ORAL ARGUMENT IS REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 03-9577

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FUEL SAFE WASHINGTON,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

_____

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

_____

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF PRIOR OR RELATED APPEALS

Counsel is unaware of any prior or related cases in this or any other court.

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction to consider arguments that the Commission has no authority to issue a certificate for the pipeline facilities at issue, when no party raised this point on rehearing to the Commission, and raising an issue on rehearing is a jurisdictional prerequisite to judicial review under § 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b).

2. Assuming the Court may hear the issue, whether the Commission properly ruled it had jurisdiction under NGA § 7 to certificate the proposed

pipeline based on record evidence that the pipeline will have an interconnection with an interstate pipeline through which gas in interstate commerce will be both received and delivered by displacement, which is a recognized means of transporting gas in interstate commerce.

3. Assuming the Court may hear the issue, whether the Commission correctly determined that the proposed pipeline was not exempt from federal regulation under the Hinshaw Amendment, 15 U.S.C. § 717(c), which applies only where all the gas that enters a state through the facilities is also consumed within the same state, because here most of the gas will be transported to Canada.

4. Whether the Commission satisfied the requirements of the National Environmental Policy Act, when it prepared and considered a Final Environmental Impact Statement that addressed in detail all of the relevant issues raised by the parties.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in Addendum A to this brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This case involves the Commission's authorization of Georgia Strait Crossing Pipeline LP's ("GSX") proposed gas pipeline and related facilities to carry natural gas from the Canadian border near Sumas, Washington through Whatcom and San Juan Counties, Washington to a subsea interconnection in the Boundary Pass between Canada and the United States. In an order not challenged here, the Commission found that, subject to completion of an environmental review, the benefits of the proposed project would outweigh any potential adverse effects. *Georgia Strait Crossing Pipeline LP*, 98 FERC ¶ 61,271 (2002) ("Preliminary Determination"). R 183.[1] Subsequently, in the orders challenged here, the Commission determined that the proposed project would be an environmentally acceptable action, if constructed and operated in accordance with specified mitigation measures. *Georgia Strait Crossing Pipeline LP*, 100 FERC ¶ 61,280 (2002) ("Certificate Order"), *reh'g denied*, 102 FERC ¶ 61,051 (2003) ("Rehearing Order"). R 222 and 232. This appeal followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

NGA 1(b), 15 U.S.C. 717(b), grants the Commission jurisdiction over (1) the transportation of natural gas in interstate commerce; (2) the sale in interstate

[1] "R" refers to the record item number in the certified index to the record.

commerce of natural gas for resale for ultimate public consumption; and (3) natural gas companies engaged in such transportation or sale. In this regard, the Supreme Court has long recognized that the Commission's jurisdiction is "plenary," and extends to all transactions "except those which Congress has made explicitly subject to regulation by the States." *FPC v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964). One such exception, the "Hinshaw Amendment," provides that the NGA shall not apply to a natural gas company engaged in interstate transportation if: (1) the company receives all gas volumes at or within the boundary of a state; (2) the gas is consumed entirely within that state; and (3) the facilities, rates, and services for that intra-state transportation are subject to regulation by the state. NGA 1(c), 15 U.S.C. 717(c).

NGA 7(c)(1)(A) prohibits any "natural-gas company or person" from constructing or operating pipeline facilities for the interstate transportation of natural gas prior to obtaining a "certificate of public convenience and necessity" from the Commission. 15 U.S.C. 717f(c)(1)(A). Under section 7(e), the Commission is directed to issue such certificates to qualified applicants once it determines that the proposed service "is or will be required by the present or future public convenience or necessity." 15 U.S.C. 717f(e). Section 7(e) also

authorizes the Commission to attach to certificates "such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

As part of its review of proposed projects, the Commission must comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321, *et seq.*, which sets out certain procedures to be followed by federal agencies to assure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA mandates that an Environmental Impact Statement ("EIS") be prepared for all "major Federal actions significantly affecting" the quality of the human environment. 42 U.S.C. 4332(2)(C).

B. Events Leading Up to the Commission Orders

On April 24, 2001, GSX applied for authority to construct and operate a gas pipeline and related facilities in Whatcom and San Juan Counties, Washington. The pipeline would carry gas east to west from the Canadian border near Sumas, Washington, overland across Whatcom and San Juan Counties, then underwater across the Strait of Georgia, to a subsea interconnection with a Canadian pipeline mid-channel in the Boundary Pass at the international border between the United States and Canada. The onshore facilities would consist of: a receipt point meter station at the eastern interconnection; approximately 32.1 miles of 20-inch pipe

extending from the eastern connection to a new compressor station near Cherry Point, Washington; and, about 1.4 miles of 16-inch pipe connecting the station to the offshore facilities. The offshore facilities would consist of approximately 14 miles of 16-inch pipe and a subsea tap valve assembly near the San Juan Islands.

At Sumas, the proposed pipeline will interconnect with a Canadian pipeline, Westcoast Energy Inc. ("Westcoast"), and with a United States pipeline, Northwest Pipeline Corporation ("Northwest"). At its west subsea terminus, the proposed pipeline will interconnect with a new pipeline to be built and operated by Georgia Strait Crossing Pipeline Ltd ("GSX-Canada") for the purpose of transporting the natural gas from the interconnection point to Vancouver Island, British Columbia.

On June 1, 2001, FERC's "Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Georgia Strait Crossing Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings and Site Visit" ("NOI"),[2] R 30, was sent to 339 interested parties including Federal, state, and local officials; agency representatives; conservation organizations; local libraries and newspapers; intervenors in the FERC proceeding; and property owners along the proposed pipeline route. *See* Final Environmental Impact Statement ("FEIS") at ES-3. R 213. The Commission held two public meetings in

[2] 66 Fed. Reg. 30,730 (June 7, 2001).

the State of Washington, one in Lynden on June 26, 2001 and the other in Friday Harbor on June 28, 2001 to discuss the scope of the project and to hear from the public. Comments were received throughout the summer.

On December 10, 2001, the Commission staff's Draft Environmental Impact Statement ("DEIS") (R 118) was filed with the Environmental Protection Agency ("EPA"), made available through a Federal Register announcement, and mailed to individuals and organizations on the mailing list. Under Council on Environmental Quality's ("CEQ") regulations implementing NEPA, the public had until February 4, 2002 to comment on the DEIS. The Commission also held another public meeting in Lynden, Washington on February 26, 2002 to elicit additional comments. *Id*. Comments on the DEIS were received from a total of four Federal agencies, five state organizations, five local agencies and elected officials, two Native American groups, six companies and organizations, ten individuals, and GSX-US. Statements were made by 25 people at the public meeting in Lynden.

Meanwhile, the Commission acted on the non-environmental issues. Notice of the application was published in the Federal Register on May 4, 2001.[3] Motions to intervene were filed by 24 parties. After review of the application and the comments, FERC concluded that, subject to completion of the environmental

[3] 66 Fed. Reg. 23,905 (May 4, 2001).

review, the benefits of the proposed project will outweigh any potential adverse effects. Preliminary Determination, 98 FERC at 62,062. GSX had demonstrated a need for the proposed project by presenting agreements for long-term, firm transportation service for the full capacity of the facilities. *Id*. at 62,053.

Among the benefits were increased gas supplies for electric generating plants that would benefit both gas and electric customers. If a lateral line linking the San Juan Islands to the Georgia Strait pipeline were to be constructed, island residents would be able to access natural gas for the first time. In addition, the tap to be installed at Cherry Point should facilitate access to gas supplies by the industrial customers at that site. Finally, increased electric generation on Vancouver Island could be expected to reduce demand on the island for American sources of electric supply, thus enhancing electric supply for the U.S. market. *Id*.

No party filing a brief in the proceeding here requested rehearing of the Preliminary Determination. On June 17, 2002, Whatcom County filed a motion to dismiss Georgia Strait's application (R 208), and on July 17, 2002, the Commission issued the FEIS.

C. The First Order Under Review

The Certificate Order, the first order under review, denied Whatcom County's motion, analyzed the environmental issues, and issued a certificate authorizing the construction and operation of the proposed pipeline. Whatcom County contended that FERC lacked NGA 7 jurisdiction to authorize the project because the gas supply sources and gas end users identified in the application were Canadian, and that the current gas supplies and the configuration of the existing gas infrastructure removed any reasonable possibility that domestic gas would flow through the proposed pipeline.[4]

While the proposed pipeline will primarily move Canadian gas to Canadian customers, Certificate Order, 100 FERC at 30,[5] some amount of the pipeline's capacity will be used to transport gas in interstate commerce in the United States. This is sufficient to invoke FERC jurisdiction. "Because NGA § 7 does not grant the Commission jurisdiction by degree, no matter how small this interstate aspect of the GSX project is when compared to the pipeline's foreign commerce

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[4] Whatcom County agreed that the Commission has NGA § 3 jurisdiction over the border crossing endpoints of the proposed pipeline, contending only that the Commission lacks jurisdiction over the transportation between the endpoints. Under NGA § 3, 15 U.S.C. 717b, ". . . no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so."

[5] All cites to the Certificate, Rehearing, and Reopening (*see infra*) Orders are to paragraph numbers.

transactions," the interstate movement of gas subjects the entire project to Commission oversight under NGA § 7. *Id*.

FERC also found that it was immaterial whether the gas in interstate commerce moves across the interconnection molecule by molecule, or is transported by displacement. Because natural gas is fungible, transportation of a given volume does not always require the physical carriage of an identified amount of gas from its starting point to its destination; rather, the transaction may be completed by an amount of gas entering a pipeline system, and an equal amount of gas being delivered from the system. Transportation by displacement does not produce different jurisdictional results from those for forward haul transportation. Here, the proposed pipeline has an interconnection with Northwest, an interstate pipeline, that constitutes physical and operational integration with the interstate pipeline grid, makes displacement transportation possible, and so renders the proposed project jurisdictional under NGA § 7. *Id*. at 31.

The Commission then considered and adopted the findings and conclusion of the FEIS. *Id*. at 37. Specific mitigation measures had been developed in the FEIS for the construction and operation of the proposed facilities, including a program of environmental inspection and monitoring designed to limit any potential impact to the project vicinity, thus assuring compliance with certificate

requirements related to environmental concerns. The FEIS concluded that these mitigation measures will substantially reduce any environmental impact, and that if the project were constructed and operated in accordance with them, it would be an environmentally acceptable action. *Id*. The Certificate Order also barred GSX from commencing construction unless the National Energy Board approved the portion of the project to be located in Canada. *Id*. at 48.

D. The Second Order Under Review

Whatcom County did not seek rehearing of the Certificate Order and Petitioner Fuel Safe Washington ("FSW") requested rehearing only of environmental issues. FSW Rehearing Request, R 226. The Commission addressed these issues in the Rehearing Order, the second order under review. With regard to noise, the Commission considered the cumulative impact of noise on marine wildlife and had found that noise impacts from routine operation and maintenance activities should be temporary, infrequent, and of an intensity significantly below levels capable of causing any permanent damage. Rehearing Order at 4. Moreover, to ensure that operating noise levels will be acceptable, the Commission required GSX to consult with the U.S. Fish and Wildlife Service ("Fish and Wildlife") and National Marine Fisheries Service ("NMFS") to develop

a plan to monitor sound emitted from the offshore pipeline at normal operating pressures, and to submit results to the Commission prior to construction. *Id.*

The Commission found it unnecessary to assess the cumulative impact of noise attributable to seismic surveys GSX undertook prior to submitting its application. *Id*. at 5. These preliminary activities, which might or might not result in an NGA 7 application being filed, are outside FERC's jurisdiction, but are subject to other applicable federal, state, and local laws.

The Commission also rejected FSW's assertion that it should supplement the FEIS to evaluate recent earthquakes in the project area. *Id*. at 6-7. The FEIS had already identified the area as tectonically active, and the GSX pipeline is designed to withstand earthquakes of a magnitude greater than those FSW cited. An EIS does not need to be supplemented due to an event occurring after its issuance where impacts from the same type of event have already been addressed. *Id*.

FERC similarly rejected FSW's argument that an alternative route of a pipeline located exclusively within Canada should be reevaluated. The DEIS had already considered and discarded four alternatives based on expansions of the

existing Canadian pipeline systems, BC Gas Inc. and Centra Gas British Columbia, Inc. ("Centra"). Rehearing Order at 9.[6]

E. Subsequent Events

On March 17, 2003, FSW petitioned for review in the Ninth Circuit Court of Appeals. The Commission filed a motion to dismiss on grounds of incorrect venue. On July 30, 2003, the Ninth Circuit transferred the case to this Court and on October 17, 2003, the Commission filed the certified index to the record.

On September 3, 2003, FSW requested the Commission to reopen the evidentiary record and to prepare a supplemental EIS. FERC dismissed the request on November 13, 2003. *Georgia Strait Crossing Pipeline LP*, 105 FERC ¶ 61,190 (2003) ("Reopening Order) (attached as Addendum B). Filing the record had already transferred exclusive jurisdiction over the proceeding to this Court, and the Commission no longer had authority to reopen the record, unless directed by the Court. *Id*. at 5; NGA 19(a), 15 U.S.C. 717(a).

The Commission also found that it would not have reopened the record even if it had had jurisdiction to do so. Changes are inevitable after a record is closed,

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[6] FSW also raised on rehearing two arguments it has not raised here: that the Commission should reassess its position on the open cut at Cherry Point and that the Presidential Permit required for transportation of gas between the United States and Canada is in error. The Commission found these arguments meritless. Rehearing Order at 8 and 10.

and a party requesting reopening must demonstrate extraordinary circumstances that outweigh the need for finality in the administrative process. *Id*. at 6. FSW had made no such showing, *id*. at 7, but merely repeated concerns about marine wildlife that had already been addressed in the FEIS and prior orders, or about transportation alternatives that either had already been reviewed or were merely speculative. FERC, nevertheless, reiterated the reasons for its prior conclusions that FSW's concerns had been resolved. *Id*. at 8-15. FSW's subsequent rehearing request was rejected. *Georgia Strait Crossing Pipeline LP*, 106 FERC ¶ 61,002 (2004) (Addendum C to this brief).

SUMMARY OF ARGUMENT

I.

The Court lacks jurisdiction to consider whether the Commission has NGA § 7 authority over the proposed pipeline. A jurisdictional predicate under NGA §19(b) to judicial review of an issue is that the petitioner has raised the issue before the Commission in its request for rehearing. No party requested Commission rehearing of the NGA § 7 authority issue raised here.

II.

Assuming that the issue is reached, the Commission has NGA § 7 authority to certificate the proposed pipeline. The pipeline will interconnect with the interstate pipeline grid and can receive and deliver gas in interstate commerce at the interconnect. It is immaterial for the jurisdictional question whether a particular volume of gas moves across the interconnect physically, molecule by molecule, or is transported by displacement. Displacement has been a recognized form of transportation since at least 1979, and transportation by displacement does not lead to different jurisdictional results from those associated with transportation by forward haul.

The Hinshaw Amendment, which excludes certain transactions from FERC jurisdiction, does not apply here. The Amendment applies only if natural gas

received within or at the boundary of a State is ultimately consumed within the same State. Here, the gas received in Washington will be destined primarily for Canada.

III.

The FEIS fully addressed all reasonable alternatives to the proposed natural gas pipeline, including alternative energy sources such as upgrading the underwater electric transmission cables that serve Vancouver Island, solar power, hydroelectric power, wind-powered electricity generation, and wave energy. None was found to be a feasible alternative. The cable upgrade would be too expensive, and the other energy sources could not provide the quantities of power needed.

Several pipeline route or system alternatives were also analyzed in detail. These were not viable alternatives for environmental and engineering reasons, largely because they involved crossing urban areas or unstable geological areas subject to extensive ground movement during even moderate seismic events.

FSW's contention that FERC failed to consider transboundary environmental effects pursuant to the Transboundary Pamphlet was not raised on rehearing, and so may not be considered on judicial review. In any event, the Transboundary Pamphlet does not require the Commission to consider the environmental effects of the Canadian portion of the project.

The Commission took a “hard look” at the project’s acoustic effects by considering the cumulative impact of noise on marine wildlife. After this hard look, the Commission found that noise impacts from routine operation and maintenance activities should be temporary, infrequent, and of an intensity significantly below levels capable of causing any permanent damage. Noise during construction, albeit of greater intensity, is still expected to be significantly below the level that would cause permanent damage. Emergency repairs could result in higher noise levels, but emergency repairs in a marine environment are exceedingly rare.

The Commission fully considered the potential for earthquake damage to the proposed pipeline. The pipeline will be constructed to comply with engineering standards that include a safety factor that accounts for the chance that earthquakes could exceed anticipated intensities, as well as with all current engineering design protocols as specified in publications such as American Society of Civil Engineers, 1984, Guidelines for the Seismic Design of Oil and Gas Pipeline Systems.

ARGUMENT

I. The Commission Has Jurisdiction Over the Proposed Pipeline.

FSW and Whatcom County contend that FERC lacks NGA 7 jurisdiction over the proposed pipeline, theorizing that either there is no interstate flow of gas, or if there is such flow, the pipeline is exempt from Commission regulation under the Hinshaw Amendment. The Court does not have jurisdiction to consider these arguments because neither party raised them on rehearing before the Commission, as required by the NGA. In any event, the arguments are without merit.

A. This Court Lacks Jurisdiction to Consider Arguments Not Raised Before the Commission on Rehearing.

NGA 19(b), 15 U.S.C. 717r(b), provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." As with other statutory limitations on judicial review, this NGA limitation is jurisdictional and may not be waived. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955) (holding that NGA 19 prerequisites for judicial review must be followed explicitly; court may not raise, *sua sponte*, issue petitioner did not raise on rehearing); *Wisconsin v. FPC*, 373 U.S. 294, 307 (1963) (same). The purpose of the provision is "to afford [FERC] an opportunity to bring its knowledge and

expertise to bear on an issue," and "[the Court] must apply this statute 'punctiliously' to carry out its purpose." *Colorado Interstate Gas Co. v. FERC*, 890 F.2d 1121, 1125 (10th Cir. 1989) (citations omitted).

While conceding that it did not "squarely" raise the issue of FERC's jurisdiction on rehearing and that it had no reasonable ground for its failure to do so, FSW contends that NGA 19(b) does not control because its issue is jurisdictional. Br. at 24-25. FSW is incorrect. Courts (including this one) have routinely required strict compliance with the NGA 19(b) rehearing requirement when jurisdictional issues are raised on review. *See, e.g., Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 156-157 (1960) (refusing to consider issue of whether order was inconsistent with NGA denial of Commission jurisdiction over natural gas production or gathering); *Panhandle Eastern Pipe Line Co. v. FERC*, 324 U.S. 635, 648-49 (1945) (while noting there was controlling precedent on jurisdictional issue, found that failure to raise issue on rehearing precluded petitioner from contending Commission had exceeded its NGA 1 jurisdiction); *Utah Power & Light Co. v. FPC*, 339 F.2d 436, 438 (10th Cir. 1964) (rejecting argument that jurisdictional objections are exceptions to the rehearing

requirement);[7] *City of Oswego, New York v. FERC*, 97 F.3d 1490, 1493-94 (D.C. Cir. 1996) (court barred from considering jurisdictional authority to impose annual fees retroactively because petitioner did not seek rehearing of FERC order); *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 (D.C. Cir. 2003) (court foreclosed from considering whether NGA exempted transportation from regulation because issue not raised on rehearing); *Cal. Dep't. of Water Resources v. FERC*, 341 F.3d 906, 910-11 (9th Cir. 2003) (argument that FERC lacked FPA authority for action at issue rejected because petitioner failed to raise it on rehearing); *Aquaenergy Systems, Inc. v. FERC*, 857 F.2d 227, 229 (4th Cir. 1988) (declining to consider jurisdictional issue because issue was not presented to the Commission).[8]

Moreover, there is no "reasonable ground" for FSW's failure to comply with the rehearing requirement, and FSW offers none. Whatcom County raised the same jurisdictional issues in a motion to dismiss, which the Commission addressed

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[7] The Federal Power Act ("FPA"), at issue in that case, has the same rehearing requirement as the NGA. Substantially identical provisions of the Natural Gas Act and Federal Power Act are to be interpreted consistently with each other. *See Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

[8] *See also Billy J. McCombs v. FERC*, 705 F.2d 1177, 1182-83 (10th Cir. 1980) (determining that court was free to consider whether FERC had NGA authority to issue payback orders because issue had been raised in rehearing request). That decision, which remanded for further proceedings, was subsequently vacated at petitioner's and intervenor's request, 710 F.2d 611 (10th Cir. 1980).

in the Certificate Order. When FSW filed for rehearing of that order, it could easily have requested rehearing of the jurisdictional issues. Because FSW did not do so, this Court lacks jurisdiction to consider them now.

Whatcom County likewise failed to perfect its right to judicial review by not filing a rehearing request. Moreover, as an *amicus*, Whatcom is limited to issues properly brought before the court by the petitioner. *Cf.*, *Cal. Dep't. of Water Resources v. FERC*, 306 F.3d 1121, 1126 and cases cited therein (D.C. Cir. 2002) (absent extraordinary circumstances, intervenors may join issue only on a matter that has been brought before the court by a petitioner).

B. The Commission's Determination That The Proposed Pipeline Will Engage In Interstate Commerce Pursuant to NGA ' 7 Is Correct.

1. Standard of Review

Courts review a federal agency's interpretation of its enabling statute in accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S.C. 837, 842-43 (1984). *Mainstream Marketing Services, Inc. v. FCC*, 2004 U.S. App. LEXIS 2564 at 59 (10th Cir. No. 03-1429, filed February 17, 2004); *Universal Construction Co., Inc. v. OSHA*, 182 F.3d 726, 728-29 (10th Cir. 1999). In reviewing an agency's construction of a statute it administers, the Court must first ask whether Congress has directly spoken to the issue. If so, that is the end of

the matter and Congress' intent controls. If the statute is silent or ambiguous with respect to the issue, the Court's inquiry is limited to whether the agency's interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43. An agency's interpretation of a silent or ambiguous statutory provision is entitled to deference and will be upheld if it is reasonable and consistently applied and does not frustrate the policy sought to be implemented by Congress. *Universal Construction*, 182 F.3d at 729.

2. The Proposed Pipeline Will Engage In Transportation In Interstate Commerce Pursuant to NGA ' 1.

NGA § 1(b) grants the Commission jurisdiction over the "transportation" of natural gas in interstate commerce. NGA 7(c)(1)(A) prohibits constructing or operating pipeline facilities for transportation that is subject to the Commission's jurisdiction without the Commission's authorization.

Here, the Commission found transportation in interstate commerce would occur via backhaul. A "backhaul" is a form of "transportation by exchange" where the transportation service is provided in the opposite direction of the aggregate physical flow of gas along the pipeline. *National Fuel Gas Distribution Corporation*, 93 FERC ¶ 61,276 at 61,897, n.18 (2000) ("*National Fuel*"). Typically, it occurs when the transporting pipeline delivers a shipper's gas at a

point upstream from the receipt point at which the shipper's volumes entered the pipeline's system. *Id*.

Both forward haul and backhaul transportation operate by displacement. *Williams Natural Gas Company*, 59 FERC ¶ 61,306 at 62,119 (1992) ("*Williams I*"), *reh'g denied*, 61 FERC ¶ 61,205 (1992) ("*Williams II*"), *aff'd sub nom. Oklahoma Natural Gas Company v. FERC*, 28 F.3d 1281 (D.C. 1992) ("*Oklahoma III*"). This occurs, as *Williams I* explained, because fungible gas volumes are continuously moving onto and being taken off the pipeline system:

> The interstate pipeline system in the United States resembles a complex, spider web like grid of vast proportion . . . [with] numerous receipt and delivery points throughout its network. With gas constantly being injected into and withdrawn from different points throughout any given system, it is not possible in most instances to trace the progression of specific molecules of gas. The conceptual ideal of transportation from point to point does not match the physical reality . . . .
>
> Both forms of transportation – forward haul and backhaul – operate by displacement . . . Gas may enter and exit a pipeline from many different points. The pressure of the "line pack," which keeps the pipeline filled, is maintained by both the pressure of the gas feeding into the system and by compression along the system's route. . . . The transportation service becomes one of preserving line pack and pressure in the system so that withdrawals of gas by customers can be maintained. Displacement of gas in the system is what effectuates transportation, not the movement of gas from receipt point to delivery point.

Williams I, 59 FERC at 62,119.[9]

Because of displacement, forward haul and backhaul transportation involve the same physical operation. While each is characterized by a receipt point for gas input and a delivery point for gas output, the actual transportation takes place instantaneously through displacement (*i.e.*, as gas enters the system at a receipt point, an equivalent volume of gas exits the system at a delivery point). *Id*. The cosmetic difference is that in forward hauls the delivery point is downstream of the receipt point, while in backhauls, the delivery point is upstream of the receipt point. Transportation by backhaul, exchange, and similar arrangements (*i.e.*, transportation by other than forward haul) constitutes a major portion of interstate gas transportation in the United States. *Id*. at 62,120.

The Commission has long held that delivery of interstate gas by displacement and backhaul constitutes jurisdictional interstate transportation. *National Fuel*, 93 FERC at 61,897, *citing Williams II*, 61 FERC at 61,760, and *Natural Gas Pipeline Company of America*, 15 FERC ¶ 61,254 at 61,586 (1981).

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[9] In this respect, interstate gas transportation is similar to interstate electricity transmission. *Compare*, *New York v. FERC*, 535 U.S. 1, 7-8 (2002) (stating that "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce . . . . .[n.5] . . . [a]s *amici* explained in less technical terms, 'energy flowing onto a power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid.'" [emphasis in the original])

Moreover, for the last 25 years, the Commission's regulations have defined transportation as including backhaul and displacement arrangements.[10]

It is also well settled in the case law that transportation by backhaul does not produce different jurisdictional results from transportation by forward haul:

> [s]ince natural gas is fungible, its 'transportation' does not always take the form of the physical carriage of a particular supply of gas from its starting point to its destination. Just as Western Union can 'transport' money from one place to another by accepting cash at the starting point and paying out different, but equivalent cash at the destination, so too pipelines transport gas by 'backhaul' . . . .

Associated Gas Distributors v. FERC, 899 F.2d 1250, 1254 n.1 (D.C. Cir. 1990). *See also*, *Louisiana Association of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101 (D.C. Cir. 1992) (affirming, *inter alia*, FERC's finding that certificate authorized pipeline to exchange domestic natural gas supplies in its interstate system for imported gas supplies in another pipeline's interstate system); *Tennessee Gas Pipeline Co. v. FERC*, 809 F.2d 1138 (5th Cir. 1983) (Commission's jurisdiction over the transportation at issue rested on backhaul arrangements; no jurisdictional question raised).

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[10] 18 C.F.R. § 284.1, as originally promulgated in 1979, defined "transportation" as including exchange, backhaul, and displacement. *See* 44 Fed. Reg. 52,179 (Sept. 9, 1979). Storage was added to the definition in 1992. *See* 57 Fed. Reg. 13,267 (April 16, 1992).

Here, the record shows that interstate backhaul deliveries can occur. The proposed pipeline will connect with the existing FERC-jurisdictional Northwest pipeline. GSX Application at 2. Gas in interstate commerce can be both received and delivered at this interconnect. Certificate Order at para. 31. The interconnect constitutes physical and operational integration with the existing interstate grid, *id*., and allows backhauls, for example, of Canadian gas to customers in all the states served by Northwest:

> Although the GSX project is designed to physically flow gas in one direction, from Sumas to Vancouver Island, the system will be able to accommodate backhauls by displacement. For example, if Centra [a Canadian pipeline that delivers gas to Vancouver Island] has off-peak excess supply on its system, such supply could be backhauled to markets in the U.S. via displacement of scheduled GSX system deliveries to Centra.

GSX Application at 20; Preliminary Determination at 62,049 n.6. The GSX *pro forma* tariff provides a rate for such backhaul transportation. *Id*. at 62,050 n. 9.

Neither FSW nor Whatcom County disputes the fact that the configuration of the GSX system will support backhaul movements. FSW contends that case law does not support a finding of FERC jurisdiction based solely on backhauls. However, this ignores the *Associated Gas*, *Louisiana Association*, and *Tennessee Gas* decisions cited above. Moreover, the two cases FSW does cite, *Oklahoma I*

and *Oklahoma II*,[11] were not dispositive. In *Oklahoma III*, the third review of FERC's authority over the same facilities, the court affirmed the Commission's exercise of jurisdiction. *Oklahoma III* emphasized that because the lateral at issue was integrated into the Williams Natural Gas Company's interstate system, and Williams could use the lateral to meet the needs of its interstate customers, the lateral was jurisdictional. *Id*. at 1287. Similarly, because the facilities here are integrated into the interstate pipeline grid and can be used to meet the needs of gas consumers in the various states, FERC properly exercised jurisdiction.[12]

FSW's argument, that there are good policy reasons to foreclose Commission jurisdiction over backhaul transactions (Br. at 23), also lacks merit. FSW makes the unsupported assertion that permitting such jurisdiction would "largely render the Hinshaw Amendment a nullity." *Id.* Likewise, FSW's assertion (Br. at 24) that there is no "regulatory gap" because the Washington Utilities and Transportation Commission ("UTC") can regulate construction and operation of the proposed pipeline is similarly unsupported. In fact, UTC, though intervening

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[11] *Oklahoma Natural Gas v. FERC*, 906 F.2d 708) (D.C. Cir. 1990) ("*Oklahoma I*") and *Oklahoma Natural Gas v. FERC*, 940 F.2d 699 (D.C. Cir. 1991) ("*Oklahoma II*").

[12] Whatcom County's argument (Br. at 3), that Powerex currently appears to have no agreements to receive domestic gas or to deliver gas within the United States, fails for similar reasons. The proposed pipeline will be integrated into the interstate pipeline and, as the application stated, can deliver gas to interstate customers.

and filing comments addressing environmental concerns, did not assert jurisdiction over the pipeline. See FEIS at SA1.

FSW admits as much in the same paragraph, by stating that "to the extent backhauling transactions occur, FERC will regulate the transactions under the NGA and NGPA." *Id*. This undercuts FSW's argument that FERC lacks NGA 7 authority over the construction and operation of the proposed pipeline because NGA 7 authority applies where FERC has NGA 1 jurisdiction to regulate the transportation involved. *See* NGA 7(c)(1)(A). FERC's NGA 7 authority is not a matter of degree, *see* Certificate Order at para. 30. Even a relatively small amount of interstate transportation (whether by backhauls or forward hauls) will subject the project to Commission oversight.

3. The Hinshaw Amendment Does Not Apply Here.

The Commission has jurisdiction over interstate natural gas transactions "except those which Congress has made explicitly subject to regulation by the States." *FPC v. Southern California Edison Co*., 376 U.S. at 216. One such exception, the Hinshaw Amendment, provides that the NGA shall not apply to a natural gas company engaged in interstate transportation if: (1) the company receives all gas volumes at or within the boundary of a state; (2) the gas is consumed entirely within that state; and (3) the facilities, rates, and services for

that intra-state transportation are subject to regulation by the state.[13] Congress enacted the Hinshaw Amendment "to preserve state control over local distributors who purchase gas from interstate pipelines." *Louisiana Power & Light Co. v. FPC*, 483 F.2d 623, 633 (5th Cir. 1973) (discussing the history and scope of the Hinshaw Amendment).

Whatcom County and FSW both contend that the proposed pipeline falls under the Hinshaw Amendment. However, as demonstrated above, the pipeline will be moving gas out of Washington State, both into Canada and into other

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[13] The Hinshaw Amendment, NGA § 1(c), 15 U.S.C. § 717(c), removes from NGA jurisdiction:

> any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such transportation or sale, provided that the rates and services of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State Commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of state regulatory power or jurisdiction.

states. Thus, it is not a Hinshaw pipeline under the plain language of the statute, which excludes the transportation from FERC oversight only if all the gas received at the state boundary is consumed within the same state. NGA 1(c); Certificate Order at para. 31. Moreover, the record does not support Whatcom County's contention (Br. at 6) that the pipeline is subject to regulation by the UTC. As discussed above, the UTC has not asserted jurisdiction over the pipeline, nor could it because transportation in interstate commerce is involved.[14]

II. The Commission's Environmental Impact Statement Complied Fully With NEPA Requirements.

A. Standard of Review

FSW's challenge arises under the Administrative Procedure Act ("APA"). A court reviewing agency action under the APA may only set aside that action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). Actions of administrative agencies, like FERC, taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Oregon Resources Council*, 490 U.S. 360, 377-78 (1989). When reviewing determinations by an agency within the agency's special area of expertise, a court "must generally

[14] Whatcom County also contends (Br. at 6-12) that FERC should not extend its NGA § 3 authority to regulate the issue pipeline. As FERC declined to address the scope of its NGA § 3 authority here, there is no need to consider the issue further. See Certificate Order at n. 31.

be at its most deferential." *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 103 (1983). "The inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1030 (10th Cir. 2001) (citation omitted), *cert. denied*, 534 U.S. 1127 (2002).

B. The Commission Fully Addressed All Reasonable Alternatives.

FSW's overarching contention is that the Commission defined the project purpose too narrowly, thus foreclosing a "reasonable discussion of alternatives." Br. at 31. FSW did not raise the scope of the project purpose statement on rehearing, and thus NGA 19(b) precludes consideration of it here. Moreover, as now demonstrated, the Commission examined a broad range of alternatives in detail.

FSW contends first (Br. at 33) that FERC did not seriously consider other options of increasing electricity supply to Vancouver Island. One option FSW cites, *id.*, is upgrading the underwater electric transmission cables to Vancouver Island, but as the FEIS found, this is not a practical alternative:

> If a project sponsor were to replace or upgrade existing cables or were to install new cables, demand for energy production on Vancouver Island could be reduced to the extent that the demand for natural gas could also be reduced. Despite this fact, no such project has been proposed by potential sponsors. Studies by BC Hydro show that generating electricity on the mainland and replacing and upgrading its electric transmission cables would cost about $100,000,000 (Cdn) more than building the GSX Project and

> generating electricity on Vancouver Island. Further, BC Hydro indicates that generation of electricity on Vancouver Island would result in fewer air emissions as more of the electricity generated would be available to consumers rather than being lost during transmission to the island. Because additional electric generation capacity is needed throughout the region, new power plants would need to be sited. The GSX Project would avoid environmental impacts associated with constructing and operating new generation facilities at sites on the mainland.

FEIS at 4-3. Thus, not only would the cost be higher, but also the environmental impact might be greater due to the need to site new generation plants to serve the growing demand for electric energy

FSW also contends (Br. at 34) that FERC failed to seriously consider alternative energy sources (i.e., other fuels, solar power, the Vancouver Island Green Project,[15] hydroelectric power, wind-powered electricity, and wave energy). However, on rehearing, neither FSW nor any other party contradicted the FEIS findings that none of these energy sources has the potential to provide quantities of energy anywhere close to the quantities of the proposed project. *See* FEIS at 4-2. As the FEIS indicates, solar power is not a reliable energy source on Vancouver Island because of the lack of sunny days, the few good wind-generation sites are in

[15] This project comprises approximately ten MW of wind-generated electricity, six to eight MW of small-scale hydroelectric generation, and three to four MW of ocean-wave generated energy. The combined total generation capacity will be less than five percent of the equivalent energy delivered by the proposed GSX project and thus could not replace the need for the project. FEIS at 4-2.

remote and rugged locations, the possible hydroelectric projects would be small-scale, intermittent energy providers, and wave energy is still in the research stage. *See* FEIS at 4-1 to 4-3. Thus, they do not provide viable alternatives to the project. FSW's argument that FERC was remiss in its treatment of these alternatives is in error.

FSW is also wrong in contending (Br. at 35) that the Commission refused to analyze route alternatives that are located entirely in Canada. The DEIS identified and discussed four route alternatives, three of which were entirely in Canada. DEIS at 4-4 to 4-8. Two of the all-Canada routes were not viable alternatives for environmental and engineering reasons, largely because they involved crossings of urban areas, forest land, provincial parks, and major waterbodies, and rugged, unstable topography. DEIS at 4-6. The third all-Canada alternative appeared environmentally preferable but was not feasible from an engineering perspective because it would cross unstable areas subject to extensive ground movement during even moderate seismic events. *Id*.

In addition, subsequent to issuance of the DEIS and at the request of the Canadian government, GSX-Canada commissioned a detailed hydraulic analysis and capital cost comparison of expanding the existing Canadian Centra and BC Gas systems to meet the objectives of the GSX system. FEIS at 4-10. This

analysis of alternative *systems* incorporated many of the components the DEIS had evaluated as all-Canadian *route* alternatives. *Id*. As expansion of the existing Centra and BC Gas systems would result in far less environmental impact than constructing a new pipeline across Canada, the Commission reasonably concluded that the all-Canadian *route* alternatives, which would require building a new pipeline, should not be considered further. Instead, FERC considered the all-Canadian *system* alternatives. FEIS at 4-10; *see also* detailed discussion of the system alternatives in the FEIS at 4-4 to 4-10. Consequently, FSW's contention (Br. at 36) that the Commission "summarily dropped [the Canadian] route alternatives from the EIS" is wrong.

On the adequacy of FERC's detailed analysis of the Canadian *system* alternatives, FSW now argues that the Commission ignored the "important distinction" that the GSX Project will impact United States property while the Canadian system alternatives will not. Br. at 37-38. FSW did not raise this argument on rehearing and under NGA 19(b), the Court may not consider it. Nevertheless, good reasons justify not taking FSW's "stick-it-to-the-Canadians" approach. The United States imports far more natural gas from Canada than

Canada imports from the United States.[16] Thus, building a pipeline on United States territory creates an additional opportunity to take advantage of Canadian gas resources.[17]

FSW also contends that "multiple commentators recognized FERC's failure to adequately address alternatives." Br. at 38. FSW's cites only two: the EPA and the Washington Department of Ecology ("WDOE"). WDOE commented on the DEIS, but not on the FEIS, so presumably the FEIS satisfied its concerns with FERC's initial analysis of alternatives.

FSW's statement (Br. at 40) that "FERC ignored [EPA's] commentary" is incorrect. The Certificate Order observed that EPA preferred expanding an existing system. Certificate Order at 41. But, in the United States, the only possibility, the ARCO pipeline, is currently operating at full capacity. This means any expansion would require looping another pipeline to the existing line or replacing the line with larger diameter pipe. Neither is a good alternative because the existing corridor runs through residential areas. Certificate Order at 41.

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[16] In 2002, for example, the United States imported over 4,000 billion cubic feet of natural gas, the majority of it from Canada, and exported only 516 billion cubic feet, the majority of it going to Mexico (by pipeline or liquefied natural gas ("LNG")) or Japan (by LNG). *See* the Energy Information Administration website, http://www.eia.doe.gov/neic/quickfacts/quickgas.htm.

[17] FSW's point here would also seem to be inconsistent with FSW's complaint, discussed *infra*, that the FEIS failed to analyze the transboundary effects of the project.

Similarly, expanding Canadian systems would have greater adverse impacts than the proposed GSX project. Enlarging the Centra system would require a longer route and placing a compressor in a residential area, and would affect more sensitive environmental resources including residences, mountains, forests, major rivers, a provincial park, and a wildlife sanctuary. *Id*. at 42. By comparison, the proposed pipeline avoids most residences, crosses no major rivers, and is mainly in flat, agricultural land. *Id*.

Similarly, extending the existing BC Gas system presented engineering difficulties and geotechnical hazards. *Id*. at 43. Moreover, it would not offer, as the proposed pipeline does, the option to provide deliveries of gas to American customers. *Id*.

C. The Commission's Treatment of Transboundary Effects Was Appropriate.

FSW contends FERC failed to consider transboundary effects (Br. at 41) pursuant to the that Transboundary Pamphlet,[18] and that the Court should remand so that the Commission "can properly analyze the effects of the GSX Project in Canada" (Br. at 45). However, FSW did not raise this issue on rehearing, and thus the Court lacks jurisdiction to consider it now.

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[18] The Pamphlet is found in Tab H to the Pamphlet to Petitioner's Opening Brief.

In any case, FSW's argument is without merit. Although FSW complains that FERC's discussion of "the transboundary impacts of the GSX Project's 37.4 miles of pipeline in Canada" totals only four and a half pages, Br. at 42-43, FSW fails to acknowledge the Pamphlet does not require any analysis of Canadian facilities. The Transboundary Pamphlet does not expand the range of actions to which NEPA applies, but pertains only to proposed federal actions that: (1) take place within the United States and its territories, and (2) "may have transboundary effects extending across the border and affecting another country's environment." Pamphlet at 1. Thus, it does not require FERC to analyze the environmental impact of the GSX-Canada project's 37.4 miles to be constructed in Canada.

FSW's argument that the Commission failed to heed the EPA and WDOE regarding transboundary effects (Br. at 43) also misses the mark. WDOE commented on the DEIS, but did not either comment on the FEIS or seek rehearing of the Certificate Order.[19] Presumably, WDOE found FERC's final environmental analysis satisfactory.

And, again, while FSW notes EPA concern about a perceived lack of coordination between FERC and the Canadian government (see Br. at 43), FSW's brief ignores the fact that FERC's Certificate Order addressed this concern, stating

[19] WDOE was an intervenor, *see* Appendix A to the Preliminary Order, and could have sought rehearing had it deemed rehearing necessary.

that the Commission had coordinated with Canada's National Energy Board ("NEB") and Joint Review Panel. Certificate Order at 44. Moreover, the Commission prohibited GSX from beginning construction until the NEB approved the GSX Canada project. *Id*. at 48.

D. The Commission Took a "Hard Look" at the Project's Acoustic Effects.

FSW also complains that FERC did not adequately consider the effect of noise. Br. at 45. However, the FEIS considered thoroughly the specific impact of noise on marine wildlife (3-58 to 3-60), fish (3-69 to 3-70), and marine invertebrates (3-87 to 3-88). Increased noise levels during construction would be temporary, and research has indicated that marine mammals habituate to noisy environments. FEIS at 3-58. Noise may cause fish to avoid the construction area, but that, too, would be temporary and localized. *Id.* at 3-69.

When operating, the pipeline is expected to produce low-frequency, low-energy sounds, with intensity levels less than those generated by vessels and general wave turbulence. *Id*. at 3-58 to 3-59. Noise from typical commercial vessels that are within three miles of the pipeline would be expected to mask any sounds emitted from the pipeline. *Id*. at 3-59. Given the more or less continuous vessel traffic in the Strait of Georgia, noise from the pipeline would be largely below ambient levels.

The FEIS found further that the only marine mammals in the project area that are likely to detect sound from the pipeline are baleen whales that may occasionally move through the area. *Id*. at 3-59. However, because the sounds are at such a low intensity level, they are unlikely to cause the whales to avoid the area. *Id*. Based on a Washington Department of Natural Resources ("WDNR") screening level risk assessment, the effects on herring or marine fish from pipeline noise are also expected to be negligible to low. *Id*. at 3-73. Noise associated with pipeline operations do not appear to affect marine invertebrates at all, and visual surveys of underwater high pressure gas pipeline found numerous invertebrates adjacent to the pipeline. *Id*. at 3-87 to 3-88.

FSW's several objections to the Commission's noise analysis were not raised on rehearing. Outside of a general statement that the FEIS failed to provide a cumulative assessment of pipeline noise levels, FSW's rehearing mentions with specificity only that FERC had not considered the impacts of the seismic surveys that GSX conducted prior to filing its application. FSW Rehearing Request, fourth page. As a rehearing request must "set forth specifically the ground or grounds upon which" it is based, *see* NGA § 19(a), the issues raised on appeal by FSW, which go beyond the impacts of the seismic surveys, should not be considered further.

In any event, contrary to FSW's contention (Br. at 45), the Commission considered the acoustic effects of pipeline repair. FERC found that repair work associated with typical operation and maintenance would likely result in impacts similar to construction. As discussed above and in the cited portions of the FEIS, such results are likely to be temporary and localized. Moreover, repair work will have to comply with applicable environmental statutes. FEIS at 2-24 to 2-25 and SA3-20.

FERC also recognized that the environmental impacts associated with emergency pipeline repair could exceed those during the original pipeline construction, but found that emergency repairs within a waterbody are exceedingly rare.[20] *Id*. at SA3-20. FSW's brief responds by listing reportable ruptures and leaks in pipelines owned by Williams. Br. at 48. Placed in context, the small number of incidents listed is relatively insubstantial compared against the large number of miles of pipeline operated by these subsidiaries. Northwest Pipeline operates about 3,900 miles of natural gas pipeline and has had only 14 reportable incidents since 1991; Williams Gas Pipeline-Central, 6,000 miles, 17 reportable

[20] FSW's brief, at 47, argues that FERC's analysis of the general environmental effects of repair was lacking. This argument goes far beyond the limited issues raised in FSW's rehearing request about the noise effects of the pre-application seismic surveys. Further, FSW's rehearing request raised no issues about the general environmental impacts of repairs.

incidents since 1991; Transcontinental Gas Pipeline, 10,500 miles, five reportable incidents since 1995; and Texas Gas, 6,000 miles, two reportable incidents since 1995. FEIS at 3-153 to 3-154.

FSW's suggestion (Br. at 48) that FERC lacks data to support its statement that emergency repairs for underwater projects are rare is off the mark. As demonstrated above, reportable incidents are not frequent. Most of them are caused by outside forces, particularly equipment such as bulldozers and backhoes operated by either the pipeline operator or outside parties. *See* FEIS at 3-151 and Tables 3.13.2-1 and 3.13.2-2. Marine pipelines are not subject to these dangers.

FSW also complains (Br. at 49) that FERC's recommendation that GSX perform a post-approval analysis of acoustic impacts of the offshore pipeline does not satisfy NEPA. However, as demonstrated above, the FEIS relied on existing scientific research to conclude the noise generated by pipeline operations was unlikely to disturb marine life. That is sufficient information for a NEPA evaluation. FERC should not be faulted for going beyond NEPA requirements to seek information that may be useful in the future.

Finally, FSW contends that FERC failed to analyze: 1) the cumulative acoustic effect of the project in light of noise already in the marine environment; 2) the cumulative acoustic effect of the pipeline in light of reasonably foreseeable

future projects; and 3) the pipeline's cumulative non-acoustic environmental effects in the marine environment. Br. at 51-56. The Court lacks jurisdiction to consider these objections because none of them were raised with specificity by FSW's rehearing request.

In any event, the objections lack merit. As discussed *supra* at 36-38, the noise from pipeline operations in the marine environment is expected to have a negligible effect on marine mammals, fish, and marine invertebrates. This is reflected in FEIS Table 3.14-1 which summarizes the existing or proposed activities having a cumulative effect on the relevant resources. The table indicates that the only aspect of the proposed pipeline that will cumulatively affect noise levels will be the Sumas compressor station to be constructed in an agricultural field, not in the marine environment. See Table 3.14-1, FEIS at 3-155.

FSW summarizes FERC's analysis as stating that "the sum of all present and future projects in the area will not combine to affect marine resources to any significant degree because these resources may go elsewhere." Br. at 54. FSW's summary is not accurate. The FEIS considered the current research on the effects of noise on marine life and concluded that the low frequency and low intensity of sound from pipeline operations would have a negligible effect, either alone or on a

cumulative basis.[21] Only during the construction phase, and possibly some repair phases, will sufficient noise be generated that might cause movement of marine species away from the area. These phases are infrequent and temporary, and their impact on marine species is expected to be the same. The FEIS analysis thus left the decision maker with sufficient facts to determine whether a temporary acoustic effect on marine species outweighs building a pipeline that will provide additional, needed energy sources. Contrary to FSW's contention (Br. at 55-56), the FEIS analysis was sufficient to warn a decision maker of the possible adverse consequences of the construction and operation of the pipeline.

FSW's contention that FERC failed to analyze the cumulative non-acoustic environmental effect of the proposed pipeline, Br. at 57, was not one of the four arguments FSW raised on rehearing, and the Court thus lacks jurisdiction to hear it. In any event, FSW's statement, Br. at 57, that the Commission "devotes a total of five additional sentences to the analysis of the project's non-acoustic cumulative impacts" is inexplicable. The FEIS devotes almost seven pages, mostly on non-acoustic topics, to the cumulative effects, *see* FEIS at 3-154 to 3-160. The analysis demonstrates that there will be little cumulative environmental effect from the

[21] In fact, the pipeline would have some positive effects in that the portion of pipeline in deep offshore areas will be colonized by invertebrate species, increasing diversity and prey resources for both vertebrate and invertebrate species. FEIS at 3-86.

proposed pipeline. For example, any water quality impacts from construction will be temporary until restoration is completed. FEIS at 3-157. Moreover, the impact on vegetation and wildlife will be minimal because the project will be primarily located in agricultural and open space habitats that have already been extensively fragmented. A majority of both the temporary workspace and permanent right-of-way will revert to preconstruction land uses. *Id*.

The FEIS also considered visual factors, finding that the pipeline would not affect the visual qualities of the area (which include views of snow-capped mountains and dense forests) and that the above-ground Cherry Point Compressor Station and other prospective facilities will be constructed adjacent to existing industrial sites. *Id*. at 3-158. While there would be little direct impact on air pollution from the project, indirectly the GSX Project could result in a cumulative impact on the region's air pollution by providing gas for electric generation facilities. The FEIS notes, however, that the demand for energy in the area cannot be met by currently available or alternative non-polluting sources of energy, and that any new electric generation facilities would have to comply with strict United States or Canadian regulations. *Id*. at 3-160. In sum, FSW's argument, that FERC failed to consider cumulative environmental effects, is without merit.

E. The Commission Fully Considered the Potential Impact of Earthquakes on the Project.

FSW contends that FERC never properly considered the consequences of all reasonably foreseeable earthquakes, ignored comments from EPA and WDNR, and authorized GSX to build a pipeline to an inappropriate standard. Br. at 61-64. FSW overlooks the Commission's response to the comments in both the FEIS and the Certificate Order on these matters.

The information presented in section 3.1.2 of the FEIS indicates that there is a ten percent chance over the next 50 years of an earthquake capable of producing ground motions that would exceed the pipeline design parameters, not pipeline design standards. FEIS at FA1-16; Certificate Order at 45. Engineering design standards include a safety factor in case natural phenomena could exceed the design parameters. GSX-US designed the pipeline to conform with current engineering design as specified in the following publications: (1) American Society of Civil Engineers, 1984 Guidelines for the Seismic Design of Oil and Gas Pipeline Systems; (2) Canadian Standards Association, Section 11.2.4., 1999, CSA-Z662-99, "Oil and Gas Pipeline Systems;" and (3) American Petroleum Institute, 1999, RP 1111 – "Design, Construction, Operation, and Maintenance of Offshore Hydrocarbon Pipelines" (Limit State Design). FEIS at FA1-16; Certificate Order at 45, n.37.

In addition, the proposed pipeline will be constructed to meet Federal standards outlined in 49 C.F.R. § 192. FEIS at 3-3. These regulations govern the construction and operation of natural gas pipelines throughout the country, including areas with equal or greater seismic hazards. *Id*. Moreover, a recent study of earthquake performance data in southern California indicates that well-maintained pipelines constructed using modern techniques have performed well in southern California earthquakes. FEIS at 3-3. Consequently, FSW's contention that the FEIS should be remanded for further earthquake study should be rejected.

III. The Motion of Georgia Strait Crossing Concerned Citizens Coalition for Leave to File an *Amicus* Brief Should Be Denied.

The motion for leave to file an *amicus* brief should be denied because the Coalition seeks to expand the issues on review. One seeking to intervene or to present an *amicus* brief may join issue only on a matter that has been brought before the court by another party. *California Dept. of Water Resources v. FERC*, 306 F.3d at 1126, *quoting Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990), *citing Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues"). Here, the Coalition seeks to inform the Court of events which occurred after the Commission issued

the orders under review.[22] Petitioner FSW has not raised these matters, and the Coalition's attempt to expand the issues in the proceeding must be rejected.

Moreover, the Coalition concedes (Motion at 2) that FSW previously presented at least some of this information to the Commission in its September 8, 2003 request to reopen. As discussed, *supra* at 12-13, FERC dismissed FSW's request to reopen the record, FSW sought rehearing, and rehearing was denied. FSW could have sought judicial review of those orders, but did not do so. Thus, the Coalition's argument (Motion at 2), that there was "no forum" in which the information could be heard, is not accurate.

Additionally, as the purpose of the Coalition's brief is to present extra-record, post-decision material, the brief should be rejected as irrelevant. Judicial review of FERC orders is limited to the record before FERC. Obviously, the challenged orders did not address events that occurred after those orders were issued. Information that was not before the Commission when the orders issued is not part of the agency record, and cannot be the basis for determining whether the orders meet the "arbitrary and capricious" standard. *Citizens to Preserve Overton*

[22] The orders under review were issued on September 20, 2002 and January 13, 2003. The Coalition seeks to submit information pertaining to Canadian proceedings that took place between February and November, 2003. *See* Coalition brief at 3-4.

Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (the basis for review required by APA § 706 is the "whole record" compiled by the agency).

Changes, of course, are inevitable after records close. If events of sufficient significance to require reversal of orders occur after the orders are final, parties may seek reopening (as FSW did), and petition for review if they are dissatisfied with the Commission's response. Here, the Coalition submitted comments to FERC on the DEIS (*see* Motion at 3), and could have just as easily intervened in the Commission proceeding, subsequently requested reopening, and sought review if its request were denied. Instead, the Coalition avoided that process by filing an *amicus* brief asking the Court to determine whether the challenged orders are arbitrary and capricious on the basis of extra-record information and events that occurred after the orders issued. *See* Coalition's brief at 3-4.[23] This the Court may not do.

The Coalition cites several cases for the general proposition that new information may warrant a supplemental EIS. Br. at 6-7. However, these cases all assume that the agency had a chance to consider the new information first.[24] Here,

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[23] Moreover, to the extent the Coalition relies on information addressed in the Reopening Order, it is mounting a collateral attack on a final order for which the time for petitioning for review has expired.

[24] *See*, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000) (Forest Service refused petitioners' demand that it prepare a supplemental EIS);

the Coalition complains that FERC "failed" to consider new information from the Canadian review of the GSX-Canada project, Br. at 7, even though the Canadian review was not completed until after FERC's decisions issued. The Coalition also ignores the fact that it has never presented the information contained in its brief to the Commission.

The Coalition is wrong in its contention (Br. at 7) that the British Columbia Utilities Commission's ("BCUC") denial of a certificate for the electric generation project "requires FERC to reconsider its decision."[25] The Commission anticipated this possibility by prohibiting GSX from commencing construction until the Canadian NEB approved the proposed GSX-Canada facilities. Certificate Order at

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Citizens Committee to Save Our Canyons v. United States Forest Service, 297 F.3d 1012 (10th Cir. 2002) (Citizens Committee participated in the Forest Service proceedings, including filing an administrative appeal); *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002) (in determining whether an agency took a "hard look" at new information, courts may consider whether agency obtained expert opinion or otherwise provides a reasoned explanation for the new circumstance's lack of significance); *Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984) (finding that over half of the new items of information relied upon by the trial court were not available until after the Navy decisions had been made and could not possibly form the basis for finding the Navy in default of its NEPA duties); and *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 379 (Army Corps of Engineers responded to claim that new information required a supplemental EIS).

[25] FSW also informed the Commission of the denial in its December 16, 2003 Petition for Rehearing of the Commission's Order Dismissing Request to Reopen the Record.

44. As the NEB has conditioned its approval on the electric generation project being built, *see* Coalition Br. at 4, a supplemental EIS is unnecessary, given that the challenged orders have already considered the possible change in the need for the proposed project by forbidding construction if Canadian approvals are not obtained.

The Coalition's argument (Br. at 11) that the Commission "never evaluated" the possibility of a new underwater electric transmission cable is incorrect. *See* discussion, *supra* at 31; FEIS at 4-3. Moreover, the single sentence quoted by the Coalition from the 84-page BCUC decision,[26] stating that the cable "may be the best reliability reinforcement if on-Island generation becomes prohibitively expensive" does not support reopening of the FERC proceeding. The sentence pertains only to economic and reliability factors, not to the relative environmental consequences addressed in the FERC proceeding. *See* FEIS at 4-3 (stating, among other things, that generating electricity on the mainland and replacing the transmission cables would result in greater air emissions because of the additional generation required to compensate for electricity lost in transmission).[27]

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[26] The decision may be accessed through the BCUC website: http://www.bcuc.com/.

[27] In fact, the BCUC apparently does not have authority to address environmental matters. See BCUC decision at 47 (stating that because its authority

The Coalition also contends (Br. at 12) that the Court should vacate or remand so that FERC may consider the alternative of an expansion of Terasen Gas (formerly Centra). When FSW presented that alternative, the Reopening Order explained that there was no assurance that the Terasen alternative would prove environmentally preferable. Reopening Order at 9. Moreover, although the FEIS had not considered the exact scenario presented in FSW's reopening request, the FEIS did address two alternative Terasen system expansions, and found neither alternative to be environmentally preferable to the GSX proposed project. FEIS at 4-4 to 4-7. Thus, the Commission had a reasoned basis for the doubts expressed in the Reopening Order as to the environmental desirability of Terasen expansions.

The Reopening Order declined to reopen for the additional reason that Terasen had not yet presented a proposal for authorization, so that the expansion was speculative. Reopening Order at 9. FSW did not seek judicial review of this order. The Coalition's brief, which indicates that Terasen still has not submitted a proposal (Br. at 15), does not contradict this, and is nothing more than a collateral attack on an order for which the time for appeal has expired.

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to consider environmental impacts is limited to costs that are likely to emerge as unavoidable costs for the utilities, BCUC leaves environmental issues to the Environmental Assessment Office).

In any event, the Coalition's brief indicates that BCUC will not approve the generating plant unless it is satisfied that the gas transportation alternatives for the plant are acceptable and that the plant is economically preferable to other alternative energy sources. The Commission has conditioned its certification of the proposed pipeline on Canadian approval of the GSX-Canada project. Certificate Order at 48. If, as the Coalition seems to suggest, the Canadian authorities will approve energy alternatives that do not include the GSX-Canada project, the FERC order already precludes building of the proposed pipeline. Under these circumstances, even if the Coalition brief could properly be considered by the Court, the Coalition's request that the challenged orders be vacated or remanded should be denied.

CONCLUSION

For the foregoing reasons, the Coalition's motion to file an amicus brief should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28.2(C)(4), the Commission respectfully requests oral argument. Oral argument will be useful to the Court because the appeal involves the Natural Gas Act, which the Commission administers, and lengthy orders and environmental impact statements issued by the Commission.

Fuel Safe Washington v. FERC **Docket Nos. CP01-176 et al.**
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 10,075 words, as counted by my word processor, Microsoft Word.