ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 09-1100

WASHINGTON GAS LIGHT COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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JANUARY 27, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties appearing before the Court and the Commission are listed in Petitioner's Rule 28(a)(1) certificate. There are no *amici*.

B. Rulings Under Review:

1. *Dominion Cove Point LNG, LP, et al.*, 125 FERC ¶ 61,018 (October 7, 2008) ("Remand Order"), JA 1; and

2. *Dominion Cove Point LNG, LP, et al.*, 126 FERC ¶ 61,036 (January 15, 2009) ("Rehearing Order"), JA 27.

C. Related Cases:

The FERC orders on appeal respond to the Court's remand in *Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008).

/s/ *Judith A. Albert*
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Senior Attorney

January 27, 2010

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GLOSSARY

Br.	Petitioner's Brief
Commission or FERC	Federal Energy Regulatory Commission
Dth/d	dekatherms per day
Gas Quality Settlement	*Cove Point LNG Limited Partnership*, 102 FERC ¶ 61,227 (2003)
NGA	Natural Gas Act
JA	Joint Appendix
LNG	liquefied natural gas
P	paragraph number in a FERC order or record item
Rehearing Order	*Dominion Cove Point LNG, LP, et al.*, 126 FERC ¶ 61,036 (Jan. 15, 2009), JA __
Remand Order	*Dominion Cove Point LNG, LP, et al.*, 125 FERC ¶ 61,018 (Oct. 7, 2008), JA __
Washington Gas	Washington Gas Light Company

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FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") satisfied the Court's 2008 remand requiring that the Commission "more fully address" whether the Cove Point Expansion Project "can go forward without causing unsafe leakage" in Washington Gas Light Company's ("Washington Gas") compromised pipeline, when the Commission re-authorized construction and operation of the Expansion only upon the condition that no additional volumes of

liquefied natural gas ("LNG") attributable to the Expansion flow through compromised portions of the Washington Gas system.

STATUTES AND REGULATIONS

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

INTRODUCTION

The Commission orders challenged here are *Dominion Cove Point LNG, LP, et al.*, 125 FERC ¶ 61,018 (October 7, 2008) ("Remand Order") (JA 1), *order on rehearing and clarification*, 126 FERC ¶ 61,036 (January 15, 2009) ("Rehearing Order") (JA 27) (collectively, "Cove Point II Orders"). These orders respond to the Court's remand in *Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008).

Washington Gas v. FERC addressed orders authorizing Dominion Cove Point LNG, LP ("Cove Point") and Dominion Transmission, Inc. ("Dominion") to construct and operate facilities (collectively, the "Expansion") to increase the LNG volumes that can be imported, stored, regasified, and delivered to points in the Mid-Atlantic and Northeast. *Dominion Cove Point LNG, LP, et al.*, 115 FERC ¶ 61,337 (June 16, 2006) ("Certificate Order"), *order on rehearing*, 118 FERC ¶ 61,007 (January 4, 2007) ("Certificate Rehearing Order") (collectively, "Cove Point I Orders"). Washington Gas petitioned for review, contending that higher

volumes of regasified LNG (which may have a lower heavy hydrocarbon content than domestic gas) would increase the number of leaks on its system.

In *Washington Gas v. FERC*, this Court affirmed Commission findings that defects in Washington Gas's system (not regasified LNG) were the primary cause of past leaks on that system. 532 F.3d at 931-32. Consequently, Washington Gas should be responsible "for paying to adapt its system" to accept the LNG. *Id.* at 933 n.4. The Court, however, found that, given the deficiencies in the Washington Gas system, the Commission had not adequately explained why the Expansion could proceed safely. *Id.* at 932-33.

The challenged orders re-authorized construction and operation of the Expansion with the condition that deliveries of regasified LNG into compromised portions of Washington Gas's system are restricted to the volumes allowable prior to the Expansion. As the Expansion will result in no additional volumes of regasified LNG, it will not affect safety.

This appeal followed.

STATEMENT OF FACTS

I. Regulatory Background

The background is set forth in *Washington Gas v. FERC*, 532 F.3d at 929-930, and the cases cited therein. In brief, under Section 7(c)(1)(A) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c)(1)(A), an entity must obtain from the

Commission a certificate of public convenience and necessity before engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission or constructing or operating any facilities for those purposes. NGA § 3, 15 U.S.C. § 717b, addresses natural gas imports. Under NGA § 3(a), "no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." 15 U.S.C. § 717b(a); *see also id*. §§ 717b(b)-(e) (importation of LNG and construction of LNG terminals) and 717b-1 (state and local considerations in LNG terminal siting).

II. Cove Point Proceedings 1972-2003

In 1972, the Commission authorized various entities [1] to import LNG for delivery to Cove Point, Maryland, and to construct and operate the necessary facilities and pipelines. LNG shipments began in 1978, but ceased in 1980.

In 1994, FERC authorized Cove Point to reactivate its mothballed onshore facilities and to construct a liquefaction unit for storing domestic natural gas during the summer for use during peak winter times. *Cove Point LNG Limited Partnership*, 68 FERC ¶ 61,377, *reconsideration denied*, 69 FERC ¶ 61,292 (1994). In 2001, the Commission authorized Cove Point to construct new facilities and to start importing LNG again. *Cove Point LNG Limited Partnership*, 97 FERC

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[1] Columbia LNG Corporation, Consolidated LNG Corporation, Southern Energy Company, and Southern Natural Gas Company.

¶ 61,043, *order on reh'g*, 97 FERC ¶ 61,276 (2001), *reh'g denied*, 98 FERC ¶ 61,270 (2002) ("Reactivation Proceeding"). In 2002, Washington Gas and Cove Point (among others) reached a settlement on gas composition standards. *Cove Point LNG Limited Partnership*, 102 FERC ¶ 61,227 (2003) ("Gas Quality Settlement"). Cove Point revised its tariff to reflect the settlement in 2003. LNG service commenced again the same year.

III. *Washington Gas v. FERC*

In 2005, Cove Point and Dominion applied for authorization to construct and operate the Expansion. Washington Gas objected. It contended that existing LNG flows had caused leaks in its Prince George's County, Maryland system, and that increased Expansion LNG flows would cause severe leakage in significant portions of the rest of its system. *See Washington Gas v. FERC*, 532 F.3d at 929-30. The Commission found that: (1) LNG would not have affected Washington Gas's system if a subset of system couplings had not been compromised during installation; (2) Washington Gas is responsible for paying for repairs; and (3) Washington Gas could repair its system before Expansion operations began. *See* 532 F.3d at 930, 933.

On July 18, 2008, the Court affirmed the Commission's first two findings. 532 F.3d at 931-32, 933 n.4. The Court found, however, that the Commission had not supported the third finding with substantial evidence. *Id*. at 932-33.

Consequently, the Court remanded so "FERC can more fully address whether the Expansion can go forward without causing unsafe leakage." *Id*. at 933; *see also id*. at 929 (remand on third finding because "substantial evidence does not support FERC's conclusion that WGL can address safety concerns before the [Expansion] project's in-service date").

IV. Post-Remand Proceedings

On July 28, 2008, Cove Point and Dominion requested that the Commission act expeditiously to affirm and reissue all Expansion authorizations. They asserted, among other things, that mere construction would have no safety implications. Remand Order P 19-22, 58, JA 7, 19. [2] They also asserted that the record supported re-authorizing operations. Remand Order P 28-29, JA 8-9. They argued that LNG was, at most, an insignificant cause of Washington Gas leaks, and that Washington Gas had made numerous statements to its stockholders and to the Maryland Public Service Commission that it had taken adequate steps to allow it to receive additional LNG volumes safely. Remand Order P 29, JA 9.

Washington Gas responded that Dominion had taken its public statements out of context. Moreover, although it had "devoted substantial time and effort to the safety issue," Washington Gas was unconvinced that it could remedy the

[2] "P" refers to paragraph numbers in Commission orders and in record materials. Citations with respect to other documents are to page numbers.

leakage problem in a timely manner. Remand Order P 33, JA 10-11. Injecting hexane into regasified LNG, for example, did not seem as yet to be a complete solution. Remand Order P 34-35, JA 11. Thus, Expansion LNG might result in more leaks than Washington Gas would be able to repair.

A technical conference convened by Commission staff took place on August 14, 2008. Remand Order P 44, JA 13. On August 19, 2008, initial comments were filed by Statoil Natural Gas LLC ("Statoil"), Washington Gas, Cove Point and Dominion, and Maryland Office of People's Counsel. Reply comments were filed by Washington Gas, CPV Power Development, Inc., and Cove Point and Dominion on August 22, 2008. On August 25, Shell NA LNG LLC ("Shell") responded to Washington Gas's reply comments, and Statoil did the same on August 26. BP Energy Company ("BP") filed comments in support of Shell's August 25 filing.

The Commission staff also issued various data requests. Responses included August 8, 2008 responses from Columbia Gas Transmission Corporation ("Columbia"), Cove Point, and Transcontinental Gas Pipeline Corporation ("Transco"); August 19 responses from Cove Point, Statoil, and Transco; Columbia's August 20 response; Cove Point's and Dominion's August 21 response; and Washington Gas's August 22 supplemental response.

V. The Challenged Orders

On remand, the Commission reissued its prior authorizations for Expansion construction and operation, but imposed a new condition on operations to ensure that they would not adversely affect safety on the Washington Gas system. Remand Order P 69, JA 22-23.

A. Re-authorizing Expansion Construction

FERC found that construction by itself would not affect Washington Gas's system. Rather, it was the flow of additional volumes of gas associated with the Expansion that could pose a safety risk. Remand Order P 52, JA 17. In addition, stopping construction of the almost-completed project would have substantial adverse safety, environmental, and other impacts. *Id.* P 59-63, JA 19-20. For one thing, "the continued safe operation of the existing LNG facilities relies upon the successful mechanical integration of the new and old facilities." *Id.* P 62, JA 20. That process had been started but not completed. *Id.* P 61-62, JA 20.

Moreover, as of August 1, 2008, 139 of the 162 miles of pipeline right-of-way had been disturbed, but cleanup, seeding, and mulching had occurred on only 42 miles. Cove Point and Dominion would also need to stabilize approximately 33 miles of pipe strung along the right-of-way, but not yet placed in the ditch. *Id.* P 60, JA 19-20. Accordingly, completion of Expansion facilities would result in less

adverse impact on affected landowners and the environment than requiring construction to stop. *Id.* P 63, JA 20.

The Commission also found that stopping construction would have substantial adverse impacts beyond financial for Cove Point and Dominion. *Id.* P 59-62, JA 19-20. The terminal expansion was 93 percent complete and approximately 65 percent of the pipeline and compression portions of the Expansion was finished. *Id.* P 58, JA 19. Change orders would have to be negotiated with contractors; numerous federal, state, and local permitting agencies would have to be consulted regarding stabilizing the construction work areas and rights-of-way; and Cove Point and Dominion would have difficulty later securing qualified contractors to complete the relatively small amount of work that remained. *Id*. P 58-60, JA 19-20. In sum, FERC found, construction continued to satisfy the NGA §§ 3 and 7 public interest requirements. *Id.* P 53, 63, JA 17, 20.

B. Re-authorizing Expansion Operation

The Commission reasoned, in response to this Court's mandate on Expansion safety concerns, that "if no additional volumes of LNG associated with the [Expansion] flowed through the [Washington Gas] system, the [Expansion] poses no additional risk of unsafe leakage." Rehearing Order P 23, JA 36. FERC found that Washington Gas has already isolated its at-risk facilities from receipt of Expansion LNG except at its connection with Columbia. Remand Order

P 64-67, JA 20-22; Rehearing Order P 78, JA 57. Accordingly, the Commission authorized operation of Expansion facilities on the condition that Cove Point's deliveries of LNG into its interconnection with Columbia's system are limited to 530,000 dekatherms per day ("Dth/d"), the amount permitted prior to the Expansion. Remand Order P 69, JA 22; Rehearing Order P 64, JA 52.

On rehearing, Washington Gas contended that the Commission should decrease authorized deliveries into Columbia's system to 31,000 Dth/d. *See, e.g.*, Rehearing Request at 19-20, JA 1315-16; Rehearing Order P 57-58, JA 50-51. The Commission found, however, that this would require modifying pre-Expansion contracts and authorizations. None of these had been addressed in *Washington Gas v. FERC*, which considered only the Expansion. Rehearing Order P 69, JA 54. Washington Gas may petition the Commission to examine the safety implications of other facilities in an appropriate proceeding. *Id.* P 70 n. 66, JA 54-55 (noting Washington Gas's reserved right, under its 2002 Settlement with Cove Point and others, "to petition should unsafe conditions develop"); *see id*. P 43 n. 42, JA 44 (same).

SUMMARY OF ARGUMENT

Washington Gas v. FERC required that the Commission "more fully address whether the Expansion can go forward without causing unsafe leakage." 532 F.3d at 933. Leakage can occur on Washington Gas's system when regasified LNG flows through the system's compromised mechanical couplings. Consequently, the Commission reasonably determined that the Expansion can go forward safely so long as it results in no additional volumes of regasified LNG entering Washington Gas's system.

Washington Gas connects to four pipelines that can receive regasified LNG from Cove Point. Washington Gas has isolated the compromised portions of its system from receipt of LNG from these connections except for the one with Columbia. Accordingly, responding on remand to the Court's mandate, FERC authorized operation of the Expansion facilities on the condition that Cove Point deliveries of regasified LNG into its interconnection with Columbia are limited to amounts permitted prior to the Expansion. As the Expansion will result in no additional LNG volumes passing through defective Washington Gas couplings, it can go forward without causing unsafe leakage.

Washington Gas's overarching argument is that the Commission must also consider the safety implications of LNG volumes that might enter its system from non-Expansion facilities. However, the Cove Point I Orders and *Washington Gas*

v. FERC decision addressed only Expansion facilities, and the latter mandated only that FERC reconsider the safety effects of the Expansion. This, however, does not leave Washington Gas without options. If it is unable to develop operational solutions to lingering safety concerns associated with pre-Expansion authorizations, Washington Gas can ask the Commission to consider its arguments pertaining to pre-Expansion facilities in an appropriate proceeding. To date, it has not done so.

Washington Gas's other arguments are primarily variations on its theme that the Commission should have modified existing authorizations. These arguments include the contentions that the Commission failed its NGA obligation to address safety concerns, and that the 530,000 Dth/d cap is unlawful, will lead to more leakage, is unsupported by the record, and will not solve all safety questions. The Commission properly rejected these arguments as outside the scope of this Expansion proceeding and, in any event, without merit.

ARGUMENT

I. The Commission Complied With The Court's Remand In *Washington Gas v. FERC*.

In proceedings on remand, the Commission's determinations are generally reviewed to ensure that they are responsive to the Court's mandate. *See*, *e.g.*, *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). In *Washington Gas v. FERC*, the Court remanded the Commission's prior orders so that the Commission could further consider whether, in light of the defects in the Washington Gas system, the Expansion could go forward safely:

> We grant WGL's petition for review, vacate the orders to the extent they approve the Expansion, and remand the case so FERC can more fully address whether the Expansion can go forward without causing unsafe leakage.

Washington Gas v. FERC, 532 F.3d at 933 (footnote omitted). The Commission has fully complied with this directive.

A. Standard Of Review

In addition to the requirement that it comply with the Court's mandate in *Washington Gas v. FERC*, the Commission's determination, that the Expansion may go forward safely, is subject to the Administrative Procedure Act's "arbitrary and capricious" standard. *See* 5 U.S.C. § 706(2)(A); *Washington Gas v. FERC*, 532 F.3d at 930 (citations omitted). Under this deferential standard, the 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) (citation omitted).

B. The Commission Reasonably Concluded That The Expansion Can Go Forward Safely Because No Additional Volumes Of Gas Attributable To It Will Enter Compromised Portions Of The Washington Gas System.

Leakage can occur on Washington Gas's system when regasified LNG flows through its compromised mechanical couplings. *Washington Gas v. FERC*, 532 F.3d at 932. Accordingly, "if no additional volumes of LNG associated with the [Expansion] flowed through the [Washington Gas] system, the Cove Point Expansion Project poses no additional risk of unsafe leakage." Rehearing Order P 23, JA 36.

Washington Gas has gate stations and associated receipt and delivery points on four interstate pipelines that can flow Cove Point gas: Dominion, Cove Point Pipeline, Transco, and Columbia. Remand Order P 64, JA 21. Dominion is expected to receive the most Expansion LNG. *Id.* P 66, JA 21. [3] However, Expansion LNG delivered to Dominion will not adversely affect Washington Gas's

[3] This is because Statoil, the sole importer and shipper of the Expansion LNG, intends to transport the regasified LNG to Pennsylvania and West Virginia via Dominion. Remand Order P 69 n. 44, JA 23.

system, as Washington Gas is expected to complete repairs by the fall of 2008 to the parts of its system behind its Dominion connections (Leesburg, Virginia and Jefferson, Maryland). *Id*.; Chapman Affidavit P 7, JA 878-79.

Washington Gas has not regularly used its Cove Point Pipeline gate stations (located at Centerville, Virginia and White Plains, Maryland) since it experienced its Prince George's County leaks. Moreover, it presented no evidence indicating any intent to resume those gate stations. Accordingly, Expansion LNG volumes will have no impact on Washington Gas through its Cove Point Pipeline connections. Remand Order P 65, JA 21; Chapman Affidavit P 4, JA 877.

Similarly, delivery points on Transco's system that serve Washington Gas have been isolated from all LNG-sourced supplies by the installation of valves. Remand Order P 67, JA 21. Transco has multiple parallel pipelines that transport gas through Washington Gas's service territory. Chapman Affidavit P 9, JA 4-5. Some transport Cove Point LNG and others transport domestic gas. Washington Gas can close the valves that access LNG and open the valves that access domestic gas. *Id*. P 8-9, JA 4-5.

This leaves Columbia. Columbia would receive Expansion LNG at its Loudoun, Virginia connection with Cove Point Pipeline ("Columbia-Loudoun Interconnect") and pass it on to Washington Gas at Dranesville, Virginia and Rockville, Maryland. Remand Order P 68, JA 22. To prevent Expansion-related

leakage in the compromised couplings behind these gate stations, the Commission restricted deliveries from Cove Point into Columbia's Loudoun connection to 530,000 Dth per day. *Id*. This is the amount of regasified LNG that Cove Point Pipeline was authorized to deliver to Columbia prior to the Expansion proceeding, and can deliver even if the Expansion is never built or operated. *Id*. P 69, JA 22-23. Thus, as it will not cause additional LNG volumes to enter compromised areas of Washington Gas's system, the Expansion can safely go forward.

Washington Gas contends that the 530,000 Dth/d cap is unlawful because it sets a benchmark level that has never previously been reached (Br. at 37), that this "remedy" will lead to more unsafe leakage (Br. at 38), that there "is no evidence of record to support the Commission's conclusion that its 530,000 Dth/d condition will address and resolve all safety concerns" (Br. at 39), and that a 31,000 Dth/d cap is necessary to ensure safety (Br. at 22). A 31,000 Dth/d cap, however, would require the Commission to modify contracts and authorizations approved in other, earlier proceedings. As now discussed, such actions would be inappropriate here.

II. Washington Gas's Contention That The Commission Must Revisit Authorizations Made In Other Proceedings Lacks Merit.

Washington Gas's overarching contention (*see, e.g.*, Br. at 22-26, 34-36) is that FERC should have limited Cove Point Pipeline deliveries to the Columbia-Loudoun Interconnect to 31,000 (not 530,000) Dth/d. Such an action, however, would redo authorizations made in other proceedings. The 530,000 Dth/d figure

represents firm delivery rights that have been in effect since the 2001 Reactivation Proceeding, and which supported the certificate issued in that proceeding. Washington Gas's proposed reduction would substantially reduce those rights. Remand Order P 69, JA 22; *id.* n. 43, JA 22 (describing BP, Shell, and Statoil firm delivery rights); Rehearing Order P 68, JA 53 (addressing same); *see also id*. P 69, JA 54 (reduction would also adversely impact Columbia service obligations that "are wholly outside the scope of the facilities and services approved in the orders vacated by the court in *[Washington Gas] v. FERC*"). Such action is neither required by *Washington Gas v. FERC* nor otherwise appropriate.

A. *Washington Gas v. FERC* Requires Only That FERC Consider Whether The Expansion Can Go Forward Without Resulting In Unsafe Leakage.

On remand, the Commission's determinations must be responsive to the Court's mandate. *Process Gas Consumers Group v. FERC*, 292 F.3d at 840. Where the Court has ruled on an issue, an agency is bound by that ruling. *Atlantic City Electric Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003). If the Court has remanded for further explanation, the agency satisfies the mandate by providing that explanation. *See AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095, 1099 (D.C. Cir. 2004) (court will defer "[t]o the extent the Commission's explanation on remand encompasses technical predictions within its expertise"); *see also Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (agency has discretion

how to proceed "[w]here the court does not require additional fact gathering on remand"). While it is for the Court, of course, to construe its own mandate, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940), "the court's opinion may be consulted to ascertain the intent of the mandate." *City of Cleveland v. FPC*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

Washington Gas v. FERC reviewed the Cove Point I Orders, which addressed only the Expansion. The Court vacated the orders to the extent they approved the Expansion, and remanded only "so FERC can more fully address whether the Expansion can go forward without causing unsafe leakage." 532 F.3d at 933; *see also id*. at 929 (remand on one of several issues because "substantial evidence does not support FERC's conclusion that WGL can address safety concerns before the [Expansion] project's in-service date"). As the Commission reasonably concluded, nothing in this language "hints the court vacated any authorizations beyond those pertaining to the Cove Point Expansion Project. The pre-expansion certificate was not before the court, and it was not vacated or otherwise within the scope of the mandate." Rehearing Order P 69, JA 54.

B. The Commission Properly Declined To Expand The Scope Of The Proceeding.

Nothing in NGA § 3 or § 7 compels (or otherwise authorizes) the Commission to impose conditions regarding matters not properly before it. Rehearing Order P 68, JA 53. Pre-Expansion facilities and services have never

been part of this proceeding. Consequently, the Commission's refusal to impose the reduction in pre-Expansion service sought by Washington Gas here was appropriate.

Washington Gas's assertion that FERC must conflate the Cove Point Expansion with past Cove Point proceedings is contrary to well-established administrative law principles. "[A]n agency need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991). Rather, as the Supreme Court held in *Mobil* (in upholding a FERC rulemaking addressing only certain 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).

Here, the Cove Point II Orders resolved safety issues attributable to the Expansion. If Washington Gas believes that those orders resolve only part of its

LNG problems, it may request that the Commission re-examine other Cove Point facilities and operations in an appropriate proceeding.

C. If Washington Gas Believes Pre-Expansion Operations Should Be Modified, It Should Initiate A Proceeding At FERC.

Washington Gas itself states (Br. at 31) that the Commission has the authority to modify or even revoke a certificate. Washington Gas, however, is silent as to why it has not initiated a proceeding requesting the Commission to do so.

In addition, the Commission noted that Washington Gas has particular rights that it can enforce under the Gas Quality Settlement. Remand Order P 69 n. 43, JA 22; Rehearing Order P 43 n. 42, JA 44. Paragraph 6 of Article II of the Settlement preserved Washington Gas's right to raise gas quality concerns if the quality of regasified LNG from Cove Point caused unsafe conditions on Washington Gas's system. Gas Quality Settlement P 18; Rehearing Order P 43 n. 42, JA 44. The Commission's order approving the Settlement noted that Washington Gas would retain the ability to petition should unsafe conditions develop. Gas Quality Settlement P 31; Rehearing Order P 43 n. 42, JA 44, and P 70 n. 66, JA 54-55. The Remand and Rehearing Orders reiterated this point. Washington Gas has not, however, filed any complaint suggesting that the interchangeability standards to which it agreed are inadequate. *See Washington Gas v. FERC*, 532 F.3d at 933 n. 4 (rejecting Washington Gas's claim that

Dominion "must pay to fix" Washington Gas's system, "because unblended LNG meets the specifications [Washington Gas] accepted in its tariff").

D. Washington Gas Has Other Options.

Regasified LNG has never been delivered to the Columbia-Loudoun Interconnect at the maximum contracted level. Remand Order P 70, JA 23; Pet. Br. at 38. The largest volume delivered at the interconnection has been about 290,000 Dth/d in the winter of 2006-2007. For the three years preceding the Cove Point II Orders, the average flow for both winter and summer was about 30,000 Dth/d. Remand Order P 70, JA 23. Thus, current LNG deliveries are at levels Washington Gas has stated are safe for its system.

During this period of low demand for LNG, Washington Gas and other parties may explore options that would enable Washington Gas to accept additional LNG volumes safely. Remand Order P 71, JA 24. Construction of hexane-injection facilities (to improve gas quality and lower incidence of leaks) and Columbia's routing of its LNG receipts (to bypass Washington Gas) might be two such options. [4] *See* Rehearing Order P 59, JA 51 (arguments of Cove Point and Dominion); *id*. P 15-16, JA 32 (argument of Washington Gas); *id*. P 44, JA 45

[4] Cove Point LNG and Dominion assert that Washington Gas has already constructed hexane facilities at Dranesville and Rockville, and that Columbia already flows 95 percent of its Cove Point gas away from Washington Gas because the operating costs are lower. Answer to Rehearing Request at 13, JA 1350.

(finding by Commission that "measures necessary to isolate WGL's at-risk facilities" are "essentially already in place" and subject to monitoring by "the various parties responsible for ensuring their effectiveness"). Moreover, since the Commission has limited the LNG volumes Columbia may receive, parties presumably would have incentives to consider the options, particularly if economic conditions change and the demand for LNG increases. *See* Remand Order P 71, JA 23-24.

III. Washington Gas's Other Arguments Are Primarily Variations On Its Argument That FERC Must Expand The Scope Of The Proceeding, And Should Be Rejected.

A. The Commission's Findings Are Consistent With The NGA.

1. The Commission Considered Safety.

Throughout its brief, Washington Gas mischaracterizes the Cove Point II Orders, implying that FERC has little regard for the safety of the Washington Gas system. *See*, *e.g*., Br. at 30, citing Rehearing Order P 47, JA 45-46, for the proposition that "FERC is saying that the public safety impacts on WGL's system are none of its concern . . . ." Paragraph 47, in fact, merely makes the point that the Commission lacks jurisdiction to compel local distribution companies such as Washington Gas, subject to the jurisdiction of state public utility commissions, to make repairs or improvements, even for safety.

Similarly, Washington Gas (Br. at 41) states that "the Cove Point II Orders are predicated on the theory that the agency is free to ignore all hazardous leaks caused by increased Cove Point LNG gas flows into WGL's system at Columbia-Loudoun unless such increased leaks are associated with flows in excess of 530,000 Dth/d." This statement ignores the fact that flows of 530,000 Dth/d or less, authorized in earlier FERC proceedings, are not properly at issue in this Expansion proceeding. It also ignores the other avenues (operational or regulatory) Washington Gas can pursue if it believes that gas flows less than or equal to 530,000 Dth/d are problematic.

In sum, the Commission conducted this proceeding in order to consider the Expansion's impact on safety on Washington Gas's system. The Commission has restricted Expansion regasified LNG shipments to address these concerns. The claims addressed above (and other, similar claims by Washington Gas), that the Commission does not care about safety, are without merit.

2. NGA § 16 Does Not Empower The Commission To Impose Conditions On Activities Authorized In Other Proceedings.

Washington Gas argues (Br. at 33) that NGA § 16, 15 U.S.C. § 717*o* (giving the Commission "any and all" authority "to carry out the provisions of this act"), permits the Commission to reduce the 530,000 Dth/d level authorized in pre-Expansion proceedings to the 31,000 Dth/d level Washington Gas seeks here. As a preliminary matter, even if Washington Gas's NGA § 16 contentions were correct,

that outcome would not be appropriate here for at least two reasons. First, the Commission's objective on remand was to address whether the Expansion could go forward safely. Rehearing Order P 65, JA 52-53. Washington Gas's proposed service reduction would affect pre-Expansion (not Expansion) operations.

Second, the Commission found Washington Gas's evidence in support of its proposed 31,000 Dth/d cap unpersuasive as it "lacked technical detail and was conclusory." Rehearing Order P 70, JA 54. Thus, even if the Commission had authority under NGA § 16 to impose the lower cap, it would not have done so because the lower cap was not supported by the evidence. *See id*.

In any case, Washington Gas's NGA § 16 analysis is in error. As this Court has held, NGA § 16, while broadly phrased, "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined." *Pub. Serv. Comm. of New York v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989) (citations omitted).

Neither NGA § 3 nor § 7 (the relevant substantive sections here) confers jurisdiction upon the Commission to impose – much less compels the Commission to impose – conditions regarding matters not properly before it. Rehearing Order P 68, JA 53 (citing *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 792-93 (D.C. Cir. 1987); *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1129-33 (D.C. Cir. 1979)). The pre-Expansion facilities and services implicated by

Washington Gas's proposal are not part of this proceeding. *See* Rehearing Order P 68-69, JA 53-54. Accordingly, NGA § 16 does not compel or even authorize the condition Washington Gas seeks.

For its part, Washington Gas contends (Br. at 34) that *Northern Natural* and *Panhandle* stand only for the proposition that the Commission may not use its NGA § 7 authority to circumvent protections provided by NGA §§ 4 and 5 (the NGA's rate-adjustment provisions), *see* 15 U.S.C. §§ 717c-d. That reading is too narrow. These cases found that "FERC may not as a condition on a section 7 certificate require a pipeline to adjust rates previously approved by the Commission for customers not receiving the services to be certificated." *Northern Natural*, 827 F.2d at 795 (quoting *Panhandle*, 613 F.2d at 1130). Similarly, FERC may not, as a condition on the Expansion certificate, require a decrease in services previously authorized for customers not receiving Expansion-related LNG.

3. The Commission's Authority To Modify Pre-Existing Terms In Hydropower Licenses Is Not Analogous.

Washington Gas argues (Br. at 35) that, in the "analogous context" of authorizing expansion of existing licensed hydropower projects, the Commission "has made clear" that it has authority to modify pre-existing license terms. However, NGA § 19(b), 15 U.S.C. § 717r(b), requires a petitioner raising an issue before the Court to have first raised the same issue before the Commission in a rehearing request, unless there is a reasonable ground for failure to do so.

Washington Gas did not raise its hydropower analogy on rehearing. Consequently, it is precluded from raising it now on appeal.

In any case, the situations are not comparable. For one thing, Washington Gas's proposal would require the Commission to modify third-party contracts based on existing authorizations. Rehearing Order P 68-69, JA 53-54. This would not be the case in the hydropower setting. The hydropower case Washington Gas cites, for example, involved license terms concerning project water flows and their impacts on fish, not modification of third-party contracts based on existing authorizations. *See Pacific Gas & Elec. Co.*, 46 FERC ¶ 61,249 at 61,732-33 (1989). Moreover, there must be a demonstrated nexus between the hydropower license amendment being considered and the pre-existing license term being modified. *See Idaho Power Co. v. FPC*, 346 F.2d 956, 959-60 (9th Cir. 1965). That showing has not been made here. *See* Rehearing Order P 70, JA 54 (Washington Gas's evidence "lacked technical detail and was conclusory").

4. The Cove Point I and Cove Point II Orders Are Consistent.

Washington Gas argues (Br. at 27) that "FERC's definition of the scope of its authorized inquiry for purposes of [Cove Point II] is flatly inconsistent with the Commission's conclusion on this identical issue in Cove Point I." That contention is wrong. In Cove Point I, the Commission examined evidence from pre-Expansion operations because the evidence was relevant to whether the Expansion

would pose significant safety risks. "[The Commission] never intended to indicate that the expansion proceedings were an appropriate forum in which to contest pre-existing conditions." Rehearing Order P 66, JA 53.

B. The Commission Addressed The Requirements Of The Gas Quality Policy Statement.

Washington Gas asserts (Br. at 44) that, "[o]n remand, the Commission is entirely silent regarding whether the Expansion Project is in compliance with the [Gas Quality Policy Statement]." [5] Washington Gas is incorrect. The Commission addressed the Gas Quality Policy Statement in the Rehearing Order at P 88-89, JA 60-61 (referring back to 2006 Certificate Order).

More specifically, Washington Gas complains first (Br. at 47-48) that the Cove Point II Orders do not address recent data documenting the relationship between gas quality changes and the leaks in Prince George's County. The cause of the leaks was resolved in Cove Point I. *See Washington Gas v. FERC*, 532 F.3d at 932 (affirming FERC's conclusion that unblended LNG would not have caused leaks if the Washington Gas pipeline couplings had not been previously compromised); Rehearing Order P 88, JA 60 (noting that Cove Point I found that,

[5] *Natural Gas Interchangeability*, "Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs," 115 FERC ¶ 61,325 (2006) ("Gas Quality Policy Statement").

consistent with the Gas Quality Policy Statement, Cove Point gas meets the relevant gas quality and interchangeability standards).

Washington Gas next complains (Br. at 48) that the orders do not consider whether the Expansion will impose excessive cost burdens on downstream entities. That issue was also resolved in Cove Point I. *See Washington Gas v. FERC*, 532 F.3d at 933 n.4 (affirming FERC's finding that Washington Gas is responsible for its own system upgrades, "because unblended LNG meets the specifications WGL accepted in its tariff and FERC reasonably concluded WGL should be responsible for paying to adapt its system to fulfill its commitments"). In any case, the Cove Point II Orders do not compel Washington Gas to expend any additional sums to remediate its system because it will not receive any additional volumes of regasified LNG as a result of the Expansion. Rehearing Order P 88, JA 60.

In sum, *Washington Gas v. FERC* required that the Commission "more fully address whether the Expansion can go forward without causing unsafe leakage." Because Washington Gas has repaired portions of its system and isolated other portions from receipt of regasified Cove Point LNG, only those portions of its system behind Washington Gas's interconnect with Columbia risk leakage associated with the Expansion. The Commission has eliminated this possibility by restricting Columbia receipts of Cove Point LNG to volumes arising from pre-

Expansion contracts and authorizations. Accordingly, the Commission on remand has fully complied with the Court's mandate.

CONCLUSION

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

Respectfully submitted,

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January 27, 2010

Washington Gas Light Co. v. FERC **Docket No. CP05-130**
D.C. Cir. No. 09-1100

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this briefs contains 6,131 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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January 27, 2010

ADDENDUM

STATUTES

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

(a) After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) 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.

(c) For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e)(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b–1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f)(1) In this subsection, the term “military installation”—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

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

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c)(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.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided*, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) 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.

(f)(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

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

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) 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.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) *Judicial Review* ---

(1) *In General*. -- The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) *Agency Delay*. -- The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq*.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n (c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) *Court Action*. -- If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) *Commission Action.* -- For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) *Expedited Review*. -- The Court shall set any action brought under this subsection for expedited consideration.

Washington Gas Light Company v. FERC **Docket No. CP05-130**
D.C. Cir. No. 09-1100

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 27th day of January 2010, served the foregoing 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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