

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 06-1145

**WILLISTON BASIN INTERSTATE PIPELINE 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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APRIL 23, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

All parties and intervenors appearing in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Williston Basin Interstate Pipeline Company*, 113 FERC ¶ 61,201 (November 22, 2005) ("Affirming Order"), JA 148.

2. *Williston Basin Interstate Pipeline Company*, 115 FERC ¶ 61,081 (April 20, 2006) ("Rehearing Order"), JA 220.

C. Related Cases:

Counsel is not aware of any related cases pending before this or any other Court.

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April 23, 2007

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
PERTINENT STATUTES AND REGULATIONS.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
I. STATUTORY AND REGULATORY BACKGROUND.....	3
A. Natural Gas Act.....	3
B. FERC Actions.....	6
II. EVENTS LEADING TO THE CHALLENGED ORDERS.....	7
A. The Mapleton Extension.....	7
B. The Restatements And Earlier Appeals.....	10
C. The December 1999 Rate Filing.....	11
III. THE FERC RULINGS ON REVIEW.....	13
A. Affirming Order.....	13
B. Rehearing Order.....	15
SUMMARY OF ARGUMENT.....	19
ARGUMENT.....	20
I. STANDARD OF REVIEW.....	20

TABLE OF CONTENTS

	PAGE
II. THE COMMISSION REASONABLY CONCLUDED THAT WILLISTON BASIN’S CONTRACT WITH NORTHERN STATES SHOULD BE REFORMED TO PERMIT OPEN-ACCESS SERVICE, THEREBY ALLOWING NORTHERN STATES TO RESELL ITS PURCHASED, UNUSED CAPACITY.....	21
A. The Commission Reasonably Interpreted The Rate Schedule X-13 Contract To Apply The Just And Reasonable Standard.....	22
1. <i>The Rate Schedule X-13 Contract Has a Memphis Clause.....</i>	22
2. <i>The Mobile-Sierra Public Interest Standard Does Not Apply.....</i>	23
B. The Commission’s Orders Are Consistent With Precedent And Established Policy.....	28
C. The Commission Properly Applied The Just And Reasonable Standard.....	33
1. <i>Service Under the Rate Schedule X-13 Contract Was Unjust and Unreasonable.....</i>	33
2. <i>Reforming the Rate Schedule X-13 Contract to Permit Northern States to Resell Its Unused Capacity Under Rate Schedule FT-1 Was Just and Reasonable.....</i>	37
D. Preserving The Biennial Rate Adjustment Is Reasonable.....	42
CONCLUSION.....	45

TABLE OF AUTHORITIES

PAGE

COURT CASES:

<i>American Gas Ass’n v. FERC</i> , 428 F.3d 255 (D.C. Cir. 2005).....	37
<i>Arkansas Louisiana Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	5
<i>Boston Edison Co. v. FERC</i> , 233 F.3d 60 (1st Cir. 2000).....	4
<i>Consolidated Edison Co. v. FERC</i> , 165 F.3d 992 (D.C. Cir. 1999).....	4
<i>Exxon Mobil Corp. v. FERC</i> , 430 F.3d 1166 (D.C. Cir. 2005).....	23
<i>Exxon Mobil Corp. v. FERC</i> , 315 F.3d 306 (D.C. Cir. 2003).....	5
<i>Florida Municipal Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	20
<i>FPC v. Louisiana Power & Light Co.</i> , 406 U.S. 621 (1971).....	4
<i>FPC v. Sierra Power Co.</i> , 350 U.S. 348 (1956).....	4
<i>FPL Energy Me. Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	20
<i>Koch Gateway Pipeline Co. v. FERC</i> , 136 F.3d 810 (D.C. Cir. 1998).....	21

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES: (con't)

Midwest ISO Transmission Owners v. FERC,
373 F.3d 1361 (D.C. Cir. 2004).....20

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....20

Municipal Defense Group v. FERC,
170 F.3d 197 (D.C. Cir. 1999).....4

Natural Gas Clearinghouse v. FERC,
108 F.3d 397 (D.C. Cir. 1997).....21

**Papago Tribal Util. Auth. v. FERC*,
723 F.2d 950 (D.C. Cir. 1983).....5, 25, 26

Sithe/Indep. Power Partners, L.P. v. FERC,
165 F.3d 944 (D.C. Cir. 1999).....20

**Texaco Inc. v. FERC*,
148 F.3d 1091 (D.C. Cir. 1998).....4, 24

United Distribution Cos. v. FERC,
88 F.3d 1105 (D.C. Cir. 1996).....6, 7

United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,
358 U.S. 103 (1958).....5

United Gas Pipe Line Co. v. Mobile Gas Service Corp.,
350 U.S. 332 (1956).....4

Williston Basin Interstate Pipeline Co. v. FERC,
215 F.3d 875 (8th Cir. 2000).....7, 10

Williston Basin Interstate Pipeline Co. v. FERC,
165 F.3d 54 (D.C. Cir. 1999).....7, 10

TABLE OF AUTHORITIES

PAGE

COURT CASES: (con't)

Williston Basin Interstate Pipeline Co. v. FERC,
2006 U.S. App. LEXIS 31452 (D.C. Cir. Dec. 22, 2006).....7

ADMINISTRATIVE CASES:

Atlanta Gas Light Co.,
100 FERC ¶ 61,071 (2002).....30

Marathon Oil Co. v. Trailblazer Pipeline Co.,
111 FERC ¶ 61,236 (2005).....31

*Pipeline Service Obligations & Revisions to Regulations
Governing Self-Implementing Transportation & Regulation
of Natural Gas Pipelines After Partial Wellhead Decontrol*,
Order No. 636, FERC Stats. & Regs.,
Regs. Pmbles. 1991-96 ¶ 30,939, *order on reh'g*,
Order No. 636-A, FERC Stats. & Regs.,
Regs. Pmbles. 1991-96 ¶ 30,950, *order on reh'g*,
Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh'g denied*,
62 FERC ¶ 61,007 (1993).....6, 27

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,
Order No. 500, FERC Stats. & Regs. ¶ 30,761 (1987).....27

*Regulation of Short-Term Natural Gas Transportation Services and
Regulation of Interstate Natural Gas Transportation Services*,
Order No. 637, FERC Stats. & Regs. ¶ 31,091 (2000).....34

Transcontinental Gas Pipe Line Corp.,
106 FERC ¶ 61,299 (2004), *reh'g denied*,
112 FERC ¶ 61,170 (2005).....31

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES: (con't)

**Williston Basin Interstate Pipeline Co.*,
 115 FERC ¶ 61,081 (2006).....2, 9, 15-17, 22-27, 29, 31-33,
 36-38, 40-41, 43-44

**Williston Basin Interstate Pipeline Co.*,
 113 FERC ¶ 61,201 (2005).....8-11, 13-15, 23, 25-27,
 30-31, 33-42, 44

**Williston Basin Interstate Pipeline Co.*,
 111 FERC ¶ 63,007 (2005).....8-9, 11-12, 25-26, 30-31,
 33-36, 39-40

Williston Basin Interstate Pipeline Co.,
 107 FERC ¶ 61,164 (2004).....12

Williston Basin Interstate Pipeline Co.,
 95 FERC ¶ 63,008 (2001).....12

Williston Basin Interstate Pipeline Co.,
 89 FERC ¶ 61,330 (1999).....11

Williston Basin Interstate Pipeline Co.,
 89 FERC ¶ 61,026 (1999).....10

STATUTES:

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706.....20

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c.....3

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d.....2, 4

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r.....20

TABLE OF AUTHORITIES

PAGE

REGULATIONS:

18 C.F.R. § 284.7.....7

18 C.F.R. § 284.9.....7

GLOSSARY

Affirming Order	<i>Williston Basin Interstate Pipeline Company</i> , 113 FERC ¶ 61,201 (2005)
ALJ	Administrative Law Judge
Commission or FERC	Respondent Federal Energy Regulatory Commission
Contract No. FT-00157	Contract between Williston Basin and Northern States, covering a minority of transmission service on the Mapleton Extension and filed under Rate Schedule FT-1, pursuant to Part 284 of the Commission's regulations
FT	Firm Transmission
Initial Decision	<i>Williston Basin Interstate Pipeline Company</i> , 111 FERC ¶ 63,007 (2005)
Intervenors	Montana Consumer Counsel and South Dakota Public Utilities Commission
IT	Interruptible Transmission
Mapleton Extension	An addition to Williston Basin's natural gas transmission pipeline system, consisting of a 49.3-mile extension from Valley City, North Dakota to Mapleton, North Dakota, an 1100 horsepower compressor station located upstream of the extension, and appurtenant facilities
<i>Memphis</i> clause	As outlined in <i>United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division</i> , 358 U.S. 103 (1958), a contractual clause that permits a regulated utility to make unilateral tariff changes
NGA	Natural Gas Act

GLOSSARY (con't)

Northern States	Northern States Power Company
Rate Schedule FT-1	Rate schedule for open-access transmission service, pursuant to Part 284 of the Commission's regulations, covering a minority of transmission service on the Mapleton Extension
Rate Schedule X-13	Rate schedule for individually certificated service, pursuant to Part 157 of the Commission's regulations, covering a majority of service on the Mapleton Extension
Rate Schedule X-13 contract	Contract between Williston Basin and Northern States, covering a majority of transmission service on the Mapleton Extension and filed under Rate Schedule X-13, pursuant to Part 157 of the Commission's regulations
Rehearing Order	<i>Williston Basin Interstate Pipeline Company</i> , 115 FERC ¶ 61,081 (2006)
Williston Basin	Williston Basin Interstate Pipeline Company

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably affirmed the decision of an administrative law judge (“ALJ”) to reform a contract provision, to require Petitioner Williston Basin Interstate Pipeline Company (“Williston Basin”) to allow its customer Northern States Power Company (“Northern States”) to resell in the secondary market the pipeline capacity that Northern States has paid for and does not need.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

In the instant natural gas pipeline proceeding, the Commission confronted the basic question of “once the capacity is contracted and paid for, whose capacity is it to use and release: the shipper’s or the transporter’s?” *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61,081 at P 27 (2006).¹ After remanding the issue to an ALJ for a hearing, the Commission affirmed the ALJ’s detailed and exhaustive opinion confirming “the general rule that it is the shipper’s right to release and segment the capacity for which it has paid.” *Id.*

Under one of the contracts between the shipper Northern States and the transporter Williston Basin, Northern States had individually certificated service under Part 157 of the Commission’s regulations, *see* 18 C.F.R. Part 157, which precluded Northern States’s ability to fully realize the value of the capacity that it purchased. Pursuant to section 5 of the Natural Gas Act (“NGA”), 15 U.S.C. § 717d, and the certificated contract’s own terms, Northern States sought to convert its service to open-access under Part 284 of the Commission’s regulations, *see* 18 C.F.R. Part 284. Finding that the contract permitted unilateral NGA § 5

¹ “P” refers to the internal paragraph number within a FERC order.

filings and that the Commission had authority to require conversion, the Commission ordered contract reformation to assure non-discriminatory service to Northern States and, more generally, a competitive natural gas environment. In doing so, the Commission concluded that the just and reasonable standard applied in assessing whether contract reformation was appropriate and determined that Northern States had satisfied that evidentiary burden of proof.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The Natural Gas Act grants the Commission jurisdiction over the transmission and wholesale sale of natural gas in interstate commerce. Under NGA § 4(a), 15 U.S.C. § 717c(a), “[a]ll rates and charges made” or “demanded . . . for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates and charges, shall be just and reasonable[.]” To effectuate this requirement, each interstate pipeline must file and comply with tariffs showing all jurisdictional rates and all practices and regulations affecting those rates. *See* 15 U.S.C. §§ 717c(c), 717c(d). Pipelines may propose changes in their tariffs under NGA § 4(e), 15 U.S.C. § 717c(e), but have the burden of showing that their

proposed tariff revisions are “reasonable and fair.” *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1971).

NGA § 5(a), 15 U.S.C. § 717d(a), states that when FERC (on its own motion or on complaint) finds any rate or any rule, regulation, practice, or contract affecting such rate to be unjust or unreasonable, it must replace that rate, rule, regulation, practice, or contract with a just and reasonable rate, rule, regulation, practice, or contract. The Commission (or a complainant seeking Commission action) must prove that the existing rate, rule, regulation, practice, or contract is unjust and unreasonable, and that the replacement imposed on the pipeline is just and reasonable. *See, e.g., Consolidated Edison Co. v. FERC*, 165 F.3d 992, 1000-01 (D.C. Cir. 1999); *see also, e.g., Municipal Defense Group v. FERC*, 170 F.3d 197, 201 (D.C. Cir. 1999) (burden of proof).

The NGA regulatory regime is superimposed on a private contractual regime. *See generally Boston Edison Co. v. FERC*, 233 F.3d 60, 64-65 (1st Cir. 2000). The *Mobile-Sierra* doctrine, which arose out of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Power Co.*, 350 U.S. 348 (1956), generally prohibits a pipeline from unilaterally proposing changes that are not authorized by the pipeline’s contracts with its customers. The Commission may, however, reform a contract if it shows that the public interest requires the Commission to intervene. *See Texaco Inc. v. FERC*, 148 F.3d 1091,

1096 (D.C. Cir. 1998). Furthermore, consistent with *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), a regulated utility may make unilateral tariff changes by including a contractual clause, also known as a *Memphis* clause, reserving such rights.

Under a *Memphis* clause, the pipeline is authorized to make unilateral NGA § 4(e) filings to change the rates, terms, and conditions under which the pipeline will provide the service included in the customer's contract. *See Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 310 (D.C. Cir. 2003). Likewise, a shipper may challenge a pipeline's rates terms, and conditions if a contract includes a *Memphis* clause reserving the shipper's right to challenge under NGA § 5. *See, e.g., Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (noting that parties to a contract may leave unaffected the power of the Commission to replace unjust, unreasonable, or unduly discriminatory rates).²

² Although *Papago* concerned provisions of the Federal Power Act, courts have applied interpretations of Federal Power Act provisions to their counterparts in the Natural Gas Act, and vice versa, because the relevant provisions of the two statutes are in all material respects substantially identical. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

B. FERC Actions

Order No. 636³ restructured the natural gas pipeline industry to maximize the benefits flowing from Congressional decontrol of natural gas pricing at the wellhead. *See generally United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1123-27 (D.C. Cir. 1996). In furtherance of this end, the Commission directed pipelines to: (1) “unbundle” their sales and transportation services and thus enable customers to take only such services as they required; and (2) transport other sellers’ gas on the same terms that they transported their own sales gas. *See* Order No. 636 at 30,412-13.

In conjunction with the requirement that pipelines unbundle their firm gas sales services, Order No. 636 also included a provision that customers be allowed to convert their entitlements to bundled sales from the pipeline into rights to an equivalent amount of firm transmission (“FT”) capacity on the pipeline. That allowed customers to purchase gas from sources other than the pipeline by using

³ *Pipeline Serv. Obligations & Revisions to Regulations Governing Self-Implementing Transp. & Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regs. Pmbles. 1991-96 ¶ 30,939, *order on reh’g*, Order No. 636-A, FERC Stats. & Regs., Regs. Pmbles. 1991-96 ¶ 30,950, *order on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh’g denied*, 62 FERC ¶ 61,007 (1993), *aff’d in relevant part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

their FT capacity to transport the gas to their receipt points. *See United Distrib.*, 88 F.3d at 1130-33.

FT service is not “subject to a prior claim by another customer[.]” 18 C.F.R. § 284.7(a)(3). Pipelines are permitted to charge a two-part rate for FT: (1) a “reservation charge,” which is a fixed monthly charge that the customer pays regardless of whether it uses its capacity; and (2) a “volumetric” charge for each unit of gas actually transported for the shipper. *See* 18 C.F.R. § 284.7(e). FT service contrasts with interruptible transmission (“IT”) service, which is subject to a prior claim by another customer (*i.e.*, is subject to interruption), and for which pipelines may charge only a one-part, volumetric charge. *See* 18 C.F.R. §§ 284.9(a)(3), 284.9(c).

II. EVENTS LEADING TO THE CHALLENGED ORDERS

A. The Mapleton Extension

The instant case is merely the latest in a string of appeals brought by Williston Basin, *see, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 215 F.3d 875 (8th Cir. 2000); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54 (D.C. Cir. 1999),⁴ and related to and involving the rates, terms, and conditions of the Mapleton Extension. Williston Basin is an interstate natural gas

⁴ *See also Williston Basin Interstate Pipeline Co. v. FERC*, No. 05-1209, 2006 U.S. App. LEXIS 31452 (D.C. Cir. Dec. 22, 2006) (dismissing for lack of jurisdiction Williston Basin’s appeal challenging FERC’s rejection of Williston Basin’s proposed rate changes).

pipeline company operating in the states of Montana, North Dakota, South Dakota, and Wyoming and is a subsidiary of MDU Resources Group, Inc. *See* Petitioner’s Brief at iii. The Mapleton Extension is an addition to Williston Basin’s natural gas transmission pipeline system and consists of a 49.3-mile extension from Valley City, North Dakota to Mapleton, North Dakota and certain appurtenant facilities. *See Williston Basin Interstate Pipeline Co.*, 111 FERC ¶ 63,007 at P 3 (2005) (“Initial Decision”), JA 26.

In 1991, Williston Basin negotiated with Northern States, a local distribution company serving approximately 400,000 natural gas retail customers in North Dakota and Minnesota, *see* R 188 at 1, JA 20,⁵ for Williston Basin to build the Mapleton Extension. Williston Basin ultimately entered into two transportation contracts to provide service via the Mapleton Extension to Northern States. The first covers most of the service on the Mapleton Extension, *see Williston Basin Interstate Pipeline Co.*, 113 FERC ¶ 61,201 at P 6 (2005) (“Affirming Order”), JA 149, and is an individually certificated service filed as Rate Schedule X-13, pursuant to Part 157 of the Commission’s regulations, of Williston Basin’s FERC Gas Tariff, *see* R 190 at 4, JA 23. The second, also known as Contract No. FT-00157, pertains to the remaining service on the Mapleton Extension and is filed as

⁵ “R” refers to a record item. Unless otherwise noted, the “R” reference is to the record in FERC Docket No. RP00-107. “JA” refers to the Joint Appendix page number.

Rate Schedule FT-1, pursuant to Part 284 of the Commission's regulations, of Williston Basin's FERC Gas Tariff.⁶ *See* Affirming Order at P 6, JA 149-50.

When Williston Basin first filed its application to construct the pipeline extension and to transport natural gas, *see Williston Basin*, 215 F.3d at 876, the Commission rejected the original proposed rate as a minimum bill. *See* Initial Decision at P 3 n.6, JA 27 n.6. Consequently, Williston Basin and Northern States executed a contractual amendment providing for the use of a different rate in Rate Schedule X-13, plus a biennial restatement of that Rate Schedule X-13 rate until the rate became equal to or less than the effective maximum rate under Rate Schedule FT-1. *See id.* The first restatement was to occur on March 1, 1995. *See Williston Basin*, 215 F.3d at 876. In calculating and restating the Rate Schedule X-13 rate, Williston Basin had to utilize two cost components – the return-on-equity and depreciation rates – that it uses in calculating the Rate Schedule FT-1 rate. *See id.* at 876-77.

⁶ The Rate Schedule FT-1 service proscribed Northern States's ability to use its full contract entitlement by limiting the Annual Delivery Quantity by 50%. The ALJ concluded, and the Commission affirmed, that the 50% limitation on the Annual Delivery Quantity was unjust and unreasonable because Williston Basin's proffered maintenance rationales for limiting the Annual Delivery Quantity were not justified. *See* Initial Decision at P 160, JA 114; Affirming Order at P 79, JA 180; Rehearing Order at P 60, JA 250. Williston Basin does not seek review of this issue before this Court.

B. The Restatements And Earlier Appeals

During the first half decade or so of restatements, Williston Basin routinely disputed FERC's interpretation of the formula for computing the rate in Rate Schedule X-13. *See* Affirming Order at P 11, JA 151. In *Williston Basin*, 165 F.3d 54, Williston Basin challenged, among other things, FERC's decision lowering the return-on-equity and depreciation cost components for the Rate Schedule FT-1 rate, which had been effective, subject to investigation and refund, since November 1, 1992, *see id.* at 57. Those cost components directly affected the Rate Schedule X-13 rate for the 1995 restatement. The D.C. Circuit affirmed the Commission on the depreciation component, but remanded for further consideration of the return-on-equity part. *See id.* at 56. Thereafter, Williston Basin entered into a settlement agreement resolving the return-on-equity charge, *see Williston Basin Interstate Pipeline Co.*, 89 FERC ¶ 61,026 (1999), and the Rate Schedule FT-1 cost components relevant to the 1995 restatement of the Rate Schedule X-13 rate became final.

In *Williston Basin*, 215 F.3d 875, Williston Basin disputed several FERC orders holding that when the Rate Schedule FT-1 rate at the time of a restatement filing is subject to refund based on the final outcome of a pending general NGA § 4 rate filing, the restated Rate Schedule X-13 rate must also be subject to revision based on the outcome of that rate case. *See id.* at 877; *see also* Affirming Order at

P 11 n.12, JA 151 n.12. Williston Basin argued that the Commission erred in requiring Williston Basin to use the “final” Rate Schedule FT-1 cost components in computing the Rate Schedule X-13 rate rather than the initial Rate Schedule FT-1 cost components proposed by Williston Basin and effective at the time of restatement. *See* 215 F.3d at 878. The Eighth Circuit ultimately rejected Williston Basin’s argument and affirmed the Commission’s position. *See id.* at 876.

C. The December 1999 Rate Filing

On December 1, 1999, Williston Basin filed for a general rate increase under NGA § 4. *See* Initial Decision at P 4, JA 27. The filing raised numerous issues concerning the justness and reasonableness of the rate increase. *See id.* Among other things, Northern States charged that it should be permitted to resell in the secondary market the pipeline capacity that it purchased and did not require. Hence, it sought Commission action to reform its contract under Rate Schedule X-13 to open-access service under Part 284 of the Commission’s regulations. *See id.* Due to the issues raised, the Commission accepted and suspended, subject to refund, the filing to be effective June 1, 2000, and set the issues for hearing. *See Williston Basin Interstate Pipeline Co.*, 89 FERC ¶ 61,330 at 61,999 (1999).

On May 9, 2001, the ALJ issued a decision addressing the various issues raised by interested parties in Williston Basin’s rate filing. *See Williston Basin Interstate Pipeline Co.*, 95 FERC ¶ 63,008 (2001). That decision, though, did not

confront Northern States's request that its contract under Rate Schedule X-13 be converted to open-access service. In striking testimony regarding that issue, the ALJ had previously determined that court precedent had decided whether conversion should occur. *See Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 at P 97 (2004).

On July 3, 2003, the Commission affirmed many of the ALJ's determinations, but remanded on the issue of whether the Rate Schedule X-13 contract should be reformed and Northern States permitted to resell its unused capacity. *See Williston Basin*, 107 FERC at PP 99-100. Noting that the possibility of contract conversion had not been closely examined, the Commission directed the ALJ to re-examine that issue on remand and to permit the parties a forum in which arguments and evidence could be tested. *See id.* at PP 100-01.

On remand and after receiving extensive evidence and testimony, the ALJ ruled in a detailed decision that Northern States's request to reform the Rate Schedule X-13 contract and to resell its unused capacity was just and reasonable. The ALJ concluded that the Commission had authority to require a conversion from a Part 157 individually certificated service to a Part 284 open-access service if the burden of proof was met, *see* Initial Decision at P 69, JA 69; that the burden of proof was the just and reasonable standard due to a *Memphis* clause in the Rate Schedule X-13 contract, *see id.* at PP 84-85, JA 74-75; that Northern States's

request for conversion was not untimely, *see id.* at P 97, JA 80; and that the evidence indicated that the present service provided by Williston Basin to Northern States was unjust and unreasonable, *see id.* at P 157, JA 112.

Williston Basin challenged the ALJ's decision before the Commission.

III. THE FERC RULINGS ON REVIEW

A. Affirming Order

After carefully considering Williston Basin's contentions, the record, and applicable precedent, the Commission rejected Williston Basin's arguments and affirmed the ALJ's ruling. *See generally* Affirming Order, JA 148. In its challenge to the ALJ's decision, Williston Basin maintained that FERC policy seeks voluntary, not mandatory, conversion of Part 157 service to Part 284 open-access service, *see* R 199 (Brief on Exceptions) at 12-27, JA 117-32; that the ordered conversion was actually a contractual abrogation that must satisfy the rigorous "public interest" standard, *see id.* at 28-32, JA 133-37; that neither the public interest nor the just and reasonable standard was satisfied, *see id.* at 34, JA 138; and that conversion would negatively impact, without adequate mitigation, other customers, *see id.* at 39-47, JA 139-47.

The Commission found Williston Basin's assertions wanting. Regarding its policy for conversion, the Commission observed that "it has the authority [for conversion] and should exercise it to require conversion of [Northern States]'s Part

157 service to Part 284 service.” Affirming Order at P 27, JA 159. “The Commission’s policy is that it generally will not force shippers to convert if they do not wish to do so, but pipelines [such as Williston Basin] may be required to accept conversion if the facts show that the Part 157 service has become unjust and unreasonable.” *Id.* at P 29, JA 160. The Commission concluded that the ALJ’s Initial Decision correctly applied current Commission policy and rejected Williston Basin’s case citations as unpersuasive. *See id.* at P 41, JA 165.

With respect to the standard to apply in determining whether conversion must occur, the Commission held that the *Mobile-Sierra* doctrine and the public interest standard did not apply because “the terms and conditions of Rate Schedule X-13 give either party the right to seek changes, whether fundamental or not.” *Id.* at P 21, JA 156-57. “[T]he Rate Schedule X-13 contract specifically permits Williston [Basin] to ‘make unilateral application to the . . . Commission . . . for changes in rates and terms and conditions under section 4 of the Natural Gas Act’” and “also provides that [Northern States] can ‘seek to initiate proceedings under Section 5 of the Natural Gas Act.’” *Id.* at P 23, JA 157. Because the parties have the ability to seek changes in rates, terms, and conditions of service under Rate Schedule X-13, Northern States “may seek a modification of that contract pursuant to the just and reasonable standard under NGA section 5 to obtain full Part 284

open-access transportation rights that Williston [Basin] provides under its Rate Schedule FT.” *See id.*

In addition to applying the just and reasonable standard, the Commission determined that Northern States had satisfied that burden of proof by showing that “Rate Schedule X-13 does not afford [Northern States] adequate flexibility in the use of the capacity *for which it pays.*” Affirming Order at P 22, JA 157 (emphasis added). Moreover, the Commission noted that “there are no countervailing circumstances that warrant retention of the Rate Schedule X-13 service.” *Id.*

Although conversion would result in Williston Basin losing certain IT revenue that Williston Basin credited to lower costs for FT-1 customers, the Commission found this loss to be *de minimis*. *See id.* at P 54, JA 170. Indeed, no other customers had intervened to argue that they would be adversely impacted. *See id.* at P 51, JA 169. Furthermore, there was no present impact on other customers’ FT-1 rates because any change in the FT-1 rates could not take place until Williston Basin sought recovery of those costs in a future section 4 filing. *See id.* at P 54, JA 170. Moreover, to the extent there were appreciable costs from contract conversion, “the need for the benefits of competition outweigh[ed] some cost shifts” *Id.*

B. Rehearing Order

On rehearing, the central issue remained “whether the Commission applied the proper standard in deciding the case.” Rehearing Order at P 4, JA 221.

Williston Basin again argued that FERC could only grant Northern States's request to reform the Rate Schedule X-13 contract and to resell its unused capacity if the public interest so requires. *See* R 211 (Request for Rehearing) at 1, JA 181. In addition, Williston Basin contended that the Commission wrongly placed the burden of proof under NGA § 5 on Williston Basin rather than on Northern States and charged that the Affirming Order failed to include specific findings of support. *See id.* at 1-2, JA 181-82. Williston Basin also maintained that the Affirming Order was inconsistent with and inexplicably departed from prior precedent. *See id.* at 2, JA 182. Finally, for purposes of this appeal, Williston Basin asserted that continuing the biennial rate adjustments established by the Rate Schedule X-13 contract, while ostensibly abrogating that contract, granted Northern States an undue preference and exceeded the Commission's authority. *See id.*

In a thorough opinion, the Commission rejected Williston Basin's points of error and denied rehearing. *See* Rehearing Order at P 3, JA 221. Because "the Commission may order changes in the provisions of a contract pursuant to the ordinary just and reasonable standard in NGA sections 4 and 5, whenever the contract includes provisions permitting the parties to seek such changes," *id.* at P 10, JA 224, the Commission deemed meritless Williston Basin's contention that the rigorous public interest standard applied. "The Rate Schedule X-13 contract at issue here includes a broad *Memphis* clause providing for changes at the behest of

either of the parties, pursuant to NGA sections 4 and 5.” *Id.* at P 11, JA 224. The Commission distinguished as inapposite Williston Basin’s reference to cases where the public interest standard was utilized. *See id.* at PP 16-19, JA 227-29.

With respect to the burden of proof being mistakenly placed upon Williston Basin, not Northern States, the Commission stated that no such act took place as it was “satisfied that [Northern States] met its burden under NGA section 5 to show that the existing Part 157 status of the X-13 contract is no longer just and reasonable and that a change to Part 284 open-access status is necessary.”

Rehearing Order at P 24, JA 231. The Commission noted that it ordered a hearing to receive evidence, that the ALJ determined that Northern States had satisfied the statutory burden after hearing evidence, and that the Commission had “adopted the ALJ’s citation to and analysis of substantial evidence in the record.” *Id.* Thus, there were sufficient findings of support.

As for whether conversion contradicted prior policy or precedent, the Commission concluded that transitioning to open-access service under Part 284 “is not a departure from or inconsistent with existing policy or precedent.” *Id.* at P 25, JA 232. Although Williston Basin argued that the Commission had not required conversion in previous cases, it did not argue that the Commission lacks authority to order conversions if the Commission exercises that authority properly. *See id.* at P 26, JA 233. The Commission observed that it was exercising authority properly

and that it was illogical to argue that the Commission has authority to order conversion but that it must justify its exercise of that authority as a “new policy.”

See id.

The Commission also rejected Williston Basin’s assertion that continuing the biennial rate adjustments established by the Rate Schedule X-13 contract was an undue preference and exceeded the Commission’s authority. “The Commission’s intent was to preserve as much of the parties’ original agreement as possible, while according [Northern States] the ability to release capacity and other features of Part 284 service that are accorded FT shippers.” *Id.* at P 43, JA 242.

Moreover, the Commission noted that “it is reasonable . . . to maintain the biennial restatement process, because the X-13 rate always was intended to converge with the FT-1 rate.” *Id.* at P 35, JA 238.

The instant appeal followed.

SUMMARY OF ARGUMENT

The Commission reasonably agreed with the ALJ in holding that the Rate Schedule X-13 contract between Williston Basin and Northern States should be reformed to allow open-access service, thereby permitting Northern States to resell its purchased, unused capacity. In doing so, the Commission reasonably interpreted the contract to conclude that the just and reasonable standard applied, and not the more stringent *Mobile-Sierra* public interest standard. Finding the *Mobile-Sierra* public interest standard to apply would have been illogical due to the broad *Memphis* clause in the contract. Furthermore, precedent and policy authorized reformation of the contract under the just and reasonable standard.

In addition, Northern States properly satisfied its burden to show that the existing contractual service was unjust and unreasonable and that conversion to open-access service, with capacity release rights, would be just and reasonable. The substantial evidence reviewed by the ALJ and adopted by the Commission revealed that a shipper should be afforded flexibility in the use of its purchased capacity, and that Williston Basin's refusal to permit such flexibility was likely anticompetitive and unjust and unreasonable. Northern States also established that the contract reformation would be just and reasonable as it would permit flexibility for Northern States, increase competitiveness, and only affect other customers in a *de minimis* fashion. Finally, the Commission properly concluded that maintaining

the biennial contract rate adjustment would be appropriate due to the history surrounding that mechanism and the desire to preserve as much of the contract as possible.

ARGUMENT

I. 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* *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). 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); *see also* *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). 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.” *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

“[B]ecause Congress has delegated to FERC a broad range of adjudicative powers over natural gas rates, this [Court] gives substantial deference to its

interpretation of filed tariffs, even where the issue simply involves the proper construction of language.” *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks omitted). This Court must sustain the Commission’s interpretation of a FERC order if that interpretation is reasonable. *See Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

II. THE COMMISSION REASONABLY CONCLUDED THAT WILLISTON BASIN’S CONTRACT WITH NORTHERN STATES SHOULD BE REFORMED TO PERMIT OPEN-ACCESS SERVICE, THEREBY ALLOWING NORTHERN STATES TO RESELL ITS PURCHASED, UNUSED CAPACITY

In two thorough and detailed orders, the Commission affirmed the ALJ’s exhaustive analysis and well-supported conclusion that Williston Basin’s service to Northern States under Rate Schedule X-13 was unjust and unreasonable and that this service should be converted prospectively to open-access service, so that Northern States could properly utilize its rights to purchased, but unused capacity. Nevertheless, Williston Basin continues to make many of its same meritless arguments on appeal. Because those arguments are unavailing and because the ALJ’s and the Commission’s findings rest on substantial evidence, the petition for review should be denied.

A. The Commission Reasonably Interpreted The Rate Schedule X-13 Contract To Apply The Just And Reasonable Standard

1. The Rate Schedule X-13 Contract Has a Memphis Clause

The Rate Schedule X-13 contract between Williston Basin and Northern States contains a provision, Article IX, Part II, titled “Unilateral Applications” in the Table of Contents, which provides:

Nothing herein shall be construed as affecting in any way the right of [Williston Basin] to make unilateral application to the Federal Energy Regulatory Commission or successor agency(ies), for changes in rates and terms and conditions under Section 4 of the Natural Gas Act, or any other applicable statute(s), and the FERC’s rules and regulations promulgated thereunder. Nor shall this Agreement be construed as affecting in any way the rights of [Northern States] to intervene, protest or otherwise participate in such proceedings or to seek to initiate proceedings under Section 5 of the Natural Gas Act, other provisions thereof, or the FERC’s rules and regulations thereunder, or any other applicable statute(s).

R 219 at 16 (Williston Basin’s FERC Gas Tariff, Original Volume No. 2, Original Sheet No. 349), JA 253. The Commission reasonably interpreted this provision as “a broad *Memphis* clause providing for changes at the behest of either of the parties, pursuant to NGA section 4 and 5,” Rehearing Order at P 11, JA 224, thereby permitting the Commission to “order changes in the provisions of a contract pursuant to the ordinary just and reasonable standard in NGA sections 4 and 5,” *id.* at P 10, JA 224.

Despite the broad scope of language in Article IX, Part II, Williston Basin contends that this is no *Memphis* clause, *see* Pet. Brief at 17. Yet, Williston Basin

recognizes that this contractual clause provides Northern States with the right to initiate a section 5 proceeding. *See* Pet. Brief at 19. Where “contractual provisions of this nature preserve the customer’s section 5 rights,” Affirming Order at P 23, JA 157, such a clause is a *Memphis* clause, as the Commission found, *see* Rehearing Order at PP 9-11, JA 224-25. And “[g]iven the parties’ ability to seek changes in rates or terms and conditions of service under the Rate Schedule X-13 contract, [Northern States] may seek a modification of that contract pursuant to the just and reasonable standard under NGA section 5 to obtain the full Part 284 open-access transportation rights that Williston [Basin] provides under its Rate Schedule FT.” Affirming Order at P 23, JA 157-58.

2. *The Mobile-Sierra Public Interest Standard Does Not Apply*

Even if Northern States has the right to initiate proceedings under NGA § 5, Williston Basin maintains that the *Mobile-Sierra* public interest standard controls whether the changes mandated by the Commission should occur. *See* Pet. Brief at 18 (citing *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005)).⁷ This is an argument without any substance.

⁷ In quoting *Exxon Mobil*’s statement that “[u]nder the *Mobile-Sierra* doctrine, FERC may modify a contract rate provision if (but only if) the ‘public interest’ so requires,” Pet. Brief at 18, Williston Basin conveniently ignores the very next sentence of that court decision: “However, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division* . . . allows pipeline companies to change their rates if their contracts contain clauses (now known as ‘*Memphis* clauses’) reserving the right to do so.” *See also* Rehearing Order at P 10 n.12, JA 224 n.12.

“In arguing that the Commission must satisfy the public interest standard, Williston [Basin] starts from the premise that the *Mobile-Sierra* doctrine requires that the Commission satisfy the public interest standard whenever it modifies a contract. This is a mischaracterization of the *Mobile-Sierra* doctrine.” Rehearing Order at P 9, JA 224. As this Court observed in *Texaco*, 148 F.3d at 1095, the *Mobile-Sierra* doctrine “holds that where parties have negotiated a natural gas shipment contract that sets firm prices or dictates a specific method for computing shipping charges and that denies either party the right to change such prices or charges unilaterally, FERC may abrogate or modify the contract only if the public interest so requires.” *See also* Rehearing Order at P 9, JA 224 (quoting *Texaco*). “Thus, contrary to Williston [Basin]’s contention, the *Mobile-Sierra* doctrine does not establish an across-the-board requirement that the Commission must satisfy the public interest standard whenever it orders a change in a contract.” *Id.* at P 10, JA 224. Instead, because the Rate Schedule X-13 contract specifically permits Northern States the right to initiate proceedings to change the contract, the Commission may order changes to the contract under the ordinary just and reasonable standard. *See id.*

In an attempt to clarify its position, Williston Basin next contends that the right to invoke FERC’s NGA § 5 authority does not equate to applying a just and reasonable standard particularly because Article IX, Part II does not expressly state

an applicable standard. *See* Pet. Brief at 18-21. But this is again a meritless argument.

“The Commission believes that the natural reading of the *Memphis* clause at issue here is that it authorizes [Northern States], a gas distributing company, to do exactly what NGA section 5 says: request the Commission to find that the Rate Schedule X-13 contract is unjust and unreasonable, and fix the just and reasonable contract to be thereafter observed.” Rehearing Order at P 12, JA 225; Affirming Order at P 23, JA 158 (“The Commission rejects Williston’s contention that the *Mobile-Sierra* public interest standard must be satisfied in order to require a change from individually-certificated transportation service to Part 284 open-access service.”); Initial Decision at P 82, JA 74 (“[T]he ‘public interest’ standard of review only applies in cases concerning Section 5 of the Natural Gas Act that involve contracts that do not confer on shippers the right to initiate proceedings under Section 5; here, [Northern States] has reserved that right in the Rate Schedule X-13 contract.”).

Moreover, as the Commission, *see* Rehearing Order at PP 13-14, JA 225-26; Affirming Order at P 23 n.34, JA 157 n.34, and the ALJ recognized, *see* Initial Decision at P 81, JA 74, “specific acknowledgment of the possibility of future rate changes is virtually meaningless unless it envisions a just-and-reasonable standard.” *Papago*, 723 F.2d at 954. Because the public interest standard, as

applied, is much more restrictive than the just and reasonable standard, perhaps “practically insurmountable,” “[f]uture rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just-and-reasonable standard to govern.” *Id.*; *see also* Rehearing Order at P 14, JA 226 (quoting *Papago*). “The Rate Schedule X-13 *Memphis* clause is similar to the contract provision in *Papago*,” *id.*, which provided that either party could unilaterally seek Commission action to change the contract after the first year and which this Court interpreted as permitting just and reasonable changes after the first year, *see Papago*, 723 F.2d at 954. “Since the Rate Schedule X-13 *Memphis* clause specifically acknowledges the possibility of future changes [like the provision in *Papago*], it is reasonable to find that the parties intended the just and reasonable standard to govern those changes.” Rehearing Order at P 14, JA 226; *see also* Affirming Order at P 23, JA 157; Initial Decision at P 81, JA 74.

“Indeed, if that were not the case, there would have been no point in including the provision in the Rate Schedule X-13 contract at all, since the contract would be subject to change under the public interest standard without the *Memphis* clause.” Rehearing Order at P 14, JA 226. Under Williston Basin’s interpretation, Article IX, Part II would effectively be “useless surplusage.” *Id.*

Furthermore, as the Commission observed, it has applied the less restrictive just and reasonable standard on various occasions in NGA § 5 proceedings. “In

Order No. 500, the Commission relied on the NGA section 5 just and reasonable standard to order interstate pipelines to permit their sales customers to convert their individually-certificated sales contracts to Part 284 open-access transportation contracts.” Affirming Order at P 23, JA 158 (referring to *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, FERC Stats. & Regs. ¶ 30,761 at 30,796 (1987)). “Similarly, in Order No. 636, the Commission relied on the NGA section 5 just and reasonable standard to require that contracts for bundled sales and transportation service be unbundled, with Part 284 open-access transportation service provided under a separate contract.” *Id.* (referring to Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,393 & 30,406).

In a final attempt to invoke the public interest standard, Williston Basin asserts that the Commission cannot rely on the “just and reasonable” standard because NGA § 5 authority to change rates, terms, or conditions of service does not permit replacing a contract entirely with a different contract and service. *See* Pet. Brief at 22-24. But as the Commission rightly noted, there is no totally different contract and service. Williston Basin’s contract with Northern States, as reformed by the Commission at Northern States’s request, “will [still] obligate Williston [Basin] to provide the same level of guaranteed firm service, in the same location, as previously.” Rehearing Order at P 17, JA 228. “[N]either [Northern States] nor the Commission is seeking to increase [Northern States]’s contract

demand or change the primary receipt and delivery points in the Rate Schedule X-13 contract defining the guaranteed firm service Williston [Basin] must provide to [Northern States].” *Id.*

In short, all the Commission has required, acting on the recommendation of the ALJ, is to convert the Williston Basin X-13 contract to the limited extent necessary to allow Northern States to enjoy the flexibility to resell the pipeline capacity it has purchased. Virtually all other rates, terms, and conditions of service between Williston Basin and Northern States remain the same. *See id.* Thus, “[t]he just and reasonable standard,” applied in other cases with respect to changes that were no less altering than those here, “is appropriate in the instant case as well.” *Id.* at P 18, JA 229.

B. The Commission’s Orders Are Consistent With Precedent And Established Policy

Just as the Commission’s determination that the just and reasonable standard applies is consistent with earlier cases, the Commission’s orders reforming the Rate Schedule X-13 contract, thereby permitting Northern States to resell its unused capacity, do not depart from precedent and prior policy. Although Williston Basin contends that the Commission has never ordered a conversion from a Part 157 individually-certificated contract to a Part 284 open-access contract before the instant case, *see* Pet. Brief at 26, this is a contention without any effect. “Even if this is the first case where the Commission has required a

transition to Part 284 from Part 157 service upon failure of the parties to negotiate a transition, it is not a departure from or inconsistent with existing policy or precedent.” Rehearing Order at P 25, JA 232.

Williston Basin cannot point to a single authority indicating that the Commission does not have the authority to require transition to open-access service under Part 284 from individually certificated service under Part 157. Indeed, Williston Basin essentially conceded in its Request for Rehearing that the Commission has such authority. *See* R 211 at 20-21, JA 200-01 (admitting that it is not arguing that FERC lacks the statutory authority to order conversions). “The authority to taken an action assumes that it can and will be exercised in an appropriate case.” Rehearing Order at P 26, JA 233. Here, the Commission, affirming the judgment of the ALJ, has properly exercised under the facts of this case the authority that Williston Basin concedes FERC has. *See id.* “Each case rests on its own facts, and it is not a matter of caprice if petitioners have, in other cases, been denied contract reformation based on the different merits of those cases.” *Id.* at P 25, JA 232.

Williston Basin, though, maintains that the authority to order a conversion is not the same as properly exercising that authority because the Commission never announced a change in policy of not just favoring conversion, but requiring it. *See* Pet. Brief at 28-29. The fact that the Commission has supported voluntary

conversions, however, does not mean that the Commission cannot order conversions in appropriate cases “when agreement of pipelines and their customers cannot be achieved.” Affirming Order at P 31, JA 161.

In the past, the Commission has signaled a policy desiring individually certificated services to convert to open-access services, *id.* at PP 30-31, JA 160-61, and hoped that conversions would be accomplished by agreement of the parties, *see id.* at P 30, JA 160. Consequently, “most pipelines and their customers have reached agreement with respect to such conversions.” *Id.* at P 31, JA 161. But the Commission has never stated that voluntary agreements are the only way to achieve conversion, nor has the Commission said that it does not have the authority to require conversion. Rather, it has made clear that it has the authority to order conversion when individually certificated service becomes unjust and unreasonable, *see id.* at P 33, JA 162 (discussing *Atlanta Gas Light Co.*, 100 FERC ¶ 61,071 (2002)); Initial Decision at P 70, JA 69 (same), and it “repeatedly has emphasized the importance of the facts specific to each case,” Affirming Order at P 31, JA 161. Thus, “[r]ecognizing in this case the Commission’s ability and willingness to order conversions when appropriate does not represent a change of policy.” *Id.*

Notwithstanding the Commission’s adherence to policy and precedent, Williston Basin argues that the Commission’s decision to reform the Rate Schedule

X-13 contract and permit Northern States to resell its unused capacity is inconsistent with FERC's treatment of two other pipelines' contracts.⁸ See Pet. Brief at 34-36. But those cases, *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 (2004), *reh'g denied*, 112 FERC ¶ 61,170 (2005) ("*Transco*"), and *Marathon Oil Co. v. Trailblazer Pipeline Co.*, 111 FERC ¶ 61,236 (2005) ("*Marathon*"), "are factually distinguishable because they did not concern the same issues of capacity release and segmentation that are present here." Rehearing Order at P 28, JA 233-34. With respect to the former, the Commission observed:

In *Transco*, the issue was whether unbundling certain storage services would impair Transco's ability to provide no-notice service to existing shippers. The Commission found that the other party had failed to meet the NGA section 5 burden to show that the existing Part 157 service was unjust and unreasonable and that the replacement service was just and reasonable. The Commission found that it would not be just and reasonable to make changes to Transco's system that would compromise its operational flexibility and service to existing no-notice customers based on facts limited to certain geographical areas or changes designed to benefit customers only in certain states. In the instant case, the Commission did not base its decision to require conversion on operating conditions. The Commission based its decision on the facts unique to this case that demonstrated that the Part 157 service provided to [Northern States] has become unjust and unreasonable.

⁸ Although Williston Basin cites to several cases supposedly indicative of the voluntary, not mandatory, nature of conversion, see Pet. Brief at 27 n.12, it fails to explain them. In any case, those decisions are inapposite as the Commission, see Affirming Order at PP 36-39, JA 163-64, and the ALJ, see Initial Decision at PP 73-77, JA 70-73, reasonably found.

Rehearing Order at P 28, JA 233 (footnotes omitted). With respect to the latter, the Commission stated:

In *Marathon Oil Co. v. Trailblazer Pipeline Co. (Marathon)*, the issue concerned an expansion bid process and whether this was done fairly consistent with the Commission's negotiated rate policies. Marathon claimed that the rates under its contracts for the expansion capacity were the result of an exercise of market power and that the Commission should invalidate the rates. In the alternative, Marathon argued that the Commission should find that the subject rates were unduly discriminatory. The Commission stated that, absent a "compelling reason," it would not second-guess the business and economic decisions of knowledgeable business entities when they entered into negotiated rate contracts, and the Commission found that Marathon had not provided a compelling reason that would warrant the Commission action it sought. The Commission also stated that it was reluctant to upset the expectations of the parties when a customer foregoes numerous opportunities to raise its concerns in a more appropriate forum. Thus, Marathon also is distinguishable on its facts. For the reasons previously stated, the facts of the instant case do provide a compelling reason for the Commission to order the requested conversion. [Northern States] made numerous efforts to obtain this relief in the biennial restatement process, but those biennial restatements were not appropriate vehicles for seeking such relief. Once [Northern States] sought X-13 conversion in this NGA section 4 rate case, the Commission confirmed that this was the appropriate proceeding in which to address [Northern States]'s request for conversion.

Id. at P 29, JA 233 (footnotes omitted). In short, the Commission analyzed the specific facts in *Transco* and *Marathon*, including the agreements, and determined them to be unlike the facts at hand in the instant matter; accordingly, it reasonably chose to act differently here. *See id.* at P 25, JA 232 (noting fact-specific nature of each contract reformation case).

C. The Commission Properly Applied The Just And Reasonable Standard

Contrary to Williston Basin’s argument, *see* Pet. Brief at 24-25, the Commission correctly applied the just and reasonable standard, placing the burden of proof on Northern States “under NGA section 5 to show that the existing Part 157 status of the X-13 contract is no longer just and reasonable and that a change to Part 284 open-access status is necessary.” Rehearing Order at P 24, JA 231. The Commission, affirming the judgment of the ALJ on the substantial evidence in the record, reasonably concluded that Northern States had carried that burden with respect to these issues. *See id.*; Affirming Order at P 22, JA 157.

1. Service Under the Rate Schedule X-13 Contract Was Unjust and Unreasonable

“[Northern States]’s burden in this case was to show that, under the circumstances presented, it has become unjust and unreasonable to continue service under a form of transportation no longer favored by the Commission.” Affirming Order at P 22, JA 157. As the ALJ found, *see* Initial Decision at P 99, JA 81, and as the Commission later affirmed, *see* Affirming Order at P 22, JA 157, “[u]nder the Part 157 service that Williston [Basin] currently provides [Northern States], [Northern States] is prevented from use of capacity release, segmenting, and flexible receipt and delivery points that it could enjoy under Part 284 service.” Initial Decision at P 99, JA 81. The Williston Basin X-13 contract “does not afford

[Northern States] adequate flexibility in the use of the capacity for which it pays.” Affirming Order at P 22, JA 157. As a result, the contract was unjust and unreasonable.

Segmenting capacity and flexible receipt and delivery points are important to creating efficient competition in the market. *See* Initial Decision at P 99, JA 81. “[S]egmentation refers to the ability of firm capacity holders to subdivide their capacity into segments and to use segments for different capacity transactions, and the ability to segment capacity significantly enhances the value of firm capacity and the ability of firm capacity holders to compete with capacity available from the pipeline as well as capacity available from other releasing shippers.” *Id.* “In Order No. 637, the Commission amended its regulations regarding capacity segmentation ‘in order to improve the competitiveness and efficiency of the interstate pipeline grid.’” Affirming Order at P 48, JA 168 (quoting *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,300 (2000)). The ALJ stated that the Commission “expects a pipeline to permit segmentation to the maximum extent possible given the configuration of its system.” Initial Decision at P 100, JA 82 (quoting Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,304). “[G]reater receipt point flexibility would provide greater assurance to [Northern States] that it will be able to obtain alternative

supplies at alternative receipt points in the event a supplier fails to deliver at one of [Northern States]’s primary receipt points.” *Id.* at P 99, JA 82.

Here, Northern States established, among other things, that the service under the Rate Schedule X-13 contract hindered its flexibility to use its paid capacity and alternative receipt points, items “intended to provide captive customers the opportunity to reduce their cost of holding long-term pipeline capacity while continuing to protect against the exercise of market power.” Affirming Order at P 48, JA 168. In light of its goal of promoting a competitive market for natural gas, the Commission could not support Williston Basin’s refusal to permit reformation of the Rate Schedule X-13 contract, especially since that refusal perpetuated a secondary market that continues to be dominated by Williston Basin and its affiliate. *See id.*

Williston Basin, though, contends that the burden satisfied by Northern States was no burden at all because “the most significant factor of relevance to the Commission here was uncontested, that is, that the [Northern States] contract, because it was a Part 157 contract, did not provide the flexibility of a Part 284 contract.” Pet. Brief at 24-25. According to Williston Basin, there was no need for an evidentiary hearing or ALJ findings, as the Commission’s “most significant factor” already undercut Williston Basin’s position, and Northern States’s burden satisfaction was essentially a sham.

Although the Commission has expressed its general preference that a shipper should have flexibility in the use of capacity for which it pays to promote a competitive market, Northern States still had to satisfy that its situation was unjust and unreasonable under the circumstances. Hence, “[t]he Commission set these issues for hearing to ascertain all the facts relevant to the decision, to afford the parties an opportunity to settle their differences and *to determine if there are any operational reasons why the conversion should not be ordered.*” Affirming Order at P 49, JA 168 (emphasis added). “Based on the evidence presented at that hearing, the ALJ determined that [Northern States] had met its burden under NGA section 5 of showing that Williston [Basin]’s failure to permit [Northern States] to convert to Part 284 service is unjust and unreasonable, and may be motivated by anticompetitive concerns. In affirming the [Initial Decision], the Commission adopted the ALJ’s citation to and analysis of substantial evidence in the record.” Rehearing Order at P 24, JA 231.

Northern States proffered, the ALJ accepted, and the Commission affirmed substantial evidence reflecting the unjust and unreasonable nature of service under the Rate Schedule X-13 contract. In particular, the ALJ and the Commission considered evidence that Williston Basin favored an affiliate, *see id.* & n.29, JA 231 & n.29; Initial Decision at P 102, JA 84, that Williston Basin is unwilling to grant flexible capacity use via transition to open-access service, *see* Rehearing

Order at P 24, JA 231-32, that this failure is contrary to the Commission’s goal, *see id.*, and that “there are no operational or other reasons that outweigh the pro-competitive benefits of the conversion,” Affirming Order at P 49, JA 169. *See also* Rehearing Order at P 45 (noting various factors, including Williston Basin’s litigation history and “many years of rebuffing the shipper’s request” to transition to open-access, flexible service, that “in the aggregate evidenced obstruction of the Commission’s policy favoring open-access use of capacity by those who pay for it”), JA 243-44. In short, the burden on Northern States was not a sham, and Northern States satisfied it based on the substantial evidence received by the ALJ and affirmed by the Commission.

2. *Reforming the Rate Schedule X-13 Contract to Permit Northern States to Resell Its Unused Capacity Under Rate Schedule FT-1 Was Just and Reasonable*

The Commission properly concluded that reforming the Rate Schedule X-13 contract to permit Northern States to resell its unused capacity was just and reasonable. As previously noted, the Commission seeks to promote a competitive natural gas market and believes that flexibility in the use of capacity and alternative receipt points may aid in that development. *See also, e.g., American Gas Ass’n v. FERC*, 428 F.3d 255, 261-62 (D.C. Cir. 2005) (explaining capacity segmentation and release). Open-access service under Part 284 provides those

tools, which Northern States seeks to utilize, “to further the Commission’s goal of a competitive natural gas market.” Affirming Order at P 24, JA 159.

Williston Basin, however, alleges that the switch to open-access service financially would impact Williston Basin and its customers to such a degree that conversion is not just and reasonable. *See* Pet. Brief at 36-41; *see also generally* Intervenors’ Brief. According to Williston Basin, “any increase in revenues to [Northern States] from capacity release and segmentation will cause a reduction in revenues to Williston Basin and a corresponding need to recover additional costs from its other customers.” Pet. Brief at 37. But in making its claim, Williston Basin confuses the conversion’s potential benefit to Northern States with the *de minimis* effect that conversion will have on Williston Basin’s other customers.

Although the “Commission reasonably found, based on the record evidence weighed by the ALJ, that the revenue impact of shifting the capacity release and segmentation rights from the transporter [Williston Basin] to the shipper [Northern States] who paid for the capacity would likely be approximately \$402,000 to \$695,000,”⁹ Rehearing Order at P 35, JA 238, the actual impact on Williston Basin’s FT-1 rates is around \$50,000, which is *de minimis*, *see id.* That is,

⁹ Williston Basin argued that the revenue impact on Northern States was approximately \$2 million, but this was based on the unrealistic assumption that Northern States would be segmenting and releasing capacity almost 100% of the time. *See* Rehearing Order at P 35, JA 238; Affirming Order at P 53, JA 170; Initial Decision at P 107, JA 86.

Northern States can expect to generate between \$402,000 and \$695,000 additional revenues annually from capacity release and segmentation with conversion to open-access service, but the impact on Williston’s customers will only be the loss of IT revenues on the Mapleton Extension, i.e., \$50,000. *See* Affirming Order at P 52, JA 169. “Williston [Basin]’s FT-1 rates are designed based in part on the assumptions that a certain amount of IT will be performed and that the assumed revenues from the IT will be used to lower the costs that otherwise would be paid by FT-1 customers. In Williston [Basin]’s last section 4 rate filing, this reduction amounted to approximately \$50,000” *Id.* at P 54, JA 170; *see also* Initial Decision at P 108, JA 87. This \$50,000 impact is *de minimis* and is outweighed by the benefits in competition that will result with contract reformation. *See* Affirming Order at P 54, JA 170-71.

Williston Basin, *see* Pet. Brief at 38-39, and Intervenors Montana Consumer Counsel and South Dakota Public Utilities Commission (“Intervenors”), *see* Int. Brief at 7-8, also appear to argue that the potential revenue to be gained by Northern States should be the barometer of the impact on Williston Basin’s customers because Northern States will allegedly engage in capacity release and segmentation throughout Williston Basin’s mainline system, not just the Mapleton Extension. Williston Basin and Intervenors seem to think that Northern States’s increased revenue will mean the equivalent decreased revenue for them. But the

evidence, as viewed by the ALJ, is that the actual impact on the FT-1 rate due to Williston Basin's IT sales as a result of Williston Basin's use of Northern States's unused capacity is no better than \$50,000. *See* Initial Decision at P 108, JA 87 (noting Williston Basin's witness's testimony that FT-1 rates were only reduced by approximately \$50,000). Even if it were the case that Northern States will engage in capacity release and segmentation throughout Williston Basin's system, how that may affect rates and evidence in support were never properly before the Commission. *See* Initial Decision at P 110, JA 88. The issue below was the Mapleton Extension arrangements. *See* Affirming Order at P 57, JA 172.

Thus, other than pointing to Northern States's potential revenue gain, neither Williston Basin nor Intervenors proffer evidence indicating that they would suffer a specific amount of loss and that the FT-1 rate for the mainline system would change by a certain amount. Furthermore, to the extent there is any impact on the costs for the mainline system, that is a matter properly for a future NGA § 4 filing by Williston Basin, *see* Affirming Order at P 57, JA 172, and not a NGA § 5 case regarding Northern States's complaint, *see* Initial Decision at P 110, JA 88.

Finally, "even in the unlikely event Williston [Basin]'s estimates prove true, it is the shipper and its customers who should receive the revenues, since they are paying for the capacity." Rehearing Order at P 35 n.58, JA 238 n.58.

In addition, “[Northern States] offers to pay what it would have paid under Rate Schedule X-13 and without the 25-basis point deduction in the return on equity component.” Affirming Order at P 47, JA 168. “By proposing to pay a somewhat higher rate than the rate it pays today, and by proposing to forego the IT-1 revenues made possible by the Mapleton Extension facilities, while obtaining open-access flexibility on the main system, [Northern States] further minimizes any net decrease in revenues to Williston [Basin] and any ultimate shift of costs to Williston [Basin]’s other customers.” Affirming Order at P 55, JA 171. In other words, Northern States offers various concessions that will lessen any potential negative impact on Williston Basin’s FT-1 customers as a result of Northern States, not Williston Basin, being able to resell Northern States’s purchased capacity.

Williston Basin, on the other hand, maintains that this rate proposal is insufficient and does not properly mitigate the costs for the conversion. *See* Pet. Brief at 42-43. The Commission, though, never said that Williston Basin and its customers would not be affected by the decision to permit Northern States open-access service and the right to resell its purchased, unused capacity. *See* Rehearing Order at P 36, JA 239. Rather, it “found that the revenue from use of [Northern States]’s capacity should flow to [Northern States] and its customers.” *Id.* Moreover, the Commission believed that “the need for the benefits of competition

outweighs some cost shifts, which will be *de minimis* and will not occur except in the context of a multitude of cost changes in a future section 4 rate case.”

Affirming Order at P 54, JA 171. The fact that some mitigation occurs, which even Williston Basin concedes, *see* Pet. Brief at 43 (theorizing that the 25-basis point difference in the return on equity amounts to \$8,712), merely reinforces the justness and reasonableness of the contract reformation permitting Northern States to flexibly utilize its purchased, unused capacity.

D. Preserving The Biennial Rate Adjustment Is Reasonable

Although Williston Basin contends that there is no justification for retaining the biennial contract rate adjustment while reforming the Rate Schedule X-13 contract to allow open-access service, *see* Pet. Brief at 43-45, the Commission reasonably concluded under the facts that retention was proper. In supporting its position that retaining the biennial contract rate adjustment is unduly preferential, Williston Basin continues to argue mistakenly that a total contract abrogation has occurred. Because a total contract abrogation has purportedly occurred, Williston Basin believes that preserving the biennial contract rate adjustment ostensibly favoring Northern States makes no sense.

But as the Commission correctly noted, the substance of the contract between Williston Basin and Northern States will remain the same as the contract “will [still] obligate Williston [Basin] to provide the same level of guaranteed firm

service, in the same location, as previously.” Rehearing Order at P 17, JA 228.

“[A]ll that the Commission has required to be changed are the terms and conditions pursuant to which the existing Rate Schedule X-13 service is provided so that [Northern States] will receive the terms and conditions of service required by Part 284 of the Commission’s regulations.” *Id.* at P 18, JA 228. There is no alteration to the level of service or receipt points, which could amount to a contract abrogation that would preclude Commission action. *See id.* at PP 16-18, JA 227-29.

“The Commission’s intent was to preserve as much of the parties’ original agreement as possible, while according [Northern States] the ability to release capacity and other features of Part 284 service that are accorded FT shippers. The Rate Schedule X-13 agreement always envisioned the ultimate convergence of the X-13 rate with the FT rate, and the biennial rate adjustments were the mechanism for accomplishing that. Thus, continuing the restatement process preserves the parties’ agreement as much as possible”¹⁰ Rehearing Order at P 43, JA 242.

Furthermore, contrary to Williston Basin’s contention, *see* Pet. Brief at 45, “Williston [Basin] has in no way been deprived of its bargain with respect to the

¹⁰ The Commission also believed that the somewhat contradictory stance of Williston Basin as to whether the biennial contract adjustment should be retained and the lengthy history of litigation surrounding how the biennial rates should be set militated in favor of preserving the rate adjustment framework. *See* Rehearing Order at P 44, JA 243.

X-13 rate itself.” Rehearing Order at P 42, JA 242. “[Northern States] offers to pay what it would have paid under Rate Schedule X-13 and without the 25-basis point deduction in the return on equity component.” Affirming Order at P 47, JA 168. Moreover, Williston Basin knows full well that the parties envisioned the Rate Schedule X-13 contract rate to converge with the Rate Schedule FT-1 rate via the biennial contract rate adjustments. To argue that this adjustment mechanism is a one-sided bargain that it “never thought it had entered into,” Pet. Brief at 44, is meritless.

“What is unduly preferential and unreasonable is for Williston [Basin] to garner revenues from the sale of the capacity [Northern States] has paid for.” Rehearing Order at P 42, JA 242. Pursuant to the Commission’s orders, those revenues will flow to Northern States and its customers, not Williston Basin and/or its affiliates and other customers. *See id.*

CONCLUSION

For the reasons stated, the petition for review should be denied, and the challenged orders upheld in all respects.

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April 23, 2007

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule 32(a)(2), I hereby certify that this brief contains 10,479 words, not including the tables of contents and of authorities, the glossary, the certificate of counsel, this certificate, and the addendum.

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