ORAL ARGUMENT SCHEDULED NOT YET SCHEDULED

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

Nos. 04-1374 & 04-1437 (Consolidated)

COLUMBIA GAS TRANSMISSION CORPORATION AND VIRGINIA NATURAL GAS, INC.,
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

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INITIAL BRIEF: JANUARY 13, 2006
FINAL BRIEF: MARCH 3, 2006

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 each Petitioner's respective Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 108 FERC ¶ 61,086 (July 29, 2004) ("Initial Order"), JA 514.

2. *Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 109 FERC ¶ 61,090 (Oct. 28, 2004) ("Rehearing Order"), JA 581.

C. Related Cases:

Case Numbers 04-1374 and 04-1437 have been consolidated before this Court. Counsel is not aware of any related cases pending before this or any other Court.

_____

Patrick Y. Lee
Attorney

Initial Brief: January 13, 2006
Final Brief: March 3, 2006

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GLOSSARY

Chesapeake LNG plant	Columbia facility used for storage and vaporization of LNG
Columbia	Petitioner Columbia Gas Transmission Corporation
Commission	Respondent Federal Energy Regulatory Commission
FERC	Respondent Federal Energy Regulatory Commission
Force Majeure	Defined in section 15.1 of the General Terms and Conditions of Columbia's tariff as an event that creates an inability to serve that could not be prevented or overcome by due diligence of the party claiming *force majeure*. Such events include mechanical or physical failure that affects the ability to transport gas or operate storage facilities.
Initial Order	*Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 108 FERC ¶ 61,086 (2004)
LNG	Liquefied Natural Gas
NGA	Natural Gas Act

GLOSSARY

Rate Schedule FTS	Schedule under which Columbia provides Virginia Natural with firm transportation service
Rate Schedule SST	Schedule under which Columbia provides Virginia Natural with firm storage service transportation
Rate Schedule X-133	Schedule under which Columbia provides Virginia Natural with liquefied natural gas storage service, which service consists of the liquefaction, storage, regassification, and delivery of gas
Rehearing Order	*Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 109 FERC ¶ 61,090 (2004)
Virginia Natural	Petitioner Virginia Natural Gas, Inc.
VNG	Petitioner Virginia Natural Gas, Inc.

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably concluded that a court of law could best determine a remedy for Columbia Gas Transmission Corporation's ("Columbia's") failure to satisfy its service obligations to its customer Virginia Natural Gas, Inc. ("Virginia Natural" or "VNG").

2. Whether the Commission reasonably held that there was no permanent abandonment of service by Columbia under its service tariff.

3. Whether the Commission reasonably concluded that Columbia's service shortfalls were not the result of *force majeure* circumstances.

PERTINENT STATUTES

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

STATEMENT OF THE CASE

These consolidated appeals concern objections by both the pipeline supplier, Columbia, and the pipeline customer, Virginia Natural, to the Commission's consideration of a complaint filed by Virginia Natural. That complaint addressed Columbia's compliance with its tariff obligations when it failed, in the winter of 2003, to provide Virginia Natural with a certain amount of contracted-for natural gas supplies. The Commission granted Virginia Natural's complaint in part, finding that Columbia failed to meet certain of its firm service obligations to Virginia Natural. *See Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 108 FERC ¶ 61,086 (2004) ("Initial Order"), JA 514, *reh'g denied*, 109 FERC ¶ 61,090 (2004) ("Rehearing Order"), JA 581.

The Commission referred Virginia Natural's claim for retroactive relief to a court of competent jurisdiction. The Commission recognized that Virginia Natural was seeking broad relief that exceeded the Commission's limited remedial

authority under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* The Commission also recognized that the service disruptions were not *force majeure* events and thus did not, as Columbia preferred, adopt a *force majeure* remedy under the tariff.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Natural Gas Act grants the Commission jurisdiction over the transmission and wholesale sale of natural gas in interstate commerce. "The Commission's primary purpose under the Natural Gas Act is to protect the consumer." *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 186 (5th Cir. 1971). Notwithstanding its jurisdiction and purpose, the Commission has limited remedial authority under the ratemaking sections of the NGA. *See* Brian M. Zimmet, *FERC's Authority to Impose Monetary Remedies for Federal Power Act and Natural Gas Act Violations: An Analysis*, 57 Admin. L. Rev. 543, 545 (2005). In particular, the NGA contains minimal civil and criminal penalty authority. *See, e.g., FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) ("[T]his Court has repeatedly held that the Commission has no reparation power."); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) ("It is well-settled that the Natural Gas Act does not give the Commission the authority to impose civil penalties.").

Because of the NGA's limitations on remedial authority, the Commission relies on its general enforcement authority under section 16 of the NGA, 15 U.S.C. § 717o, to support the imposition of monetary remedies for violations of other NGA sections. *See* Zimmet, *supra*, 57 Admin. L. Rev. at 546. Although that provision does not expressly grant monetary remedies, *see id.*, it states that "[t]he Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the NGA]." 15 U.S.C § 717o.

II. COLUMBIA'S SERVICE OBLIGATIONS TO VIRGINIA NATURAL

Virginia Natural is a local distribution company that transports and sells gas to end users in Virginia. *See* R 1 at 7, JA 7.[1] Columbia is a natural gas pipeline engaged in the business of interstate transportation service, including storage service, under the NGA and the Commission's implementing regulations. *See* Initial Order at P 4, JA 515.

Under Rate Schedule X-133, Columbia provides Virginia Natural with liquefied natural gas ("LNG") storage service, which service consists of the liquefaction, storage, regassification, and delivery of gas. *See* R 1 at 9, JA 9.

[1] "R" refers to a record item. Unless otherwise noted, the "R" reference is to the record in Docket No. RP04-139. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

From December 1 of any year to March 31 of the succeeding year, Virginia Natural is entitled to 778,500 Dekatherms (Dth), i.e., the volume of gas that Columbia must liquefy, store, and have available for delivery. *See id.* During that period, the maximum daily volume of vaporized LNG that Columbia must deliver is 52,090 Dth. *See id.* To render service under Rate Schedule X-133, Columbia uses its Chesapeake LNG plant, an LNG facility located in Chesapeake, Virginia, near Virginia Natural's Southern System. *See id.*

In addition to LNG service, Columbia provides Virginia Natural with firm transportation service under Rate Schedule FTS and firm storage service transportation under Rate Schedule SST. *See* R 1 at 23, JA 23. Pursuant to section 13 of the General Terms and Conditions of Columbia's tariff, which is incorporated by reference into its rate schedules, Columbia and Virginia Natural may agree to a minimum delivery pressure obligation for a particular delivery point. *See id.* at 24, JA 24.

In 1993, Columbia experienced problems with the Chesapeake LNG plant's pump and vent system facilities when the LNG inventory level stood around 30 feet. *See* Rehearing Order at P 25, JA 591. Pursuant to its consultants' advice and recommendations, Columbia subsequently modified its pump and ventilation facilities, *see id.* at PP 25-26, JA 591-92, although it did not verify whether it could maintain service at an LNG inventory level lower than 30 feet, *see id.* at P 28, JA

593. Those modifications were completed by July 1997. *See* R 28 (Shivley Aff. ¶ 14), JA 232.

On February 19, 2003, the LNG inventory at the Chesapeake LNG plant fell to about 23 feet, *see id.* (Shivley Aff. ¶ 18), JA 234, which was the lowest the LNG level had ever stood, *see* Rehearing Order at P 25, JA 591. The pumps again experienced problems. *See id.* The next day, Columbia issued a Notice of Interruption of Service and reduced the volumes Virginia Natural could take under Rate Schedule X-133 by 75 percent from February 20, 2003, through March 31, 2003. *See* Initial Order at P 7, JA 515. Columbia attributed the service interruption to *force majeure*[2] conditions at its Chesapeake LNG plant. *See id.* at P 8, JA 516. Columbia later removed the withdrawal restriction effective November 30, 2003. *See id.* at P 7, JA 515. Furthermore, it installed a new vent/dry vent system to rectify the deficiencies at the Chesapeake LNG plant. *See* Rehearing Order at P 27, JA 592.

During the same time in early 2003 that Columbia experienced problems with its LNG facility, Columbia also encountered difficulties with maintaining its delivery pressure. *See* Initial Order at PP 22 & 33, JA 520 & 524. On five

[2] Under section 15.1 of the General Terms and Conditions of Columbia's tariff, "the term *force majeure* means an event that creates an inability to serve that could not be prevented or overcome by due diligence of the party claiming *force majeure*. Such events include . . . mechanical or physical failure that affects the ability to transport gas or operate storage facilities." Initial Order at P 8 n.2 (quoting Columbia's tariff) (internal quotation marks omitted), JA 516.

different days – January 23, February 17, 18, and 19, and March 7, 2003, for a total of eight hours and 43 minutes, delivery pressures at Virginia Natural's Norfolk Gate Station fell below contracted-for levels. *See id.*

Because of Columbia's problems with operating the Chesapeake LNG plant and maintaining proper delivery pressures, Virginia Natural filed a complaint against Columbia on January 13, 2004, pursuant to NGA §§ 5(a) & 16, 15 U.S.C. §§ 717d(a) & 717o. *See* R 1, JA 1. Virginia Natural alleged that Columbia had failed to fulfill its firm service obligations under its tariff and rate schedules. *See id.* In addition to prospective relief, Virginia Natural asked the Commission to require Columbia to pay Virginia Natural for losses incurred as a result. *See id.* The requested monetary compensation included: "the return of demand charges and contributions in aid of construction paid out over more than a decade (accounting for approximately $30 million of the total $37 million VNG seeks); the cost to replace gas that Columbia did not provide; income lost due to an inability to resell gas during a time of tight supply; operating costs for its own LNG, propane-air, and regulator station facilities; and legal fees." Rehearing Order at P 10, JA 584; *see also* R 1 at 44-49, JA 44-49.

Columbia answered that the Commission should dismiss the complaint because FERC could not, under its limited NGA authority, order the relief sought by Virginia Natural. *See* R 28 at 3, JA 174. Columbia further argued that its

inability to provide the requisite LNG volumes to Virginia Natural was excused by *force majeure* circumstances. *See id.* at 20-26, JA 191-97. In addition, it asserted that the failure to maintain delivery pressures was insignificant and that any failure did not constitute a violation of the NGA. *See id.* at 30-33, JA 201-04.

III. THE FERC RULINGS ON REVIEW

A. Initial Order

The Initial Order granted in part and denied in part Virginia Natural's complaint. *See* Initial Order at P 2, JA 514. Although the Commission concluded that Columbia may have breached its agreements with Virginia Natural, the Commission believed that a court of law could best determine the amount of compensation. *See id.* at P 27, JA 521.

The Commission first addressed Columbia's failure to provide the requisite level of delivery service. It observed that no dispute exists that Columbia's Chesapeake LNG plant failed to provide requisite Schedule X-133 firm service on certain days in 2003. *See id.* at P 28, JA 522. Although Columbia had taken certain steps to rectify previously experienced problems at the Chesapeake LNG plant, *see id.*, the Commission concluded that Columbia could not rely on the defense of *force majeure* because Columbia had not exercised sufficient due diligence "in its modifications to and/or operation of its vaporization equipment," *see id.* at P 32, JA 523. The Commission noted that Columbia had never tested the

pump and venting facilities, e.g., by doing a full draw-down, to see whether they would "send out maximum entitlements under the extreme, but foreseeable, conditions of harsh weather and diminished storage levels of LNG." *Id.* at P 29, JA 523. Moreover, the Commission surmised that Columbia should have maintained its pumps in continuous run-mode, which Columbia indicated could have avoided the operational problems, rather than shut down those pumps when the LNG level had fallen to 23 feet. *See id.* at P 30, JA 523. Given that Columbia had experienced problems at such a level, the Commission did not believe that Columbia should have relied on its "theoretical capability to be able to continue to draw down and vaporize LNG." *Id.*

Because the Commission rejected Columbia's *force majeure* defense, the Commission ruled that Virginia Natural could not seek compensation under the *force majeure* provisions of Columbia's tariff. *See* Initial Order at P 32, JA 523. Virginia Natural, however, could pursue compensation for firm service not received as a violation of its service agreement with Columbia in a court of law, which the Commission believed could best determine the amount of contractual damages. *See id.* at P 32, JA 524.

The Commission next addressed Virginia Natural's allegations concerning inadequate delivery pressures. The Commission noted Columbia's admission that, on five different occasions, delivery pressure at the Norfolk Gate Station fell below

the contracted level. *See id.* at P 33, JA 524. Despite Columbia's argument that its failures to comply were *de minimis* infractions, *see id.*, the Commission concluded that those failures violated the terms of Columbia's service agreement with Virginia Natural, *see id.* at P 35, JA 524, and should be considered as a breach of contract claim by a court of law, *see id.* at P 35, JA 525.

But contrary to Virginia Natural's complaint, the Commission found the deliveries at diminished pressures to be isolated incidents, not representative of any systematic flaws in Columbia's facilities or operations, and rejected Virginia Natural's allegation that Columbia's imperfect performance constituted a *de facto* abandonment of service under section 7(b) of the NGA, 15 U.S.C. § 717f(b). *See id.* at P 34, JA 524. Consequently, the Commission dismissed Virginia Natural's contention that Columbia should have obtained NGA § 7(b) permission and approval for its service lapses. *See id.*

B. Rehearing Order

Both Virginia Natural and Columbia sought rehearing – for entirely different reasons. Virginia Natural asserted that the Commission erred in: (1) not granting prospective relief for Columbia's violations of its tariff obligations; (2) not finding that Columbia's service failures constituted an unlawful abandonment of service under NGA § 7(b); (3) not granting full monetary compensation as requested by Virginia Natural for Columbia's violations; (4) not adequately explaining FERC's

refusal to remedy Columbia's violations of the NGA and its refusal to grant prospective relief and monetary compensation; and (5) not discharging its duty to consider the impact of its order on Columbia and other pipelines. *See* R 38 at 5-6, JA 533-34. On the other hand, Columbia argued that the Commission should accept Columbia's *force majeure* defense and should defer all aspects of Virginia Natural's breach of contract claims, including the factual merits, to a court of law. *See* R 39 at 1-2, JA 564-65.

The Commission denied both rehearing requests. *See* Rehearing Order at P 1, JA 581. Initially addressing Virginia Natural's rehearing request, the Commission rejected Virginia Natural's position that the Commission could order Columbia to pay compensation of nearly $37 million and that, by failing to do so, the Commission had acted inconsistently with past practice. *See id.* at PP 8, 10-12, JA 583-85. Noting that FERC's NGA authority does not extend to imposing civil penalties or reparations, *see id.* at P 11, JA 584, the Commission reiterated its earlier holding that Virginia Natural's request "includes remedies that go beyond those typically contemplated by the Commission, and go beyond [FERC's] authority by including remedies . . . that would reasonably be considered to constitute civil penalties or reparations," *id.* at P 12, JA 584-85.

The Commission observed that it may enforce compliance with the terms of a tariff when a company fails to provide service in conformity with its certificate

and its tariff specifies compensation for the failure to provide such service. *See id.* at P 14, JA 586. But the Commission concluded that this was not the instant situation because it concluded that the *force majeure* provisions of Columbia's tariff, which would have limited Virginia Natural's available compensation, did not apply. *See id.* at PP 14-15, JA 586. Instead, compensation for Columbia's LNG service shortfalls could be awarded by the Commission pursuant to NGA § 16 or by a court of law in a breach of contract proceeding. *See id.* at P 16, JA 587. Because the range of remedies sought by Virginia Natural extends "beyond the bounds of those that this Commission can provide," the Commission decided to defer to a court of law that could more efficiently and consistently assess all of Virginia Natural's requested relief. *See id.* As for prospective relief concerning the LNG shortfall, the Commission noted its earlier assessment that Columbia's post-shortfall LNG facilities do not have current deficiencies likely to compromise Columbia's future service obligations. *See id.* at P 17, JA 587.

The Commission likewise found that prospective relief was not necessary with respect to Columbia's failure to comply with minimum delivery pressure because the pressure violations were not due to inadequate facilities or to inept or unlawful practices. *See id.* at PP 18-19, JA 588. The Commission, however, noted that retrospective relief could be obtained by Virginia Natural in a court of law pursuant to a breach of contract action. *See id.* at P 19, JA 589.

The Rehearing Order again rejected Virginia Natural's renewed charge that Columbia's failure to meet its firm service commitments constituted an unapproved NGA § 7(b) abandonment of service. *See id.* at P 21, JA 589-90. Referring to the definition of abandonment in *Reynolds Metals Company v. FPC*, 534 F.2d 379 (D.C. Cir. 1976), that "[a]n 'abandonment' within the meaning of section 7(b) occurs whenever a natural gas company permanently reduces a significant portion of particular service," *id.* at 384, the Commission "found no indication that Columbia was unable or unwilling to meet its firm service commitments, given that its service interruptions were not sustained and have not been repeated before or since the winter of 2002-2003," Rehearing Order at P 21, JA 590.

Moving to Columbia's rehearing request, the Commission observed that although Columbia adopted in full the advice and recommendations of its LNG consultants following the pump failure in 1993, Columbia was still on notice that these facilities were a weak link. *See id.* at P 24, JA 591. Prior to 2003, Columbia's ability to continue to extract LNG as the inventory level in its tank declined had been tested, and it had been found wanting. *See id.* The Commission reiterated its earlier statement that a drawdown test should have been done and that such a test would be prudent to confirm the physical capacity of Columbia's facilities. *See id.* at PP 25-26, JA 591-92.

In addition, the Commission affirmed its previous finding that Columbia should not have relied on its theoretical capability to be able to continue to draw down and vaporize LNG when the LNG level sank to its lowest level ever in 2003. *See id.* at P 28, JA 593. Although the Commission clarified "that Columbia could not have known in advance that maintaining the pumps in continuous-run mode *would* make a difference," *id.* at P 29 (emphasis in original), JA 593, the Commission believed that continuous-run mode would still have been prudent to avoid disruptions in light of circumstances on February 18, 2003, and Columbia's previous difficulties with its pumps, *see id.* at P 30, JA 593. Thus, not employing continuous-run mode weighed against Columbia's *force majeure* claim and Columbia's contention that pump failure could not have been prevented or overcome by due diligence. *See id.*

The Commission rejected Columbia's request that all aspects of Virginia Natural's breach of contract claims be deferred to a court. *See id.* at P 31, JA 594.

On November 5, 2004, Columbia filed a petition for review of the Initial Order and the Rehearing Order. That appeal was designated Case No. 04-1374. On December 23, 2004, Virginia Natural filed a petition for review of the Orders, and the petition was assigned Case No. 04-1437. Thereafter, this Court consolidated the two cases for briefing and argument purposes.

SUMMARY OF ARGUMENT

The Commission engaged in reasoned decision-making when it concluded that a court of law could best address the scope of relief to be afforded Virginia Natural for Columbia's failure to fulfill firm service obligations in the winter of 2003. Because the Commission could not grant, under its limited NGA remedial authority, all of Virginia Natural's requested remedies, the Commission reasonably concluded that it would be more efficient and consistent to have a single competent forum, i.e., a court of law, consider the full array of remedies sought by Virginia Natural.

NGA § 5(a) does not compel the Commission to provide retrospective monetary relief, such as that sought by Virginia Natural, including compensation that may constitute a penalty, after finding a tariff violation. The Commission has broad remedial discretion. The fact that FERC may have exercised that discretion in other cases to craft a particular remedy based on particular circumstances does not mean that it must do so in this case. Here, Virginia Natural requested remedies not typically contemplated by the Commission, including the return of charges paid over more than a decade, and which may conflict with judicially-recognized restrictions. The Commission's decision here not to provide remedial relief itself but to defer that issue to a competent court of law reflected the Commission's exercise of its discretion and its realization that efficiency and consistency could be

best served in such a court, and was not an attempt to avoid the challenge of calculating the requested remedies.

The Commission also reasonably held that there was no permanent abandonment by Columbia notwithstanding the service shortfalls in the winter of 2003. The Commission could not find any indication that Columbia was unable or unwilling to meet its firm service commitments. Indeed, in contrast to the cases cited by Virginia Natural where abandonment was found, Columbia did not propose to terminate or significantly diminish its certificated obligations. Hence, the Commission reasonably concluded that Columbia's service interruptions, which were not sustained and have not been repeated, did not constitute permanent abandonment under NGA § 7(b).

In addition to finding that Columbia's service shortfalls were not a permanent abandonment, the Commission properly determined that those shortfalls were not the result of *force majeure* circumstances. The Chesapeake LNG plant had previously encountered operating difficulties; Columbia had not tested out its modifications of the plant's facilities; and storage levels were lower in 2003 than in 1993. Due to those circumstances, the Commission reasonably concluded that the failure of Columbia's facilities, giving rise to the service shortfalls, was a problem that, perhaps, could have been prevented or overcome by due diligence; therefore, it was not a *force majeure* event.

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).

"In general, [this Court] defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted); *see also, e.g., Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) (explaining the Commission's broad remedial discretion under the statutes it administers); *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-76 (D.C. Cir. 1992) (same). "Similarly,

because Congress has delegated to FERC a broad range of adjudicative powers over natural gas rates, this [Court] gives substantial deference to its interpretation of filed tariffs, even where the issue simply involves the proper construction of language." *Koch*, 136 F.3d at 814 (internal citation and quotation marks omitted). Indeed, "when agency orders involve complex scientific or technical questions, as here," *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004), this Court is "particularly reluctant to interfere with the agency's reasoned judgments," *id.*

II. VIRGINIA NATURAL CANNOT ESTABLISH THAT THE COMMISSION VIOLATED A STATUTORY MANDATE OR ACTED ARBITRARILY IN DIRECTING IT TO PURSUE RETROACTIVE REMEDIES IN A COURT OF LAW

A. The Commission Reasonably Held That A Court Of Law, Rather Than The Commission, Could Best Determine Remedial Relief For The Harms Suffered By Virginia Natural

In the Initial and Rehearing Orders (the "Orders"), the Commission concluded that Columbia had failed to fulfill certain firm service obligations, *see generally* Initial Order at PP 27-35, JA 521-25; Rehearing Order at P 7, JA 583, but that a court of law could best resolve the issue of remedial relief for Virginia Natural, *see* Initial Order at PP 27 & 35, JA 521 & 525; Rehearing Order at P 16, JA 587. Although the Commission recognized that "compensation for Columbia's LNG service shortfalls may be awarded by the Commission pursuant to NGA section 16," *id.*, it deemed "the range of remedies VNG requests [to] extend[] beyond the bounds of those that this Commission can provide," *id.* Those

requested remedies include "redress for business, commercial, economic, financial, and operational harm, lost opportunity costs, incidental and consequential damages, and legal fees." *Id.* at P 12, JA 584. Some of those remedies "go beyond those typically contemplated by the Commission, and go beyond [FERC's] authority by including remedies – although not described by VNG as such – that would reasonably be considered to constitute civil penalties or reparations." *Id.*; *see also id.* at P 10 (noting that "$30 million of the total $37 million VNG seeks" for two-month disruption of service in 2003 is for return of changes "paid out over more than a decade"), JA 584. FERC's authority under the NGA, even "exercised at its zenith, does not extend to imposing civil penalties or reparations." *Id.* at P 11, JA 584.

Because FERC could not provide all the remedial relief sought by Virginia Natural, it "directed the parties to a forum competent to consider the full array of requested remedies, whether characterized as penalties, reparations, refunds, repayment of unjust gains, restitution, etc." Rehearing Order at P 12, JA 585. The Commission concluded that "as a procedural matter, the interests of efficiency and consistency would be best served by having all of VNG's various claims heard and decided in one place and at one time, namely, before a court competent to award or reject each of the proposed the remedies." *Id.* at P 16, JA 587.

Thus, in making its decision to refer the issue of remedies to a court of law,

the Commission did not, as Virginia Natural argues, *see* VNG Brief at 17, entirely abdicate its remedial obligations. Rather, it balanced the various competing equities and interests to come to a resolution worthy of the deference accorded by this Court with respect to FERC's remedial authority. *See Koch*, 136 F.3d at 816.

1. Virginia Natural's Reliance On NGA § 5(a) Is Unavailing

Notwithstanding the deference FERC merits on remedial matters, Virginia Natural claims that having acted on Virginia Natural's complaint and having found that Columbia violated the NGA, the Commission's decision to defer to a court of law violates the NGA. *See* VNG Brief at 24-26. In particular, Virginia Natural argues that NGA § 5(a) mandates a FERC remedy, but that the Commission did not institute one. This argument fails to capture accurately the Commission's obligations under the statute or its assessment of Virginia Natural's claim for monetary compensation.

Section 5(a) of the NGA requires the Commission to determine the just and reasonable rate, charge, rule, or practice "to be thereafter observed and in force . . ." 15 U.S.C. § 717d(a). Thus, as Virginia Natural concedes in its complaint, NGA § 5(a) applies to prospective relief and the Commission's power under that section is "on a going forward basis." R 1 at 43, JA 43. Virginia Natural, however, seeks monetary remedies for past violations of the NGA. It seeks retrospective relief, which is not covered by NGA § 5(a).

To the extent Virginia Natural demands prospective relief, the Commission addressed such relief in the Orders. The Commission required Columbia "to conduct a full test of the system under all operational situations and confirm the capabilities of its new LNG pump vent system." Initial Order at P 29 n.18, JA 522; Rehearing Order at PP 17 n.15, 27 & n.28, JA 587, 592. Furthermore, the Commission observed that "[w]ith respect to VNG's request that we order Columbia to take remedial action to ensure it is able to meet all its existing service obligations going forward, our assessment of Columbia's existing system's facilities found no current deficiencies likely to compromise its capability to do so." Rehearing Order at P 17, JA 587. Thus, the Commission did act prospectively to ensure that service disruptions do not reoccur, and it also concluded that no additional improvements were necessary to assure a just and reasonable practice under NGA § 5(a).

Moreover, contrary to Virginia Natural's assertion, *see* VNG Brief at 25-26, there is no obligation that the Commission impose *retroactive* relief once it finds a tariff violation. While the Commission's remedial authority under the NGA is limited, its exercise of that authority is discretionary. Specifically, "the Commission ordinarily has remedial discretion, even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy." *Connecticut Valley*, 208 F.3d at 1044 (affirming Commission decision not to

provide relief under the circumstances). The NGA does not mandate any particular remedy for a tariff violation. To the contrary, the statute employs broad permissive language: "At every turn the NGA confirms that FERC's decision how, or whether, to enforce the statute is entirely discretionary." *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001); *see also id.* at 461 (NGA is "utterly silent on the manner in which the Commission is to proceed against a particular transgressor"); *see also* Rehearing Order at P 19 n.20 (quoting *Baltimore Gas*), JA 589.

2. The Commission Did Not Contravene Precedent By Deferring Remedial Relief To A Court Of Law

Virginia Natural cites to a number of FERC cases and court decisions for the proposition that the Commission has broad authority to fashion monetary remedies like those requested in its complaint and that the Commission has used that authority in various other cases similar to Virginia Natural's. *See* VNG Brief 26-34. Accordingly, Virginia Natural contends that the Commission's decision to defer to a court constitutes an unexplained departure from precedent, which must be vacated and remanded. *See id.* at 29-30, 33.

The fact that the Commission, on occasion, may have chosen to exercise its remedial discretion and itself craft a remedy for a particular tariff or service violation, rather than allow a court to do so, does not mean that the Commission must, on all occasions, exercise that discretion in uniform fashion. The

Commission's decision to exercise, or not exercise, that discretion, is subject to review only under an abuse of discretion standard. *See Connecticut Valley*, 208 F.3d at 1044-45. An agency abuses that discretion only if its decision conflicts with statutory objectives or otherwise does not reasonably accommodate relevant and equitable considerations. *Id.*

Here, the Commission's decision to allow a court to consider Virginia Natural's claim for relief does not conflict with the NGA. The Commission explained that its consideration of Virginia Natural's broad claim for redress, "go[ing] beyond those typically contemplated by the Commission," would in fact conflict with judicially-recognized restrictions on its ability to consider requests for civil penalties or reparations. *See* Rehearing Order at PP 11-12 & n. 6, JA 584. In particular, the Commission referred the issue of remedies to a court in order not to conflict with the holding of the court in *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986), that the NGA does not confer on the Commission the authority to direct penalties. *See* Rehearing Order at P 12 n.7 (noting that *Coastal* court rejected remedy for pipeline service violation that reflected disgorgement of revenues and disallowance of cost recovery), JA 585. The Commission was concerned that the requested remedy, resulting in the return of charges "paid out over more than a decade," *id.* at P 10, JA 584, if ordered by the Commission, would conflict with its limited remedial authority as construed by the courts.

Nor is there any conflict with the specific equities involved. The Commission acted in an even-handed manner, finding that "both parties misstate the range of our remedial authority." *Id.* at P 13, JA 585. While Virginia Natural complains about the Commission's decision to send the matter of remedies to a court, it understandably does not complain about the Commission's decision not to limit the size of potential remedies. Specifically, the Commission agreed with Virginia Natural to the extent it did not insist on a tariff-based remedy, much smaller than that requested by Virginia Natural, applicable to *force majeure* events. *See infra* pp. 34-40 (addressing Columbia's objections to this disposition).

Despite spending considerable attention to *Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,400 (2005), *see* VNG Brief 26-29, 32-33, Virginia Natural did not present that authority to the Commission. It obviously could not as the *Sunoco* order issued after the Orders now on appeal. But as this Court recently reiterated in *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404 (D.C. Cir. 2005), "We will not reach out to examine a decision made after the one actually under review. . . . An agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication." *Id.* at 406 (quoting *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995) (internal quotation marks omitted)).

Similarly, Virginia Natural's cites, *see* VNG Brief at 26, to *Transwestern Pipeline Co.*, 100 FERC ¶ 61,058 (2002), and *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3d Cir. 1977), fare little better. In the case of the former, Virginia Natural's Request for Rehearing only cited to that case once, *see* R 38 at 17 n.49, JA 545, and not for the proposition posed in Virginia Natural's Brief. Rather, *Transwestern* is cited for the unrelated proposition that once a NGA violation has been found, the Commission must provide a remedy in accordance with NGA § 5(a). *See* R 38 at 17 & n.49, JA 545. In the case of the latter, Virginia Natural merely referred to *Gulf Oil* as part of a string cite comparing certain cases in Virginia Natural's complaint with FERC's decision in *El Paso Electric Co.*, 108 FERC ¶ 61,071 (2004).[3] *See* R 38 at 26 & n.76, JA 554.

As for *El Paso Electric*, *see* VNG Brief at 27, 31-32, that case does not aid Virginia Natural's cause. Whether *El Paso Electric*'s approval of a disgorgement remedy of unjust profits may reflect FERC authority to provide some monetary relief to Virginia Natural is of no moment. The Commission never denied that it had the power to provide some monetary relief like the relief afforded litigants in *El Paso Electric*. Indeed, it recognized that "compensation for Columbia's LNG

[3] Virginia Natural's references to *Coastal Oil & Gas Corporation v. FERC*, 782 F.2d 1249 (5th Cir. 1986), and *Mesa Petroleum Co. v. FERC*, 441 F.2d 182 (5th Cir. 1971), suffer from the same problem. Furthermore, Virginia Natural's Request for Rehearing never cited *Gulf Oil Corp.*, Opinion 780, 56 FPC 2293 (1976).

service shortfalls may be awarded by the Commission pursuant to NGA section 16." Rehearing Order at P 16, JA 587.

But the Commission believed that efficiency and consistency militated in favor of deferring to a court of law because such an adjudicatory tribunal could properly mete out all forms of remedial relief. *See* Rehearing Order at P 16, JA 587. Moreover, the Commission understood that the NGA grants substantial discretion to FERC as to how, or whether, to enforce that statute. *See id.* at P 19 & n.20 (citing *Baltimore Gas*, 252 F.3d at 460), JA 589. Hence, what may have transpired in *El Paso Electric* was not conclusive as to what should occur here, particularly since Virginia Natural sought remedies beyond just disgorgement of unjust profits. *See* R 1 at 44-49, JA 44-49 (requesting, besides unjust profits, consequential damages and incidental costs).

3. On Rehearing, Virginia Natural Failed To Question FERC's Finding That Virginia Natural's Requested Remedies Were Not Typically Contemplated Remedies

Virginia Natural charges that the Commission did not engage in reasoned decision-making because the Commission did not offer specific reasoning for rejecting each of the requested remedies, but rather relied on its finding that Virginia Natural's requested remedies include some that go beyond those "typically contemplated" by the Commission. *See* VNG Brief at 34-37. Virginia Natural failed to make this specific argument on rehearing. Hence, this Court does

not have jurisdiction to review it. *See* 15 U.S.C. § 717r(b); *see also, e.g., 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).[4]

In the Initial Order, the Commission remarked, among other things, that "VNG asks for damages that include Rate Schedule SST demand charges, the cost of manning regulator stations, the cost to place on standby and to run its LNG and propane-air facilities, costs to obtain additional gas supplies, reimbursement of [construction-related] payments, and legal fees – remedies beyond those typically contemplated by the Commission." Initial Order at P 35 n.24, JA 525. Accordingly, the Commission, mindful of statutory restraints on its remedial authority, believed deferral to a court of law was appropriate. *See id.* Despite the Commission's clear pronouncement regarding the atypical nature of Virginia Natural's requested remedies, Virginia Natural failed to challenge on rehearing the meaning of "typically contemplated" or whether that reasoning was substantively sufficient. Nor has Virginia Natural previously questioned the Commission's determination that some of the proposed remedies could be extra-statutory penalties or the Commission's decision not to evaluate in detailed fashion each and every specific remedy asserted by Virginia Natural.

[4] Courts have applied interpretations of Federal Power Act provisions to their counterparts in the Natural Gas Act, and vice versa, because the relevant provisions of the two statues are in all material respects substantially identical. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

In the Rehearing Order, the Commission noted its prior conclusion "that VNG's request includes remedies that go beyond those typically contemplated by the Commission," Rehearing Order at P 12, JA 584, and reiterated the atypical nature of those remedies because they "extend[] beyond the bounds of those that this Commission can provide," *id.* at P 16, JA 587. Under these atypical circumstances, it was reasonable for the Commission to forward Virginia Natural's atypical remedial request to a court.

4. The Commission Did Not Defer To A Court Of Law Simply To Avoid The Challenge Of Calculating The Requested Remedies

Virginia Natural asserts that the Commission did not engage in reasoned decision-making because FERC purportedly thought that calculating monetary remedies would be too difficult. *See* VNG Brief at 38-39. According to Virginia Natural, FERC has the analytical competence to accord remedial relief; thus, FERC's decision to defer, based on supposed difficulties in calculating damages, is unreasonable.

This is an argument without any factual predicate and is a red herring that seeks to detract from the Commission's actual basis for deferring to a court of law. Virginia Natural does not and cannot refer to a single statement by the Commission that the Commission believed that calculating Virginia Natural's requested remedial relief was too mentally taxing and difficult. Rather, the Commission's decision to defer resulted from FERC's reasonable belief that some of Virginia

Natural's requested remedies could "reasonably be considered to constitute civil penalties," Rehearing Order at P 12, JA 584-85, which the courts have cautioned are impermissible under the NGA, *see id.* at P 12 n.7 (discussing and quoting *Coastal Oil*, 782 F.2d at 1253), JA 585. Balancing the various competing equities and interests, the Commission concluded that efficiency and consistency could best be served by a court of law that has the ability to grant all, not just some, of the requested relief.[5] *See* Rehearing Order at PP 11-12, 16, JA 584-85.

Thus, to say that the Commission erred because it was wrongly wary of having to do difficult remedial calculations is completely without foundation. If the Commission truly were wary of undertaking a difficult challenge, it never would have adjudicated the merits of Virginia Natural's claims in the first place. Instead, the Commission, if it had accepted the arguments of the parties, could have declined to hear this dispute altogether under its primary jurisdiction analysis under *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175 (1979). *See*

[5] In its Brief, Virginia Natural makes the argument that the Commission did not state "what it meant by 'efficiency' or 'consistency'" and then asserts that those purportedly undefined rationales lack merit. *See* VNG Brief at 40-41. The Commission does not have to define every single term in its orders, particularly non-technical ones. In any event, efficiency is best served by deferring the issue of remedies to "a court competent to award or reject each of the proposed remedies." Rehearing Order at P 16, JA 587. Under Virginia Natural's thinking, efficiency would be better served if two tribunals, one of which has limited remedial authority, adjudicated potentially conflicting remedial relief claims. Consistency in remedial relief is best served by adjudication by a single tribunal because it can more uniformly address the issue. Having two, not one, adjudicators does not assure greater consistency even if each requested monetary relief is separate.

Rehearing Order at PP 16 & 31, JA 587 & 594. In other words, it would have been within the Commission's discretion to send the entire case, including the issue of remedies, to a court of competent jurisdiction. It can hardly be considered an abuse of discretion for the Commission to decide itself all issues that are clearly within its authority, and to defer to a court the one issue, i.e., remedies, that is not so clearly within that authority.

B. The Commission Reasonably Found That There Was No Permanent Abandonment Of Service By Columbia

Although Virginia Natural complained that Columbia's failure to meet its LNG service obligations constituted abandonment of service in violation of NGA § 7(b), *see* R 1 at 19-21, JA 19-21, the Commission reasonably found that "Columbia's imperfect performance does not constitute a de facto abandonment of service, and so reject[ed] VNG's contention that Columbia was remiss in not obtaining NGA section 7(b) permission and approval for its service lapses." Initial Order at P 34, JA 524.

Under NGA § 7(b), no natural gas pipeline company can abandon any of its jurisdictional facilities or services rendered by such facilities without FERC permission. *See* 15 U.S.C. § 717f(b). "An 'abandonment' within the meaning of section 7(b) occurs whenever a natural gas company *permanently* reduces a significant portion of a particular service." *Reynolds Metals Co. v. FPC*, 534 F.2d 379, 384 (D.C. Cir. 1976) (emphasis added). Moreover, being "operationally

dormant for a period of indefinite duration," *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 88 (1966) (quoting *Continental Oil Co.*, 31 FPC 1079, 1083 (1964) (internal quotation marks omitted)), may constitute abandonment. "But the physical alteration of facilities is not a *sine qua non* . . . ." *See id.* Well aware of this precedent, *see* Rehearing Order at P 21 & nn.22-23 (citing cases), JA 589-90, the Commission concluded that "none of the service shortfalls identified by VNG, including the curtailment of service under Rate Schedule X-133, constitute an abandonment of service." Rehearing Order at P 21, JA 589.

On appeal, Virginia Natural contends that the Commission's finding does not rest on substantial evidence because FERC's determination in the Rehearing Order that there was "no indication that Columbia was unable or unwilling to meet its firm service commitments," *id.*, JA 590, conflicts with FERC's earlier statement that "Columbia was not able to correct a known deficiency, or operate in accordance within the parameters of the known deficiency," Initial Order at P 32, JA 523. *See* VNG Brief at 41-42. But there is no actual inconsistency. The statement in the Rehearing Order pertains to Columbia's general ability and willingness to meet firm service commitments. On the other hand, the earlier statement in the Initial Order concerns Columbia's failure to correct known mechanical problems or to operate within the confines dictated by such problems,

e.g., Columbia's failure to run in continuous mode so as to preclude operational problems associated with pumping failures.

Abandonment, as the Commission observed, "occurs whenever a natural gas company permanently reduces a significant portion of a particular service." Rehearing Order at P 21 (quoting *Reynolds*) (internal quotation marks omitted), JA 589-90. Here, there was no permanent reduction of service. The Commission noted "a history of Columbia's reliably satisfying its contractual and certificated service obligations to VNG."[6] *Id.* at P 21 n.23, JA 590. Columbia's "service interruptions were not sustained and have not been repeated before or since the winter of 2002-03." *Id.* at P 21, JA 590. Thus, the Commission engaged in reasoned decision-making when it concluded that there had been no abandonment in violation of NGA § 7(b).

The cases cited by Virginia Natural on appeal do not support an abandonment finding. *See* VNG Brief at 43-44 (referring to *United Gas*; *Reynolds*; and *Panhandle E. Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949)). As the Commission recognized, "the circumstances in the cases VNG cited . . . involved instances in which service was terminated, either because

[6] That history runs counter to Virginia Natural's belated and jurisdictionally improper argument, *see* VNG Brief at 43 n.16, that there was an *ab initio* reduction at the Chesapeake LNG plant that could be deemed a permanent reduction for purposes of determining abandonment.

a gas company could not or would not meet its certificated obligations. The facts here are markedly different . . . ." Rehearing Order at P 21 n.23, JA 590.

For example, in *United Gas*, the Supreme Court agreed that an abandonment of facilities and service had occurred because the pipeline company expressly ceased taking gas from a certain field and refused to purchase gas from that source, thereby rendering its facilities operationally dormant for a period of indefinite duration. *See* 385 U.S. at 85-86. In *Reynolds*, this Court found abandonment because the pipeline company sought a permanent and significant reduction in its transportation obligation. *See* 534 F.2d at 384-85 (affirming FERC's conclusion that a permanent, sixty-two percent reduction of the pipeline's obligation to transport gas amounted to an abandonment of service). Similarly, in *Panhandle*, the Sixth Circuit observed in dicta that the pipeline company's proposal to substantially reduce the quantity of gas delivered may constitute abandonment. *See* 177 F.2d at 945.

Unlike the pipeline companies in those cases, Columbia here has not proposed to terminate or significantly diminish its certificated obligations. Rather, it has merely suffered "infrequent and isolated lapses in service," Rehearing Order at P 21, JA 590, which could hardly be called permanent. Indeed, the Commission "found no indication that Columbia was unable or unwilling to meet its firm service commitments, given that its service interruptions were not sustained and

have not been repeated before or since the winter of 2002-2003." Rehearing Order at P 21, JA 590. Based on the applicable case law, construing "infrequent and isolated lapses in service as unlawful abandonments would be unwarranted, particularly when there is no showing of additional service interruptions." *Id.*

III. COLUMBIA CANNOT ESTABLISH THAT ITS SERVICE SHORTFALLS WERE THE RESULT OF *FORCE MAJEURE* CIRCUMSTANCES

The Commission properly dismissed Columbia's defense that its service interruptions in the winter of 2003 were excused by *force majeure*. *See* Rehearing Order at P 30, JA 594. Under section 15.1 of the General Terms and Conditions of Columbia's tariff, "the term *force majeure* means an event that creates an inability to serve that could not be prevented or overcome by due diligence of the party claiming *force majeure*. Such events include . . . mechanical or physical failure that affects the ability to transport gas or operate storage facilities." Initial Order at P 8 n.2 (quoting Columbia's tariff) (internal quotation marks omitted), JA 516. Applying its industry knowledge and technical expertise, the Commission reasonably interpreted that tariff provision and the circumstances surrounding Columbia's pumping problems to conclude that Columbia's service shortfalls were not the result of *force majeure*. *See* Initial Order at PP 28-32, JA 522-24; Rehearing Order at PP 23-30, JA 591-94. The service shortfalls, and the pumping facilities problems that contributed to those shortfalls, could have been prevented or overcome by due diligence.

Contrary to Columbia's claim, *see* Columbia Brief at 14-19, it did not exercise due diligence in the operation and maintenance of the Chesapeake LNG plant. As the Commission observed, "Columbia had long been aware of difficulties with its Chesapeake LNG Plant's pump and vent system facilities." Rehearing Order at P 23, JA 591. In 1993, Columbia experienced problems with those facilities' performance, *see id.*, when the LNG in its tank stood at around 30 feet, *see id.* at P 25, JA 591. Although Columbia subsequently made modifications to the facilities pursuant to its consultants' advice, *see id.* at PP 23-24, JA 591, "Columbia exercised insufficient due diligence in its modifications to and/or operation of its vaporization equipment," Initial Order at P 32, JA 523.

Despite knowing that the Chesapeake LNG plant's facilities had previously failed, Columbia never "actually tested these facilities by subjecting them to a full draw-down test to verify the plant's performance capabilities, either before or after modification." *Id.* at P 29, JA 522. Moreover, in 2003, right before the pumping facilities again failed precipitating the LNG service shortfalls, Columbia shut down its pumps and chose not to run them in continuous-run mode even though the LNG level stood at its lowest level ever and nearly seven feet lower than the last time the pumping facilities failed. *See id.* at P 30, JA 523.

Considering that the Chesapeake LNG plant had previously encountered operating difficulties, that Columbia had not tested out its modifications of the

plant's facilities, and that the LNG level was in a more precarious level in 2003 than in 1993, i.e., seven feet lower, the Commission acted reasonably when it denied Columbia's defense that the failure of its facilities constituted a *force majeure* event. *See, e.g.*, *id.* at P 31 (noting that repeated modifications of Columbia's facilities undermine the credibility of *force majeure* contention), JA 523; Rehearing Order at PP 25-26 (referring to Columbia's failure to conduct a draw-down test and believing that such a test would be prudent), JA 591-92; *id.* at P 30 (holding that failure to operate in continuous-run mode weighs against *force majeure* claim), JA 593-94. Columbia had notice of problems and could have acted if it so chose. There was no event that created an inability to serve that could not be prevented or overcome by due diligence.

Columbia, though, argues that the Commission's reference to past problems at the Chesapeake LNG plant and the resulting modifications cannot be used to establish Columbia's lack of due diligence. *See* Columbia Brief at 15-16. Columbia asserts that because it implemented all of its consultants' recommendations, it ostensibly fixed the problems with the Chesapeake LNG plant and it cannot be deemed to be forever on notice that the repaired facilities might again malfunction. *See id.* at 15. The problem with this argument is that it assumes that the recommendations fixed the deficiencies associated with the facilities and that they necessarily improved the facilities to the point that the

facilities would not malfunction at an even lower level than before, i.e., 23 feet as opposed to 30 feet. The Commission recognized that while Columbia may have been able to assume that the LNG level could go down to 30 feet without problems, it could not have assumed that going lower than that level would not result in any problems, particularly in light of the fact that its pumps had previously failed at a low level (30 feet).[7] *See* Rehearing Order at PP 28, 30, JA 593. Hence, Columbia was on notice of potential problems and it cannot argue that those problems could not be prevented or overcome by due diligence.

Likewise, Columbia is wrong to challenge the Commission's conclusion that Columbia could have operated the pumps in continuous-run mode. *See* Columbia Brief at 16-18. As Columbia itself conceded, "[I]f the pumps had been in continuous-run mode (rather than start-up mode), it may have been possible to

[7] Columbia draws the analogy, *see* Columbia Brief at 16 n.8, of a car owner who, having suffered brake failure, replaces the entire brake system in his car, and cannot be blamed for lack of due diligence when a second brake failure occurs five years later. A better analogy is of a car owner who runs his engine to 6000 rpm, wrecking it and causing the engine to be replaced, and who then goes out and tries to run the engine up to 8000 rpm. Although the car owner replaced the original engine after the first failure, one cannot say that the car owner is not on notice that going higher than 6000 rpm may damage the new engine.

continue to pump LNG from the storage tank down to a level well below 23 feet."[8] R 28 at 25 (citing Shivley Aff. ¶ 18), JA 196; *see also* Rehearing Order at P 30 & n.32, JA 593-94. That concession reveals an action that was available to Columbia and that, considering the prior pump deficiencies and the circumstances in 2003, should have been considered by Columbia. *See* Rehearing Order at P 30 ("In light of these conditions, Columbia should have taken every action it could to ensure that its LNG facilities would continue to function."), JA 593.

Similarly, the Commission reasonably held that Columbia ought to have run a full draw-down test to confirm the physical capacity of its system's facilities. *See* Initial Order at P 29 (noting Columbia's failure to conduct a full draw-down test despite pumping facilities situation), JA 522-23; *see also* Rehearing Order at PP 25-26, JA 591-92. Although no Columbia expert, FERC staff, or Virginia Natural recommended such a test, *see* Columbia Brief at 19, "Columbia had, historically, identified its pump vent system as a weak link in its LNG plant's performance," *see* Initial Order at P 31, JA 523. Thus, the Commission, with its

[8] Columbia refers, *see* Columbia Brief at 17, to the Commission's point that "Columbia could not have known in advance that maintaining the pumps in continuous-run mode *would* make a difference," *see* Rehearing Order at P 29 (emphasis in original), JA 593. But as the Commission's italicized use of the term "would" and the paragraph following that statement reveal, the Commission's point only admits that Columbia could not have known with certainty that continuous-run mode *would* make, i.e., conclusively result in, a difference. *See id.* at P 30 (noting Columbia's own statement that continuous-run mode might have made a difference), JA 593-94.

considerable industry knowledge and technical expertise, determined that "to be confident its facilities were adequate to meet its existing service commitments, Columbia would have needed to test the Chesapeake LNG Plant's capacity to send out maximum entitlements under the extreme, but foreseeable, conditions of harsh weather and diminished storage levels of LNG." *Id.* at P 29, JA 522-23.

The Commission recognized Columbia's point that a full draw-down test imposes difficulties and burdens. *See* Rehearing Order at P 26 ("We do not diminish these difficulties."), JA 592. Nevertheless, the Commission reasonably believed that Columbia's failure to conduct a full draw-down test, in conjunction with its failure to be in continuous-run mode, undermined any defense of *force majeure*, when Columbia clearly knew of prior deficiencies at the Chesapeake LNG plant and when the 2003 LNG inventory was at a lower level than in 1993.

In these circumstances, Columbia's ability to exercise a degree of control over its obligations differentiates its activities from the "acts of God" in typical *force majeure* situations. The basic purpose of a *force majeure* clause, reflected in Columbia's tariff, is to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the contract's purpose has been frustrated. *See*, *e.g.*, *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985); *see also Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1540 (5th Cir. 1984)

("'*Force majeure*' has traditionally meant an event which is beyond the control of the contractor."); *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 452 (3d Cir. 1983) ("[I]t is well settled that a *force majeure* clause in a non-warranty contract defines the area of unforeseeable events that might excuse performance within the contract period."). The Commission reasonably could find, in these particular circumstances, that the breakdown in Columbia's service obligations during the winter of 2003 did not rise to the level of unforeseeability, outside of Columbia's control, to implicate a *force majeure* defense.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the challenged orders upheld in all respects.

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Columbia Gas Transmission Corp. v. FERC **FERC Docket No. RP04-139**
D.C. Cir. No. 04-1374 (Consolidated)

Virginia Natural Gas, Inc. v. FERC **FERC Docket No. RP04-139**
D.C. Cir. No. 04-1437 (Consolidated)

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 9517 words, not including the tables of contents and of authorities, the glossary, the certificate of counsel, this certificate, and the addendum.

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