ORAL ARGUMENT NOT YET SCHEDULED

---

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

---

No. 03-1257
(Consolidated with Nos. 04-1065 & 04-1066)

---

GAS TRANSMISSION NORTHWEST CORPORATION ET AL.,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

---

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

---

# BRIEF FOR RESPONDENT
# FEDERAL ENERGY REGULATORY COMMISSION

---

JOHN S. MOOT
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

PATRICK Y. LEE
ATTORNEY

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

MAY 30, 2007

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties:

All parties and intervenors appearing in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

### B. Rulings Under Review:

1. *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,062 (2003) ("*e prime I*"), JA 167.

2. *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,289 (2003) ("*e prime II*"), JA 252.

3. *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 104 FERC ¶ 61,026 (2003) ("*e prime III*"), JA 342.

4. *PG&E Gas Transmission, Northwest Corp.*, 101 FERC ¶ 61,280 (2002) ("*PG&E Gas Transmission I*"), JA 110.

5. *PG&E Gas Transmission, Northwest Corp.*, 103 FERC ¶ 61,137 (2003) ("*PG&E Gas Transmission II*"), JA 295.

6. *PG&E Gas Transmission, Northwest Corp.*, 105 FERC ¶ 61,382 (2003) ("*PG&E Gas Transmission III*"), JA 349.

7. *North Baja Pipeline, LLC*, 102 FERC ¶ 61,239 (2003) ("*North Baja I*"), JA 242.

8. *North Baja Pipeline, LLC*, 105 FERC ¶ 61,374 (2003) ("*North Baja II*"), JA 382.

9. *North Baja Pipeline, LLC et al.*, 115 FERC ¶ 61,141 (2006) ("*Directing Briefs Order*"), JA 396.

10. *North Baja Pipeline, LLC et al.*, 117 FERC ¶ 61,146 (2006) ("*Remand Order*"), JA 482.

## C. Related Cases:

Counsel is not aware of any related cases pending before this or any other Court.

______________________
Patrick Y. Lee
Attorney

May 30, 2007

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE..…………………...……………..……………………1

PERTINENT STATUTES AND REGULATIONS….……………………………2

STATEMENT OF THE CASE..…………………..……………………………2

STATEMENT OF FACTS………………………..…………..…………………3

I. STATUTORY AND REGULATORY BACKGROUND…...………….……….……..3

II. EVENTS LEADING TO THE CHALLENGED ORDERS…………..……..……..…6

III. THE FERC RULINGS ON REVIEW……..…………………………...……..…9

A. *North Baja* Orders…..…………..…………………………..……...9

B. *e prime* Orders………………..…………………………….......11

C. *PG&E Gas Transmission* Orders……………………………………13

D. The Voluntary Remand Orders……………………………………...17

SUMMARY OF ARGUMENT……………………………………………...22

ARGUMENT…………………………………………………………………...23

I. STANDARD OF REVIEW…...……………………………………………..23

II. TO ENSURE OPEN ACCESS, THE COMMISSION REASONABLY APPLIED ITS GENERAL POLICY ON CREDITWORTHINESS TO DENY PIPELINES' PROPOSAL TO REQUIRE TWELVE MONTHS OF COLLATERAL FROM ALL NON-CREDITWORTHY SHIPPERS..……………..24

TABLE OF CONTENTS

PAGE

A. FERC's General Policy Does Not Permit Twelve Months Of Collateral From Non-Creditworthy Shippers …………..……….24

*1. FERC Policy Limits Collateral Requirements to Three Months of Reservation Charges*……………………….24

*2. In Establishing FERC's General Policy on Collateral, the Commission Properly Distinguished Between Newly Constructed Capacity and Existing Capacity*………………...28

*3. Denying Pipelines' Proposal for Twelve Months of Collateral Is Consistent with FERC Policy*…………………..31

B. The Commission Properly Applied Its General Policy On Collateral To Pipelines' Proposal……………………….........35

*1. The Commission Has Authority to Regulate the Amount of Collateral Required from Shippers*………………………...35

*2. The Commission Reasonably Accounted for Remarketing Risk*……………………………………………..39

III. PIPELINES FAILED TO ESTABLISH THAT THEY SHOULD BE EXCEPTED FROM FERC'S GENERAL POLICY FAVORING A THREE-MONTH COLLATERAL REQUIREMENT……………………………………………..43

CONCLUSION………………………………………………………...48

TABLE OF AUTHORITIES

PAGE

COURT CASES:

*American Gas Ass'n v. FERC*,
912 F.2d 1496 (D.C. Cir. 1990)……………………………………………36

*Bonneville Power Admin. v. FERC*,
422 F.3d 908 (9th Cir. 2005)………………………………………………46

*Canadian Ass'n of Petroleum Producers v. FERC*,
254 F.3d 289 (D.C. Cir. 2001)……………………………………………..42

*Consolidated Edison Co. v. FERC*,
165 F.3d 992 (D.C. Cir. 1999)………………….…………………………5

*Domtar Maine Corp. v. FERC*,
347 F.3d 304 (D.C. Cir. 2003)…………………………………………33, 34

*Florida Municipal Power Agency v. FERC*,
315 F.3d 362 (D.C. Cir. 2003)……………………………………………..23

*FPC v. Hope Natural Gas Co.*,
320 U.S. 591 (1944)………………………………………………………..42

*FPC v. Louisiana Power & Light Co.*,
406 U.S. 621 (1971)…………………………………………………………4

*FPL Energy Me. Hydro LLC v. FERC*,
287 F.3d 1151 (D.C. Cir. 2002)……………………………………………23

*Midwest ISO Transmission Owners v. FERC*,
373 F.3d 1361 (D.C. Cir. 2004)……….…………………………………...23

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*,
463 U.S. 29 (1983)…….…………………………………………………..23

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES: (con't)

*National Fuel Gas Supply Corp. v. FERC*,
468 F.3d 831 (D.C. Cir. 2006)………………………………………3, 5, 6

**North Baja Pipeline, LLC v. FERC*,
2007 U.S. App. LEXIS 5520 (D.C. Cir. Mar. 9, 2007)…...2, 7, 24, 28, 39, 43

*Sithe/Indep. Power Partners, L.P. v. FERC*,
165 F.3d 944 (D.C. Cir. 1999)…………………………………………..23

*Tennessee Gas Pipeline Co. v. FERC*,
400 F.3d 23 (D.C. Cir. 2005)……………………………………………24

*United Distribution Cos. v. FERC*,
88 F.3d 1105 (D.C. Cir. 1996)……………………………………………6

ADMINISTRATIVE CASES:

*Alliance Pipeline L.P.*,
84 FERC ¶ 61,239 (1998)……………………………………………….34

*ANR Pipeline Co.*,
115 FERC ¶ 61,273 (2006)……………………………………………...32

*Creditworthiness Standards for Interstate Natural Gas Pipelines*,
Notice of Proposed Rulemaking, 69 Fed. Reg. 8587,
FERC Stats. & Regs. ¶ 32,573 (2004)…………………………………17, 18

**e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*,
102 FERC ¶ 61,062 (2003)…………………………………………...7, 9, 11

**e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*,
102 FERC ¶ 61,289 (2003)………………………………………...12, 25, 27

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES: (con't)


*_e prime, inc. v. PG&E Gas Transmission, Northwest Corp._,
104 FERC ¶ 61,026 (2003)……………………………………12, 13, 25-27, 34

_El Paso Natural Gas Co._,
114 FERC ¶ 61,305 (2006)……………………………………………...32

_Florida Gas Transmission Co._,
66 FERC ¶ 61,140, _vacated on other grounds_,
66 FERC ¶ 61,376 (1994)……………………………………………….26

_Kern River Gas Transmission Co._,
98 FERC ¶ 61,079 (2002)……………………………………………….27

_Natural Gas Pipeline Co._,
41 FERC ¶ 61,164 (1987)……………………………………………….26

_North Baja Pipeline, LLC_,
100 FERC ¶ 61,183 (2002)……………………………………………….8

*_North Baja Pipeline, LLC_,
102 FERC ¶ 61,239 (2003)…………………………..…7-9, 26, 27, 29, 34

*_North Baja Pipeline, LLC_,
105 FERC ¶ 61,374 (2003)……………………………….7, 9, 10, 27, 29, 30

*_North Baja Pipeline, LLC et al._,
115 FERC ¶ 61,141 (2006)…………………………………………….18, 44

*_North Baja Pipeline, LLC et al._,
117 FERC ¶ 61,146 (2006)………………………………….19-21, 24, 28-47

_Northern Border Pipeline Co._,
51 FERC ¶ 61,261 (1990)……………………………………………….34

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES: (con't)


*Northern Border Pipeline Co.*,
95 FERC ¶ 61,427 (2001)……………………………………………….32

*Northern Natural Gas Co.*,
37 FERC ¶ 61,272 (1986)……………………………………………….26

*Northern Natural Gas Co.*,
102 FERC ¶ 61,076 (2003)……………………………………………...9, 27

*Ozark Gas Transmission Co.*,
68 FERC ¶ 61,032 (1994)……………………………………………….42

*Pacific Gas Transmission Co.*,
40 FERC ¶ 61,193 (1987)……………………………………………….26

**PG&E Gas Transmission, Northwest Corp.*,
101 FERC ¶ 61,280 (2002)……………………………………….9, 13, 14

**PG&E Gas Transmission, Northwest Corp.*,
103 FERC ¶ 61,137 (2003)……………………….................14, 15, 26, 27,
29, 30, 34

**PG&E Gas Transmission, Northwest Corp.*,
105 FERC ¶ 61,382 (2003)…………………….......................15-17, 26, 28,
30-32, 37-41

*Pipeline Service Obligations & Revisions to Regulations Governing Self-Implementing Transportation & Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*,
Order No. 636, FERC Stats. & Regs.,
Regs. Pmbls. 1991-96 ¶ 30,939, *order on reh'g*,
Order No. 636-A, FERC Stats. & Regs.,
Regs. Pmbls. 1991-96 ¶ 30,950, *order on reh'g*,
Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh'g denied*,
62 FERC ¶ 61,007 (1993)………………………………………………..6

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES: (con't)

**Policy Statement on Creditworthiness Issues for Interstate Natural Gas Pipelines & Order Withdrawing Rulemaking Proceeding*,
111 FERC ¶ 61,412 (2005)……………………………18, 25, 27-29, 38

*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*,
Order No. 436, 50 Fed. Reg. 42,408,
FERC Stats. & Regs. ¶ 30,665 (1985)……………………………………5

*Southern Natural Gas Co.*,
62 FERC ¶ 61,136 (1993)…………………………………………………26

*Tennessee Gas Pipeline Co.*,
40 FERC ¶ 61,194 (1987)…………………………………………………26

*Tennessee Gas Pipeline Co.*,
102 FERC ¶ 61,075 (2003)…………………………………………………9

*Tennessee Gas Pipeline Co.*,
103 FERC ¶ 61,275 (2003)……………………………………………10, 27

*Texas Eastern Transmission Corp.*,
41 FERC ¶ 61,373 (1987)…………………………………………………26

*Valero Interstate Transmission Co.*,
62 FERC ¶ 61,197 (1993)…………………………………………………26

*Williams Natural Gas Co.*,
43 FERC ¶ 61,227 (1988)…………………………………………………26

*Williston Basin Interstate Pipeline Co.*,
67 FERC ¶ 61,137 (1994)…………………………………………………42

TABLE OF AUTHORITIES

PAGE

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A)……………………………………………………….…23

Natural Gas Act, 15 U.S.C. §§ 717 *et seq*.………………………………...……......3

Section 2, 15 U.S.C. § 717a…………………………………………………7

Section 4, 15 U.S.C. § 717c…………………………………4, 17, 35, 43, 45

Section 5, 15 U.S.C. § 717d……….……………………….........4, 10, 21, 35

Section 7, 15 U.S.C. § 717f………………………………………….34, 36

Section 19, 15 U.S.C. § 717r……………………………….……………23

REGULATION:

18 C.F.R. § 284.7…………………………………….……………………...2

## GLOSSARY

| | |
|---|---|
| Alliance | Alliance Pipeline L.P. |
| Commission or FERC | Respondent Federal Energy Regulatory Commission |
| *Creditworthiness Policy Statement* | *Policy Statement on Creditworthiness Issues for Interstate Natural Gas Pipelines & Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412 (2005), JA 538 |
| *Directing Briefs Order* | *North Baja Pipeline, LLC et al.*, 115 FERC ¶ 61,141 (2006), JA 396 |
| *e prime I* | *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,062 (2003), JA 167 |
| *e prime II* | *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,289 (2003), JA 252 |
| *e prime III* | *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 104 FERC ¶ 61,026 (2003), JA 342 |
| GTN | Petitioner Gas Transmission Northwest Corporation, formerly known as PG&E Gas Transmission, Northwest Corporation |
| NGA | Natural Gas Act |
| North Baja | Petitioner North Baja Pipeline, LLC |
| *North Baja I* | *North Baja Pipeline, LLC*, 102 FERC ¶ 61,239 (2003), JA 242 |
| *North Baja II* | *North Baja Pipeline, LLC*, 105 FERC ¶ 61,374 (2003), JA 382 |

GLOSSARY (con't)

| | |
|---|---|
| Northern Border | Northern Border Pipeline Company |
| *PG&E Gas Transmission I* | *PG&E Gas Transmission, Northwest Corp.*, 101 FERC ¶ 61,280 (2002), JA 110 |
| *PG&E Gas Transmission II* | *PG&E Gas Transmission, Northwest Corp.*, 103 FERC ¶ 61,137 (2003), JA 295 |
| *PG&E Gas Transmission III* | *PG&E Gas Transmission, Northwest Corp.*, 105 FERC ¶ 61,382 (2003), JA 349 |
| Pipelines | Petitioners Gas Transmission Northwest Corporation and North Baja Pipeline, LLC |
| *Remand Order* | *North Baja Pipeline, LLC et al.*, 117 FERC ¶ 61,146 (2006), JA 482 |
| WCSB | Western Canadian Sedimentary Basin |

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

---

**No. 03-1257**
**(Consolidated with Nos. 04-1065 & 04-1066)**

---

**GAS TRANSMISSION NORTHWEST CORPORATION ET AL.,**
**PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

---

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

---

**BRIEF FOR RESPONDENT**
**FEDERAL ENERGY REGULATORY COMMISSION**

---

## STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably determined that the proposal of Petitioners Gas Transmission Northwest Corporation ("GTN") and North Baja Pipeline, LLC ("North Baja") (collectively, "Pipelines") to collect twelve months of collateral from non-creditworthy shippers conflicted with FERC policy and, under the specific circumstances presented, was unjust and unreasonable.

## PERTINENT STATUTES AND REGULATION

The pertinent statutes and regulation are contained in the Addendum to this Brief.

## STATEMENT OF THE CASE

This case addresses Pipelines' efforts to include in their tariffs a condition that all non-creditworthy shippers be required to post as collateral an amount equal to twelve months of reservation charges.[1] The Commission denied Pipelines' attempts to include such a condition, including directing North Baja to excise such a provision from its tariff. But consistent with longstanding FERC policy, reaffirmed in 2005, the Commission allowed Pipelines to include language requiring non-creditworthy shippers who did not contract with a pipeline for expansion or new construction capacity to post an amount equal to three months of reservation charges. In denying Pipelines' collateral proposal of twelve months, but requiring adherence to FERC's general policy of three months, the Commission balanced Pipelines' interest in receiving adequate security with protecting shippers against unduly harsh collateral requirements to ensure that

[1] Reservation charges are that portion of a two-part rate (with usage charges being the other component) through which a pipeline collects all fixed costs attributable to firm transportation service. *See* 18 C.F.R. § 284.7(e); *see also North Baja Pipeline, LLC v. FERC*, No. 05-1214, 2007 U.S. App. LEXIS 5520, at *2 (D.C. Cir. March 9, 2007) (explaining charges).

pipeline service is reasonably available on an open access, non-discriminatory basis.

Pipelines objected to application of FERC's general policy to their particular situations. But despite being afforded the opportunity to raise facts and circumstances favoring departure from FERC's general policy, Pipelines failed to do so. Instead, the Commission concluded that Pipelines' situations were no different than most other pipelines and that use of a twelve-month collateral requirement would be unjust and unreasonable.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

"[N]atural gas pipelines traditionally have been considered natural monopolies." *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 834 (D.C. Cir. 2006). "As natural monopolies, pipelines if unregulated would possess the ability to engage in monopolistic pricing for transportation services and discriminate against unaffiliated entities that seek to transport gas." *Id.* "[F]ederal regulation of the natural gas industry is 'designed to curb pipelines' potential monopoly power over gas transportation." *Id.* at 835.

The "fundamental purpose" of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.*, "is to protect natural gas consumers from the monopoly power of natural gas pipelines." *National Fuel*, 468 F.3d at 833. The NGA grants the

Commission jurisdiction over the transmission and wholesale sale of natural gas in interstate commerce.

Under NGA § 4(a), 15 U.S.C. § 717c(a), "[a]ll rates and charges made" or "demanded . . . for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates and charges, shall be just and reasonable[.]" To effectuate this requirement, each interstate pipeline must file and comply with tariffs showing all jurisdictional rates and all practices and regulations affecting those rates. *See* 15 U.S.C. §§ 717c(c), 717c(d). Pipelines may propose changes in their tariffs under NGA § 4(e), 15 U.S.C. § 717c(e), but have the burden of showing that their proposed tariff revisions are "reasonable and fair." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1971).

NGA § 5(a), 15 U.S.C. § 717d(a), states that when FERC finds any rate or any rule, regulation, practice, or contract affecting such rate to be unjust or unreasonable, it must replace that rate, rule, regulation, practice, or contract with a just and reasonable rate, rule, regulation, practice, or contract. The Commission (or a complainant seeking Commission action) has the burden of proving that the existing rate, rule, regulation, practice, or contract is unjust and unreasonable, and that the replacement rate, rule, regulation, practice, or contract to be imposed on

the pipeline is just and reasonable. *See*, *e.g.*, *Consolidated Edison Co. v. FERC*, 165 F.3d 992, 1000-01 (D.C. Cir. 1999).

During the past few decades, FERC has enforced the NGA and protected natural gas consumers through, among other means, open-access rules that require pipelines to carry gas on equal terms and not to grant undue preferences or discriminate in favor of gas sold by the pipeline itself. *See National Fuel*, 468 F.3d at 833.

In its landmark Order No. 436, *see Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42,408, FERC Stats. & Regs. ¶ 30,665 (1985) (rehearing orders omitted), the Commission "declared the bundling of transportation and marketing services 'unduly discriminatory' and conditioned 'blanket certification' (which allowed pipelines to avoid costly individual certifications) on non-discriminatory 'open access' to pipelines' transmission facilities." *National Fuel*, 468 F.3d at 835. Order No. 436 helped deregulate the sales market, where no natural barriers to market competition exist, while it simultaneously prevented anticompetitive activity by the monopolistic pipelines in the transportation market. *See id.* Following up on

Order No. 436, in 1992, FERC issued Order No. 636,[2] which fully mandated the unbundling of transportation and marketing by directly requiring pipelines to offer transportation service on a non-discriminatory basis. *See id.*

## II. EVENTS LEADING TO THE CHALLENGED ORDERS

In 2002, as a result of Enron's collapse and downgrades in the credit ratings of energy companies, natural gas pipelines began to pay greater attention to credit exposure and their risk profiles. Several pipelines argued that tariff revisions were necessary to strengthen creditworthiness provisions and to minimize risk to the pipelines and to shippers in the event of shipper default. Accordingly, some pipelines made filings with the Commission to revise creditworthiness provisions in their tariffs. *See*, *e.g.*, *North Baja* R 1 at 5-6, JA 5-6 (among other things, raising the threshold for acceptable debt ratings and requiring security worth at least one year's worth of reservation charges).[3] In addition, other pipelines became

---

[2] *Pipeline Serv. Obligations & Revisions to Regulations Governing Self-Implementing Transp. & Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regs. Pmbls. 1991-96 ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regs. Pmbls. 1991-96 ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in relevant part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

[3] "R" refers to a record item. In the instant consolidated proceeding, there are three separate FERC record dockets. "*North Baja* R" refers to the record in Docket No. RP02-363, which is D.C. Circuit Case No. 04-1065. "*e prime* R" refers to the record in Docket No. RP03-41, which is D.C. Circuit Case No. 03-1257. "*PG&E* R" refers to the record in Docket No. RP03-70, which is D.C. Circuit Case No. 04-1066. "JA" refers to the Joint Appendix page number.

more diligent in seeking collateral from shippers whose credit ratings were downgraded. *See*, *e.g.*, *e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,062 (2003) ("*e prime I*") (complaint as to whether the twelve months of transportation charges sought as collateral by PG&E Gas Transmission, Northwest Corporation from e prime was proper), JA 167.

Among the pipelines seeking tariff revisions and/or collateral were North Baja and GTN. North Baja is a "natural-gas company" as defined in the NGA, 15 U.S.C. § 717a(6), and is a wholly-owned subsidiary of GTN. *See* Pet. Brief at iii. It operates a 79.8 mile interstate natural gas pipeline that interconnects El Paso Natural Gas Company's facilities near Ehrenberg, Arizona, with Gasoducto Bajanorte's pipeline near Mexicali, Mexico. *See North Baja Pipeline LLC*, 102 FERC ¶ 61,239 at 61,709 ("*North Baja I*"), JA 242, *reh'g denied*, 105 FERC ¶ 61,374 (2003) ("*North Baja II*"), JA 382. *See also North Baja Pipeline*, 2007 U.S. App. LEXIS at *1-2 (explaining North Baja's operations). GTN, formerly known as PG&E Gas Transmission, Northwest Corporation,[4] is an interstate natural gas pipeline transporting gas from the United States/Canada border in Idaho to California. *See* Pet. Brief at ii, 4. In 2002, both of these natural gas pipeline

[4] As GTN is the successor-in-interest to PG&E Gas Transmission, Northwest Corporation, GTN shall be used throughout to refer to PG&E Gas Transmission, Northwest Corporation.

companies sought to improve their risk exposure vis-à-vis shippers in case of shipper default.

On June 6, 2002, prior to placing the 79.8 mile natural gas pipeline into service, North Baja submitted revisions to its FERC Gas Tariff ("North Baja Tariff"). *See North Baja* R 1 at 1, JA 1. Among other things, North Baja proposed to modify the North Baja Tariff's creditworthiness provisions. Section 12.1(b) of the North Baja Tariff provided that any firm shipper deemed to be non-creditworthy could continue to receive service if it submitted any one of the following items: (1) a guarantee from a creditworthy corporate affiliate or third party; (2) a cash prepayment; (3) a letter of credit; or (4) other security acceptable to North Baja's lenders. *See North Baja I*, 102 FERC at P 13,[5] JA 247. If a shipper elected to submit a cash prepayment or a letter of credit, the value of either method had to cover the value of at least one year's worth of reservation charges. *See id.* On August 9, 2002, the Commission accepted many of North Baja's creditworthiness proposals, but directed North Baja to alter the language in Section 12.1(b) of the North Baja Tariff to state that the collateral requirement would equal the value of "no more than" one year's worth of reservation charges rather than "at least" one year's worth of reservation charges as initially proposed. *See North Baja Pipeline, LLC*, 100 FERC ¶ 61,183 at P 13 (2002).

[5] "P" refers to the internal paragraph number within a FERC order.

Meanwhile, in September 2002, GTN requested substantial collateral from e prime, a firm shipper on GTN's pipeline, demanding a cash deposit or acceptable letter of credit for twelve months of service. *See e prime I*, 102 FERC at PP 3 & 5, JA 167-68. In response, e prime charged that the twelve-month collateral requirement contravened FERC policy, *see id.* at P 7, JA 168, and that GTN's creditworthy standards were not clearly articulated in its tariff, *see PG&E Gas Transmission, Northwest Corp.*, 101 FERC ¶ 61,280 at P 2 (2002) ("*PG&E Gas Transmission I*"), JA 110. Thereafter, in November 2002, GTN filed revised tariff sheets to clarify its policies related to its existing creditworthy standards. *See id.* at P 1, JA 110.

As a result of these actions by North Baja and GTN, the Commission issued a series of orders that are now before this Court.

## III. THE FERC RULINGS ON REVIEW

### A. *North Baja* Orders

Although the Commission initially permitted North Baja to revise its tariff to require collateral up to a year's worth of reservation charges, the Commission subsequently reassessed that decision in light of its discussion of FERC's creditworthiness policies in various cases. *See North Baja I*, 102 FERC at P 12, JA 246 (noting creditworthiness decisions in *Northern Natural Gas Co.*, 102 FERC ¶ 61,076 (2003), and *Tennessee Gas Pipeline Co.*, 102 FERC ¶ 61,075, *order on*

*reh'g*, 103 FERC ¶ 61,275 (2003)). Taking action pursuant to NGA § 5, the Commission found that a general twelve-month collateral requirement was inconsistent with FERC policies and was unjust and unreasonable. *See id.* Referring to earlier FERC precedent, the Commission noted that "the three-month prepayment has been the standard used throughout the natural gas industry in the past and in the new post-Order No. 636 industry," and that "a prepayment requirement for any period longer than three months [wa]s excessive and should be rejected." *Id.* at P 15, JA 247.

On rehearing, North Baja asserted, among other things, that its situation was distinguishable from *Northern Natural* and *Tennessee* and that an evidentiary hearing should have been conducted to determine the facts and circumstances specific to North Baja. *See North Baja* R 17 at 3, JA 258. In denying rehearing, however, the Commission again emphasized its decision in *Tennessee Gas Pipeline Co.*, which applied different collateral requirements based on the risk profiles presented by various kinds of shippers. There, the Commission explained that the amount of collateral a particular shipper would be required to provide would depend on whether the shipper was an initial subscriber or a new shipper that took service after the facilities were placed in service. *See North Baja II*, 105 FERC at P 19, JA 388. The differences in collateral requirements for initial subscribers and new shippers reflected the relative risks faced by a pipeline

proposing to construct new facilities versus an existing pipeline. *See id.* "Once pipeline facilities [we]re constructed, the major risk to the pipeline [wa]s the potential loss of reservation charges associated with the contract termination process." *Id.* The three-month collateral requirement provided a pipeline, including North Baja, with sufficient protection against this risk. *See id.*

### B. *e prime* Orders

After GTN demanded and obtained twelve months of collateral from e prime, e prime filed a complaint against GTN, alleging that the collateral demand was unlawful and requesting refund of the collateral with interest. *See e prime I*, 102 FERC at P 1, JA 167. Among other claims, e prime asserted that the collateral demand for twelve months of prepayment of transportation charges was not authorized by the GTN Tariff. *See id.* at P 25, JA 173.

GTN maintained that its tariff permitted it to impose a twelve-month prepayment obligation on a non-creditworthy shipper, but nothing in the GTN Tariff specifically provided that authority. *See id.* at P 26, JA 174. Rather, Paragraph 18.3(A)(2) of the GTN Tariff allowed a shipper to establish creditworthiness by offering security acceptable to GTN's lenders. *See id.* Hence, the Commission directed GTN to submit documentation regarding the level of security acceptable to GTN's lenders before issuing a further ruling on whether a twelve-month collateral requirement was appropriate. *See id.* at P 27, JA 174.

Upon reviewing GTN's proffered documentation, the Commission concluded that a 1993 loan agreement did require non-creditworthy shippers to post letters of credit or cash in an amount equal to twelve months of demand charges, but that subsequent loan agreements did not contain such specific standards. *See e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶ 61,289 at P 5 (2003) ("*e prime II*"), JA 253. Furthermore, the Commission noted that past and present FERC policy supported establishing a three-month collateral limit. *See id.* at P 7, JA 254. Moreover, the Commission agreed with e prime that GTN had failed to support its twelve-month collateral requirement and found in favor of e prime. *See id.* at P 8, JA 255.

On rehearing, GTN challenged, among other things, the Commission's application of a three-month collateral requirement, *see e prime* R 28 at 3, JA 284, which the Commission denied, *see e prime, inc. v. PG&E Gas Transmission, Northwest Corp.*, 104 FERC ¶ 61,026 at P 2 (2003) ("*e prime III*"), JA 342. The Commission rejected GTN's contention that it had authority to require twelve months of collateral based on the 1993 loan agreement. *See id.* at P 10, JA 346. That loan agreement no longer applied, and at the time the contract between e prime and GTN was disputed, FERC policy required non-creditworthy shippers to prepay for up to three months of service. *See id.* Likewise, the Commission

noted that the GTN Tariff did not set forth a twelve-month collateral requirement. *See id.* at P 11, JA 347.

Finally, the Commission dismissed GTN's arguments that the Commission had not properly addressed GTN's unique circumstances before applying the three-month collateral limit. *See id.* at P 12, JA 347. GTN had failed to specify any circumstances or facts that would distinguish it from other pipelines, nor had it established any facts as to e prime that would compel consideration of a greater prepayment obligation on e prime's part. *See id.* The Commission also found GTN's argument that other tariffs had creditworthiness provisions deviating from the three-month collateral limit, to be misplaced; FERC's role in the instant case was solely to determine whether collateral was appropriate under the circumstances on September 17, 2002, when GTN demanded and obtained from e prime twelve months of prepayment collateral. *See id.* at P 13, JA 348.

### C. *PG&E Gas Transmission* Orders

Shortly after e prime filed its complaint against GTN, charging GTN lacked tariff authority to require twelve months of collateral, GTN submitted revised tariff sheets to clarify its policies related to its creditworthy standards. *See PG&E Gas Transmission I*, 101 FERC at P 1, JA 110. GTN proposed, among other things, new language specifically requiring a shipper to provide twelve months of collateral, in the form of a letter of credit or cash prepayment, if the shipper could

not satisfy GTN's creditworthy standards with an acceptable credit rating or with a creditworthy entity's guarantee. *See id.* at P 4, JA 111.

Because of the numerous concerns raised by various shippers regarding GTN's proposed tariff changes, *see id.* at PP 11-13, JA 113-14, the Commission established a technical conference to gather additional information and to provide the parties a forum to discuss the relevant issues. *See id.* at P 22, JA 117. It accepted the proposed tariff sheets, but suspended them until the earlier of five months or the date established in a further Commission order following the technical conference. *See id.*

Subsequent to the technical conference, the Commission concluded that "requiring security equal to twelve months of service charges is excessive for shippers subscribing to service after the pipeline is in operation." *PG&E Gas Transmission*, *Northwest Corp.*, 103 FERC ¶ 61,137 at P 32 (2003) ("*PG&E Gas Transmission II*"), JA 304. The Commission again observed that FERC policy permitted pipelines to demand existing shippers three months of collateral. *See id.* It rejected GTN's claim that GTN was merely clarifying an existing tariff provision allowing twelve months of collateral as the evidence indicated that the GTN Tariff did not provide for a one-year collateral requirement. *See id.* at P 31, JA 303.

In denying the twelve-month collateral requirement for shippers subscribing to service after a pipeline is in service, the Commission distinguished such shippers from expansion shippers and those shippers subscribing to greenfield projects. *See id.* at PP 33-34, JA 304-05. "When undertaking a system expansion or constructing a greenfield pipeline, a transporter and its lenders can legitimately require greater collateral to ensure that prior to the investment of resources, they have a reasonable probability of recovering their investment." *Id.* at P 33, JA 304. But once a pipeline is in service, the construction costs are already sunk, and the ongoing risk to the pipeline is less. *See id.* Under such circumstances, shippers newly subscribing to the operating pipeline should not be subjected to the same collateral requirement as shippers upon whose credit the construction was financed. *See id.*

GTN sought rehearing, which the Commission denied. *See PG&E Gas Transmission*, *Northwest Corp.*, 105 FERC ¶ 61,382 at P 19 (2003) ("*PG&E Gas Transmission III*"), JA 354. As before, the Commission reiterated its general policy since Order Nos. 436 and 636, requiring no more than three months of collateral for service on existing facilities. *See id.* The Commission emphasized that it chose "this standard for existing service to balance the risks to the pipeline from potential contract default against the need under open access service to ensure that existing pipeline services are reasonably available to all shippers." *Id.* The

Commission observed that the three-month period corresponded to the time it takes a pipeline to terminate a shipper in default and be in a position to remarket the capacity. *See id.* The remarketing risk that GTN claimed supported a longer time period for collateral was properly a risk to be accounted for in the rate of return on equity, *see id.*, and was not a risk that would be reduced by extra collateral, *see id.* at P 25, JA 357.

The Commission found a meaningful distinction between collateral for new projects and for existing facilities because a pipeline is under no obligation to construct facilities and because a pipeline and its lenders have an interest in ensuring a reasonable amount of collateral from initial shippers before committing funds. *See id.* at P 23, JA 356. But once facilities have been constructed, a pipeline's risk from any shipper default rests with the costs of remarketing capacity, which the Commission reiterated is more properly a part of the rate of return calculation and not a collateral demand. *See id.* at PP 24-25, JA 356-57.

The Commission also rejected GTN's argument that FERC had previously allowed, on a few occasions, pipelines to include in their tariffs collateral requirements greater than three months. *See id.* at P 20, JA 355. GTN only cited to tariff provisions, not the underlying orders; hence, the Commission observed that it could simply have accepted those provisions without examining whether they conformed to FERC policy and precedent. *See id.* More important, "[t]he

fact that the Commission ha[d] accepted such tariff provisions d[id] not prevent the Commission from making a determination with respect to GTN's current filing based on [FERC's] precedent and policy, taking into account the current focus on creditworthiness provisions, as long as [FERC] provide[d] a reasoned explanation for its policy . . . ." *Id.*

The Commission also dismissed GTN's argument that the burden was on FERC to justify using a shorter collateral time period because, as the proponent of a NGA § 4 rate filing, GTN had the burden to establish that a longer twelve-month requirement was proper. *See id.* at P 21, JA 355.

**D. The Voluntary Remand Orders**

On August 29, 2003, GTN sought appellate review in Case No. 03-1257 of the Commission's orders in *e prime I*, *II*, and *III*. GTN similarly filed a petition for review in Case No. 04-1066 of the Commission's orders in *PG&E Gas Transmission I*, *II*, and *III* on February 23, 2004. That same day, North Baja requested appellate review in Case No. 04-1065 of the Commission's orders in *North Baja I* and *II*. Pursuant to this Court's order, all three appellate cases were consolidated on March 30, 2004.

On August 13, 2004, the Commission and Pipelines jointly moved to hold the cases in abeyance pending completion of a proposed rulemaking proceeding to evaluate creditworthiness standards. *See Creditworthiness Standards for Interstate*

*Natural Gas Pipelines*, Notice of Proposed Rulemaking, 69 Fed. Reg. 8587, FERC Stats. & Regs. ¶ 32,573 (2004), JA 509. After the Commission terminated the creditworthiness rulemaking proceeding and reaffirmed its general policy of requiring up to three months of collateral for existing shippers, *see Policy Statement on Creditworthiness Issues for Interstate Natural Gas Pipelines & Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412 (2005) ("*Creditworthiness Policy Statement*"), JA 538, the consolidated cases were reactivated.

On January 13, 2006, the Commission moved to hold the cases in abeyance and for voluntary remand of the record to more fully consider the arguments raised by Pipelines. Upon remand of the record, the Commission directed North Baja and GTN "to submit briefs to address certain issues concerning whether North Baja and GTN should be permitted to collect 12 months of collateral from non-creditworthy shippers as opposed to the Commission's general policy of 3 months of collateral for non-creditworthy shippers." *North Baja Pipeline, LLC et al.*, 115 FERC ¶ 61,141 at P 1 (2006) ("*Directing Briefs Order*"), JA 396. The *Directing Briefs Order* clearly outlined numerous issues to be addressed by North Baja and GTN, including the specific facts and circumstances making North Baja and GTN different from all other pipelines. *See id.* at P 12, JA 402. Pipelines submitted a joint brief, which was commented upon by numerous parties.

After reviewing the various filings, including Pipelines' joint brief and comments thereto, the Commission issued an order denying North Baja's and GTN's proposals to require twelve months of collateral from non-creditworthy shippers. *See North Baja Pipeline, LLC et al.*, 117 FERC ¶ 61,146 (2006) ("*Remand Order*"), JA 482. The Commission again observed that its "historic policy on creditworthiness was designed to ensure all shippers had equal access to service without unreasonable barriers to entry that would inhibit the development of a national grid and access to competitively priced supplies." *Id.* at P 39, JA 497. As reflected in the *Creditworthiness Policy Statement*, the "Commission strives to establish credit and collateral policies that balance the interests of the pipeline in receiving adequate security while protecting shippers against unduly harsh collateral requirements and ensuring that pipeline service is reasonably available on an open access basis." *Id.* "The collateral requirement asked of existing shippers whose credit status has fallen below the pipeline's credit standards must be reasonable and directly related to the risks faced by the pipeline." *Id.* at P 42, JA 499. In the instant cases, the Commission concluded that the twelve-month collateral requirements did not meet that standard. *See id.* at P 43, JA 499.

Under the proposals offered by both GTN and North Baja, any shipper, "which has not defaulted and is continuing to pay for service under its contracts, [must] put up 12 months collateral or risk termination, simply because its credit

status has been lowered." *Id.* But the twelve-month requirement would not appreciably reduce the pipeline's remarketing risk. *See id.* In short, the twelve-month collateral requirement proposals lacked balance.

The Commission further found that Pipelines failed to justify, via specific facts and circumstances, their argument that they were unlike other pipeline systems and, therefore, required a twelve-month collateral requirement. Pipelines argued that they faced unusual credit risk that warranted an extended collateral time period, but the Commission noted that credit risk is normally a part of calculating a pipeline's rate of return. *See id.* at PP 47-48, JA 501. Indeed, GTN itself agreed that credit risk should be considered in evaluating rate of return. *See id.* at P 50, JA 501. And although the Commission recognized that GTN had endured several shipper defaults, the Commission noted that they were isolated and were the result of the anomalous Western energy crisis. *See id.* at P 53, JA 502. Furthermore, the Commission did not believe Pipelines' argument that they faced unusual remarketing risk. *See id.* at PP 55-57, JA 503-04.

That some currently effective tariffs may provide pipelines some discretion in serving shippers did not mean that any collateral requirements proposed by Pipelines are just and reasonable. Those other pipeline tariff provisions may not have been examined to see whether they conformed to FERC precedent and policy, and they did not necessarily establish a generic FERC policy. *See id.* at PP 58-60,

JA 504-06. In the instant circumstances, "the Commission could act on the basis of the filings based on its current precedent and policy, without necessarily taking action with respect to other pipelines in which complaints have not been raised with respect to existing tariff provisions." *Id.* at P 61, JA 506. Finally, the Commission found unavailing and/or irrelevant Pipelines' arguments that the twelve-month collateral requirement would prevent capacity speculation, *see id.* at P 62, JA 506, that the longer time period would not cause a liquidity crisis, *see id.* at P 63, JA 507, that debt-financed pipelines like GTN should be treated like project-financed pipelines with longer collateral requirements, *see id.* at P 64, JA 507, and that North Baja deserved a trial-type hearing under NGA § 5, *see id.* at P 65, JA 507.

## SUMMARY OF ARGUMENT

This Court gives great deference to FERC's policy determinations. In the instant cases, the Commission concluded that Pipelines' proposal to require twelve months of reservation charges as collateral from all non-creditworthy shippers violated FERC's general policy favoring three months' worth of collateral. That FERC policy has been followed in numerous cases since issuance of Order No. 436 two decades ago to ensure open access to non-discriminatory pipeline service, and was recently reaffirmed in the 2005 *Creditworthiness Policy Statement*.

Although the Commission has occasionally permitted certain pipelines to procure collateral greater than three months, those occasions were generally limited to instances where pipelines were constructing new or expansion facilities and where additional collateral was necessary to justify committing funds to the construction project. Here, Pipelines sought to require more than three months of collateral from all non-creditworthy shippers, not just shippers committed to new or expansion facilities. Pursuant to its statutory duty, and balancing the respective interests of both pipelines and shippers, the Commission reasonably found that the proposed twelve-month collateral requirement was disproportionate to the risks, including remarketing risk, faced here by Pipelines.

Pipelines had the opportunity to present facts and circumstances reflecting how their situations were unlike those of other pipelines and, thus, deserving of a

larger collateral requirement from all non-creditworthy shippers. Despite that opportunity, Pipelines proffered no evidence indicating that their individual circumstances merited a variance from FERC's general policy of three months of collateral.

## ARGUMENT

### I. STANDARD OF REVIEW

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). This standard requires the Commission to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 15 U.S.C. § 717r(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (internal quotation marks omitted)).

"Th[is] Court's review of Commission policy is highly deferential because the breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *Tennessee Gas Pipeline Co. v. FERC*, 400 F.3d 23, 25 (D.C. Cir. 2005) (internal quotation marks omitted); *see also North Baja Pipeline*, 2007 U.S. App. LEXIS at *6-12 (affirming, under "deferential" standard of review, Commission's application of longstanding *force majeure* policy to North Baja where the pipeline's particular facts and circumstances did not warrant a departure from that policy).

## II. TO ENSURE OPEN ACCESS, THE COMMISSION REASONABLY APPLIED ITS GENERAL POLICY ON CREDITWORTHINESS TO DENY PIPELINES' PROPOSAL TO REQUIRE TWELVE MONTHS OF COLLATERAL FROM ALL NON-CREDITWORTHY SHIPPERS

### A. FERC's General Policy Does Not Permit Twelve Months Of Collateral From Non-Creditworthy Shippers

#### *1. FERC Policy Limits Collateral Requirements to Three Months of Reservation Charges*

"The Commission's historic policy on creditworthiness was designed to ensure all shippers had equal access to service without unreasonable barriers to entry that would inhibit the development of a national grid and access to competitively priced supplies." *Remand Order*, 117 FERC at P 39, JA 497. "[B]ecause pipelines are regulated utilities with market power, the Commission strives to establish credit and collateral policies that balance the interests of the

pipeline in receiving adequate security while protecting shippers against unduly harsh collateral requirements and ensuring that pipeline service is reasonably available on an open access basis. Maintaining such a balance is particularly important with respect to the collateral requirements imposed on existing shippers of the pipeline because termination of service to such shippers constitutes abandonment of service." *Id.*

"Since Order Nos. 436 and 636, the Commission's general policy in order to ensure that open access service is reasonably available has been to permit pipelines to require shippers that fail to meet the pipeline's creditworthiness requirements for pipeline service to put up collateral equal to three months' worth of reservation charges." *Creditworthiness Policy Statement*, 111 FERC at P 11 (citing numerous FERC cases), JA 545. In declining permission to Pipelines to impose a twelve-month collateral requirement, the Commission properly recognized this general policy in the various orders on appeal. *See e prime II*, 102 FERC at PP 2 ("The Commission's policy during the time collateral was demanded from e prime . . . requires non-creditworthy shippers to provide three-months prepayment of service."), JA 252, 7 ("The Commission's policy in effect at the time the contract was disputed relies upon three-months prepayment of service."), JA 254; *e prime III*, 104 FERC at P 10 ("The Commission's policy in effect at the time the contract was disputed permits pipelines to require non-creditworthy shippers to prepay for

up to three months of service."), JA 347; *North Baja I*, 102 FERC at P 15 (noting favorably that the three-month prepayment has been the standard used throughout the natural gas industry), JA 247; *PG&E Gas Transmission II*, 103 FERC at P 32 ("The Commission policy is that for on-going shippers collateral can be required up to three months of service."), JA 304; *PG&E Gas Transmission III*, 105 FERC at P 19 ("The Commission's general policy since Order Nos. 436 and 636 has been to require no more than three months of collateral for service on existing facilities."), JA 354.

As the Commission explained in the orders on review, *see id.*, FERC's general policy supporting a three-month collateral requirement had been followed in numerous earlier orders. *See Florida Gas Transmission Co.*, 66 FERC ¶ 61,140 at 61,262, *vacated on other grounds*, 66 FERC ¶ 61,376 (1994); *Valero Interstate Transmission Co.*, 62 FERC ¶ 61,197 at 62,397 (1993); *Southern Natural Gas Co.*, 62 FERC ¶ 61,136 at 61,954 (1993); *Williams Natural Gas Co.*, 43 FERC ¶ 61,227 at 61,596 (1988); *Texas Eastern Transmission Corp.*, 41 FERC ¶ 61,373 at 62,017 (1987); *Natural Gas Pipeline Co.*, 41 FERC ¶ 61,164 at 61,409 n.4 (1987); *Tennessee Gas Pipeline Co.*, 40 FERC ¶ 61,194 at 61,636 (1987); *Pacific Gas Transmission Co.*, 40 FERC ¶ 61,193 at 61,622 (1987); *Northern Natural Gas Co.*, 37 FERC ¶ 61,272 at 61,822 (1986). More recently, the Commission acknowledged its general policy in several cases that came before the Commission

at about the same time as the instant appealed cases. *See Kern River Gas Transmission Co.*, 98 FERC ¶ 61,079 at 61,241 (2002) ("Commission policy with respect to creditworthiness requires that shippers who cannot demonstrate creditworthiness be allowed to get service by prepaying for up to 3 months of service."), *cited in e prime II*, 102 FERC at P 7, JA 254, and *e prime III*, 104 FERC at P 10 n.14, JA 347; *Tennessee Gas*, 103 FERC at P 28 (noting that FERC policy on collateral depends on whether a shipper takes service after facilities are placed in service and stating that FERC's established three-month collateral requirement provides a pipeline with sufficient protection once facilities are constructed), *cited in North Baja II*, 105 FERC at P 19, JA 388; *Northern Natural*, 102 FERC at P 37 (accepting Northern Natural's offer to modify its security requirements so that firm shippers would only have to provide security up to three months of reservation charges), *cited in e prime II*, 102 FERC at P 7, JA 254, *North Baja I*, 102 FERC at P 15, JA 247, and *PG&E Gas Transmission II*, 103 FERC at P 32, JA 304.

Furthermore, in 2005, the Commission reaffirmed its general policy supporting a three-month, not a twelve-month, collateral requirement in *Creditworthiness Policy Statement*, 111 FERC at P 14, JA 547. There, the Commission concluded that it "generally finds that its traditional policy of requiring no more than the equivalent of three months' worth of reservation

charges reasonably balances the shippers' right to continued service with the pipeline's risk." *Id.*

In short, when the Commission ruled against Pipelines' proposal for a twelve-month collateral requirement, the Commission reasonably could rely on a longstanding general policy favoring a three-month collateral requirement for non-creditworthy shippers. *See North Baja Pipeline*, 2007 U.S. App. LEXIS at *7-8 (noting that "there is nothing unreasonable about the Commission comparing North Baja's proposal to previously approved policies to determine if the proposal equitably shares the risk between North Baja and its shippers" and concluding that the agency "reasonably rejected North Baja's proposal as inconsistent with agency policy").

### 2. *In Establishing FERC's General Policy on Collateral, the Commission Properly Distinguished Between Newly Constructed Capacity and Existing Capacity*

While the Commission generally permits pipelines to require only three months of collateral from non-creditworthy shippers, it allows greater leeway for "contracts leading to new construction." *Remand Order*, 117 FERC at P 40, JA 498; *PG&E Gas Transmission III*, 105 FERC at P 25 (recognizing need for greater collateral for initial shippers on new construction projects, but balancing the interests to find that greater collateral should not be exacted from other shippers), JA 357. For such construction contracts, "the Commission has recognized that

pipelines and their lenders can have a reasonable basis for requiring large collateral requirements for non-creditworthy shippers in order to justify committing funds to the construction project." *Remand Order*, 117 FERC at P 40, JA 498; *see also Creditworthiness Policy Statement*, 111 FERC at P 17, JA 549; *North Baja II*, 105 FERC at P 19 (noting different risks faced by a company proposing to construct new facilities versus an existing pipeline), JA 388. Contrary to Pipelines' argument, *see* Pet. Brief at 51-54, the basis for this distinction is reasonable.

"Since [a] pipeline is not required to construct facilities under Section 7 of the Natural Gas Act, [a] pipeline should not be required to lend funds to non-creditworthy shippers by constructing facilities without adequate collateral requirements." *PG&E Gas Transmission II*, 103 FERC at P 33, JA 304; *North Baja I*, 102 FERC at P 14 (discussing greater risk for expansion and greenfield projects), JA 247. "For new construction projects, [a] pipeline[] need[s] sufficient collateral from non-creditworthy shippers to ensure, prior to the investment of significant resources in the project, that it can protect its financial commitment to the project." *Creditworthiness Policy Statement*, 111 FERC at P 17, JA 549.

But "once [a] pipeline is in service, the construction costs are sunk (have already been expended), so the ongoing financial risk to the pipeline is less . . . ." *PG&E Gas Transmission II*, 103 FERC at P 33, JA 304. Indeed, after construction, the major risk to the pipeline is merely "the potential loss of

reservation charges associated with the contract termination process."[6] *North Baja II*, 105 FERC at P 19, JA 388. Thus, shippers on what is now existing capacity do not pose the same risk as shippers upon whose credit the construction was financed, and the Commission reasonably can subject different classes of customers, with different risk profiles, to different collateral requirements. *See PG&E Gas Transmission II*, 103 FERC at P 33, JA 304.

Perhaps recognizing FERC's reasonableness in distinguishing between newly constructed capacity and existing capacity in assessing collateral requirements, GTN argues that it is like those pipelines who project-finance new construction and should, accordingly, receive similar treatment. *See* Pet. Brief at 52-53 (arguing that, as GTN is a debt-financed pipeline whose lenders relied on its shipper contracts for payment, GTN is no different than a new project-financed pipeline). But "GTN provided no data to support its contention that it is similar to project financed pipelines with debt obligations that specifically require a one-year prepayment of transportation charges." *PG&E Gas Transmission III*, 105 FERC at P 48, JA 367; *see also Remand Order*, 117 FERC at P 64 (observing that GTN has presented no new arguments on debt-financing issue), JA 507. Although GTN did have such debt financing before 1993, it no longer has such financing. *See PG&E*

[6] Pipelines contend that this is not so with respect to constructed but not yet depreciated facilities, *see* Pet. Brief at 54, but offer no proof or explanation how depreciation changes the risk profile.

*Gas Transmission III*, 105 FERC at P 48, JA 367. Indeed, GTN is no different than other pipelines that are not project-financed and which do not require specific collateral from shippers, *see id.*; therefore, GTN does not merit the different collateral arrangements afforded project-financed newly constructed capacity.

### 3. *Denying Pipelines' Proposal for Twelve Months of Collateral Is Consistent with FERC Policy*

Citing various tariffs, Pipelines argue that the Commission failed to follow FERC precedent permitting collateral arrangements different than three months and failed to explain why their proposal should not be accepted. *See* Pet. Brief at 33-41. The Commission, however, did not depart from its precedent in rejecting Pipelines' twelve-month collateral requirement, but adhered to what has been FERC policy as outlined in numerous cases since Order No. 436. *See supra* Part II.A.1.

That other pipelines may have previously procured different collateral arrangements, especially prior to the 2005 *Creditworthiness Policy Statement*, does not mean that Pipelines' proposal is just and reasonable and that the Commission erred in rejecting it. "The Commission has the ability to proceed either through case-by-case adjudication or rulemaking." *Remand Order*, 117 FERC at P 61, JA 506. With respect to the *e prime* set of orders, a shipper filed a complaint against GTN, which precipitated GTN's decision to file a rate case resulting in the *PG&E*

*Gas Transmission* orders. As for the *North Baja* orders, they arose "during the course of an ongoing proceeding." *Id.*

Consequently, the Commission acted through case-by-case adjudication and could reasonably make its determinations regarding the specific filings made by Pipelines based on FERC's current precedent and policy and on Pipelines' specific circumstances, "without necessarily taking action with respect to other pipelines in which complaints have not been raised with respect to existing tariff provisions." *Id.* "The fact that the Commission has accepted such [nonconforming] tariff provisions does not prevent the Commission from making a determination with respect to GTN's [and North Baja's] current filing based on its precedent and policy, taking into account the current focus on creditworthiness provisions, as long as it provides a reasoned explanation for its policy," which the Commission clearly has. *PG&E Gas Transmission III*, 105 FERC at P 20, JA 355.

Furthermore, the mere acceptance of tariff filings in and of themselves without further elaboration does not establish a FERC policy receptive to twelve-month collateral requirements.[7] *See Remand Order*, 117 FERC at P 60, JA 506

[7] Pipelines allege that the Commission itself has on occasion cited tariff provisions, *see* Pet. Brief at 38 (citing *Northern Border Pipeline Co.*, 95 FERC ¶ 61,427 at 62,589 n.5 (2001), *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 at P 275 n.172 (2006), and *ANR Pipeline Co.*, 115 FERC ¶ 61,273 at P 5 n.1 (2006)), but in none of those cases did the Commission base its decision purely on the cited tariff provisions as policy or precedent dictating an outcome. Rather, the Commission referred to them as examples.

("[A]ccepting another pipeline's provisions does not necessarily establish a generic Commission policy or precedent regarding similar tariff provisions."). On rehearing, Pipelines did not cite to any specific orders, but to various tariff provisions, which were all issued before the Commission's *Creditworthiness Policy Statement* and its 2005 reaffirmation of the general three-month collateral requirement. *See PG&E* R 53 at 10-11, JA 330-31; *e prime* R 28 at 4-5, JA 285-86; *North Baja* R 17 at 16-18, JA 271-73; *see also Remand Order*, 117 FERC at P 60 ("GTN/North Baja did not cite to specific orders . . . ."), JA 506. None of those bare citations indicated that the Commission had adopted a policy favoring twelve months of reservation charges as collateral.

Moreover, failing to adequately brief the circumstances of these tariffs, Pipelines did not put the Commission on notice, *see Domtar Maine Corp. v. FERC*, 347 F.3d 304, 310, 312-13 (D.C. Cir. 2003) (rejecting arguments not specifically nor adequately raised in rehearing request), as to whether the holders of these tariffs were in similar situations as Pipelines or whether the Commission "may simply have accepted these provisions without examining whether they conformed to Commission policy and precedent." *Remand Order*, 117 FERC at P 60, JA 506. Under these conditions, even if there were isolated, pre-*Creditworthiness Policy Statement* tariffs with collateral arrangements different than three months, the

Commission did not act unreasonably in denying Pipelines' proposal for twelve months of collateral.

Likewise, Pipelines' argument that two of its competitors, Alliance Pipeline L.P. ("Alliance") and Northern Border Pipeline Company ("Northern Border"), have received approval to use twelve-month collateral provisions is unavailing. *See* Pet. Brief at 41. First, Pipelines failed to mention either pipeline in any of the requests for rehearing. Accordingly, Pipelines' argument concerning those pipelines is barred. *See Domtar*, 347 F.3d at 310. Second, because both Alliance's and Northern Border's pipelines concerned new construction or expansion capacity, *see Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 at 62,209 & 62,214 (1998) (describing new pipeline requiring NGA § 7(c) approval), and *Northern Border Pipeline Co.*, 51 FERC ¶ 61,261 at 61,768-69 (1990) (noting expansion of Northern Border's capacity), collateral requirements could be greater than the general policy of three months. *See Remand Order*, 117 FERC at P 40 (citing *Alliance Pipeline L.P.* and *Northern Border Pipeline Co.* as cases involving new construction), JA 498; *PG&E Gas Transmission II*, 103 FERC at P 33, JA 304; *North Baja I*, 102 FERC at P 14, JA 247. *Cf. e prime III*, 104 FERC at P 9 (reiterating that expansion capacity shippers may have different prepayment obligations), JA 345. Hence, Pipelines' contention based on these competitors' situations is without merit.

## B. The Commission Properly Applied Its General Policy On Collateral To Pipelines' Proposal

### *1. The Commission Has Authority to Regulate the Amount of Collateral Required from Shippers*

Although Pipelines argue that the NGA does not require pipelines to serve non-creditworthy shippers and that, therefore, they have discretion, like certain other pipelines, in the amount of collateral to require from such shippers, *see* Pet. Brief at 33, under the NGA, "the Commission is responsible for establishing just and reasonable terms and conditions of service." *Remand Order*, 117 FERC at P 58, JA 504. To satisfy that statutory duty, the Commission "shall determine the just and reasonable . . . practice [] or contract to be thereafter observed and in force, and shall fix the same by order." 15 U.S.C. § 717d; *see also id.* § 717c ("All rates and charges made, or demanded, or received . . . and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."). Thus, Pipelines "are incorrect in asserting they can establish any collateral policy they wish for shippers with contracts." *Remand Order*, 117 FERC at P 58, JA 504.

The Commission's authority to regulate the collateral requirement charged by Pipelines and Pipelines' concomitant lack of such discretion is particularly evident when one understands that "[t]he failure to put up required collateral can lead to termination, hence abandonment of service." *Remand Order* at P 58, JA

504; *see also id.* at P 39 (citing *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1516-18 (D.C. Cir. 1990) (finding that termination of a contract even at the expiration of its term constitutes abandonment of service)), JA 497-98. "Because the termination of service is abandonment under the Natural Gas Act, the Commission needs to ensure that pipeline tariff requirements do not unreasonably and unnecessarily result in the abandonment of service to a shipper." *Id.* at P 42, JA 499. Abandonment is expressly within the purview and approval of the Commission, *see* 15 U.S.C. § 717f(b), and the Commission ostensibly has authority to regulate the amount of collateral to assure that termination and, hence, abandonment do not arise haphazardly and are "in the public convenience and necessity," *see Remand Order*, 117 FERC at P 58, JA 504.

Pipelines, though, contend that the harm of abandonment cannot be the basis upon which the Commission acts because abandonment is a speculative harm and only applies to a subset of shippers in the instant cases. *See* Pet. Brief at 43-47. Beside the fact that the Commission has a statutory duty to assure just and reasonable terms and conditions of service, *see Remand Order*, 117 FERC at P 58, JA 504, Pipelines' contention mistakes what is a rationale for the Commission's decisions with being the rationale and authority for the Commission's rulings. Contrary to their argument, *see* Pet. Brief at 43, the Commission never said that

abandonment is the only harm and rationale for denying Pipelines' twelve-month collateral requirement.

Rather, "[t]he Commission is concerned with providing shippers access to pipeline transportation capacity at reasonable terms." *Remand Order*, 117 FERC at P 63, JA 507. The Commission seeks "to ensure all shippers ha[ve] equal access to service without unreasonable barriers to entry that would inhibit the development of a national grid and access to competitively priced supplies." *Id.* at P 39, JA 497; *see also PG&E Gas Transmission III*, 105 FERC at P 19 (balancing risks of default against need under open access "to ensure that existing pipeline services are reasonably available to all shippers), JA 354. "[U]nduly harsh collateral requirements," *Remand Order*, 117 FERC at P 39, JA 497, hinder such development and diminish open access. The Commission's reference to abandonment was to demonstrate a by-product of high collateral requirements limiting open access, and not the sole harm resulting from such requirements.

That abandonment and other FERC rationales may focus on existing shippers, as alleged by Pipelines, *see* Pet. Brief at 42-43, do not make the Commission's decisions infirm. Those rationales do not merely concern existing shippers. For example, as to prospective shippers, their credit risk need not be reflected in onerous collateral requirements, but can be taken "into account in evaluating bids for capacity." *Remand Order*, 117 FERC at P 41, JA 498; *see also*

*id.* at P 66 (same), JA 508. Likewise, the Commission worries about collateral requirements that act as a deterrent to open access and competitive markets whether such requirements are for existing shippers or for prospective shippers seeking service in the first instance. *See Remand Order*, 117 FERC at P 39 (seeking to protect "shippers" against unduly harsh collateral requirements to ensure open access), JA 497.

Moreover, although the rationales against unduly harsh collateral requirements apply generally to all shippers, the Commission recognized distinctions among different classes of shippers. *See Creditworthiness Policy Statement*, 111 FERC at PP 14-20 (describing potentially different collateral requirements for existing shippers, those bidding for available capacity on a pipeline's existing system, and expansion shippers), JA 547-50. Pipelines, though, sought to apply their twelve-month collateral requirement in all situations. *See PG&E Gas Transmission III*, 105 FERC at P 28 (stating that GTN failed to justify its proposal to apply a twelve-month collateral requirement in all situations), JA 358; *North Baja* R 1 at 5-6, JA 5-6.

Recognizing how such a broad proposal negatively affects shippers, particularly existing shippers, the Commission concluded that Pipelines' general twelve-month collateral requirement was unjust and unreasonable and observed that Pipelines had failed to justify such a proposal. *See*, *e.g.*, *PG&E Gas*

*Transmission III*, 105 FERC at P 28, JA 358 (noting that GTN seeks to apply the twelve-month collateral requirement in all cases, but failed to justify it). Nevertheless, the Commission specifically invited pipelines "to propose mechanisms to take into account credit status when allocating available capacity," *see Remand Order*, 117 FERC at P 62, JA 507, and recognized that pipelines may employ alternative collateral arrangements for expansion facilities, *see id.* at P 40, JA 498. Thus, in determining here that Pipelines' proposal to uniformly apply a twelve-month collateral requirement was unjust and unreasonable, the Commission did not err in highlighting the effect on existing shippers, as the Commission still permitted pipelines to proffer potentially just and reasonable alternatives for other types of shippers. *See North Baja Pipeline*, 2007 U.S. App. LEXIS at *8 (noting favorably that the Commission, while relying on longstanding policy, "made clear that it remained open to alternative mechanisms").

2. *The Commission Reasonably Accounted for Remarketing Risk*

Contrary to Pipelines' contentions, *see* Pet. Brief at 47-51, the Commission properly considered remarketing risk in applying FERC's general policy on collateral to Pipelines' situations. The Commission found that "[t]he risk of remarketing capacity is one that pipelines are expected to face, and is part of the rate of return pipelines are allowed on their capital investments." *PG&E Gas Transmission III*, 105 FERC at P 24, JA 356. It "is a business risk of the pipeline

which is being reflected in its rate of return on equity." *Id.* at P 19, JA 354-55. Moreover, the Commission understood that requiring twelve months of collateral from shippers did not directly reduce the remarketing risk of pipelines like Pipelines. *See id.* at P 25, JA 357; *Remand Order*, 117 FERC at P 44, JA 499. As the Commission observed:

> For example, suppose a shipper's credit rating has fallen so that it is no longer creditworthy under GTN's tariff. Certainly, if the shipper could cobble together the twelve-months of collateral proposed by GTN, GTN would be better protected for a potential future default, since it would have a longer period to try to remarket the capacity. But such a potential future benefit does not change GTN's current remarketing risk. If the shipper defaults, GTN is subject to the risk of remarketing the capacity.

*PG&E Gas Transmission III*, 105 FERC at P 25, JA 357; *Remand Order*, 117 FERC at P 44 (quoting *PG&E Gas Transmission III*), JA 500.

In short, the amount of collateral "does not significantly affect the pipeline's risk of having to remarket the capacity." *Id.* at P 45, JA 500. Instead of reducing remarketing risk, large collateral requirements tend to increase the current risk of default by placing undue pressure on shippers who cannot easily provide such expensive collateral. *See PG&E Gas Transmission III*, 105 FERC at P 25, JA 357; *Remand Order*, 117 FERC at P 44, JA 500.

Pipelines, though, maintain that the Commission focuses on the wrong question when it addresses remarketing risk. *See* Pet. Brief at 49-50. According to Pipelines, the question is not whether increased collateral will reduce a pipeline's

remarketing risk; rather, the question is whether the increased collateral will help ameliorate the pipeline's financial exposure in the event the pipeline is unable for some period of time to remarket its capacity after a shipper default. *See id.* But it is Pipelines, not the Commission, who are mistaken in assessing the issue of remarketing risk. As the Commission concluded, "[t]he risk of remarketing capacity is one that pipelines are expected to face, and is part of the rate of return pipelines are allowed on their capital investments." *PG&E Gas Transmission III*, 105 FERC at P 24, JA 356. Remarketing risk is subsumed within the rate of return, which ostensibly accounts for the realities confronting pipelines.[8] *See id.* What Pipelines seek is merely a penalty clause for future defaults, and not something that actually addresses current remarketing risk. *See id.* at P 25, JA 357.

Pipelines respond that rate of return inadequately protects pipelines serving non-creditworthy shippers and that they deserve additional credit safeguards. *See* Pet. Brief at 54-57. The Commission, however, has routinely "taken into account credit risk as an element to be considered in determining a pipeline's rate of return." *Remand Order*, 117 FERC at P 48, JA 501. The rate of return encompasses credit risks, including the risk of remarketing, faced by pipelines.

---

[8] While the remarketing risk is subsumed in the rate of return, termination risk is covered by the three-month collateral requirement. *See Remand Order*, 117 FERC at P 45, JA 500. "The three months corresponds approximately with the time period it would take a pipeline to seek to terminate or abandon service and be in a position to remarket the capacity." *Id.*

*See id.* (citing *Ozark Gas Transmission Co.*, 68 FERC ¶ 61,032 at 61,107-108 (1994), and *Williston Basin Interstate Pipeline Co.*, 67 FERC ¶ 61,137 at 61,360 (1994) ("Bad debts are a risk of doing business that is compensated through the pipeline's rate of return.")); *see also*, *e.g.*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (pipeline return must be commensurate with risk); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001) (pipeline risk is a factor in calculating pipeline rate of return).

Furthermore, the Commission found Pipelines' arguments that rate of return inadequately accounts for their credit risks were "contradicted by GTN's own testimony in its RP06-407-000 rate case where they are seeking a 14.5 percent rate of return because of increased business and financial risks." *Remand Order*, 117 FERC at P 50, JA 501. In response to the question as to whether the Commission should consider other factors in evaluating a pipeline's business risk, GTN's witness stated that "[a]nother factor is the credit quality of the shipper's [sic] that hold a pipeline's capacity." *See id.* (quoting testimony of GTN witness Levine), JA 502. In other words, credit risk is a factor in evaluating the business risk that gives rise to a pipeline's rate of return. *See*, *e.g.*, *id.* at P 51 ("GTN has recognized that credit risk needs to be examined in the light of other factors to determine an appropriate rate of return."), JA 502. Thus, Pipelines' arguments that rate of return

inadequately addresses credit risks and that, therefore, they merit the right to seek twelve months of collateral are without merit and belied by GTN's testimony.

As both the Commission and GTN agreed that rate of return addresses the credit risks of shippers, the Commission further stated that if North Baja believed that it faced increased business and financial risk due to, among other things, credit issues, then North Baja could also seek an increased rate of return in a NGA § 4 rate filing, just like GTN. *See id.* Hence, although Pipelines could not impose a twelve-month collateral requirement, Pipelines were not necessarily foreclosed from seeking an adequate rate of return to compensate for their credit risks.

## III. PIPELINES FAILED TO ESTABLISH THAT THEY SHOULD BE EXCEPTED FROM FERC'S GENERAL POLICY FAVORING A THREE-MONTH COLLATERAL REQUIREMENT

In applying FERC's general policy limiting collateral requirements to three months and denying Pipelines' twelve-month collateral proposal, the Commission reasonably determined that Pipelines had not shown that the Commission should depart from the general policy. *See North Baja Pipeline*, 2007 U.S. App. LEXIS at * 12 (concluding, in similar circumstances, that the Commission "reasonably determined that North Baja's circumstances did not exempt it from the Commission's longstanding policy regarding scheduled maintenance").

The Commission recognized that "the policy established in prior creditworthiness orders indicated that a pipeline's individual circumstances could

be taken into account" in determining whether that pipeline may depart from the general three-month collateral policy. *Remand Order*, 117 FERC at P 57, JA 504. But after directing Pipelines to provide briefs describing facts and circumstances distinguishing them from other pipelines, *see generally Directing Briefs Order*, 115 FERC ¶ 61,141, JA 396, and extensively reviewing that information and responsive filings, the Commission concluded that Pipelines' arguments in favor of a departure were unavailing, *see Remand Order*, 117 FERC at P 57, JA 504. "Neither GTN nor North Baja . . . presented any support to show that any differences between their and other pipeline systems justify the significant deviation from standard Commission creditworthiness policy that they have requested." *Id.* at P 66, JA 508.

Pipelines, though, maintain that the Commission missed the point on the purportedly difficult takeaway capacity situation in the Western Canadian Sedimentary Basin ("WCSB") from which GTN transports natural gas. *See* Pet. Brief at 58-59. According to them, GTN's transportation value is low and hard to market because WCSB producers can earn more money selling gas to the Midwest and Eastern markets and because the California market into which GTN transports has better options than the WCSB from which to procure gas. *See id.* at 59.

Although the Commission understood Pipelines' argument, *see id.* at 58 (noting FERC's recognition of Pipelines' claim), it reasonably did not accept that

argument or believe that the situation was as serious as Pipelines claimed, *see Remand Order*, 117 FERC at PP 56-57, JA 503-04. The Commission agreed with protester Coral Energy Resources, L.P. that there was no evidence that the northern California markets would not continue to grow. *See id.* at P 57, JA 504. As "growing markets," *see id.*, Northern California and the Pacific Northwest could require additional gas transportation in the future to offset any perceived benefit of shipping to the Midwest or the Eastern markets. Moreover, the Commission believed that any "deficiencies in their gas supplies or market profiles or both," as Pipelines asserted, "would not be solved by requiring 12 months of collateral from non-creditworthy shippers." *Id.* at P 56, JA 503. In addition, the Commission assumed that Pipelines' asserted deficiencies concerning the WCSB, which allegedly affected GTN's remarketing capabilities, could "be considered in determining the appropriate rate of return . . . ." *Id.* That is, the takeaway capacity concerns about the WCSB were best reserved for GTN's NGA § 4 rate filing, which could address "the increased business and financial risks GTN now faces." *Id.* (internal quotation marks omitted), JA 503-04.

Likewise, the Commission did not find that the number of defaults experienced by GTN warranted a larger collateral amount. *See id.* at P 53, JA 502. As the Commission rightly noted, "these defaults are isolated and appear to be related to or a result of an unusual event, the western energy crisis." *Id.*; *see also*,

*e.g.*, *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 921 (9th Cir. 2005) (noting extraordinary nature of the California energy crisis). Pipelines seem to contend that the unusual nature of the Western energy crisis does not detract from the occurrence of the defaults and the need for collateral, *see* Pet. Brief at 59-60, but they are mistaken. By referring to the unusual nature of the Western energy crisis that created the defaults, the Commission was implying that the defaults would not necessarily have occurred except as the result of an extraordinary event and that, consequently, Pipelines' excessive collateral proposal is not required to protect against future non-extraordinary defaults.

The Commission similarly did not find North Baja's default situation to be so exceptional to require additional collateral. As the Commission noted, "[North Baja] has had only one default, which occurred in 2002." *Remand Order*, 117 FERC at P 54, JA 503. With only that one default, arising in the aftermath of the Western energy crisis, the Commission reasonably could conclude that North Baja had not established unusual circumstances to warrant a departure from FERC's general policy on collateral.

Although Pipelines contend that the Commission unreasonably discounts the importance of North Baja's customer base consisting of five non-creditworthy shippers, *see* Pet. Brief at 60, Pipelines fail to note that "virtually all of North Baja's current shippers participated in its construction, and the twelve month

collateral requirement established for these shippers remain fully in place." *Remand Order*, 117 FERC at P 54, JA 503. In other words, those non-creditworthy shippers are already providing twelve months of collateral, and referring to them is irrelevant for purposes of whether other shippers should have to pay the same collateral amount.

The insignificance of Pipelines' default circumstances is further amplified by the fact that 89 percent of GTN's long term firm capacity is subscribed as well as 95 percent of North Baja's. *See id.* at PP 53-54, JA 502-03. Pipelines contend that subscription levels are immaterial, *see* Pet. Brief at 60-61, without realizing how high levels may reflect an active, healthy capacity market, which would aid in lessening remarketing risk, *see id.* at 49 (acknowledging how the market dictates a pipeline's remarketing risk). In sum, as the Commission correctly found, the facts and circumstances surrounding Pipelines' default risks do not indicate unusual situations requiring departure from FERC general policy.

## CONCLUSION

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

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Patrick Y. Lee
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6451
FAX: (202) 273-0901

May 30, 2007

***Gas Transmission Northwest Corp. v. FERC*** **FERC Docket No. RP03-41**
**D.C. Cir. No. 03-1257**
**(Consolidated with Nos. 04-1065 & 04-1066)** **(Nos. RP 02-363 & RP03-70)**

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule 32(a)(2), I hereby certify that this brief contains 10,807 words, not including the tables of contents and of authorities, the glossary, the certificate of counsel, this certificate, and the addendum.

Patrick Y. Lee
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
TEL: (202) 502-6451
FAX: (202) 273-0901

May 30, 2007