

ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 06-1275

**CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
AND PHILADELPHIA GAS WORKS,
PETITIONERS,**

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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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

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

1. *Transcontinental Gas Pipe Line Corporation*, 106 FERC ¶ 61,299 (March 26, 2004); and
2. *Transcontinental Gas Pipe Line Corporation*, 112 FERC ¶ 61,170 (August 5, 2005).

C. Related Cases:

This case has not previously been before this Court or any other court. *Transcontinental Gas Pipe Line Corporation v. FERC*, D.C. Cir. No. 06-1286, seeks review of the same orders challenged here. While separate briefs are being filed in this case and in No. 06-1286, the Court ordered that they be scheduled for oral argument on the same day and before the same panel.

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November 1, 2007

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GLOSSARY

1995 Pricing Policy	<i>Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines</i> , 71 FERC ¶ 61,241 (1995), <i>order on reh'g</i> , 75 FERC ¶ 61,105 (1996)
1999 Pricing Policy	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)
1999 Pricing Policy Statement Clarification	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 90 FERC ¶ 61,128 (2000)
ALJ	Administrative Law Judge
Commission	Federal Energy Regulatory Commission
Consolidated Edison	Consolidated Edison Company of New York, Inc. and Philadelphia Gas Works
FERC	Federal Energy Regulatory Commission
Initial Decision	<i>Transcontinental Gas Pipe Line Corp.</i> , 101 FERC ¶ 63,022 (2002)
Mobile Bay Certificate Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 81 FERC ¶ 61,104 (1997)
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NGA	Natural Gas Act

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Rehearing Order Setting Hearing	<i>Transcontinental Gas Pipe Line Corp.</i> , 95 FERC ¶ 61,268 (2001)
Transco	Transcontinental Gas Pipe Line Corporation

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably approved, as just and reasonable, Transcontinental Gas Pipe Line Corporation’s (“Transco”) Natural Gas Act (“NGA”) § 4, 15 U.S.C. § 717c, ratemaking proposal to roll-in the costs of the Mobile Bay expansion.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

This case involves the Commission's review of an NGA § 4 rate filing by Transco which proposed, among other things, to roll-in the costs of its previously-certificated Mobile Bay expansion to all shippers. *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 (2004) ("Rate Order"), JA 136-208, *order on reh'g*, 112 FERC ¶ 61,170 (2005) ("Rehearing Order"), JA 209-75. Based on the extensive record in this proceeding, which included a trial-type hearing before an Administrative Law Judge ("ALJ"), the Commission found that Transco had met its NGA § 4 burden to show that its proposed rolled-in rates were just and reasonable. Rate Order at P 97, JA 172. Two of Transco's customers, Consolidated Edison Company of New York, Inc. and Philadelphia Gas Works (collectively, "Consolidated Edison") challenge the Commission's determination that Transco's proposal to allocate a portion of the Mobile Bay costs to them was just and reasonable.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), “[a]ny pipeline seeking to build or to expand its facilities must first apply for a certificate of public convenience and necessity from FERC.” *Consolidated Edison Co. of New York v. FERC*, 315 F.3d 316, 319 (D.C. Cir. 2003). Additionally, the “NGA requires that all rates and charges by pipelines must be ‘just and reasonable.’” *Id.* (quoting NGA Section 4(a), 15 U.S.C. § 717c(a)). “The pipeline bears the burden of showing its proposed rate is just and reasonable.” *ChevronTexaco Exploration & Production Co. v. FERC*, 387 F.3d 892, 895 (D.C. Cir. 2004).

A pipeline can recover the costs of an expansion either “through ‘incremental’ pricing, which imposes an additional charge payable solely by customers who are directly served by the expansion facilities,” or through “‘rolled-in’ pricing, in which the cost of the new facilities are added to the pipeline’s total rate base and reflected in rates charged to all customers system-wide.” *Midcoast Interstate Transmission Inc. v. FERC*, 198 F.3d 960, 964 (D.C. Cir. 2000).

II. Events Leading To The Challenged Orders

A. 1995 Pricing Policy Statement

After issuing Order Nos. 436¹ and 636², which “fundamentally restructured the natural gas market by requiring pipelines to provide open access transportation service and to unbundle the sale of gas from the related transportation service,” the Commission determined that “the development of pricing policies for pipeline capacity is important both for pipelines and their customers, because they need to know the rates that will be charged in order to make appropriate decisions about the amount of capacity to build and to purchase.” *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 at 61,914 (1995), *order on reh’g*, 75 FERC ¶ 61,105 (1996) (“1995 Pricing Policy” or “1995 Pricing Policy Statement”). Thus, “the Commission held a public

¹ *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985), *order on reh’g*, Order No. 436-A, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,675 (1985), *aff’d in pertinent part*, *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1009-13 (D.C. Cir. 1987).

² *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., Regulations Preambles 1991-96 ¶ 30,939, *order on reh’g*, Order No. 636-A, FERC Stats. & Regs., Regulations Preambles 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 pertinent part*, *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

conference at which all segments of the industry presented their views” regarding whether new pipeline construction projects should “be priced on a rolled-in basis (rolling in the expansion costs with the existing facilities) or an incremental basis (establishing separate cost[s]-of-service[] and separate rates for the existing and expansion facilities).” 1995 Pricing Policy, 71 FERC at 61,914; *see also* “Complex” *Consolidated Edison Co. of N.Y. v. FERC*, 165 F.3d 992, 997 n.9 (D.C. Cir. 1999) (The Commission “receiv[ed] written submissions from seventy-five companies and groups and hear[d] oral comments through a public hearing.”).

During the proceeding:

The commenters universally agreed that the Commission needed to provide parties with greater certainty about the rate design that will be applied. They pointed out that in the new market created by Order Nos. 436 and 636, potential shippers need to know the rates they will face prior to making a decision whether to commit to long-term contracts. Such certainty, they maintained, can be provided either through adoption of a consistent policy or through an upfront determination in the certificate proceeding.

1995 Pricing Policy, 71 FERC at 61,915; *see also* *Midcoast*, 198 F.3d at 970 (“The Commission, and all those who offered comments during the development of the [1995] Pricing Policy, felt that such certainty was needed to encourage efficient growth in the natural gas industry as a whole following the Commission’s restructuring of the industry to convert pipelines into common carriers.”) (citing 1995 Pricing Policy, 71 FERC at 61,914-15). Many commenters “recommended

that the Commission establish thresholds for determining the rate impact on existing customers (such as 5 or 10% rate increase) and adopt a presumption for rolled-in pricing for projects that meet the thresholds. For projects that exceed the thresholds, they recommended that rolled-in pricing should be permitted if the system-wide benefits reasonably balance the rate impact to existing customers.” 1995 Pricing Policy, 71 FERC at 61,915.

“Based on the comments,” the Commission found “that the principal goals of its pricing policy should be to provide the industry with as much upfront assurance as is possible with respect to the rate design to be used for an expansion project, while, at the same time, to provide for a flexible assessment of all the relevant facts of a specific project.” 1995 Pricing Policy, 71 FERC at 61,915. The Commission determined, therefore, that it would “apply a presumption in favor of rolled-in rates when the rate increase to existing customers from rolling-in the new facilities is 5% or less and the pipeline makes a showing of system benefits” *Id.* at 61,916.

The Commission explained that pipelines were not to “break projects into small segments solely to qualify for the 5% test for each project.” *Id.* at 61,917. Moreover, a “pipeline seeking rolled-in pricing must specifically identify the system benefits, describe the value of the benefits to its existing customers, and demonstrate, with particularity, how the expansion project will provide the claimed

benefit.” *Id.* at 61,916. “Customers opposing rolled-in rates will then have the burden of showing that the benefits are so insignificant that rolled-in rates are not justified.” *Id.* at 61,917.

“In most cases,” the Commission found, “an integrated system expansion will produce system-wide benefits, and the 5% threshold protects existing shippers against a significant rate shock from rolled-in pricing. At the same time, the use of a presumption serves a valuable purpose in providing increased certainty of rate design to pipelines and shippers while they are in the planning stage of a project.” *Id.* “Moreover,” the Commission added, “even when rate increases are less than 5%, existing shippers still have the opportunity to show that the system benefits do not warrant even this rate increase.” *Id.*

In response to comments “suggest[ing] that specific policies should be developed for pricing lateral lines,” the Commission found that, “[w]hen the project involves the construction of a downstream lateral for the benefit of one or only a small number of customers, the Commission generally will presume that the project should be priced incrementally, because other shippers will not share in the benefits.” *Id.* On the other hand, upstream supply laterals, like the Mobile Bay expansion at issue in the instant case, “often provide greater access to supplies for

all of a pipeline's customers. Thus, pricing for such laterals will be determined using the same standards set out above for integrated expansions." *Id.*

Finally, "to provide advance assurance of rate design," the Commission determined that it would "make the pricing determination at the certificate stage of a proceeding." *Id.* at 61,918. That pricing determination would "apply to the pricing of the facilities in the first rate case after the facilities go into operation, unless the parties demonstrate that circumstances have changed significantly between the time the certificate is issued and the pipeline files the rate case." *Id.* See also *Consolidated Edison*, 315 F.3d at 320 ("The Commission's goals were to give the industry clear signals about which pricing approach would govern an expansion project and to avoid imposing 'rate shock' on existing pipeline customers.") (citing 1995 Pricing Policy, 71 FERC at 61,915); *Midcoast*, 198 F.3d at 970 (the "purpose of the [1995] Pricing Policy was to 'provide parties with greater certainty about the rate design that will be applied'" (quoting 1995 Pricing Policy, 71 FERC at 61,915); *Consolidated Edison*, 165 F.3d at 997 n.9 ("Concerned that the use of rolled-in pricing could force existing customers to pay substantially higher prices without receiving proportionate system-wide benefits, and that the lack of price certainty negatively impacted customers with long-term service contracts, FERC announced a new policy designed to minimize significant rate shocks and to provide greater cost certainty prior to the construction of new

facilities. The [1995] Pricing Policy Statement sought to achieve these goals by making a determination as to the appropriate rate design at the certificate stage, at which time FERC would assess the system-wide benefits of a project as well as its rate impact on existing customers.”)

In 2001, after the Commission applied the 1995 Pricing Policy to a Transco proposed roll-in of the costs of several expansion projects, Consolidated Edison, among others, petitioned this Court for review, contending that the Commission erred both in applying the 1995 Pricing Policy rather than its 1999 Pricing Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at 61,736 (1999) (“1999 Pricing Policy” or “1999 Pricing Policy Statement”), *order on clarification*, 90 FERC ¶ 61,128 (“1999 Pricing Policy Statement Clarification”), *order on clarification*, 92 FERC ¶ 61,094 (2000), and in approving Transco’s roll-in proposal. *See Consolidated Edison*, 315 F.3d at 318-19. The Court denied the petition, holding “that the 1995 [Pricing] Policy Statement is not unreasonable, either facially or as applied in this case.” *Id.* at 319; *see also Midcoast*, 198 F.3d at 970 (finding that, “[i]n deciding to encourage efficient pipeline expansion by offering greater rate certainty at the outset in circumstances that could affect the balance of market forces, FERC exercised the kind of judgment on matters of policy that Congress has entrusted to it.”). The Court

further held “that FERC did not act unlawfully in applying its 1995 [Pricing] Policy Statement when it resolved Transco’s proposal to implement rolled-in rates.” *Id.*

B. Mobile Bay Expansion Certification

On November 12, 1996, as amended on May 1, 1997, Transco filed an NGA § 7(c), 15 U.S.C. § 717f(c), application for a certificate of public convenience and necessity to construct and operate an expansion of its Mobile Bay onshore lateral in Alabama and an extension of the onshore lateral into the offshore Alabama Mobile Bay area (“Mobile Bay Project” or “Mobile Bay expansion”). *See Transcontinental Gas Pipe Line Corp.*, 81 FERC ¶ 61,104 at 61,377-78 (1997) (“Mobile Bay Certificate Order”), *order on reh’g*, 82 FERC ¶ 61,084 (1998) (“Mobile Bay Certificate Rehearing Order”) (collectively, “Mobile Bay Certificate Orders”). Transco also requested authority to roll-in the costs of the Mobile Bay Project in its first NGA § 4 rate proceeding after the expansion facilities are placed into service. *Mobile Bay Certificate Order*, 81 FERC at 61,378.

Transco explained that it qualified for a presumption of rolled-in rate treatment under the 1995 Pricing Policy because “the rate impact on existing customers, by firm rate schedule, of rolling in the costs of the project is below the 5% threshold, the proposed facilities will be fully integrated physically and operationally with Transco’s existing system, the operational flexibility and

reliability will be enhanced by the connection of new offshore supplies to its system and the proposed additional compression, and the project will provide the financial benefit of reducing the cost of future expansions.” *Id.* at 61,379.

The Commission agreed with Transco:

In addition to meeting the five percent threshold, Transco has provided evidence of system benefits by the new facilities. The proposed facilities will be used to effectuate deliveries to customers at Station No. 85 and throughout Transco’s system, increasing the access of Transco’s system customers to gas supply sources in the Mobile Bay area. Transco points out that, from August 1995 through July 1996, 103 of Transco’s shippers, including 73 firm shippers, accessed gas that was pooled at Station No. 85. For that period, 96.85% of the gas pooled at Station No. 85 was sourced from the Mobile Bay lateral. The Mobile Bay Project will provide the same benefits to the system that the Commission previously recognized in approving rolled-in rates for the Mobile Bay Lateral [facilities].

Id. at 61,384 (citing *Transcontinental Gas Pipe Line Corp.*, 63 FERC ¶ 61,194 at 62,498 (1993)). Based on this, and “consistent with the [1995] Pricing Policy Statement,” the Commission found that, “unless circumstances materially change between the date of issuance of [the Mobile Bay Certificate Order] and Transco’s filing of its first general rate proceeding after all facilities are placed in service, Transco may roll-in the costs of the proposed facilities in such rate case.” *Id.*

The Commission recognized that a large number of Transco customers protested the roll-in proposal and that the immediate benefits of the expansion would accrue principally to a Transco affiliate which was the sole subscriber to the

expansion capacity. *Id.* Additionally, the Commission “note[d] that the [1995] Pricing Policy Statement was intended to provide guidance, not to bind the Commission to an inflexible position regardless of the facts presented.” *Id.* at 61,385. But, “[i]n this case,” the Commission found, “when weighed against the minimal rate impacts of the project, the advantages afforded by increased access in the supply area warrant a predetermination favoring rolled in rates” Mobile Bay Certificate Rehearing Order, 82 FERC at 61,316.

Furthermore, the Commission found no merit to claims that Transco had segmented the Mobile Bay Project from its Cherokee expansion project, *see Transcontinental Gas Pipe Line Corp.*, 80 FERC ¶ 61,398 (1997), *order on reh’g*, 82 FERC ¶ 61,019 (1998), and a potential Cumberland expansion project, solely to meet the 1995 Pricing Policy’s five percent threshold. Mobile Bay Certificate Rehearing Order, 82 FERC at 61,313-15. While the Commission “assume[d] that Transco’s ongoing expansion of its system through the addition of supply, mainline and market area capacity are coordinated in the sense that they are considered by Transco to respond to market and competitive forces in a coordinated fashion,” there was “no evidence to suggest that Transco ha[d] segmented the Mobile Bay Project facilities solely to circumvent the 5 percent threshold established in the pricing policy statement for the roll-in of new project costs.” *Id.* at 61,314.

Rather, “Transco ha[d] been continuously expanding its system by adding supply, mainline and market area capacity [through] various expansions,” and the “mere fact that the Cherokee and (not yet filed) Cumberland expansion projects may utilize gas available from the Mobile Bay Project does not indicate, or even give rise to concern, that these projects were separately proposed ‘solely to qualify for the five percent test for each project.’” *Id.* “In fact,” the Commission pointed out, “the Mobile Bay Project is the only recent expansion in which Transco has sought an upfront determination that the related costs can be rolled-in in its next rate proceeding.” *Id.*

Consolidated Edison, among others, sought review of the Mobile Bay Certificate Orders. *See Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369 (5th Cir. 1999). The Court granted the Commission’s and Transco’s motions to dismiss the petitions as unripe. *Id.* at 374.

C. 1999 Pricing Policy Statement

On July 29, 1998, in light of the changes that had taken place in the natural gas industry in recent years, the Commission initiated proceedings regarding its policies on project certification and new construction pricing. *See* 1999 Pricing Policy Statement, 88 FERC at 61,736. “Information received in [those] proceedings as well as recent experience evaluating proposals for new pipeline

construction persuade[d] [the Commission] that it [was] time for [it] to revisit its policy for certifying [and pricing] new construction” *Id.* “As the industry becomes more competitive,” the Commission explained, “the Commission needs to adapt its policies to ensure that they provide the correct regulatory incentives to achieve the Commission’s policy goals and objectives.” *Id.* at 61,744.

Concerned that the “current pricing policy sen[t] the wrong price signals” by “masking the real cost of expansions,” the Commission announced a new policy, under which the “threshold requirement in establishing the public convenience and necessity for existing pipelines proposing an expansion project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.” 1999 Pricing Policy Statement, 88 FERC at 61,745, 61,746; *see also id.* at 61,745 (“Once a certification application is filed, the threshold question applicable to an existing pipeline is whether the project can proceed without subsidies from [its] existing customers.”). The no-subsidization requirement eliminated the 1995 Pricing Policy’s presumption in favor of rolled-in pricing. *Id.* at 61,746. Instead, under the 1999 Pricing Policy, expansion projects usually will be incrementally priced. *Id.* at 61,745.

The Commission determined that the “new policy [would] not be applied retroactively” because “[i]t is important for participants to know the economic consequences that can result before construction begins.” *Id.* at 61,750. Likewise,

the Commission added, “[i]ssuance of the [1999 Pricing] Policy Statement will not constitute ‘changed circumstances’ for projects that were previously given a predetermination that rolled in rates would be appropriate.” 1999 Pricing Policy Statement Clarification, 90 FERC at 61,398.

D. Transco’s NGA § 4 Rate Filing

On March 1, 2001, Transco submitted a general NGA § 4 rate filing. R. 1. Among other things, Transco proposed to roll-in the costs of the Mobile Bay Project, as well as the costs of its Sunbelt, Pocono and Cherokee expansion projects. Parties filed protests raising numerous issues, including objections to the proposed roll-ins. See R. 87 and 113, *Transcontinental Gas Pipe Line Corp.*, 94 FERC ¶ 61,360 at 62,300 (“Order Setting Hearing”), JA 3, *order on reh’g*, 95 FERC ¶ 61,268 (2001) (“Rehearing Order Setting Hearing”), JA 15-29 (collectively, “Orders Setting Hearing”).

E. Orders Setting Hearing And Determining Threshold Issue Of Whether The 1995 or 1999 Pricing Policy Would Apply To Transco’s Rolled-in Rate Proposals

The Commission found that “Transco ha[d] not shown that the proposed tariff sheets [were] just and reasonable,” and “that the instant filing raise[d] issues that need[ed] to be investigated further” Order Setting Hearing, 94 FERC at 62,300, JA 3. Accordingly, the Commission accepted and suspended the revised

tariff sheets to be effective September 1, 2001, subject to refund and the outcome of a trial-type hearing. *Id.* at 62,299, JA 1.

In addition, because parties had “raised a threshold issue of whether the roll-in issue should be determined based on the policies set forth in the 1995 Pricing Policy Statement or the policies in the 1999 [Pricing] Policy Statement,” the Commission determined that, “[i]n order to facilitate the hearing, [it would] decide this threshold issue in [the instant] order.” Order Setting Hearing, 94 FERC at 62,301, JA 5.

First, the Commission noted, Transco had proposed, and the Commission had approved, certification of the SunBelt, Pocono, and Cherokee expansions with incremental rates. Order Setting Hearing, 94 FERC at 62,302, JA 7-8. Also at the certification stage, the Commission had held that those “three expansions would remain incrementally priced in the first section 4 rate case, unless the proponents of rolled-in rates could show a significant change in circumstances.” *Id.*; JA 8. In light of these facts, the Commission determined that, “when Transco and the expansion shippers made their investment decisions to proceed with the [Sunbelt, Pocono, and Cherokee] projects, they could not reasonably [have] rel[ie]d on obtaining rolled-in rates pursuant to the 1995 Pricing Policy Statement.” *Id.* “In these circumstances,” the Commission found, “it [was] reasonable to apply the Commission’s current policies, as set forth in the 1999 [Pricing] Policy Statement

. . . to the decision of whether to approve Transco’s proposal to roll in the costs of these expansions.” *Id.*

By contrast, Transco had requested a presumption in favor of rolled-in rates in the Mobile Bay expansion certificate proceeding, which the Commission granted “after analyzing cost data and determining that the rate impact to existing customers from rolling in the proposed facilities was below five percent and finding that the pipeline had made a showing of system operational or financial benefit as required by the 1995 Pricing Policy Statement.” Rehearing Order Setting Hearing at 61,948, JA 17-18 (citing Mobile Bay Certificate Order, 81 FERC at 61,384); *see also* Order Setting Hearing at 62,303, JA 9. The Mobile Bay Project Certificate Order also had held that the presumption would apply “unless parties could demonstrate that circumstances have changed significantly between the time the certificate issued and the pipeline files the rate case.” Order Setting Hearing at 62,303, JA 9 (citing Mobile Bay Certificate Order, 81 FERC at 61,383 and 1995 Pricing Policy Statement, 71 FERC at 61,918).

Thus, “[u]nlike the situation with respect to the SunBelt, Pocono, and Cherokee projects,” the Commission found that “Transco and the Mobile Bay expansion shippers could reasonably [have] rel[ied] upon the Commission’s preliminary presumption in the certificate order in favor of rolled-in treatment

when they invested in the Mobile Bay expansion.” Order Setting Hearing at 62,303, JA 10. As the Commission explained, “[u]nder the 1995 Pricing Policy Statement, the purpose of predetermination was to provide as much up-front assurance as possible of how an expansion would be priced so that the pipeline and expansion shippers could make informed investment decisions.” Rehearing Order Setting Hearing at 61,949, JA 19. It was “[f]or this reason [that], on rehearing of the [1999 Pricing] Policy Statement, the Commission held that where a predetermination that rolled-in rates would be appropriate had already been made pursuant to the 1995 Pricing Policy Statement, the issuance of the [1999 Pricing] Policy Statement would not constitute changed circumstances justifying a departure from the predetermination.” Order Setting Hearing at 62,303, JA 10 (citing 1999 Pricing Policy Statement Rehearing Order, 90 FERC at 61,398).

F. The ALJ’s Initial Decision

Many of the issues set for hearing were resolved through settlement, leaving 13 issues to be addressed before the ALJ. *Transcontinental Gas Pipe Line Corp.*, 101 FERC ¶ 63,022 at P 3 (2002) (“Initial Decision”), JA 40. Only one of those issues – whether, under the 1995 Pricing Policy, the costs of the Mobile Bay Project should be rolled-in -- is at issue in the instant case.

In addressing this issue, the ALJ aggregated the Mobile Bay Project’s rate impact with that of the Cherokee Project because, in his view, those projects were

sufficiently interrelated to require their aggregation. Initial Decision at PP 122-27, JA 75-76. The ALJ then found that the rate impact of rolling in the costs of both the Mobile Bay and Cherokee Projects would be slightly more than five percent, and that the project's system benefits were not sufficient to permit rolling in its costs to all customers. *Id.* at PP 116, 136-38, JA 73, 78-79.

III. The Challenged Orders

At the outset, the Commission noted that, in dismissing the petitions for review of the Mobile Bay Project Certificate Order as unripe, the Fifth Circuit had stated that “petitioners must have a full opportunity to challenge the roll-in rates, including the footing of the presumption of roll-in rates itself” when Transco files its rate case with the Commission. Rate Order at P 61, JA 159 (quoting *Brooklyn Union*, 190 F.3d at 374). As a result, the Commission explained, it “reviewed the evidence as if there had been no predetermination in the certificate proceeding and the Commission was addressing the roll-in issue under the 1995 Pricing Policy Statement for the first time in this Section 4 rate proceeding.” *Id.* at P 99, JA 172.

“Based on this analysis, the Commission [found] that Transco ha[d] supported the roll-in of the Mobile Bay costs, even without the benefit of any presumption arising from a predetermination in the certificate proceeding.” *Id.*, JA 173. As the Commission had “rejected Transco’s proposal to roll in the costs of

the Cherokee project,” that “project will continue to be incrementally priced, [and] there [was] no reason to include its costs in a determination of the rate impact of rolling in the Mobile Bay costs.” Rate Order at P 102, JA 174; Rehearing Order at PP 59-60, JA 231-32 (same). “In any event,” the Commission found, the Mobile Bay and Cherokee projects should not be aggregated because they “are entirely distinct from one another.” Rehearing Order at P 61, JA 232-33; *see also id.* at P 62, JA 233.

The Commission further found “that the rate impact of rolling in the Mobile Bay costs [was] less than five percent.” Rate Order at P 102, JA 174. In fact, “no one in this proceeding seriously challenge[d] the outcome of [Commission] Staff’s analysis that the roll-in of the Mobile Bay costs causes less than a 5 percent impact on system rates. The only way the 5 percent test is exceeded is if the costs of the Mobile Bay project are combined with the costs of the Cherokee project.” *Id.* (quoting R. 439, Commission Staff’s Br. on Exceptions at 15, JA 391).

“In light of the less than five percent rate impact,” the Commission continued, “the 1995 Pricing Policy Statement requires Transco only to make a general showing of benefits from the expansion in order to justify its Section 4 roll-in proposal.” Rate Order at P 103, JA 174. The Commission found that “Transco ha[d] presented sufficient evidence of benefits to meet this standard.” *Id.*; *see also id.* at P 104, JA 175 (same).

Thus, the Commission determined that “Transco ha[d] satisf [ied] its burden under NGA Section 4 to show that its proposed rolled-in rates [were] just and reasonable, and accordingly its proposal [was] accepted.” Rate Order at P 97, JA 172.

SUMMARY OF ARGUMENT

Consolidated Edison did not preserve its right to challenge the determination that Transco and the Mobile Bay expansion shippers reasonably could have relied upon application of the 1995 Pricing Policy because it failed to file for rehearing of the Order Setting Hearing, which made that determination. Additionally, even if the challenged Rate Order had made that determination, Consolidated Edison still would be jurisdictionally barred from raising the arguments now asserted on brief regarding that determination because Consolidated Edison did not raise those arguments in its request for rehearing of the Rate Order.

In any event, the contentions regarding the “reasonably could have relied” finding lack merit. In the Mobile Bay expansion certificate proceeding Transco had requested and received a presumption in favor of rolled-in rates, which was to apply in the next Transco NGA § 4 rate case unless the parties demonstrated significantly changed circumstances. As the 1995 Pricing Policy explained, the purpose of predetermining whether rolled-in rates would apply in the next rate case

was to provide as much up-front assurance of how an expansion would be priced so the pipeline and expansion shippers could make informed investment decisions. Thus, the Commission appropriately found that, when Transco and the Mobile Bay expansion shipper made their investment decisions, they reasonably could have relied on the project being priced on a rolled-in basis.

Despite Consolidated Edison's claims to the contrary, the Commission fully considered the specific facts and circumstances in applying the 1995 Pricing Policy here. After reviewing all the evidence, the Commission reasonably found that the Mobile Bay Project provided system benefits, including increased access to different sources of gas supply and improved system-wide reliability.

Furthermore, the Commission reasonably determined that, in analyzing whether the Mobile Bay Project costs could be rolled-in, the costs of the Mobile Bay Project should not be aggregated with those of the Cherokee Project. The costs of the Cherokee Project will be charged incrementally to Cherokee Project expansion shippers and, therefore, will not impact existing Transco shipper rates.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, "FERC's

decisions will be upheld as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made.” *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 973, 951 (D.C. Cir. 2007). “In other words, the Commission must cogently explain why it has exercised its discretion in [the] given manner.” *Id.* (quoting *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. Cir. 2000) (internal quotation marks omitted; alteration in original)). The Commission's factual findings are conclusive if supported by substantial evidence. *East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007); NGA § 19(b), 15 U.S.C. § 717r(b).

The Court is “‘particularly deferential’ when FERC is involved in the highly technical process of ratemaking.” *East Kentucky*, 489 F.3d at 1306 (quoting *Ass’n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)); *see also ExxonMobil*, 487 F.3d at 951 (same). As the Court has explained, “policy choices about ratemaking are the responsibility of the Commission – not this Court.” *Id.* at 953; *see also Midcoast*, 198 F.3d at 971 (the “question of how to allocate costs among a pipeline’s customers is a difficult issue of fact, and one on which the Commission enjoys broad discretion.”) (quoting *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991) (internal quotation marks and citation omitted by Court)). In addition, the Court “defer[s] to FERC’s

interpretation of its orders so long as the interpretation is reasonable.” *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004).

II. THE COMMISSION APPROPRIATELY APPLIED THE 1995 PRICING POLICY AND REASONABLY DETERMINED, IN THE CIRCUMSTANCES HERE, THAT TRANSCO’S ROLL-IN RATEMAKING PROPOSAL WAS JUST AND REASONABLE

A. Consolidated Edison Did Not Preserve Its Right To Challenge The Determination That Transco And The Mobile Bay Expansion Shippers Reasonably Could Have Relied Upon Application Of The 1995 Pricing Policy

Consolidated Edison contends that “the Commission erred in finding that Transco and [the Mobile Bay expansion shipper] had a reliance interest in the application of the 1995 Policy and/or in the Certificate Proceeding’s roll-in predetermination.” Br. at 21 (capitalization and italics in heading altered); *see also* Br. at 21-28. More specifically, Consolidated Edison asserts that “[a]bsent a factual showing of actual detrimental reliance [by Transco and/or the Mobile Bay expansion shipper], it was legal error for the Commission to conclude that [they] had a reliance interest.” Br. at 24; *see also id.* at 25-27. Furthermore, Consolidated Edison asserts that “Transco and [its expansion shipper] could not have reasonably relied on the roll-in predetermination *as a matter of law*” because “the Fifth Circuit expressly warned that the Commission’s roll-in related determinations were preliminary only and subject to final determination in the then-subsequent rate case.” Br. at 27-28. These claims challenge a determination

made in the Order on Hearing -- that because the parties reasonably could have relied on application of the 1995 Pricing Policy, the 1995 Pricing Policy would apply to the Mobile Bay Project -- not a determination made in the later orders challenged in the instant petition for review.³

“In order to facilitate the hearing,” the Order Setting Hearing resolved the “threshold issue of whether the roll-in issue should be determined based on the policies set forth in the Commission’s 1995 Pricing Policy Statement or the policies in its 1999 Pricing Policy Statement.” Order Setting Hearing, 94 FERC at 62,301, JA 5. The Order Setting Hearing found that, “[a]t hearing, the Commission [would] apply the 1995 Pricing Policy Statement in determining whether rolled-in rate treatment is appropriate” because “Transco and the Mobile Bay expansion shippers could reasonably rely upon the Commission’s preliminary

³ Consolidated Edison admits this. *See, e.g.*, Consolidated Edison’s Br. at 21-22 (“The [Order Setting Hearing] determined that the *1995 Policy* should be applied to Transco’s [Mobile Bay Project] roll-in proposal. This meant that roll-in would be allowed unless opponents demonstrated significantly changed circumstances. The [Order Setting Hearing] further stated that Transco and [the Mobile Bay expansion shipper] had a reliance interest in ‘the Commission’s preliminary presumption in the certificate order in favor of rolled-in treatment when they invested in the Mobile Bay expansion.’”) (citing Order Setting Hearing, 94 FERC at 62,303, JA 9-10); Consolidated Edison’s Rate Order Rehearing Request, R. 481 at 8, JA 412 (“The Commission’s [Order Setting Hearing] determined that, as between the 1995 and 1999 policies, the 1995 Policy should be applied to Transco’s [Mobile Bay Project] roll-in proposal.”) (footnotes with citations omitted) (citing Order Setting Hearing, 94 FERC at 62,303, JA 9-10).

presumption in the certificate order in favor of rolled-in treatment when they invested in the Mobile Bay expansion.” Order Setting Hearing, 94 FERC at 62,303, JA 10; *see also* Rehearing Order Setting Hearing, 95 FERC at 61,949, JA 18 (explaining that the Order Setting Hearing “determined that, because of the Commission’s action in granting a predetermination of rolled-in treatment for facilities costs in the Mobile Bay Order at the time the facilities were certificated, the parties could reasonably be expected to have relied on the Commission’s application of the policy contained in the 1995 Pricing Policy Statement, which was in effect at the time the Commission granted the presumption of rolled-in treatment for the costs associated with these facilities.”).

Consolidated Edison already had intervened, and been granted party status, in the proceeding when the Order Setting Hearing issued. R. 42 (Consolidated Edison’s motion to intervene); R. 67 (Philadelphia Gas Works’ motion to intervene); Order Setting Hearing, 94 FERC at 62,300, JA 3. Nonetheless, Consolidated Edison chose not to seek rehearing of the Order Setting Hearing, *see* Rehearing Order Setting Hearing, 95 FERC at 61,947 and n.2, JA 15 (listing parties that had filed for rehearing), rendering the determination that the 1995 Pricing Policy would apply to the Mobile Bay Project final as to Consolidated

Edison.⁴ *Bell South Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (“finality with respect to agency action is a party-based concept”); *IGC Concerned Workers Ass’n v. U.S.*, 888 F.2d 1455, 1457-58 (D.C. Cir. 1989) (same).

Consolidated Edison forfeited any right it might have had to challenge the Commission’s determination that the parties reasonably could have relied on application of the 1995 Pricing Policy when it failed to file for rehearing within 30 days of the Order Setting Hearing that made that determination. NGA §§ 19(a) and (b); *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334-35 (D.C. Cir. 2006). Judicial review of a Commission finding is available only if a party timely seeks rehearing of the order making that finding. *Williston Basin*, 475 F.3d at 334 (citing *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 205 n.2 (D.C. Cir. 1984) (“An application for rehearing is a jurisdictional prerequisite to judicial review of Commission orders under the NGA. 15 U.S.C. § 717r(a)”)); *Moreau v. FERC*, 982 F.2d 556, 563 (D.C. Cir. 1993) (NGA § 19’s rehearing requirement is a jurisdictional prerequisite to judicial review that cannot be waived).

⁴ Several other parties sought rehearing of the Order Setting Hearing. Rehearing Order Setting Hearing, 95 FERC at 61,947, JA 15. In fact, KeySpan Delivery Companies’ rehearing request argued that “the Commission erred in applying the 1995 Pricing Policy Statement to rolling in the costs of the Mobile Bay expansion facilities instead of the 1999 Pricing Policy Statement.” *Id.* at 61,949, JA 18.

Furthermore, even assuming, contrary to fact, that the challenged Rate Order rather than the Orders Setting Hearing determined that the 1995 Pricing Policy applies to the Mobile Bay expansion, Consolidated Edison still would be jurisdictionally barred from raising the arguments now asserted on brief regarding that finding, Br. at 21-28, because Consolidated Edison did not raise those arguments in its request for rehearing of the Rate Order. R. 481, JA 405-22.

“NGA section 19(b) flatly states: ‘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 to do so.’” *Intermountain Municipal Gas Agency v. FERC*, 326 F.3d 1281, 1285 (D.C. Cir. 2003). A rehearing objection must be “specifically urged . . . so as put the Commission on notice of the ground on which rehearing was being sought” *Id.* (internal quotation marks and citation omitted); *see also Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006). This Court strictly construes NGA § 19(b)’s jurisdictional requirement. *California Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 906 F.2d 772, 774-75 (D.C. Cir. 1990); *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107, 1109 (D.C. Cir. 1989); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985).

On rehearing, Consolidated Edison mentioned the notion that the expansion shipper “would have taken the [Mobile Bay expansion] capacity under either incremental or rolled-in rates” only in the context of discussing Transco’s purported motive for requesting rolled-in rates for the Mobile Bay Project, Rehearing Request at 4-5, JA 408-09, and as one of the “circumstances” it believed “present[ed] compelling reasons not to apply the 5% test to the [Mobile Bay Project] roll-in proposal,” *id.* at 9-10, JA 413-14. These statements on rehearing did not put the Commission on notice of Consolidated Edison’s appellate contention that the Commission was legally barred from applying the 1995 Pricing Policy unless it found that Transco and the expansion shipper actually and detrimentally relied on application of that policy. Br. at 24-27. Nor did they put the Commission on notice of the appellate contention that the Fifth Circuit’s ruling in *Brooklyn Union*, 190 F.3d 369, prevented Transco and the expansion shipper from reasonably relying on the Certificate Order’s roll-in predetermination. Br. at 27-28.

In short, Consolidated Edison fails to meet the jurisdiction prerequisites for the Court to be able to address its claims regarding the Commission’s determination that Transco and the expansion shipper reasonably could have relied

on application of the 1995 Pricing Policy to the Mobile Bay Project in this rate case.

B. Consolidated Edison’s Challenges To The Determination That Transco And The Mobile Bay Expansion Shippers Reasonably Could Have Relied Upon Application Of The 1995 Pricing Policy Lack Merit

In any event, even if there were jurisdiction to address Consolidated Edison’s contentions regarding the “reasonably could have relied” finding, Br. at 21-28, those contentions lack merit. The Commission appropriately determined that Transco and the Mobile Bay expansion shipper reasonably could have relied on the 1995 Pricing Policy applying when they made their investment decisions.

As the Commission explained, Transco had requested a presumption in favor of rolled-in rates in the Mobile Bay expansion certificate proceeding, which the Commission granted “after analyzing cost data and determining that the rate impact to existing customers from rolling in the proposed facilities was below five percent and finding that the pipeline had made a showing of system operational or financial benefit as required by the 1995 Pricing Policy Statement.” Rehearing Order Setting Hearing at 61,948, JA 18 (citing Mobile Bay Certificate Order, 81 FERC at 61,384); *see also* Order Setting Hearing at 62,303, JA 9.

The Mobile Bay Project Certificate Order also had held that the presumption would apply “unless parties could demonstrate that circumstances have changed

significantly between the time the certificate issued and the pipeline files the rate case.” Order Setting Hearing at 62,303, JA 9 (citing Mobile Bay Certificate Order, 81 FERC at 61,383 and 1995 Pricing Policy Statement, 71 FERC at 61,918). *See also* Consolidated Edison’s Br. at 21-22 (“The [Order Setting Hearing] determined that the *1995 Policy* should be applied to Transco’s [Mobile Bay Project] roll-in proposal. This meant that roll-in would be allowed unless opponents demonstrated significantly changed circumstances.”) (footnotes with citation omitted).

Thus, “[u]nlike the situation with respect to the SunBelt, Pocono, and Cherokee projects,” the Commission found that “Transco and the Mobile Bay expansion shippers could reasonably [have] rel[ied] upon the Commission’s preliminary presumption in the certificate order in favor of rolled-in treatment when they invested in the Mobile Bay expansion.” Order Setting Hearing at 62,303, JA 10. “Under the 1995 Pricing Policy Statement, the purpose of predetermination was to provide as much up-front assurance as possible of how an expansion would be priced so that the pipeline and expansion shippers could make informed investment decisions.” Rehearing Order Setting Hearing at 61,949, JA 19; *see also Midcoast*, 198 F.3d at 970 (the “purpose of the [1995] Pricing Policy was to ‘provide parties with greater certainty about the rate design that will be

applied’”) (quoting 1995 Pricing Policy, 71 FERC at 61,915); *Consolidated Edison*, 315 F.3d at 320 (one of the “Commission’s goals [was] to give the industry clear signals about which pricing approach would govern an expansion project”) (citing 1995 Pricing Policy, 71 FERC at 61,915). It was “[f]or this reason [that], on rehearing of the [1999 Pricing] Policy Statement, the Commission held that where a predetermination that rolled-in rates would be appropriate had already been made pursuant to the 1995 Pricing Policy Statement, the issuance of the [1999 Pricing] Policy Statement would not constitute changed circumstances justifying a departure from the predetermination.” Order Setting Hearing at 62,303, JA 10 (citing 1999 Pricing Policy Statement Rehearing Order, 90 FERC at 61,398).

Applying the 1995 Pricing Policy also was consistent with the Commission’s determination in the 1999 Pricing Policy Statement that “the new policy [would] not be applied retroactively.” 1999 Pricing Policy Statement, 88 FERC at 61,750. As the Commission explained:

A major purpose of the policy statement is to provide certainty about the decisionmaking process and the impacts that would result from approval of the project. This includes providing participants in a certificate proceeding certainty as to the economic impacts that will result from the certificate. It is important for participants to know the economic consequences that can result before construction begins. After the economic decisions have been made it is difficult to undo those choices. Therefore, the new policy will not be applied

retroactively to cases where the certificate has already issued and the investment decisions have been made.

Id.

In support of its claim that “[a]bsent a factual showing of *actual* detrimental reliance, it was legal error for the Commission to conclude that respondents had a reliance interest,” Consolidated Edison cites *Public Service Company of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996), and *Washington Water Power Company v. FERC*, 201 F.3d 497, 503 (D.C. Cir. 2000). Br. at 24-25 and n.48.

Neither case helps Consolidated Edison.

Colorado addressed whether the Commission should have made liability for refunds regarding a tax matter effective only prospectively or retroactively to 1988 or 1983. *Colorado*, 91 F.3d at 1489. The Court explained that:

Because no seller of natural gas could justifiably be confident that it was entitled to recover the tax until the legal question was settled anew under the new statute, we hold that the producers’ liability for refunds extends back to October 1983, the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under § 110 of the NGPA was at issue, and the earliest date advocated by any party before this court. Absent detrimental and reasonable reliance, anything short of full retroactivity (*i.e.*, to 1978) allows the producers to keep some unlawful overcharges without any justification at all.

Id. at 1490.

In contrast, here, as the Commission found, Transco and the Mobile Bay expansion shipper could reasonably have relied on (*i.e.*, “could justifiably be confident” of) pricing for the Mobile Bay expansion being determined under the 1995 Pricing Policy and, therefore, on the expansion being priced on a rolled-in basis. *See* Order Setting Hearing at 62,303, JA 10; Rehearing Order Setting Hearing at 61,948, 61,949, JA 16-19. Applying the 1995 Pricing Policy in these circumstances was reasonable and does not conflict with *Colorado*.

In *Washington Water Power*, petitioners challenged the Commission’s application of a new policy that would allow rolled-in, rather than incremental, rates to apply to capacity released under existing contracts. *Washington Water Power*, 201 F.3d at 502-03. The court rejected the petitioners’ claim that applying the new policy was impermissibly retroactive, explaining that, before any of the contracts at issue were entered into, “FERC had already announced that the incremental versus rolled-in rate issue would be addressed when the pipeline submitted its next rate filing in 1994 or early 1995. All replacement shippers therefore should have been fully aware of the possibility that the pipeline would adopt rolled-in” rather than incremental rates. *Id.* at 503.

Here, the Commission found that, because all parties were put on notice at the investment stage that the costs of the Mobile Bay expansion would, in all probability, be rolled-in in accordance with the 1995 Pricing Policy, allocation of

the Mobile Bay expansion costs should be determined under the 1995 Pricing Policy. *See* Order Setting Hearing at 62,303, JA 10; Rehearing Order Setting Hearing at 61,948, 61,949, JA 16-19; *see also* Rehearing Order at P 56 (explaining that “[o]rdinarily, under the 1995 [Pricing] Policy Statement, a predetermination of rolled-in rates in the certificate proceeding created a presumption for rolled-in rates in the section 4 rate case, which can only be rebutted by a showing of a significant change in circumstances since the certificate proceeding.”). This was fully consistent with *Washington Water Power*.

There also is no merit to Consolidated Edison’s claim that “Transco and [its expansion shipper] could not have reasonably relied on the roll-in predetermination *as a matter of law*” because “the Fifth Circuit expressly warned that the Commission’s roll-in related determinations were preliminary only and subject to final determination in the then-subsequent rate case.” Br. at 27-28. As the Rehearing Order Setting Hearing explained:

KeySpan’s [rehearing] argument that the Commission’s order granting a predetermination of rolled-in rates for the Mobile Bay expansion was under review by the courts, and therefore the parties could not be expected to rely on the predetermination, misse[d] the mark. The point is that, pursuant to the standards in the 1995 Pricing Policy Statement, the Commission made a predetermination that approval of rolled-in rates would be justified in Transco’s next rate case, absent a significant change in circumstance. Transco has now filed that rate case and proposed rolled-in rates for the Mobile Bay expansion, consistent with that determination. Under the 1995 Pricing

Policy Statement, the purpose of the predetermination was to provide as much up-front assurance as possible of how an expansion would be priced so that the pipeline and expansion shippers could make informed investment decisions. We continue to believe that analyzing Transco's Mobile Bay roll-in proposal pursuant to the standard in the 1995 Pricing Policy Statement is appropriate in light of the purpose of the predetermination granted in the certificate order.

Rehearing Order Setting Hearing, 95 FERC at 61,949, JA 19.

While the Commission recognized that, consistent with the Fifth Circuit's decision, parties would be able to raise issues such as whether the impact of the rolled-in rates was less than five percent and whether Transco had demonstrated system benefits to justify a roll-in, those "issues all go to whether rolled-in rates are justified under the 1995 Pricing Policy Statement. For example, the issue whether the rate impact is less than five percent is only relevant under the 1995 Pricing Policy Statement." *Id.* at 61,949-50, JA 18-20.

Consolidated Edison next argues that the Commission's statement that it "reviewed the evidence as if there had been no predetermination in the certificate proceeding and the Commission was addressing the roll-in issue under the 1995 Pricing Policy Statement for the first time in this Section 4 rate proceeding," Rate Order at P 99, JA 172, indicated that the Commission believed "the 1995 Policy created a binding legal norm." Br. at 22-23. As the Commission explained, however, that statement was intended only "to make clear that, in this [rate] case, [it was] not applying such a presumption and [was] taking a fresh look at whether

rolling in the Mobile Bay costs [was] justified under the 1995 Pricing Policy Statement.” Rehearing Order at P 56, JA 230.

Furthermore, the cited statement did not indicate that the Commission changed its rationale for applying the 1995 Pricing Policy to the Mobile Bay Project, as Consolidated Edison claims. Br. at 23. Rather, the Commission’s rationale always had been that, since the Mobile Bay Certificate Orders granted Transco’s request for a rolled-in rate presumption under the 1995 Pricing Policy, the parties “could reasonably rely on the Commission examining Transco’s subsequent section 4 proposal to roll in the costs pursuant to the policies in the 1995 Pricing Policy Statement.” Rehearing Order at P 57, JA 230. Applying the 1999 Pricing Policy, the Commission found, “would render the Commission’s assurance [in the certificate proceeding] that the roll-in proposal would be analyzed under the 1995 Policy Statement meaningless.” *Id.*

C. The Commission Fully Considered The Specific Facts And Circumstances In Applying The 1995 Pricing Policy Here

Consolidated Edison contends that the Commission applied the 1995 Pricing Policy as if it were a rule rather than a policy statement. Br. at 24, 28-31, 36, 41. In its view, the Commission did not support application of the policy to the Mobile Bay Project because it is an upstream supply lateral. Br. at 30-31, 39. Consolidated Edison is mistaken.

The 1995 Pricing Policy Statement rejected the notion that a different policy should apply to upstream supply laterals. 1995 Pricing Policy, 71 FERC at 61,917. The Commission found that upstream supply laterals “often provide greater access to supplies for all of a pipeline’s customers” and, “[t]hus, pricing for such laterals will be determined using the [1995 Pricing Policy] standards. *Id.*; see Consolidated Edison’s Br. at 29 (acknowledging that “when the rationale underlying an administrative order relies on a policy statement, this Court ‘necessarily review[s] the Commission’s conclusions and reasoning in the Policy Statement.’”) (quoting *ExxonMobil*, 487 F.3d at 951).

Moreover, in reviewing the proposal here, the Commission did not simply rely on the 1995 Pricing Policy Statement’s general benefits finding regarding upstream supply laterals. Rather, the Commission analyzed whether the Mobile Bay Project, the specific upstream supply lateral at issue here, provided system benefits. The Commission found that:

The primary benefit of the Mobile Bay Project is that it affords increased access to different sources of gas supply in the Mobile Bay region where the development of resources continues to expand and the project is fully integrated with the rest of Transco’s system. As Transco point[ed] out, “these facilities extend into the Gulf of Mexico and add compression at Stations 82 and 83, all to expand the capacity and capabilities of the pipeline to enhance supply to the Transco system as a whole.”

Rate Order at P 103, JA 174 (quoting R. 750, Ex. T-47 at 25, JA 327; citing R. 751, Ex. T-48 at 3-4, JA 331-32).

Furthermore, “[a]s Transco ha[d] shown, a number of new fields (East Main Pass Blocks 259, 261 and 264; Viosca Knoll Block 739; Mississippi Canyon Blocks 305, 348, 772 and 773; and Desoto Canyon Block 133) have been or will be attached upstream as a result of the expansion.” *Id.* at P 104, JA 175 (citing R. 750, Exh. T-47 at 26, JA 328). Moreover, “the ability of the supply to access Transco’s mainline downstream of Station 85 adds to system-wide reliability when there are supply emergencies, or capacity or other difficulties, such as compression or pipeline outages upstream in Transco’s traditional production area.” *Id.* (citing R. 750, Exh. T-47 at 26, JA 328); *see also* Rehearing Order at P 69, JA 237 (same). “In addition, even though the [Mobile Bay Project] capacity is under contract to [one expansion shipper], it is subject to capacity release and available for interruptible transportation, and, in fact, [Mobile Bay Project] capacity has been released from time to time.” Rehearing Order at P 69, JA 237 (citing R. 750, Exh. T-47 at 25-26, JA 327-28); *see also* Mobile Bay Certificate Order, 81 FERC at 61,384 (discussing Mobile Bay expansion’s system wide benefits).

Although conceding that “[i]t is perfectly clear that the [Mobile Bay Project] provides access to natural gas supplies,” Br. at 34, Consolidated Edison asserts that

the Commission failed to justify its determination that the Mobile Bay Project provides greater access to supplies, Br. at 31, and that the Commission failed to satisfy the substantial evidence requirement, Br. at 34-35. The just-discussed, record evidence-supported, findings that the Mobile Bay Project provided system benefits, including increased access to different sources of gas supply and improved system-wide reliability (Rate Order at PP 103-04, JA 174-75; Rehearing Order at P 69, JA 236-37), establish otherwise. As this Court has long held, the deferential substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 385 (D.C. Cir. 2006) (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

Consolidated Edison asserts that other evidence indicated the Mobile Bay Project does not benefit Transco’s shippers. Br. at 35-36, 38, 40. “The question [the Court] must answer, however, is not whether record evidence supports [Consolidated Edison’s] version of events, but whether it supports FERC’s.” *Columbia Gas*, 448 F.3d at 386 (quoting *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)). As already discussed, substantial evidence supports FERC’s benefits finding. In any event, the Commission found that Consolidated Edison’s evidence “does not negate the fact [that] Transco ha[d]

adequately shown that the Mobile Bay expansion provides system wide benefits including increased access to different sources of gas supply in the Mobile Bay region,” increased “system-wide reliability when there are supply emergencies, or capacity or other difficulties, such as compression or pipeline outages in Transco’s traditional production area,” and increased capacity “subject to capacity release and available for interruptible transportation” Rehearing Order at P 69, JA 237.

Next, Consolidated Edison contends that the Commission erred in finding that system benefits are accruing notwithstanding that the throughput on the Mobile Bay expansion is less than 50 percent because, Consolidated Edison asserts, the Commission relied for that finding on volumes transported within Transco’s Zone 4A rather than those transported within the Mobile Bay expansion, Zone 4B. Br. at 37-38 (citing Rehearing Order at P 69 and n.27, JA 237). Consolidated Edison takes too narrow a view of the Commission’s finding.

The Commission rejected Consolidated Edison’s “argu[ment] that system benefits are not accruing because the throughput on the Mobile Bay expansion is less than 50 percent” because, the Commission found, it “ignore[d] both the fact that at 50 percent, Mobile Bay was a significant contributor of throughput to Transco’s downstream mainline throughput which has both operational and

financial benefits for all on the system, and that the unutilized Mobile Bay capacity was available to others under interruptible contracts.” Rehearing Order at P 69, JA 237 (footnotes omitted). Moreover, the Commission noted, Consolidated Edison did “not point to anything in the 1995 Policy Statement or in the Mobile Bay certificate orders which indicate[s] that rolled-in pricing was contingent on any particular throughput level.” *Id.*

In support of its finding that the Mobile Bay expansion was a significant contributor of throughput to Transco’s downstream mainline throughput, the Commission cited to R. 254, April 12, 2002 Settlement Proposal at Appendix C p. 2, JA 277. Rehearing Order at P 69 and n.27, JA 237. The cited document shows both that the throughput for a Zone 4A to 4A haul was 164,115,315 Dekatherms and that the throughput for a Zone 4B to 4A haul was 132,221,250 Dekatherms. R. 254, April 12, 2002 Settlement Proposal at Appendix C p. 2, JA 277. As Consolidated Edison points out, “Transco’s Zone 4A is downstream of the offshore [Mobile Bay expansion] facilities,” and “Zone 4A connects with Transco’s mainline at Station 85.” Br. at 38 n.74. Thus, as the Commission found, the Mobile Bay expansion, which provided 132,221,250 of the 164,115,315 Dekatherms transported through Zone 4A, was a significant contributor of throughput to Transco’s downstream mainline.

Consolidated Edison also contends that the Commission did not justify allowing a 3.7 percent increase in system rates in the circumstances here. Br. at 31, 37. To the contrary, the Commission explained that, “[b]y requiring a showing of system benefits and rate impact of 5 percent or less, the Commission ensured that existing shippers do not receive dramatic increases in rates that are disproportionate to the benefits they receive from the expansion.” Rehearing Order at P 68, JA 236. “Under the 1995 Pricing Policy Statement, the pipeline need only make a general showing of benefits to justify a roll-in with a rate impact of less than five percent.” Rehearing Order at P 58, JA 231; *see also id.* at P 69, JA 236 (citing *Transcontinental Gas Pipeline Corp.*, 94 FERC 61,362 at 62,312-14 (2001), and *Tennessee Gas Pipeline Company*, 76 FERC ¶ 61,022 at 61,100 (1996) (same), *order on reh’g*, 80 FERC ¶ 61,070 (1997), *aff’d*, “Complex” *Consolidated Edison Co. of N.Y.*, 165 F.3d 992 (D.C. Cir. 1999)).

Moreover, while the “Commission recognize[d] that . . . rolling in the costs of the Mobile Bay Expansion [would] increase Transco’s annual system-wide cost of service by \$27,975,063, [with] only \$10,600,592 of that cost of service [being] allocated to the Mobile Bay expansion shippers” that did “not negate the fact that the impact on system wide rates, when calculated as provided by the 1995 Pricing Policy Statement, is less than five percent.” Rehearing Order at P 65, JA 234

(footnotes omitted); *see also* Rate Order at P 109, JA 176-77. Thus, while the Commission was aware, contrary to Consolidated Edison’s claim, Br. at 37 (citing Rate Order at PP 107-09, JA 176-77), that the “uncontested evidence” established that rolling in the Mobile Bay Project costs would increase the rates of existing customers by \$17 million, that amounted to “less than [a] five percent” increase. Rate Order at P 109, JA 176.

D. The Commission Reasonably Determined That The Mobile Bay and Cherokee Facilities Should Not Be Aggregated

Consolidated Edison contends that, even though the Commission had determined that the costs of the Cherokee Project would continue to be charged incrementally to Cherokee Project expansion shippers rather than rolled-in with Transco’s system-wide costs, the Commission should have aggregated the costs of the Cherokee Project with the costs of the Mobile Bay Project. Br. at 42-49. The Commission reasonably found, however, “that the rate impact issue must be resolved by calculating the impact of rolling in the only costs that will be rolled in – costs of the Mobile Bay project alone.” Rate Order at P 102, JA 174; *see also* Rehearing Order at P 60, JA 232 (“the rate impact issue for the Mobile Bay expansion should be determined based upon the actual potential rate impact faced by Transco’s existing shippers, rather than including non-Mobile Bay costs in the rate impact analysis even though those costs cannot and will not be rolled in.”).

Consolidated Edison professes concern that considering the rate impact only of projects whose costs will be rolled-in will allow a pipeline “to guarantee itself partial roll-in with respect to one (or more) [expansion] facilities by simply conceding incremental treatment for another facility (or facilities) in order to defeat the 5% test.” Br. at 43. In Consolidated Edison’s view, “[t]his is a loophole that swallows the underlying rule.” *Id.* The Commission reasonably rejected this purported concern.

The Commission’s concern in the 1995 Pricing Policy Statement was that pipelines might break projects into separate parts so that both parts could meet the five percent test and obtain rolled-in pricing. That cannot happen here, since the Commission has held that the Cherokee project must continue to be priced incrementally. Moreover, in the 1995 Pricing Policy Statement, the Commission suggested that one way to mitigate significant price increases from rolled-in rates would be to “roll-in a portion of the expansion costs and collect the remainder through incremental rates charged to the expansion shippers.”⁵ Thus, the 1995 Pricing Policy Statement did not prohibit dividing projects, with one part to be rolled in and the other part to remain incrementally priced.

Rehearing Order at P 60, JA 232.

The Commission also reasonably rejected Consolidated Edison’s argument, Br. at 42-49, that, if the Commission applied the analysis used in a previous Transco rate case, *Transcontinental Gas Pipe Line Corp.*, 87 FERC ¶ 61,087

⁵ Quoting 1995 Pricing Policy, 71 FERC at 61,918.

(1999), *reh'g denied*, 94 FERC ¶ 61,362 (2001), the Commission would determine that it should aggregate the costs of the Cherokee and Mobile Bay Projects.

Rehearing Order at PP 58, 61-62, JA 231, 232-33. The Commission found that, “even applying the same analysis the Commission used in the previous rate case, the Commission would not group the Mobile Bay and Cherokee projects together for purposes of determining rate impact.” Rehearing Order at P 61, JA 232.

The Mobile Bay and Cherokee projects were not proposed or certificated simultaneously. The Mobile Bay project is an expansion of a supply lateral to enable producers and marketers of gas to compete for a share of markets throughout the Transco system. The only shipper on the expansion is a gas marketer Cherokee is a mainline expansion that provides shippers with greater access to gas supplies throughout the Gulf Coast region. The Cherokee expansion shippers are two distribution companies, Atlanta Gas Light and City of Toccoa. Neither the Mobile Bay expansion nor the Cherokee expansion originated in a comprehensive proceeding like the Northeast U.S. Pipeline Projects proceeding and neither was part of a series of projects by multiple companies like the Niagara Import Point Projects. The Mobile Bay and Cherokee projects are entirely distinct from one another. While Station 85, the intersection of the Mobile Bay lateral with Transco’s mainline, is the most upstream primary receipt point for the Cherokee expansion shippers, it is not their only available receipt point and they are in no way obligated to obtain supplies at Station 85 or from the Mobile lateral at all. There is no evidence to suggest that either project in any sense depended upon, or would not have gone forward in the absence of the other project.

Id., JA 232-33. Rather, “the [evidence] show[ed] that Transco’s Board of Directors authorized the capital expenditure for the Mobile Bay expansion

separately from, and without even considering the cost of the Cherokee project.” Rehearing Order at P 62, JA 233 (citing Exh. KSD-7, JA 306-12).

Thus, despite Consolidated Edison’s claim to the contrary, Br. at 45, 47-49, the Commission reasonably applied an “objective-functional approach” in analyzing whether the Mobile Bay and Cherokee Projects should be aggregated. Moreover, to the extent Consolidated Edison disagrees with the Commission’s interpretation of its analysis in *Transcontinental*, 87 FERC ¶ 61,087, Br. at 45 and n. 86, 47-49, it is the Commission’s reasonable interpretation of its own order which deserves deference, not Consolidated Edison’s alternative interpretation of that order. *Entergy Services*, 375 F.3d at 1209.

E. Consolidated Edison Did Not Preserve Its Right To Challenge The 1995 Pricing Policy As Facially Arbitrary And Capricious

On appeal, Consolidated Edison raises several matters it asserts indicate that the 1995 Pricing Policy is facially arbitrary and capricious. Br. at 31-34. On rehearing, however, Consolidated Edison did not challenge the 1995 Pricing Policy facially, but only as applied here. *See* R. 481, Rehearing Request, JA 405-22. As a result, Consolidated Edison is jurisdictionally barred from raising its appellate claims that the 1995 Pricing Policy is facially arbitrary and capricious. NGA § 19(b); *see also, e.g., Constellation*, 457 F.3d at 22; *Intermountain*, 326 F.3d at 1285; *California*, 306 F.3d at 1125; *Town of Norwood*, 906 F.2d at 774-75. In any

event, this Court already has rejected the claim that the 1995 Pricing Policy Statement is facially arbitrary and capricious. *Consolidated Edison*, 315 F.3d at 319.

F. Consolidated Edison Has Not Demonstrated Standing To Complain That Rolling In The Costs Of The Mobile Bay Project Caused Competitive Harm To Others

Finally, Consolidated Edison complains that allowing Transco to roll-in the Mobile Bay Project costs “give[s] TEMCO a competitive advantage in the marketplace or adversely affect[s] competitor[.]” pipelines, such as Destin Pipeline Company, LLC (“Destin”), and Dauphin Island Gathering System (“Dauphin”), who, Consolidated Edison asserts, “also make gas available to markets downstream of Transco’s Station 85[, but] without receiving a subsidy from Transco’s system customers.” Br. at 36-37 and n.67; *see also* Br. at 41. Consolidated Edison does not claim to be, nor is it, a pipeline in competition with Transco, nor has it claimed to be a customer of competing pipelines; accordingly, Consolidated Edison does not have standing to raise this complaint.

“To meet the constitutional requirements for standing, a plaintiff must show ‘an *injury to himself* that is likely to be redressed by a favorable decision.’” *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1069 (D.C. Cir. 2005) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)) (emphasis added). *See also DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001)

(“competitive standing” requires a showing that the challenged agency action “will almost surely cause *petitioner* to lose business”) (quoting *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995)) (second emphasis added).

Even if Consolidated Edison had standing to raise this claim, it does not have merit. The Commission found that “[t]here is no evidence that such a small cost shift [less than five percent] will give Transco’s affiliate a competitive advantage in the market place or adversely affect competitors such as Destin. Indeed, the evidence cited by the ALJ ([Initial Decision] at P 115, JA 73 [(citing R. 524, Exh. BP-28 at 6-7, JA 371-72)] that Destin and Dauphin Pipelines have provided more gas supply to the Transco mainline than the Mobile Bay project undercuts any notion of competitive harm to them.” Rate Order at P 109, JA 176-77. Furthermore, as in *Midcoast*, 198 F.3d at 970, “the Commission sought, pursuant to the 1995 Pricing Policy Statement, to provide parties with greater certainty about the rate design to be applied to the Mobile Bay expansion,” and therefore, found “that the interest in maintaining that rate certainty outweighs any of the potential anti-competitive effects described by [Consolidated Edison].” Rehearing Order at P 67, JA 235-36.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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