-risk condition in Portland Natural’s Certificate Order will provide shipper protection in the future and will “inhibit negotiation of long-term contract and rate issues, forcing further administrative litigation.” *Id.*

Shippers’ claims of injury are entirely speculative. The Commission expressly limited its ruling to establishing the certificated capacity of Portland Natural’s system and deferred the impact of its ruling on all rate issues, including appropriate billing determinants, to Portland Natural’s next rate case. The Commission’s ruling has no immediate impact on Shippers’ rates, and all of the factual arguments Shippers make here concerning the at-risk condition and the appropriate billing determinants will be available to them in the next rate case.

Although Shippers allege that the challenged orders “enable [Portland Natural] to contend” that billing determinants in the next rate case should be based on the reduced capacity level, Br. at 30, Shippers do not, indeed cannot, claim that Portland Natural is likely to make such a contention or, if it does, that the Commission is bound by the challenged orders to accept or is even likely to accept

such a contention in the next rate case. Moreover, even if Shippers had claimed that the challenged orders constitute precedent that influences or binds the Commission in Portland Natural's next rate case, this Court has held that this type of "injury" does not confer standing. *Alabama Mun. Distribs. Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002) (reliance on precedential effect within FERC is insufficient to satisfy Article III jurisdictional requirements); *Friends of Keeseville v. FERC*, 859 F.2d 230, 235 (D.C. Cir. 1988) ("It is not this court's job . . . to speculate as to possible impacts of possible outcomes of existing lawsuits upon future litigation; it is the petitioner's responsibility to show the specifics of the aggrievement alleged.")

Because they have failed to demonstrate the requisite injury, Shippers lack standing to pursue their objections to the Commission's orders.

B. The Challenged Orders Are Not Ripe for Review

Even assuming aggrievement, a dispute is ripe for judicial review only if it is presented in a concrete setting with actual consequences. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967) (review denied where impact not felt "immediately" in "day-to-day affairs" and "no irremediable adverse consequences" from delay); *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995) (review denied where future impact of FERC orders on rates was uncertain); *Alabama Mun. Distribs. Group*, 312 F.3d at 473-74 (review denied where effect of

certificate order on shippers' rates would be decided in next NGA § 4 rate case). Ripeness principles require that a court postpone review of administrative decisions where delay (1) would permit better review of the issues and (2) impose no significant hardship on the parties. *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967); *see also, e.g., Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (declining to review regulation that has no immediate or direct impact on parties, and where judicial review of legal issue would benefit from "further factual development").

Here, there are no immediate rate impacts on Shippers. In addition, there is no benefit to review of the Commission orders determining the capacity of Portland Natural's system. As the Commission explained, *see* Declaratory Order P 30, JA 171 and Rehearing Order P 20, JA 242, any rate issues associated with its ruling, including the appropriate determinants to use to design Portland Natural's rates in the future, are more appropriately determined in Portland Natural's next rate proceeding. As a general matter, after a pipeline has been in operation for 12 months, rates are established using the pipeline's volume, cost and billing determinants based on its most recently available actual experience, not based on certificated capacity. 18 C.F.R. § 154.303(a); *Exxon Corp. v. FERC*, 114 F.3d 1252, 1263 (D.C. Cir. 1997). Thus, any claim that Portland Natural should or should not be allowed to design its rates on the basis of the reduced capacity can be

reviewed in the context of a specific record in Portland Natural's next rate proceeding. *See, e.g., Alabama Mun. Distribs. Group*, 312 F.3d at 472-74 (dismissing petition on standing and ripeness grounds, where "no one can say now" what the "precise effect" of Commission's pipeline certificate order on rates will be, and where "[t]he injury has not yet materialized nor has the factual record related to that injury been established"); *Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) ("substantial judicial interest" in deferring resolution exists where issue could be resolved in separate administrative proceeding and "may not require adjudication at all").

II. Assuming Jurisdiction, the Commission Reasonably Determined the Physical Capacity of Portland Natural's System While Deferring Any Associated Rate Issues to the Pipeline's Next General Rate Proceeding

A. Standard of Review

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also, e.g., Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (pipeline construction certificate); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004) (certificated boundary of natural gas storage field). This standard requires the Commission to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*

Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (same).

The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 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." *B&J Oil & Gas*, 353 F.3d at 77. In addition, courts are particularly reluctant to interfere with an agency's reasoned judgments that involve complex scientific or technical questions. *Id.* at 76 ("We will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise" (*quoting City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003))). Moreover, if an agency interprets its own orders reasonably, its interpretation will be sustained. *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

Furthermore, it is well established that "an agency need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991). Rather, as the Court held in *Mobil*, on review of a FERC rulemaking that deferred take-or-pay contract issues to other proceedings, "an agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities." 498 U.S. at 230 (citations omitted).

B. The Commission Reasonably Determined the Physical Capacity of Portland Natural's System Without Immediately Determining the Rate Impacts of Its Decision

In arguing that the Commission's decision granting Portland Natural's petition for declaratory order was arbitrary and capricious, Shippers make two primary related arguments. First, they argue that the Commission was compelled to require Portland Natural to file an application for abandonment authority under NGA Section 7(b), 15 U.S.C. § 717f(b). Br. at 38. Second, Shippers argue that the Commission was required by NGA Section 7(b) to immediately shield Shippers from any potential adverse rate impacts of a capacity reduction. Br. at 49.

As explained below, Shippers' arguments are not persuasive.

1. The Commission Reasonably Determined That Portland Natural Was Not Required to File an Abandonment Application

The Commission reasonably determined that Portland Natural was not required to file an abandonment application and that the pipeline's request for declaratory order was an appropriate vehicle to resolve the certificated capacity issue. Portland Natural emphasized in its petition that it was not seeking to abandon any facilities or any contractual commitments. Declaratory Order P 16, JA 165. Moreover, the Commission explained that, under the particular circumstances surrounding the issue of Portland Natural's certificated capacity, it was not necessary for Portland Natural to file an abandonment application. *Id.* P 27, JA 169. Those circumstances included the uncertainty that existed in 1997

when Portland Natural received certificate authority concerning future events that could impact the pipeline's capacity, the Commission's deferral of the certificated capacity issue to Portland Natural's rate case, and the settlement of that rate case without resolution of the capacity issue. *Id.* In addition, the Commission found that it was appropriate to determine the certificated capacity across the Portland Natural system going forward because it would remove uncertainty and provide transparency to the market, including to Portland Natural and its shippers. *Id.*

Shippers argue that an abandonment application under NGA Section 7(b) was the only vehicle for relief available to Portland Natural, because the Commission originally granted Portland Natural authorization under NGA Section 7(c) to construct, operate and maintain pipeline capacity of at least 210,000 Mcf per day of natural gas. Br. at 32. Shippers assert that the Commission's Certificate Order only deferred the requirement that Portland Natural design its rates and be placed at risk for higher capacity after its first year of operation to Portland Natural's rate case, not the certificated capacity issue. Br. at 32-33. In addition, Shippers claim that since Portland Natural entered into long-term firm contracts to provide service at levels even higher than 210,000 Mcf per day after the first year, which commitments could not have been legally performed without certificate authority, FERC must have granted certificate authority to Portland Natural to

construct and operate sufficient capacity to satisfy those contractual obligations.

Id.

Shippers' interpretation of the Certificate Order is insupportable. As the Commission explained in the challenged orders, the Certificate Order ultimately did not establish a system-wide certificated capacity level after the first year of service, but instead deferred this issue to Portland Natural's rate case. Declaratory Order P 27, JA 169; Rehearing Order P 16, JA 239-240. That rate case was resolved by an uncontested settlement that also did not establish a certificated capacity for Portland Natural's system. The language of the Certificate Order, which was quoted in the Rehearing Order at P 16, JA 240, stated that "[i]t is not certain at this time when the additional compression will go into service or the actual amount of increased compression and its effect on the capacity of the [Portland Natural] system" (emphasis added). Based on this uncertainty, the Commission stated it would "review this matter" when Portland Natural filed its rate case. *Id.* Thus, the Certificate Order did not establish a certificated capacity for the Portland Natural system after the first year, but instead deferred the issue to Portland Natural's rate case.

Even if the language of the Certificate Order were considered ambiguous, the Commission's interpretation of its own order was reasonable and, therefore, should be upheld. *See Natural Gas Clearinghouse*, 108 F.3d at 399 (court

sustained as reasonable FERC's interpretation that pipeline's fuel payment tariff option did not violate unbundling requirements in Order No. 636); *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 266 (D.C. Cir. 2007) (FERC's interpretation of silence in its own order as permission for a particular rate approach upheld as reasonable). There is no indication in the Certificate Order that, despite the uncertainty involving the timing and impact of the additional compression, the Commission nevertheless implicitly affirmed its initial determination that after the first year Portland Natural's mainline capacity would increase to 210,000 Mcf per day.

Shippers also incorrectly assert that Portland Natural could not legally provide service at an increased capacity level after the first year unless it had certificate authorization to construct and operate its system at that higher level. Br. at 31-32. As explained in the Rehearing Order at P 16, JA 239, the Commission's general practice is to establish a design capacity for a pipeline project that represents the pipeline's firm service obligation. The design capacity "reflects the Commission's findings as to what the pipeline can reliably deliver on a daily basis, year round." *Id.* The Rehearing Order further explained that "[a]dditional capacity may be available on the system during parts of the year due to changing operating conditions." *Id.* P 16 n.17, JA 239. The Commission also confirmed that Portland Natural is required to maintain its facilities to meet the certificated design capacity.

Id. In addition, the Commission stated that it typically establishes initial rates based on the design capacity of the project in order to place the pipeline at risk for unused capacity. *Id.* P 16, JA 239.

Shippers' claim is premised on the misconception that a pipeline cannot transport gas volumes in excess of certificated levels. However, the Commission has acknowledged that pipelines commonly transport gas volumes in excess of certificated levels. *See Kern River Gas Transmission Co.*, 80 FERC ¶ 61,399 at 62,324 (1997) ("[The certificated capacity] was not meant to represent the maximum capacity at which the system can or may operate . . . nor a prohibition against transporting more . . . gas when the system is able to move higher volumes. . . . If a pipeline is able to operate at a higher capacity from time to time or for specific periods of time, in an open access environment, there is no policy reason why the pipeline should not make that capacity available to customers who require it . . .). As Shippers themselves note, the Commission encourages pipelines to expand system usage and enhance opportunities for cost and revenue recovery. *Br.* at 34. Thus, contrary to Shippers' argument, the fact that Portland Natural was able historically to provide service in excess of the initial certificated design capacity does not mean that the Commission must have established in the Certificate Order a higher certificated capacity level after the first year. In fact,

that issue was deferred and the uncertainty was never resolved until the challenged orders were issued.

2. The Commission Considered All Relevant Factors in Determining Whether Portland Natural's Petition Was Consistent with the Public Convenience and Necessity and its Decision was Supported by Substantial Evidence

The Commission evaluated all relevant factors in determining whether the adoption of 168,000 Mcf per day as the certificated capacity level for the Portland Natural system would be in the public convenience and necessity, as required by NGA Section 7(c). In addition, the Commission's decision was supported by substantial evidence.

First, the Commission evaluated the engineering information submitted by Portland Natural. As explained in the challenged orders, the capacity of the Portland Natural system is dependent upon both the receipt pressure from TransQuebec at Pittsburg, which is established by the interconnection agreement between TransQuebec and Portland Natural, and the minimum delivery pressure from Portland Natural at the interconnection of its solely-owned system and the joint Portland Natural/Maritimes facilities at Westbrook. Declaratory Order P 28, JA 170; Rehearing Order P 17, JA 240-241. The evidence further indicated that when Maritimes' Phase IV Expansion facilities were placed in service on November 1, 2008, the minimum delivery pressure from Portland Natural to the joint facilities at Westbrook would be higher than the current design pressure. *Id.*

The result of this change, in combination with the existing receipt pressure from TransQuebec at Pittsburg, would prevent Portland Natural from transporting volumes in excess of 168,000 Mcf per day from Pittsburg through Westbrook to Dracut on a firm year-round basis. *Id.* Shippers did not challenge the Commission's finding that, based on the engineering information, Portland Natural would be incapable of transporting gas volumes in excess of 168,000 Mcf per day from Pittsburg to Dracut after Maritimes' Phase IV Expansion facilities were placed in service. Rehearing Order P 18, JA 241.

The Commission next determined whether natural gas service would be jeopardized. The Commission found that there was no basis to conclude that requiring Portland Natural to operate its system at a capacity level greater than 168,000 Mcf per day was needed to serve current or anticipated customers. Declaratory Order P 29, JA 170; Rehearing Order P 17, JA 241. The Commission further found that, significantly, no party to the proceeding, including Shippers, took issue with Portland Natural's assertions that it was able to meet all of its existing contractual obligations for service after October 1, 2008, and was not aware of any interest in additional firm service that would exceed the 168,000 Mcf per day capacity level. Declaratory Order P 29, JA 170. On the basis of these findings, the Commission granted Portland Natural's petition.

Thus, the Commission considered all relevant factors and its decision to adopt 168,000 Mcf per day as the certificated capacity level of Portland Natural's system going forward satisfied the substantial evidence standard. Moreover, the Commission's decision was based on scientific data within its technical expertise and is, therefore, entitled to an "extreme degree" of deference. *See B&J Oil & Gas*, 353 F.3d at 76-77 (FERC's decision in determining the certificated boundary of a natural gas storage field "rests on just the type of highly technical evidence that this court is least equipped to second-guess").

Shippers argue that the Commission was required by NGA Section 7(b) and the abandonment regulations to consider the economic effect of Portland Natural's proposed capacity reduction on its existing shippers and potential future market needs. Br. at 39, 44, 49. As discussed in the preceding section, Portland Natural was not required to file an abandonment application to obtain the requested relief. Therefore, the Commission was not required to apply the requirements of NGA Section 7(b) or the abandonment regulations. Nevertheless, the Commission appropriately considered whether Portland Natural's petition was consistent with the similar public convenience and necessity standard in NGA Section 7(c). *See* Rehearing Order P 17, JA 240 (While the Commission "did not require [Portland Natural] to file an abandonment application," it nevertheless "evaluated [Portland Natural's] petition under similar requirements set forth in section 7(c) of the NGA"

and “considered all relevant factors” in determining compliance with the public convenience and necessity standard). The Commission concluded that the standard was met, because Portland Natural would have more than sufficient capacity to meet its existing contractual obligations and there was no interest in additional firm service.

3. The Commission Reasonably Exercised Its Discretion in Deferring Consideration of Any Associated Rate Impacts to Portland Natural’s Next Rate Case

Moreover, it was well within the Commission’s discretion to defer consideration of any rate issues associated with its decision, including the appropriate billing determinants used to design Portland Natural’s rates, to the pipeline’s next rate case. Shippers argue that the Commission was required to protect Shippers by deciding immediately that the Commission’s certificated capacity determination could not be relied upon to establish billing determinants used to design Portland Natural’s rates. *See* Br. at 48-49 (demanding an “assurance” now that Shippers “will *not* be negatively impacted”). Shippers’ position is contrary to the well-established principle that “an agency need not solve every problem before it in the same proceeding.” *Mobil Oil*, 498 U.S. at 231. Rather, as the Court held in *Mobil*, affirming a FERC decision not to address expensive “take-or-pay” contracts in a rulemaking addressing related rate issues, “an agency enjoys broad discretion in determining how best to handle related, yet

discrete, issues in terms of procedures . . . and priorities.” 498 U.S. at 230 (citations omitted); *see also FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 49 (1968) (finding that the Commission “did not abuse its discretion” in concluding that a particular issue “can be better dealt with” in another proceeding); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (“[s]ince agencies have great discretion to treat a problem partially, we would not strike down the [agency’s decision] if it were a first step toward a complete solution, even if we thought [the agency] ‘should’ have covered both” issues in the same order (footnote omitted)).

In addition, the Commission’s deferral of any rate impacts associated with its certificated capacity ruling to Portland Natural’s next rate case was consistent with its practice in other cases, including abandonment proceedings. For example, the Commission cited *Northern Natural Gas Co.*, 119 FERC ¶ 61,035 at P 23 (2007), where the Commission determined that the impact of abandonment on the pipeline’s applicable rates would be addressed in a separate rate case. Declaratory Order P 30 n.32, JA 171; *see also Trunkline Gas Co.*, 94 FERC ¶ 61,381 at 62,419 n.12 (2001) (impact of abandonment on pipeline’s rates deferred to separate rate proceeding); *Panhandle E. Pipeline Co.*, 77 FERC ¶ 61,284 at 62,254 (1996) (same); *NorAm Gas Transmission Co.*, 75 FERC ¶ 61,127 at 61,428 (1996) (same).

Shippers do not dispute that in abandonment proceedings the Commission has routinely and appropriately deferred associated rate impacts to a separate rate

proceeding. *See* Br. at 41 (“calculations” of “the *precise rate impact* of an abandonment” are “generally matters for NGA §4 rate proceedings”). Instead, Shippers claim that the Commission erroneously cited *Northern Natural* “for the proposition that granting abandonments without consideration of potential rate consequences is consistent with FERC abandonment practice.” Br. at 42. In fact, in the Declaratory Order, the Commission simply cited *Northern Natural* as support for the statement that its “action,” i.e., deferring any rate issues, including the appropriate billing determinants to use to design Portland Natural’s rates, to the pipeline’s next rate case, was “consistent with the Commission’s practice in abandonment proceedings.” Declaratory Order P 30 n.32, JA 171. Thus, Shippers’ claim should be disregarded.

4. Shippers’ Remaining Arguments Lack Merit

Shippers make three additional arguments, all of which lack merit. First, Shippers assert that the Commission was required under NGA Section 7(b) to consider that Portland Natural’s capacity reduction was caused by its own voluntary actions in entering into certain agreements with TransQuebec and Maritimes. Br. at 49-56. Second, Shippers argue that the Commission was compelled to determine whether upstream compression already exists or could be installed to enable Portland Natural to maintain capacity in excess of 168,000 Mcf per day. Br. at 56-60. Third, Shippers argue that the Commission ignored the

adverse impact of the capacity reduction on short-term firm and interruptible natural gas service. Br. at 60-63.

The Commission addressed each of these arguments in the challenged orders. With respect to Shippers' first argument, the Commission stated that it was not necessary to rule on the reasonableness of Portland Natural's actions in this proceeding, since current and anticipated natural gas service will not be jeopardized by adopting 168,000 Mcf per day as the certificated capacity across Portland Natural's system. Declaratory Order P 30 n.31, JA 171; Rehearing Order P 18, JA 241. The Commission found that this issue was more appropriate for Portland Natural's next general rate proceeding. Rehearing Order P 18, JA 241. Similarly, the Commission found there was no reason to inquire whether Portland Natural could contract for additional existing compression from its affiliates or whether cheap compression could be built, because there were no pending requests for additional firm service. *Id.*

The Commission disagreed with Shippers' claim that the Commission ignored the impact of its ruling on interruptible shippers, stating that interruptible shippers have no guarantee that capacity will continue to be available. *Id.* P 19, JA 240. In addition, the Commission found that it was not in the public convenience and necessity to require Portland Natural to incur additional costs to increase its capacity to support interruptible service; since interruptible shippers do not pay

demand charges, any increased costs would be at risk for recovery from either Portland Natural and/or its existing firm shippers. *Id.*

In their brief, Shippers claim that the Commission's "assumption" that Portland Natural's capacity reduction was unavoidable "distorts the central question" of whether the abandonment of previously authorized existing capacity serves the public interest. Br. at 50. As demonstrated above, the Commission did not assume that Portland Natural's capacity reduction was unavoidable. Rather, the Commission found that, based on the engineering information submitted by Portland Natural, which was not challenged by Shippers or any other parties, Portland Natural would be unable physically to transport volumes in excess of 168,000 Mcf per day once Maritimes' Phase IV Expansion was placed in service. Declaratory Order P 28, JA 170.

The Commission further found that Portland Natural's actions in entering into agreements with TransQuebec and Maritimes were irrelevant to the determination of the certificated capacity across Portland Natural's system going forward. Declaratory Order P 30 n.31, JA 171; Rehearing Order P 18, JA 241. Instead, the Commission determined that this issue would be more appropriately raised in Portland Natural's next rate case. Rehearing Order P 18, JA 241. In addition, Shippers' claim is premised on the argument that the Commission certificated Portland Natural's capacity at 210,000 Mcf per day and, therefore,

Portland Natural was required to file an abandonment application in order to reduce that certificated capacity. As demonstrated above, those arguments lack merit.

Shippers further argue in their brief that the Commission should have inquired into whether sufficient upstream compression exists, or could be installed, to maintain capacity at a higher level. Br. at 56-57. Shippers maintain that if a higher capacity level could be achieved “without significant additional upstream installations, it would clearly be in the interest of the New England market area.” *Id.* at 58. Shippers do not offer any evidence that such upstream compression already exists or could be installed at a “modest” cost. In addition, Shippers incorrectly assert that Portland Natural needs such compression “in order to avoid breaching its legally enforceable service obligations to customers.” *Id.* at 59. Contrary to Shippers’ claim, as demonstrated above, Portland Natural had no “legally enforceable service obligation” to maintain its system capacity at a level in excess of the initial design capacity for the first year of operation. Moreover, no party, including Shippers, challenged Portland Natural’s assertion that it would have more than sufficient capacity to meet all of its contractual obligations to existing or anticipated firm customers at a certificated capacity level going forward of 168,000 Mcf per day. Declaratory Order P 29, JA 170; Rehearing Order P 19, JA 241. Thus, Portland Natural had no “legally enforceable service obligation” to

provide firm service to existing or anticipated customers in excess of 168,000 Mcf per day.

Finally, Shippers claim that the Commission ignored the adverse impact of its ruling on short-term firm and interruptible service. Br. at 60. Shippers do not contend that a capacity level greater than 168,000 Mcf per day is needed for Portland Natural to meet its existing contractual obligations for firm service after October 31, 2008, or that there is any interest in additional firm service that would exceed the 168,000 Mcf per day capacity level. Declaratory Order at P 29, JA 170; Rehearing Order at P 19, JA 241. Instead, Shippers effectively argue that, based on the level of past deliveries and the possibility of future demand, the Commission should require Portland Natural to incur additional costs, which may never be recovered, to increase its pipeline capacity in order to meet demand that may materialize in the future. Br. at 61-62. Shippers' position is inconsistent with the Commission's policy of establishing certificated capacity based on the level of service a pipeline can reliably provide on a year-round basis, not on conjectural need. *See* Rehearing Order P 16, JA 239.

The Commission correctly based its certificated physical capacity determination on the undisputed engineering information submitted by Portland Natural and the pipeline's undisputed current and anticipated firm service contractual commitments. In addition, the Commission correctly determined that

requiring Portland Natural to incur additional costs, which may not be recoverable, to increase its capacity to support interruptible service was not warranted.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction. If the Court proceeds to the merits, the petition for review should be denied, and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,594 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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