

ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 06-1286

**TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' 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. *Transcontinental Gas Pipe Line Corporation*, 106 FERC ¶ 61,299 (March 26, 2004); and
2. *Transcontinental Gas Pipe Line Corporation*, 112 FERC ¶ 61,170 (August 5, 2005).

C. Related Cases:

This case has not previously been before this Court or any other court. *Consolidated Edison Company of New York, Inc., et al. v. FERC*, D.C. Cir. No. 06-1275, seeks review of the same orders challenged here. While separate briefs are being filed in this case and in No. 06-1275, the Court ordered that they be scheduled for oral argument on the same day and before the same panel.

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November 1, 2007

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GLOSSARY

1995 Pricing Policy	<i>Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines</i> , 71 FERC ¶ 61,241 (1995), <i>order on reh'g</i> , 75 FERC ¶ 61,105 (1996)
1999 Pricing Policy	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)
1999 Pricing Policy Statement Clarification	<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 90 FERC ¶ 61,128 (2000)
ALJ	Administrative Law Judge
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
Initial Decision	<i>Transcontinental Gas Pipe Line Corp.</i> , 101 FERC ¶ 63,022 (2002)
NGA	Natural Gas Act
Rate Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 106 FERC ¶ 61,299 (2004)
Rehearing Order	<i>Transcontinental Gas Pipe Line Corp.</i> , 112 FERC ¶ 61,170 (2005)
Transco	Transcontinental Gas Pipe Line Corporation

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably affirmed the Administrative Law Judge’s (“ALJ”) determination that certain costs associated with a particular incrementally-priced pipeline expansion should be allocated incrementally only to expansion customers, rather than rolled-in and charged to all pipeline customers.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

This case involves review of one of many issues litigated in a comprehensive proceeding regarding Transcontinental Gas Pipe Line Corporation's ("Transco") rates. Transco customers claimed, under Natural Gas Act ("NGA") Section 5, 15 U.S.C. § 717d, and the Commission's 1999 Pricing Policy Statement, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("1999 Pricing Policy" or "1999 Pricing Policy Statement"), *order on clarification*, 90 FERC ¶ 61,128 ("1999 Pricing Policy Statement Clarification"), *order on clarification*, 92 FERC ¶ 61,094 (2000), that certain existing Transco tariff provisions were unjust and unreasonable to the extent that they would allow transportation electric power costs associated with compressors added as part of the incrementally-priced Cherokee expansion to be rolled-in and charged to all Transco customers. *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 (2004) ("Rate Order"), JA 203-75, *order on reh'g*, 112 FERC ¶ 61,170 (2005) ("Rehearing Order"), JA 278-344. After a hearing, the Commission affirmed the ALJ's findings that the NGA § 5 proponents had met both prongs of their NGA § 5 burden and that, therefore, Transco's tariff should be

amended to provide incremental rather than rolled-in transportation electric power charges for the Cherokee expansion. Rate Order at PP 121-24, JA 247-49; Rehearing Order at PP 101-12, JA 316-22; *Transcontinental Gas Pipe Line Corp.*, 101 FERC ¶ 63,022 at PP 182-86 (2002) (“Initial Decision”), JA 150-52.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), “[a]ny pipeline seeking to build or to expand its facilities must first apply for a certificate of public convenience and necessity from FERC.” *Consolidated Edison Co. of New York v. FERC*, 315 F.3d 316, 319 (D.C. Cir. 2003). Additionally, the “NGA requires that all rates and charges by pipelines must be ‘just and reasonable.’” *Id.* (quoting NGA Section 4(a), 15 U.S.C. § 717c(a)). Under NGA § 4, 15 U.S.C. § 717c, “the pipeline must prove that its proposed rates are just and reasonable.” “*Complex*” *Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1007 (D.C. Cir. 1999). NGA “Section 5 applies when the Commission or an intervenor seeks to impose on the pipeline rates different from either present rates or rates proposed by the pipeline. Under section 5, the Commission or the intervenor must prove that the pipeline’s present rates are not just and reasonable and that the new rates proposed by the Commission or the intervenor are just and reasonable.” *Id.*

A pipeline can recover the costs of an expansion either “through ‘incremental’ pricing, which imposes an additional charge payable solely by customers who are directly served by the expansion facilities,” or through “‘rolled-in’ pricing, in which the cost of the new facilities are added to the pipeline’s total rate base and reflected in rates charged to all customers system-wide.” *Midcoast Interstate Transmission Inc. v. FERC*, 198 F.3d 960, 964 (D.C. Cir. 2000).

II. Events Leading To The Challenged Orders

A. 1999 Pricing Policy Statement

Shortly after issuing Order Nos. 436¹ and 636², which “fundamentally restructured the natural gas market by requiring pipelines to provide open access transportation service and to unbundle the sale of gas from the related transportation service,” the Commission held proceedings to determine whether

¹ *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985), *order on reh’g*, Order No. 436-A, FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,675 (1985), *aff’d in pertinent part*, *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1009-13 (D.C. Cir. 1987).

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

new pipeline construction projects should “be priced on a rolled-in basis (rolling in the expansion costs with the existing facilities) or an incremental basis (establishing separate cost[s]-of-service[] and separate rates for the existing and expansion facilities).” *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 at 61,914 (1995), *order on reh’g*, 75 FERC ¶ 61,105 (1996) (“1995 Pricing Policy” or “1995 Pricing Policy Statement”). In the resulting 1995 Pricing Policy Statement, the Commission determined that it would “apply a presumption in favor of rolled-in rates when the rate increase to existing customers from rolling-in the new facilities is 5% or less and the pipeline makes a showing of system benefits” *Id.* at 61,916.

Several years later, in light of changes that had taken place in the natural gas industry in recent years, the Commission again initiated proceedings regarding its new construction pricing policy. *See* 1999 Pricing Policy, 88 FERC at 61,736. “As the industry becomes more competitive,” the Commission explained, “the Commission needs to adapt its policies to ensure that they provide the correct regulatory incentives to achieve the Commission’s policy goals and objectives.” *Id.* at 61,744.

The Commission found that the 1995 pricing policy “sends the wrong price signals” by “masking the real cost of expansions.” 1999 Pricing Policy Statement, 88 FERC at 61,745. “[B]ecause rolled-in pricing often results in projects that are

subsidized by existing rate payers,” the “true costs of the project are not seen by the market or the new customers, leading to inefficient investment and contracting decisions.” *Id.* Thus, the Commission announced a new policy, under which the “threshold requirement in establishing the public convenience and necessity for existing pipelines proposing an expansion project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.” 1999 Pricing Policy Statement, 88 FERC at 61,746.

The no-subsidy requirement eliminated the 1995 Pricing Policy’s presumption in favor of rolled-in pricing. *Id.* at 61,746. Instead, because the 1999 Pricing Policy requires expansion shippers’ rates to cover “the full costs of the project, without subsidy from existing shippers through rolled-in pricing,” 1999 Pricing Policy Statement Clarification, 90 FERC at 61,392, expansion projects usually are incrementally priced, 1999 Pricing Policy Statement, 88 FERC at 61,745.

The 1999 Pricing Policy explained that “existing shippers should not have the rates under their current contracts changed because the pipeline has built an expansion to provide service to other customers. Existing customers’ rates can be increased for projects that improve their service,” *i.e.*, where “the new facilities are needed to improve service to existing customers.” 1999 Pricing Policy Statement Clarification, 90 FERC at 61,392. This is because:

One of the Commission's regulatory goals is to protect captive customers from rate increases during the terms of their contracts with pipelines with the exception that increases in their rates will be related to the costs and usage of the system for which they subscribe and not based on construction needed to serve other shippers. One of the benefits generally associated with long-term contracts is that they reduce the buyer's risk by providing greater price certainty. Raising the rates of existing shippers during the term of their long-term contracts in order to subsidize expansions for new shippers reduces rate certainty and increases contractual risk. Existing shippers, therefore, should not be subject to increases in rates during the term of their existing contracts to reduce the rates faced by new shippers subscribing to expansion capacity.

1999 Pricing Policy Statement Clarification, 90 FERC at P 61,393. *See also id.*

("The Commission's no-subsidy policy recognizes that existing customers should pay the costs of projects designed to improve their service").

The Commission made clear that "this approach does not justify rolling-in the entire costs of an expansion simply because the existing customers receive some benefit from the construction of new facilities" 1999 Pricing Policy Statement Clarification, 90 FERC at 61,394 (internal quotation omitted). Rather, additional costs can be charged to existing customers only "if the facilities are needed to improve service for existing customers, the increase in rates is related to the improvements in service, and raising existing customers' rates does not constitute a subsidy of an expansion by the existing customers." *Id.*

B. Transco's NGA § 4 Rate Filing

On March 1, 2001, Transco submitted a general NGA § 4 rate filing proposing, among other things, to roll-in the costs of several expansion projects.

R. 1. The Commission found that “Transco ha[d] not shown that the proposed tariff sheets [were] just and reasonable,” and “that the instant filing raise[d] issues that need[ed] to be investigated further” *See* R. 87 and 113, *Transcontinental Gas Pipe Line Corp.*, 94 FERC ¶ 61,360 at 62,300, JA 13, *order on reh’g*, 95 FERC ¶ 61,268 (2001), JA 25-39. Accordingly, the Commission accepted and suspended the revised tariff sheets to be effective September 1, 2001, subject to refund and the outcome of a trial-type hearing. *Id.* at 62,299, JA 11.

Many of the issues were resolved through settlement, leaving 13 issues to be addressed at the hearing before the Administrative Law Judge (“ALJ”). Initial Decision at P 3, JA 100. Only one of those issues – whether Transco’s tariff should be amended, under NGA § 5, to provide for incremental recovery of the electric power costs related to the Cherokee expansion -- is at issue in the instant case.

C. Intervenor's NGA Section 5 Fuel And Electric Power Cost Claims

At the hearing, several parties³ complained that sections 38 and 41 of Transco's existing tariff, under which the fuel and electric power costs associated with operating all of Transco's compressors were rolled-in, were unjust and unreasonable and inconsistent with the 1999 Pricing Policy to the extent that they allowed fuel and electric power costs associated with compressors added as part of an incrementally-priced expansion to be rolled-in. *See, e.g.*, Testimony of Richard Thatcher, R. 194 at 1-10, JA 41-50; Testimony of Joseph Stengel, R. 201 at 13-14, JA 52-53; Testimony of Lila Rothman, R. 202 at 17-19, JA 55-57; Initial Br. of Commission Staff, R. 376 at 7-9, JA 84-86; Initial Br. of Consolidated Edison, R. 392 at 17-23, JA 88-94; Initial Br. of Dominion at 2-10,⁴ JA 2-10. The parties' complaint was directed only at the fuel and electric power costs associated with Transco's Cherokee, Mobile Bay, and SouthCoast expansion projects.

³ Consolidated Edison Company of New York, Inc., Philadelphia Gas Works (collectively, "Consolidated Edison"), Dominion Transmission, Inc., Virginia Power Energy Marketing, Inc., and Virginia Power Services Energy Corp. (collectively, "Dominion").

⁴ Although Dominion's Initial Brief was filed on August 28, 2002, along with all other Initial Briefs in this proceeding, *see, e.g.* Initial Decision at PP 4, 170, JA 100, 147, it was inadvertently omitted from the Certified Index to Record and, therefore, does not have a designated record number.

D. The ALJ's Initial Decision

The ALJ found that the evidence “show[ed] that the added compression the [Mobile Bay], Cherokee, and SouthCoast facilities provide was not added to the Transco system to provide a service to the pre-expansion customers,” *i.e.*, it was “added for expansion shippers, not for an added overall system benefit.” As a result, the ALJ found that “burdening existing customers with costs for which expansion customers benefit flies in the face of the Commission’s 1999 Pricing Policy.” Initial Decision at P 182, JA 150-51. This finding, the ALJ noted, was consistent with Commission precedent. Initial Decision at PP 183-84, JA 151 (citing, *e.g.*, *Texas Eastern Transmission, LP*, 99 FERC ¶ 61,383 at PP 22-37 (2002); *PG&E Gas Transmission, Northwest Corp.*, 99 FERC ¶ 61,366 at PP 29-30 (2002); *Kern River Gas Transmission Co.*, 98 FERC ¶ 61,205, *reh’g denied*, 100 FERC ¶ 61,056 (2002)).

Accordingly, the ALJ concluded that Consolidated Edison and Dominion had “met the first prong of their Section 5 burden of proof” to “show that Transco’s existing rates are unjust and unreasonable,” Initial Decision at PP 169, 184, JA 147, 151 and, therefore, that “Transco’s tariff should be amended to reflect incremental rates on the fuel/electricity charges for the [Mobile Bay], Cherokee, and SouthCoast expansion facilities,” *id.* at P 182, JA 150.

The ALJ also found that Consolidated Edison and Dominion had met the second prong of their NGA § 5 burden to “offer a just and reasonable alternative to the existing methodology” Initial Decision at P 185, JA 151. “A reasonable allocation of fuel and electric power costs to incremental customers based on the incremental compression relative to overall compression, as [Consolidated Edison], Dominion, and [Commission] Staff propose[d], is just, reasonable, and appropriate.” *Id.* Furthermore, the ALJ determined, “the most recent data available to Transco should be the basis for this calculation.” *Id.*

While Transco contended that it would be “[i]nfeasible’ to track, as a practical matter, fuel and electric costs that cannot be identified for any specific customer,” the ALJ noted that the Commission already had rejected such an “impracticality” argument.” Initial Decision at P 186, JA 151-52 (citing *PG&E*, 99 FERC at PP 26-30). Moreover, “Transco’s own witness [Mr.] Turkington conceded that Transco must calculate the incremental fuel or electric power that will be used in an expansion project.” *Id.* (citing R. 338, Transcript at 239-40, JA 59-60) (acknowledging that when Transco files a certificate application it is required to calculate the fuel it expects to use as a result of the proposed expansion)).

Transco filed a brief on exceptions to the Initial Decision which, among other things, challenged the ALJ's fuel and electric power cost determinations. R. 442; *see* Rate Order at PP 115-16, JA 246 (describing Transco's exceptions).

III. The Challenged Orders

After thoroughly reviewing the record, the Commission reversed the ALJ's decision requiring Transco to establish incremental charges to recover the fuel and electric costs of the Mobile Bay expansion. Rate Order at P 121, JA 247. The Commission had determined that the costs of the Mobile Bay expansion may be rolled in and, therefore, "[i]t follow[ed] that Transco should be able to collect the costs of fuel and electricity for compression on a system-wide basis as provided by Transco's tariff." *Id.*

Initially, because "the evidence show[ed] that as [a] result of the new SouthCoast Station 115 compression, Transco's generally applicable electric charges went up between 11 and 17 percent depending on rate zone," the Commission affirmed the ALJ's decision requiring Transco's tariff to be amended to establish incremental charges to recover the electric costs of the incrementally-priced SouthCoast expansion. Rate Order at P 122, JA 248 (citing R. 586, Exh. CE-24 at 4, JA 382). On rehearing, however, the Transco Municipal Group pointed out that, while the projected cost data evidence had shown the SouthCoast expansion would cause Transco's generally applicable electric costs to increase,

other evidence showed that Transco's actual electric power costs had decreased substantially after the SouthCoast expansion's in-service date. Rehearing Order at PP 98, 103-105, JA 315-16, 317-19.

While recognizing that the decrease in electric power costs did not necessarily mean existing Transco shippers would not subsidize the SouthCoast shippers' electric power costs if they were rolled-in, Rehearing Order at P 106, JA 319, the Commission determined that the existing record did not provide "a basis on which to determine whether the SouthCoast expansion contributed to the cost reduction, such that the existing shippers were actually benefited rather than being required to subsidize additional costs, or whether the cost reduction was entirely unrelated to the SouthCoast expansion." *Id.*

Thus, the Commission found that the proponents of the NGA § 5 action had not met their burden to show that the existing system-wide transportation electric power rates were unjust and unreasonable with respect to the SouthCoast expansion. *Id.*; *see also id.* at P 102, JA 317 (under the 1999 Pricing Policy, "a showing that Transco's current system-wide [transportation electric power] and/or fuel charges require its existing shippers to subsidize additional fuel or electric power costs incurred in order to serve the SouthCoast shippers would justify requiring . . . incremental charges to the SouthCoast shippers. However, the proponents of section 5 action to require an incremental electric charge have the

burden of showing that such subsidization is occurring. The Commission has concluded that the current record provides an insufficient basis upon which to meet that burden.”).

The Commission affirmed the ALJ’s decision requiring Transco to establish incremental charges to recover transportation electric power costs associated with compressors built as part of the incrementally-priced Cherokee expansion. Rate Order at P 122, JA 248. A system-wide roll-in of Cherokee costs would be unjust and unreasonable because it “would result in the existing shippers subsidizing expansion shippers in contravention of the 1999 Pricing Policy Statement.” *Id.* “As the evidence in this case shows, the annual cost of electricity used by the Station 115 Cherokee compressors is \$2,380,399. However, Cherokee shippers pay only \$135,151 annually in electricity costs, resulting in a \$2,245,248 subsidy from existing shippers.” *Id.* (citing R. 456, Consolidated Edison’s Br. Opposing Exceptions at 9-10, JA 199-200, and R. 569, Exh. CE-8 at 14, JA 380); *see also* Rehearing Order at P 108 and n.41, JA 319-20 (same). Moreover, while Transco claimed “that the compressors are fully integrated with Transco’s system and are used to serve everyone,” the Commission found that, “under the 1999 Pricing Policy Statement, such a claim of generalized system benefits is not enough to justify requiring the existing shippers to subsidize the uncontested increase in

electric costs caused by the Cherokee project.” Rehearing Order at P 109, JA 320; *see also* Rate Order at P 123, JA 248.

“The Commission also affirm[ed] the ALJ’s finding that the just and reasonable replacement for the system-wide . . . electric power cost rates charged to the Cherokee . . . shippers is an incremental rate for electric compression based on Transco’s most recent operating experience.” Rate Order at P 124, JA 248. As Transco had conceded, “[t]here is no question that Transco can determine how much fuel or electric power is used to operate any particular compressor unit over a particular time.” *Id.* (quoting R. 444, Transco Br. on Exceptions at 18, JA 197).

The Commission further explained that:

the structure for [the] electric charges should be as described in *Northwest Pipeline Corporation*, 99 FERC ¶ 61,365 at P 37 (2002), where the Commission stated that “expansion shippers are to pay both the compressor fuel rate charged to existing shippers and any additional fuel costs attributable to the proposed expansion, with the additional fuel costs captured in the surcharge. . . . The incremental fuel surcharge is intended to amount to the difference between the proposed incremental fuel rate and the existing compressor fuel rate.”

Id. (citing R. 456, Consolidated Edison’s Brief Opposing Exceptions at 16-17, JA 201-02).

SUMMARY OF ARGUMENT

The Commission reasonably affirmed the ALJ’s determination that Transco’s tariff should be amended, under NGA § 5, to provide incremental

transportation electric power charges for the incrementally-priced Cherokee Project. The Commission consistently has found that the 1999 Pricing Policy’s determination that existing shippers may not subsidize an expansion project applied not only to general rates for service, but also to fuel and electric power cost charges.

In addition, the Commission appropriately affirmed the ALJ’s finding that the proponents of the tariff change met both prongs of their NGA § 5 burden. First, they established that rolling-in the transportation electric power costs associated with the compressors built as part of the Cherokee expansion would be unjust and unreasonable because doing so would cause the existing shippers to subsidize the expansion. Second, the NGA § 5 proponents offered a just and reasonable alternative to the existing methodology.

ARGUMENT

I. STANDARD OF REVIEW

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, “FERC’s decisions will be upheld as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made.” *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 973, 951 (D.C. Cir. 2007). “In

other words, the Commission must cogently explain why it has exercised its discretion in [the] given manner.” *Id.* (quoting *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. Cir. 2000) (internal quotation marks omitted and alteration in original)). The Commission's factual findings are conclusive if supported by substantial evidence. *East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007); NGA § 19(b), 15 U.S.C. § 717r(b).

The Court is “‘particularly deferential’ when FERC is involved in the highly technical process of ratemaking.” *East Kentucky*, 489 F.3d at 1306 (quoting *Ass’n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)); *see also ExxonMobil*, 487 F.3d at 951 (same). As the Court has explained, “policy choices about ratemaking are the responsibility of the Commission – not this Court.” *Id.* at 953; *see also Midcoast*, 198 F.3d at 971 (the “question of how to allocate costs among a pipeline’s customers is a difficult issue of fact, and one on which the Commission enjoys broad discretion.”) (quoting *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991) (internal quotation marks and citation omitted by Court)). In addition, the Court “defer[s] to FERC’s interpretation of its orders so long as the interpretation is reasonable.” *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004).

II. THE COMMISSION REASONABLY AFFIRMED THE ALJ'S DETERMINATION THAT TRANSCO'S TARIFF SHOULD BE AMENDED, UNDER NGA SECTION 5, TO PROVIDE INCREMENTAL TRANSPORTATION ELECTRIC POWER CHARGES FOR THE INCREMENTALLY-PRICED CHEROKEE PROJECT

A. The Commission Reasonably Relied On The 1999 Pricing Policy In Making Its NGA Section 5 Determinations Here

Transco asserts that the 1999 Pricing Policy did not address system-wide allocation of compressor electric power costs and, therefore, that the Commission should not have relied on that Policy in reviewing the NGA § 5 claim here. Br. at 7-8, 10. The Commission found otherwise, explaining that, “[u]nder the [1999 Pricing Policy], a showing that Transco’s current system-wide [transportation electric power] and/or fuel charges require its existing shippers to subsidize additional fuel or electric power costs incurred in order to serve [expansion] shippers would justify requiring . . . incremental charges to the [expansion] shippers.” Rehearing Order at P 102, JA 317.

As the 1999 Pricing Policy found, “existing shippers should not have the rates under their current contracts changed because the pipeline has built an expansion to provide service to other customers. Existing customers’ rates can be increased for projects that improve their service,” *i.e.*, where “the new facilities are needed to improve service to existing customers.” 1999 Pricing Policy Statement Clarification, 90 FERC at 61,392; see *also id.* at 61,393 (“The Commission’s no-

subsidy policy recognizes that existing customers should pay the costs of projects designed to improve their service”).

The Commission’s interpretation of the 1999 Pricing Policy was not only reasonable but, as the ALJ noted, Initial Decision at PP 183-84, JA 151, it also was consistent with Commission precedent. In *PG&E*, 99 FERC at PP 29-30, for example, the Commission found that the 1999 Pricing Policy’s determination that existing shippers may not subsidize an expansion project applied not only to general rates for service, but also to fuel and electric power cost charges. The Commission found, therefore, that PG&E could not apply its generally-applicable system fuel charge to the fuel costs associated with the incrementally-priced expansion at issue, but, rather, “must insulate existing shippers from increased fuel costs attributable to this expansion by establishing an incremental fuel charge for the [expansion] shippers.” *PG&E*, 99 FERC at PP 29-30. *See also Texas Eastern*, 99 FERC at PP 22-37; *Kern River*, 98 FERC ¶ 61,205, *reh’g denied*, 100 FERC ¶ 61,056.

Similarly, in *Northwest Pipeline*, “concerned that [the pipeline] ha[d] not adequately assured that its existing shippers . . . would not bear any increase in fuel costs attributable to the proposed expansion,” the Commission “direct[ed] [the pipeline] to apply its incremental fuel rate as a surcharge to its current system-wide fuel rate.” *Northwest Pipeline*, 98 FERC ¶ 61,352 at 62,499, *order on reh’g and*

clarification, 99 FERC ¶ 61,365 at P 33 (2002). In support of this, the Commission cited *PG&E Gas Transmission Northwest Corporation*, 96 FERC ¶ 61,194 (2001), *reh'g denied*, 97 FERC ¶ 61,101 (2002). In that case, “to insulate existing shippers from increased fuel costs attributable to the proposed expansion” in accordance with the 1999 Pricing Policy, the Commission directed the pipeline to charge expansion shippers an incrementally-priced surcharge for “fuel costs above the costs attributable to fuel absent the [expansion] compression.” *PG&E*, 96 FERC at 61,839-40, *reh'g denied*, 97 FERC at 61,534-35.

While Transco may interpret the 1999 Pricing Policy to exclude electric power costs associated with an incrementally-priced expansion, the Commission’s reasonable and consistent interpretation of its own orders, not Transco’s alternative interpretation, deserves deference. *Entergy Services*, 375 F.3d at 1209.

B. The Commission Assured That The Proponents Of The Tariff Change Met Both Prongs Of Their NGA Section 5 Burden

1. The Commission Reasonably Found That The Proponents Met Their NGA Section 5 Burden To Show That It Would Be Unjust And Unreasonable To Roll-in The Electric Power Costs Associated With Compressors Added As Part Of The Incrementally-Priced Cherokee Expansion Project

The Commission reasonably affirmed the ALJ’s finding that rolling-in the transportation electric power costs associated with compressors built as part of the incrementally-priced Cherokee expansion would be unjust and unreasonable

because it “would result in the existing shippers subsidizing expansion shippers in contravention of the 1999 Pricing Policy Statement.” Rate Order at P 122, JA 248. As the Commission and ALJ explained, the compressors added by the Cherokee expansion were not needed to improve service to existing shippers, but existing shippers would pay almost all (\$2,245,248) of the \$2,380,399 transportation electric power costs associated with those compressors.⁵ *Id.* at PP 122-23, JA 248-49; Rehearing Order at PP 108-09 and n.41, JA 319-20; Initial Decision at P 182, JA 150-51.

Transco contends, nonetheless, that the NGA § 5 proponents failed to establish that applying Transco’s existing rolled-in transportation electric power tariff provisions to the incrementally-priced Cherokee expansion was unjust and unreasonable because Transco’s system is fully integrated, *i.e.*, it uses all of its compressors to serve all of its customers. Br. at 22-23; *see also* Br. at 8-15. As the

⁵ The Commission found that:

Transco’s actual electric expenses at Station 115 during the period September 2000 through August 2001 were \$3,659,705, of which 47.6 percent, or \$1,742,020 is attributable to the Cherokee expansion. Its actual electric expenses at Station 125 were \$638,379. Thus, the total electric expenses at the two Stations during September 2000 through August 2001 were \$2,380,399. During the same period Transco collected . . . total [transportation electric power] charges from the Cherokee shippers of \$135,151.

Rehearing Order at n.41, JA 320 (citing R. 569, Exh. CE-8 at 14, JA 380).

Commission found, however, “under the 1999 Pricing Policy Statement, such a claim of generalized system benefits is not enough to justify requiring the existing shippers to subsidize the uncontested increase in electric costs caused by the Cherokee project.” Rehearing Order at P 109, JA 320; *see also* Rate Order at P 123, JA 248. There had been “no showing that the added compression at Stations 115 and 125 has improved the quality of service received by the existing shippers.” Rehearing Order at P 109, JA 320. Moreover, “while [Transco] claim[ed] that the added compression provides redundancy and potential backup when older compressors are out of service or undergoing maintenance, there ha[d] been no showing that there were any service interruptions in the past which would have been prevented by the installation of new compressors.” *Id.* (footnote with citation omitted).

Transco also argues that, because its system is integrated, it is “impossible to rationally associate use of any particular compression facility with any particular group of customers or service.” Br. at 22-23. All the Commission has required, however, is that, consistent with the 1999 Pricing Policy, the Cherokee expansion shippers pay all the costs, including the transportation electric power costs, associated with the Cherokee expansion. That can be accomplished, as Transco has “concede[d] that ‘[t]here is no question that [it] can determine how much fuel or electric power is used to operate any particular compressor unit over a particular

time.” Rate Order at P 124, JA 248-49 (quoting R. 444, Transco Br. on Exceptions at 18, JA 197); *see also* Br. at 14 (noting that the extent of customers’ actual use of particular services is known after the gas day has ended.).

Next, Transco complains that “the Commission failed to recognize, indeed it was apparently unaware, that the allocation of the \$135,151 of Cherokee electric power costs to the Cherokee shippers during the period simply reflected the Cherokee shippers’ allocated portion of the total, system-wide electric power costs.” Br. at 11 (discussing the Rate Order). To the contrary, it was the very practice of only “charg[ing] system-wide rates to incremental shippers” that the Commission found unjust and unreasonable in the circumstances here. Rate Order at P 122, JA 248; *see also* Rehearing Order at PP 108-09 and n.41, JA 319-20.

2. The Commission Reasonably Found That The Proponents Met Their NGA Section 5 Burden To Propose A Just And Reasonable Replacement Rate

The Commission also reasonably affirmed the ALJ’s determination that the NGA § 5 proponents had “offer[ed] a just and reasonable alternative to the existing methodology.” Rate Order at P 124, JA 248-49; Initial Decision at P 185, JA 151. The Commission found that, as in *Northwest Pipeline Corporation*, 99 FERC ¶ 61,365 at P 37 (2002), Cherokee expansion shippers are to pay the rolled-in fuel and transportation electric power costs charged to existing shippers and a surcharge for the additional transportation electric power costs attributable to the Cherokee

expansion compressors. Rate Order at P 124, JA 249 (citing R. 456, Consolidated Edison’s Brief Opposing Exceptions at 16-17, JA 201-02); *see also* Initial Decision at P 185, JA 151 (“A reasonable allocation of . . . electric power costs to incremental customers based on the incremental compression relative to overall compression, as [Consolidated Edison], Dominion, and Staff propose, is just, reasonable, and appropriate.”). Moreover, the Commission explained, the surcharge is to be based on Transco’s most recent operating experience. Rate Order at P 124, JA 249; Initial Decision at P 185, JA 151. There is no merit, therefore, to Transco’s contention that “the Commission ordered that Transco . . . develop on its own some way of charging the Cherokee shippers for all Cherokee electric power charges, in addition to their system-wide fuel and electric power cost allocation.” Br. at 12 (citing Rate Order at P 124, JA 249-50); *see also* Br. at 24 (same).⁶

Transco also asserts that “none of the parties seeking NGA Section 5 changes to Transco’s system-wide fuel and electric power allocation even offered

⁶ In a footnote, Transco claims that the three protests filed in response to the filing it made to comply with the requirement at issue here show that the “Commission had not approved a specific proposal here, as required by NGA Section 5.” Br. at 24 n.22. Compliance filing protests, like the ones Transco points to here, however, are commonplace, and do not support the notion that the Commission’s approved remedy was not sufficiently specific to satisfy NGA § 5.

any specific alternative methodology at all for isolating and assigning Transco's Cherokee compressors electric power costs to the Cherokee shippers alone, as required by Section 5." Br. at 23; *see also* Br. at 23-24 (same). Furthermore, Transco claims that, "[a]t most, the proponents only cited (and, even there, only with respect to another project, not Cherokee) the case of *Iroquois Gas Transmission System, L.P.*, 95 FERC ¶ 61,335 at 62,205-06 (2001)" *Id.* Transco is mistaken on both counts.

As the Commission pointed out, Consolidated Edison proposed that:

the structure for fuel and electric charges should be as described in *Northwest Pipeline Corporation*, 99 FERC ¶ 61,365 at P 37 (2002), where the Commission stated that "expansion shippers are to pay both the compressor fuel rate charged to existing shippers and any additional fuel costs attributable to the proposed expansion, with the additional fuel costs captured in the surcharge. . . . The incremental fuel surcharge is intended to amount to the difference between the proposed incremental fuel rate and the existing compressor fuel rate."

Rate Order at P 124, JA 249 (quoting R. 456, Consolidated Edison's Br. Opposing Exceptions at 17, JA 202 (quoting *Northwest Pipeline*, 99 FERC at P 37)); *see also* R. 392, Consolidated Edison's Initial Brief at 22-23, JA 93-94 (same).

Consolidated Edison also proposed that the incremental Cherokee transportation electric power surcharge be based on Transco's most recent operating experience. R. 392, Consolidated Edison's Initial Brief at 22, JA 93; *see also* Initial Decision at P 185, JA 151 (same). Thus, the just and reasonable specific alternative

methodology adopted by the Commission was that proposed by the NGA § 5 proponents.

C. The Commission Reasonably Determined That Cherokee Expansion Shippers Should Pay The Transportation Electric Power Costs Associated With The Cherokee Expansion As Well As A Portion Of The Rolled-In, System-Wide Fuel And Electric Power Costs

Transco asserts that the Cherokee expansion shippers should not be required to pay both the transportation electric power costs associated with the Cherokee expansion as well as a portion of the rolled-in, system-wide fuel and electric power costs. Br. at 10, 12, 16, 17-18, 19-20.⁷ As the Commission reasonably explained, however, consistent with Commission precedent:

“expansion shippers are to pay both the compressor fuel rate charged to existing shippers and any additional fuel costs attributable to the proposed expansion, with the additional fuel costs captured in the surcharge.”⁸ Since fuel is a variable cost, it is appropriate that the expansion shippers pay the full fuel costs incurred on their behalf, as well as the electric costs incurred on their behalf. The Cherokee shippers do receive service on portions of the system that make use of

⁷ It is questionable whether Transco has demonstrated standing to make this assertion. Transco does not claim that it will be harmed by Cherokee expansion shippers paying both the Cherokee expansion transportation electric power costs and a portion of the system-wide electric power and fuel costs. Rather, Transco claims only that Cherokee expansion shippers will be harmed. Br. at 16. “To meet the constitutional requirements for standing, a plaintiff must show ‘an *injury to himself* that is likely to be redressed by a favorable decision.’” *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1069 (D.C. Cir. 2005) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)) (emphasis added).

⁸ Quoting *Northwest Pipeline*, 99 FERC at P 37.

gas-fired compression. Therefore, it is appropriate that they pay their appropriately allocated share of those costs.

Rehearing Order at P 112, JA 321-22.

Transco asserts that “the *Northwest Pipeline* order does not support the Commission’s decision here” because it believes, incorrectly, that the challenged orders require Cherokee expansion shippers “to pay twice for existing rolled-in non-Cherokee electric power costs.” Br. at 20. As noted above, the Commission found both here and in *Northwest Pipeline*, 99 FERC at P 37, that expansion shippers should pay both their allocated portion of the rolled-in fuel and transportation electric power costs charged to existing shippers and an incrementally-priced surcharge for the additional transportation electric power costs attributable to the Cherokee expansion compressors. Rate Order at P 124, JA 249. Because the transportation electric power costs attributable to the Cherokee expansion compressors will not be included in the rolled-in costs charged to existing shippers, consistent with *Northwest Pipeline*, Cherokee expansion shippers will be charged only once for existing rolled-in compressor fuel costs.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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