ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 08-1243

COLORADO INTERSTATE GAS COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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January 21, 2009
FINAL BRIEF: February 25, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties before this Court, and those that appeared before the agency, are identified in the Petitioner's brief.

B. Rulings Under Review

1. *Colorado Interstate Gas Co.*, 121 F.E.R.C. ¶ 61,161 (2007) ("Tariff Order"), JA 1-11; and

2. *Colorado Interstate Gas Co.*, 123 F.E.R.C. ¶ 61,183 (2008) ("Rehearing Order"), JA 12-20.

C. Related Cases

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

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February 25, 2009

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GLOSSARY

Colorado Commission	Colorado Oil and Gas Conservation Commission
Colorado Interstate	Colorado Interstate Gas Company
Commission or FERC	Federal Energy Regulatory Commission
Fort Morgan	Fort Morgan Underground Gas Storage Facility, located in Morgan County, Colorado
Rehearing Order	*Colorado Interstate Gas Co.*, 123 F.E.R.C. ¶ 61,183 (2008), JA 12-20
Tariff	Colorado Interstate Gas Company, FERC Gas Tariff, First Revised Volume No. 1
Tariff Order	*Colorado Interstate Gas Co.*, 121 F.E.R.C. ¶ 61,161 (2007), JA 1-11

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

No. 08-1243

COLORADO INTERSTATE GAS COMPANY, PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT.

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

STATEMENT OF THE ISSUE

Colorado Interstate Gas Company ("Colorado Interstate"), an interstate natural gas pipeline company, charges rates for natural gas transportation service pursuant to a tariff on file with the Federal Energy Regulatory Commission ("Commission" or "FERC") that contains a mechanism enabling Colorado Interstate to retain a percentage of the gas tendered to it by shippers in order to recoup the cost associated with gas that is "lost and unaccounted-for" in connection with the normal operation of its pipeline. The question presented on appeal is:

Whether the Commission reasonably interpreted the "Lost, Unaccounted for and Other Fuel" tracker provision in Colorado Interstate's tariff to preclude the

automatic recovery of the costs associated with the extraordinary malfunction of Colorado Interstate's underground storage facility.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the addendum to this brief.

STATEMENT OF THE CASE

This case concerns the proper application of a provision in Colorado Interstate's tariff that permits it to recover, on an in-kind basis, the costs associated with gas that is "lost and unaccounted-for" during pipeline operations by retaining a fixed percentage of all gas tendered to it by shippers for delivery. In February 2007, Colorado Interstate filed a revised tariff sheet which proposed an increase in its retention percentage. That increase was due, in large part, to a significant gas loss stemming from a system failure at one of the pipeline's storage wells. Certain of Colorado Interstate's customers protested the proposed increase.

In response to that protest, the Commission explained that "lost and unaccounted-for" gas is that which is lost as a consequence of a pipeline's routine operations. The Commission found that, because the loss in question arose from a "totally unexpected non-routine malfunction of underground storage mechanics," it was "not recoverable under [Colorado Interstate's] L&U and other fuel gas tracker." *Colorado Interstate Gas Co.*, 121 F.E.R.C. ¶ 61,161, PP 24 (2007)

(“Tariff Order”), JA 10.[1]

Colorado Interstate sought rehearing, which the Commission denied. *Colorado Interstate Gas Co.*, 123 F.E.R.C. ¶ 61,183 (2008) (“Rehearing Order”), JA 12-20. The Commission made clear, however, that “recovery of some or all of the costs of this loss may be pursued in a rate proceeding” under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c. *Id.* P 13, JA 17. The issue thus decided by the Commission (and before this Court) is not whether Colorado Interstate is entitled to recover the costs arising from a particular (and extraordinary) storage failure, but whether that loss is properly characterized as “lost and unaccounted-for” gas such that the associated costs may be recovered through the Tariff’s tracker mechanism.

I. STATUTORY BACKGROUND

The Natural Gas Act grants the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b). The Act charges the Commission with the duty “to ensure ‘just and reasonable’ rates in the natural gas industry.” *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C. Cir. 2007). In order to permit the Commission to fulfill this obligation, each interstate pipeline must file “schedules” setting forth “all rates

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[1] “P” refers to the internal paragraph number within a FERC order. “R” refers to the item number in the certified index to the record. “Br.” refers to Petitioner’s initial brief, and “JA” refers to the joint appendix.

and charges for any [jurisdictional] transportation or sale," along with all "practices and regulations affecting such rates and charges." 15 U.S.C. § 717c(c).

The pipeline may not change such rates, terms and conditions "except after thirty days' notice to the Commission and to the public." *Id*. § 717c(d). Any proposed rate change is subject to the Commission's review and approval. *Pub. Serv. Comm. of N.Y. v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1989) ("Under § 4, 15 U.S.C. § 717c, a company may file rate changes, but these are subject to Commission review to determine whether they are 'just and reasonable.'").

II. STATEMENT OF FACTS

A. The Development Of Tracking Mechanisms

In 1993, the Commission issued Order No. 636, 57 Fed. Reg. 13267 (Apr. 16, 1992), which required natural gas pipelines to unbundle their sale and transportation services. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1121-27 (D.C. Cir. 1996) (discussing background to Order No. 636). During the course of the restructuring occasioned by that order, "many pipelines instituted fuel and lost gas tracking mechanisms to compensate them for these day-to-day costs of providing services." *Williams Natural Gas Co*., 73 F.E.R.C. ¶ 61,394, p. 62,214 (1995).

A "tracker" is a tariff mechanism that permits a pipeline to adjust its rates periodically on the basis of a change in its cost-of-service without having to file

evidence of its other costs during the same period. *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 91 n.3 (D.C. Cir. 1991) (discussing cost tracking mechanisms). Tracking mechanisms are generally prohibited because they permit rate increases, "even though other costs that are not being tracked may have decreased enough to offset the increases in the tracked costs." *Id.*

The Commission has recognized, however, that certain recurring costs may be volatile and thus difficult to project on an annual basis – a key consideration in the ratemaking context where pipelines are at risk for any under-recovery of their projected costs. *See, e.g*., Notice of Inquiry, *Fuel Retention Practices of Natural Gas Companies*, 72 Fed. Reg. 55762, at P 4 (Oct. 1, 2007) ("Fuel Retention Notice"). In order to afford pipelines the opportunity for full recovery, the Commission has permitted tracking mechanisms to be used in limited circumstances where certain recurring operating costs are subject to significant changes from year to year. *Id*. P 5.

The fuel used to operate the compressors that transport gas through a pipeline is one of the recurring cost items for which tracking mechanisms are permitted. Many tariffs permit pipelines to retain a small percentage of the gas tendered for transportation by customers – the "fuel retention percentage" – as in-kind reimbursement for fuel costs. *Id*. P 2. *See also Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 849 n.4 (D.C. Cir. 2008) (describing pipeline practice of

fuel retention to recover "the cost of lost and spent fuel"). The Commission permits pipelines to employ tariff mechanisms that allow for periodic changes in their fuel retention percentages. Fuel Retention Notice at P 2. These adjustments are affected through filings that are subject to the Commission's review and approval under Section 4 of the Natural Gas Act. *See Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1491-92 (10th Cir. 1995) (discussing Section 4 review procedures applicable to fuel retention percentage filings); *Associated Gas Distributors v. FERC*, 706 F.2d 344, 345-46 (D.C. Cir. 1986) (discussing Section 4 review procedures applicable to analogous purchase gas adjustment proceedings).

B. The Colorado Interstate Tariff

Colorado Interstate is an interstate natural gas pipeline company whose rates, terms and conditions for transportation of natural gas are subject to the Natural Gas Act and set forth in its open access tariff, FERC Gas Tariff, First Revised Volume No. 1 ("Tariff"). Br. at 3. The Tariff obligates shippers to furnish the pipeline with "Fuel Reimbursement," which is defined to mean "Fuel Gas and Lost, Unaccounted For and Other Fuel Gas as described in Article 42 of the General Terms and Conditions." *See, e.g.*, Tariff at Rate Schedules TF-1, Art. 6.1 (2d Rev. Sheet No. 25), JA 195; TI-1, Art. 4.1 (7th Rev. Sheet No. 67), JA 196; NNT-1, Art. 6.1 (4th Rev. Sheet No. 92), JA 197; Gen. Terms and Conditions at Art. 1.30 (13th Rev. Sheet No. 230A), JA 198.

Article 42 – entitled "Fuel and L&U" – establishes a reimbursement percentage for transportation fuel gas and a separate percentage for "Lost, Unaccounted For and Other Fuel Gas," which is referred to as "L&U and Other Fuel" in the Tariff. *Id*. at Arts. 42.1, 42.2 (Sheet Nos. 380F-H), JA 202, 203-204. "L&U" – *i.e*., "lost and unaccounted-for" – is a common term in the pipeline industry and refers to gas which is lost as a consequence of routine pipeline operation. "Other fuel" refers to that gas utilized to power the pipeline's auxiliary equipment. *See infra* Argument, Part II.A.

Article 42.2 sets forth the calculation to be utilized when computing the fuel retention percentage for lost and unaccounted-for and other fuel gas. Tariff at Art. 42.2 (Sheet Nos. 380G-H), JA 203-204. As the Commission explained in an earlier proceeding regarding the Tariff, "[t]he L&U and other fuel retention percentage is derived by dividing the L&U and other fuel gas volume by [Colorado Interstate's] total receipt quantity for the twelve-month period ending three months prior to the beginning of the quarter" for which the percentage is applicable. *Colorado Interstate Gas Co*., 116 F.E.R.C. ¶ 61,310, p. 62,548 (2006). The Tariff requires the pipeline to file quarterly true ups, which reconcile its actual fuel use to the projections underlying the retention percentages. Tariff, Art. 42.5 (Sheet Nos. 380K-L), JA 205-206.

C. The Failure Of The Fort Morgan Storage Well

On October 22, 2006, Colorado Interstate discovered that significant quantities of gas and water were escaping from its Fort Morgan Underground Gas Storage Facility ("Fort Morgan"). Affidavit of Larry D. Kennedy Jr., executed Mar. 19, 2007 (R. 9), at ¶ 3, JA 100. Upon discovery, Colorado Interstate initiated its Emergency Response Procedures and notified federal, state and local authorities. *Id*. ¶¶ 3-4, JA 100. It was determined that the Fort Morgan #26 well was leaking. The well ultimately was isolated and plugged. *Id*. ¶ 5, JA 101. In light of the serious nature of the incident, Colorado Interstate "communicated with the public and local authorities by the use of newsletters, E-Mail, and public meetings on a regular basis" and established a "hot-line" for concerned residents. *Id*. ¶ 13, JA 102.

The Colorado Oil and Gas Conservation Commission ("Colorado Commission"), the state agency charged with ensuring, among other things, that jurisdictional wells are operated with due care and prudence, investigated the failure of the Fort Morgan storage facility. *Id*. ¶ 10, JA 101. *See also Voss v. Lundvall Bros., Inc*., 830 P.2d 1061, 1065 (Colo. 1992) (discussing authority of Colorado Commission); Rules of Oil and Gas Conservation Commission, 2 Colo. Code Regs. 404-1, *et. seq*. As a result of that investigation, the Colorado Commission issued a Notice of Alleged Violations in December 2006. Kennedy

Aff., Attachment A at p. 1, JA 106. The incident also resulted in a number of lawsuits and Colorado Interstate "has been actively involved in promptly settling [those] damage claims." Kennedy Aff. at ¶ 13, JA 102.

D. Colorado Interstate's Proposed Adjustment To Its Fuel Retention Percentage

On February 28, 2007, Colorado Interstate filed a revised tariff sheet that proposed to increase the pipeline's "Lost, Unaccounted-for and Other Fuel Gas" fuel retention percentage from 0.00% to 0.06%. Fuel Reimbursement Percentage Filing, Docket No. RP07-320-000 (Feb. 27, 2007) (R. 1) at p. 3, JA 23. The majority of the adjustment was attributable to the Fort Morgan storage system failure, which resulted in an estimated gas loss of 451,000 decatherms (Dth). *Id*. at p. 4, JA 24. On April 30, 2007, Colorado Interstate supplemented its filing with an expert report that confirmed the pipeline's initial estimate and noted that an additional 304,170 Dth may also have been lost. Quarterly L&U and Other Fuel Gas Filing, Docket No. RP07-320-001 (Apr. 30, 2007) (R. 14), JA 128-135.

A number of shippers protested the proposed retention percentage increase. They argued, among other things, that (1) the loss occasioned by the Fort Morgan system failure was not recoverable as "lost and unaccounted for" gas because that term is limited to losses stemming from a pipeline's routine operations that cannot be attributed to any specific cause, and (2) that, pursuant to the terms of the Tariff,

the pipeline bears the risk of loss for any gas lost at the Fort Morgan storage facilities. Tariff Order at P 2, JA 1-2.

After reviewing Colorado Interstate's filing, the Commission initially determined that the "proposed tariff sheet has not been shown to be just and reasonable" and ordered a technical conference to address the "technical, engineering and operational issues" raised by the filing. *Colorado Interstate Gas Co*., 118 F.E.R.C. ¶ 61,265 at PP 11, 13 (2007). The Commission accepted Colorado Interstate's proposed tariff sheet for filing, but suspended its effectiveness, subject to the outcome of the technical conference. *Id*. PP. 13-14.

E. The Commission's Orders On Review

On May 8, 2007, the Commission held a technical conference to gather further information regarding the issues raised by the pipeline's filing. Tariff Order at P 1, JA 1. Based upon the information developed at the hearing, along with subsequent filings submitted by the parties, the Commission concluded that "the gas lost as a result of the well casing failure at the Fort Morgan storage field is not recoverable either under [Colorado Interstate's] 'L&U' or 'other fuel gas' components of its fuel tracking mechanism." *Id*. P 18, JA 7.

1. The Tariff Order

The Commission initially explained that, pursuant to Section 4 of the Natural Gas Act, Colorado Interstate is obligated to establish that the proposed

revision to its fuel retention percentage is just and reasonable, "giving effect to the entirety of the tariff language" and "the accepted usage defining the inputs" to the tracker mechanism. *Id*. P. 20, JA 8. The Commission then reiterated its long-standing position that "lost and unaccounted-for" gas tracking mechanisms are appropriate for the recovery of "normal operating costs." *Id*. P 23, JA 9-10. The Fort Morgan loss, however, "resulted from a totally unexpected non-routine malfunction of underground storage mechanics." *Id*. P 24, JA 10. Such a loss "cannot be reasonably classified as a normal operating expense" and it would therefore "not be reasonable for [Colorado Interstate] to recover such costs from shippers through its fuel tracker." *Id*., JA 10.

2. The Rehearing Order

Colorado Interstate sought rehearing, which the Commission denied by order dated May 16, 2008. In the Rehearing Order, the Commission explained that Colorado Interstate's interpretation of the tariff as permitting recovery of any gas loss, so long as it did not result from pipeline negligence, was unreasonable and contrary to Commission precedent. Rehearing Order at P 10, JA 15-16. The Commission again explained that the "standard for recovery of actual losses of gas in a tracking mechanism is based on whether or not the loss resulted from normal pipeline operations." *Id*. P 12, JA 17. As the "Fort Morgan gas loss resulted from a non-routine storage failure … [i]t cannot reasonably be classified as a normal

L&U operating expense." *Id.* P 13, JA 17.

The Commission made clear, however, that losses of the type sought to be included in the fuel tracker by Colorado Interstate could potentially be recoverable in a general rate proceeding, "where prudence of field management can be fully examined and the interplay of other relevant tariff provisions considered." *Id.* P 13, JA 17.

This appeal followed.

SUMMARY OF ARGUMENT

Colorado Interstate contends that it should be permitted to recover for a catastrophic gas loss via a tariff mechanism designed to allow for the streamlined recovery of the costs associated with "lost, unaccounted-for and other fuel gas." It is well-established, however, that "lost and unaccounted-for" gas refers to that which is lost as a consequence of a pipeline's routine operations.

Consistent with that established usage, the Commission's long-standing precedent asks whether the loss stemmed from "normal operation" of the pipeline's system – and thus recoverable as properly characterized "lost and unaccounted-for" gas – or if it arose from a failure of the pipeline's system – and thus constituting an extraordinary loss which cannot be recovered as "lost and unaccounted-for" gas. Here, there is little doubt that the Fort Morgan loss stemmed from a catastrophic system failure.

In addition to ignoring the established meaning of "lost and unaccounted-for" gas and Commission precedent regarding that term, Colorado Interstate's proffered interpretation fails to consider the Tariff as a whole. Interpreting the tracking mechanism in a manner that permits the pipeline to recover any loss, so long as it did not arise from pipeline negligence, could render a number of risk of loss provisions irrelevant. Colorado Interstate's proposed interpretation also would severely limit the Commission's role in reviewing the pipeline's quarterly updates to its fuel retention percentage.

In addition, even if the Court were to find the Tariff provisions ambiguous, it should sustain the Commission's findings. The Commission considered all relevant provisions, its construction is a permissible one, and, under the applicable standard of review, the Commission's reasonable interpretation of the Tariff is entitled to *Chevron*-type deference.

In upholding the challenged orders, the Court would not be ruling that costs associated with the Fort Morgan storage loss are unrecoverable *per se*. The Commission only found that the extraordinary loss was not properly characterized as "lost and unaccounted-for" gas and could not be recovered under the Tariff's gas tracker mechanism. The Commission noted that extraordinary losses of this type may be recoverable in a general Section 4 rate proceeding, where other categories of costs are exposed to scrutiny. Colorado Interstate's decision to agree

to a rate moratorium may hinder its ability to pursue this avenue of recovery. But it does not render the Commission's decision arbitrary or capricious. Indeed, Colorado Interstate's earlier tactical decision sheds light on its current efforts to characterize the extraordinary loss occasioned by the Fort Morgan system failure as simply a "normal" part of pipeline operations.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). This standard of review is particularly deferential in the rate design context, which involves issues that "are fairly technical" and "involve policy judgments that lie at the core of the regulatory mission." *Stithe/Independence Power Partners, L.P. v FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (internal quotations omitted). So long as the Court can "discern a reasoned path" to the decision, the challenged orders will be upheld. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

The Court also "generally gives substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language." *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005) (internal quotations omitted). In such circumstances, the Court employs a

variation of the familiar two-step analysis established in *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc*., 467 U.S. 837 (1984). The Court first looks to see whether the "language of the tariff is unambiguous – that is, if it reflects the clear intent of the parties to the agreement." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). If so, the plain language of the tariff controls. If, however, the Court determines the tariff language is ambiguous, it will "defer to the Commission's construction of the provision at issue so long as that construction is reasonable." *Id*. at 814-15.

Colorado Interstate contends that the language of the Tariff is "plain," (Br. at 26), implying that *Chevron* step one applies here. If, however, the Tariff meaning is clear, then it is clear in favor of the Commission's interpretation which (unlike Colorado Interstate's) takes into consideration the well-established meaning of the term "lost and unaccounted-for" gas and all relevant Tariff provisions. If the Tariff is ambiguous, and thus deserving of *Chevron* step two deference, then the Commission's construction must be sustained as reasonable.

II. FERC REASONABLY CONCLUDED THAT THE LOSS RESULTING FROM THE FORT MORGAN SYSTEM FAILURE WAS NOT RECOVERABLE AS "LOST AND UNACCOUNTED-FOR" GAS.

The Natural Gas Act charges the Commission with ensuring that rates charged by interstate natural gas pipelines are "just and reasonable." 15 U.S.C. § 717c(a). *See also Office of the Consumer's Counsel v. FERC*, 783 F.2d 206, 213

(D.C. Cir. 1986) ("Rate setting is governed by section 4 of the NGA, which provides that all changes in rates must be approved by the Commission."). When presented with proposed adjustments to fuel retention rates for lost and unaccounted-for gas, the Commission carries out its statutory mandate by requiring a pipeline to demonstrate "that the losses it alleges are the type for which recovery was contemplated [via the fuel retention mechanism] and … demonstrate with reasonable accuracy the amount of the adjustment it seeks to recover." *Mississippi River Transmission Corp.*, 95 F.E.R.C. ¶ 61,323, at p. 62,146 (2001). *See also* Tariff Order at P 21 (noting that issue to be determined is "whether the gas lost … is the type of loss that is recoverable as 'L&U' or as 'other fuel gas' under the applicable tariff and Commission precedent"), JA 8.

Here, the Commission concluded that the catastrophic loss at the Fort Morgan storage facility was not the type of loss for which recovery was contemplated via the lost and unaccounted-for gas tracker. *See* Rehearing Order at P 13 ("The Fort Morgan loss is simply not the type of loss that is appropriate for automatic recovery in an L&U mechanism, although there may be other avenues of recovery for such a loss"), JA 17-18. That conclusion was reasonable, supported by substantial evidence, and consistent with terms of the Tariff and Commission precedent.

A. The Well-Established Meaning Of "Lost And Unaccounted-For" Gas Is That Which Is Lost As A Consequence Of Routine Pipeline Operations.

The Tariff obligates Colorado Interstate's customers to tender "Fuel Reimbursement" to compensate the pipeline, on an in-kind basis, for "Fuel Gas" and "Lost, Unaccounted for and Other Fuel Gas." *See, e.g.*, Rate Schedules TF-1, Art. 6.1, JA 195; TI-1, Art. 4.1, JA 196; NNT-1, Art. 6.1, JA 197; Tariff at Gen. Terms and Conditions at Art. 1.30, JA 198. "Fuel Gas" refers to the gas used to operate the compressors that propel gas through the pipeline. *See Transwestern Pipeline Co.*, 51 F.E.R.C. ¶ 61,343, p. 62,116 n.3 (1990) (addressing common usage of term "fuel gas"). "Other Fuel Gas" is that which is consumed by a pipeline's auxiliary equipment. *Id.* The final component of Colorado Interstate's tracker mechanism – "lost and unaccounted-for" gas – also has a well-established meaning.

As the Supreme Court explained nearly 75 years ago, "lost and unaccounted-for" gas is that which is inevitably lost through routine pipeline operations:

> "unaccounted for gas"… is gas lost as a result of leakage, condensation, expansion or contraction. There is no dispute that a certain loss through these causes is unavoidable, no matter how carefully the business is conducted.

West Ohio Gas Co. v. Pub. Util. Comm'n of Oh., 294 U.S. 63, 67 (1935). While advancements in pipeline technology since the *West Ohio Gas* decision have changed the manner in which gas is lost during pipeline operations, the meaning of

the term “lost and unaccounted-for” has remained constant. The phrase still refers to the loss of gas as an unavoidable consequence of a pipeline’s normal operations:

> As natural gas is transported through a pipeline, a fraction is lost due to system leakage. This is known as lost and unaccounted-for fuel.

Northwest Pipeline Corp., 61 F.3d at 1482. *See also Dominion Transmission, Inc.*, 533 F.3d at 849 n.4 (“When a pipeline transports natural gas, some of the gas becomes lost or is used by the pipeline to fuel compressor stations.”).

The Commission has explained that the “common usage” of “lost and unaccounted for gas” is that which is lost “from leakage, variations in metering at different locations and other reductions in the volume of gas transmitted that can not be allocated to a particular operating account. [Such] costs are incurred as part of the pipeline’s daily operations.” *Transwestern*, 51 F.E.R.C. ¶ 61,343, at p. 62,116 n.3.

B. The Commission Reasonably Concluded That The Fort Morgan Loss Stemmed From A Catastrophic Failure Of Colorado Interstate’s Underground Storage Mechanisms.

The loss incurred as a result of the Fort Morgan storage failure was not a normal part of Colorado Interstate’s daily operations. Rather, as the Commission found, the “gas lost to the atmosphere at Fort Morgan resulted from a totally unexpected non-routine malfunction of underground storage mechanics (*i.e.*, a well casing failure), outside the scope of normal pipeline operations.” Tariff Order at P 22, JA 9.

Colorado Interstate contends that this conclusion is "not supported by substantial evidence." Br. at 24. It argues that, because the storage failure was within the scope of the pipeline's business, it should be deemed "part of a pipeline's normal operations." *Id.* at 25. Colorado Interstate's core business function, however, is to store and transport natural gas through its systems. *Id.* at 3. Those activities necessarily require routine maintenance tasks so that the pipeline and storage systems can function properly. But a catastrophic *failure* of those systems cannot reasonably be characterized as a "normal" and "daily" part of the pipeline's business. Tariff Order at PP 24-25 (noting that the Fort Morgan storage loss was a "catastrophic system failure" that "cannot be reasonably classified as a normal operating expense"), JA 10-11.

The contention that the Fort Morgan storage failure was a "normal" part of Colorado Interstate's operations is also belied by the pipeline's filings, which describe the loss as one that:

- "does not occur often;" Br. at 25;
- required the pipeline to invoke "Emergency Operating Procedures;" Kennedy Aff. at ¶ 3, JA 100;
- required "updates … by CIG to federal, local and state authorities;" *id.* at ¶ 4, JA 100;
- led to "a 'hot-line' [being] set up for the residents' use" and "CIG [becoming] actively involved in promptly settling damages claims." *id.* at ¶ 13, JA 102;

- resulted in the loss of in excess of 450,000 Dth of gas; Tariff Order at P 2, JA 1; and
- led the Colorado Commission to issue a Notice of Alleged Violation to Colorado Interstate. Kennedy Aff., Attachment A at p. 1, JA 106.

It is plain that the Commission's conclusion that the Fort Morgan loss was a "catastrophic system failure" that resulted from a "non-routine malfunction" is well-supported by the record. Tariff Order at PP 24-25, JA 10-11. As a result, that finding, backed by substantial evidence, is conclusive. 15 U.S.C. § 717r(b).

C. The Refusal To Allow Recovery Of Losses Resulting From A Catastrophic System Failure Through A "Lost And Unaccounted-For" Gas Tracker Was Consistent With Commission Precedent.

1. The Commission has long held that losses stemming from a pipeline's daily operations are properly recoverable as "lost and unaccounted-for" gas.

In the challenged orders, the Commission applied its well-established test for determining whether a loss is properly characterized as "lost and unaccounted-for" gas. That test divides losses into two categories: "losses resulting from normal pipeline operations, which are recoverable," and those caused by extraordinary events, such as "the malfunction of underground storage mechanics, which are not recoverable in an L&U tracking mechanism." Rehearing Order at P 11, JA 16.

This standard was derived from the Commission's decision in *Williams Natural Gas Co.*, 73 F.E.R.C. ¶ 61,394 (1995), where it considered whether a loss resulting from the migration of gas outside of the pipeline's storage field could be recovered through a "lost and unaccounted-for" tracker mechanism. The

Commission first noted that pipelines instituted lost gas tracking mechanisms in the wake of the restructuring mandated by Order No. 636 to obtain compensation for their "day-to-day costs of providing service." *Id*. at p. 62,215. It went on to find that a loss due to gas migration was not a day-to-day cost of providing service, but rather one arising from an extraordinary malfunction. Accordingly, the loss could not properly be recovered through a "lost and unaccounted-for" gas tracking mechanism:

> Under normal operations gas should not move beyond the established field boundaries, and therefore the loss is more closely related to a malfunction of underground storage mechanics than to normal operating consequences …. Accordingly, the Commission finds that Williams cannot use its fuel and loss reimbursement mechanism to recover these costs.

Id. at p. 62,215.

On rehearing, the Commission reaffirmed that gas lost due to an extraordinary event is not properly characterized as "lost and unaccounted-for" gas and is not eligible for recovery through a tracking mechanism. The Commission observed that "recoverable gas losses are operating expenses" – *i.e.*, expenses "incurred as a normal part of operations … that recur on an annual basis." *Williams*, 74 F.E.R.C. ¶ 61,215, at p. 61,699 (1996). By contrast, gas migration was "not a normal part of [Williams'] operations and did not recur on an annual basis." *Id*. Accordingly, the loss was not recoverable through the lost and unaccounted-for gas tracker mechanism:

> As the Commission stated in its suspension order, "Under normal operations gas should not move beyond the established field boundaries, and therefore the loss is more closely related to a malfunction of underground storage mechanics than to normal operating consequences." Consequently, the migrating gas costs are not operating expenses and are not recoverable through [Williams'] fuel and loss reimbursement percentages.

Id. at p. 61,699. *See also* Tariff Order at PP 22-23 (discussing *Williams* precedent), JA 9-10; Rehearing Order at P 11 (same), JA 16.

2. The Commission did not depart from its precedent in holding that extraordinary losses could not be recovered through "lost and unaccounted-for" tracking mechanisms.

Colorado Interstate contends that the Commission "misinterpreted" and "departed" from the holding in *Williams*. Br. at 20-21. The Commission's "interpretation of its own precedent," however, "is entitled to deference by the court." *Entergy Servs. Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003). And, in any event, there is no support for the assertion that the Commission departed from prior precedent.

Colorado Interstate contends that the *Williams* decision created a recoverability standard that turned on "whether the loss is … the result of operator imprudence." Br. at 22. But *Williams* is devoid of any finding regarding operator imprudence. Rather, the decision followed from the long-standing principle that "tracking mechanisms are appropriate for normal operating costs." *Williams*, 73 F.E.R.C. ¶ 61,394, p. 62,215. The Commission thus focused on whether the loss

was extraordinary or a simply a consequence of normal pipeline operations. *See Williams*, 74 F.E.R.C. ¶ 61,215, p. 61,698 ("under normal operations gas should not move beyond the established field boundaries"); *id*. ("the loss is more closely related to a malfunction of underground storage mechanics"). It ultimately concluded that the loss was "analogous to a hole in a storage tank and constituted a malfunction of the system." *Id*. at p. 61,700. As explained in the Rehearing Order, the *Williams* decision rested on "the fact that the gas loss at issue was not a result of normal operations." Rehearing Order at P 11, JA 16.[2]

Colorado Interstate nonetheless argues that *Mississippi River Transmission Corp*., 91 F.E.R.C. ¶ 61,199 (2000), "confirms" that recovery via a lost and unaccounted-for gas tracker turns on whether the operator acted prudently in connection with the loss in question. Br. at 22. But, as the Commission noted, "the issue addressed in *[Mississippi]* is not analogous to the one addressed here." Rehearing Order at P 12, JA 17. First, *Mississippi* concerned a loss occasioned by a measurement error, rather than a catastrophic system failure. 91 F.E.R.C.

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2 Colorado Interstate (at 21) also cites a 1998 decision in which the Commission approved the settlement of an enforcement action regarding Williams' alleged failure to operate its storage field properly by exceeding the authorized maximum average. That settlement – which came several years after the *Williams* gas tracker decisions – played no role in the Commission's determination that the losses in question were not recoverable as "lost and unaccounted-for" gas because they were not a consequence of the pipeline's normal operations.

¶ 61,199 at p. 61,701. Second, the denial of recovery did not turn on the circumstances giving rise to the loss, but rather the terms of the tracker itself, which precluded recovery for prior period losses. *Id.* Third, the reference to operator prudence in the *Mississippi* decision did not occur in a discussion of whether the prior period losses should be characterized as "lost and unaccounted-for" gas. Rather, the Commission observed that, if recovery is to be had at all, it must be in a "section 4 general rate case proceeding where parties would have an opportunity to test [*Mississippi's*] evidence" regarding "whether [*Mississippi*] prudently operated its pipeline or adequately maintained its equipment." *Id. See also* Rehearing Order at P 12 (discussing *Mississippi* decision), JA 17.

Colorado Interstate similarly argues that *High Island Offshore System, LLC*, 118 F.E.R.C. ¶ 61,256 (2007), demonstrates the Commission's "shift[] from a prudence test." Br. at 24. But this argument is based upon a distorted reading of *High Island* and the challenged orders. First, Colorado Interstate claims that the losses at issue in *High Island* "were characterized by the pipeline as 'unusual' and 'non-recurring.'" Br. at 23. In fact, *High Island* involved a "very slight up-tick" in lost and unaccounted-for gas attributable in part to valve leaks discovered in the wake of an "unusual, non-recurring increase in throughput" following an outage. 118 F.E.R.C. ¶ 61,256, P 10. Colorado Interstate also asserts that "the Commission distinguished *HIOS* primarily on the ground that the gas loss in that

case was only 0.5 percent higher than its normal level." Br. at 23. But while the Commission certainly found that the "circumstances in *HIOS* … are different from those in the instant proceeding," Tariff Order at P 25, JA 10, it did so because of the circumstances – rather than the size – of the loss:

> HIOS explained that it experienced a gas loss approximately 0.5 percent higher than its normal level when fragments of a pipeline pig[3] got stuck in a meter during normal maintenance activities and it experienced a loss from a leak in a series of two ball valves. As discussed above, *gas lost during normal maintenance operations is generally considered recoverable as lost and unaccounted for gas under the Commission's precedents*. Accordingly, we find *HIOS* to be inapposite.

Id. (emphasis added), JA 11.

It is thus apparent that the Commission's conclusion that losses arising from catastrophic system failures are not recoverable as "lost and unaccounted-for" gas is well-grounded in FERC precedent.

III. COLORADO INTERSTATE'S PROPOSED INTERPRETATION OF THE TARIFF IS UNREASONABLE.

Colorado Interstate argues that the "plain language" of the Tariff permits it to recover all gas losses through its tracker, so long as they do not result from operator negligence. Br. 12, 26. This argument is premised on the notion that, because Section 42.2 of the Tariff entitles the tracker "Lost, Unaccounted For and Other Fuel Gas" – rather than "Lost *and* Unaccounted-For and Other Fuel Gas" –

[3] A "pig" is a device used to internally clean or inspect the pipeline.

"three categories, [a] lost gas, [b] unaccounted-for gas, and [c] other fuel gas, are separately recoverable under the LUF tracker." Br. at 26.

The Commission found, however, that "[t]he placing of a comma … does not change the trade usage and tariff understanding of L&U as a single term." Rehearing Order at P 17, JA 19. Indeed, the Tariff refers to the tracker as one pertaining to "L&U and Other Fuel." *See e.g.*, Tariff at Art. 42.2 (Sheet 380G), JA 203. The Commission therefore reasonably held that the tracker "recovers both 'L&U' and 'other fuel gas,'" a result that is "consistent with industry usage." Rehearing Order at P 17 n.26, JA 19. That conclusion – derived from the Commission's "vast experience in the interpretation of the language contained in natural gas tariffs" – is entitled to deference. *Northwest Pipeline,* 61 F.3d at 1486 (noting that FERC "reviews thousands of such filings annually").

In addition, as the Commission found, Colorado Interstate's proffered interpretation fails to give "effect to the entirety of the tariff language." Tariff Order at P 20, JA 8. In construing earlier versions of the Tariff, the Commission noted that it was "troubled" by language suggesting "that in the absence of negligence on [Colorado Interstate's] part, [Colorado Interstate] is not responsible for gas lost when it is in [Colorado Interstate's] control and possession." *Colorado Interstate Gas*, 42 F.E.R.C. ¶ 61,380, p. 62,125 (1988). It therefore ordered certain language to be "revised to make explicit that [Colorado Interstate] and the shipper

are deemed to be responsible for the gas while it is in their respective control and possession." *Id.*

Because the Commission only ruled that the loss caused by the Fort Morgan storage failure was not recoverable under the "lost and unaccounted-for" tracking mechanism, it did not reach the question of whether other portions of the Tariff would serve as a bar to recovery. Tariff Order at P 26, JA 11. Nonetheless, it is apparent the Colorado Interstate's proposed interpretation – which would permit recovery of any loss, so long as it was not the result of operator negligence – is at odds with the Commission's prior pronouncements regarding the Tariff, and could render a number of provisions irrelevant, including:

- Article 15.1 – entitled "Liability" – which provides that "Each Party assumes full responsibility and liability arising from the installation, ownership, and operation of its pipelines and facilities and will hold the other Party harmless from any claim, loss, expense or liability (except as otherwise specifically provided in this Agreement) that such Party incurs on account of such installation, ownership, and operation." Tariff, Art. 15.1 (2nd Rev. Sheet No. 334), JA 200; and

- Article 17.1 – entitled "Responsibility for Gas" – which provides that, as between the shipper and the pipeline, "[t]he Party which is or is deemed to be in exclusive control and possession of such Gas shall be responsible for all injury, damage, loss, or liability caused thereby." *Id.* at Art. 17.1 (1st Rev. Sheet No. 335), JA 201.

Colorado Interstate's interpretation would also severely limit the role of Article 42.5, which requires the pipeline to file quarterly "true ups" regarding its lost and unaccounted-for gas reimbursement percentages. *Id.* at Art. 42.5 (Sheet

Nos. 380K-L), JA 205-206. As the Commission explained, if Colorado Interstate's expansive interpretation were adopted "there would be no need to review the inputs to the tracker formula." Tariff Order at P 20, JA 8. Such a result would be contrary to Commission precedent, which makes clear that tracker filings "will be carefully reviewed to ensure that the costs are appropriate" and that the resulting rates are just and reasonable. *Texas E. Transmission Corp*., 64 F.E.R.C. ¶ 61,305, p. 63,267 (1993).

Because Colorado Interstate's proffered interpretation is contrary to established trade usage and does not give effect to all provisions in the Tariff, it fails to demonstrate that the Commission's contrary interpretation was unreasonable or otherwise undeserving of judicial respect. *See, e.g., Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) (noting that "[i]n construing tariffs, courts and agencies must … consider the entire instrument as a whole"); *Ameren Serv. Co. v. FERC*, 330 F.3d 494, 501 n.10 (D.C. Cir. 2003) (noting that Court may consider all relevant tariff provisions in determining reasonableness of Commission's interpretation). *See also Petal Gas*, 496 F.3d at 703 (noting that issue to be determined on appeal is not whether petitioner's interpretation is "more reasonable," but whether the agency's interpretation is unreasonable).

IV. COLORADO INTERSTATE'S REMAING ARGUMENTS ARE WITHOUT MERIT.

In an effort to bolster its over-expansive interpretation of the Tariff, Colorado Interstate contends that the Commission: (1) employed a standard that is "irrelevant to the issue of cost recovery" (Br. at 14-20); (2) established "poor public policy" (*id*. at 26-31); and (3) improperly modified the Tariff (*id*. at 31-32). Most of these arguments amount to little more than policy disagreements with the Commission, which cannot serve as a basis for reversing the challenged orders. *See, e.g., Pub. Citizen Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004) (holding that, where the agency's decision is "supported by the record and rationally explained, we have no basis for substituting Public Citizen's [policy] views for the agency's"). And all of them are without merit.

A. Extraordinary Losses May Be Eligible For Recovery In General Rate Proceedings.

Colorado Interstate asserts that the Commission's established distinction between "lost and unaccounted-for" gas – *i.e.*, gas lost as a consequence of a pipeline's routine operations – and extraordinary gas losses is arbitrary because it is "irrelevant to the issue of cost recoverability." Br. at 15. But the challenged orders did not conclusively resolve whether the loss occasioned by the catastrophic failure of the Fort Morgan storage system was recoverable. They addressed

whether that loss was properly characterized as "lost and unaccounted-for" gas such that it was eligible for inclusion in the Tariff's tracker mechanism.

Indeed, the Commission expressly advised Colorado Interstate that it could pursue the loss in a general rate proceeding under Section 4 of the Natural Gas Act:

> although "L&U" is not so infinitely expansible as CIG might wish, recovery of some or all of the costs of this loss may be pursued in a rate proceeding, where prudence of field management can be fully examined and the interplay of other relevant tariff provisions considered. The Fort Morgan loss is simply not the type of loss that is appropriate for automatic recovery in an L&U mechanism, although there may be other avenues of recovery for such loss.

Rehearing Order at P 13, JA 17-18. The Commission has previously advised pipelines to pursue extraordinary gas losses in such a manner, where other cost changes may also be examined. *See, e.g., Mississippi River Transmission*, 91 F.E.R.C. ¶ 61,199, at p. 61,701 (noting that loss falling outside the terms of a lost and unaccounted-for gas tracker could be pursued "in a section 4 general rate case proceeding where the parties would have an opportunity to test [the pipeline's] evidence and the rate implications of its alleged loss can be explored"); *Williams*, 74 F.E.R.C. ¶ 61,215, at p. 61,700 (finding that, although "costs could not be recovered here through the fuel and loss reimbursement percentages, … [Williams] could propose to collect the costs in a future section 4 rate filing").

Colorado Interstate disagrees and argues that trackers are "the more appropriate mechanism to recover gas losses that are unexpected or unusual." Br.

at 19. But this ignores the fundamental holding in the challenged orders: recovery via the tracker was not appropriate because, by it terms, it did not embrace the loss at issue. *See, e.g.*, Tariff Order at PP 22-25, JA 9-11; Rehearing Order at PP 11-13, 16-17, JA 16-17, 19-20.

Second, as this Court has recognized, the Commission created tracker mechanisms to allow for streamlined rate adjustments for certain routine costs. Such mechanisms are designed to prevent "rate increase filings from becoming 'pancaked,' *i.e.*, piled up on top of one another such that new ones were filed before the old ones were approved." *Assoc. Gas Distributors*, 706 F.2d at 345. Allowing the review of tracker adjustments to expand into a sweeping examination of the circumstances surrounding an extraordinary loss and how various tariff provisions address such a loss would threaten this policy objective. By way of example, the Colorado Commission's investigation of the Fort Morgan storage failure commenced in December 2006 and did not conclude until January 2008, when the parties executed a consent order. *In re Colorado Interstate Gas Co.*, Cause No. 1V, Order No. 1V-317 (Jan. 15, 2008).[4]

Colorado Interstate's contention that recovery of extraordinary losses is not available in general Section 4 rate proceedings due to a pipeline's obligation to

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[4] The consent order is publicly available at http://cogcc.state.co.us/orders/orders/1v/317.html.

"normalize" its costs is simply wrong. Br. at 19-20. Under appropriate circumstances, the Commission allows pipelines to recover non-recurring, extraordinary costs in rate proceedings. *See, e.g., Tarpon Gas Transmission Co*., 59 F.E.R.C. ¶ 61,241 (1992) (permitting pipeline to "amortize the nonrecurring, extraordinary costs at issue here over a three-year period").

Colorado Interstate claims that its decision to agree to a rate moratorium may limit its ability to pursue recovery through a general Section 4 rate proceeding. But Colorado Interstate's tactical choice – made years after the *Williams* decision which made clear that "tracker mechanisms are appropriate for normal operating costs," 73 F.E.R.C. ¶ 61,394, at p. 62,215 – does not render the Commission's decision arbitrary and capricious. Rather, it explains why Colorado Interstate is straining to expand the "lost and unaccounted-for" tracker mechanism to cover the loss in question.

B. The Commission Rationally Considered Whether The Cause Of The Loss Was Known When Determining Whether It Was Properly Characterized As "Lost And Unaccounted-For."

Colorado Interstate points to the Commission's observation that, while the Fort Morgan storage failure resulted in gas being lost, "the cause is known and accounted-for," Tariff Order at P 24, JA 10, and argues that this "create[s] a perverse incentive for pipelines to forego investigating the cause of lost gas." Br. at 28. It strains credulity, however, to suggest that a pipeline would forego

investigating the cause of a leak given the potential consequences. Here, for instance, the Fort Morgan storage failure subjected Colorado Interstate to state administrative litigation and damage claims from affected landowners. Kennedy Aff. at ¶¶ 10, 13, Attachment A at p. 1, JA 101-102, 106. Liability in such proceedings would only be exacerbated if a pipeline failed to prudently investigate and remedy a known loss. Such imprudent behavior could also serve as a bar to cost recovery in a rate proceeding.

In any event, the distinction between "known" and "unknown" losses serves as an initial screen for determining whether a loss is properly characterized as "lost and unaccounted-for" – *i.e.*, a consequence of daily pipeline operations. As a general matter, "L&U gas is by definition a cost item that cannot be fully explained." *Colorado Interstate Gas Co*., 106 F.E.R.C. ¶ 61,332, p. 62,298 (2004). By contrast, the cause of extraordinary losses will virtually always be known. Accordingly, the Commission generally does not permit known losses to be recovered as "lost and unaccounted-for" gas, "beyond instances involving losses due to routine maintenance activities." Rehearing Order at P 17, JA 20. Colorado Interstate has not and cannot establish that the loss occasioned by the Fort Morgan storage failure was a "routine" consequence of its daily operations.

C. The Commission Has Long Held That Pipelines Generally Should Be Responsible For Gas While It Is In Their Possession.

Colorado Interstate (at 29-31) also quibbles with the Commission's observation that the pipeline's proffered interpretation would turn the tracker into a "free insurance policy" that would "saddle shippers with a risk against which they are in no position to insulate themselves." Rehearing Order at P 16, JA 19. That observation, however, is consistent with the Commission's long-standing policy that, as a general matter, it is appropriate to place the risk of loss on pipelines so they have an incentive to minimize gas loss on their systems:

> The Commission's policy as articulated in *Colorado Interstate Gas Co*., [42 F.E.R.C. ¶ 61,380 (1988),] is that the pipeline and shipper are deemed to be responsible for the gas while it is in their respective control and possession; it is reasonable to assume that the parties can more readily insure against loss while the gas is in their possession.

Windy Hill Gas Storage, LLC, 119 F.E.R.C. ¶ 61,291, P 66 (2007).

In any event, the Commission's observations in this regard were peripheral to the central holding of the challenged orders: only those gas losses that arise as a consequence of a pipeline's routine operations are appropriately characterized as "lost and unaccounted-for." Again, Colorado Interstate cannot reasonably contend that the catastrophic system failure at the Fort Morgan storage field was "routine."

D. The Commission Did Not Modify The Tariff.

Finally, there is no basis for Colorado Interstate's contention that the Commission failed to comply with the requirements of Section 5 of the Natural

Gas Act when it "modified" the Tariff. Br. at 31-32. The Commission did not modify the Tariff at all. It simply found that, under the terms of the Tariff, the loss resulting from the catastrophic failure at the Fort Morgan storage facility is not properly characterized as "lost and unaccounted-for" gas and thus not recoverable under the tracker mechanism. *See, e.g.*, Tariff Order at P 26 ("we have concluded that the Fort Morgan gas loss is not recoverable as L&U and other fuel gas"), JA 11; Rehearing Order at P 13 ("the Fort Morgan gas loss resulted from a non-routine storage failure … [i]t cannot reasonably be classified as a normal L&U operating expense, and it would not be reasonable for CIG to recover such costs from shippers through its L&U and other fuel gas mechanism"), JA 17.

CONCLUSION

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

Respectfully submitted,

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February 25, 2009

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,070 words, not including the (i) cover page, (ii) certificate of counsel, (iii) table of contents and authorities, (iv) glossary, (v) certificate of compliance, and (vi) addendum.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have, this 25th day of February, 2009, served the foregoing by causing copies of it to be mailed to the counsel listed below.

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February 25, 2009