ORAL ARGUMENT IS SCHEDULED FOR APRIL 15, 2005

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

No. 04-1079

THE BROOKLYN UNION GAS COMPANY
D/B/A KEYSPAN ENERGY DELIVERY NEW YORK *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

DENNIS LANE
SOLICITOR

CAROL J. BANTA
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

DECEMBER 22, 2004
FINAL BRIEF: FEBRUARY 10, 2005

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The parties are as stated in Petitioners' brief.

B. Rulings Under Review

1. *Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-000, 104 FERC ¶ 61,008 (2003); and

2. *Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-001, 106 FERC 61,013 (2004).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is aware of one consolidated case before this Court, *Independent Oil & Gas Ass'n v. FERC*, Nos. 05-1016 and 05-1023, that arises from a related rate proceeding referenced in this Brief.

Carol J. Banta
Attorney

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

GLOSSARY

1999 Settlement	Joint Stipulation and Agreement approved in Docket Nos. RP97-346-018, *et al.*, *see Equitrans, L.P.*, 87 FERC ¶ 61,116 (1999)
2003 Settlement	Stipulation and Agreement, dated March 25, 2003, R. 18, JA 107-25
Commission or FERC	Federal Energy Regulatory Commission
Equitrans	Equitrans, L.P.
Initial Order	*Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-000, 104 FERC ¶ 61,008 (2003), JA 243-59
IOGA	Independent Oil and Gas Association of West Virginia
KeySpan	Petitioners The Brooklyn Union Gas Company d/b/a KeySpan Energy New York; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island; and Boston Gas Company, Colonial Gas Company, EnergyNorth Natural Gas, Inc., and Essex Gas Company, all d/b/a KeySpan Energy Delivery New England
NGA	Natural Gas Act
Orders	Collectively, Initial Order and Rehearing Order
Petitioners	Collectively, KeySpan and PSEG
PSEG	Petitioner PSEG Energy Resources & Trade LLC

GLOSSARY

Rehearing Order	*Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-001, 106 FERC ¶ 61,013 (2004), JA 275-81
Trailblazer I	*Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110 (1999)
Trailblazer II	*Trailblazer Pipeline Co.*, 106 FERC ¶ 61,034 (2004)

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

No. 04-1079

THE BROOKLYN UNION GAS COMPANY
D/B/A KEYSPAN ENERGY DELIVERY NEW YORK, *et al.*,
PETITIONERS,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly declined, in the absence of exceptional circumstances: (1) to approve a contested settlement that, by its terms, would have "terminate[d]" and declared to be "of no further force and effect" a prior FERC-approved rate settlement; and (2) to sever issues raised by the objecting party for separate litigation.

COUNTERSTATEMENT OF JURISDICTION

In addition to satisfying the requirements of Section 19(b) of the Natural Gas

Act ("NGA"), 15 U.S.C. § 717r(b), for judicial review of FERC rulings, Petitioners must also satisfy the requirements of Article III of the United States Constitution to show that they have standing. Petitioners lack standing because their asserted injury (avoidance of a rate case) may not be redressed by a favorable decision of this Court, in light of an ongoing FERC rate case. Nor have Petitioners met the statutory prerequisites under NGA § 19(b) for several issues they now raise because they failed to raise them on rehearing.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns a FERC order rejecting a contested certificate settlement that, by its terms, would have abrogated a prior rate settlement approved by the Commission. The Independent Oil and Gas Association ("IOGA"), which was a party to the prior settlement but not to the instant settlement, objected to the proposed abrogation. Petitioners, consenting parties to the proposed settlement, seek to overturn FERC's rejection.

The prior rate settlement, approved in 1999, among Equitrans, L.P. ("Equitrans"), an interstate natural gas pipeline, and all affected parties, maintained

Equitrans's then-existing rates through July 31, 2003, and required Equitrans to file an NGA § 4 rate case to establish rates to take effect on August 1, 2003. On March 25, 2003, Equitrans filed the instant settlement related to its proposed acquisition of certain FERC-jurisdictional facilities, that would, *inter alia*, (1) keep Equitrans's existing rates in effect until at least March 31, 2005, (2) relieve Equitrans of the obligation to file an NGA § 4 rate case at any time, (3) deem the requirement in the prior settlement that Equitrans file a rate case would be "satisfied" and "of no further force and effect," and (4) "terminate" the prior rate settlement. IOGA opposed those provisions.

The Commission determined that the contested settlement should not be approved because IOGA's objection went to the heart of the proposed settlement — to wit, the negation of Equitrans's prior settlement obligation to file an NGA § 4 rate case for rates to be effective August 1, 2003. The Commission further concluded that severing IOGA from the settlement to litigate a separate rate proceeding would not adequately address IOGA's concern about losing the benefit of the prior bargain and would not necessarily save time or expense. With respect to the policy implications of approving a contested settlement that, by its terms, would nullify a prior settlement, the Commission concluded that rejecting the contested settlement would assure parties that their settlement bargains will not be nullified or superseded without their consent. The Commission denied Petitioners' requests for rehearing for the same reasons.

This appeal followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

The NGA confers upon FERC jurisdiction to regulate (1) the transportation and sale for resale "of natural gas in interstate commerce" and (2) "natural-gas companies engaged in such transportation or sale." NGA § 1(b), 15 U.S.C. § 717(b).

NGA § 7, 15 U.S.C. 717f, requires a natural gas company to obtain permission and approval from FERC before abandoning any portion of its FERC-jurisdictional facilities, and to obtain from FERC a certificate of public convenience and necessity before acquiring or operating any such facilities. NGA § 7(b) and (c), 15 U.S.C. § 717f(b) and (c).

The NGA also gives FERC rate authority over natural gas companies. NGA § 4, 15 U.S.C. § 717c, governs rates proposed by pipelines. Under § 4, the Commission may suspend the effectiveness of proposed rates for a five-month period and make those rates subject to refund if the pipeline fails to sustain its burden of proof that the proposed rates are just and reasonable. *See, e.g., East Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988). Section 5(a), 15 U.S.C. § 717d(a), governs rate changes sought by the Commission on its own initiative or by third-party complaint.

The complex rate and regulatory issues arising from pipeline rate filings are frequently resolved by settlements. The Commission has long taken the view, as has this Court, that settlements are in the public interest and should be encouraged. *See, e.g., United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984) ("*UMDG*"); *Pennsylvania Gas & Water Co. v. FPC*, 463 F.2d 1242 (D.C. Cir. 1972). Under Rule 602(g)(3) of FERC's Rules of Practice and Procedure, the Commission may approve an *uncontested* offer of settlement if it finds that the settlement is fair and reasonable and in the public interest. 18 C.F.R. § 385.602(g)(3) (2004). The Commission may also adopt a *contested* settlement as to those parties supporting it. *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 312 (1974). Contested issues or parties may be severed for separate treatment, so as to preserve the benefit of the bargain for the settling parties, and to provide the contesting parties an opportunity to have their objections decided on the merits. 18 C.F.R. §§ 385.602(h)(1)(iii) and 385.602(h)(2)(iv) (2004); *UMDG*, 732 F.2d 202 (affirming FERC orders severing contested party). If the Commission finds that the contesting parties or contested issues cannot be severed from the settlement, it may "[t]ake other action which the Commission determines to be appropriate." 18 C.F.R. § 385.602(h)(1)(ii)(B) (2004).

B. The Commission Orders

On May 20, 2002, Equitrans and Carnegie Interstate Pipeline Company ("Carnegie"), affiliated interstate pipelines, filed an NGA § 7 application for abandonment and certificate authority to allow Equitrans to acquire Carnegie's jurisdictional facilities by merger and to assume its jurisdictional service obligations. R. 1, JA 14.[1] After several parties intervened and raised issues in response to the application, Carnegie and Equitrans filed an offer of settlement on March 25, 2003 (the "2003 Settlement"), to address those issues. R. 18, JA 107. The 2003 Settlement, at issue here, provided, in the parts pertinent to this appeal, that:

> (A) Equitrans would waive its right to file a general Section 4 rate case so that Equitrans's and Carnegie's existing rates would remain in effect until March 31, 2005;
>
> (B) The requirement of the previous 1999 settlement[2] that Equitrans file a general Section 4 rate case to place new rates in effect on August 1, 2003, would be deemed satisfied and of no further force and effect;
>
> (C) If Equitrans chose not to file a general Section 4 rate case at the end of the rate moratorium period provided by the 2003 Settlement, Equitrans could still submit a single-issue rate filing under Section 4 to recover certain post-retirement benefits through a surcharge, and the parties would reserve their right to challenge its cost accounting methodology;
>
> (D) If FERC approved the settlement without modification,

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

[2] *See Equitrans, L.P.*, 87 FERC ¶ 61,116 (1999) (approving Joint Stipulation and Agreement in Docket Nos. RP97-346-018, *et al.* ("1999 Settlement")).

> Equitrans's previous rate settlement would terminate and be of no further force and effect.

See R. 18, JA 111-13.

IOGA opposed the 2003 Settlement on the grounds, *inter alia*, that it would terminate the contractual obligations under the 1999 Settlement without the consent of all parties thereto. *See* R. 25, JA 150. IOGA's objections centered on its agreement as part of the 1999 Settlement to accept increases in Equitrans's rates in exchange for Equitrans's undertaking to file a general Section 4 rate case to establish new rates to be effective no later than August 1, 2003. *See* R. 25 at p. 2; *id.* at p. 3 ("IOGA made significant rate concessions . . . . [Equitrans's rate] filing obligation was an integral component of the settlement to IOGA."), JA 151-52. Under the 2003 Settlement, however, Equitrans would *never* have to file a general Section 4 rate case. *See id.* at p. 4, JA 153. Therefore, approving the settlement would "upset[] the integrated bargain of the 1999 Settlement and severely abridg[e] IOGA's rights and expectations under that settlement." *Id.* at p. 5, JA 154. IOGA contended that, absent special circumstances, the Commission must enforce the 1999 Settlement, and that a settlement could be abrogated only if (1) all parties thereto agreed or (2) the Commission made the requisite NGA § 5 public interest findings. *See id.* at p. 4, JA 153. IOGA further argued that severance of IOGA would be inappropriate. *See id.* at p. 9, JA 158.

IOGA also submitted an analysis asserting that Equitrans's 1999 Settlement rates were no longer just and reasonable. *See* R. 25 at p. 7, JA 156; R. 25, Exhibit A, JA 162-81. IOGA argued that the 1999 Settlement obligation for Equitrans to submit an NGA § 4 rate case was necessary to address whether rolling in the costs and volumes of the Carnegie acquisition and a previous acquisition would reduce Equitrans's rates. *See* R. 25 at pp. 7-8, JA 156-57.

A July 1, 2003 order rejected the 2003 Settlement, *Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-000, 104 FERC ¶ 61,008 (2003) ("Initial Order"), JA 243, based on analysis of the four approaches FERC had previously outlined under which a contested settlement could be approved:

> Approach No. 1, where the Commission renders a binding merits decision on each of the contested issues; Approach No. 2, where approval of the contested settlement is based on a finding that the overall settlement as a package provides a just and reasonable result; Approach No. 3, where the Commission determines whether the benefits of the settlement outbalance the nature of the objections, in light of the limited interest of the contesting party in the outcome of the case; and Approach No. 4, where the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to litigate the issues.

Initial Order at P 27 (citing *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110, at p. 61,439 (1999) ("*Trailblazer I*")), JA 253.

The Commission examined Approaches 2, 3, and 4 and determined that it could not approve the 2003 Settlement under any of them.[3] Under Approach No. 2, the Commission found IOGA's members could be in a worse position under the 2003 Settlement than if Equitrans filed the general Section 4 rate case required by the 1999 Settlement. Initial Order at P 28, JA 254. As IOGA's interest was not minimal, Approach No. 3 did not allow approval of the 2003 Settlement. *Id.* at P 29. Whether IOGA's members were themselves shippers on Equitrans's or Carnegie's pipeline system, its producer members had a sufficient interest in transportation rates on those systems due to netback pricing of their gas to preclude approval of the settlement over their objections. *Id.* at P 30, JA 254-55.

The Commission declined to sever IOGA and approve the 2003 Settlement as to the consenting parties, under Approach No. 4, because IOGA's objection, seeking to enforce the 1999 Settlement rate filing requirement, "goes to the heart of the settlement." *Id.* at P 31, JA 255. The Commission further explained that, aside from its concerns that IOGA would lose the benefit of its bargain, severing IOGA to litigate a proceeding limited to its members' rates would not adequately address its producer members' concerns, and would not necessarily realize cost savings, as an "expensive and time-consuming" rate proceeding would be

---

3 The Commission did not discuss Approach No. 1 "because IOGA was not raising specific issues related to new rates proposed by Equitrans, but rather was raising the issue of whether, as a matter of law or policy, a previous rate settlement should be abrogated by the Commission over IOGA's objections." Rehearing Order (defined below) at P 7 n.2, JA 277.

necessary to establish just and reasonable rates for IOGA's members. *Id.*

The Commission further concluded that policy grounds favored rejection of the 2003 Settlement:

> The Commission also is concerned that the settlement would by its terms declare a previously approved settlement of no force and effect, despite the objection of a party to the earlier settlement. The Commission will not disturb a settlement it has approved over the objections of parties to the settlement unless special circumstances exist which dictate that the public interest will be served by abrogating the settlement.[] Such special circumstances have not been shown by Carnegie and Equitrans. Contrary to Carnegie's and Equitrans'[s] assertion, the Commission does not agree that rejection of this new settlement will undermine its policy favoring settlements. Rather, rejection of this settlement will provide parties assurance that when they bargain to reach a settlement it will not be superceded by a later settlement, notwithstanding their opposition and the absence of exceptional circumstances justifying abrogation of the original settlement.

Id. at P 32 (footnote omitted), JA 255-56.

Petitioner KeySpan's request for rehearing focused on Approach No. 4 and the policy considerations. It argued that declining to sever IOGA and approve the 2003 Settlement as to the consenting parties "cannot be reconciled with the Commission's well-established policy of encouraging negotiated settlements." R. 37 at p. 3 (citations omitted), JA 263. KeySpan also asserted that approving the settlement and severing IOGA would spare the consenting parties the expense of participating in Equitrans's general Section 4 rate case, and that IOGA's members' interest in Equitrans's rates based on netback pricing was no basis for denying severance. *See id.* at p. 4, JA 264.

Petitioner PSEG supported KeySpan's arguments, and separately contended that the Commission erred by failing to approve the 2003 Settlement over IOGA's objections, based on the support of "all of Equitrans'[s] firm transmission and storage customers, representing 98 percent of current revenues . . . ." R. 38 at pp. 4, 5, JA 272, 273. PSEG also suggested the Commission had "failed to consider the benefits of maintaining [the 1999 Settlement] in full force and effect to the extent that it does not conflict with the [2003 S]ettlement," and not requiring any entity to litigate a Section 4 rate case. *Id.* at p. 4.

An order denying the requests for rehearing, *Equitrans, L.P. and Carnegie Interstate Pipeline Company*, Docket No. CP02-233-001, 106 FERC ¶ 61,013 (2004) ("Rehearing Order," and together with the Initial Order, the "Orders"), JA 275, reiterated that none of the *Trailblazer* approaches supported approval of the 2003 Settlement and explained that rejection of the 2003 Settlement was consistent with FERC policy:

> Approval of a settlement under the circumstances presented here would risk undermining confidence in the settlement process. The Commission believes that a party to a rate settlement generally should be able to rely upon the terms and conditions of that settlement until a new rate case can be conducted under NGA Section 4 or a Section 5 proceeding in response to a complaint. Parties to a settlement should not have to worry that other parties to the settlement may, at a later date, do an "end run" in a proceeding not involving the subject matter of the settlement, and change the settlement without all of the parties' consent.

Rehearing Order at P 14, JA 280.

C. Equitrans's Subsequent Rate Case

Because the Commission rejected the 2003 Settlement, Equitrans filed the general Section 4 rate case mandated by the 1999 Settlement, after receiving an extension, on December 1, 2003. After rejecting that filing for failure to comply with FERC's filing regulations, *Equitrans, L.P.*, 105 FERC ¶ 61,407 (2003), the Commission accepted Equitrans's second set of proposed tariff sheets, effective September 1, 2004, subject to refund and the outcome of a future hearing *Equitrans, L.P.*, 109 FERC ¶ 61,214, at P 49 (2004). Petitioners and IOGA are currently participating in Equitrans's rate case.

SUMMARY OF ARGUMENT

The Commission properly rejected the 2003 Settlement under its broad discretion to determine the appropriate treatment of a contested settlement. Here, rejection furthers FERC's policy of encouraging settlements by assuring parties that the bargains reached in settlements will not, absent exceptional circumstances, be swept aside by a later settlement over their objections.

First, jurisdictionally, Petitioners lack Article III standing because they assert no cognizable injury that can be redressed by reversal of the Orders. Equitrans's rate case, filed over a year ago, has moved forward, and its new rates went into effect as of September 1, 2004, subject to potential refund following further proceedings. Having filed that rate case, only Equitrans could stop the proceeding, by withdrawing its filing, and there has been no indication that it would do so. Therefore, redress of Petitioners' injury is contingent on the independent actions of a third party. Reversing the Orders and remanding to the Commission would have no effect on the ongoing rate case or on Petitioners' involvement therein.

On the merits, there is no basis for reversing the Commission's Orders. By its very terms, the 2003 Settlement would have "deemed" the requirement that Equitrans file a rate case "satisfied," "terminate[d]" the 1999 Settlement, and declared it "to be o[f] no further force and effect." For that reason, IOGA's objection to the 2003 Settlement went "to the heart of" that settlement, which replaced the 1999 Settlement requirement that Equitrans file a general Section 4 rate case to put new rates into effect by August 1, 2003, with an extension of Equitrans's existing rates through March 31, 2005, without any obligation for Equitrans *ever* to file a rate case thereafter. The Commission found no special circumstances to upset its longstanding policy against modifying FERC-approved settlements over the objections of parties thereto. The Commission also reasonably concluded that its policy favoring settlements would be better served by upholding the bargain of the 1999 Settlement — and might be undermined by the proposed abrogation.

Exercising its broad discretion in how to approach contested settlements, the Commission properly determined that the "last resort" of severing IOGA to litigate its own rate case was not justified in the specific factual circumstances presented.

First, IOGA's issues could not be isolated because its objection went to the essential conflict between the 1999 Settlement's rate filing requirement and the 2003 Settlement's elimination of that obligation. In addition, the Commission concluded that severing IOGA to establish separate rates for its members would not protect the members' interests. Because a pipeline's rates directly affect the netback prices to producers for gas shipped on its system, IOGA's producer members have an interest in Equitrans's rates charged to shippers. Therefore, severing IOGA to litigate rates limited to its members would not address producer members' concerns. This finding is not inconsistent with other FERC decisions, as all cases Petitioners cite — most prominently, a case not raised on rehearing — are distinguishable on their facts and analyses. In addition, as even an IOGA-specific rate proceeding would require analysis of Equitrans's overall cost of service and the appropriate allocation across all its customers, it was not clear that any savings would be realized by forgoing the general rate case required by the 1999 Settlement. Moreover, the benefit of rate certainty and the level of customer support for the 2003 Settlement could not overcome the Commission's grounds for rejecting that settlement.

Finally, the Commission's decision to reject the settlement was not "arbitrarily inconsistent" with its decisions in "similar situations." In fact, none of the cases that Petitioners cite presented a "similar situation" of a contested settlement that would abrogate a previous FERC-approved settlement. On these unique facts, the Commission's decision to reject the 2003 Settlement was not arbitrary or capricious.

ARGUMENT

I. PETITIONERS LACK STANDING.

A party that is "aggrieved" by a FERC order may obtain judicial review under NGA § 19(b), 15 U.S.C. § 717r(b), provided it also meets the requirements of Article III standing. *See, e.g., Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 54 (D.C. Cir. 2002). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997).

The sole harm asserted by Petitioners is the cost of participating in Equitrans's general Section 4 rate case. Br. at 27-28. Assuming litigation costs constitute a cognizable injury, reversal of the Orders rejecting the 2003 Settlement would not redress that harm. Equitrans filed a general Section 4 rate case on December 1, 2003, in which Petitioners and IOGA (as well as other parties not before this Court) have actively participated. That rate case will presumably continue until settled or resolved by FERC order and judicial review. Reversing the instant Orders and remanding to the Commission would not terminate that separate, ongoing rate case, nor could Petitioners' past participation in that proceeding be undone.[4]

Petitioners assert that, if this Court were to reverse and remand the Orders, Petitioners "likely would be relieved of the ongoing need to continue to participate" in the ongoing rate case, "and would achieve rate stability until Equitrans files its next general NGA Section 4 increase or the Commission acts to adjust Equitrans'[s] rates under Section 5 of the NGA." Br. at 28. But reversal would not necessarily bring about that result. Only Equitrans's withdrawal of its rate filing would stop that proceeding. Petitioners' standing thus "'depends on the unfettered choices made by [an] independent actor[] not before the court[].'" *US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (quoting *Asarco Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). Reversing the Orders would not compel Equitrans to withdraw its rate case, and there is no indication that Equitrans would choose to do so. To base redressability on such "cooperation of a third party," Petitioners must show that Equitrans would, in fact, withdraw its ongoing rate proceeding if this Court reversed the Orders rejecting the 2003 Settlement. *See Defenders of Wildlife*, 504 U.S. at 562 (when redress depends on

[4] Even if, as Petitioners contend, Equitrans's rate case results in higher rates, those higher rates cannot be redressed in the instant appeal, but would be subject to separate review on the record developed in the rate case.

third party's independent choices, "it becomes the burden of the [petitioner] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury"). Petitioners have not met that burden.

In addition, Petitioners fail to explain how reversal of the Orders would, as they claim, provide rate stability going forward. Even under the 2003 Settlement, had it been approved, Equitrans would have been entitled to file a general Section 4 rate case, at any time after March 31, 2005, at its own election. While the settlement did not require Equitrans to make such a filing, it allowed a filing to be made, and any rate certainty available prior to March 31, 2005 would be lost. Indeed, given that Equitrans *did* file a rate case, in which Petitioners and other parties have participated, resulting in new rates effective September 1, 2004 (subject to refund), it is unclear how Petitioners' alleged injury — already expended litigation costs — could be redressed by reversal of the instant Orders.

Therefore, Petitioners lack Article III standing because the remedy they seek could not redress their claimed injuries.

II. THE COMMISSION PROPERLY EXERCISED ITS BROAD DISCRETION IN REJECTING THE 2003 SETTLEMENT.

A. Standard of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *Sithe/Independence Power Partners v.*

FERC, 165 F.3d 944, 948 (D.C. Cir. 1999). For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Deference to the Commission's decisions regarding rate issues is broad, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

The Commission's discretion is particularly expansive in dealing with a contested settlement. This Court has long recognized that FERC's rules governing settlements, particularly on contested settlements, are "quite broadly worded." *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987). Rule 602(h)(1)(ii)(B) (18 C.F.R. § 385.602(h)(1)(ii)(B) (2004)), the applicable rule, "states in rather sweeping terms that when confronted with a contesting party to a settlement, the agency may take such 'action which the Commission determines to be appropriate.' The breadth of discretion trumpeted by that provision is manifest." *Arctic Slope*, 832 F.2d at 164 (quoting Rule 602(h)(1)(ii)(B)); *see also id.* at 167 n.20 ("Under its settlement rules, the Commission has wide latitude in determining the appropriate remedy [to be afforded to a contesting party].”); *UMDG*, 732 F.2d at 208 (“The governing regulations . . . confer upon the Commission broad authority to take other action which the Commission deems appropriate when the Commission determines that the issue cannot be severed from the offer of settlement.” (internal quotation marks omitted)). Indeed, “both the wording of the rule and its construction by this [C]ourt are quite generous and flexible.” *Arctic Slope*, 832 F.2d at 164 (citing *UMDG*).

B. The Commission Properly Exercised Its Broad Discretion in Declining to Approve a Contested Settlement That Would Have Abrogated a Previously Approved Settlement.

FERC’s long-standing policy of encouraging negotiated settlements[5] is tempered by a corresponding policy of preserving FERC-approved settlements against later attempts to change or set aside their terms over the objections of parties to such settlements. Those goals are achieved by allowing modifications of

---

5 *See, e.g.*, *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at p. 62,341 (1998) (“The Commission has long recognized the value of settlements . . . .”). *See also Mobil Oil Corp. v. FPC*, 570 F.2d 1021, 1026 (D.C. Cir. 1978) (noting that “encouraging settlements is in the public interest”).

Of course, such settlements usually are limited to the subject matter of the underlying proceeding — *i.e.*, rate settlements are negotiated in rate proceedings. *See, e.g.*, *Trailblazer I*, 87 FERC at p. 61,436 (summarizing background of rate proceeding leading to contested rate settlement); *Texas Gas Transmission Corp.*, 99 FERC ¶ 61,328, at p. 62,398 (2002) (same). Here, however, the resolution of general rate issues in the 2003 Settlement went beyond the underlying application for abandonment and certificate authority in connection with Equitrans’s acquisition of Carnegie’s facilities.

existing settlements (absent all parties' consent) only if special circumstances justify the modification as in the public interest. Initial Order at P 32 & n.25 (citing cases), JA 255-56; *see El Paso Natural Gas Co.*, 50 FERC ¶ 61,202 at p. 61,653 (1990) ("Unless *all* parties agree to the proposed change to a settlement, the Commission will reject the proposal absent convincing evidence of public interest, which has not been demonstrated here." (emphasis added)). *See also Williston Basin Interstate Pipeline Co.*, 874 F.2d 834, 837 (D.C. Cir. 1989) (vacating orders that declined to give effect to provision of settlement agreement; "approval binds the Commission, at least in the absence of special circumstances, to all constituent parts of the [settlement] agreement"); *accord Mobil Oil*, 570 F.2d at 1026.

Here, the 2003 Settlement ostensibly was an agreement among consenting parties resolving disputes related to Equitrans's acquisition of Carnegie's facilities. *See* Initial Order at P 18 ("Carnegie and Equitrans maintain that . . . this proceeding concerns only the effectuation of their merger and does not involve a proposal to change any rate . . . ."), JA 248. Yet, the settlement went well beyond those matters to address a previously approved rate settlement. *See id.* ("The applicants point out that Equitrans is required by its 1999 rate settlement to file a general Section 4 rate case proposing rates to be effective August 1, 2003, and that it is in that proceeding that just and reasonable rates will be determined for all of

Equitrans'[s] services.").

In fact, the proposed abrogation in the 2003 Agreement cut to the core of the 1999 Settlement by eliminating the requirement to file a general Section 4 rate case to put new rates into effect by August 2003. *See id.* at P 19, subparas. (D) and (E) (eliminating filing requirement), JA 249. The Commission focused on this conflict as "go[ing] to the heart of the settlement," *id.* at P 31, JA 255, and indicated the required rate filing was "the better vehicle to address the complicated rate issues likely to result from the merger of the two pipeline systems." *Id.* at P 34, JA 256.

No special circumstances justifying abrogation of the 1999 Settlement as in the public interest were proffered. *Id.* at P 32 ("Such special circumstances have not been shown by Carnegie and Equitrans."), JA 256. Nor did Petitioners' rehearing requests attempt to show any such "special circumstances" or "convincing evidence of public interest."[6] *See Williston Basin*, 874 F.2d at 837; *El Paso*, 50 FERC at p. 61,653.

Furthermore, the Commission in this case reasonably concluded that its pro-settlement policy would be better served by upholding the 1999 Settlement. "[R]ejection of [the 2003 S]ettlement will provide parties assurance that when they

[6] Having failed to demonstrate any "special circumstances" or to address the Commission's finding on rehearing or in their initial brief to this Court, Petitioners are barred from introducing any such argument at this late stage. *See* NGA § 19(b), 15 U.S.C. § 717r(b).

bargain to reach a settlement it will not be superceded by a later settlement, notwithstanding their opposition and the absence of exceptional circumstances justifying abrogation of the original settlement." Initial Order at P 32, JA 256. On rehearing, the Commission emphasized that a rate settlement should not be overturned by a settlement in another (non-rate) matter that does not involve all parties to the rate settlement:

> a party to a rate settlement generally should be able to rely on the terms and conditions of that settlement until a new rate case can be conducted . . . . Parties to a settlement should not have to worry that other parties to the settlement may, at a later date . . . change the settlement without all of the parties' consent.

Rehearing Order at P 14, JA 280; *see id.* (noting concern that the 2003 Settlement constituted an "end run" around the 1999 Settlement "in a proceeding not involving the subject matter of the [1999 S]ettlement").

Indeed, the Commission concluded that not rejecting the 2003 Settlement would make settlements *less* appealing to parties: "Approval of a settlement under the circumstances presented here would risk undermining confidence in the settlement process." *Id.* In other words, because no "exceptional circumstances justifying abrogation" had been shown, Initial Order at P 32, JA 256, approval of the 2003 Settlement would signal that a subgroup of the original settling parties could change the terms of an approved settlement as it suited them. Such a message would mean no party to a FERC-approved settlement could ever count on the benefit of its bargain remaining intact. As a result, parties would be less willing to make the concessions necessary to resolve contested proceedings by settlement.

Based on the foregoing, the Commission's careful balancing of the considerations presented in this case demonstrates its reasoned determination how best to preserve and advance its settlement policy.

C. The Commission Properly Exercised Its Broad Discretion in Determining That the "Last Resort" of Severing IOGA Was Not Warranted.

Petitioners urged the Commission to sever IOGA from the 2003 Settlement and require Equitrans to file a Section 4 rate case that it and IOGA would litigate. *See* R. 37 at p. 6, JA 266; R. 38 at p. 5, JA 273. The Commission has often noted that "severance is an option of last resort." *Texas Gas Transmission Corp.*, 98 FERC ¶ 61,244, at p. 61,993 (2002); *see also Kern River Gas Co.*, 90 FERC ¶ 61,124, at p. 61,375 (2000); *Dominion Transmission, Inc.*, 94 FERC ¶ 61,329, at p. 62,229 (2001); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at p. 62,344 (1998); *Northwest Pipeline Corp.*, 81 FERC ¶ 61,242, at p. 62,041 (1997). Severance also is case-specific: "There are no bright line rules to determine whether severance is appropriate, and the Commission must analyze the nature of the objections and determine whether they can be resolved on the basis of policy, or substantial evidence in the record, or whether additional evidence is needed." *Trailblazer I*, 87 FERC at p. 61,447.[7] Given these well-established principles, the Commission's wide latitude in handling contested settlements, and its policy-based concerns about a contested abrogation of a previously approved settlement, the Commission's decision not to sever IOGA was proper.

1. The Commission Reasonably Concluded Severing IOGA Would Not Address IOGA's Objection.

In considering Approach No. 4 under *Trailblazer I*, the Commission began with the substance of IOGA's objection. Equitrans and Carnegie had suggested, as Petitioners argue here, that IOGA could be severed "to litigate its issues separately." Initial Order at P 31, JA 255. But IOGA's "issues" cannot be isolated, as the 1999 Settlement required Equitrans to file a general Section 4 rate case, which would affect rates for all customers. *See id.* at P 18 (noting that rate filing would determine rates "for all of Equitrans'[s] services"), JA 248. The 1999 Settlement thus contemplated that Equitrans and its customers would have an opportunity fully to litigate the costs and methodology underlying its rates.

The 2003 Settlement, however, would, at a minimum, postpone that opportunity for two years, and potentially eliminate it forever. IOGA's "issues"

---

[7] *See also* Order No. 578, 60 Fed. Reg. 19494, at 19502 (1995) ("Of course, there are no hard and fast criteria for determining whether party severing is appropriate. That decision depends on the circumstances of the particular settlement. The Commission must consider the nature of the issue or issues contested, the state of the record, and the impact of the Commission's decision on the settlement.") (amending 18 C.F.R. Parts 343 and 385).

were thus fundamentally irreconcilable with the terms of the 2003 Settlement: either Equitrans would have to file a general Section 4 rate case or it would not. Therefore, the Commission found that IOGA's objection went "to the very heart of the [1999] settlement" and could not be severed. Rehearing Order at P 12, JA 280; *see also* Initial Order at P 31, JA 255.

In light of that inherent conflict, Petitioners' suggestion that IOGA could be severed and the 1999 Settlement "would continue to remain in full force and effect with respect to any relationship covered [by the 1999 Settlement] between IOGA and any other settling party" (Br. at 18-19) would be unworkable. IOGA's interest, particularly as to "the rates that shippers who purchase [IOGA members'] gas pay for transportation service" due to netback pricing for that gas, Initial Order at P 31, JA 255, implicates most, if not all, classes of shippers on Equitrans's system. *See id.* at P 30 (noting shipper could be "the producer or a marketer, local distribution company or end user"), JA 255. Accordingly, Petitioners' proposal that the 1999 Settlement would remain in effect as to any relationship between IOGA and a settling party would mean all shipper classes' rates would be governed by the proposed severed IOGA rate proceeding.

Petitioners also characterize the Commission's decision to uphold the 1999 Settlement, rather than to sever IOGA, as granting IOGA "veto power" over any settlement between Equitrans and other parties. Br. at 33-34. But the so-called "veto power" does not exist. The Commission did not reject the 2003 Settlement on IOGA's say-so. Rather, following its policy, the Commission found Equitrans and Carnegie (and Petitioners) failed to demonstrate "exceptional circumstances justifying abrogation of the original settlement." Initial Order at P 32, JA 256. In these specific circumstances, the Commission made the unremarkable choice of binding Equitrans to its contractual obligations.

2. The Commission Reasonably Concluded Severing IOGA Would Not Adequately Address Its Members' Interests in Equitrans's Rates.

Petitioners argue the Commission's reliance on IOGA's netback interest to avoid severance was "factually inaccurate" because IOGA itself stated that its members are transportation and storage customers of Equitrans. Br. at 31 & n.69 (citing filing by IOGA). The Commission's finding that the netback pricing interests of IOGA's producer members would not be protected by severance to litigate a separate rate proceeding still stands, even if some of IOGA's members are customers of Equitrans. The Commission has long recognized that a producer behind a pipeline has an interest in the pipeline's transportation rates because those rates affect the value of the gas sold by the producer. *See, e.g., Trailblazer I*, 87 FERC at p. 61,443 ("Amoco's interest is not hypothetical. Amoco, as a producer behind the pipeline, has a substantial interest in Trailblazer's rates. It is an interest that cannot be ignored.").

In some instances, severance may not protect the interests of contesting parties who object to the rates to be paid by consenting parties. *See, e.g.*, *Trailblazer*, 85 FERC at p. 62,345 ("[I]f the contesting party is, for example, a competing pipeline, a downstream customer of one of the pipeline's direct customers, or a state commission, it is almost impossible to give the contesting party an opportunity to litigate its concerns without also affecting the rates of settling customers." (footnotes omitted)). Here, the Commission reasonably found that IOGA members' interest in netback pricing placed them in a similar situation. Initial Order at P 31, JA 255. Consequently, it would be almost impossible to litigate IOGA's concerns without affecting the rates of other parties.

Moreover, the Commission's finding on this point is not, as Petitioners contend (Br. at 33), inconsistent with other FERC decisions. KeySpan's request for rehearing identified *Texas Gas Transmission Corp.*, 99 FERC ¶ 61,328 (2002), as the only alleged inconsistent case. But the Rehearing Order explained that the interests of the contesting party in *Texas Gas* were speculative concerns related to the secondary transportation market. *See* Rehearing Order at P 12, JA 279. The secondary market refers to unused capacity that is released by shippers at market prices. To prevent abuse, FERC's capacity release policy requires a pipeline to offer all unused capacity at the pipeline's maximum cost of service rate (the recourse rate), thus acting as a check on pricing for capacity release by shippers.

In *Texas Gas*, the contesting parties sought to challenge a pipeline's settlement rates as too high for recourse rate purposes in the secondary market. 99 FERC at p. 62,400. That attenuated harm contrasts sharply with the instant case, where higher Equitrans transportation rates translate directly to lower netback prices for IOGA members. The asserted harm in *Texas Gas* was not only indirect but also "purely speculative." *Id.* Therefore, severing those shippers to litigate their own rates would adequately protect their actual, non-speculative interests. *See id.*

The present case is different from *Texas Gas* because the objecting parties in that case "did not claim to own producing properties whose value would be affected by the other shippers' rates" based on netback pricing. Rehearing Order at P 12, JA 279-80. Thus, *Texas Gas* did not "address any issue concerning how such an interest should be treated in reviewing a contested settlement. Issues raised by IOGA in this case do not involve the secondary market and are considered on their own merits." *Id.*

Petitioners now relegate *Texas Gas* to a footnote (Br. at 33 n. 74) and, instead, principally rely on *Trailblazer Pipeline Co.*, 106 FERC ¶ 61,034 (2004) ("*Trailblazer II*"), a decision that they did not raise on rehearing and thus cannot now raise on appeal. *See* NGA § 19(b), 15 U.S.C. § 717r(b); *Domtar Me. Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003) (rejecting Petitioners' reliance on FERC decision not cited on rehearing).

In any event, Petitioners' new argument lacks merit. The *Trailblazer II* decision can be distinguished on numerous grounds, discussed in Section D *infra*. In particular, its ruling limiting the scope of severance to exclude producers' interests in netback prices is inapposite because, "in the circumstances of th[at] case," the objecting parties' interest in the pipeline's firm rates could be adequately protected by severance of only their "direct interest" in their own reservation charges for pipeline transportation. 106 FERC ¶ 61,034, at P 23.[8] "[T]he circumstances of th[at] case" were that the producers' objections concerned reservation charges that would not affect netback pricing: "producer netbacks are generally affected only by volumetric transportation rates paid on a current basis," and not "by reservation charges," which are "a sunk cost" that should not affect prices on a current basis. *Id.* at PP 23, 24. Because the *Trailblazer II* producers' objections "[went] to the fixed costs reflected in the reservation charge, rather than [to] the variable costs in the usage charge," *id.* at P 24, their objections would not necessarily involve rate changes to all shipper classes, as was the case here. In other words, *Trailblazer II* rested on a finding that the particular issue the producers wanted to litigate did not involve netback pricing, *not* on a finding that

[8] While *Trailblazer II* did sever the objecting producers' interruptible rate questions, *see id.*, no one suggests here that IOGA's producer members' concerns are limited to interruptible transportation; rather, their main concern appears to be the rates paid by shippers for firm transportation.

producer netbacks do not give rise to a cognizable interest in a pipeline's overall rates.

Petitioners argue that severance would protect IOGA members' interests because those members could, if separate litigation resulted in lower rates, obtain the benefits of those rates by purchasing firm or interruptible service directly from Equitrans, presumably in substitution for the present arrangements in which their purchasers themselves ship the gas. Br. at 32. This argument, too, is barred because Petitioners failed to raise it on rehearing.[9] *See* NGA § 19(b). Petitioners do not provide any support to show IOGA members could break current contracts to allow for direct shipping by Equitrans. Moreover, the argument misses the Commission's point: that IOGA's members had a substantial current interest in Equitrans's existing rates to other shippers, and they had a right under the 1999 Settlement to demand that Equitrans file a general Section 4 rate case to put new rates into effect by August 2003.

[9] In its rehearing request, KeySpan remarked in passing that, "to KeySpan's knowledge, there is nothing that prevents IOGA's members from contracting for firm service on Equitrans to the extent that these parties may find such services beneficial." R. 37 at p. 2, JA 262. But KeySpan "never expanded on that assertion" (*Domtar*, 347 F.3d at 313) or its relevance to severing IOGA from the 2003 Settlement to litigate its own rate case, as Petitioners now do on appeal (Br. at 31-33).

3. *The Commission Reasonably Found It Unclear Whether Severing IOGA to Litigate a Rate Case Specific to Its Members Would Save the Costs of a General Section 4 Rate Case.*

The Commission also concluded it was "not at all clear that any savings could be realized" by substituting an IOGA-specific rate case for the general Section 4 rate case that Equitrans was required by the 1999 Settlement. Initial Order at P 31, JA 255. As noted, IOGA's netback pricing concerns brought into play rates for all shipper classes, and presumably the affected shippers would want a say in how their rates would be set in such a severed hearing. Thus it was not clear that any savings would be realized by severance, as either the severed proceeding or a general rate proceeding "would be expensive and time-consuming." *Id.* at P 31, JA 255. In addition, the 2003 Settlement only assured that a general rate case, should Equitrans choose to file one, would be delayed. The Commission correctly noted it was "not at all clear" that approval of the 2003 Settlement and severance of IOGA would end up saving any costs, as Equitrans could in a relatively short time file a general rate case. *Id.*

Petitioners contend that the costs to Equitrans of litigating a separate rate case for IOGA members did not weigh against severance because Equitrans agreed to it. Br. at 30-31. That may be so, but it is irrelevant in light of the requirement that severance "fully protect[]" the interests of a contesting indirect customer. *See Trailblazer*, 85 FERC at p. 62,345; *see also Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998). As IOGA, the contesting party here, is not itself a direct customer of the pipeline, "it is almost impossible to give the contesting party an opportunity to litigate its concerns without also affecting the rates of settling customers." *Trailblazer*, 85 FERC at p. 62,345. Whether or not Equitrans's litigation costs should be considered, the key point is that severing IOGA to litigate its members' rates would not adequately address the members' concerns.

4. Petitioners' Remaining Arguments Do Not Justify Reversal.

Petitioners claim the Commission "completely ignored" the benefit to the consenting parties of the rate certainty provided by the 2003 Settlement. Br. at 34. First, they cannot fault the Commission for allegedly ignoring an argument that Petitioners failed to raise on rehearing, and that is now jurisdictionally barred.[10] *See* NGA § 19(b). Second, any potential benefits to consenting parties, such as rate certainty, may be grounds for approving the settlement as fair and reasonable as to those parties, but do not outweigh the adverse effects of severance to an objecting party. *See, e.g., Trailblazer I*, 87 FERC at p. 61,446 (considering

---

[10] KeySpan mentioned rate certainty in its rehearing request only in generic statements about FERC's policy of encouraging rate settlements, but never in connection with the benefits of the 2003 Settlement in particular, or the severance of IOGA's issues. *See* R. 37 at p. 5 (quoting *Texas Gas* regarding "utility of settlements in providing rate certainty to customers and resolving rate proceedings in an expeditious manner" (citation omitted)), JA 265.

benefits of settlement in determining whether to approve settlement as to consenting parties). As the Commission found, besides severance not addressing IOGA's objection or adequately protecting its members' interests, that approach would require abrogation of the 1999 Settlement, which was inconsistent with FERC policy of encouraging and upholding rate settlements. The potential rate certainty benefits to the consenting parties could not override those findings.

Petitioners also emphasize the degree of customer support for the 2003 Settlement. Br. at 29. But customer support, though a relevant factor to be considered, does not mandate approval of a settlement. *See Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993) ("Even when customer support is unanimous . . . FERC retains the responsibility of making an 'independent judgment' [regarding the settlement]."); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1002-03 (D.C. Cir. 1990) (remanding order approving settlement because Commission relied on customer support and failed to make independent determination regarding public interest). In addition, the KeySpan parties, as local distribution companies ("LDCs"), and PSEG as supporting the basic gas service offering of its LDC affiliate (Br. at 11-12), "might not have a sufficient incentive, in dealing with the pipeline, to minimize their costs" because, as regulated utilities, they are able to pass the increased rates on to end-users. *Tejas Power*, 908 F.2d at 1003; *accord Laclede Gas*, 997 F.2d at 946. Petitioners thus may have a greater interest in rate certainty, whatever its cost, than do IOGA's members who would actually be harmed by higher rates. Therefore, the support of customers such as Petitioners does not override the various grounds for rejecting the 2003 Settlement.

D. The Commission's Decision to Reject the Contested 2003 Settlement Was Not "Arbitrarily Inconsistent" With Other FERC Decisions.

Petitioners contend that the Commission's decision in this case is inconsistent with other orders in similar situations. Br. at 22, 26. This is a new argument raised on appeal that Petitioners failed to raise on rehearing; their principal authorities on appeal either were not raised before the Commission or were raised only in passing. But even if this argument is properly before the Court, the Commission's reasoning on the unique facts before it was not inconsistent with the decisions cited by Petitioners.

First, there are no "factually similar situations" (Br. at 22), as no case cited by Petitioners involved a proposed settlement that would abrogate a previous FERC-approved settlement over the objection of a party thereto. Indeed, not one FERC decision or opinion of this Court cited by Petitioners implicated a prior settlement.

That distinction undercuts Petitioners' heavy reliance on *Trailblazer II* as controlling here. Because the proposed agreement there did not abrogate any contesting party's right under a prior settlement, the Commission's policy of encouraging settlements pointed in one direction, favoring approval of the contested settlement as a valid compromise of competing objectives:

> It is the Commission's long-standing policy to encourage, not discourage, settlements. Rate case settlements almost always involve compromise, as well as a considerable amount of time and expense of all parties, to resolve a multitude of contentious issues. Although we must protect the interests of the nonconsenting party, we must do so in a manner that allows the consenting parties to enjoy the benefits of their bargain.

Trailblazer II, 106 FERC ¶ 61,034, at P 25. But the compromise here — reached without IOGA's involvement or consent — would abrogate the 1999 Settlement, and thus *Trailblazer II* is inapposite. Absent exceptional public interest circumstances to justify overturning the benefits of a previously-approved bargain, maintaining parties' confidence that prior settlement deals will not later be nullified better promotes FERC's policy than would abrogation. *See* Initial Order at P 32, JA 256. Though Petitioners did not raise *Trailblazer II* below and thus the Commission had no opportunity to address it in this case, there is no inconsistency.

Another distinction is that, here, the 2003 Settlement of a certificate proceeding would result in "an 'end run' in a proceeding not involving the subject matter" of the 1999 rate settlement. Rehearing Order at P 14, JA 280. In contrast, the rate settlement in *Trailblazer II* did arise in a rate case and thus raised no such concern.

The *Trailblazer II* order also can be distinguished because the contesting parties *sought* severance. *See* 106 FERC ¶ 61,034, at PP 12, 23. The instant Orders addressed a wholly different question of whether to sever a contesting party against its will where only consenting parties pushed for severance. The differing equities of the two situations led to different conclusions as to whether severance was appropriate.[11]

[11] Nor are the Orders in this case inconsistent with *Texas Gas*, the only case substantively discussed in KeySpan's request for rehearing, because that case did not involve producer netbacks. *See* Rehearing Order at P 12, JA 279-80; *see also* Section C.2, *supra*.

In addition, Petitioners' current reliance on *Wyoming Interstate Company*, 92 FERC ¶ 61,256 (2000), as a principal authority (*see* Br. at 14, 17, 29, 30) is a turnabout from rehearing, where KeySpan included it merely as one in a string of citations for the proposition that shipper support for a settlement favors severing contesting parties. *See* R. 37 at p. 3 n.10, JA 263. Petitioners did not cite *Wyoming Interstate* below for their current argument that producers' interests in netback prices may not preclude severance. For that reason, the Commission had no opportunity to address Petitioners' argument. Regardless, the Commission's Orders here are not "arbitrarily inconsistent" with *Wyoming Interstate*, which approved a settlement that, unlike the 2003 Settlement in this case, was negotiated in a general Section 4 rate case and did not purport to abrogate a prior settlement.

CONCLUSION

For the reasons stated, the petition should be dismissed, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Dennis Lane
Solicitor

Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901

December 22, 2004
Final Brief: February 10, 2005