

**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 17, 2009**

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

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**No. 08-1266**

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**AMERICAN GAS ASSOCIATION,  
PETITIONER,  
v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION  
WASHINGTON, D.C. 20426**

**JUNE 11, 2009**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

**A. Parties and Amici**

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

**B. Rulings Under Review**

1. *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs., Regs. Preambles ¶ 31,267 (2008) (“Rule”), JA 191;
2. *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710-A, 123 FERC ¶ 61,278 (2008) (“Rehearing Order”), JA 262.

**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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June 11, 2009

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**GLOSSARY**

AGA	American Gas Association
FERC or Commission	Federal Energy Regulatory Commission
NGA	Natural Gas Act
Proposed Rule	<i>Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines</i> , Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs. ¶ 32,623 (2007), JA 86
Rehearing Order	<i>Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines</i> , Order No. 710-A, 123 FERC ¶ 61,278 (2008), JA 262
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**BRIEF FOR RESPONDENT  
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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”), in adopting new cost and revenue reporting requirements for interstate natural gas pipelines, while declining to require pipelines to report certain additional detail regarding shipper-supplied gas, reasonably balanced the need for additional information with the additional reporting burdens.

## STATUTORY AND REGULATORY PROVISIONS

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

### INTRODUCTION

Following two years of review, outreach meetings, formal notice, and opportunity for comment, the Commission in 2008 adopted extensive revisions to financial forms and reporting rules for interstate natural gas pipelines. *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, FERC Stats. & Regs., Regs. Preambles ¶ 31,267 (“Rule”), JA 191, *on reh’g*, Order No. 710-A, 123 FERC ¶ 61,278 (2008) (“Rehearing Order”), JA 262. The changes were designed to enhance the transparency of financial reporting by pipelines and better reflect the current market and cost information needed for the Commission’s oversight of natural gas pipeline rates to ensure that such rates are just and reasonable. Among other changes, in response to concerns raised during the rulemaking process, the final rule required pipelines to provide additional information regarding costs and revenues related to the disposition of shipper-supplied gas. In adopting the changes, the Commission balanced the need for the new information with the additional reporting burden on pipelines.

On appeal, the American Gas Association (“AGA”) asserts that, in order for the new data to be useful, the Commission must compel pipelines to report certain

additional detail concerning shipper-supplied gas for pipeline operations. The Commission concluded that AGA's request for such additional detail was unnecessary and burdensome.

## **STATEMENT OF FACTS**

### **I. Overview Of FERC Financial Reporting For Natural Gas Pipelines**

Section 10 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717i, authorizes the Commission to prescribe rules and regulations concerning annual and other periodic or special reports, as necessary or appropriate for purposes of administering the NGA. The Commission may prescribe the manner and form in which such reports are to be made, and may require from natural gas companies specific answers to all questions on which the Commission may need information.

As relevant here, the challenged orders amended Part 260 of the Commission's rules, which describes the current reporting requirements for natural gas companies. 18 C.F.R. Part 260 (Statements and Reports).<sup>1</sup> Natural gas companies are required to file either FERC Form No. 2 ("Form 2"), Annual report for major natural gas companies, 18 C.F.R. § 260.1, or FERC Form No. 2-A ("Form 2-A"), Annual report for non-major natural gas companies, 18 C.F.R. § 260.2. In addition, all natural gas companies must file FERC Form No. 3-Q

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<sup>1</sup> The orders also amended Part 158 of the Commission's rules, which requires certification of the forms by an independent accountant.

(“Form 3-Q”), Quarterly financial report of electric utilities, licensees and natural gas companies, 18 C.F.R. § 260.300. The forms are used by the Commission to obtain financial and operational information from natural gas companies, which is compiled using a standard chart of accounts contained in the Commission’s Uniform System of Accounts. *See* 18 C.F.R. Part 201.

The forms contain schedules that include a basic set of financial statements: Comparative Balance Sheet, Statement of Income and Retained Earnings, Statement of Cash Flows, and Statement of Comprehensive Income and Hedging Activities. Pipelines file supporting schedules containing supplementary information, including revenues and the related quantities of products sold or transported; account balances for various operating and maintenance expenses; selected plant cost data; and other information.

## **II. FERC Proceedings Prior To The Challenged Orders**

### **A. Notice Of Inquiry**

Following the assumption of responsibility by the Commission’s Office of Enforcement in the spring of 2006 for all financial forms filed with the Commission and informal outreach meetings in the fall of 2006 with filers and users of the financial forms, the Commission issued a Notice of Inquiry into the need for revisions to its reporting requirements. *Assessment of Information Requirements for FERC Financial Forms*, 118 FERC ¶ 61,108 (2007), JA 1. With

respect to the issues here, the Commission stated that its inquiry was prompted in part because of pleadings filed by market participants in recent matters questioning the adequacy of the data reported in the forms for the purpose of challenging rates on file for natural gas companies. *Id.* P 4, JA 2. Specifically, the Commission sought comments on “whether the Commission’s annual and quarterly financial forms provide sufficient information to the public to permit an evaluation of the filers’ jurisdictional rates, and whether these forms should otherwise be modified to improve their usefulness.” *Id.* P 1, JA 1.

Generally, during the outreach meetings and in subsequent written comments, the natural gas pipelines complained that then-existing reporting requirements were burdensome and collected unnecessary data. In addition, the pipelines asserted that the financial forms are accounting documents that do not include projections and, therefore, should not be used as a substitute for a cost and revenue study or to gauge earnings. *Id.* P 9, JA 3. On the other side, financial form users asserted that more, not less, data should be reported by the pipelines. They emphasized the importance of the information as the primary source for evaluating pipeline rates. *Id.* P 10, JA 3.

Based on the comments and two pending complaints regarding pipeline rates, the Commission decided to solicit formal comments. The Commission stated it would next determine whether to propose changes to the financial forms in

the context of a formal rulemaking. *Id.* P 10, JA 3. In response to the Notice of Inquiry, the Commission received approximately 50 comments. AGA submitted comments stating that it did not propose any specific changes to the filing requirements. AGA Comments on Notice of Inquiry at 1, JA 20. In addition, AGA stated that the Commission should design its forms “so as not to be unduly burdensome to prepare and file in a timely manner” and urged the Commission to “balance the need for sufficient information with the burden and cost of producing the equivalent of a complete cost-of-service study on an annual basis.” *Id.* at 3, JA 22.

#### **B. Notice Of Proposed Rulemaking**

On September 20, 2007, the Commission issued a Notice of Proposed Rulemaking (“Proposed Rule”) proposing to amend Forms 2, 2-A and 3-Q. *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs. ¶ 32,623 (2007), JA 86. The stated rationale for the proposed revisions was that, in the current regulatory environment where the number of rate filings has declined, the financial forms need to be revised in order for the Commission and the public to have sufficient information to assess the continuing justness and reasonableness of pipeline rates. *Id.*

Based on the comments in response to the Notice of Inquiry, the Commission proposed extensive changes to the forms, which would require pipelines to provide additional, detailed information regarding their costs and revenues. The Commission stated that it sought to balance the benefits of the changes and the additional burden on pipelines, and noted that most of the new information was maintained by pipelines and could be transferred to the forms. *Id.* P 25, JA 93.

As relevant here, one category of revisions, Acquisition and Disposition of Gas, covered revenue data that were not previously included in the forms, in particular revenue from shipper-supplied gas. *Id.* P 35, JA 95. The Commission noted that Forms 2 and 2-A users could not readily determine from the existing financial forms the disposition and value of shipper-supplied gas that exceeds the pipeline's operational needs or the source and cost of gas acquired to meet deficiencies in shipper-supplied gas. *Id.*

Therefore, the Commission proposed to add new schedules entitled "Shipper-Supplied Gas for the Current Quarter" to Forms 2, 2-A and 3-Q, which would require the pipeline to report: (1) the difference between the volume of gas received from shippers and the volume of gas consumed in pipeline operations each month; (2) the disposition of any excess gas and the accounting recognition given to such disposition, including the basis of valuing the gas and the specific

accounts charged or credited; and (3) the source of gas used to meet any deficiency and the accounting recognition given to the gas used to meet the deficiency, including the accounting basis of the gas and the specific accounts charged or credited. *Id.* P 39, JA 96. In addition, the Commission proposed to require pipelines to provide the volumes of gas purchased applicable to each of the gas purchase expense accounts (18 C.F.R. Part 201, Account Nos. 800-805). The Commission explained that previously pipelines were required to report volumes of gas purchases only in the aggregate. *Id.*

### **III. Challenged Orders**

#### **A. Rule — Order No. 710**

On March 21, 2008, the Commission issued its final Rule, Order No. 710. JA 191. With respect to shipper-supplied gas, the Commission adopted the proposed changes in the Proposed Rule. The Commission declined to adopt AGA's request to require pipelines to report additional fuel information broken out by function (*e.g.*, transportation, storage, gathering) and to include, by function, the amount of fuel that has been waived, discounted, or reduced as part of a negotiated rate agreement.

The Commission stated that fuel information broken out by function was available in Form 2 at page 520, where pipelines are required to provide detailed information regarding gas received and delivered by the pipeline, identified by



function and account number. Rule P 16, JA 196. In addition, the Commission emphasized that the addition of the new schedules, pages 521a and 521b, reflected a “fair balance between the need for the information and the additional burden on the pipeline.” *Id.*

**B. Rehearing Order — Order No. 710-A**

Several commenters, including AGA, filed for rehearing of the Rule. The Commission issued its Rehearing Order, Order No. 710-A, on June 20, 2008. JA 262. The Commission (with one Commissioner dissenting in relevant part) denied AGA’s request for rehearing of the Rule. AGA argued that, while page 520 of Forms 2 and 2-A provides certain fuel information by function, it is not adequate to enable a form user to determine where on the pipeline system fuel costs are being incurred and how they are being allocated. AGA Request for Rehearing at 5, JA 252. AGA asserted that additional detail regarding fuel costs was required for the schedules on pages 521a and 521b to ensure that the Commission and pipeline customers have the information required to assess the justness and reasonableness of pipeline rates. *Id.* at 5-6, JA 252-253.

In response, the Commission stated that the Rule required extensive revisions to the forms with respect to the disposition of shipper-supplied gas, including two new schedules for information collection. Rehearing Order P 10, JA 264. The Commission also noted that other commenters objected to the revisions

as burdensome. *Id.* The Commission reiterated that the need to provide greater transparency with regard to fuel costs had to be balanced with the additional reporting burdens and that it approved the new schedules as a fair reflection of this balance. *Id.* The Commission stated that, while the detail sought by AGA might provide additional clarity with respect to fuel costs, its exclusion would not preclude the Commission's or customers' ability to assess the justness and reasonableness of pipeline rates. *Id.*

In addition, the Commission deemed unnecessary and burdensome AGA's request for information regarding the amount of fuel that a pipeline has waived, discounted, or reduced as part of a negotiated rate agreement. *Id.* P 11, JA 264. AGA argued that some pipelines currently provide such information in periodic fuel reports, citing an annual fuel report filed by one pipeline pursuant to a rate settlement agreement. AGA Request for Rehearing at 3, JA 250. The Commission found that the cited report exceeded, "in significant detail," the type of financial and rate information the Commission deems appropriate for Forms 2, 2-A and 3-Q. Rehearing Order P 11, JA 264. The Commission stated that it was unlikely that all pipelines would have this information readily available, since many pipelines do not periodically file to adjust fuel rates and may not keep records of this type of information. *Id.* In addition, the Commission found that it was not apparent that the level of fuel associated with these types of transactions was significant enough

to warrant additional reporting requirements. *Id.* The Commission further noted that customers of pipelines that use fuel tracking mechanisms and file periodic true-up reports could explore these issues in the context of the pipeline's periodic fuel filings. *Id.*

## **SUMMARY OF ARGUMENT**

The Commission's revised reporting requirements for natural gas companies reasonably balanced the need for additional cost and revenue information with the additional reporting burden on pipelines and, thus, should be upheld.

To address specific concerns raised with respect to shipper-supplied gas, the rule required pipelines to report extensive new information concerning the disposition and value of such gas that exceeds a pipeline's operational needs and the source of gas acquired to meet deficiencies in shipper-supplied gas. The Commission concluded that AGA's request that pipelines also be required to segregate the new information by function (*e.g.*, transportation, storage, gathering) and to report, by function, the amount of fuel that has been waived, discounted, or reduced as part of a negotiated rate agreement was unnecessary and burdensome.

Contrary to AGA's argument, the Commission's explanation for denying AGA's request for additional detail was entirely adequate. The Commission properly considered the relevant factors and exercised its discretion in balancing the competing interests. That the Commission did not go farther and compel

additional data, that could have added greater burden than benefit, hardly means that the Commission abused the discretion afforded to it by statute, *see* 15 U.S.C. § 717i, to adopt appropriate reporting requirements. As a policy matter, reasonable minds may differ as to where to draw the line between reporting benefit and reporting burden. However, as a legal matter, under applicable standards of review, the Commission’s balance is entrusted to its discretion and, under the circumstances, must be upheld as a reasonable – even if it is not necessarily the only possible reasonable – decision.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court must uphold the Commission’s orders unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995). In general, judicial scrutiny under the Natural Gas Act is limited to assuring that the Commission’s decisionmaking is reasoned, principled, and based upon the record. *Pa. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997). “An agency’s policy decisions are entitled to deference so long as they are reasonably explained.” *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (FERC’s affiliate standards of conduct rules for natural gas pipelines vacated where administrative record lacked

evidence of need for such rules justifying burden on pipelines). The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive. NGA § 19(b), 15 U.S.C. § 717r(b).

In particular, the Commission has significant discretion here, where it implemented NGA section 10, 15 U.S.C. § 717i, which provides that the Commission “may” prescribe annual and other periodic or special reports by rules and regulations or orders “as necessary or appropriate” to assist in the proper administration of the NGA. *See Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (“By enacting the ‘necessary or appropriate’ standard, the Congress invested the Commission with significant discretion.”) (citing *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (“‘necessary or appropriate’ standard in § 309 of the Federal Power Act, 16 U.S.C. § 825h, leaves determination ‘to the Commission’s expert judgment’)).

## **II. THE COMMISSION REASONABLY BALANCED THE NEED FOR ADDITIONAL INFORMATION AND THE ADDITIONAL REPORTING BURDEN ON PIPELINES.**

### **A. The Commission Reasonably Balanced Competing Interests in Refusing to Compel Natural Gas Pipelines to Report Additional Data Concerning Shipper-Supplied Gas by Function.**

The Commission announced at the start of the rulemaking that it would balance the need for additional information from interstate natural gas pipelines with the reporting burden on pipelines, and the agency adhered to that principle

throughout the rulemaking. *See* Rule P 16, JA 196 (reporting revisions announced in Proposed Rule were designed to “reflect a fair balance” between reporting need and reporting burden); Rehearing Order P 10, JA 264 (financial transparency “balanced with” additional reporting burdens). Indeed, AGA itself, in its response to the Notice of Inquiry, urged the Commission to balance these competing interests, AGA Comments on Notice of Inquiry at 3, JA 22, and, in its comments on the Proposed Rule, acknowledged that the changes proposed by the Commission, which were adopted in the final rule, achieved the appropriate balance. AGA Comments in response to Proposed Rule at 1, JA 141. AGA now has a different view concerning how successfully the Commission balanced the benefits and burdens.

Courts have consistently held that the balancing of competing interests is within the Commission’s discretion. *See, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 519 (1979) (“[Requiring] pipelines and the large producers to assume the risk in bargaining for reasonable prices from small producers is within the Commission’s discretion in working out the balance of the interests . . . involved,” quoting *FPC v. Texaco, Inc.*, 417 U.S. 380, 392 (1974)); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1240 (D.C. Cir. 2005) (deferring to FERC’s policy choice where “predictive judgment” regarding cost

savings was supported by substantial evidence and because the “balancing of short-term costs against long-term benefits is within the Commission’s discretion”).

The Commission properly exercised its discretion in this instance in balancing the benefits of additional cost and revenue information from pipelines and the additional reporting burden. The Commission determined that additional information would aid the ability of the Commission and pipeline customers to make a reasonable assessment of a pipeline’s cost of service. Rule P 12, JA 194. The Commission approved extensive changes to the reporting requirements to achieve this goal. However, the Commission also declined to adopt many recommendations submitted by commenters, including AGA, as burdensome.

### **1. Value and Availability of Shipper-Supplied Gas Information**

The new reporting requirements concerning shipper-supplied gas were designed to address particular concerns. Pipeline shippers pay a fuel charge or contribute an in-kind percentage, ranging from fractions of a percent to as high as 13 percent, of the volumes of natural gas tendered for transportation service to provide fuel for compressors and to make up for lost and unaccounted-for gas. Each pipeline states the percentage it retains in its tariff. *Fuel Retention Practices of Natural Gas Companies*, Notice of Inquiry, FERC Stats. & Regs., Notices ¶ 35,560 at P 2 (2008); *see also id.* at P 3 (explaining cost recovery options for shipper-supplied fuel).

The Commission stated that escalating gas prices coupled with the decline in pipeline rate review filings had made the disposition of shipper-supplied gas an important item in a pipeline's cost of transportation. Proposed Rule P 38, JA 96; Rule P 16, JA 195. The Commission noted that, despite the existing accounting and reporting requirements for gas used in operations, gas lost, and gas sold, customers were unable to determine the disposition and value of shipper-supplied gas that exceeds a pipeline's operational needs or the source and cost of gas acquired to meet deficiencies in shipper-supplied gas. Proposed Rule P 37, JA 96; Rule P 13, JA 194. Comments on the Notice of Inquiry identified information regarding pipelines' fuel retainage percentage as particularly lacking in detail. Rule P 13, JA 194. In addition, the Commission referenced a pending administrative case where customers asserted that a pipeline's alleged excess revenue was due to its retention of more fuel from shippers than was necessary to operate the system. *Id.*

To address these concerns, the Commission added two new schedules, pages 521a and 521b (Shipper Supplied Gas for the Current Quarter), to the financial reporting forms. Those schedules require pipelines to report, on an annual and quarterly basis, the difference between the volume of gas received from shippers and the volume of gas consumed in pipeline operations each month; the disposition of any excess gas and the accounting recognition given to such disposition; and the



source of gas used to meet any deficiency and the accounting recognition given to the gas used to meet the deficiency. In addition, the Commission required pipelines to report volumes of gas purchased applicable to each of the gas purchase expense accounts. Rule P 13, JA 195.

AGA claims that, in denying AGA's request for additional detail regarding the new information, the Commission failed to achieve its goal of providing sufficient data to adequately assess the justness and reasonableness of pipeline rates, including fuel charges. Br. at 25. In addition, AGA argues that the Commission's justification for rejecting AGA's request that the fuel data be broken out by function is not supported by the record. Br. at 30. Both of these claims fail to withstand scrutiny.

In its brief comments on the Proposed Rule, AGA supported the proposed changes to the financial forms as appropriately balancing the goal of assisting customers, state commissions, and interested parties in evaluating whether rates continue to be just and reasonable with the burdens of additional reporting obligations. AGA Comments on Proposed Rule at 1, JA 141. However, AGA recommended that the Commission require additional detail on fuel consumption to achieve "greater clarity" and enable interested parties to determine if any inappropriate cross-subsidization is occurring. *Id.* at 5, JA 145.

In the final rule, the Commission declined to adopt AGA's recommendation. The Commission stated that the information broken out by function sought by AGA was available in Form 2 at page 520 (Gas Account), where pipelines are required to provide detailed information regarding gas received and delivered by the pipeline, identified by function and account number. Rule P 16, JA 196. In addition, the Commission stated that the changes adopted in the rule reflected a fair balance between the need for the information and the additional burden on the pipeline. *Id.*

AGA then became more insistent, although only marginally more specific, concerning the need for additional detail. In its request for rehearing, AGA argued that the additional detail it sought was required to ensure that the Commission and pipeline customers have the information they need to assess the justness and reasonableness of pipeline rates. AGA claimed: "Fuel data segregated by function will provide . . . valuable information regarding where on the pipeline system fuel costs are being incurred and how they are being allocated. Such information will allow the Commission and pipeline customers to better scrutinize pipeline fuel costs and may assist in identifying opportunities for pipelines to improve fuel efficiency." AGA Request for Rehearing at 5, JA 252. In response, the Commission reiterated that the need to provide greater transparency with regard to fuel costs had to be balanced with the additional reporting burdens on

pipelines, who had objected to the changes, and that the new schedules were a fair reflection of this balance. Rehearing Order P 10, JA 264. The Commission further stated: “While the detail sought by AGA might provide additional clarity with respect to fuel costs, we do not believe its exclusion will preclude the ability to assess the justness and reasonableness of pipeline rates.” *Id.*

AGA’s claim, Br. at 30, that the Commission’s justification for rejecting AGA’s recommendation “rests solely on vague and unsupported conclusions” is inaccurate. In both the Rule and the Rehearing Order, the Commission explained why it was not adopting AGA’s recommendation concerning the segregation of fuel data by function, that is, because fuel data is already broken out by function, although perhaps not in the format or amount of detail AGA would like. Moreover, requiring the additional information sought by AGA could upset the balance between the need for additional information and the burdens on the pipelines. Rule P 16, JA 196; Rehearing Order PP 9-10, JA 263-264. In addition, the Commission explained that exclusion of the detail sought by AGA would not preclude the Commission’s or customers’ ability to assess the justness and reasonableness of pipeline rates. Rehearing Order P 10, JA 264. The Commission’s explanation for declining to adopt AGA’s recommendation to require the segregation of data by function was entirely reasonable, particularly in light of AGA’s conclusory description of the need for such additional information.

## 2. Burden of Information Reporting

In addition, the Commission fully described how the information requirements that were adopted addressed concerns with deficiencies in reported fuel data and achieved the goal of aiding the assessment of the justness and reasonableness of pipeline rates, without unduly burdening pipeline reporters. Rule PP 13, 16, JA 194, 196. *See also* Proposed Rule PP 37-39, JA 96. As the Commission stated in the Rehearing Order at P 10, JA 264, the detail sought by AGA might provide additional clarity; however, it was not “necessary and appropriate,” within the meaning of NGA § 10, 15 U.S.C. § 717i, and the considerable discretion afforded to the Commission under that section, *see supra* p. 13, to support a reasonable analysis of gas costs.

The Commission, exercising its discretion, was not obliged to adopt every recommendation in order to achieve its goals; indeed, it rejected many of the requests for additional information that were submitted during the rulemaking. The Commission’s responsibility is to consider the recommendations and concerns and to balance the need for additional information to support a reasonable and fair analysis of gas costs with the additional reporting burdens. *See, e.g., ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) (the Commission “has wide discretion to determine where to draw administrative lines”) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)). The reviewing court is

“generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.” *Id.* (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)). The Commission stated that the revisions would not affect the burden of proof in a complaint proceeding brought under NGA § 5, 15 U.S.C. § 717d, or change the Commission’s obligation to rule on complaints “based on a full record and substantial evidence.” Rule P 12, JA 194. That record typically includes a cost and revenue study, which contains significantly more detail than the financial forms, and additional information obtained through discovery. *See* Reply Comments of Interstate Natural Gas Association of America on Notice of Inquiry at 28, JA 80.

AGA claims that the Commission’s balancing assessment was “largely opaque,” Br. at 28, and that the agency made no assessment of the burden associated with functionalizing the data. Br. at 29. However, there is ample evidence in the record concerning additional reporting burdens. From the beginning of the rulemaking, the Commission was aware of and sensitive to the fact that revisions to the financial forms would create additional reporting obligations and that it was important, as AGA acknowledged, that a fair balance be struck between the need for revisions and the additional burdens on pipelines. Pipelines submitted comments throughout the rulemaking proceeding objecting to

(or insisting that the Commission remain sensitive to) the additional reporting burdens. *See, e.g.*, Comments of Dominion Resources, Inc. on Proposed Rule at 4 (quantifying burden), 7, 9, JA 171, 174, 176; Dominion Request for Rehearing at 4, JA 245; INGAA Comments on Notice of Inquiry at 3, JA 37; INGAA Reply Comments on Notice of Inquiry at 14, 15, 20, JA 66, 67, 72; INGAA Comments on Proposed Rule at 1, 5, JA 185, 189; INGAA Request for Clarification or Rehearing at 2, JA 257; Comments of Enbridge, Inc. on Proposed Rule at 6, JA 161; Comments of Williston Basin Interstate Pipeline Company on Notice of Inquiry at 3, 6, JA 12, 15; Williston Reply Comments on Notice of Inquiry at 2, 6-7, JA 45, 50-51; Williston Comments on Proposed Rule at 3, 5, JA 149, 151; Comments of Boardwalk Pipeline Partners, LP on Proposed Rule at 1-2, JA 182-183.

In addition, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. § 3507(d), the Rule contains a detailed assessment of the burden on pipelines. *Id.* P 60, JA 205-207. The Commission was not required to perform an additional assessment of the burden associated with AGA's request in order to conclude that adding more requirements could upset the balance between burden and benefit reached in the Rule, particularly in light of AGA's conclusory description of need. Rehearing Order P 9, JA 263-264. Moreover, the fact that one pipeline, pursuant to a settlement agreement, provides fuel data broken out by function does not

demonstrate that all, or even most, pipelines could readily produce the same information, as AGA implies. Br. at 29-30; *see also* Rehearing Order P 11, JA 264.

AGA failed to establish that the need for additional detail outweighed the imposition of additional reporting burdens on the pipelines. Adoption of AGA's request may have tipped the balance of benefits and burdens, so that the new reporting requirements would have done more harm than good. *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005) (in reviewing orders issued pursuant to the Federal Power Act, the Court held that the "crucial question" was whether the program FERC approved "will do more good than harm"); *Elec. Consumers Res. Council*, 407 F.3d at 1239 (Court deferred to Commission's predictive judgment that new rate design would result in "more good than harm," when Commission articulated reasons for its judgment and responded adequately to objections). Therefore, the Commission properly exercised its discretion in balancing the competing interests and declining to adopt AGA's request for information detail beyond the already extensive requirements in the rule.

**B. The Commission Reasonably Deemed Unnecessary and Burdensome AGA's Request to Require Pipelines to Report the Amount of Fuel Waived or Reduced as Part of a Negotiated Rate Agreement.**

Similarly, AGA failed to establish that the need for additional detail

regarding the amount of fuel waived or reduced as part of a negotiated rate agreement outweighed the additional reporting burden on pipelines. Once again, the administrative line drawn by the Commission was reasonable and directly related to the underlying regulatory problem. *See ExxonMobil Gas Mktg. Co.*, 297 F.3d at 1085 (petitioner must demonstrate that agency’s choice was “patently unreasonable”).

In its comments on the Proposed Rule, AGA argued that such information, like functionalized fuel data, could achieve greater clarity by enabling interested parties to determine if any inappropriate cross-subsidization is occurring. AGA Comments at 5, JA 145. In its request for rehearing, AGA repeated the same basis for its recommendation and added that requiring such information would enable interested parties to determine whether any particular pipeline is in compliance with the Commission’s policy against discounting fuel charges. AGA Request for Rehearing at 6, JA 253. AGA’s brief here focuses on the compliance aspect and asserts that customers need the information to determine whether a pipeline is engaging in undue discrimination or preference through reduced fuel charges, contrary to the NGA and FERC policy. Br. at 30.

The Commission deemed AGA’s request unnecessary and burdensome for several reasons. First, the Commission discounted AGA’s claim that some pipeline fuel reports already provide information regarding fuel waivers, discounts,



and reductions as part of a negotiated rate agreement. Rehearing Order P 11, JA 264. AGA's claim was based on an annual fuel report filed by one pipeline pursuant to a settlement agreement. The Commission correctly found that the fuel report referenced by AGA exceeded in significant detail the type of information appropriate for the financial reporting forms. *Id.* In addition, the Commission determined that it was unlikely that all pipelines would have this information readily available, since many pipelines do not file periodic fuel adjustments and may not keep records of this type of information. *Id.* Moreover, the Commission concluded that it was not apparent that the level of fuel associated with these types of transactions is significant enough to warrant additional reporting requirements. *Id.* Finally, the Commission stated that, for pipelines that use fuel tracking mechanisms and file periodic true-up reports, customers may explore these issues in the context of the pipelines' periodic fuel filings. *Id.*

AGA takes issue only with the first of these reasons and ignores the rest. AGA claims that FERC misunderstood that AGA only sought one page of data in the referenced fuel report, not the entire report. Br. at 32. Thus, AGA claims, FERC's conclusion that AGA was seeking burdensome and unnecessary information was factually incorrect. *Id.*

It was not apparent from AGA's request for rehearing, which simply referenced the report in its entirety in a footnote, AGA Request for Rehearing at 3

n.7, JA 250, that AGA was seeking only a portion of the information in that report.<sup>2</sup> However, even assuming that the Commission misunderstood the extent of AGA's request as it related to the referenced fuel report, the agency's conclusion that AGA's request was unnecessary and burdensome was nonetheless fully supported.

AGA does not dispute the Commission's findings that it is unlikely that all pipelines would have the fuel waiver information sought by AGA readily available or even keep records of this type of information. In addition, AGA does not take issue with the Commission's finding that the level of fuel associated with these types of transactions may not be significant enough to warrant additional reporting requirements, nor does it dispute the finding that other avenues exist for exploring these issues. All of these reasons support the Commission's decision to treat AGA's request as unnecessary and burdensome. *See Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 704 (9th Cir. 2003) (Commission decision upheld because it "properly exercised its discretion to balance factors it deems relevant to the public interest").

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<sup>2</sup> Although AGA claims that the data it seeks represent "hardly a burdensome requirement," that assessment is based solely on AGA's assertion that the data "would fit into one page." Br. at 32. AGA's self-serving conclusion regarding burden fails to take into account the efforts pipelines would have to expend to gather the information.

AGA has failed to demonstrate that the Commission's decision to reject its request for additional information regarding fuel waivers was arbitrary and capricious. Therefore, its claim should be disregarded.

### **CONCLUSION**

For the foregoing reasons, the petition for review should be denied, and the challenged orders should be upheld in every respect.

Respectfully submitted,

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June 11, 2009

*American Gas Association v. FERC*  
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**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that the Brief of Respondent Federal Energy Regulatory Commission contains 5,860 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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