ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 08-1195

IBERDROLA RENEWABLES, INC.
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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January 30, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in the Petitioner's brief.

B. Rulings Under Review:

The rulings under review are:

1. *Alliance Pipeline L.P.*, 121 FERC ¶ 61,039 (2007); and

2. *Alliance Pipeline L.P.,* 122 FERC ¶ 61,250 (2008).

C. Related Cases:

This case has not previously been before this court or any other court.

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January 30, 2009

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GLOSSARY

Alliance	Alliance Pipeline L.P.
FERC	Federal Energy Regulatory Commission
Iberdrola	Iberdrola Renewables, Inc.
Initial Order	*Alliance Pipeline L.P.*, 121 FERC ¶ 61,309 (2007)
Negotiated Rate Policy Statement	*Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996)
Rehearing Order	*Alliance Pipeline L.P.*, 122 FERC ¶ 61,250 (2008)

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Commission reasonably interpreted a transportation agreement between Alliance Pipeline L.P. and Iberdrola Renewables, Inc. as not requiring Commission cost-based review of annual adjustments for negotiated rates, when the agreements contain no language requiring review, and the Commission's standard policy is to decline cost-based review of rates when shippers have agreed to ship under negotiated rather than cost-based recourse rates.

COUNTERSTATEMENT OF JURISDICTION

As explained *infra* at 23, to the extent Petitioner Iberdrola Renewables, Inc. challenges the lawfulness of the negotiated rate agreement on file with (and previously approved by) the Commission, as opposed to the annual adjustment to the negotiated rate, that challenge is barred as an untimely collateral attack on prior and now final pipeline certification orders. *See*, *e.g.*, *Pacific Gas and Electric Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008).

STATUTORY AND REGULATORY PROVISIONS

The pertinent provisions are contained in the addendum to this brief.

INTRODUCTION

The orders under review are *Alliance Pipeline L.P.*, 121 FERC ¶ 61,309 (2007) (Initial Order), R 92, JA 1-5, *reh'g denied*, 122 FERC ¶ 61,250 (2008) (Rehearing Order), R 96, JA 6-14. Intervenor Alliance Pipeline L.P. (Alliance) filed an annual adjustment to its costs, increasing the rate specified in its negotiated rate agreements. Petitioner Iberdrola Renewables, Inc. (Iberdrola) protested, contending that the Federal Energy Regulatory Commission (Commission or FERC) must review the change in operating and maintenance costs underlying the rate increase.

The Commission disagreed and accepted Alliance's filing in the challenged orders. FERC found, *inter alia*, that: (1) Alliance and its customers had entered

into negotiated rate agreements with the full understanding that Alliance could periodically adjust the rates to reflect operating cost changes; (2) FERC had rejected Alliance's original proposal that rate adjustments be subject to FERC approval, since customers who wanted cost-based review of rate changes could opt for the recourse (fallback) rate instead; and (3) Alliance's customers (including Iberdrola's predecessor-in-interest) had subsequently agreed to and signed negotiated rate agreements that omitted language requiring FERC review of rate changes. Initial Order P 9, JA 4-5; Rehearing Order P 8, JA 8-9.

STATEMENT OF FACTS

STATUTORY AND REGULATORY BACKGROUND

Natural Gas Act (NGA) § 1(b), 15 U.S.C. § 717(b), confers upon the Commission jurisdiction over the transportation and sale for resale of natural gas in interstate commerce, and over natural gas companies engaged in such transportation. Facilities subject to Commission jurisdiction must have certificates of public convenience and necessity prior to construction. NGA § 7(c), 15 U.S.C. § 717f(c). Before initiating a certification proceeding, a pipeline company may gauge interest in a new pipeline by conducting an "open season" during which prospective shippers submit requests for capacity on the pipeline. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 966 (D.C. 2000). FERC may approve initial rates as a condition to a pipeline certificate. *Id*. at 964.

Under NGA § 4(a), 15 U.S.C. § 717c(a), all rates and charges must be just and reasonable. Similarly, NGA § 4(b), 15 U.S.C. § 717c(b), prohibits undue preference in rates and charges. Under NGA § 4(d), 15 U.S.C. § 717c(d), an interstate natural gas pipeline must file with the Commission any proposed change in "any . . . rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto," at least 30 days prior to the proposed effective date. A shipper may file a complaint alleging that an existing rate is unjust and unreasonable or unduly discriminatory. NGA § 5, 15 U.S.C. § 717d.

As NGA § 4 states, pipelines can set rates for particular customers through contracts or tariffs. *See*, *e.g.*, *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956). In 1996, the Commission issued its Negotiated Rates Policy Statement.[1] The Policy Statement permits interstate pipelines to negotiate rates that vary from the otherwise applicable cost-of-service pipeline tariff, but the shipper must have the option of using a traditional cost-of-service "recourse" rate instead of negotiating. The availability of a recourse rate prevents pipelines from exercising market power by assuring that the customer can choose cost-based, traditional service if the pipeline demands excessive prices, while the

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[1] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services*, 74 FERC ¶ 61,076 (Negotiated Rates Policy Statement), *order on clarification*, 74 FERC ¶ 61,194, *order on reh'g*, 75 FERC ¶ 61,024 (1996).

negotiated rate option permits flexible, streamlined ratemaking. Negotiated Rates Policy Statement, 74 FERC at 61,240. The Commission does not engage in cost-based review of a negotiated rate, but a shipper believing itself similarly situated with a shipper receiving a negotiated rate may file a complaint with the Commission alleging undue discrimination. *Id.* at 61,242.

The Commission reviewed its negotiated rates policy in 2003. *Modification of Negotiated Rates Policy*, 104 FERC ¶ 61,134 (2003). Based upon comments received, FERC concluded that the negotiated rates program had "been generally successful in providing flexible, efficient pricing of pipeline capacity while mitigating pipeline use of market power by means of a recourse rate." *Id.* at P 4. While the Commission also made some modifications to the policy, none is relevant here.

II. FACTUAL BACKGROUND

A. Alliance's Certificate Proceeding

Alliance is a limited partnership organized for the purpose of constructing and operating approximately 886.8 miles of pipeline and related facilities to transport natural gas from the North Dakota/Canada border to Will County, Illinois. *Alliance Pipeline L.P.*, "Preliminary Determination on Non-Environmental Issues," 80 FERC ¶ 61,149 at 61,590 (1997) (Preliminary Determination); "Order Issuing Certificates, Granting Natural Gas Act Section 3

Authorization, and Granting and Denying Rehearing," 84 FERC ¶ 61,239 (1998) (Certificate Order) (collectively, Certification Orders). Between September 16, 1996 and November 8, 1996, Alliance conducted an open season to solicit customers for its proposed pipeline. Preliminary Determination, 80 FERC at 61,590. The open season documents offered prospective customers two rate options, negotiated rates or cost-based recourse rates.

Specifically, the "Open Season Precedent Agreement" stated that "[r]ates to be charged pursuant to the Transportation Agreement and the Tariff for long-term firm transportation service will reflect the Rate Principles." Precedent Agreement, page 10 (attached to PPM Energy, Inc.'s protest), R 83, JA 307. The Precedent Agreement Rate Principles differentiated between recourse and negotiated rates:

> Consistent with the FERC's Negotiated Rate policy, Shippers electing negotiated rates agree to pay such rates without regard to any action or determination of the FERC with respect to the proposed cost-based recourse rates.

Precedent Agreement, Schedule C, page 1, JA 322. For negotiated rates, certain cost elements would be fixed for the duration of the agreement, including: (1) imputed capital structure of 70 percent equity and 30 percent debt; (2) rate of return on equity of 12 percent with incentive adjustments; (3) actual capital costs; (4) use of certain income tax methodologies; and (5) levelized depreciation schedules. Schedule C, page 1-2, JA 322-23. For operating costs, the Precedent Agreement Rate Principles stated that:

> Changes in Transporter's operating costs will be reflected in its rates from time to time, for the primary term and any extension of the primary term of the Transportation Agreement.

Id., page 3, paragraph 11, JA 324.

Recourse rates, on the other hand, would be subject to the usual NGA cost-based procedures:

> Shippers electing recourse rates agree to pay such rates, subject to changes determined by the FERC, from time to time. Recourse rates will be cost-based rates filed with and approved by the FERC, pursuant to the Natural Gas Act or successor legislation.

Id. Cost elements that were fixed for negotiated rates would be subject to change under recourse rates. *Id*., pages 3-4, JA 324-25.

Alliance's open season resulted in 40 executed precedent agreements for 93 percent of the pipeline design capacity. Preliminary Determination, 80 FERC at 61,591. All shippers, including Iberdrola's predecessor-in-interest, elected the negotiated rate, which was lower than the recourse rate. *Id.*

Alliance filed its certificate application on December 24, 1996. The application included a *pro forma* tariff which set forth a "Negotiated Rates Formula." *See* Exhibit 1 (attached to PPM Energy, Inc.'s protest), JA 293. The *Pro Forma* Tariff Negotiated Rates Formula was the same in most respects to the Precedent Agreement Rate Principles except that the Formula contained the following language:

> The Negotiated Rates are determined using actual operating and

> maintenance costs, gross plant, and debt costs approved by the FERC from time to time. Changes in these elements shall be reflected in Transporter's Negotiated Rates and must be approved by the FERC from time to time pursuant to the Natural Gas Act. Such changes in Transporter's Negotiated Rates may be made effective contemporaneously with the effective date of corresponding changes in the Recourse Rates.

Negotiated Rates Formula, paragraph 2, JA 293. [emphasis added]

Upon review, the Commission directed Alliance to delete the Negotiated Rates Formula from its tariff. Preliminary Determination, 80 FERC at 61,599. A tariff's purpose where there are negotiated rates is to provide information to other shippers who might be entitled to seek the negotiated rate. *Id.* Alliance provided the actual rates in its *pro forma* tariff so there was no need to provide the formula, which was "more appropriately included in the service agreements." *Id.* The Commission stated, moreover, that pursuant to the Negotiated Rates Policy Statement, it was "not reviewing the level of Alliance's proposed negotiated rates nor the method by which they were calculated." *Id*. at 61,597.

No shipper objected either to deletion of the Rate Formula from Alliance's tariff or to FERC's statement that it would not review the negotiated rates. Certificate Order, 84 FERC at 62,213-14. The Certificate Order, issued on September 17, 1998, authorized construction and operation of the pipeline. *Id.* at 62,223. Alliance and its shippers executed Firm Transportation Agreements in March, 1999, which omitted language stating that changes in certain cost elements

were subject to FERC review. *See* Alliance's Answer at 6-7, R 90, JA 374-75. The pipeline was constructed, and Alliance submitted its tariff (modified pursuant to the Certification Orders) on August 4, 2000. *Id.* at 6, JA 374.

B. The Orders On Review

Alliance commenced operation of its pipeline in December, 2000. Since then, Alliance has made regular filings to adjust its negotiated rate. None of Alliance's customers protested the adjustments until Alliance made the November 30, 2007 filing at issue here. PPM Energy, Inc. (Iberdrola's predecessor) protested and requested summary rejection or a maximum suspension period and full evidentiary hearing, contending that the Commission must approve any increased operating and maintenance expenses. Initial Order P 2, JA 2; PPM Energy, Inc.'s Protest at 1-2, JA 273-74.

The Commission accepted Alliance's revised tariff sheets to become effective January 1, 2008, as proposed. FERC found that Alliance and its shippers had entered into the negotiated rate agreements with full understanding that Alliance could adjust the rates to reflect projected changes in operating and maintenance costs, subject to later true-up to reflect actual changes incurred, and that the Commission would not review those changes. Initial Order P 9, JA 4-5. PPM Energy, Inc. (Iberdrola's predecessor in interest) then requested rehearing, which the Commission denied. Rehearing Order P 1, JA 6. Among other things,

the Commission explained that PPM Energy, Inc. "has a number of remedial procedures it may pursue," under the tariff or the Commission's complaint procedures, but cannot pursue such an objection in response to Alliance's annual cost adjustment. *Id*. P 15, JA 13. This appeal followed.

SUMMARY OF ARGUMENT

The size and complexity of Iberdrola's brief notwithstanding, this case is, at bottom, a garden-variety tariff interpretation dispute arising from a routine annual update to a negotiated rate. Iberdrola tries to make the lawfulness of the negotiated rate agreement itself the issue, but the rate agreement became effective years ago and is not open to challenge now except through an NGA § 5 complaint (which Iberdrola has not filed). Consequently, the only issue properly before the Court is whether Alliance's 2007 update complies with the negotiated rate agreement.

The Commission reasonably concluded that the Firm Transportation Agreement negotiated by Alliance and Iberdrola does not require the Commission to review Alliance's cost adjustments. The *pro forma* tariff filed in Alliance's pipeline certification proceeding had proposed FERC approval of cost adjustments to negotiated rates, but the Commission had rejected that proposal because shippers who wanted FERC cost review of rate changes could opt for Alliance's cost-based recourse (fallback) rate instead. Alliance's customers (including

Iberdrola's predecessor-in-interest) subsequently executed rate agreements that omitted any language requiring FERC review of negotiated rate changes.

Iberdrola's arguments concerning the lawfulness of the long-final rate agreement represent an untimely collateral attack on the Certification Orders announcing that the Commission will not engage in cost-based review and are thus not properly before the Court. In any case, Iberdrola's arguments rest on a fundamental misunderstanding of negotiated rates. The purpose of negotiated rates is to provide flexible, streamlined pricing for pipeline service in lieu of traditional, rigid cost-of-service rate proceedings. Shippers and pipelines may negotiate rates that vary from otherwise applicable tariff rates, but shippers must have the option of using a traditional cost-of-service recourse rate. Since the recourse rate option protects shippers from a pipeline's exercise of market power, the Commission does not engage in similar cost-of-service review when shippers and pipelines have negotiated and agreed to another approach.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews FERC orders under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this deferential standard of review, the Court upholds orders in which it can "discern a

reasoned path" to the decision. *Old Dominion Electric Cooperative, Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

The familiar two-step analysis established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies to an agency's interpretation of a jurisdictional contract. *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991). This is true even if the "issue simply involves the proper construction of language" and not a matter within the agency's special expertise. *Id.*; *see also Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814-15 (D.C. Cir. 1998) (applying *Chevron* analysis to Commission's interpretation of a FERC-jurisdictional natural gas tariff).

In applying *Chevron* principles to agreements subject to the Commission's jurisdiction, this Court first makes a *de novo* determination as to whether the relevant language unambiguously addresses the matter at issue. If the language is unambiguous, it controls. However, if the Court determines that the agreement is ambiguous as to the matter at issue, it will defer to any reasonable interpretation by the Commission. *See*, *e.g.*, *Old Dominion Electric*, 518 F.3d at 48-49 (applying *Chevron* analysis to Commission's interpretation of a FERC-jurisdictional agreement); *Southwestern Electric Coop., Inc. v. FERC*, 347 F.3d 975, 979 (D.C. Cir. 2003) ("given [the] ambiguity" of a FERC-jurisdictional agreement "and the

technical aspects of some of the determinations, the court's review is most deferential") (citing cases).

II. THE COMMISSION'S REASONABLE INTERPRETATION OF THE TRANSPORTATION AGREEMENT SHOULD BE AFFIRMED.

A. The Transportation Agreement Between Alliance and Iberdrola's Predecessor Does Not Provide For Commission Review Of Annual Cost Adjustments To The Negotiated Rate.

Iberdrola states (Br. at 18) that this case centers on whether "FERC erred in reading the service agreements" which "govern all firm service on the Alliance System." The Commission agrees that Alliance's service is governed by the Firm Transportation Agreements. Rehearing Order P 8, JA 8. As the challenged orders demonstrate, however, FERC did not err in concluding that the agreements do not require Commission cost review of Alliance's periodic rate changes.

FERC's conclusion rests on the language and context of the Firm Transportation Agreement and its related documents. Rehearing Order P 8, JA 8. Iberdrola's predecessor executed both the Open Season Precedent Agreement (in 1996) and the Firm Transportation Agreement (in 1999). Rehearing Order P 8, JA 8. The Open Season Precedent Agreement required Iberdrola's predecessor to choose between negotiated rates and recourse rates. *See* Precedent Agreement, Schedule C, pages1-3, JA 322; Rehearing Order P 8, JA 8. The recourse rate option stated that "[s]hippers electing recourse rates agree to pay such rates, subject to changes determined by the FERC from time to time." Precedent

Agreement, Schedule C, page 3, JA 324; Rehearing Order P 8, JA 8. The Precedent Agreement negotiated rate option, on the other hand, stated that "[c]hanges in Transporter's operating costs will be reflected in rates from time to time . . ." and that "[c]onsistent with the FERC's Negotiated Rate Policy, Shippers electing Negotiated Rates agree to pay such rates without regard to any action or determination of the FERC with respect to the proposed cost-based recourse rates." Precedent Agreement, Schedule C, pages 3 and 1, JA 324, 322; Rehearing Order P 8, JA 8.

The Firm Transportation Agreement, which governs the transportation at issue, reflects the Open Season Precedent Agreement principle that no review of changes in the negotiated rate is required. Rehearing Order P 8, JA 8; *see* Section 3 of the Firm Transportation Agreement, JA 388 (stating that "Shipper and Transporter have agreed that rates charged for transportation service under the Firm Transportation Agreement will be established in accordance with the Rate Principles outlined in Appendix B"); Appendix B to the Firm Transportation Agreement, Rate Principle 12 ("Changes in Transporter's operating costs will be reflected in its rates from time to time, for the primary term and any extension of the primary term of the Firm Transportation Agreement."), JA 392.

As the Open Season Precedent Agreement offered shippers the option of either a recourse rate with FERC review of rate changes specified or a negotiated

rate with no requirement of FERC review specified, and the Firm Transportation Agreement in which the shipper had elected the negotiated rate likewise had no FERC review requirement specified, the Commission reasonably concluded that no FERC review of changes in the negotiated rate is required. Moreover, there is nothing in Alliance's tariff that requires a different conclusion. *See* Rehearing Order P 8, JA 8.

FERC also relied on its prior orders in Alliance's certification proceeding in interpreting the agreement. Rehearing Order P 12, JA 10-11. As discussed *supra* at 7-8, the Negotiated Rates Formula in Alliance's *pro forma* tariff stated that Alliance's negotiated rate cost changes were subject to Commission review. The Commission ordered the Formula moved from the tariff to the rate agreements. Preliminary Determination, 80 FERC at 61,599. Alliance did so. Rehearing Order P 8, JA 8-9 (quoting Alliance's tariff which states only that the rate "is derived from rate principles stipulated in the Firm Transportation Agreement").

The Preliminary Determination also stated that pursuant to the Negotiated Rates Policy Statement, the Commission was "not reviewing the level of Alliance's proposed negotiated rates nor the method by which they were calculated." Preliminary Determination, 80 FERC at 61,597. Accordingly, Alliance removed the review language from its tariff and did not incorporate it into the Firm Transportation Agreements. No shipper sought rehearing of the

Commission's finding that it would not review Alliance's negotiated rates, and all shippers executed Firm Transportation Agreements which lacked language requiring such review. *See* discussion *supra* at 8; Rehearing Order P 12, JA 11. Presumably, if Alliance's shippers had expected FERC review of Alliance's rate changes as part of the bargain they struck, they would have objected to the Commission's statement that it would not engage in such review, and would have also declined to execute the Firm Transportation Agreements. *See id.*

Finally, the shippers knew (or should have known) of the Commission's Negotiated Rates Policy Statement, which preceded the Certification Orders. FERC has interpreted the language in the Firm Transportation Agreements in a manner entirely consistent with this Policy Statement and cases decided thereunder. *See id.* P 9, JA 9. The purpose of the negotiated rates option is to allow shippers and pipelines to mutually agree to dispense with lengthy and expensive cost-of-service ratemaking. Negotiated Rates Policy Statement, 74 FERC at 61,224-25. Accordingly, the Commission has emphasized that:

> [T]he Commission simply does not review the rate design of a negotiated rate. If a customer is willing to accept a rate design or rate form that the Commission would not impose on recourse customers as a group, that does not mean that under negotiated rates an individual customer cannot agree to it. However, in so agreeing, these negotiated rate customers also remove themselves from any protection the Commission may give customers under recourse rates.

Rehearing Order P 9, JA 9 (quoting *Columbia Gulf Transmission Co.*, 78 FERC ¶ 61,263 at 62,124 (1997)). *See also Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 849 n.4 (D.C. Cir. 2008) (recognizing that, under FERC policy, a pipeline may negotiate specific rates with individual shippers; the pipeline bears the risk of under-recovery of its costs and enjoys the possibility of rates higher than those from recourse shippers). If, as Iberdrola argues, "the intent of Alliance and its shippers was to have the negotiated rates subject to Commission review pursuant to [NGA § 4], that principle could have been incorporated in the open season precedent agreement or the subsequent firm transportation agreement." Rehearing Order P 12, JA 11.

B. Iberdrola's Arguments To The Contrary Are Not Persuasive.

(1) Iberdrola's Argument That No Rational Party Would Choose The Negotiated Rate

Iberdrola argues (Br. at 22-24) that the Commission's interpretation of the negotiated rate agreement is "fundamentally unreasonable" because no rational customer would choose a rate that could be changed "unilaterally" and "without justification, limitation, or any FERC review and approval." Instead, Iberdrola contends (Br. at 23), the parties to the contracts intended that the fixed cost elements would not be subject to review, but that for the unfixed cost elements, full-blown NGA § 4 review would be required.

Iberdrola's argument fails for several reasons. First, as the challenged orders find, the relevant contract language, related documents, and events demonstrate that, regardless of Iberdrola's view of the wisdom embodied in the negotiated rate agreement, Alliance's negotiated rates are not, in fact, subject to full-blown, cost-of-service NGA § 4 review by the Commission. *See* discussion *supra* at 13-17; Rehearing Order P 8, 12, JA 8, 10-11.

Second, sophisticated parties routinely enter into agreements that appear unwise in hindsight but which parties believing themselves injured may not routinely modify. *See*, *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 128 S. Ct. 2733, 2746 (2008) (contracting parties are often sophisticated businesses; contract rate is unjust and unreasonable only if it seriously harms the public). Iberdrola may have "buyer's remorse," *see id*. 128 S.Ct. at 2743, now that the negotiated rate is (for the first time) higher than the recourse rate, but that merely puts Iberdrola in the same position as other entities that have come to regret the contracts they have agreed to. In any case, there is no evidence that shippers struck a bad bargain here; the rate agreements were in their seventh year before a rate increase engendered a protest. *See* Rehearing Order P 14 & n.21, JA 13 (noting that previous annual cost adjustments resulted in either a rate decrease or a rate increase averaging (for the

years 2003-2007) 2.5 percent; "the proposed increase for 2008 over 2007 is less than 6 percent").

Finally, Ibedrola's claim (Br. at 23) that FERC's interpretation permits Alliance to change its rates "without justification, limitation or any FERC review" is simply wrong. Significant cost elements, including rate of return and capital costs, are fixed, *see* discussion *supra* at 6, and increases in variable cost elements are constrained by an audit and reconciliation process:

> [T]he idea that Alliance has the ability to charge excess rates with unfettered discretion was rebutted in Alliance's December 17, 2007 answer to PPM's original protest. Alliance stated that "[t]he Rate Principles effectively constrain Alliance's current negotiated rates to the cost of service elements identified therein and regularly recurring, post-audit procedures guarantee that cost estimates, however imprecise when made, will ultimately be reconciled with actual cost experience."

Rehearing Order P 14, JA 13. Moreover, if Iberdrola continues to object to Alliance's negotiated rates, it can follow procedures set forth in the tariff or file an NGA § 5 complaint with the Commission. *Id*. P 15, JA 13. Iberdrola can presumably also seek appropriate contract remedies in the courts. *See City of Glendale, California v. Portland General Electric Co.*, 113 FERC ¶ 61,285 (2005), *reh'g denied*, 115 FERC ¶ 61,231 (2006) (Commission and courts have concurrent jurisdiction over suits for enforcement of an existing FERC-jurisdictional contract).

(2) Iberdrola's Argument That The Commission Misconstrued Its Prior Orders Requiring Removal Of The Rate Formula From The Tariff

Iberdrola argues (Br. at 40-41) that the challenged orders erred in concluding that the Preliminary Determination directive to remove the Rate Formula from the tariff meant that the Rate Formula rate review language was no longer operative. Iberdrola contends that the Preliminary Determination relied on *NorAm Gas Transmission Co.*, 75 FERC ¶ 61,322 (1996), for the proposition that if a tariff sheet states a specific numeric rate, it is not required also to state the formula for determining the rate. Thus, argues Iberdrola, the Commission intended only a procedural, not a substantive change, in the parties' agreements.

Iberdrola's argument is without merit. Initially, "it is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 871 (D.C. Cir. 1991) (citations omitted). Here, the Preliminary Determination did not, in fact, cite *NorAm* (or any other case) when it ordered the Rate Formula removed from the tariff. *See* Preliminary Determination, 80 FERC at 61,599. More importantly, the Preliminary Determination also stated that the Commission was "not reviewing the level of Alliance's negotiated rates nor the method by which they were calculated." *Id.* at 61,597. Accordingly, the Firm Transportation Agreements reflect not just the directive that the Rate Formula be

removed from the tariff (as Iberdrola seems to suggest), but also the directive that the Commission would not review the negotiated rates.

(3) Iberdrola's Argument That Prior FERC Orders Acknowledge The Rate Approval Requirement

Iberdrola also asserts (Br. at 36-37) that prior Commission orders acknowledge that approval of Alliance's rate adjustments is required. Iberdrola's predecessor did not raise this argument on rehearing as required by NGA § 19(b), 15 U.S.C. § 717r(b). Consequently, the issue is jurisdictionally barred. *See*, *e.g*., *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D.C. Cir. 1992) (construing same language in Federal Power Act and finding that "[n]either FERC nor this court has authority to waive these statutory requirements").

In any case, Iberdrola ignores the fact that the prior orders it refers to are citing Alliance's certificate application for the "as approved by the Commission" language. This language, while included in the proposed *pro forma* tariff, was struck by the Certification Orders, and never appeared in either the Open Season Precedent Agreement or the Firm Transportation Agreement. *See* discussion *supra* at 6-8; Rehearing Order P 8, JA 8. Thus, there is no contradiction among the relevant FERC orders.

(4) Iberdrola's Argument That Remand, At A Minimum, Is Required

Iberdrola contends that "at a minimum," remand is required so that the Commission can "correct the plainly erroneous holding" that the Firm Transportation Agreements "unambiguously" permit rate changes without FERC review. *See* Br. at 42, citing *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991), for the proposition that "if FERC's decision turns on the erroneous assertion that the plain language of the agreement is unambiguous, the Court must remand the matter." However, FERC's determination that the Agreements do not require FERC review of updates to the negotiated rate did not turn on a finding that the language in the Firm Transportation Agreement was unambiguous. Rather, the Commission considered the language of the Firm Transportation Agreement in the context of the Open Season Precedent Agreement, the *pro forma* tariff, the Certification Orders, the shippers' acceptance of the Certification Orders' statement that FERC would not review negotiated rates, and the Negotiated Rates Policy Statement. *See* Initial Order P 9, JA 4-5; Rehearing Order P 8, 12, JA 8, 10-11.

Iberdrola's contention (Br. at 43-44) that the Firm Transportation Agreements are ambiguous because they do not "define a process" for cost updating misses the point. The Commission's policy, stated in the challenged orders, the Certification Orders, the Negotiated Rates Policy Statement, and

elsewhere, is that the costs underlying negotiated rates are not reviewed. As the Commission found, the Firm Transportation Agreements reflect this policy. Rehearing Order P 12, JA 10-11. The options of Alliance's shippers, if dissatisfied with the Agreement language, were to try to negotiate other language or to choose the recourse rate. In any case, as the Commission found, the iterative process used by Alliance to forecast and then reconcile its projected and actual cost changes assures that Alliance's operating costs are properly reflected in its negotiated rates. *Id.* P 11, JA 10; *see also* discussion *supra* at 19 (discussing remedies available to Iberdrola).

III. ALLIANCE'S EXISTING TARIFF AND FIRM TRANSPORTATION AGREEMENTS ARE BEYOND THE SCOPE OF THIS CASE AND, IN ANY EVENT, ARE LAWFUL.

A. Iberdrola's Arguments Challenging The Lawfulness Of The Firm Transportation Agreement Constitute An Impermissible Collateral Attack On The Commission's Earlier Certification Orders.

To the extent Iberdrola now challenges the lawfulness of the Firm Transportation Agreements, Iberdrola is making an untimely collateral attack on the Certification Orders which declared that the Commission would not review periodic cost adjustments to Alliance's negotiated rates, and for which the 60-day period for petitioning for review expired years ago. *See* NGA §19(b), 15 U.S.C. §717r(b); *Pacific Gas and Electric Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (this Court has "repeatedly held that the sixty-day limitations period is

jurisdictional");[2] *Sacramento Municipal Utility District v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005) (citing *City of Nephi v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998)). In other words, it is now far too late, especially in response to a routine periodic cost adjustment, for Iberdrola to challenge findings made in 1997 and 1998 authorizing Alliance and its shippers to use streamlined procedures that do not examine costs in the same manner applicable to cost-based recourse rates. *See Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir. 1993) (if petitioner's argument were accepted, prior final order "would be a dead letter;" obvious "that petitioner has brought an impermissible collateral attack").

In any case, as now demonstrated, Iberdrola's arguments lack merit.

B. The Rate Principles In The Firm Transportation Agreements Are Lawful.

Iberdrola asserts (Br. at 37) that the challenged orders "cannot be upheld because FERC has failed to provide any assurance that Alliance's contract rates will remain just and reasonable." Iberdrola, however, has a fundamental misunderstanding of the Commission's negotiated rates policy. As discussed *supra* at 4-5, the purpose of the policy is to provide a flexible, streamlined

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[2] *Pacific Gas and Electric* involved the Federal Power Act, but courts have applied interpretations of provisions of the Federal Power Act to their counterparts in the Natural Gas Act because "the relevant provisions of the two statutes are in all material respects substantially identical." *Arkansas Louisiana Gas v. Hall*, 453 U.S. 571, 577 n. 7 (1981).

ratemaking methodology as an alternative to lengthy cost-of-service ratemaking in situations where the shipper is assured of a reasonable rate because of the recourse rate option. *See* Rehearing Order P 14, JA 12-13; *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 54 (D.C. 2002) (non-captive shippers, "who have alternatives in the marketplace, as typically evidenced by their ability to negotiate discounts below the 'just and reasonable' rate, do not need this type of regulatory protection").

Here Iberdrola's predecessor had access to cost-of-service ratemaking (including full cost-of-service review of rate changes), but opted instead for streamlined ratemaking under the terms set forth in the Rate Principles. Rehearing Order P 14, JA 13. Iberdrola's predecessor thus received the benefits of fixed cost elements and avoidance of protracted, expensive cost-of-service rate proceedings, but accepted the risk that non-fixed operating costs would increase. In accordance with the Negotiated Rates Policy Statement, the Commission did not second-guess the choice made by Iberdrola's predecessor or Alliance's other shippers. Rehearing Order P 9, JA 9.

Iberdrola's contention (Br. at 37-38) that FERC must assure that Alliance's contract rates remain reasonable years into the terms of the contract would be off the mark even in the absence of the Negotiated Rates Policy Statement. *See*, *e.g.*, *Morgan Stanley*, 128 S. Ct. at 2739 ("[t]he regulatory system created by the

[analogous Federal Power Act] is premised on contractual agreements devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity") [citations omitted]. A public utility may "agree by a contract to a rate affording less than a fair return." *Id*. Moreover, if circumstances should change so that the rate becomes temporarily unfavorable as to one of the parties, that party has no recourse unless the contract so provides. *Id.*; *see* Rehearing Order P 9, JA 9 (reiterating that pipeline customer is free to accept a rate design for a negotiated rate that the Commission would not impose on recourse customers as a group). As discussed more fully *supra* at 18, Iberdrola's "buyer's remorse" simply puts it in the same position as other entities regretting the contracts they have agreed to.

C. The Level Of Specificity In The Rate Principles Is Sufficient.

Iberdrola contends (Br. at 26-27) that "the level of specificity in the rate principles is insufficient, as a matter of law, to permit Alliance to change the unfixed cost elements in customers' rates absent FERC approval under NGA § 4." Iberdrola states that under the NGA, agreements must set forth either a specific numeric rate or a formula rate that allows computation of the rate by plugging in known values, such as indices.

Iberdrola's contention, however, wrongly conflates the Rate Principles and the tariff. There is no need to be able to easily calculate the rate using a formula because the actual rates are stated on Alliance's tariff sheets:

> The difference between the two approaches is that when a pipeline states the actual negotiated rate it must file new tariff sheets each time the rate changes while a tariff sheet containing a negotiated rate formula need not be changed as long as the formula does not change. In either case, the [NGA § 4] requirement that rates be on file with the Commission is satisfied.

Rehearing Order P 10, 13, JA 10, 11. FERC's analysis, moreover, accords with the premises underlying the negotiated rate policy. Because shippers have the recourse rate option, the Commission does not review the negotiated rate for reasonableness. However, other shippers are entitled to be able to determine whether they are similarly situated and entitled to the negotiated rate. Alliance's publication of the rate in its tariff provides the notice to the public required for this purpose. *See* Rehearing Order P 9, JA 9; Negotiated Rates Policy Statement, 74 FERC at 61,241-42.

The cases Iberdrola cites (Br. at 26-30) are not persuasive otherwise. They stand principally for the unremarkable propositions that: (1) rates must be filed; (2) either the rate itself or a formula can qualify as a filed rate; and (3) a formula must be specific enough to result in predictability. *See* cases cited by Iberdrola's brief at 27-28.

Iberdrola then cites additional cases for the proposition that an agreement

containing a non-specific formula lacks the specificity required for a filed rate. Br. at 28, citing *Sierra Pacific Power Co.*, 42 FERC ¶ 61,149 (1988) (agreements under which a power company bills its customer for certain expenses not specific enough; company must file actual charges); *Pennsylvania Power and Light Co*., 65 FERC ¶ 61,039 (1993) (supplemental agreements under which parties reimburse each other for "actual cost" of work on interconnection facilities not specific enough to satisfy filed rate requirement); *Southern Co. Services*, 112 FERC ¶ 61,145, P 38 (2005) (Interconnection Agreements, when combined with Informational Filing containing cost methodology, sufficiently detailed to constitute filed rate). These cases are inapposite, however. Alliance filed the actual rate in the cost update at issue here. Consequently, the NGA § 4 "requirement that rates be on file with the Commission is satisfied." Rehearing Order P 10, JA 9-10.

CONCLUSION

Iberdrola's attempts here to turn a routine annual update to a negotiated rate into an investigation of the lawfulness of a negotiated agreement its predecessor entered into years ago should be rejected. The Firm Transportation Agreement executed by Iberdrola's predecessor lacks any language requiring Commission cost review of rate updates, and the course of dealings among the parties and the Commission demonstrate that the parties knew (or should have known) that the

Commission would not engage in such review of negotiated rates. Moreover, there is nothing unfair or unlawful about this. The shippers had the recourse rate option if they desired cost-of-service ratemaking protection, and in choosing the negotiated rate option they received the benefits of certainty for the fixed cost elements and of eliminating lengthy cost-of-service proceedings. If Iberdrola believes that Alliance's cost increases do not accord with the Agreement, Iberdrola has other remedies including (presumably) a breach of contract action.

Accordingly, for the reasons stated, the Iberdrola petition for review, to the extent not dismissed as an untimely collateral attack on long-final FERC orders, should be denied on the merits, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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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 6,353 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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