ORAL ARGUMENT IS NOT YET SCHEDULED

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

Nos. 05-1468 and 06-1016

MIDWEST REGION GAS TASK FORCE ASSOCIATION
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 16, 2007

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Northern Natural Gas Company*, 111 FERC ¶ 61,287 (May 27, 2005);

2. *Northern Natural Gas Company*, 113 FERC ¶ 61,119 (November 1, 2005);

3. *Northern Natural Gas Company*, 110 FERC ¶ 61,321 (March 23, 2005);

4. *Northern Natural Gas Company*, 111 FERC ¶ 61,379 (June 8, 2005); and

5. *Northern Natural Gas Company*, 113 FERC ¶ 61,188 (November 21, 2005).

C. Related Cases:

This case has not previously been before this Court or any other court. The related cases pending judicial review are those listed in Petitioner's listed in Petitioner's Rule 28(a)(1) certificate.

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Beth G. Pacella
Senior Attorney

March 16, 2007

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1989 Rate Policy Statement	*Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295, *order on reh'g*, 48 FERC ¶ 61,122 (1989)
CenterPoint	CenterPoint Energy Minnesota Gas
CenterPoint First Rehearing Order	*Northern Natural Gas Company*, 111 FERC ¶ 61,379 (2005)
CenterPoint Order	*Northern Natural Gas Company*, 110 FERC ¶ 61,321 (2005)
CenterPoint Second Rehearing Order	*Northern Natural Gas Company*, 113 FERC ¶ 61,188 (2005)
Commission	Federal Energy Regulatory Commission
Cornerstone	Cornerstone Energy, Inc.
FERC	Federal Energy Regulatory Commission
Metropolitan	Metropolitan Utilities District
Metropolitan Order	*Northern Natural Gas Company*, 111 FERC ¶ 61,287
Metropolitan Rehearing Order	*Northern Natural Gas Company*, 113 FERC ¶ 61,119 (2005)
Midwest	Midwest Region Gas Task Force Association
NGA	Natural Gas Act
Northern	Northern Natural Gas Company

Policy Reaffirmance Order	*Policy for Selective Discounting By Natural Gas Pipelines*, 111 FERC ¶ 61,309
Policy Reaffirmance Rehearing Order	113 FERC ¶ 61,173 (2005)
ROFR	Right of first refusal

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Assuming jurisdiction, the issues presented for review are:

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably determined, consistent with policy and precedent, that it will address whether Northern Natural Gas Company ("Northern") shall be granted a discount adjustment if and when Northern files for one.

2. Whether the Commission appropriately found that the right of first refusal ("ROFR") process did not apply here.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

COUNTER-STATEMENT OF JURISDICTION

Petitioner Midwest Region Gas Task Force Association ("Midwest")[1] invokes this Court's jurisdiction under Section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b). Br. at 1. As shown in Point I of the Argument below, however, Midwest's discount adjustment claims should be dismissed for lack of standing and ripeness, and its ROFR claims should be dismissed for lack of standing. *Toca Producers v. FERC*, 411 F.3d 262, 265-67 (D.C. Cir. 2005); *Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 471-74 (D.C. Cir. 2002); *see also Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 57 (D.C. Cir. 2002) ("*INGAA*").

INTRODUCTION

The FERC proceeding underlying this appeal involved the Commission's review of several provisions in discounted rate contracts executed between Northern and two of its shipper customers, Metropolitan Utilities District

[1] On December 28, 2006, after the filing of Petitioners' Initial Brief, the Court granted Northern Municipal Distributors Group's motion to withdraw as Petitioners.

("Metropolitan") and CenterPoint Energy Minnesota Gas ("CenterPoint") that did not conform to Northern's Tariff. The discounted rates were not before the Commission for review in this proceeding as they already had been approved in a prior proceeding. Moreover, the discounted rates could not affect other Northern shippers' rates unless Northern sought and was granted a discount rate adjustment in its next general rate case. Nonetheless, Midwest insisted that the Commission should determine in these proceedings that, if at some time in the future Northern were to request a discount adjustment, the Commission would deny that request.

Additionally, although Midwest did not claim to want the capacity at issue in the Metropolitan and CenterPoint contracts, Midwest complained that ROFR procedures should have been followed regarding that capacity.

The Commission determined, consistent with its policy and precedent, that it will address whether to grant Northern a discount adjustment if and when Northern files for one. Additionally, the Commission interpreted Northern's Tariff and contracts and a 1993 Settlement from which they derived, and determined that ROFR procedures did not apply in this case. *Northern Natural Gas Company*, 111 FERC ¶ 61,287 ("Metropolitan Order"), JA 377-386, *order on reh'g*, 113 FERC ¶ 61,119 (2005) ("Metropolitan Rehearing Order"), JA 387-410; *Northern Natural Gas Company*, 110 FERC ¶ 61,321 ("CenterPoint Order"), JA 1-14, *order on reh'g*, 111 FERC ¶ 61,379 ("CenterPoint First Rehearing Order"), JA 15-34, *order*

on reh'g, 113 FERC ¶ 61,188 (2005) ("CenterPoint Second Rehearing Order"), JA 35-50.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

"The Natural Gas Act requires that 'all rates and charges made, demanded, or received by a natural gas company . . . be just and reasonable' and declares 'any such rate or charge that is not just and reasonable . . . unlawful.'" *Chevron Texaco Exploration & Production Co. v. FERC*, 387 F.3d 892, 895 (D.C. Cir. 2004) (quoting NGA § 4, 15 U.S.C. §717c). "The pipeline bears the burden of showing its proposed rate is just and reasonable." *Id.*

"[A]ny contract that conforms to the form of service agreement that is part of the pipeline's tariff . . . does not have to be filed" with the Commission. 18 C.F.R. § 154.1(d). However, "[a]ny contract or executed service agreement which deviates in any material respect from the form of service agreement in the tariff is subject to [Commission] filing requirements . . . ." *Id.*

A. Rate Discounting

In Order No. 436, [2] the Commission "established a system of flexible rates."

[2] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985),

Order No. 436-A, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶

Associated Gas, 824 F.2d at 1007; *see also United Distribution Cos. v. FERC*, 88 F.3d 1105, 1124 (D.C. Cir. 1996). Accordingly, "[t]ariffs are to provide for ceilings and floors, with the pipeline free to charge anywhere within that band." *Associated Gas*, 824 F.2d at 1007; *see also* 18 C.F.R. § 284.10(c)(5)(ii)(A) (providing that "the pipeline may charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file for [a] service").[3] Discounted rates within a pipeline's approved minimum and maximum tariff rates thus conform to the pipeline's tariff and do not require Commission review and approval. *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,002 (2001); *Filing Requirements for Interstate Natural Gas Cos.*, Order No. 582, FERC Stats. & Regs., Regulations Preambles (Jan. 1991- June 1996) ¶ 31,025 at 31,384-85 (1995), *order on reh'g*, Order No. 582-A, 74 FERC ¶ 61,224 (1996).

"This provision for flexibility conforms to Congress's intention in the NGA to allow a vital role for private contracting between parties." *Associated Gas*, 824

30,675 (1985), *aff'd in pertinent part*, *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1009-13 (D.C. Cir. 1987).

[3] A maximum rate is "based on what is typically known as 'fully allocated cost,' *i.e.*, a rate such that, if the pipeline carries projected volume at the specified unit price, it should exactly recover all costs allocable to the relevant service for the period." *Associated Gas*, 824 F.2d at 1007; *see also* 18 C.F.R. §§ 284.10(b)(3) and 284.10(c)(4)(i). "Minimum rates are to be based on average variable cost[s]" allocated to the service to which the rate applies. *Associated Gas*, 824 F.2d at 1007; *see also* 18 C.F.R. § 284.10(c)(4)(ii).

F.2d at 1009. Indeed, "judicial acceptance of such price differentials [*i.e.*, based on demand conditions] is longstanding." *Id.* at 1011. Furthermore, such selective discounts provide "protection for non-favored customers from rate increases that would ultimately occur if pipelines lost volume through inability to respond to competition." *Id.* at 1010; *see also id.* at 1011 (noting that "rates varying on the basis of different demand characteristics . . . may benefit captive customers by making a contribution to fixed costs that otherwise would not be made at all").

B. Discount Rate Adjustment

As a separate matter, in 1989, in response to concerns noted in *Associated Gas*, 824 F.2d at 1012 -- that a pipeline would under-recover its costs if, in the next rate case after obtaining throughput by giving discounts, the pipeline were required to design its rates based on the full amount of the discounted throughput – the Commission established a discount adjustment policy, *Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295 at 62,056-57, *order on reh'g*, 48 FERC ¶ 61,122 at 61,448-49 (1989) (collectively, "1989 Rate Policy Statement"). *See Policy for Selective Discounting By Natural Gas Pipelines*, 111 FERC ¶ 61,309 ("Policy Reaffirmance Order"), *order on reh'g*, 113 FERC ¶ 61,173 at PP 3-4 (2005) ("Policy Reaffirmance Rehearing Order"), *appeal pending sub nom. Illinois Municipal Gas Agency v. FERC*, D.C. Cir. No. 06-1006.

Under that policy, if a pipeline is granted a discount in order to meet competition, the pipeline is not required in its next NGA § 4 rate case to design its rates based on the assumption that those discounted volumes will flow at the maximum rate. Policy Reaffirmance Rehearing Order, 113 FERC at P 4; *Southern Natural Gas Co.*, 65 FERC ¶ 61,347 at 62,829-30 (1993), *order on reh'g*, 67 FERC ¶ 61,155 at 61,456-57 (1994) (explaining discount adjustment policy).

> Otherwise there would be a disincentive to pipelines discounting their rates to capture marginal firm and interruptible transportation business, since a pipeline might not be able to recover its cost-of-service in the future if the maximum rate in its next rate case would be based on the full throughput obtained through the discounting.

Southern, 67 FERC at 61,456. This is because:

> Standard FERC ratemaking, in its most simple form, involves projecting a "revenue requirement" for service on the pipeline's facilities and dividing the sum by projected "throughput." The quotient is a maximum unit rate. Although both the revenue requirement and throughput are largely based on past experience, both figures are projections. Where it is expected that some service will be sold at a discount from the maximum rate, there is obviously a problem with assuming that throughput – itself enhanced by discounts – will, when multiplied by the maximum rate, yield the revenue requirement.

INGAA, 285 F.3d at 56.

In 2004, the Commission issued a Notice of Inquiry seeking comments on: (1) whether the 1989 Rate Design Policy Statement should continue to be applied to discounts provided to meet competition from another natural gas pipeline; and (2) the 1989 Rate Design Policy Statement's impact on captive customers. *Policy*

for Selective Discounting By Natural Gas Pipelines, 109 FERC ¶ 61,202 (2004). After carefully reviewing the comments, the Commission reaffirmed its longstanding discount adjustment policy, finding it to be "an integral and essential part of the Commission's policies furthering the goal of developing a competitive national natural gas transportation market" that "provides for safeguards to protect captive customers." Policy Reaffirmance Order, 111 FERC at P 2.

Furthermore, the Commission explained:

> While the permission given by the Commission to pipelines to discount their rates between a minimum and maximum rate was promulgated in Order No. 436 and adopted in a regulation,[4] the adjustment in throughput to recognize discounting is not a rule, but is a policy that was adopted by the Commission in the [1989] Rate Design Policy Statement. Therefore, in individual rate cases, the parties are free to develop a record based on the specific circumstances on the pipeline to determine whether the discounts given were beneficial to captive customers. The pipeline has the burden of proof under section 4 of the NGA in a rate case to show that its proposal is just and reasonable. If there are circumstances on a particular pipeline that may warrant special considerations or disallowance of a full discount adjustment, those issues may be addressed in individual proceedings.[5] Parties in a rate proceeding may address not only the issue of whether a discount was given to meet competition, but also issues concerning whether the discount was a result of destructive competition and whether something less than a full discount adjustment may be appropriate in the circumstances.

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[4] Citing 18 C.F.R. § 284.10.

[5] Citing, *e.g.*, *Natural Gas Pipeline Co. of America*, 73 FERC ¶ 61,050 at 61,128-29 (1995), and *El Paso Natural Gas Co.*, 72 FERC ¶ 61,083 at 61,441 (1995).

Policy Reaffirmance Rehearing Order, 113 FERC at P 22 (second footnote containing citation omitted).

C. Right of First Refusal

NGA § 7(b), 15 U.S.C. § 717f(b), prohibits a natural gas company from ceasing to provide, *i.e.*, abandoning, service to an existing customer without Commission approval to do so. The Commission's regulations, 18 C.F.R. § 284.221(d)(2)(ii), automatically grant a pipeline's abandonment of service to a shipper "upon expiration of the contractual term," subject to the shipper's ROFR. Thus, a pipeline cannot abandon its service to a shipper if the shipper "[g]ives notice that it wants to continue its transportation arrangement and will match the longest term and highest rate for its firm service, up to the applicable maximum rate under § 284.10, offered to the pipeline . . . by any other person desiring firm capacity, and executes a contract matching the terms of any such offer." 18 C.F.R. § 284.221(d)(2)(ii).

As this Court explained, "[i]f the existing customer is willing to pay the maximum approved rate, then the right-of-first-refusal mechanism ensures that the pipeline may not abandon the certificated service." *United Distribution*, 88 F.3d at 1140.

II. Events Leading To The Challenged Orders

A. Northern's Filings

On February 11, 2005, Northern submitted, pursuant to NGA § 4, three service agreements and a Letter Agreement executed with CenterPoint which contained a number of provisions that did not conform to Northern's Tariff. CP-R 1 Transmittal Letter at 1-9, JA 51-59.[6] The non-conforming provisions were:

> (1) a growth option allowing CenterPoint to increase its [maximum daily quantity] at certain intervals over the contract term, at specific levels, and at pre-determined rates; (2) a commitment by CenterPoint to take its full service requirements from Northern; (3) a provision whereby CenterPoint agrees not to bypass Northern in its existing service territories; (4) a renegotiation provision should the Commission not approve the subject provisions; (5) a provision obligating CenterPoint to support the agreed-to transportation rates; (6) revised TF12/TF5 [firm service length] entitlements; (7) a provision requiring Northern to grant a Most Favored Nation (MFN) provision to CenterPoint should it grant one to another shipper; (8) a provision requiring Northern to exercise commercially reasonable best efforts to secure any approvals required for the construction of new facilities under the agreements, and; (9) a provision clarifying that the three subject service agreements and letter agreement constitute the entire agreement between the parties.

CenterPoint Order at P 6, JA 3; *see also* CP-R 1 Transmittal Letter at 3-7, JA 53-57. Petitioner's Brief does not raise any matters regarding any of these provisions.

Also, on April 29, 2005, Northern submitted, pursuant to NGA § 4, two non-conforming amendments to agreements executed with Metropolitan. M-R 1 Transmittal Letter at 1-6, JA 411-16. These amendments similarly contained provisions that did not conform to Northern's Tariff:

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6 "CP-R" refers to items in the CenterPoint Certified Index to Record; "M-R" refers to items in the Metropolitan Certified Index to Record.

> (1) a growth option allowing [Metropolitan] to increase its maximum daily quantity at certain intervals over the contract term; (2) a commitment by [Metropolitan] to take its full service requirements from Northern; (3) a commitment by [Metropolitan] not to bypass Northern in its existing service area; (4) a commitment by Northern to meet [Metropolitan]'s and its customers' gas quality requirements; . . . (5) a "renegotiation" provision should the Commission not approve the subject provisions[; and (6)] an option allowing [Metropolitan] to obtain additional storage service under Rate Schedule PDD (Preferred Deferred Delivery), an interruptible storage service . . . .

Metropolitan Order at P 6, JA 378; *see also* M-R 1 Transmittal Letter at 2-5, JA 412-15. Petitioner's Brief does not raise any matters regarding any of these provisions either.

B. Midwest's Protests

Midwest protested both filings, complaining, as pertinent here, that "the contracts can and will have a substantial effect on Northern's other customers as it is virtually certain that, in the future, Northern will attempt to recoup the discounts and other costs associated with these contracts from Northern's other customers." CP-R 6 at 3, JA 177; *see also* M-R 9 at 5, JA 530 (claiming that "the maximum rates paid by these captive shippers are driven even higher as the pipelines continue to recover these discounts by adjusting base rates upward through such devices as selective discount adjustments."). Midwest further argued that, if the Commission approved the service agreements, "Northern would certainly argue in a later case that such approval constitutes approval of the discounts contained in

those Agreements and use that as a basis to pass those discounts on to other customers." CP-R 6 at 5, JA 179.

In addition, Midwest claimed that the proposed Metropolitan agreements violated ROFR procedures. M-R 9 at 9-14, JA 534-39.

C. Northern's And CenterPoint's Answers

Northern answered the protests, noting that, while "[v]irtually all of the comments made by the Protestors relate to conforming provisions of the . . . service agreements[,] . . . Northern filed the service agreements to obtain approval of the nonconforming provisions . . . ." M-R 13 at 11, JA 561. Northern also pointed out that Midwest's concern that, "in the future, Northern will attempt to recoup the discounts and other costs associated with these contracts from Northern's other customers," was speculative and premature. CP-R 19 at 2, JA 186 (quoting CP-R 6 at 3, JA 177).

> It is undisputed that the Commission's policy is to consider arguments as to the rate impact of discounting in a general rate case. Consistent with such policy, [Midwest]'s arguments as to the future rate impact of discounts should be considered at the time the Commission reviews rates in a future general rate case. [Midwest] wrongly speculate[s] ([CP-R 6 at 5, JA 179]) that 'Northern would certainly argue in a later case that such approval constitutes approval of the discounts contained in those Agreements and use that as a basis to pass those discounts on to other customers.' . . . Northern herein reiterates that it will not make any claim in a future rate case proceeding that approval of the CenterPoint Energy contracts in this proceeding constitutes approval 'to pass those discounts on to other customers' in such future rate case.

CP-R 19 at 3, JA 187; *see also* M-R 13 at 5-6, JA 555-56 (same regarding Metropolitan agreements).

CenterPoint also answered Midwest's protest, adding that, "[i]f and when Northern seeks a throughput billing adjustment for the discounting reflected in the CenterPoint Energy service agreement, [Midwest] will be free to explore [its] laundry list of challenges to the CenterPoint Energy discount . . . and to argue that such proposed throughput billing adjustment should be less or even disallowed altogether." CP-R 22 at 3, JA 196.

Northern further explained that it "correctly applied the ROFR and rollover provisions to the extension of [Metropolitan]'s service agreements" as "the express terms of [its] Global Settlement give the shipper the right to rollover its entitlement at a discounted rate if agreed to by Northern and the shipper." M-R 13 at 2-3, JA 552-53.

III. The Challenged Orders

A. Discounts

As the Commission "had already authorized the discounts through its Part 284 regulations and its approval of Northern's tariff," it explained that the discount provisions were not before it for review in these proceedings. CenterPoint Second Rehearing Order at P 21, JA 45-46.

> Section 284.10[(c)](5)(ii)(A) of the Commission's regulations expressly permits a pipeline to "charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file for that service." Consistent with that regulation, Northern's tariff sets forth both a maximum just and reasonable rate and a minimum rate for each service. Thus, the discounted rates Northern has agreed to provide CenterPoint are not deviations from Northern's tariff that require Commission approval.

CenterPoint First Rehearing Order at P 12, JA 18; *see also* Metropolitan Rehearing Order at P 13, JA 391-92 (same regarding Metropolitan's discounted rates).

In fact, "[t]he only reason that Northern was required to file the . . . contracts is that certain of the non-rate provisions of the contracts . . . do materially deviate from Northern's tariff and form of service agreement,[[7]] and accordingly, section 154.1(d) of the Commission's regulations require that these provisions be filed for Commission approval." Metropolitan Rehearing Order at P 13, JA 391.

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[7] A material deviation is "any provision of a service agreement which goes beyond the filling in of spaces in the form of service agreement with the appropriate information provided for in the tariff, and that affects the substantive rights of the parties." CenterPoint Order at n. 5, JA 4 (citing *ANR Pipeline Co.*, 97 FERC ¶ 61,224 at 62,022 (2001)).

Accordingly, the Commission determined, "the discounted rates proffered by Northern are not the subject of the instant proceeding, which needs only to address whether the material deviations from Northern's form of service agreement contained in Northern's contracts . . . are permissible." *Id.*; *see also* Metropolitan Order at P 11, JA 380; Metropolitan Rehearing Order at P 20, JA 395-96; CenterPoint Order at P 9, JA 4; CenterPoint First Rehearing Order at P 7, JA 17; CenterPoint Second Rehearing Order at P 21, JA 45-46.

B. Potential Future Discount Adjustment

The Commission found that it would be inappropriate in the instant material deviation provisions proceedings to decide whether Northern will be permitted, in its next NGA § 4 general rate case, to reduce its rate design volumes to account for discounts. Metropolitan Rehearing Order at PP 25-33, JA 398-402; CenterPoint Order at P 32, JA 13; CenterPoint First Rehearing Order at PP 17-21, 49, JA 21-23, 32; CenterPoint Second Rehearing Order at PP 22-25 and n. 25, JA 46-47, 43-44. Rather, for several reasons, the Commission found that a rate adjustment determination should be made if and when Northern proposes such an adjustment in its next general § 4 rate case.

First:

> the discounts in the subject agreements have no effect on the rates that [Midwest] or any other customer other than the discounted customer currently pays. Northern's maximum rates will remain those approved in its last general section 4 rate case, until such time as Northern proposes to change them in a new section 4 filing. Because the record in Northern's last section 4 rate case did not, and could not, reflect the discounts Northern is providing in the instant agreements, those rates do not include any discount adjustment with respect to the instant agreements.

CenterPoint Second Rehearing Order at P 22, JA 46; *see also* Metropolitan Rehearing Order at P 26, JA 398-99 (same).

Moreover, the Commission pointed out, "if, in the future, Northern does file a new rate case[,] it must base its proposed rates upon costs and volumes during the test period applicable to that case." Metropolitan Rehearing Order at P 27, JA 399 (citing 18 C.F.R. § 154.303(a)). That test period may or may not include the discounts at issue, as "[t]here is no guarantee that the [instant] contract[s] will be in effect during whatever test period is applicable to Northern's next rate case." *Id.*; *see also* CenterPoint Second Rehearing Order at P 23, JA 47 (same).

Furthermore, the Commission emphasized, its "approval of the subject agreements does not represent a determination that the Commission will allow Northern to recover these discounts in any future rate proceeding." CenterPoint Order at P 32, JA 13. Rather, consistent with Commission precedent, regulation, and policy, "in any future rate case that Northern may file, it must justify its case

for any recovery of discounts, and the Commission will make its determination in that proceeding." *Id.* (citing 18 C.F.R. § 154.301(c) and *KN Interstate Gas Transmission Co.*, 87 FERC ¶ 61,267 at 62,085 (1999)).[8] Indeed, the Commission pointed out, Northern's filing explicitly stated that "Northern is not . . . here requesting any approval in regard to the rate impact, which will be dealt with in the normal course in a subsequent general rate proceeding." CenterPoint Order at P 32, JA 13 (citing CP-R 1 Transmittal Letter at 3, JA 53).

At that time, the Commission explained, Midwest and others will have "a full opportunity to contest any discount adjustment Northern may seek with respect to the discounts in effect at the time of the rate case test period and all parties will have an opportunity to seek discovery from Northern as to all the facts surrounding any discount in effect at the time of the rate case." Metropolitan Rehearing Order at P 28, JA 400; *see also* CenterPoint Second Rehearing Order at P 25, JA 47 (same). "This would include the right to contest the issue whether the discount was required to meet competition and also whether there are other equitable reasons why less than a full discount adjustment may be appropriate in these circumstances." CenterPoint Second Rehearing Order at P 19, JA 44 (citing Policy

[8] *See also* CenterPoint First Rehearing Order at PP 17-19, 21, 49, JA 21-23, 32, and Metropolitan Rehearing Order at PP 26-28, 32-33, JA 398-402 (citing 1989 Rate Policy Statement, 47 FERC ¶ 61,295 and 48 FERC ¶ 61,122 at 61,449; Policy Reaffirmance Order, 111 FERC ¶ 61,309 at P 62; and *Iroquois Gas Transmission L.P.*, 84 FERC ¶ 61,086 at 61,477 (1998)); CenterPoint Second Rehearing Order at PP 17-20, 23, JA 42-47.

Reaffirmance Rehearing Order, 113 FERC at PP 61-62, 91, 108). Also at that time, "the effect of the discount on projected rate design volumes may be determined . . . in conjunction with all of Northern's costs to establish a new just and reasonable rate." Metropolitan Rehearing Order at P 27, JA 399; *see also* CenterPoint Second Rehearing Order at P 23, JA 47 (same).

C. Right Of First Refusal

The Commission found that Northern was not required, under Commission precedent and policy or Northern's Tariff or contracts, to post the capacity at issue here for bidding by others before entering into the instant contracts. In fact, under Commission precedent, "pipelines are permitted to negotiate extensions to existing contracts at maximum or discounted rates without offering the subject capacity to other shippers." Metropolitan Rehearing Order at P 41, JA 404 (citing *TransColorado Gas Transmission Co.*, 109 FERC ¶ 61,117 at PP 9-10 (2004)); *see also* CenterPoint Order at P 25, JA 10; CenterPoint First Rehearing Order at P 34, 41, JA 27, 29; CenterPoint Second Rehearing Order at P 26, JA 48.

Additionally, Northern's 1993 settlement, from which Northern's Tariff rollover provisions derive, provides that, if a shipper requests a rollover at less than maximum rates, the contract shall be subject to the ROFR process unless Northern and the party have agreed otherwise in writing. Metropolitan Rehearing Order at P 48 and n.38, JA 407-08. The Commission found that these contracts constituted

that agreement and, therefore, that the ROFR process did not apply here. Metropolitan Rehearing Order at P 48, JA 407-08.

Moreover, the Commission explained, ROFR did not apply here because it:

> is intended to protect the current shipper from losing its capacity upon expiration of its contract consistent with the abandonment provisions of NGA section 7[, 15 U.S.C. § 717f].[9] At the same time the right also attempts to balance the interests of the pipeline by permitting it an opportunity to test the market value of its capacity. However, the Commission assumes that a pipeline will always seek the highest possible rate from such shippers, because it is in the pipeline's own economic interest to do so. This permits pipelines a degree of business judgment regarding the sale of its capacity. If the pipeline is satisfied that its agreements to extend contracts with its existing customer give[] it as much revenue as it could expect to obtain through marketing the capacity to third parties, it need not commit the capacity to a bidding process.

Metropolitan Rehearing Order at P 44, JA 405-06; *see also United Distribution*, 88 F.3d at 1138-40, *cited in* Metropolitan Rehearing Order at n. 33, JA 405; 18 C.F.R. § 284.221(d)(2)(ii).

SUMMARY OF ARGUMENT

The petitions for review should be dismissed for lack of jurisdiction. Midwest's primary contention -- that Northern should not be granted a discount rate adjustment -- will not become an issue unless and until Northern files for one

[9] Citing *Tennessee Gas Pipeline Co.*, 94 FERC ¶ 61,097 (2001).

in a future general rate proceeding. Until at least that time, Midwest's rates will be unaffected by the agreements at issue here. Thus, Midwest's ratemaking claims should be dismissed for lack of constitutional standing and ripeness.

Midwest also lacks constitutional and prudential standing to raise its other contention -- that the Commission erred in finding ROFR procedures inapplicable here. Midwest was unaffected by the Commission's ROFR determination, and cannot establish any injury that would fall within the zone of interests sought to be protected by NGA § 7(b), as Northern did not attempt to abandon service to any shipper, but proposed to continue serving CenterPoint and Metropolitan.

On the merits, the Commission reasonably determined, consistent with policy and precedent, that it will determine whether to grant Northern a discount adjustment if and when Northern files for one in a general rate proceeding. These proceedings concerned only whether the material deviations from Northern's tariff, which did not include the discounted rates, were permissible.

The Commission also appropriately determined that the ROFR process did not apply here. First, Commission precedent permits pipelines to negotiate contract extensions at discounted rates without offering the subject capacity to other shippers. Moreover, Northern's 1993 settlement, from which its Tariff rollover provision derives, permits a shipper to rollover a contract at discounted rates without going through the ROFR process if Northern and the shipper so agree

in writing. The Commission found that the instant contracts constituted such agreement.

ARGUMENT

I. The Petitions For Review Should Be Dismissed For Lack Of Jurisdiction

A. Standard Of Review

Midwest seeks judicial review under NGA § 19(b), Br. at 1, which provides that only parties aggrieved by FERC orders may obtain judicial review. To be aggrieved, a party must establish both Article III constitutional and prudential standing requirements. *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000); *Grand Council of the Crees v. FERC*, 198 F.3d 950, 954 (D.C. Cir. 2000); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998); *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993).

To establish constitutional standing, a petitioner must show that it has "suffered or [is] in imminent peril of suffering injury in fact – invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual and imminent, not conjectural or hypothetical." *Alabama*, 312 F.3d at 471 (internal quotation omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish prudential standing, a petitioner must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Grand Council*, 198 F.3d at 954

(quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The "meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 956 (quoting *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997)); *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("The plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

Additionally, to establish jurisdiction a petitioner must show that its claims "meet[] the requirements of a 'Case' or 'Controversy' within the meaning of Article III of the Constitution," including "the requirement that [petitioner's] claim be ripe for judicial resolution . . . ." *Toca Producers*, 411 F.3d at 265; *see also Alabama*, 312 F.3d at 471-72; *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 507-09 (D.C. Cir. 1995). In reviewing ripeness, the Court "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Toca Producers*, 411 F.3d at 265 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

B. Midwest Does Not Have Standing To Challenge The Commission's Orders, And Its Claims Are Not Ripe For Review

Midwest claims that it has standing because it "filed timely motions to intervene on a joint and several basis in the FERC dockets that resulted in the orders under review here. FERC granted these motions in both dockets." Br. at 23. Participation in the underlying proceedings, however, does not establish Midwest's standing to obtain court review of the resulting orders. As this Court has found:

> The requirement of aggrievement serves to distinguish a person with a direct stake in the outcome of a litigation from a person with a mere interest in the problem. Nevertheless a party does not acquire such a direct stake in a litigation simply by participating in the antecedent administrative proceedings whence the litigation arises; it must establish its constitutional and prudential standing.

City of Orville v. FERC, 147 F.3d 979, 985 (D.C. Cir. 1998).

1. Midwest's Discount Adjustment Claims

Midwest's primary contention in this case is that Northern should not be granted a rate adjustment for the discounts provided to CenterPoint and Metropolitan. Br. at 23-41, 47. The Commission explained, however, that, consistent with Commission policy and precedent, it will not address whether Northern should be granted a discount adjustment unless and until Northern files for one in a general § 4 rate proceeding. Metropolitan Rehearing Order at PP 25-33, JA 398-402; CenterPoint Order at P 32, JA 13; CenterPoint First Rehearing

Order at PP 17-21, 49, JA 21-23, 32; CenterPoint Second Rehearing Order at PP 22-25 and n. 25, JA 46-47, 43-44.

As the Commission found, this procedure will not harm Midwest because its rates will not change as a result of the filings at issue here. CenterPoint Second Rehearing Order at PP 22, 25, JA 46, 47; Metropolitan Rehearing Order at P 26, JA 398-99. In fact, the Commission noted, Midwest "does not allege any harm has occurred to [it] as yet, but anticipates that the harm will occur when Northern seeks a discount adjustment in its next rate case.[[10]] This harm is therefore speculative." CenterPoint Second Rehearing Order at n.25, JA 44, quoting Policy Reaffirmance Order, 111 FERC at P 54 (discussing Midwest's claims in the instant proceedings).

In strikingly similar circumstances, this Court dismissed, for lack of constitutional standing and ripeness, challenges to FERC's approval of a discounted rate agreement. *Alabama*, 312 F.3d at 471, 473-74. Just like in the instant case, while petitioners' challenges there were based "on the Commission's practice of making 'discount adjustments,'" *id.* at 472,

> [t]he orders that petitioners challenge[d] . . . [did] not resolve or even tackle the issue of what discount adjustment, if any, the Commission should allow. The effect that the [discount agreement] will have on petitioners' rates will be decided in [the pipeline's] next rate case under § 4 of the [NGA] (or conceivably in a Commission-initiated rate proceeding under [NGA] § 5, 15 U.S.C. § 717d). What that precise effect will be, no one can now say. The injury has not yet

10 The same is true on appeal. *See*, *e.g.*, Br. at 23, 24, 27, 29, 32, 33, 34, 35.

> materialized nor has the factual record related to that injury been established.

Id. at 473. Additionally, because "no rate change (of whatever degree) will take effect independently of [the pipeline's] next rate case," the Court found, "delay will cause [petitioners] no harm." *Id.* (citing *New York State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040-41 (D.C. Cir. 1999) (finding a rate related claim unripe before completion of the actual § 4 rate proceeding)).

Accordingly, as Midwest has suffered no harm related to its discount adjustment challenges, Br. at 23-41, those challenges should be dismissed for lack of constitutional standing and ripeness.

2. Midwest's ROFR Claims

Midwest's other contention is that the Commission erred in finding ROFR procedures inapplicable in the circumstances here. Br. at 42-46. This contention should be dismissed both for lack of constitutional and prudential standing.

First, as with its discount adjustment claims, Midwest did not suffer any injury from the Commission's ROFR determinations. As the Commission pointed out, Midwest has not claimed that it wanted the pipeline capacity in question. CenterPoint First Rehearing Order at P 39, JA 29 ("no party on rehearing stated that it was willing to obtain this capacity for itself"). Midwest, therefore, lacks constitutional standing to challenge the Commission's ROFR determinations.

Midwest also lacks prudential standing to challenge the ROFR determinations. NGA § 7(b), the statutory provision at issue here, "protects long-term pipeline capacity holders by prohibiting natural gas companies from ceasing to provide service to their existing customers when their contracts expire" without Commission approval. *American Gas Ass'n v. FERC*, 428 F.3d 255, 257 (D.C. Cir. 2005) (internal quotation omitted). Northern did not attempt to cease providing service to any shipper in this case. To the contrary, Northern proposed to continue serving CenterPoint and Metropolitan. Under these circumstances, Midwest cannot establish any injury that would fall within the zone of interests sought to be protected by NGA § 7(b). *See Grand Council*, 198 F.3d at 954, 956; *Lujan*, 497 U.S. at 883.

II. The Commission's Determinations Were Reasonable And Appropriate

A. Standard of Review

Assuming jurisdiction, the Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b).

The Commission has broad discretion to manage its own dockets, particularly in deciding "whether to take up a merely potential problem, one that may or may not materialize soon enough." *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) (citing *Mobil Oil Exploration v. United Distribution Companies*, 498 U.S. 211 (1991)); *see also Domtar Maine Corp., Inc. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003) ("we have long given agencies broad discretion as to the manner in which they carry out their duties, including the timing of their own procedures").

B. The Commission Reasonably Determined, Consistent With Policy And Precedent, That It Will Address Whether Northern Will Be Allowed A Discount Adjustment If And When Northern Files For One In Its Next General NGA § 4 Rate Case

Midwest acknowledges that, under the Commission's longstanding policy, the Commission determines whether a pipeline's future rates will be adjusted for discounts provided since its last general § 4 rate proceeding if and when the pipeline files for a discount adjustment in its next general § 4 rate proceeding. *See* Br. at 24, 27-29. Midwest asserts, however, that the purportedly "unique circumstances surrounding these cases (including threats of bypass and loss of load, significant cost shifting to captive and other shippers, the size of the discounts and benefits, and the length of these Service Agreements) render prior approval – rather than after – not only reasonable, but necessary." Br. at 27; *see also* Br. at 28-32. Midwest is incorrect.

The circumstances here were not unique. Like in all other cases, the Commission already had "authorized the discounts through its Part 284 regulations and its approval of Northern's tariff" and, therefore, the discount provisions were not before it for review in these proceedings. CenterPoint Second Rehearing Order at P 21, JA 45-46; *see also* CenterPoint First Rehearing Order at P 12, JA 18-19; Metropolitan Rehearing Order at P 13, JA 391-92. These proceedings concerned only whether the material deviations from Northern's tariff, which did not include the discounted rates, were permissible. Metropolitan Rehearing Order at P 13, JA 392; *see also id.* at P 20, JA 395-96; Metropolitan Order at P 11, JA 380-81; CenterPoint Order at P 9, JA 4; CenterPoint First Rehearing Order at P 7, JA 17; CenterPoint Second Rehearing Order at P 21, JA 45-46.

Additionally, the instant orders did "not represent a determination that the Commission will allow Northern to recover these discounts in any future rate proceeding." CenterPoint Order at P 32, JA 13. Rather, consistent with Commission precedent, regulation, and policy, "in any future rate case that Northern may file, it must justify its case for any recovery of discounts, and the Commission will make its determination in that proceeding." *Id.* (citing 18 C.F.R. § 154.301(c) and *KN Interstate*, 87 FERC at 62,085); *see also* CenterPoint First Rehearing Order at PP 17-19, 21, 49, JA 21-22, 23, 32, and Metropolitan Rehearing Order at PP 26-28, 32-33, JA 398-400, 401-02 (citing 1989 Rate Policy

Statement, 47 FERC ¶ 61,295 and 48 FERC ¶ 61,122 at 61,449; Policy Reaffirmance Order, 111 FERC ¶ 61,309 at P 62; and *Iroquois Gas Transmission L.P.*, 84 FERC ¶ 61,086 at 61,477 (1998)); CenterPoint Second Rehearing Order at PP 17-20, 23, JA 42-45, 46-47. It is only in a general rate proceeding that "the effect of the discount on projected rate design volumes may be determined . . . in conjunction with all of Northern's costs to establish a new just and reasonable rate." Metropolitan Rehearing Order at P 27, JA 399; *see also* CenterPoint Second Rehearing Order at P 23, JA 47 (same).

Moreover, like in all other cases, Midwest will have "a full opportunity to contest any discount adjustment Northern may seek with respect to the discounts in effect at the time of the rate case test period and all parties will have an opportunity to seek discovery from Northern as to all the facts surrounding any discount in effect at the time of the rate case." Metropolitan Rehearing Order at P 28, JA 400; *see also* CenterPoint Second Rehearing Order at P 25, JA 47 (same). "This would include the right to contest the issue whether the discount was required to meet competition and also whether other equitable reasons why less than a full discount adjustment may be appropriate in these circumstances." CenterPoint Second Rehearing Order at P 19, JA 44 (citing Policy Reaffirmance Rehearing Order, 113 FERC at PP 61-62, 91, 108). Thus, there is no validity to Midwest's claim that application of the discount adjustment policy if and when Northern seeks its

application will not "protect [Midwest] from the exercise of Northern's market power." Br. at 38.

Midwest also professes concern that "[i]f review is postponed to some unspecified future time, [Midwest] and others will be left to the extremely difficult task of reconstructing (1) the entire set of circumstances that led CenterPoint and [Metropolitan] to consider bypass, (2) the negotiations between Northern and these shippers, and (3) Northern's reasons for deciding on the level of discounts and benefits." Br. at 30-31. As the Commission explained, however, Midwest will be able to "seek discovery from Northern concerning all the facts surrounding its offer of the subject discounts." Metropolitan Rehearing Order at P 32, JA 401; *see also* Policy Reaffirmance Rehearing Order at P 105 ("In a rate case where the discount is challenged, all parties have an opportunity to seek discovery of all the facts surrounding each discount").

"To the extent [Northern] is unable during the discovery process to explain what competitive alternatives the recipient of any particular discount had or otherwise give a satisfactory explanation of why the discount was required, that fact by itself would be sufficient to rebut the presumption that competition required the discount." Policy Reaffirmance Rehearing Order at P 61, *cited in* CenterPoint Second Rehearing Order at P 19, JA 43-44. "Thus, pipelines must keep information relevant to each discount because if they are unable to explain and

justify each discount, they will not be able to meet their burden of proof. Policy Reaffirmance Rehearing Order at P 105. "*[T]he pipeline has the ultimate burden of showing that its discounts were required to meet competition*." CenterPoint First Rehearing Order at P 18, JA 21.[11]

Midwest's next contention, that the Commission will be more likely to approve a discount adjustment in a later rate proceeding because "the alleged competitive alternatives available to CenterPoint and [Metropolitan] would no longer be available and they would be operating under the Service Agreements," Br. at 31, fails as well. Midwest does not, and cannot, cite any authority for the proposition that the Commission will consider as a factor in its discount adjustment analysis that the alternatives previously available to discount recipients are no longer available.

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11 "In the case of discounts to non-affiliated shippers, the Commission has stated that it is a reasonable presumption that a pipeline will always seek the highest possible rate from such shippers, since it is in the pipeline's own economic interest to do so. Therefore, once the pipeline has explained generally that it gives discounts to non-affiliates to meet competition, parties opposing the discount adjustment have the burden of producing evidence that discounts to non-affiliates were not justified by competition. To the extent those parties raise reasonable questions concerning whether competition required the discounts given in particular non-affiliate transactions, then the burden shifts back to the pipeline to show that the questioned discounts were in fact required by competition." CenterPoint First Rehearing Order at P 18, JA 21 (quoting *Policy For Selective Discounting by Natural Gas Pipelines*, 109 FERC ¶ 61,202 at P 7 (2005)) (emphasis omitted).

To the contrary, since the discount adjustment policy's inception, the Commission has made clear that the pipeline is "at risk for service provided at prices below those projected in the setting of its rates." Metropolitan Rehearing Order at P 26, JA 399 (quoting 1989 Rate Design Policy Statement Rehearing Order, 48 FERC at 61,449). Accordingly, Northern must absorb the loss in revenues due to the discounts at least until it files its next general § 4 rate case, and even then will have to continue to absorb that loss unless it shows that the discount was required by competition. *Id.*; *see also* CenterPoint First Rehearing Order at P 17, JA 21; CenterPoint Second Rehearing Order at P 22 and n. 34, JA 46; Policy Reaffirmance Rehearing Order at P 24 ("The Commission does not routinely grant pipelines a discount adjustment, but grants such an adjustment only to the extent that the discount was required to meet competition. . . . A discount adjustment is not an entitlement and the pipelines would be ill-advised to consider it so"); *see also id.* at P 107 ("There is no guarantee that the Commission will approve a discount adjustment and the Commission has denied pipelines this rate treatment when it has not been shown that the discounts were required by competition") (citing, *e.g. Iroquois Gas Transmission System* 84 FERC ¶ 61,086 at 61,476-78 (1998), *reh'g denied*, 86 FERC ¶ 61,261 (1999); *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,092-95 (2000)).

Next, Midwest complains that the Commission "failed to directly address" its "repeated[] argu[ment] that any later attempt to reconstruct the negotiations and to suggest that other actions should have been taken by Northern would be met with accusations that such suggestions were nothing more than 'twenty-twenty hindsight.'" Br. at 31. The Commission, however, rejected Midwest's twenty-twenty hindsight argument in the Policy Reaffirmance Rehearing Order, which was cited and relied upon by the Commission in the challenged orders. As the Commission found:

> [Midwest]'s concern that, in a rate case, "the opposing party's attempts to prove that the discounts were not necessary are invariably met with charges that they are using 'twenty-twenty' hindsight to challenge the discounts" is unfounded. Contrary to [Midwest]'s assertion, the opponent of the discount is not required to prove that the discount was not given to meet competition, but merely has to raise a reasonable question as to the validity of the discount and the pipeline is required to show that it was made to meet competition. Further, the relevant inquiry is whether at the time the discount was given it was necessary to meet competition and this inquiry would not be dismissed as hindsight.

Policy Reaffirmance Rehearing Order, 113 FERC ¶ 61,173 at P 104 (responding to Petitioner Midwest's and former Petitioner Northern Municipal Distributor Group's assertion). Thus, the Commission's path regarding this contention may be reasonably discerned and the Commission should be upheld. *See Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Insurance Co.*, 463 U.S. 29, 43 (1983); *Domtar*, 347 F.3d at 312; *Entergy Services, Inc. v. FERC*, 319 F.3d 536,

543 (D.C. Cir. 2003) (finding challenged orders adequately set forth rationale because they relied upon an order providing rationale).

Midwest also contends that the Commission was not actually "prohibited" from determining in the instant proceedings whether Northern would be permitted a discount adjustment if it ever filed for one. Br. at 28, 32. The Commission, however, has broad discretion to determine the appropriate proceeding in which to address a matter presented to it. *Domtar*, 347 F.3d at 314; *Tennessee Gas*, 972 F.2d at 381. The Commission appropriately exercised that broad discretion in the circumstances here, as it acted consistently with its policy and precedent in concluding that the appropriate time to make a discount adjustment determination is if and when Northern files for one. Metropolitan Rehearing Order at PP 25-33, JA 398-402; CenterPoint Order at P 32, JA 13; CenterPoint First Rehearing Order at PP 17-21, 49, JA 21-23, 32; CenterPoint Second Rehearing Order at PP 22-25 and n. 25, JA 46-47, 43-44.

Nor did the Commission rely on "routine scheduling considerations," as Midwest posits, Br. at 33. The Commission fully explained why it found that it would be inefficient to make a discount adjustment determination in the instant proceeding, including that: (1) the Commission already had approved the discounted rates as just and reasonable and, therefore, those rates were not before the Commission for review; (2) the discounted rates could not affect Midwest's

rates unless and until Northern filed for a discount adjustment in a general rate proceeding at which time Midwest would have full discovery rights and Northern would have the ultimate burden of proof; and (3) the effect of the discount on projected rate design volumes could be determined only in conjunction with all of Northern's costs to establish a new just and reasonable rate. Metropolitan Rehearing Order at PP 13, 26-33, JA 391-92, 398-402, CenterPoint Second Rehearing Order at P 19, JA 43-44. The Commission's reasonable exercise of its broad discretion should be upheld.

Midwest next complains that it does not understand why the Commission stated that "the effect of the discount on projected rate design volumes may be determined at the time of such a rate case when the effect can be examined in conjunction with all of Northern's costs to establish a new just and reasonable rate." Br. at 33 (referring to Metropolitan Rehearing Order at P 27, JA 399 and CenterPoint Second Rehearing Order at P 23, JA 47). Midwest asserts that "a discount adjustment raises a discrete issue concerning whether the discount was justified by competitive pressures." Br. at 33.

The Commission explained, however, that, in addition to contesting whether a discount was required by competition, parties also can assert that "there are other equitable reasons why less than a full discount adjustment may be appropriate in these circumstances." CenterPoint Second Rehearing Order at P 19, JA 44 (citing

Policy Reaffirmance Rehearing Order at P 62 (stating that if "Northern proposes in its next rate case a discount adjustment based on [the CenterPoint and Metropolitan] discounted rate transactions, the parties may litigate all issues concerning the justness and reasonableness of any such discount adjustment")). It is for this latter purpose that the effect of the discount on projected rate design volumes should be examined in conjunction with all of Northern's costs to establish a new just and reasonable rate.

Midwest also expends considerable energy challenging the merits of the Commission's discount adjustment policy and the Commission's purported application of that policy here. Br. at 34-37. For example, Midwest asserts that "[a]llowing a pipeline to recover discounts and benefits such as those at issue here through rates paid by 'non-favored' shippers is the antithesis of competition." Br. at 34. But the challenged orders neither applied the discount adjustment policy nor allowed Northern to recover any discounts. In fact, Northern explicitly stated that it was not seeking a discount adjustment here, and the Commission determined that it would be inappropriate to make a discount adjustment ruling unless and until Northern files for one in a general NGA § 4 rate proceeding. Midwest's discount adjustment claims do not relate to any holdings in the challenged orders and, therefore, cannot stand.

Similarly, Midwest's contention that the Commission erred in failing to investigate whether the discounts were justified by competition, Br. at 38-40, 47, is inapposite. The discounts were not at issue in these proceedings; only the non-conforming contract provisions, which Midwest does not contest, were before the Commission here. CenterPoint Order at P 9, JA 4; CenterPoint First Rehearing Order at PP 7, 12, JA 17, 18-19; CenterPoint Second Rehearing Order at P 21, JA 45-46; Metropolitan Order at P 11, JA 380-81; Metropolitan Rehearing Order at PP 13, 20, JA 391-92, 395-96. All matters relevant to a discount adjustment will be investigated if and when Northern files for one. Metropolitan Rehearing Order at P 28, JA 399-400; CenterPoint Second Rehearing Order at PP 19, 25, JA 44, 47.

Midwest further argues that "FERC's orders show a marked ambiguity in deciding whether or not to use the bypass threat as a justification for accepting the Service Agreements." Br. at 40. Midwest first points to a statement in the CenterPoint Order at P 2, JA 2, that "[t]his acceptance benefits the public by permitting Northern to retain its system load shippers and prevent any cost shift to other customers caused by the loss of such load." Br. at 40.

As the Commission explained, however, that statement:

> from the introductory section of the [CenterPoint Order] did not constitute a holding by the Commission concerning whether Northern would be permitted to recover the costs from its discounts in a future rate case. The Commission's finding on this matter in the discussion section of the order was clear. In that section, the Commission quoted its regulations and precedent and stated that, "Commission approval of the subject agreements does not represent a determination that the Commission will allow Northern to recover these discounts in any future rate proceeding." Moreover, the Commission stated that Northern acknowledged the Commission's policies in this regard by stating, "Northern is not, however, here requesting any approval in regard to the rate impact, which will be dealt with in the normal course in a subsequent general rate proceeding" in its transmittal letter. In conclusion, the Commission stated that "in any future rate case that Northern may file, it must justify its case for any recovery of discounts, and the Commission will make its determination in that proceeding."

CenterPoint First Rehearing Order at P 21, JA 23 (footnotes citing CenterPoint Order at P 32, JA 13, omitted).

Furthermore, the Commission added, while "Northern asserted that the subject filing would allow it to retain load and prevent a cost shift to other customers," the Commission approved the filing because it "was, as conditioned, consistent with the Commission's discount policies and the Commission's negotiated rate policies."[12] CenterPoint First Rehearing Order at P 22, JA 23.

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[12] Although Midwest claims that the "latter statement concerning negotiated rates remains unexplained on this record, as there is no request by Northern for approval of a negotiated rate," Br. at 41, the CenterPoint Order, for example, discusses "negotiated terms and conditions" in addressing Northern's proposed non-conforming provisions. CenterPoint Order at PP 10-11 and nn.7-9, JA 4-5.

Thus, "[t]o the extent that the Commission's attempt in its introductory paragraphs to summarize the order in one sentence inappropriately led parties to misunderstand the Commission's basis for accepting Northern's filing, the Commission clarifie[d] its previous order." *Id.*; *see also*, *e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (explaining that the purpose of rehearing is to give the Commission the opportunity to consider and respond to matters raised regarding its orders).

Midwest next asserts that the Commission "rejected an argument made by Cornerstone [Energy, Inc. ("Cornerstone")] that the rates provided to CenterPoint would give CenterPoint a competitive advantage over Cornerstone on the grounds that" discounting benefits captive customers by increasing throughput and thereby obtaining a contribution to fixed costs. Br. at 41 (citing CenterPoint First Rehearing Order at P 13, JA 19). In fact, however, the Commission rejected Cornerstone's competitive advantage argument because it was unsupported and "vague." CenterPoint First Rehearing Order at PP 13-14, JA 19-20. "Cornerstone ha[d] provided no explanation of the markets in which it competes with CenterPoint, how it transports gas to those markets, or what its transport costs are." *Id.* at P 14, JA 19-20.

Midwest also complains that the Commission responded "to claims by other parties that discounts provided to [Metropolitan] were discriminatory," by "finding

that '[t]hese selective discounts would benefit all customers . . . because the discounts allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service.'" Br. at 42 (citing Metropolitan Rehearing Order at P 14, JA 392). The Commission did not make this "finding" in the Metropolitan Rehearing Order. Rather, in response to contentions that "[d]espite the fact that Northern's proposed discounted rates are authorized by Northern's tariff, . . . the Commission should nevertheless refuse to permit Northern to provide those discounts," the Commission explained its longstanding policy:

> [S]ince Order No. 436, the Commission has consistently permitted pipelines to offer selective discounts to shippers based on their varying elasticities of demand.[13] There, the Commission explained that these selective discounts would benefit all customers, including customers that did not receive the discounts, because the discounts allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service.[14] The Commission found that permitting such discounts benefits captive customers by increasing throughput and thereby obtaining a contribution to fixed costs from demand elastic customers that otherwise would not be obtained at all,[15] and the Commission's policy in this regard has been affirmed by the court.[16]

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13 Citing Order No. 436 at 31,543-45; Order No. 436-A at 31,677-80; 18 C.F.R. § 284.10(c)(5).

14 Citing Order No. 436 at 31,544.

15 Citing Order No. 637-A, *Regulation of Short-Term Natural Gas Transportation Services And Regulation of Interstate Natural Gas Transportation Services*, FERC Stats. & Regs., Reg. Preambles 1996-2000, ¶ 31,099 at 31,551-52 (2000), *aff'd in pertinent part*, *INGAA*, 285 F.3d 18.

16 Citing *Associated Gas*, 824 F.2d at 1010-12; *United Distribution*, 88 F.3d

Metropolitan Rehearing Order at P 14, JA 392.

C. The Commission Appropriately Found That The ROFR Process Did Not Apply Here

Midwest asserts that the ROFR process applied to the contracts at issue here. Br. at 42-46. The Commission reasonably found otherwise.

First, the Commission explained, under its precedent, "pipelines are permitted to negotiate extensions to existing contracts at maximum or discounted rates without offering the subject capacity to other shippers." Metropolitan Rehearing Order at P 41, JA 404 (citing *TransColorado*, 109 FERC at PP 9-10); *see also* CenterPoint Order at P 25, JA 10; CenterPoint First Rehearing Order at P 34, 41, JA 27, 29-30; CenterPoint Second Rehearing Order at P 26, JA 48.

Next, the Commission found, Northern's Tariff rollover provision derives from its 1993 settlement, which provides that, if a shipper under an agreement containing a grandfathered rollover right, such as Metropolitan, requests a rollover at less than maximum rates, the contract is subject to the ROFR process unless Northern and the shipper have agreed otherwise in writing. Metropolitan Rehearing Order at PP47-48 and n.38, JA 407-08. The Commission found that the instant contracts constituted agreement that the ROFR process would not apply here. Metropolitan Rehearing Order at P 48, JA 407-08.

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at 1141-42.

Accordingly, there is no merit to Midwest's allegations that: (1) "[u]nder the circumstances here and the provisions of Northern's tariff, neither CenterPoint nor [Metropolitan] were eligible to simply 'rollover' their present contracts, without posting the capacity for bids" because they were discounted, Br. at 43 n. 8; (2) "FERC found that neither CenterPoint nor [Metropolitan] was required to comply with the ROFR process, apparently because they had acted within the 'spirit' of the ROFR regulations," Br. at 44; and (3) the Commission ignored that the contract language stated that Metropolitan "shall have unilateral rollover rights, as provided herein at maximum rates," Br. at 43 n.8. *See Northern Municipal Distributors Group v. FERC*, 165 F.3d 935, 943 (D.C. Cir. 1999) (deference afforded to the Commission's reasonable interpretations of settlement provisions); *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 20-21 (D.C. Cir. 2006) (deference afforded to the Commission's reasonable interpretations of Tariff provisions).

Midwest also claims that the Commission's statement that the ROFR is intended to protect the current shipper from losing its capacity upon expiration of its contract, consistent with the abandonment provisions of NGA section 7, "is at odds with FERC's stated purpose in promulgating the ROFR, as succinctly summarized by this Court" in *INGAA*, 285 F.3d at 54. Br. at 45 (citing CenterPoint

Second Rehearing Order at P 28, JA 49; Metropolitan Rehearing Order at P 46, JA 406-07).

Contrary to Midwest's claim, *INGAA*'s description of ROFR's purpose – that it "entitle[s] a protected shipper with an expiring contract to retain its service from the pipeline under a new contract," 285 F.3d at 51, -- is entirely consistent with the Commission's statement here. Additionally, in the opinion affirming the pre-granted abandonment regulation, including the ROFR provision, this Court explained that its affirmance was based on the fact that the ROFR provision allowed an existing customer of long-term firm-transportation service to avoid pre-granted abandonment. *United Distribution*, 88 F.3d at 1137-40. "Hence," the Court found, "the basic structure of the [ROFR] mechanism provides the protections from pipeline market power required for pre-granted abandonment under [NGA] § 7." *Id.* at 1140.

Midwest next mistakenly complains that the Commission "brushed aside [its] contention that FERC had violated one of its core principles: that capacity should be allocated to those that value it most." Br. at 46. The Commission fully addressed Midwest's contention:

> [W]hile the Commission has on numerous occasions stated that it favors placing capacity in the hands of those that valued it most highly, the Commission assumes that the pipeline will always seek the highest possible rate from non-affiliated shippers, since it is in its own economic interest to do so. Accordingly, the Commission has not required pipelines to implement allocation mechanisms utilizing

> methodologies such as the Net Present Value (NPV) process which would allocate capacity to the shipper bidding the highest amount to the pipeline. Rather, the Commission has permitted pipelines to implement such an allocation methodology to the extent it believes such methodologies are necessary on its system in order to allocate scarce capacity to the highest valued use.

Metropolitan Rehearing Order at P 42, JA 404; *see also* CenterPoint First Rehearing Order at P 38, JA 28; CenterPoint Second Rehearing Order at PP 12, 27, JA 40, 48. "Consistent with this policy," the Commission continued, "Northern's tariff permits it to hold open seasons for capacity based upon the NPV allocation methodology but does not require the use of such a methodology." CenterPoint First Rehearing Order at P 39, JA 29; *see also* CenterPoint Second Rehearing Order at P 26, JA 48.

CONCLUSION

For the foregoing reasons, the petitions should be dismissed for lack of jurisdiction or, in the alternative, denied on their merits.

Respectfully submitted,

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Midwest Region Gas Task Force Association v. FERC **Docket No. RP05-297**
D.C. Cir. No. 05-1468*, et al.*

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 10,515 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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