ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 05-1209

WILLISTON BASIN INTERSTATE PIPELINE COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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WASHINGTON, D.C. 20426

JUNE 08, 2006

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief. There are no *amici*.

B. Rulings Under Review

The following three orders of the Federal Energy Regulatory Commission are under review here:

1. *Williston Basin Interstate Pipeline Co.*, Order on Initial Decision, 104 FERC ¶ 61,036 (July 3, 2003) ("Initial Order"), R. 125, JA 392;

2. *Williston Basin Interstate Pipeline Co.*, Order on Rehearing and Compliance and Remanding Certain Issues for Hearing, 107 FERC ¶ 61,164 (May 11, 2004) ("Rehearing Order"), R. 135, JA 566;

3. *Williston Basin Interstate Pipeline Co.*, Order on Compliance Filing and Motion for Refunds, 111 FERC ¶ 61,102 (April 19, 2005) ("Compliance Order"), R. 196, JA 1090.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

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Michael E. Kaufmann
Attorney

June 8, 2006

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GLOSSARY

ALJ	Administrative Law Judge
ALJ Order	Initial Decision, *Williston Basin Interstate Pipeline Company*, Docket No. RP00-107-000, 95 FERC ¶ 63,008 (May 9, 2001), R. 110, JA 251
Brief or Br.	Brief of Petitioner, Williston Basin Interstate Pipeline Company, Case No. 05-1209, *Williston Basin Interstate Pipeline Company v. FERC* (originally filed February 16, 2006, page citations herein refer to June 8, 2006 final main brief)
Commission or FERC	Federal Energy Regulatory Commission
Compliance Order	Order on Compliance Filing and Motion for Refunds, *Williston Basin Interstate Pipeline Company*, Docket Nos. RP00-107-005 and RP00-107-006, 111 FERC ¶ 61,102 (April 19, 200), R. 196, JA 1090
Day 34 Filing	Request for Clarification and Reconsideration of Williston Basin Interstate Pipeline Company, (filed June 14, 2004), R. 142, JA 609
Initial Order	Order on Initial Decision, *Williston Basin Interstate Pipeline Company*, Docket No. RP00-107-000, 104 FERC ¶ 61,036 (July 3, 2003), R. 125, JA 392
JA	Joint Appendix
NGA	Natural Gas Act
R.	Record

GLOSSARY (Cont.)

Rehearing Order	Order on Rehearing and Compliance and Remanding Certain Issues for Hearing, *Williston Basin Interstate Pipeline Company*, Docket Nos. RP00-107-003 and RP00-107-004, 107 FERC ¶ 61,164 (May 11, 2004), R. 135, JA 566
Williston or Petitioner	Williston Basin Interstate Pipeline Company

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

No. 05-1209

WILLISTON BASIN INTERSTATE PIPELINE COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the challenged orders where the Petitioner failed to meet the statutory prerequisites of the Natural Gas Act ("NGA") Section 19, 15 U.S.C. § 717r.

2. Assuming jurisdiction, where Petitioner proposed an overall rate increase for its pipeline services, but did not propose changes to its depreciation rates, whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in affirming the finding of the administrative law judge ("ALJ"),

reasonably determined that: (1) Petitioner's depreciation rates were an integral part of its proposed rate increase; (2) Petitioner failed to satisfy its burden of proving, under NGA Section 4, that its depreciation rates were just and reasonable; and (3) Petitioner must refund the unjustified portions of rates that included the excessive depreciation rates.

3. Assuming jurisdiction, whether the Commission, affirming the ALJ, reasonably adopted FERC Staff's discount methodology for the allocation of natural gas storage costs, where Staff's proposed adjustment was consistent with Commission policy and Petitioner's proposed adjustment was not.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

Contrary to the argument of Petitioner (*see* Br. 11-19), this Court lacks jurisdiction to consider the issues raised in its petition for review. *See infra* pages 12-23. The three challenged orders involve a general rate increase filed by Petitioner Williston Basin Interstate Pipeline Company ("Williston"), a natural gas pipeline company, pursuant to Section 4 of the NGA, 15 U.S.C. § 717c, that was set for hearing and fully litigated. All of the orders are entitled *Williston Basin Interstate Pipeline Co.*, and are reported at:

104 FERC ¶ 61,036 (July 3, 2003) ("Initial Order"), R. 125, JA 392;
107 FERC ¶ 61,164 (May 11, 2004) ("Rehearing Order"), R. 135, JA 566; and
111 FERC ¶ 61,102 (April 19, 2005) ("Compliance Order"), R. 196, JA 1090.

As will be discussed fully herein, Williston's petition for review should be dismissed for lack of jurisdiction because, in contravention of NGA Section 19, 15 U.S.C. § 717r: (1) Williston failed to file a timely petition for review of the Rehearing Order; (2) although it filed a timely petition for review of the Compliance Order, Williston was not aggrieved by that order; (3) assuming, *arguendo,* that Williston was aggrieved by the Compliance Order, it never sought rehearing of that order as required by the NGA; and (4) Williston's "Request for Clarification and Reconsideration," filed 34 days after the issuance of the Rehearing Order, did not qualify as a timely rehearing request under the NGA and therefore did not toll the time for filing a timely petition for review.

STATEMENT OF THE FACTS

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

On December 1, 1999, Williston, pursuant to Section 4 of the NGA, 15 U.S.C. § 717c, submitted to the Commission a general rate increase filing (FERC Docket No. RP00-107-000) that raised numerous issues with respect to its justness and reasonableness. The increased rates were suspended from use until June 1,

2000, subject to refund. *See* Order Accepting and Suspending Tariff Sheets, Subject to Refund and Conditions, and Establishing a Hearing, *Williston Basin Interstate Pipeline Co.*, 89 FERC ¶ 61,330 (Dec. 28, 1999), R.13 at 1, JA 1.

The issues were set for hearing and fully litigated. *See generally* Initial Order at PP 1-3, R. 125 at PP 1-3, JA 392-93. On May 9, 2001, the ALJ, after an extensive hearing, issued a decision on the many ratemaking issues raised in this case. *See* Initial Decision, *Williston Basin Interstate Pipeline Co.*, 95 FERC ¶ 63,008 (May 9, 2001) ("ALJ Order"), R. 110, JA 251. The Commission's Initial Order, issued July 3, 2003, affirmed in part and reversed in part the ALJ Order. With the exception of two issues (certain adjustments to working capital and the elimination of certain rate schedules), the Initial Order affirmed the ALJ Order. *See* Initial Order at PP 8-10, 92-96, R. 125 at PP 8-10, 92-96. JA 394-95, 426-28. On August 4, 2003, Williston filed its Request for Rehearing of the Initial Order. *See* R. 128, JA 454. On May 11, 2004, the Commission issued its Rehearing Order that discussed and resolved each issue Williston raised in its Request for Rehearing, including the two issues Williston raises in its appeal here: (1) whether the Commission was correct in exercising its NGA Section 4 authority when it adopted changed depreciation rates where Williston had not requested any change to the depreciation rates in its filing, *see* May 2004 Rehearing Order at PP 21-52, JA 572-84; and (2) whether the Commission acted reasonably when it found that

Williston's proposed discount methodology for the allocation of storage costs did not comply with Commission policy and thus rejected it, *see id.* at PP 79-94, JA 593-98. In both respects, the Commission denied rehearing.

On June 14 and 15, 2004, Williston filed revised tariff sheets and supporting data purporting to comply with the Rehearing Order. *See* R. 143-147, JA 624-1072. Also on June 14, 2004, 34 days after the issuance of the Rehearing Order, Williston filed a "Request for Clarification and Reconsideration" of the Rehearing Order ("Day 34 Filing"). *See* R. 142, JA 609. This pleading did not mention either issue Williston now raises in this appeal.

In its April 19, 2005 Compliance Order at PP 12-14, JA 1093, the Commission found that the discounting methodology Williston used in its compliance filing was not appropriate and still did not comport with the methodology adopted in the May 2004 Rehearing Order. Williston did not seek rehearing of the April 2005 Compliance Order prior to filing its petition for review with this Court.

II. STATUTORY AND REGULATORY BACKGROUND

A. Ratemaking Under the NGA

Under NGA Section 4(e), 15 U.S.C. § 717c(e), the pipeline bears the burden of proving that its proposed increased rates are just and reasonable. *See, e.g., "Complex" Consolidated Edison Co. of New York v. FERC,* 165 F.3d 992, 1008-

09 (D.C. Cir. 1999). During the course of a rate proceeding, the Commission considers all of the costs that are part of the increased rates proposed by the pipeline. If the Commission finds that the pipeline has not borne its burden of proving that its proposed increased rates are just and reasonable, the Commission may, under Section 4, require the pipeline to refund, with interest, those portions of the rate increase that it finds are not justified. *See, e.g., Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993).

In general, where the pipeline has not proposed a change in its rates or tariff, NGA Section 5, 15 U.S.C.§ 717d, places on the Commission the burden of showing the existing rate or tariff provisions are unjust and unreasonable and justifying the replacement rate. Also, any change must be prospective only. *See, e.g., Western Resources, Inc. v. FERC*, 9 F.3d at 1578.

However, where a pipeline has proposed to increase its rates, based upon a proposed increase in its overall cost of service, Section 4 ratemaking procedures govern; thus, the Commission is empowered to assess the justness and reasonableness of the proposed increase, including both the individual cost of service components the pipeline proposed to increase and those that it left unchanged. *See, e.g., Cities of Batavia v. FERC*, 627 F.2d 64 (D.C. Cir. 1982), as clarified in *East Tennessee Natural Gas Co. v. FERC*, 863 F. 2d 932, 942-43 (D.C. Cir. 1988); *Northwest Pipeline Corp.*, 87 FERC ¶ 61,266 at 62,038 (1999);

Tennessee Gas Pipeline Co., 25 FERC ¶ 61,020 at 61,108 (1983), *reh'g denied on this issue*, 26 FERC ¶ 61,109 at 61,263-64 (1984).

B. Depreciation Rates

As part of the traditional cost-based pipeline ratemaking process, the Commission divides revenue requirements by projected demand to attain a dollar-per-unit cost-of-service figure. To begin, the Commission determines a pipeline's basic costs by totaling operation and maintenance expenses, depreciation, and taxes. *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 56-57 (D.C. Cir. 1991). Depreciation expense is the means by which a pipeline recovers the capital, which it has invested in the plant used to provide service, in a systematic fashion over the useful life of the investment. *See* ALJ Order at 65,095, JA 298.

The economic or useful life of a pipeline's facilities depends primarily on the length of time that an adequate supply of gas will flow through those facilities because it is assumed that the facilities will outlast the supply of natural gas. *See, e.g., South Dakota Pub. Utilities Comm'n v. FERC*, 668 F.2d 333, 334 (8th Cir. 1981); *Memphis Light, Gas and Water Div. v. FPC*, 504 F.2d 225, 228-29 (D. C. Cir. 1974); *Iroquois Gas Transmission Sys., L.P.*, 86 FERC ¶ 61,261 at 61,940-41 (1999). Pursuant to 18 C.F.R. §§ 154.301(c) and 154.312(*l*), the pipeline bears the burden of producing evidence to support the depreciation rates underlying a

proposed rate change.

C. Rate Discounting

Commission-approved tariff rates are the maximum rates the pipeline is authorized to charge for its services, but under Commission policy, pipelines may give discounts in order to increase its throughput and to spread the recovery of its costs over more customers. *See Policy for Selective Discounting by Natural Gas Pipelines*, 113 FERC ¶ 61,173 at P 2 (2005); 18 C.F.R. §§ 284.10(b)(2) and 284.10(c)(5)(ii)(A). The Commission's regulations permitting discounting were upheld in *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1010-12 (D.C. Cir. 1987); *see also, e.g., Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002).

When employing a discounting adjustment calculation for a service, Commission policy does not permit reallocation of the costs previously allocated to that service. Under this policy, "cost allocation" and "rate design" are entirely separate issues. *See Williston Basin Interstate Pipeline Co.*, 87 FERC ¶ 61,264 at 62,010-11 (1999) ("Costs are allocated to service based on cost causation. But the design of rates to recover costs after allocation is based on the value to the customer of different parts of service.") Further, Commission policy does not authorize discounting interruptible storage service at the allocation level as it would shift additional fixed costs to captive firm customers without justification or

precedent. *See Williston Basin Interstate Pipeline Co.*, 87 FERC at 62,009-10; *Williston Basin Interstate Pipeline Co.*, 72 FERC ¶ 61,074 at 61,380 (1995).

SUMMARY OF ARGUMENT

Williston Failed to Satisfy the Statutory Requirements of the NGA

This Court lacks jurisdiction to review the challenged orders, because Williston failed to meet the statutory prerequisites of NGA § 19, 15 U.S.C. § 717r, for seeking review of Commission orders.

Williston sought rehearing of the Initial Order, which was addressed in the Rehearing Order. Among those issues resolved in the Rehearing Order were the issues for which Williston now seeks review. However, Williston did not seek judicial review within 60 days of Rehearing Order. Instead, more than 30 days after the Rehearing Order issued, Williston filed a motion for *reconsideration* (and clarification) of that order. A petitioner seeking untimely *reconsideration*, as opposed to timely *rehearing*, has no right to seek judicial review.

With respect to the Compliance Order, Williston was not aggrieved by and did not seek rehearing of this Order. Assuming, *arguendo*, that Williston was aggrieved by the Compliance Order, it never sought rehearing of that order within 30 days as required by the NGA; thus, Williston's petition for review, arising from the Compliance Order, should be dismissed for lack of jurisdiction.

Depreciation Rates

Assuming jurisdiction, the Commission's treatment of depreciation rates was proper. Where a pipeline proposes an overall rate increase, the burden of proving that unchanged depreciation rates are just and reasonable remains on the pipeline. Since each item in the pipeline's proposed cost of service is a part of the pipeline's proposed rate increase, the pipeline's Section 4 burden to support the proposed general rate increase includes the burden of supporting the dollar amount of each item in the cost of service, including unchanged items.

This is so because, unlike unchanged aspects of a rate that are properly dealt with under NGA Section 5 (examples include proposals to change how the pipeline allocates its overall cost of service among its customers or designs the rates to recover the cost of service), unchanged components of the cost of service (such as depreciation) are an integral part of a proposed increase in the pipeline's overall cost of service. Thus, consistent with precedent, the Commission may act under Section 4 of the NGA to reduce a depreciation rate and order refunds, even where the pipeline has not proposed a change in its depreciation rate, as long as the as-filed depreciation rate is part of a proposed overall rate increase.

Discount Methodology

Also, assuming jurisdiction, the Commission reasonably adopted FERC Staff's discount methodology for the allocation of storage costs where Staff's

proposed adjustment was consistent with Commission policy and Williston's proposed adjustment was not. Williston's proposal appeared not to contain the iterative process that Williston claimed to have performed and the Commission was not able to test the reasonableness of the result. To the contrary, based on all the evidence in the case, the Commission found that Williston's approach was not reasonable and was fundamentally flawed. The Commission's findings regarding the application and interpretation of its discounting policy must be afforded great deference.

Finding that Williston's *pro forma* tariff sheets and work papers did not comply with the directives of Commission's Rehearing Order, the Commission reasonably took the next step of designing the rates for Williston using the discounting methodology it found to be just and reasonable. If Williston took issue with the Commission's calculations, it was incumbent on Williston to raise its objections to the Commission by way of a rehearing request. However, Williston did not seek rehearing of the April 2005 Compliance Order, or the rates contained therein, prior to filing its petition for review with this Court.

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, e.g.*, *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, e.g., 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* NGA § 19(b), 15 U.S.C. § 717r(b). Moreover, the Commission's ratemaking determinations are accorded considerable deference. *See, e.g., Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2004) (explaining "highly deferential" standard for issues of rate design).

II. WILLISTON FAILED TO SATISFY THE JURISDICTIONAL PREREQUISITES TO JUDICIAL REVIEW UNDER THE NATURAL GAS ACT

These proceedings are governed by the NGA, 15 U.S.C. § 717, *et seq*. Section 19 of the NGA, 15 U.S.C. § 717r, establishes this Court's jurisdiction to review orders of the FERC that are issued pursuant to the NGA and specifies the two prerequisites necessary by which an aggrieved party may obtain judicial

review. Subsection (a) requires that the aggrieved party apply for rehearing before the Commission within 30 days after issuance of the FERC order establishing aggrievement. Subsection (b) requires that the aggrieved party file any petition for review within 60 days after issuance of the Commission's rehearing order. These two deadlines are "bright line" standards that are strictly construed and non-compliance constitutes a bar to jurisdiction. *See, e.g., Moreau v. FERC,* 982 F.2d 556, 562-63 (D.C. Cir. 1993) (30-day rehearing request "time limit must be strictly construed . . . and may not be waived by FERC or evaded by courts"); *Tennessee Gas Pipeline Co. v. FERC,* 871 F.2d 1099, 1107 (D.C. Cir. 1989) ("courts are without jurisdiction to review any order unless such a petition has been timely filed"); *Washington Utility and Transp. Comm'n v. FERC,* 26 F.3d 935, 940-41 (9th Cir. 1994) (petition for review filed more than 60 days after FERC's order denying rehearing held untimely for review of FERC orders).

Because Williston failed to comply with the statutory prerequisites for seeking judicial review set out in NGA § 19, 15 U.S.C. § 717r, its Day 34 Filing in response to the Rehearing Order is not a valid rehearing petition keeping its issues alive for appeal on review of the later Compliance Order; accordingly, this Court

lacks jurisdiction to consider this petition for review.[1]

A. The July 2003 Initial Order and May 2004 Rehearing Order

Williston sought rehearing of the Initial Order, which was addressed in the May 2004 Rehearing Order. The two issues raised in this appeal (depreciation rates and discount methodology) were raised in Williston's rehearing request of the July 2003 Initial Order (R. 128 at 10-26, 92-97, JA 463-79, 545-50) and were fully addressed in FERC's May 2004 Rehearing Order (R. 135) at PP 21-52, 79-94, JA 572-84, 593-98. However, Williston failed to then seek judicial review within 60 days of the Rehearing Order. Similarly, Williston failed to seek timely *rehearing* of the Rehearing Order.

Instead, on June 14, 2004, 34 days after the May 11, 2004 Rehearing Order issued, Williston filed a *Request for Clarification and Reconsideration* of that order, the Day 34 Filing.[2] R. 142, JA 609. This Day 34 Filing did not raise either of the issues presented for review before this Court. In any event, the Day 34

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[1] On August 8, 2005, the Commission filed a Motion to Dismiss for Lack of Jurisdiction in this case. Williston filed its Response on August 18, 2005 and the Commission filed its Reply on August 30, 2005. By Order of this Court, issued November 21, 2005, the Motion to Dismiss was referred to the merits panel for its consideration.

[2] Also, on June 14 and 15, 2004, Williston "filed revised tariff sheets and supporting data purporting to comply with the [May 2004 Rehearing] Order." April 2005 Compliance Order at P 1, JA 1090.

Filing, as discussed further below, does not qualify as either a timely request for rehearing or a timely request for review of the aggrieving May 2004 Rehearing Order for purposes of satisfying the jurisdictional threshold requirements of NGA § 19.

Since Williston did not seek judicial review of the May 2004 Rehearing Order within the 60-day limit set by NGA § 19(b), 15 U.S.C. § 717r(b), it is barred from petitioning for review of that order now. *See, e.g.*, *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107 (D.C. Cir. 1989) ("courts are without jurisdiction to review any order unless such a petition has been timely filed").

B. The April 2005 Compliance Order

Williston did not seek rehearing of any portion of the April 2005 Compliance Order prior to filing its petition for review with this Court. The failure to seek rehearing of the April 2005 Compliance Order means the Court lacks jurisdiction to consider any issue arising from it, as seeking rehearing is a statutory prerequisite for judicial review under NGA § 19(a), 15 U.S.C. § 717r(a) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.") *See, e.g.*, *California Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (if an order on rehearing modifies the results of earlier an order in a significant way adverse to a party, that party must seek rehearing before filing a

petition for review); *Moreau v. FERC*, 982 F.2d 556, 562-63 (D.C. Cir. 1993) ("time limit must be strictly construed . . . and may not be waived by FERC or evaded by courts.").

As this Court ruled in a similar situation, where the putative petitioner sought review of an order "for which it did not seek rehearing before the Commission, but fail[ed] to challenge [a separate FERC order] by which it is aggrieved," that petitioner "is not a proper party to these proceedings." *DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005). The May 2004 Rehearing Order was not "conditional," *id.*, as it resolved on rehearing the two issues for which Williston seeks review. The April 2005 Compliance Order merely approved, with revision, Williston's tariff sheets filed in compliance with the May 2004 Rehearing Order.

C. Williston's Tolling Argument is Erroneous

Williston would void all NGA § 19 prerequisites for appeal by asserting that its untimely *reconsideration* of the May 2004 rehearing Order tolled the time for filing a petition for review of that order. Br. at 12-13. However, a petitioner seeking untimely *reconsideration*, as opposed to timely *rehearing*, has no right to seek judicial review.

In its brief, Williston does not dispute that its "Request For Clarification and Reconsideration" of the May 2004 Rehearing Order was filed more than 30 days

after that Order issued, and thus does not constitute a valid *rehearing* request under NGA § 19(a). Furthermore, Williston does not dispute that its reconsideration request asked only for prospective rate treatment of certain allocation issues already resolved by the May 2004 Rehearing Order or that the April 2005 Compliance Order is *not* an order on rehearing. Because the May 2004 Rehearing Order addressed the only timely rehearing request filed in this proceeding, Williston was obligated by NGA § 19 to seek timely judicial review of that Order. In this it failed.

Williston attempts to evade this conclusion by claiming (Br. at 15-16) that it was merely awaiting Commission action on its Day 34 Filing before filing for judicial review, citing this Court's ruling in *Williston Basin Interstate Pipeline Co. v. FERC*, No. 99-1311 (D.C. Cir. Oct. 12, 1999) (copy attached to Petitioner's Brief). But, in making that claim, Williston seeks to equate a timely *rehearing* request with an untimely request for *reconsideration* for jurisdictional purposes. *See, e.g.*, Br. at 15-17 (stating it represented earlier that "in the future it would abide with the Court's holding [in No. 99-1311] and not file a petition for review if it sought *further agency consideration* of issues") (emphasis added); *compare* Petitioner's Response in No. 99-1311 at 9 (November 12, 1999) (copy attached to Williston's August 18, 2005 Response in Opposition to FERC's Motion to Dismiss) (Petitioner "will abide by the Court's holding and not file a petition for

review if it has filed a request for *rehearing*") (emphasis added). This Court's earlier *Williston Basin* ruling related to a timely request for rehearing filed contemporaneously with a petition for review, and is thus inapposite to the instant situation, involving a petition and an untimely request for reconsideration.

Since a request for reconsideration filed after the 30-day period specified in NGA § 19(a) does not satisfy the jurisdictional prerequisite for appellate jurisdiction, it cannot serve as the basis for tolling the statutory time period within which review must be sought as Williston claims. Br. at 15-17. Williston had two choices under the statute following the May 2004 Rehearing Order: (1) file again for rehearing within 30 days, thereby stopping the clock for judicial review until later Commission action on that rehearing; or (2) file for judicial review of that Order within 60 days. Williston did neither, choosing instead the extra-statutory procedure of "clarification" and "reconsideration" by making the Day 34 Filing.

Moreover, the precedents Williston cites actually militate against it. For instance, on page 12 of its Brief, Williston states:

> This Court has held that the filing of a "request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002). Indeed, "a petition seeking review of such a non-final action is not only premature but incurably so…." *Id.* "It is well-established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order." *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980 (D.C. Cir. 1993).

However, a closer examination of *Clifton Power Corp.* reveals that, unlike Williston, the petitioner there had indeed filed a "Request for Rehearing and Reconsideration" **within the statutory 30-day period**, but had also improperly filed for judicial review while the timely rehearing request was pending before the Commission. *Clifton Power Corp.*, 294 F.3d at 110. Similarly, in *Tennessee Gas Pipeline*, the petitioner had filed a **timely** "Request for Clarification or Rehearing" that was pending at the time the petitioner filed for judicial review. *Tennessee Gas Pipeline*, 9 F.3d at 980. Neither case excuses Williston's inaction here.

Both *Clifton Power Corp.*, 294 F.3d at 110, and *Tennessee Gas Pipeline*, 9 F.3d at 980-81, cite to *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-34 (D.C. Cir. 1989), for the proposition that a petition for review filed while a request for **agency reconsideration** is pending as "incurably premature." But it is significant to note that the "petition for reconsideration" in *TeleSTAR* refers to a term of art under the Communications Act, 47 U.S.C. § 405(a), which is the 30-day jurisdictional threshold for those parties aggrieved by actions or orders of the Federal Communications Commission to preserve their right to judicial review (directly corresponding to the NGA § 19(a) rehearing prerequisite). Thus it is clear that Williston is improperly attempting to obscure the distinction between the term "reconsideration" as used in these cases — specifically referring to timely requests for rehearing or the equivalent — with Williston's "Request for Clarification and

Reconsideration," which was not filed until 34 days after the May 2004 Rehearing Order issued and does not satisfy the jurisdictional imperative of the NGA.

Williston also argues that FERC's motion to dismiss, which this Court carried over to briefing on the merits, *see supra* note 1, "suggests that the time for filing the petition for review is determined by the Commission's disposition of specific issues . . . contrary to this Court's rulings . . . [that a] determination of finality of an agency's action is a party-based concept." Br. at 13. The intent of FERC's Motion (at 2-3) was not to challenge this Court's party-based concept of finality, but to point out that Williston's Day 34 reconsideration request did not raise any further substantive objections to those found in its earlier rehearing request of the July 2003 Initial Order (and that it now proposes to raise on appeal). The Commission has never suggested that Williston should have filed a petition for review of the May 2004 Rehearing Order *in addition* to its Day 34 reconsideration request. Rather, consistent with the Court's precedent on the subject of finality, *see Clifton Power*, 294 F.3d at 110-12, Williston had a choice to make. By foregoing a timely rehearing request or petition for review from the May 2004 Rehearing Order, and instead making the extra-statutory Day 34 Filing, Williston has, by its own tactical choice, foregone all rights under the NGA § 19 regarding the Rehearing Order and cannot later reclaim those rights by virtue of the later-issued Compliance Order.

Williston seeks to avoid this conclusion by asserting the April 2005 Compliance Order placed new obligations on Williston: "Prior to [the April 2005 Compliance] order, Williston Basin was not required to make refunds or to adjust its rates." Br. at 17. While FERC disagrees with this characterization, even accepting it as true would not warrant retaining jurisdiction over the instant petition. If, indeed, the April 2005 Compliance Order placed new requirements on Williston with which it disagreed, Williston was obligated to seek rehearing of those new requirements prior to seeking judicial review. NGA § 19(b), 15 U.S.C. § 717r(b); *see also, e.g., Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296-97 (D.C. Cir. 2001) (citing *Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990). As Williston did not seek rehearing of the April 2005 Compliance Order, the Court lacks jurisdiction to review it.

On the other hand, if, as FERC earlier indicated (Motion at 2 and 3), the April 2005 Order merely approved tariff sheets that were filed in compliance with the rulings made in the May 2004 Rehearing Order, then any claimed aggrievement resulted from the July 2003 Initial Order and the May 2004 Rehearing Order, not the April 2005 Compliance Order. Failure to seek timely judicial review of the May 2004 Rehearing Order thus precludes a challenge now, through the guise of seeking review of the April 2005 Compliance Order, as an impermissible collateral attack. *See, e.g., Transwestern Pipeline Co. v. FERC*, 988

F.2d 169, 174 (D.C. Cir. 1973).

Indeed, Williston itself seems of two minds as to the import of the April 2005 Compliance Order. On one hand, it claims that the Compliance Order caused "injury in fact to a protected interest" for purposes of establishing "aggrievement" because the order ruled on substantive issues, took the unusual step of actually calculating the prospective rates and required Williston to make refunds. Br. at 17. On the other hand, Williston claims that same Compliance Order "did not present a new source of complaint" but merely "crystallize[d] the issues for judicial review . . . ." *Id*. at 19.

Williston cannot have it both ways. If the Compliance Order presented no new source of complaint, then it must be conceded that Williston's aggrievement resulted solely from the Initial and Rehearing Orders and Williston is thus barred from judicial review because it failed to seek timely review of the latter order. If, on the other hand, the April 2005 Compliance Order in fact caused new harm to Williston, then judicial review is barred by Williston's failure to seek timely rehearing of the Compliance Order.

Williston claims that if the Court were to dismiss its petition on jurisdictional grounds, it (and like-minded parties) would be placed in an untenable position. Br. at 19. However, this is a dilemma of Williston's own creation because it failed to seek either timely review or timely rehearing of the May 2004

Rehearing Order as required by the NGA.

III. THE COMMISSION PROPERLY EXERCISED ITS AUTHORITY IN ADJUSTING WILLISTON'S DEPRECIATION RATES

Assuming jurisdiction, the Commission's treatment of Williston's depreciation rates was proper.

A. Statutory Basis for Review

In filing its Section 4 rate increase, Williston did not propose to change the depreciation rate component from that underlying its previous rates. Rehearing Order at P 21, JA 572. The Commission upheld the finding of the ALJ, *see* ALJ Order at 65,095-104, JA 298-316, that Williston had not proved that retaining the extant depreciation rates and rate methodology produced just and reasonable rates and adopted depreciation rates proposed by Commission Staff. Initial Order at PP 54, 96, JA 413, 428; Rehearing Order at P 21, JA 572.[3]

Williston argues that because it did not propose any change to depreciation methodology or depreciation rates, the Commission must act under NGA Section

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[3] Williston maintains specific accounts for depreciation and categorizes them by Plant Function (General, Underground Storage, Transmission and Gathering). On rehearing, Williston objected to Commission Staff's General and Underground Storage depreciation rates, but did not contest Staff's Gathering function depreciation rates. As to the Transmission function, Williston only contested the economic life of 35 years estimated by Commission staff. Rehearing Order at P 2, JA 566.

5, 15 U.S.C. § 717d, to change the depreciation rates. Williston also argues that pursuant to Section 5, the Commission bears the burden of proof for such depreciation rate changes, and any rate change must only be given prospective effect. *See* Br. at 20-29. *See also* and *supra* pages 5-7 (explaining the relationship between Sections 4 and 5 of the NGA).

The Commission found that Williston's depreciation rates were an integral part of its proposed rate increase, and held that Williston bore the burden of proving, under Section 4 of the NGA, that its depreciation rates were just and reasonable. The Commission also held that the pipeline could be required to refund the unjustified portion of rates that included the excessive depreciation rates. *See* ALJ Order at 65,095-104, JA 298-316; Initial Order at PP 54, 96, JA 413, 428; Rehearing Order at PP 21-52, JA 572-84. Williston's assertions notwithstanding, where the pipeline proposes an overall rate increase, the burden of proving that unchanged depreciation rates are just and reasonable is on the pipeline. Since each item in the pipeline's proposed cost of service is a part of the pipeline's proposed rate increase, the pipeline's Section 4 burden to support the proposed general rate increase includes the burden of supporting the dollar amount of each item in the cost of service, including unchanged items. Pursuant to 18 C.F.R. §§ 154.301(c) and 154.312(*l*), the pipeline must submit materials to support the depreciation rates underlying a proposed rate change.

Thus, even where the pipeline has not proposed a change in its depreciation rate, as long as the as-filed depreciation rate is part of a proposed overall rate increase, the Commission may act under Section 4 of the NGA to reduce the depreciation rate and order refunds as necessary. *See, e.g.*, *Laclede Gas Co. v. FERC*, 670 F.2d 38 (5th Cir. 1982); *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982); *Northwest Pipeline Corp.*, 87 FERC ¶ 61,266, at 62,038 (1999); *Northern Border Pipeline Co.*, 88 FERC ¶ 61,201, *order on reh'g*, 89 FERC ¶ 61,185 (1999).

B. Burden of Proof

As a preliminary matter, Williston suggests that the Commission bears the burden of proof where the pipeline did not initiate the change in depreciation rates. Br. at 3. However, under Section 4 of the NGA, the pipeline bears the burden of proving that its proposed increased rates are just and reasonable.

> At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company.

NGA Section 4(e), 15 USC § 717c(e).

The burden of proof consists of the burden of producing evidence and the burden of persuading the trier of fact. The Commission's regulations, 18 C.F.R. § 154.301(c), places the burden of producing evidence on the pipeline. It requires the pipeline to submit sufficient evidence with its filing to sustain its case-in-chief.

More specifically, 18 C.F.R. § 154.312(*l*) requires the pipeline to submit materials to support the depreciation rates underlying a proposed rate change. The burden of proof in Section 4 rate case relates to the burden of persuasion. A pipeline may rely on any submitted evidence, regardless of its source, to satisfy its burden of proof. *Consolidated Edison v. FERC,* 165 F.3d at 1008-09 (rolled-in pricing for new facilities). Thus, under Section 4, the pipeline has the burden of persuading the trier of fact that its proposed increased rates are just and reasonable; that is, that a preponderance of the evidence supports its case. The burden of persuasion always remains on the pipeline. *See, e.g., id.*

During the course of a rate proceeding, the Commission considers all of the costs that are part of the increased rates proposed by the pipeline. It may find that the pipeline has not borne its burden of proof with respect to some or all of its costs and that those costs are thus too high and that therefore the pipeline has not borne the burden of proving that its proposed increased rates are just and reasonable. If the Commission finds that the pipeline has not borne its burden of proving that its proposed increased rates are just and reasonable, the Commission may require the pipeline under Section 4 to refund, with interest, the portions of the increased rates

that it finds are not justified. NGA Section 4(e), 15 U.S.C. § 717c(e).[4] *See, e.g., FPC v. Tennessee Gas Transmission Co*., 371 U.S. 145, 152 (1962).

Williston cites a number of cases to support its contention that unchanged depreciation rates must be considered under NGA Section 5. Br. at 20-27. These include *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 941-44 (D.C. Cir. 1988); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183-84, 186-87 (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985); and *Public Service Comm'n v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980) ("*Transco*"). As will be demonstrated: (1) these cases can be distinguished from this one; (2) a pipeline nevertheless bears the burden of proving the justness and reasonableness of its depreciation rates under Section 4; and (3) Williston did not satisfy that burden in this case.

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[4] The Commission has discretion as to whether to order refunds. In addition, refunds are limited by the amount of the proposed increase over the previously effective rates. This is known as the "refund floor." The refund floor is usually applied to the overall increase in the cost of service, but can, at times, be applied to individual increased rates. *See Sunray DX Oil Co. v. FPC*, 391 U.S. 9 (1968); *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536 (D.C. Cir. 1985); *Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 187-88 (5th Cir. 1971); *Panhandle Eastern Pipe Line Co.*, 59 FERC ¶ 61,245 at 61,874 (1992).

C. Unchanged Items that are Integral to Proposed Cost of Service Increase

The Commission's treatment of depreciation rates does not blur the line between its Section 4 and 5 authority under the NGA. *See* ALJ Order at 65,095-104, JA 298-316; Initial Order at PP 54, 96, JA 413, 428; Rehearing Order at PP 21-52, JA 572-84. Generally, where the pipeline has not proposed a change in its rates or tariff, NGA Section 5 places on the Commission the burden of showing the existing rate or tariff provisions are unjust and unreasonable and justifying the replacement rate. Also, any change must be prospective only. However, NGA Section 4 provides for different procedures where the pipeline proposes a rate increase or other changes. As pertinent here, NGA Section 4(e) provides:

> Where increased rates or charges are . . . made effective [at the expiration of the suspension period], the Commission may . . . upon completion of the hearing and decision . . . order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that an increased rate or charge is just and reasonable shall be upon the natural gas company[.] . . .

15 U.S.C. § 717c(e).

The Commission has held that these provisions of Section 4 govern any pipeline proposal to increase its rates based upon a proposed increase in its overall cost of service. *See Northwest Pipeline Corp.*, 87 FERC ¶ 61,266 (1999) ("*Northwest*"); *Tennessee Gas Pipeline Co.*, 25 FERC ¶ 61,020 at 61,108 (1983), *reh'g denied on this issue*, 26 FERC ¶ 61,109 at 61,263-64 (1984) ("*Tennessee*").

This treatment includes both the individual cost of service components the pipeline proposed to increase and those that it left unchanged. As the Commission explained in *Tennessee* and *Northwest*, each component of the pipeline's cost of service is an integral part of the pipeline's proposed overall rate increase. Therefore, the pipeline's burden under NGA Section 4(e) of "show[ing] that an increased rate or charge is just and reasonable" necessarily includes the burden of supporting *each component* of the cost of service, the unchanged as well as the changed components. Moreover, to the extent the pipeline fails to sustain that burden, the Commission may order refunds of the overall increase in the cost of service. This result is consistent with the plain language of Section 4(e) that speaks solely of "increased rates or charges," without distinguishing between specific cost components that make up those rates and charges.

As will be discussed, *infra*, regarding the cases cited by Williston, where a pipeline proposes a change other than an overall rate increase, the pipeline's Section 4 burden and refund obligation is generally limited to the change it proposes. Examples include proposals to change how the pipeline allocates its overall cost of service among its customers or designs the rates to recover the cost of service. When a pipeline proposes this type of limited change, parties wishing to change other aspects of the pipeline's rate design or cost allocation generally must proceed under NGA Section 5. In such a case, the unchanged aspects of the

rate are not integrally related to the proposed change. This is not comparable to the way, as here, that unchanged components of the cost of service (such as depreciation) are an integral part of a proposed increase in the pipeline's overall cost of service.

None of the cases cited by Williston to support its contention that the Commission must proceed under NGA Section 5 to change its depreciation rates, *see* Br. at 20-27, are persuasive because none of them concerned cost items that were part of a proposed rate increase. All of them concerned unchanged rate components that were not related to proposed rate increases, such as methods for allocating costs or for designing rates.

For example, *Sea Robin Pipeline* concerned the method of determining the rates for transportation service for a specific producer. In that case, the pipeline did not propose to change a specific customer's fixed rate, which was set by contract. The Commission required that a greater portion of the pipeline's cost of service be allocated to the customer than reflected in the fixed rate contract. This Court held that in adopting a new methodology to determine the customer's rates, the Commission was acting under Section 5 and, consequently, bore the burden of proving that the existing method was unjust and unreasonable and that its replacement method was just and reasonable. 795 F.2d at 187. However, *Sea Robin Pipeline* did not involve an increase in the pipeline's overall cost of service,

but only how costs would be allocated among Sea Robin's customers.

Similarly, *ANR* involved zone boundaries; the method for determining rates for a service using certain facilities; and the method for determining the cost of company use gas for two backhaul services. 771 F.2d at 509-13. These were means of allocating costs among customers rather than determining the costs themselves. *East Tennessee* ruled on the elimination of a minimum commodity bill, a rate mechanism for recovering a portion of the pipeline's cost of service. 863 F.2d at 934-35. In *Western Resources,* which concerned the methodology for determining a backhaul rate, the Commission accepted a backhaul rate that was methodologically distinct from the one proposed by the pipeline. 9 F.3d at 1570-71. *See also Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 453 (D.C. Cir. 1988) (involving the imposition by the Commission of a rate structure for small captive customers that was different from the rate structure proposed by the pipeline).

In *Transco,* 642 F.2d at 1342-46, this Court held that the Commission must proceed under NGA Section 5 to order a change in rate differentials for allocating charges among three delivery zones which the pipeline did not propose to change. A footnote in another part of the opinion also suggested that the Commission would have to proceed under Section 5 if it went beyond voiding a proposed increase in the pipeline's return on equity and ordered a lower return. *Id*. at 1350

n.27.

Subsequent to *Transco*, this Court held that when an existing component of a rate interacts with a changed component so as to create an unjust and unreasonable result under existing Commission policy, the Commission's Section 4 authority may apply to both parts of the rate. *Cities of Batavia*, 627 F.2d 64, as clarified in *East Tennessee*, 863 F.2d at 942-43. As discussed *supra*, each component of a pipeline's cost of service is an integral part of the pipeline's proposed overall rate increase and is properly addressed under NGA Section 4. More recently, in *Western Resources*, 9 F.3d at 1579, this Court stated that differences as to the extent of specific cost items may be handled under Section 4 and that these differences constituted minor deviations from the pipeline's proposed rate.

In contrast to the cases cited by Williston, which involved unchanged rate components that were not related to proposed rate increases, this Court has recognized that cost items that are part of a proposed rate increase are properly considered under Section 4. *Western Resources* and *East Tennessee* have described such cost items as a statutory exception to the rule that changes in

proposed rates must be made prospectively under Section 5.[5] Moreover, this Court in *Western Resources* stated that differences as to the extent of specific cost items may be handled in a Section 4 proceeding. 9 F.3d at 1579.

The decision in *North Penn Gas Co. v. FERC*, 707 F.2d 763 (3d Cir. 1983), is particularly instructive. There the court specifically considered an unchanged cost item in a filing for a rate increase. The court found that the unchanged cost item was part of the rate increase sought by the pipeline, that the pipeline had not

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[5] As this Court explained in *East Tennessee*:

> [T]he only statutory exception to the rule prohibiting retroactive rate changes arises in order to accommodate the realities of administrative delay. When a pipeline proposes rate changes under § 4, the Commission is authorized by the Act to suspend the rates for five months pending administrative review 15 U.S.C.A. § 717c(e) (1976). If the Commission is unable to determine whether or not the proposals are just and reasonable within that time limit, however, the pipeline is permitted to collect the proposed rates on a temporary basis. That is, the proposed rates may become effective *filed* rates before final approval by the Commission. If the Commission ultimately determines, however, that the rates are *not* just and reasonable, then § 4 authorizes the Commission to order that the pipeline pay refunds to any customers who purchased gas at the (filed) proposed rate, thereby retroactively changing that rate. Allowing these retroactive reductions in filed rates is a necessary compromise to accommodate delays in the approval process and is done at the pipeline's risk; in essence, the pipeline forgoes its ordinary entitlement to rely on filed rates when it chooses to go ahead and collect rates that have not yet been finally approved.

863 F.2d at 942.

shown that its proposed unchanged cost item was just and reasonable, and, hence, that the pipeline had not borne its burden of showing that its proposed increase was just and reasonable. The court also held that the Commission could require refunds for the excessive portion of the cost item.

Specifically, *North Penn Gas Co.* examined the pipeline's stored gas allowance.[6] The pipeline used the same methodology in its proposed rate increase for determining its stored gas allowance as it had used in its previous rate case. The Commission adopted a different method for determining the stored gas allowance which resulted in a lower allowance and in a lower rate and ordered North Penn to refund the difference between the new lower rate and the higher rate that its customers had been paying. 707 F.2d at 769.

North Penn argued that when the Commission changed the method of computing the stored gas allowance, it was using powers granted by NGA Section 5(a) and hence bore the burden of proof and had no authority to order a refund. However, the Court held that the working capital allowance was part of the rate increase sought by the pipeline. It held that the working capital allowance for stored gas was an integral part of the rate increase and that North Penn had not met

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[6] The stored gas allowance is part of working capital; working capital, in turn, is a component of the pipeline's rate base on which it earns a return.

its burden of showing the necessity for all of the increase it requested since it had not shown that its proposed stored gas allowance was just and reasonable. *Id*. at 767. Consequently, the Court found the Commission was authorized to order refunds for the excessive stored gas allowance under Section 4(e). *Accord Northern Border Pipeline Co.*, 88 FERC ¶ 61,201, *order on reh'g*, 89 FERC ¶ 61,185 (1999) (unchanged depreciation rates considered under NGA Section 4).

There is nothing unique about depreciation expense that would justify treating it differently than other cost items making up the overall cost of service supporting a proposed rate increase. Williston suggests that because the change in depreciation rate would produce a $1.2 million annual difference in the depreciation expense,[7] it is too significant to be treated under NGA Section 4. Br. at 23. However, when it comes to unchanged cost items that underlie an overall rate increase, there is no principled basis to distinguish between those that some would consider so "significant" as to warrant NGA Section 5 treatment and other "lesser" unchanged cost items that could be considered under Section 4. The fact is all cost items, whether changed or not, contribute to a proposed overall rate

[7] The overall cost of service in Williston's filing was $60.9 million. Initial Order at P 2, JA 393. A $1.2 million change in depreciation is, contrary to Williston's suggestion, only a small portion of the total cost of service.

increase. For this reason, the Commission has never distinguished between different cost items, large or small, underlying a proposed overall rate increase for purposes of deciding whether to apply Section 4 and Section 5. The process for determining appropriate depreciation rates is no different than deciding the appropriate levels of other cost of service items.

D. Williston's Remaining Depreciation Arguments

1. Depreciation as a Cost of Service Item

Williston also argues (Br. at 24-26) that depreciation should be treated differently from other cost items underlying a proposed rate increase because depreciation is "more analogous to the process of cost allocation." *Id.* at 25. [8] However, Williston can point to no legal basis to treat depreciation differently from any other cost of service item. In fact, Williston's argument in favor of this treatment undermines its argument cited *supra*. On one hand, Williston posits that the change in depreciation expense ($1.2 million annually) is too large and inflicts too much financial harm to Williston for depreciation to be considered pursuant to Section 4. Br. at 23. On the other hand, Williston then argues:

[8] In making this argument, Williston tacitly recognizes that the processes for analyzing cost of service and cost allocation are different. As discussed herein, unchanged cost of service items underlying a rate increase can be treated under NGA Section 4, whereas unchanged cost allocation methodologies are more properly addressed under Section 5.

> Unlike most other cost of service items, the depreciation rates the Commission fixes from time to time simply affect the timing of the pipeline's cost recovery, not the magnitude of the pipeline's overall total recovery. Higher depreciation rates translate into higher tariff rates, but they do not translate into higher profits.

Br. at 24-25. Once again, Williston is attempting to have it both ways.

2. Established Commission Policy

Williston also argues (Br. at 26) that, contrary to the requirement in *East Tennessee*, 863 F.2d at 943, the Commission's change in depreciation rates is not based on an established policy that predated Williston's filing of its rate case. This is simply not the case. As the Commission noted in its Rehearing Order at P 27, n.23, JA 575, the Commission's policy for determining appropriate depreciation rates was established years before Williston filed its rate case here:

> The depreciation rate is a measure of the loss in service value on an annual basis. Prior to the 1970's, it appears that the factors most significant in determining the useful life of facilities were those having to do with the physical life of the facilities. During the 1970's, however, available gas reserves appeared to decrease and the amount of reserves became the dominant factor in determining the useful life, and therefore, the depreciation rates for gas facilities. *Memphis Light, Gas and Water Division v. FPC*, 504 F.2d 225, 229-30 (D.C. Cir. 1974). This type of analysis, the examination of gas reserves to determine depreciation, has been widely used ever since.

This Commission policy was firmly in place at the time Williston filed its rate case and Williston cannot now claim the opposite.

3. Reliance Interest in Prior Depreciation Rates

Neither can Williston legitimately claim that it has a reliance interest in its

former depreciation rates simply because they had been approved by the Commission in Williston's 1992 rate case and had also been included in Williston's 1995 rate case that ultimately settled. *See* Br. at 6, 26-27. The Commission's approval of a cost item in a settlement does not relieve Williston from proceeding under Section 4 with respect to that cost item in its next rate case. *See Michigan Gas Storage Co.*, 87 FERC ¶ 61,038 at 61,168 (1999) (rate treatment of certain "at-risk" facilities in prior settlement limited to that settlement); *Iroquois Gas Transmission System, L.P.*, 86 FERC ¶ 61,261 at 61,941 (1999) (depreciation rate approved in settlement not meant to be a permanent feature of pipeline's rates). This is so because costs change constantly and a cost item that was just and reasonable in one rate case may be unjust and unreasonable in the next and the Commission has a continuing obligation under the NGA to find that rates are just and reasonable. *See OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995); *Texas Eastern Transmission Corp. v. FERC*, 893 F.2d 767, 774 (5th Cir. 1990).

Thus, inclusion of depreciation rates in a settlement does not change the application of Section 4 to the pipeline's proposed depreciation rates in the next rate case where the pipeline proposes an overall rate increase, nor the pipeline's burden of proving its proposed depreciation rates under Section 4 of the NGA. Therefore, Williston could not reasonably rely on its depreciation rates remaining in effect unchanged. *See FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 152

(gas company initiating an increase in rates under NGA Section 4 "assumes the hazards involved in that procedure"). Indeed, as the ALJ noted in this case:

> Staff has fully demonstrated changed circumstances which not only warrant, but require, the Commission to determine the justness and reasonableness of Williston's current depreciation rates. Williston may not be permitted to simply rely on depreciation rates that are based on plant investment, reserve for depreciation, additions, retirement, and abandonment data which are ten years old. Clearly, data from 1990 can not be considered reflective of current depreciable plant and the remaining life of the pipeline system. Not only have significant changes in the regulation and operation of the pipeline and the natural gas industry occurred due to unbundling of Williston's operations and the termination of its merchant function, changes have occurred in the gathering and production operations of Williston and in the business operation by the construction of a new office building for Williston in Bismark, N.D. Further, material changes have occurred in the regulatory and economic environment in which Williston does business, including the development of new technology and data collection, which must be considered in the determination of the "justness and reasonableness" of Williston's current depreciation rates.

ALJ Order at 65,102 (footnotes omitted), JA 313; *see also* Initial Order at PP 54, 96, JA 413, 428; Rehearing Order at PP 21-52, JA 572-84, (adopting the ALJ's depreciation findings as the Commission's own).

4. Filed-Rate Doctrine

Finally, Williston argues (without using the phrase explicitly) that the Commission-ordered changes in its depreciation rates violate the filed-rate doctrine because the change in depreciation rates resulted in a shift of depreciation expense from the depreciation function to the gathering function, which in turn reduced the

expense for transmission and increased the expense for gathering, which in turn increased the rates for gathering service. Br. at 27-28, citing *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004).

This argument is hollow. First and foremost, Williston has never before argued that the Commission's action violated the filed-rate doctrine — the main issue discussed in *Pacific Gas and Electric.* Previously, Williston had raised its concern that if the shift in depreciation expense were to be applied retroactively to calculate refunds, Williston would bear the risk of undercollection of its cost of service. *See* Request for Rehearing at 21, JA 474. However, Williston never cited to any case or ever claimed, until its brief here, that the shift in depreciation expenses would improperly increase rates. Assuming that Williston's entire petition for review is not barred for the reasons discussed *supra*, this specific argument made on brief is jurisdictionally barred. It is well settled that this Court strictly construes the jurisdictional rehearing requirement of § 19(b) of the NGA, 15 U.S.C. § 717r(b), which requires that a petitioner seek rehearing before the Commission and the petitioner raise in that rehearing request "the very objection urged on appeal." *Town of Norwood v. FERC*, 906 F.2d at 774 (quoting *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d at 1110). Moreover, the argument must be raised with sufficient specificity so as to put the Commission on notice of the ground on which rehearing was being sought. *E.g.*, *Intermountain Municipal Gas*

Agency v. FERC, 326 F.3d 1281, 1285 (D.C. Cir. 2003). Williston cannot be permitted to raise new grounds at this late date.

Second, assuming jurisdiction, the shift in depreciation rates across services represents precisely that, a shift. As Williston admits in its brief, this shift reduced the expense for transmission and increased the expense for gathering. Br. at 27. Despite these shifts, the *total* depreciation expenses equal 100% of the just and reasonable depreciation expense that was approved by the Commission, and no more. Request for Rehearing at 21, R. 128 at 21, JA 474. The result is that the total approved depreciation expense is $1.2 million per year less than what Williston sought in its rate filing. *Id*.; Br. at 23. It is this change that is the true source of Williston's complaint, not the final rate for gathering service; and for the reasons stated herein, the reduction in the depreciation expenses was reasonable.

IV. THE COMMISSION'S DISCOUNT METHODOLOGY WAS PROPER

Assuming jurisdiction, the Commission, affirming the ALJ, reasonably adopted FERC Staff's discount methodology for the allocation of storage costs where Staff's proposed adjustment was consistent with Commission policy and Williston's proposed adjustment was not. ALJ Order at 65,135-36, JA 387-88; Initial Order at PP 91, 96, JA 426, 428; Rehearing Order at PP 79-94, JA 593-98; Compliance Order at PP 11-15, JA 1093-94. Williston provides both firm and interruptible storage services. In order to retain certain interruptible storage

customers it provides service to them at a discounted rate. As a result, in order to design maximum tariff rates for storage service, a discount adjustment must be performed. One way of adjusting the maximum rate for the effects of discounting is the ratio method, a somewhat complicated iterative mathematical computation. *See* Rehearing Order at P 80, JA 593.

A. Commission Policy Supported Staff's Methodology

At hearing, Commission Staff submitted a proposed discount adjustment that the ALJ and the Commission deemed reasonable and in compliance with Commission policy because it followed sound ratemaking and cost allocation principles and the result appeared reasonable. *See* ALJ Order at 65,135-36, JA 387-88; Rehearing Order at P 84, JA 595. *See also supra* page 8-9 (explaining discount adjustment policy).

Williston also submitted at hearing a proposed discount adjustment that it claimed complied with Commission policy and precedent. The primary difference between the method presented by Staff and the method used by Williston was a storage cost allocation difference. *See* ALJ Order at 65,135-36, JA 387-88; Rehearing Order at P 81, JA 594. In contrast to Commission Staff, which allocated storage costs **once** at the beginning of the iterative discount adjustment process, Williston apparently re-allocated storage costs with each discount adjustment iteration – **sixty-six times** in this case. Rehearing Order at P 83, JA 595.

However, based on the evidence, the Commission found that Williston's schedule did not even appear to contain the iterative process Williston claimed to have performed. As a result, it was impossible for the Commission to test the reasonableness of Williston's results. *Id.* at P 85, JA 595.

Because of this flaw, among others (*see id.* at PP 79-94, JA 593-98; *see also* April 2005 Compliance Order at PP 11-15, JA 1093-94), the Commission decided that Williston's method did not comply with Commission discounting policy and rejected it. *Id*. The Commission's decision in this regard is reasonable and is entitled to respect. *See, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000) (the Commission's policy assessments are owed "great deference"); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (courts are "particularly deferential" to the Commission's ratemaking determinations).

B. Williston's Defective Compliance Filing

In its Rehearing Order at Ordering P (B), JA 608, the Commission directed Williston to submit compliance tariffs using the Commission-approved discount methodology. Williston responded with compliance filings on June 14 and 15, 2004. *See* Compliance Order at P 1, JA 1090. In its April 2005 Compliance Order, the Commission found that Williston's *pro forma* tariff sheets and work papers did not comply with the Commission's Rehearing Order. *Id.* at PP 11-15,

JA 1093-94. The Commission found that Williston ignored the directives of the Rehearing Order and once again applied the discounting methodology that the Commission specifically had rejected. *Id.*

In its Compliance Order, the Commission again specified several significant flaws with Williston's submitted methodology: (1) in Williston's model, the resulting prices produced with each iteration moved in the opposite direction than what would be expected using the model the Commission found to be just and reasonable, *id*. at P 12; (2) the origin of Williston's rate for the first iteration of the maximum IS-1 rate could not be determined either from its filing or its work papers, *id*. at n.4; (3) Williston appeared to have reallocated costs at each step of the iterative process, contrary to the Commission's orders, *id*. at P 13; and (4) Williston had allocated $26 million to transportation service alone when the total storage cost of service found reasonable in the Commission's orders and reflected elsewhere in Williston's work papers was only approximately $13 million. *Id*. at P 14. The Commission then summed up its impression of this portion of Williston's Compliance filing: "[t]hese types of anomalies provide no confidence regarding the accuracy of Williston's work papers that underlie its prospective rates." *Id.*

It was only at this point in the case that the Commission, frustrated with Williston's compliance efforts, finally took the discounting calculation out of Williston's hands and designed the rates for Williston using the discounting

methodology the Commission repeatedly had found to be just and reasonable and that Williston repeatedly had ignored. *Id*. at P 15 and Attachment B, JA 1100. The Commission's calculations, based on its own earlier discounting directives and Williston's inability to respond adequately to those directives, represent a reasonable exercise of its remedial discretion. *See, e.g.*, *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998).

Now, for the first time, Williston takes issue with the actual rates the Commission calculated in the Compliance Order. Br. at 30-43. However, if displeased with those calculations, it was incumbent on Williston to raise its objections to the Commission by filing a request for rehearing of the Compliance Order. NGA § 19(a), 15 U.S.C. § 717r(a); *see Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 296-97 (D.C. Cir. 2001) (citing *Town of Norwood v. FERC*, 906 F.2d at 775 (party must file another rehearing petition whenever a new source of complaint is introduced)). Williston did not seek rehearing of the April 2005 Compliance Order, or the rates contained therein, prior to filing its petition for review with this Court. Thus, Williston is jurisdictionally barred from seeking review of those Commission-calculated rates.

CONCLUSION

For the reasons stated, Williston's appeal should be dismissed for lack of jurisdiction. In the alternative, the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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June 8, 2006

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D.C. Cir. No. 05-1209

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 10,979 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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