

**ORAL ARGUMENT DATE NOT YET SCHEDULED**

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

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**No. 05-1342**

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**WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P. *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**INITIAL BRIEF: MARCH 13, 2006**

**FINAL BRIEF: MAY 2, 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 Petitioners' Circuit Rule 28(a)(1) certificate.

### **B. Rulings Under Review:**

1. *Transcontinental Gas Pipe Line Corp. et al.*, "Order Addressing Jurisdictional Status of Facilities and Vacating, in Part, Abandonment Authorization," 111 FERC ¶ 61,090 (2005) ("Jurisdictional Order"), JA 215-18.

2. *Transcontinental Gas Pipe Line Corp. et al.*, "Order Denying Rehearing," 111 FERC ¶ 61,498 (2005) ("Rehearing Order"), JA 239-40.

### **C. Related Cases:**

Counsel is not aware of any related cases pending before this Court. In *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003), however, this Court previously addressed the jurisdictional status of certain natural gas facilities, some of which are in this appeal. Furthermore, Case No. 05-61173 pending in the United States Court of Appeals for the Fifth Circuit seeks review of *Jupiter Energy Corp.*, "Order on Remand Affirming Jurisdictional Determination," 111 FERC ¶ 61,497 (2005), and (2) *Jupiter Energy Corp.*, "Order Denying Rehearing," 113 FERC ¶ 61,103 (2005), which concern the jurisdictional status of certain natural gas facilities upstream of the facilities in question in the

instant appeal. The Commission issued those orders after the Fifth Circuit's decision in *Jupiter Energy Corp. v. FERC*, 407 F.3d 346 (5th Cir. 2005).

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## GLOSSARY

Commission	Federal Energy Regulatory Commission
<i>Conoco</i>	<i>Conoco, Inc. v. FERC</i> , 90 F.3d 536 (D.C. Cir. 1996)
<i>ExxonMobil</i>	<i>ExxonMobil Gas Mktg. Co. v. FERC</i> , 297 F.3d 1071 (D.C. Cir. 2002)
FERC	Federal Energy Regulatory Commission
Jupiter	Jupiter Energy Corporation
<i>Jupiter</i>	<i>Jupiter Energy Corp. v. FERC</i> , 407 F.3d 346 (5th Cir. 2005)
Jupiter 8-inch line	A 3.2-mile, 8 5/8” diameter line upstream of Transco’s facilities and that transports gas from Platform 39A to a sub-sea interconnect with Transco
Jupiter 10-inch line	A 10.2-mile, 10¾” diameter line upstream of Transco’s facilities and that transports gas from Platform 39A to a shoreline interconnect with Tennessee Gas Transmission Company
Jurisdictional Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 111 FERC ¶ 61,090 (2005), JA 215-18

## GLOSSARY (con't)

Rehearing Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 111 FERC ¶ 61,498 (2005), JA 239-40
<i>Sea Robin Orders</i>	<i>Sea Robin Pipeline Co.</i> , 87 FERC ¶ 61,384 (1999), <i>reh'g denied</i> , 92 FERC ¶ 61,072 (2000)
Show Cause Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 107 FERC ¶ 61,122 (2004), JA 154-55
<i>State Farm</i>	<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)
Transco	Transcontinental Gas Pipe Line Corporation
<i>Transco I Orders</i>	<i>Transcontinental Gas Pipe Line Corp.</i> , 96 FERC ¶ 61,246, <i>reh'g denied</i> , 97 FERC ¶ 61,298 (2001)
Transco Pipeline	Transco's 12.43-mile long, 24-inch diameter pipeline facility downstream of the interconnection with Jupiter's system
Williams	Williams Gas Processing-Gulf Coast Company, L.P.
<i>Williams</i>	<i>Williams Gas Processing-Gulf Coast Co., L.P. v. FERC</i> , 331 F.3d 1011 (D.C. Cir. 2003)

**GLOSSARY (con't)**

*Williams Field Service*

*Williams Field Serv. Group v.  
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**BRIEF FOR RESPONDENT  
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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably concluded that certain natural gas facilities owned by Transcontinental Gas Pipe Line Corporation (“Transco”) and which Transco seeks to abandon and transfer to its affiliate, Williams Gas Processing-Gulf Coast, L.P. (“Williams”), are jurisdictional transmission facilities.

## PERTINENT STATUTES

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

## INTRODUCTION

The courts and the Commission have struggled with the jurisdictional classification of natural gas facilities located offshore and onshore Louisiana. This is the second time this Court has been presented with challenges to the Commission's classification of downstream facilities that Transco owns and seeks to abandon and transfer to its affiliate, Williams. *See Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) (“*Williams*”) (affirming Commission orders that Transco facilities are, in part, nonjurisdictional gathering facilities that can be transferred to nonjurisdictional affiliate). Another court, the United States Court of Appeals for the Fifth Circuit, has been presented with challenges to the Commission's classification of upstream facilities owned by Jupiter Energy Corporation (“*Jupiter*”). *See Jupiter Energy Corp. v. FERC*, 407 F.3d 346 (5th Cir. 2005) (“*Jupiter*”) (remanding, as “inconsistent and arbitrary,” Commission decision that upstream Jupiter facilities are jurisdictional transmission facilities feeding into nonjurisdictional downstream Transco facilities); *see also Jupiter Energy Corp. v. FERC*, 5th Cir. No. 05-61173 (pending appeal challenging FERC orders on remand).

The task confronting the Commission in the instant case was to reconcile its classification of the downstream Transco facilities with its classification of the upstream Jupiter facilities. The Commission decided to reconsider its earlier classification of downstream Transco facilities (as nonjurisdictional gathering facilities) when it classified the upstream Jupiter facilities as jurisdictional transmission facilities. In the challenged orders, after reviewing the submissions of the pipelines, the Commission found that no gas is collected along the Transco (or Jupiter) line. Accordingly, it overturned its earlier determination and, eliminating the inconsistency identified in *Jupiter*, found that Transco's facilities (like Jupiter's facilities) are jurisdictional transmission facilities. *See Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,090 (“Jurisdictional Order”), JA 215-18, *reh'g denied*, 111 FERC ¶ 61,498 (2005) (“Rehearing Order”), JA 239-40.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

Under section § 7(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717f(b), a natural gas company must obtain FERC permission before it can abandon jurisdictional facilities. NGA § 1(b), 15 U.S.C. § 717(b), provides the Commission jurisdiction over the “transportation of natural gas in interstate commerce” but not over the “production or gathering of natural gas.” The NGA does not define either jurisdictional “transportation”<sup>1</sup> or nonjurisdictional “gathering.” See *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1076 (D.C. Cir. 2002) (“*ExxonMobil*”). The Commission, however, has defined gathering as “the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line.” *Barnes Transp. Co.*, 18 FPC 369, 372 (1957); see also *Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996) (“*Conoco*”) (defining gathering as “the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline’s principal transmission system.”).

As a general matter, the Commission uses a “primary function” test to determine whether a facility is primarily “devoted to the collection of gas from wells – gathering – or to the further (‘downstream’) long-distance movement of

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<sup>1</sup> Transportation is also known as transmission.



gas after it has been collected – interstate transportation.” *ExxonMobil*, 297 F.3d at 1077 (quoting *Conoco*, 90 F.3d at 543); *see also Farmland Indus., Inc.*, 23 FERC ¶ 61,063 at 61,143 (1983) (enumerating various factors). Under the primary function test, no single factor is determinative. *See, e.g., Williams Field Serv. Group v. FERC*, 194 F.3d 110, 116 (D.C. Cir. 1999) (“*Williams Field Service*”); *Farmland*, 23 FERC at 61,143.

In the case of offshore facilities, such as those located in the Outer Continental Shelf,<sup>2</sup> the Commission uses a “sliding scale” to assess their physical characteristics. The “sliding scale” allows for lines of increasing length and diameter to be classified as gathering in correlation to the increasing distance from shore and water depth of the offshore production area. *See Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,988 (1990). In other words, facilities deemed too large to be gathering onshore may be classified as gathering offshore. The Commission may also consider “non-physical” criteria in determining an offshore facility’s primary function. *See id.* at 61,987-88.

As a result of the Fifth Circuit’s decision in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997), remanding FERC’s improper application of the primary function test to offshore facilities, the Commission revised the primary

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<sup>2</sup> The “Outer Continental Shelf” consists of all submerged lands that appertain to the United States and lie beyond the three-mile limit designated for state waters. *See* 43 U.S.C. §§ 1301(a), 1331(a).

function test in three respects. First, it concluded that in situations “where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation systems on [Outer Continental Shelf] systems.” *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 at 62,428 (1999). The Commission later referred to this point of collection as a “centralized aggregation point.” *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,072 at 61,289 (2000) (collectively, with *Sea Robin*, 87 FERC ¶ 61,384 (1999), the “*Sea Robin Orders*”). FERC’s second change in the primary function test was to de-emphasize the “behind-the-plant” criterion relating to the location of processing plants, stating that it would not be determinative on the Outer Continental Shelf, *see Sea Robin*, 87 FERC at 62,426, and could “be outweighed by other factors,” *Sea Robin*, 92 FERC at 61,290. The Commission’s final change was to place its “primary focus on physical factors.” *Id.* In *ExxonMobil*, this Court denied petitions seeking review of the *Sea Robin Orders*.

## II. EARLIER PROCEEDINGS

### A. The First Transco Proceeding

On May 18, 2001, Transco submitted an application in Docket No. CP01-368, pursuant to NGA § 7(b), 15 U.S.C. § 717f(b), seeking Commission approval to abandon certain natural gas facilities located offshore and onshore Louisiana, *i.e.*, the Central Louisiana facilities, to its gathering affiliate, Williams. *See generally* R 1, JA 1-63.<sup>3</sup> The Central Louisiana facilities include the onshore Cow Island Processing Plant, the web-like lateral lines that radiate out from the Cow Island plant and that collect gas from numerous wells, certain looped lines that form a spine and link the Cow Island plant to the offshore, upstream Vermilion Block 67 Platform, and various offshore lateral lines that connect into the spine or Vermilion Block 67. *See Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,246 at 61,976, JA 108, *reh'g denied*, 97 FERC ¶ 61,298 (2001), JA 143-53 (collectively, “*Transco I Orders*”); *see also* R 2 (Exhibits 6, 6W, 6I, 6WA & 6WB), JA 90, 92, 94, 96 & 97. Concurrently with Transco’s abandonment application, Williams petitioned the Commission in Docket No. CP01-369 to declare that the facilities to be abandoned by Transco would be gathering facilities exempt from the Commission’s NGA jurisdiction. *See generally* R 2, JA 64-97.

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<sup>3</sup> “R” refers to a record item. Unless otherwise noted, the “R” reference is to the record index in FERC Docket Nos. CP01-368 and CP01-369. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

The Commission granted Transco's application to abandon the identified Central Louisiana facilities, and found some, but not all, of those facilities to perform a gathering function. *See* 96 FERC ¶ 61,246 at 61,976, JA 108. Those abandoned facilities that were found to perform a transportation function, *i.e.*, the facilities forming the spine downstream of Vermilion Block 67, remain subject to the Commission's NGA oversight. *See id.* at 61,977, JA 109. In *Williams*, this Court denied petitions for review of the *Transco I* Orders.

### **B. The First Jupiter Proceeding**

Thereafter, Jupiter submitted an application seeking a Commission ruling that Jupiter's natural gas facilities also perform a gathering function and are, hence, exempt from the Commission's regulatory jurisdiction under the NGA. *See Jupiter Energy Corp.*, 103 FERC ¶ 61,184 at P 1, *reh'g denied*, 105 FERC ¶ 61,243 (2003). Those facilities have been classified as transportation for almost forty years, *see The Jupiter Corp.*, 35 FPC 1091, 1103-10 (1966), but are upstream of the Central Louisiana facilities found to be nonjurisdictional in the *Transco I* Orders, *see* 105 FERC ¶ 61,243 at P 6. Jupiter's facilities consist of a 10.2-mile, 10<sup>3</sup>/<sub>4</sub>" diameter line (the "Jupiter 10-inch line") that transports gas from Platform 39A to a shoreline interconnect with Tennessee Gas Transmission Company and a 3.2-mile, 8 <sup>5</sup>/<sub>8</sub>" diameter line (the "Jupiter 8-inch line") that transports gas from Platform 39A to a sub-sea interconnect with Transco. *See Jupiter Energy Corp.*,

103 FERC at P 3. Applying the primary function test to Jupiter’s facilities, the Commission denied Jupiter’s application and found those facilities to be jurisdictional transmission facilities. *See generally id.*; *Jupiter Energy Corp.*, 105 FERC ¶ 61,243.

Jupiter then sought appellate review in the Fifth Circuit. Without going into the substance of the primary function test, that court granted Jupiter’s petition and remanded the Commission’s orders. *See Jupiter*, 407 F.3d at 351. Noting that the Commission had previously classified the Transco line into which the Jupiter 8-inch line flows to be gathering, the Fifth Circuit found that holding Jupiter’s facilities to be jurisdictional transmission would conflict with that earlier determination. Because “there is *one* point on any given route where gathering stops and transportation begins,” *id.* at 350, “[t]he Commission’s decision [wa]s fatally flawed by the inconsistency of having the putative point where gathering ends and transportation begins upstream from a gathering pipeline,” *id.* at 351.

### **III. THE INSTANT TRANSCO PROCEEDING**

While the Jupiter case was pending before the Fifth Circuit, the Commission issued an order directing Transco and Williams to show cause “why the facilities downstream of Jupiter’s facilities should not be found to be jurisdictional facilities . . . .” *Transcontinental Gas Pipe Line Corp.*, 107 FERC ¶ 61,122 at 61,411 (2004) (“Show Cause Order”), JA 155. The Commission observed that its earlier

determination in the *Transco I* Orders “that certain facilities were gathering facilities ha[d] been called into question by the Commission’s subsequent findings in the recent proceeding regarding the jurisdictional status of the offshore system owned and operated by Jupiter Energy Corporation . . . .” *Id.* at P 2, JA 154. The Commission noted that on rehearing in the initial Jupiter proceeding “Jupiter and Williams, jointly with Transco, introduced for the first time the fact Jupiter’s system is upstream of facilities that the Commission found to be gathering facilities . . . .” *Id.* at P 3, JA 155. Jupiter asserted that its facilities must be gathering because the downstream Transco facilities are gathering. *See id.* But the Commission rejected that contention based on its application of the primary function test to Jupiter’s facilities. *See id.*

As a result of the Jupiter proceeding, the Commission further concluded that the “previous gathering determination for Transco’s downstream facilities was made on the basis of incomplete information.” *Id.* at P 5, JA 155. For that reason, the Commission directed Transco and Williams to “show cause why the Commission should not find that the facilities downstream of Jupiter’s system should be classified as jurisdictional transmission facilities . . . .” *Id.* at P 7, JA 155.

After reviewing Williams and Transco’s answer to the Show Cause Order, the Commission determined that “Transco’s facilities downstream of the

interconnection with Jupiter’s system are jurisdictional transmission facilities subject to the Commission’s jurisdiction . . . .” Jurisdictional Order at P 2, JA 215. As a result, the Commission specifically held that Transco’s 12.43-mile long, 24-inch diameter pipeline facility downstream of the interconnection with Jupiter’s system (the “Transco Pipeline”) is a jurisdictional transmission facility and vacated Transco’s abandonment authority with respect to that pipeline.<sup>4</sup> *See id.* at 61,413, JA 217. In overturning its prior gathering determination as to the Transco Pipeline, the Commission indicated that its prior determination “was made on the basis of incomplete information.” *Id.* at P 7, JA 215. The Commission also disagreed with Williams and Transco’s assertion that the Transco Pipeline together with the Jupiter system mirrored the facilities found ultimately to be gathering in the *Sea Robin* Orders. *See id.* at PP 14-15, JA 217.

The Commission denied Williams and Transco’s request for rehearing. *See* Rehearing Order, JA 239-40. The Commission reiterated its belief that FERC’s earlier gathering determination for Transco’s facilities downstream of Jupiter’s system was made on the basis of incomplete information. *See id.* at P 3, JA 239. Likewise, the Commission again rejected Williams and Transco’s assertion that the

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<sup>4</sup> The Commission did not overturn its gathering determination as to the 10.29 mile, 12-inch Transco facility that connects to the Transco Pipeline but is west and, hence, upstream of the Jupiter system’s interconnection with the Transco Pipeline.

Jupiter system and the downstream Transco facilities, collectively, resembled the gathering facilities in the *Sea Robin* Orders. *See id.* at P 5, JA 239-40.

This appeal followed.<sup>5</sup>

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<sup>5</sup> Furthermore, in Case No. 05-61173 before the Fifth Circuit, Jupiter seeks review of the Commission's orders on remand, *see* 111 FERC ¶ 61,497, *reh'g denied*, 113 FERC ¶ 61,103 (2005), from the *Jupiter* decision. Those orders reaffirm the earlier FERC determination in the first Jupiter proceeding that Jupiter's natural gas facilities comprise a jurisdictional transmission system, and state that the inconsistency of having a jurisdictional upstream facility flowing into a nonjurisdictional downstream facility, which formed the basis for the Fifth Circuit's remand decision in *Jupiter*, no longer exists as Transco's downstream facility has now been classified as jurisdictional transmission. *See* 111 FERC at P 5; 113 FERC at P 6.



## SUMMARY OF ARGUMENT

The Commission reasonably determined that Williams and Transco failed to demonstrate that the Transco Pipeline was a nonjurisdictional gathering facility. After reviewing Williams and Transco's submissions in response to the Show Cause Order, the Commission concluded that the Transco Pipeline could not be a gathering facility because no gas was collected along the length of that pipeline. The Commission's finding is entirely consistent with FERC precedent and policy concerning the line between nonjurisdictional gathering and jurisdictional transportation – a line this Court has held it will not redraw unless the Commission's selection is “patently unreasonable.” *Williams*, 331 F.3d at 1018 (quoting *ExxonMobil*, 297 F.3d at 1085)

Although the Commission previously concluded that certain Transco facilities, including the Transco Pipeline, are gathering facilities, the Commission is not precluded by the law of the case doctrine or the principles of res judicata and collateral estoppel from revisiting its prior conclusion. The Commission previously had not considered the jurisdictional status of upstream Jupiter facilities in considering the jurisdictional status of downstream Transco facilities. The Commission had to revisit its earlier determinations to eliminate the fundamental inconsistency, previously identified by the Commission in its Show Cause Order and the Fifth Circuit in *Jupiter*, of an upstream jurisdictional transportation line

(Jupiter) feeding into a downstream gathering line (Transco). Something had to change. Substantial evidence in the record supported changing the jurisdictional assessment of Transco’s facility and reclassifying it as a jurisdictional transportation facility.

## **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) (“*State Farm*”); *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).

“[A] court is not to substitute its judgment for that of the agency[.]” *Sea Robin*, 127 F.3d at 369 (quoting *State Farm*, 463 U.S. 29 at 43). Thus, it is not a court’s role “to interpose its judgment” in primary function cases. *See* *ExxonMobil*, 297 F.3d at 1084 (internal quotation omitted). Such deference acknowledges that the “line between jurisdictional transportation and

nonjurisdictional gathering is not always clear.” *ExxonMobil*, 297 F.3d at 1076-77 (quoting *Conoco*, 90 F.3d at 542). Rather, application of the primary function test may present “a line-drawing problem for which there is no easy answer,” *Williams Field Service*, 194 F.3d at 118, and for which the Commission is entitled to use “its considerable expertise about the natural gas industry.” *ExxonMobil*, 297 F.3d at 1084 (quoting *Conoco*, 90 F.3d at 544). “[T]he line between gathering and transportation is inherently elusive . . . and FERC ‘has wide discretion to determine where to draw administrative lines.’” *ExxonMobil*, 297 F.3d at 1085 (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)).

The “burden is on the petitioners to show that the Commission’s choices are unreasonable and its chosen line of demarcation is not within a ‘zone of reasonableness’ as distinct from the question of whether the line is ‘precisely right.’” *ExxonMobil*, 297 F.3d at 1084 (quoting *Hercules, Inc. v. EPA*, 598 F.2d 91, 107 (D.C. Cir. 1978) (additional internal quotation omitted)).

## **II. THE COMMISSION REASONABLY CONCLUDED THAT THE TRANSCO PIPELINE DOWNSTREAM FROM JUPITER’S SYSTEM WAS A TRANSMISSION FACILITY**

### **A. The Commission’s Decision Is Consistent With Precedent**

Contrary to Williams and Transco’s argument, *see* Brief at 19-25, the Commission’s decision finding the Transco Pipeline to be a transmission facility is consistent with precedent. Although Williams and Transco contend that the

Transco Pipeline in conjunction with the Jupiter system resembles the portion of Sea Robin's system ultimately found to be gathering in the *Sea Robin* Orders, which *ExxonMobil* affirmed, the Commission engaged in reasoned decision-making when it did "not agree that Transco's and Jupiter's facilities are comparable to those that were [at] issue in *Sea Robin*." Jurisdictional Order at P 14, JA 217. Unlike Sea Robin's facilities, "the primary function of the Transco facilities located downstream of Jupiter's system is jurisdictional transmission." Rehearing Order at P 5, JA 240.

The Sea Robin system is roughly configured in the form of an inverted "Y." *See ExxonMobil*, 297 F.3d at 1078. At the fork of the "Y" is the Vermilion 149 Station, which is a manned platform compressor station. *See id.* The portion of Sea Robin's system found to be gathering consists of the facilities upstream of the Vermilion 149 Station. *See id.* at 1081; *see also Sea Robin*, 92 FERC at 61,284. Those facilities include two pipeline arms of the inverted "Y" stretching southwest and southeast, the 45 lateral lines that run along the two arms, and the 67 receipt points located on production platforms connected to the 45 laterals. *See ExxonMobil*, 297 F.3d at 1078-79, 1081. In the *Sea Robin* Orders, the Commission deemed as transmission the top portion of the inverted "Y" pipeline system, *i.e.*, the pipeline running downstream from the offshore Vermilion 149 Station to the

onshore Erath Compressor Station, although that pipeline segment received gas from four additional platforms via two laterals. *See id.* at 1081.

Williams and Transco contend that the Transco Pipeline is analogous to the two gathering arms of Sea Robin's inverted "Y" and that the Jupiter 8-inch line connected to the Transco Pipeline and attached at its other end to Platform 39A is similar to one of the 45 Sea Robin laterals, which run along the two gathering arms of the inverted "Y" and which are fed by 67 production platforms. *See* Brief at 22. But as the Commission noted, "[t]his analogy fails since . . . no gas is collected along the length of Transco's downstream line." Rehearing Order at P 5, JA 239; *cf.* Jurisdictional Order at P 14 (noting also that "[n]o gas is collected along the Jupiter pipeline that moves gas . . . to Transco's downstream facilities"), JA 217.

Sea Robin's two gathering arms collect gas from 45 different laterals connected to 67 production platforms; on the other hand, the Commission found that the Transco Pipeline has no gas collection to warrant gathering status. Thus, contrary to Williams and Transco's contention, *see* Brief at 24-25, the Commission did not rely on reasoning allegedly rejected in *Sea Robin, ExxonMobil, and EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989), that nonjurisdictional gathering ends at a production platform; instead, it denied gathering status for the Transco Pipeline because it found no gas collection to occur along that pipeline, *see* Rehearing Order at P 5, JA 239-40. Because "[g]athering is the process of

taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system," *Conoco*, 90 F.3d at 539 n.2, the failure of Transco to take natural gas from the wells and collect it belies Williams and Transco's claim that the Transco Pipeline is a gathering one.

Williams and Transco, though, contend that the Transco Pipeline does collect gas from various upstream wells, pipelines, and production platforms along its path. *See* Brief at 23. But outside of conclusory statements, Williams and Transco proffer no evidence that actual gas collection occurs. The reality is, as even Williams and Transco acknowledge, "no significant gas is received into the arm downstream of the interconnection with Jupiter." *Id.* That is, the Transco Pipeline collects little, if any, gas.

In short, after reviewing the evidence submitted in response to its Show Cause Order, the Commission could reasonably conclude that no gas collection actually occurs along the Transco Pipeline, *see* Rehearing Order at P 5, JA 239, and that the Transco Pipeline as a purported gas collector is no better than the top portion of the Sea Robin inverted "Y" pipeline, which was found to be a transmission facility despite receiving gas from four platforms via two laterals, *see ExxonMobil*, 294 F.3d at 1081. Consequently, the Commission properly concluded, consistent with precedent, that Williams and Transco had failed to

establish that the Transco Pipeline operates as a nonjurisdictional gathering facility.

**B. The Commission's Orders Do Not Violate The Doctrines Of Law Of The Case, Res Judicata, Or Collateral Estoppel**

Williams and Transco argue, with little elaboration, that the law of the case doctrine and the principles of res judicata and collateral estoppel preclude the Commission from finding the downstream Transco Pipeline to be a jurisdictional transmission facility. *See* Brief at 25. As the Commission recognized, however, it was not precluded from changing its determination, based on additional facts, and eliminating the inconsistency of a jurisdictional upstream transmission facility feeding into a nonjurisdictional downstream gathering facility.<sup>6</sup>

*1. The Law of the Case Doctrine Does Not Bar the Commission's Ruling*

Contrary to Williams and Transco's citation, *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), does not suggest that law of the case doctrine precludes the Commission from reevaluating its earlier gathering

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<sup>6</sup> Furthermore, Williams and Transco make no attempt in their Brief, or for that matter in their Request for Rehearing, to establish why law of the case, res judicata, or collateral estoppel bars the Commission's actions other than to cite to two irrelevant cases. As such, Williams and Transco's assertion based on those doctrines are not properly before this Court and should be disregarded. *See United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004) (noting that courts refuse to disturb judgments on the basis of claims not adequately briefed); *Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312-13 (D.C. Cir. 2003) (rejecting argument not adequately addressed in rehearing request).

determination. In that case, the Supreme Court discussed the parameters of the law of the case doctrine as it applies in federal court, not in the context of a FERC proceeding. *See* 486 U.S. at 815-16. Although in the past the Commission has considered that doctrine's applicability in FERC proceedings, *see, e.g., Florida Gas Transmission Co.*, 41 FERC ¶ 61,122 (1987), this Court recently opined that "the law of the case doctrine is of uncertain force in the context of administrative litigation." *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir. 2003). Thus, the law is not at all clear that the law of the case doctrine properly applies today to administrative cases.

But even if the law of the case doctrine is applicable to the Commission's actions, the Commission has a right to revisit the jurisdictional status of the Transco Pipeline just as "[a] court has the power to revisit prior decisions of its own." *Christianson*, 486 U.S. at 817; *see also id.* (noting that law of the case doctrine is discretionary and is not a limit to a court's power). The law of the case doctrine does not insulate previous errors from later change where "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Florida Gas Transmission*, 41 FERC at 61,302 n.11 (quoting *White v. Murtha*, 337 F.2d 428, 431-32 (5th Cir. 1967)).



Here, the Commission’s gathering determination in the *Transco I* Orders “was made on the basis of incomplete information, since the record in Transco’s spin-down proceeding did not reflect Jupiter’s upstream certificated facilities.” Rehearing Order at P 3, JA 239. Specifically, “[o]n rehearing in the Jupiter proceeding, Jupiter and Williams, jointly with Transco, introduced for the first time the fact that Jupiter’s system is upstream of facilities that the Commission found to be gathering facilities in the Transco proceeding.” *Id.* at P 3 n.3, JA 239; *see also* Show Cause Order at P 5, JA 155 (reopening Transco proceeding and directing submissions because, “[b]ased on the developments in Jupiter’s proceeding, it appears that the previous gathering determination for Transco’s downstream facilities was made on the basis of incomplete information”). *Cf.* Jurisdictional Order at P 13 n.11, JA 217 (Commission can make a different jurisdictional determination as to Transco in the future “in the event additional information regarding upstream facilities comes to light, as it did in the *Jupiter* proceeding . . .”).

Thus, the evidence confronted by the Commission in the instant Transco proceeding was substantially different from that presented in the earlier Transco proceeding. When the circumstances presented are different than those previously considered, the Commission is not foreclosed from reassessing an earlier determination. *See, e.g., Chippewa & Flambeau Improvement Co. v. FERC*, 325

F.3d 353, 356-57 (D.C. Cir. 2003) (holding that changes in circumstances justified FERC's decision to reclassify a hydroelectric storage reservoir as now jurisdictional and requiring FERC licensing).

Nor can Williams and Transco successfully argue that the Court's decision in *Williams*, on review of orders in the earlier Transco proceeding, constitutes law of the case to preclude the Commission from reevaluating the earlier gathering determination. As previously noted, the prior gathering determination was made on the basis of incomplete information; therefore, the Commission could revisit that decision. In affirming the gathering status of the Central Louisiana facilities, the Court did not address, unlike the Fifth Circuit in *Jupiter*, the effect of Jupiter's upstream system being jurisdictional or the inconsistency of having an upstream jurisdictional facility (Jupiter) flow into a downstream nonjurisdictional facility (Transco). Nor did the Court consider the effect of the lack of gas collection along the length of the Transco Pipeline on the jurisdictional analysis. To the extent the law of the case doctrine applies in this case, it can only apply "to govern the same issues." *Christianson*, 486 U.S. at 816 (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Because the same issues as in *Williams* are not before this Court, the law of the case doctrine does not restrain the Commission.

2. *Res Judicata and Collateral Estoppel Do Not Preclude the Commission's Ruling*

Similarly, Williams and Transco's reference to res judicata and collateral estoppel principles does not support their argument that the Commission was barred from reassessing the jurisdictional status of Transco's facilities. For example, the cited case, *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), involved a government contracting dispute with a specific appellate review process and did not raise a procedural posture remotely similar to the one in the instant case. Accordingly, it is irrelevant to the case at hand.

Moreover, neither res judicata nor collateral estoppel necessarily precludes FERC from changing its legal interpretation and taking regulatory action based on that change. For example, in *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987) (*en banc*), this Court rejected the petitioner's claims that res judicata and collateral estoppel barred the Commission from overruling its earlier determination. *See id.* at 1078-1080. FERC had determined in the appealed orders that Congress did not intend a statutory municipal preference to apply in hydroelectric relicensing proceedings in which the incumbent licensee was competing for the license. *See id.* at 1076. This determination, however, overruled FERC's contrary conclusion articulated only three years earlier in declaratory proceedings in which both the petitioner and the incumbent licensee participated and which were later affirmed by an appellate court. *See id.* at 1076-77. In ruling

against the petitioner's claims, this Court noted that the previous appellate decision did not conclusively determine the same issue or claim presented before it, *see id.* at 1079; *see also Chippewa*, 325 F.3d at 357 (noting that issue preclusion "applies only to issues that were actually litigated in a prior proceeding"), and that preclusion principles could not attach as the petitioner and FERC were fellow travelers, *i.e.*, on the same side, in the earlier litigation, *see id.* at 1080.

The *Williams* court did not address the jurisdictional status of Jupiter or the relevance of that status on Transco's jurisdictional status. The inconsistency of an upstream jurisdictional transportation facility (Jupiter) feeding into a downstream nonjurisdictional gathering facility (Transco) arose for the first time in the Jupiter proceeding. *See* Show Cause Order at PP 2-5, JA 154-55. As recognized by the Fifth Circuit in *Jupiter*, something had to change to eliminate the inconsistency that "fatally flawed" the Commission's jurisdictional determinations. *See* 407 F.3d at 351. Either: (1) both jurisdictional determinations had to change, resulting in a gathering facility (Jupiter) feeding into a transportation facility (Transco); (2) Transco's jurisdictional determination had to change, resulting in a transportation facility (Jupiter) feeding into a transportation facility (Transco); or (3) Jupiter's jurisdictional determination had to change, resulting in a gathering facility (Jupiter) feeding into a gathering facility (Transco). Transco's preclusion arguments would prevent the Commission from revisiting any of its earlier determinations and from

making the necessary jurisdictional adjustment to eliminate the inconsistency identified by the Commission in the Show Cause Order and the Fifth Circuit in *Jupiter*.

At bottom, Williams and Transco argue that the Commission could only break the jurisdictional inconsistency by leaving Transco alone and by revisiting its Jupiter determination. While that approach would not have been legally impermissible, the evidence submitted by Williams and Transco, in response to the Show Cause Order, indicating that no gas was collected along either the Jupiter or Transco lines, justified the Commission's decision to treat both lines as jurisdictional transportation facilities. Under the circumstances, the Commission's decision can hardly be characterized as sinking to the low level of "patently unreasonable" necessary to override the Commission's assessment "where gathering ends and transportation begins." *Williams*, 331 F.3d at 1018 (quoting *ExxonMobil*, 297 F.3d at 1085).

Furthermore, in *Williams*, the Commission was not adverse to Williams and Transco with respect to the jurisdictional status of the Transco Pipeline. The Commission did not argue against Williams and Transco in *Williams* as to whether the Transco Pipeline was jurisdictional transmission. On that issue, the parties were on the same side. Thus, preclusion principles could not have attached as collateral estoppel or "[i]ssue preclusion . . . attaches only to such issues as the

parties litigated adversely to each other in the prior litigation.” *Clark-Cowlitz*, 826 F.2d at 1080. “Similarly, as to claim preclusion [or res judicata], FERC’s successfully defending its position . . . [that the Transco Pipeline was part of a gathering system] in [*Williams*] does not bar it from asserting a different position in the current proceedings.” *Id.* All that is precluded, perhaps, by virtue of FERC’s earlier success is another action by the producer petitioners in *Williams*, who disputed the gathering determination and among whom *Williams* and Transco were not members, on the claim of whether the Central Louisiana facilities are gathering. *See id.*

**C. The Commission Engaged In Reasoned Decision-Making When It Applied Current FERC Policy**

For their last argument, *Williams* and Transco refer to the Commission’s continuing efforts in a generic proceeding, reevaluating current offshore gathering policy and the primary function test, to suggest that the Commission did not engage in reasoned decision-making. *See* Brief at 25-29; *see also* Jurisdictional Order at P 12 n.10 (discussing comments concerning generic proceeding in FERC Docket No. AD03-13), JA 216-17. But such efforts are immaterial to the precise question at hand, which is whether *Williams* and Transco properly satisfied and the Commission reasonably applied FERC’s present policy on gathering with respect to the downstream Transco Pipeline. As for that question, the Commission acted reasonably in concluding that *Williams* and Transco did not establish that the

Transco Pipeline is a gathering facility in light of the upstream Jupiter system and the lack of gas collection.

The substance of Williams and Transco's position appears to be that the Commission has had difficulties in defining gathering, and therefore, it should not rule that the Transco Pipeline is not a gathering facility. But the mere fact that individual FERC Commissioners have made non-precedential references to the Commission's need and/or ongoing efforts, in the form of a Notice of Public Conference in Docket No. AD03-13, to potentially reformulate its test for gathering, *see id.* at 25-26, does not obviate the Commission's duty to address the status of the Transco Pipeline under the current policy in effect and the record compiled on the basis of that policy. Indeed, there is no guarantee that the Commission will change its policy regarding how to define gathering.

Thus, to argue, as Williams and Transco do, that the Commission did not engage in reasoned decision-making because it did not defer to some undetermined policy is putting the cart before the horse. "Since the Commission has not modified its criteria for determining jurisdictional status, it [wa]s appropriate that the Commission apply its current criteria in this proceeding." Rehearing Order at P 5 n.7, JA 239. *See also, e.g., Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (noting that "agencies enjoy 'broad discretion' to manage their own dockets").

## CONCLUSION

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

Respectfully submitted,

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INITIAL BRIEF: March 13, 2006  
FINAL BRIEF: May 2, 2006



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5 USC § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

....

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

15 USC § 717

§ 717. Regulation of natural gas companies

(b) Transactions to which provisions of [15 USCS §§ 717](#) et seq. applicable. The provisions of this Act [[15 USCS §§ 717](#) et seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 USC § 717f

§ 717f. Construction, extension, or abandonment of facilities

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

§ 717r. Rehearing and review

(b) Review of Commission order. Any party to a proceeding under this Act [[15 USCS §§ 717 et seq.](#)] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [circuit] court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in [section 2112 of title 28, United States Code \[28 USCS § 2112\]](#). Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [[28 USCS § 1254](#)].

*Williams Gas Processing-Gulf Coast  
Co. v. FERC*  
D.C. Cir. No. 05-1342

**FERC Docket Nos. CP01-368 &  
CP01-369**

**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 5,937 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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CP01-369**

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d)(1), I hereby certify that I have, this 2nd day of May 2006, served the foregoing by causing copies of it to be mailed to counsel listed below.

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