ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 09-1204

APACHE 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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MAY 27, 2010
FINAL BRIEF: JULY 16, 2010

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order Issuing Certificates, *Midcontinent Express Pipeline LLC, et al.*, FERC Docket Nos. CP08-6, *et al.*, 124 FERC ¶ 61,089 (July 25, 2008) ("Certificate Order"), R. 229, JA 1; and

2. Order Denying Rehearing and Granting Clarification, *Midcontinent Express Pipeline LLC, et al.*, FERC Docket Nos. CP08-6, *et al.*, 127 FERC ¶ 61,164 (May 21, 2009) ("Rehearing Order"), R. 520, JA 70.

C. Related Cases

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

s/ Carol J. Banta
Carol J. Banta
Attorney

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

REGULATIONS:

TABLE OF AUTHORITIES

REGULATIONS (continued): **PAGE**

GLOSSARY

Apache	Petitioner Apache Corporation
Certificate Order	Order Issuing Certificates, *Midcontinent Express Pipeline LLC*, *et al.*, FERC Docket Nos. CP08-6, *et al.*, 124 FERC ¶ 61,089 (July 25, 2008), R. 229, JA 1
Commission or FERC	Federal Energy Regulatory Commission
Enogex	Intervenor Enogex Inc.
FERC Orders	Collectively, the Certificate Order and the Rehearing Order
Midcontinent	Intervenor Midcontinent Express Pipeline LLC
NGA	Natural Gas Act
NGPA	Natural Gas Policy Act of 1978
Order No. 436	*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (1985) (subsequent history omitted – *see* note 2, *infra*)
Rehearing Order	Order Denying Rehearing and Granting Clarification, *Midcontinent Express Pipeline LLC*, *et al.*, FERC Docket Nos. CP08-6, *et al.*, 127 FERC ¶ 61,164 (May 21, 2009), R. 520, JA 70

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably approved a proposed lease of pipeline capacity by a natural gas pipeline operator that offers FERC-jurisdictional transportation service to its own customers only on an interruptible basis, over the objections of a shipper that the lease was unduly discriminatory and would adversely affect interruptible customers.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns a dispute between an interruptible shipper and an intrastate pipeline that has chosen not to offer firm service — and that, under FERC regulations, is not compelled to do so — arising from the pipeline's agreement to lease capacity on its system to an interstate open-access pipeline. In opposing that lease, the shipper seeks to obtain indirectly (as a condition of the lease) what the Commission has long declined to require: mandatory provision of firm service.

Intervenor Enogex Inc. ("Enogex") operates an intrastate natural gas pipeline system in Oklahoma. Enogex offers FERC-jurisdictional transportation service under Section 311 of the Natural Gas Policy Act of 1978 ("NGPA"), but only on an interruptible basis. Petitioner Apache Corporation ("Apache") is a shipper on Enogex's system receiving interruptible service. In the underlying FERC proceeding, the Commission granted Enogex certificate authority to lease capacity on its system to Intervenor Midcontinent Express Pipeline LLC ("Midcontinent"), an interstate pipeline subject to the Natural Gas Act that will use

the capacity to provide firm and interruptible service under its own FERC-jurisdictional open-access tariff.

Apache contends that the capacity lease is discriminatory because it is effectively equivalent to the firm service that Enogex does not offer to its own shippers, and that the dedication of capacity to the lease will harm existing interruptible customers. The Commission disagreed, finding that a capacity lessee is not similarly situated to interruptible shippers, and further explaining that any potential reduction in available capacity is inherent to the nature of interruptible service. Nevertheless, the Commission went on to find, based on predictive system modeling, that the lease would not adversely affect existing shippers. *Midcontinent Express Pipeline LLC, et al.*, 124 FERC ¶ 61,089 (July 25, 2008) ("Certificate Order"), R. 229, JA 1, *reh'g denied*, 127 FERC ¶ 61,164 (May 21, 2009) ("Rehearing Order"), R. 520, JA 70.[1] On appeal, Apache not only contests the Commission's findings regarding discrimination and harm to shippers, but further contends that the Commission should have adopted a policy of requiring intrastate pipelines like Enogex, as a condition for leasing capacity, to offer firm transportation service.

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The Natural Gas Act ("NGA") confers upon the Commission jurisdiction to regulate (1) the transportation and sale for resale "of natural gas in interstate commerce" and (2) "natural-gas companies engaged in such transportation or sale." NGA § 1(b), 15 U.S.C. § 717(b). Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), the Commission has authority to approve construction or expansion of an interstate natural gas pipeline. *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 319 (D.C. Cir. 2003) ("Any pipeline seeking to build or to expand its facilities must first apply for a certificate of public convenience and necessity from FERC."); *see also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (FERC is the guardian of the public interest and has a wide range of discretionary authority in determining whether certificates shall be granted).

The Commission views a lease of pipeline capacity as an acquisition of a property interest in the capacity, requiring NGA § 7 certificate authorization. *See, e.g., Islander E. Pipeline Co.*, 100 FERC ¶ 61,276 at P 69 (2002). Leases often are used in conjunction with new pipeline facilities to avoid the need for duplicative construction, and the Commission encourages the use of leases to reduce the need to exercise eminent domain to acquire new rights-of-way. *Id.* "The Commission's

policy is to approve a lease if it finds that: (1) there are benefits for using a lease arrangement; (2) the rate under the lease is less than comparable transportation service; and (3) the lease arrangement does not adversely affect existing customers." *Id.*

B. Natural Gas Policy Act of 1978

In 1978, Congress enacted the Natural Gas Policy Act, "in part to eliminate the regulatory barriers between the intrastate and interstate markets and to promote the entry of intrastate pipelines into the interstate market." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 898 (D.C. Cir. 1995). In particular, NGPA § 311, 15 U.S.C. § 3371, empowered the Commission to authorize intrastate pipelines to transport natural gas on behalf of interstate pipelines without themselves becoming interstate pipelines under the NGA. *See* NGPA § 301(a)(2)(A)(ii), 15 U.S.C. § 3431(a)(2)(A)(ii) (excluding transportation under NGPA § 311 from NGA provisions and FERC's NGA jurisdiction); *see also ANR*, 71 F.3d at 898 (NGPA "enabled FERC to facilitate[] development of a national natural gas transportation network without subjecting intrastate pipelines, already regulated by State agencies, to [FERC] regulation over the entirety of their operations") (internal quotation marks and citation omitted); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1003 (D.C. Cir. 1987) (noting that NGPA § 311 service is not subject to NGA's certification, reporting, and accounting requirements). The Commission

promulgated regulations implementing NGPA § 311, including rate filing and reporting requirements for § 311 transportation. *See* 18 C.F.R. §§ 284.121, *et seq.*

C. Order No. 436

In 1985, the Commission issued its landmark Order No. 436,[2] which ordered the unbundling of natural gas transportation from sales. *See generally Associated Gas Distribs.*, 824 F.2d at 993 (describing purpose and significance of Order No. 436). Among the Order's key elements was the requirement that pipelines provide nondiscriminatory access to transportation, without "undue discrimination or preference" in: the quality or duration of service; categories, prices, or volumes of gas transported; and customer classification. Order No. 436 at p. 31,498.

For interstate pipelines, the Commission grounded that requirement in its authority under NGA § 7(e), 15 U.S.C. § 717f(e), to attach conditions to certificates, as well as the prohibition of undue discrimination in NGA §§ 4 and 5. Order No. 436 at pp. 31,499-500. As to intrastate pipelines providing transportation on behalf of interstate pipelines, the Commission found "sufficient authority [in NGPA § 311] to require a comparable condition . . . ." *Id.* at

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[2] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (1985), *on reh'g*, Order No. 436-A, FERC Stats. & Regs., Regs. Preambles ¶ 30,675 (1985), *on reh'g*, Order No. 436-B, FERC Stats. & Regs., Regs. Preambles ¶ 30,688, Order No. 436-C, 34 FERC ¶ 61,404, Order No. 436-D, 34 FERC ¶ 61,405, *and* Order No. 436-E, 34 FERC ¶ 61,403 (1986), *aff'd in part and vacated and remanded in part sub nom. Associated Gas Distribs.*, 824 F.2d 981.

p. 31,501. Responding to concerns raised by intrastate pipelines in the rulemaking, the Commission changed its final rule to make clear that "there is no requirement that intrastate pipelines under section 311 provide transportation service on a firm basis." *Id.* at p. 31,502. The Commission explained that, by choosing not to require firm service under § 311, the final rule "completely avoids the situation whereby an intrastate pipeline is required to offer firm service for out-of-state shippers, thus, progressively being turned into an interstate pipeline against its will and against the will of the responsible state authorities." *Id.*

Further, in explaining why it would require interstate pipelines to offer both firm and interruptible service under the NGA, the Commission justified its decision not to impose a similar mandate on intrastate pipelines under NGPA § 311:

> [B]ecause transportation services offered by intrastate pipelines under section 311 of the NGPA are often by business nature and state regulation required to be interruptible and subject to the priority of the pipeline's strictly intrastate services and operations, the Commission has determined to not impose any quality of service requirement on intrastate pipelines under this rule. . . . Thus, intrastate pipelines under the final rule are expressly free to choose whether or not to offer firm transportation, interruptible transportation, or both.

Order No. 436 at p. 31,514.

Accordingly, the regulations promulgated in Order No. 436 provide that an intrastate pipeline providing service on behalf of an interstate pipeline under NGPA § 311 "may offer" such service on a firm and/or interruptible basis (18

C.F.R. §§ 284.7(a)(2), 284.9(a)(2)) — in contrast to an interstate pipeline under the NGA, which "must offer" both firm and interruptible service (18 C.F.R. §§ 284.7(a)(1), 284.9(a)(1)). *See also Associated Gas Distribs.*, 824 F.2d at 1003 ("Intrastate pipelines may provide firm *or* interruptible service without providing both, while interstate pipelines providing one type must also provide the other.") (emphasis in original). In either case, a pipeline that offers either kind of service must do so without undue discrimination or preference, "including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind." 18 C.F.R. §§ 284.7(b)(1) (applying to firm service); *see also* 18 C.F.R. § 284.9(b) (applying to interruptible service).

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Orders On Review

1. Certificate Order

In October 2007, Midcontinent filed an application under NGA § 7(c) for authorization to construct and operate a new interstate pipeline. In connection with that project, Midcontinent also requested certificate authorization to lease capacity on the intrastate pipeline system that Enogex operates in Oklahoma. Enogex, in turn, requested a limited-jurisdiction certificate to enable it to lease capacity on its system to Midcontinent, without its facilities and otherwise non-jurisdictional

activities becoming FERC-jurisdictional. *See* Certificate Order at PP 1, 8, JA 1, 4. Apache, among others, protested approval of the lease, contending that the dedication of firm capacity to the lease likely would cause interruptible service to be curtailed, and that it was discriminatory to allow Midcontinent to lease capacity when existing shippers could only buy interruptible service. *See* Motion of Apache Corporation for Leave to Intervene, Consolidation And Protest at 5-6 (filed Nov. 13, 2007) ("Apache Protest"), R. 32, JA 87.

On July 25, 2008, the Commission issued the Order Issuing Certificates, *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008) ("Certificate Order"), R. 229, JA 1. The Commission granted certificate authority for Midcontinent's construction and operation of new pipeline capacity and for its lease from Enogex, and approved Midcontinent's initial rates and tariff offering both firm and interruptible open-access transportation services. *Id.* at Ordering Paras. (A), (C)-(J), JA 56, 57-58. The Commission also granted a limited-jurisdiction certificate of public convenience and necessity to Enogex to lease capacity on its system to Midcontinent and to operate the leased capacity subject to the terms of the lease and subject to Midcontinent's open-access tariff. *Id.* at Ordering Para. (B), JA 56.

The Commission found that the proposed lease of capacity met the Commission's requirements for leases (*see supra* p. 5). Certificate Order at PP 31-

37 (discussing benefits of lease and amount of lease payments), JA 11-14; *see also id.* at P 64 (concluding that, based on benefits and lack of adverse effect, public convenience and necessity required approval), JA 23. The Commission gave particular consideration to the effect on existing customers, concluding that the lease arrangement "will not have an unduly adverse impact on Enogex's existing services[,]" because engineering information demonstrated that the system could accommodate the capacity commitment under the lease and because Enogex would continue to provide interruptible § 311 service — which by definition is subject to change. *Id.* at P 43, JA 15-16.

The Commission further concluded that the lease was not discriminatory. First, because a lease is an acquisition of a property interest and is only available to a natural gas company under the NGA, lessees are not similarly situated to shippers. *Id.* at P 51, JA 18-19. Second, Enogex would not be providing firm service over the leased capacity (Midcontinent would), so it was not discriminating in electing not to provide firm service under § 311. *Id.* Addressing further objections to the lease raised by Apache and other Enogex shippers, the Commission determined that purchasing firm service on Midcontinent's capacity would not constitute "rate stacking" and that the lease could be approved without establishing a defined path between specified receipt and delivery points. *Id.* at PP 53-63, 136-37, JA 19-23, 46-47.

The Commission also denied Apache's motion requesting a consolidated hearing (combining the certificate proceeding with Enogex's § 311 rate proceeding) or an evidentiary hearing. *Id.* at PP 22, 27-28, Ordering Para. (L), JA 8, 10-11, 58.

2. Rehearing Order

Apache filed a timely request for rehearing ("Rehearing Request"). R. 248, JA 204. (In addition, Midcontinent filed a request for clarification concerning matters not at issue on appeal. R. 249.) On May 21, 2009, the Commission issued the Order Denying Rehearing and Granting Clarification, *Midcontinent Express Pipeline LLC*, 127 FERC ¶ 61,164 (2009) ("Rehearing Order"), R. 520, JA 70, ruling that the capacity lease was not unduly discriminatory, anticompetitive, or violative of open-access.

The Commission again explained that it does not view lessees as similarly situated to interstate shippers; the Commission further found, responding to Apache's argument on rehearing, that shippers buying NGA firm service (from Midcontinent) are not similarly situated to shippers buying interruptible service under NGPA § 311 (from Enogex). Rehearing Order at P 12, JA 75-76. "Apache's claim . . . ignores substantial differences between the character and quality of the services the two sets of shippers are each purchasing." *Id.* (explaining that Midcontinent's shippers are buying firm service under NGA § 7(c)

and subject to Midcontinent's open-access tariff, whereas Enogex's shippers are buying interruptible service under NGPA § 311). The Commission also declined to require Enogex to offer firm § 311 service as a condition of approving the lease. *Id.* at PP 17-19, JA 78-79. The Commission reemphasized that any adverse effect on Enogex's interruptible shippers would be "a consequence inherent to the nature of interruptible service." *Id.* at P 18 & n.30 (internal quotation marks and citation omitted), JA 78.

The Commission also went on to reaffirm its finding that existing shippers would not be harmed by the lease. *Id.* at P 26, JA 82. The Commission explained that it had considered not only Enogex's evidence but also Apache's rebuttal filings. The Commission found the methodology used by Enogex, in modeling its system and future operations under the lease, to be appropriate, relevant, and sufficient for the Commission to determine the impact of the lease. *Id.* at PP 23-24, 29, JA 80-81, 83. The Commission again denied Apache's request for an evidentiary hearing, finding that the paper record provided sufficient evidence for the Commission to resolve the issues presented. *Id.* at P 29, JA 83.

This petition followed.

B. Related Proceedings

1. 2001 Rate Proceeding: Priority For Dedicated Gas

Apache's arguments in the instant case depend in part on orders the Commission issued in an earlier, separate rate proceeding. *See* Br. 13-15, 28, 41 n.8. In 2001, Enogex filed a petition for rate approval under NGPA § 311 in connection with a merger of two affiliated intrastate pipelines in Oklahoma.[3] The rate filing was resolved by a settlement that the Commission accepted. *See Enogex, Inc.*, 103 FERC ¶ 61,161 at P 1 (2003). At the same time, Enogex filed revisions to its Statement of Operating Conditions, under which Enogex afforded different priorities of service among interruptible shippers. *See id.* at PP 1, 19. In particular, Enogex gave the second highest priority of service, after firm intrastate (non-§ 311) gas, to interruptible shippers — including Apache — who had committed their entire output to be transported by Enogex. *Id.* at P 19; *cf.* Br. 28 (characterizing priority as "interruptible-plus"). The Commission found that priority procedure to be unduly discriminatory, as interruptible customers who did not dedicate their output to Enogex would receive an inferior priority. 103 FERC ¶ 61,161 at P 20. Accordingly, the Commission directed Enogex to eliminate the preference, so interruptible capacity would be allocated based on price. *Id.*

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[3] Rates for transportation services under NGPA § 311 are subject to FERC approval, though under a different "fair and equitable" standard rather than the "just and reasonable" standard under the NGA. 15 U.S.C § 3371(a)(1)(B), (a)(2)(B)(i); *ANR*, 71 F.3d at 903.

On rehearing, the Commission further explained that the priority for dedicated gas was contrary to the goal of fostering a competitive, national market for buyers and sellers freely to transact efficient deals. *Enogex, Inc.*, 106 FERC ¶ 61,093 at PP 12-13 (2004). Such a priority "would create a strong incentive for producers to dedicate their reserves to be shipped over a particular pipeline and thus to the market served by that pipeline"; that incentive "could hinder the ability of buyers to reach the lowest-priced producer, as well as discourage producers from retaining the right to reach all potential buyers." *Id.* at P 13. The Commission also affirmed its finding that the priority was unduly discriminatory:

> Commission policy requires that within a class of customers, the quality of service must be the same. Enogex is free to propose a higher quality of service than interruptible [— *i.e.*, firm —] but it should be available to all customers equally. In the meantime, customers desiring a higher quality of service can attain it by offering Enogex a higher transportation rate.

Id. at P 14; *see also id.* ("allocation based on dedicated gas is not consistent with Commission policy and has not been approved in any other case").

Neither Apache nor any other party sought judicial review of those orders. Ultimately, all issues in the rate proceeding, including the Statement of Operating Conditions, were resolved by an uncontested settlement. *See Enogex, Inc.*, 112 FERC ¶ 61,312 (2005) (accepting settlement); *id.* at P 5 (noting that Apache filed comments in support of settlement).

2. 2007 Rate Proceeding (Ongoing)

In October 2007, Enogex filed new rates for interruptible service for Commission approval under NGPA § 311. Enogex's rate filing remains pending before the Commission in that docket. FERC Docket No. PR08-1.

That rate proceeding is notable only because the Commission, in the FERC Orders challenged on appeal, denied Apache's request to consolidate the § 311 rate proceeding with the certificate proceeding. Certificate Order at PP 20, 22, 27, JA 7-8, 10-11; *see id.* P 27 n.24 ("We note that Apache's assertion that there is a common issue [of] fact, *i.e.*, undue discrimination, hinges on its claim that Enogex should be required to offer firm section 311 service . . . ."), JA 11. On rehearing, the Commission noted that Apache's discrimination argument was based on the fact that Midcontinent's lease payments to Enogex would be less than Enogex's current rates, and that Enogex had (in PR08-1) proposed an increase in its interruptible rates. Rehearing Order at P 14, JA 76. The Commission, though it found the relationship between the lease payments and the interruptible rates irrelevant, also determined that issues concerning Enogex's § 311 rates were "best addressed" in a rate proceeding. *Id.*, JA 77. Apache has not challenged that procedural ruling in this appeal.

SUMMARY OF ARGUMENT

By definition, interruptible service is contingent on the availability of pipeline capacity and subordinate to higher priority service. Petitioner Apache complains of being limited to purchasing interruptible service on Enogex's pipeline system, and seeks a more certain entitlement to service. From the inception of its open-access regime, however, the Commission has chosen not to require intrastate pipelines (in their limited role in providing FERC-jurisdictional transportation) to offer firm service, recognizing that such pipelines have their own state regulatory or business reasons for opting not to do so.

Against that backdrop, the Commission approved Enogex's lease of pipeline capacity to Midcontinent, over Apache's objections: (1) that it was discriminatory to sell firm capacity to another pipeline while refusing to offer firm service to Enogex's own shippers, and (2) that the lease commitment would adversely affect Enogex's customers by leaving less capacity available for interruptible service.

First, the Commission appropriately rejected Apache's claim that the lease was unduly discriminatory, holding that transportation customers are not similarly situated to pipeline lessees. Under FERC precedent, lease arrangements differ from transportation services in that a lessee actually acquires a property interest in the pipeline capacity; generally, only NGA-jurisdictional entities can obtain the necessary FERC authorization for such acquisitions.

Second, the Commission reasonably concluded that the Midcontinent lease would not harm existing shippers. The Commission determined, based on engineering information (using predictive methodologies that the Commission found appropriate), that the Enogex system could accommodate the Midcontinent lease and other capacity commitments. Because interruptible service is inherently subject to change, the Commission concluded that any potential future reduction in the availability of interruptible service under NGPA § 311 would not be an undue adverse effect. The Commission further determined that, in any event, the benefits of the lease, including access to firm service on Midcontinent's interstate pipeline system transporting gas from production areas to distant markets, outweighed any adverse effects on interruptible service.

Finally, the Commission declined, as a matter of policy, to require an NGPA intrastate pipeline (like Enogex) to offer firm service as a condition of leasing capacity. Having long held that intrastate pipelines are free to choose whether to offer firm service, the Commission decided that a new exception to that rule was not warranted under the circumstances presented here, where it had found neither discrimination nor undue harm caused by the lease.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission's policy assessments are owed "great deference." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). This Court also gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600-01 (D.C. Cir. 1997).

The Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522

F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord Consol. Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("we do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision"); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (same).

Moreover, where the Commission "decides between disputing expert witnesses . . . the court applies a particularly deferential standard of review." *Fla. Mun. Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (internal quotation marks and citations omitted). *See also Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (Commission's "conclusions on conflicting engineering and economic issues" must be upheld "so long as its judgment is

reasonable and based on the evidence") (citing *City of Cleveland v. FPC*, 525 F.2d 845, 849 n.36 (D.C. Cir. 1976)); *accord Fla. Gas*, 604 F.3d at 645.

II. THE COMMISSION REASONABLY CONCLUDED THAT THE LEASE WAS NOT DISCRIMINATORY

A. Apache Now Relies On A "Similarly Situated" Analysis That It Chose Not To Raise On Rehearing Before The Commission

To make a claim of undue discrimination, a party must show differential treatment between customers that are similarly situated. *See, e.g.*, *Sw. Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003); *"Complex" Consol. Edison Co. v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999). Apache's central argument on appeal is that Enogex's lease to Midcontinent is discriminatory as to Enogex's transportation customers.

In the proceeding below, however, the Commission's analysis of Apache's discrimination argument was complicated by Apache's inability to decide on the relevant "similarly situated" parties. Before the Commission, Apache tried out two distinct approaches. First, Apache suggested that it was similarly situated to Midcontinent, the lessee who, in Apache's view, was able to obtain (in effect) the firm interstate transportation service that shippers could not purchase from Enogex. *See, e.g.*, Apache Protest at 6, JA 92. The Commission addressed that argument in the Certificate Order, concluding that Enogex was not discriminating by leasing capacity while electing not to provide firm § 311 transportation service: "Lessees

[like Midcontinent] are not treated as shippers and the Commission does not consider them to be similarly situated to interstate shippers [like Apache] on the lessor's pipeline." Certificate Order at P 51, JA 18.

On rehearing, Apache changed its approach and argued that it was similarly situated to Midcontinent's shipper customers, who would be able to purchase firm interstate transportation (from Midcontinent) using the leased Enogex facilities — indeed, Apache *disavowed* its earlier comparison to the lessee. Rehearing Request at 9 ("The discrimination is not between Midcontinent the lessee, and the other Enogex shippers. The discrimination occurs between Midcontinent's shippers on Enogex and Enogex's shippers on Enogex."), JA 212. The Commission took note of this change in approach[4] and responded accordingly in the Rehearing Order; this time, the Commission concluded that Apache's comparison was "inapposite" and "ignore[d] substantial differences between the character and quality of the services the two sets of shippers are each purchasing." Rehearing Order at P 12, JA 75. "Accordingly, we do not find that Enogex's shippers using Enogex's capacity for NGPA section 311 interruptible service are similarly situated to Midcontinent's

[4] "On rehearing, Apache focuses its arguments not on the differences or similarities between the lessee, Midcontinent, and Enogex's shippers, but rather on those between Midcontinent's shippers on Enogex and Enogex's shippers on Enogex." Rehearing Order at P 12, JA 75. *See also id.* at P 10 & n.16 (noting switch from original argument in Apache Protest), JA 74.

shippers, for whom Midcontinent provides NGA section 7(c) firm service using leased capacity on Enogex." *Id.*

On appeal, Apache reverts to arguing that it is similarly situated to the lessee. *See* Br. 3 ("FERC found that, because Midcontinent is a pipeline and Apache is not, the two companies are not 'similarly situated.'"), 25-26 (comparing Enogex's dealings with Midcontinent to those with shippers), 27 ("discrimination between lessees and shippers"), 29 ("FERC's open-access rules must guard against discrimination 'among customer classes,' including lessees of capacity"), 32 ("discrimination between lessees and ordinary shippers"). (By contrast, Midcontinent's shippers now warrant only a few cursory references. *See* Br. 3, 25, 28.) Apache also takes the opportunity to elaborate upon that comparison, going well beyond the points and precedents it raised before the Commission. *See* Br. 27-36 (discussing Order No. 436, the earlier *Enogex* proceeding, and FERC lease cases).

Apache's choice to rely upon different grounds in its Rehearing Request precludes its revival of an earlier argument on appeal. *See* NGA § 19(b), 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission *in the application for rehearing* unless there is reasonable ground for failure so to do.") (emphasis added); *e.g.*, *Panhandle E. Pipe Line Co. v. FPC*, 324

U.S. 635, 645 (1945) (petitioner was precluded from raising objection on judicial review that was not raised on rehearing, despite having raised the objection earlier in the administrative proceeding); *cf. Domtar Me. Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003) (even where FERC agreed that two arguments were closely related, petitioner could not raise one on agency rehearing and the other on judicial review). That jurisdictional bar is well-established and strictly construed. *Cf. Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing substantially identical jurisdictional requirement in Federal Power Act); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same).

At a minimum, Apache's vacillation puts the Commission at a disadvantage on appeal. Though the Commission did address the original argument in the Certificate Order, Apache's shifting strategy deprived the agency of the opportunity to provide a more complete analysis of the lessee-shipper comparison on which Apache bases its appeal — including a response to Apache's principal argument that the Commission contravened its precedents or "reverse[d] course." Br. 30-36. In addition to being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission . . . to explain in its expert judgment why the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381

(D.C. Cir. 2005); *see also, e.g.*, *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny.").

B. The Commission Reasonably Determined That Shippers Were Not "Similarly Situated" To A Capacity Lessee

Apache contends on appeal that a lessee of pipeline capacity (like Midcontinent) is similarly situated to a shipper purchasing transportation (like Apache). The Commission, however, rejected that comparison. What Apache derides as the Commission's "empty formalisms" (Br. 27)[5] — to wit, the distinction between capacity leases and transportation (as well as that between firm and interruptible service, *see* Part B.2, *infra*) — are in fact substantive, and reasonable, distinctions. Moreover, they are distinctions that the Commission has consistently maintained.

1. Capacity Leases Are Distinct From Transportation Services

In the challenged orders, the Commission emphasized that capacity leases are distinct from transportation services:

> Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline. To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity.

[5] *See also* Br. 3 ("regulatory formalisms"), 21 ("arbitrary formalisms").

> Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.

Certificate Order at P 30 (internal footnotes omitted), JA 11; *accord id.* at P 51 ("Lessees are not treated as shippers and the Commission does not consider them to be similarly situated to interstate shippers on the lessor's pipeline."), JA 18; *see also* Rehearing Order at P 12 (same), JA 75. That distinction is consistent with FERC precedents. *See Tex. E. Transmission Corp.*, 94 FERC ¶ 61,139 at p. 61,530 (2001), *cited in* Certificate Order at P 30 n.25, JA 11; *Islander E. Pipeline Co.*, 100 FERC ¶ 61,276 at PP 69, 87-89 (2002), *cited in* Certificate Order at P 51 n.40, JA 18; *Tex. Gas Transmission, LLC*, 113 FERC ¶ 61,185 at P 10 (2005), *cited in* Certificate Order at P 30 n.26, JA 11; *Gulf S. Pipeline Co.*, 120 FERC ¶ 61,291 at P 35 (2007); *S. Natural Gas Co.*, 124 FERC ¶ 61,058 at P 41 (2008). Indeed, the Commission offered the same explanation in a similar order approving another lease on Enogex's system in *Gulf Crossing Pipeline Co.*, 123 FERC ¶ 61,100 at P 110 (2008).[6]

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[6] The Commission has, as Apache notes (Br. 26, 31-34), drawn some parallels between capacity leases and *firm* transportation services, though not in the context of compelling a lessor to offer a similar arrangement to shippers. *See, e.g.*, *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,030, at p. 61,757 (1997) (explaining concerns that lease payments could have adverse impact on firm transportation rate, because lease payments excluded certain fixed charges that might be subsidized by lessor's firm transportation customers), *cited in* Br. 26, 31-

The Commission has consistently held that, in determining whether a proposed lease is unduly discriminatory or preferential, the "similarly situated" parties to consider are potential lessees — that is, NGA-jurisdictional entities that can seek the requisite NGA § 7 certificate to acquire a property interest. Though Apache brushes off the significance of that qualification as a "formal distinction in customer identity" (*see* Br. 26), it is in fact a prerequisite for leasing pipeline capacity: "[T]he lease arrangement is a property interest that requires NGA section 7 certificate authorization. As such, this type of arrangement is only available to a natural gas company under the NGA." *Islander East*, 100 FERC ¶ 61,276 at P 89.[7] *See also Texas Eastern*, 94 FERC at p. 61,530 (holding requirement to file NGA § 7(c) application for approval of lease was not discriminatory because "the same requirement applies to anyone who seeks to acquire pipeline capacity through a lease arrangement"). Therefore, the Commission appropriately concluded that shippers such as Apache are not similarly situated to pipeline lessees such as Midcontinent, and differential treatment does not constitute undue discrimination.

32; *Dominion Transmission, Inc.*, 99 FERC ¶ 61,367 at PP 53, 76 (2002) (considering lessee's rights and rates as compared to firm transportation customers), *cited in* Br. 32.

[7] *Cf.* NGA § 2(6), 15 U.S.C. § 717a(6) ("'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.").

2. Firm Transportation Service Is Distinct From Interruptible Service

Apache likewise dismisses the difference between firm and interruptible service as a "formalism." Br. 22. But that distinction not only is entrenched in FERC precedent, it is in fact *definitional* — interruptible service is characterized by its contrast with (and subordination to) firm service. Whereas "[t]he essence of firm service is that it is not subject to a prior claim by another customer or another class of service" (Order No. 436 at p. 31,513; *accord* 18 C.F.R. § 284.7(a)(3)), "[s]ervice on an interruptible basis means that the capacity used to provide the service is subject to a prior claim by another customer or another class of service and receives a lower priority than such other classes of service." 18 C.F.R. § 284.9(a)(3). "Interruptible shippers do not have the same claim on a pipeline's services as firm shippers." Rehearing Order at P 18, JA 79. *See also Hadson Gas Sys., Inc. v. FERC*, 877 F.2d 66, 69 (D.C. Cir. 1989) ("A contract for firm service guarantees that a certain capacity will be available to the shipper at a certain time. An interruptible service contract, in contrast, does not guarantee fixed capacity at a set time, but ensures only that transportation will be provided 'as available,' subject to firm service contracts.").[8]

[8] The firm/interruptible dichotomy also has long applied in contexts other than natural gas transportation, such as natural gas sales and electricity transmission. *See, e.g., Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1309 n.5 (D.C. Cir. 1991) ("'Firm' sales service is provided under rate schedules or

By definition, "[i]t goes without saying that firm service has priority over interruptible service." *ANR Pipeline Co.*, 41 FERC ¶ 63,017, at p. 65,102 (1987).[9] Accordingly, "[t]he relative status of interruptible service is always a function of what firm services are available." Rehearing Order at P 18, JA 79; *accord Columbia Gas Transmission Corp.*, 55 FERC ¶ 61,366 at p. 62,114 (1991). That substantive difference is precisely the reason that Apache is dissatisfied with the interruptible service available under Enogex's NGPA § 311 tariff. Were the distinction meaningless, Apache would have no reason to seek a mandate of firm service.

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contracts that expressly obligate the gas company to deliver specific volumes of gas within a given time period. . . . Firm service differs from 'interruptible' service which provides gas on a 'when available' basis and may be interrupted after notice to the subscriber.") (citations omitted); *Fort Pierce Util. Auth. v. FERC*, 730 F.2d 778, 785-86 (D.C. Cir. 1984) ("Electric utilities often distinguish between 'firm' service, under which customers can demand power or transmission at any time, and 'interruptible' service, which the utility is entitled to shut off at any point when there is not enough excess capacity beyond that required to guarantee the needs of the utility's firm customers."), *quoted in La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 895-96 (D.C. Cir. 1999).

[9] In *ANR*, a FERC administrative law judge invalidated, as unduly discriminatory, a tariff that proposed to subdivide interruptible service into nine different priority classes. 41 FERC at 65,102 ("All interruptible services, both sales and transportation, should be given equal priority, on a first-come, first-served basis."), *cited in* Br. 29. But the discrimination was only among interruptible services; here, the priority status of firm service over interruptible service is unquestioned.

III. THE COMMISSION REASONABLY DETERMINED THAT EXISTING SHIPPERS WOULD NOT BE UNDULY HARMED AS A RESULT OF THE LEASE

The Commission also addressed Apache's claim that the capacity lease would adversely affect existing customers of Enogex. *See* Br. 38-39. The Commission found that the lease arrangement would not have an unduly adverse impact on existing services, and that the benefits of the lease outweighed any possible changes in service to Enogex's interruptible shippers. Certificate Order at P 43, JA 15-16. In particular, the Commission found that "Enogex will continue to provide interruptible section 311 transportation service, with the same rights as that service holds today . . . ." *Id.* Nevertheless, even if the amount of capacity available for interruptible service were to change in the future, interruptible service is, "by definition," subject to such change. *Id.*

A. The Commission Reasonably Determined That The Lease Would Not Adversely Affect Enogex's Existing Services

1. The Commission's Finding Was Supported By Substantial Record Evidence

Under the lease, Midcontinent would acquire an interest in 272,000 Dth/d[10] of capacity on Enogex's system (reduced from 275,334 Dth/d under an earlier version, which itself was reduced from Midcontinent and Enogex's original request for authorization to increase the lease capacity up to 800,000 Dth/d during the first

[10] Dth/d = Dekatherms per day.

five years of the ten-year lease). Certificate Order at P 9 & n.7, JA 4. The lease provides for receipts up to various specified volumes at three receipt points in Oklahoma and for delivery to a single delivery point at the interconnection of the Enogex system with Midcontinent's own system, at Bennington, Oklahoma. *Id.* at PP 9, 137, JA 4, 46. Enogex would support those deliveries using both its existing capacity and additional capacity created by adding compression and other facilities. *Id.* at P 9, JA 4.[11]

Based on analysis of engineering information submitted by Enogex, which detailed the configuration of Enogex's system and modeled its future operations, the Commission found that Enogex's system would "readily accommodate" the capacity commitments that Enogex had made under the Midcontinent lease, as well as the Gulf Crossing lease that the Commission had previously approved in a separate proceeding (*see Gulf Crossing*, 123 FERC ¶ 61,100). Certificate Order at P 43, JA 15. Further, though certain individual receipt points might decrease in capacity, the overall amount of capacity on Enogex's system would increase as a result of the additional construction that Enogex would undertake. *Id.* at PP 43, 137, JA 15-16, 46.

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[11] Enogex planned to construct 43 miles of pipeline to provide an interconnection at one of the receipt points and a new compressor station at the Bennington delivery point; both additions were planned to go forward independent of the Midcontinent lease. *See id.* at P 9 & n.8, JA 4.

Apache contends that the Commission relied "entirely" on Enogex's engineering analysis. Br. 52. But the Commission's examination of engineering evidence was only one facet of its decision; as discussed *infra* in Part III.B, the Commission also considered interruptible shippers' lack of entitlement to unchanged service and the benefits of the lease. Moreover, even if the Commission had relied only on Enogex's system modeling, that alone constitutes substantial evidence. *See, e.g., Fla. Gas*, 604 F.3d at 645 ("The substantial evidence inquiry turns not on how many discrete pieces of evidence the Commission relies on, but on whether that evidence adequately supports its ultimate decision."); *cf. Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 714 n.16 (9th Cir. 2003) (holding that FERC's decision, relying on affidavit of official of interested party, was based on substantial evidence: "We decline to hold as a matter of law that facts developed from the testimony of one interested person cannot constitute substantial evidence.").

2. The Commission Appropriately Addressed Contradictory Evidence

On appeal, Apache argues that the Commission could not reasonably base its determination on Enogex's engineering evidence because Apache's expert witness, John Bower, "persuasively demonstrated that this analysis was riddled with errors." Br. 52. But the Commission did consider Mr. Bower's analysis and disagreed with his critique. Rehearing Order at P 23 ("we considered Apache's

rebuttal filings and were not persuaded that the impact of lease operations cannot be measured or were inappropriately estimated"), JA 80-81.

Apache (at Br. 59-61) makes much of the absence of a lengthy analysis of Mr. Bower's points; the Commission explained that it did not recite the details of his critique in its Orders "in part[] due to concerns about the confidential nature of Enogex's engineering filing and much of Apache's engineering filings." Rehearing Order at P 23, JA 81. But the Commission concluded that it could adequately explain its consideration of competing methodologies, and its determination that Enogex's methodology was appropriate, without revealing specific engineering details. *Id.* ("those confidentiality requests do not prevent us from addressing issues raised by Apache concerning the methodology used by Enogex to model its system"). The Commission was not required to set forth an exhaustive response to every piece of contradictory evidence. *Cf. Fla. Mun.*, 602 F.3d at 461. Nevertheless, the Commission's attention to methodological disputes was directly responsive to Apache's Rehearing Request, which likewise focused on purported defects in Enogex's modeling. *See* Rehearing Order at P 21 n.36, JA 80.

In the Certificate Order, the Commission had found that, "while no specific path for deliveries under the lease can be determined [due to the multiple receipt points and flexibility to receive volumes from various zones at pooling points], the

effect of the lease on the operational capacities at receipt and delivery points on Enogex's system can be reasonably determined" from the engineering information that Enogex had provided. Certificate Order at P 137, JA 47; *see also id.* at P 62 & n.51 (citing cases involving similar systems), JA 22; *id*. at P 63 ("it is not necessary to have a defined path in order to assess the effects of the lease on Enogex's system and its existing shippers"), JA 23. On rehearing, the Commission further explained that the flexibility in the receipt and delivery points was acceptable, as it would "allow the parties to more easily adapt to changing circumstances." Rehearing Order at P 24 n.38, JA 81; *see also id.* at P 34 & n.49 (recognizing that leases without specific pathing may be appropriate on "operationally complex" systems such as Enogex's; citing cases), JA 85.

Moreover, because the engineering analysis showed that the Enogex system is "web-like in configuration," with gas flows that change direction depending on market demands, the Commission determined it was appropriate to consider historical operating conditions, in conjunction with estimates of future operating conditions, to determine changes in capacity at receipt and delivery points. *See* Certificate Order at P 137, JA 46. In particular, the Commission explained that it found Enogex's estimate, based on average flows, appropriate because it provided "the best estimate of how the pipeline will operate in the future," as well as "the best approximation of how the lease will actually impact current customers . . . ."

Rehearing Order at P 24, JA 81. The Commission also found Enogex's use of hypothetical future flows appropriate, given the predictive purpose of the engineering model. *Id.* The Commission's explanation of its reasons, in its expert judgment, for accepting the methodology and conclusions of one engineering model over another, shows, not that the Commission "failed to grapple" with Apache's rebuttal evidence (Br. 51), but that the Commission disagreed with Apache as to its significance. *See B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004) (reviewing court is not "equipped to second-guess" Commission's consideration of "highly technical evidence").

Finally, the Commission did not dispute that capacity on Enogex's system available for interruptible service could be reduced at some time, especially in the West Zone. Rehearing Order at PP 21 n.37, 25, JA 80, 81-82; *cf.* Br. 58. But the Commission determined that the potential for capacity constraints in that zone "are primarily due to increases in production in the region seeking outlets via Enogex's system," rather than from the lease operations. Rehearing Order at P 25, JA 82. Indeed, that increased production was the "impetus" for Midcontinent's pipeline project and its lease from Enogex. *Id.* In other words, increased production in that region might well intensify demand for transportation capacity among Apache and other shippers, but the Commission viewed the development of Midcontinent's

interstate, open-access system to serve that demand as a benefit to the public, rather than as an unduly adverse consequence to interruptible shippers.

B. The Commission Reasonably Concluded That Any Adverse Effects Were Inherent To Interruptible Service And Would Be Outweighed By Benefits Of The Lease

Apache contends that the Commission failed its obligation to protect interruptible shippers. Br. 38-39. But interruptible service is — by definition — subject to interruption if insufficient capacity is available to serve all shippers, as Apache acknowledges. Br. 6 ("Interruptible service is, as its name suggests, generally less reliable."). As discussed in Part II.B.2, *supra*, firm service has a higher priority, and the pipeline provides interruptible service using whatever capacity remains. Accordingly, "[t]he firmness of interruptible transportation can be expected to vary from day to day." Order No. 436 at p. 31,513. "The intermittent quality of [interruptible] service is its inherent characteristic, which all purchasers of such service must accept." *Columbia Gas*, 55 FERC at p. 62,114, *quoted in* Rehearing Order at P 18 n.30, JA 78.

Thus, the Commission found that Apache, as an interruptible shipper, "has no claim on Enogex's capacity. If, in fact, there is a reduction in the availability of interruptible section 311 service in the future as a result of the Midcontinent-Enogex lease, that is a consequence *inherent to the nature of interruptible service*." Rehearing Order at P 18 (emphasis added), JA 78; *see also id.* at P 25

("interruptible shippers have no contractual or regulatory expectation that any historical levels of service will continue into the future"), JA 82. Accordingly, the Commission concluded that "the limited potential reduction in the capacity available for section 311 interruptible service as a result of the lease cannot be viewed as an undue adverse effect." *Id.* at P 26, JA 82. Even so, as discussed *supra* in Part III.A.1, the Commission did consider the impact of the lease on Enogex's system and determined that it was unlikely to be the cause of capacity constraints. *See* Rehearing Order at P 25, JA 82. Moreover, the Commission noted that none of Enogex's customers receiving firm service (which it offers only for intrastate, non-NGPA transportation) — the *only* shippers entitled to guaranteed capacity on Enogex's system — objected to the capacity lease. *Id.*

Furthermore, the Commission found that the benefits of the lease outweighed any adverse effects of potential changes in existing interruptible service. *See id.* at P 26, JA 82. Contrary to Apache's contention (Br. 21-22, 25) that the lease to Midcontinent undermines the Commission's goal of open-access, the leased capacity would in fact *promote* that goal, by offering firm interstate service. Unlike Enogex, Midcontinent is required, as an open-access interstate pipeline under the NGA, to offer *both* firm and interruptible transportation, so "any shipper, including an Enogex shipper, could have participated in Midcontinent's open season for firm transportation service through the leased capacity."

Rehearing Order at P 13, JA 76. Indeed, taken to its extreme, Apache's argument that a pipeline could "lease away *all* of the capacity used by interruptible shippers" (Br. 39) collapses on itself — because, "in such an instance, all service on the facilities would be provided by interstate pipelines that are required by our regulations to provide both firm and interruptible service." Rehearing Order at P 17 n.29, JA 78. Moreover, the Commission found that the lease would benefit the public by offering shippers "seamless access" to firm transportation from production areas in Oklahoma to markets in the southern and eastern United States. Certificate Order at P 35, JA 13; *id.* at P 43 ("the availability of firm transportation on Midcontinent for supplies produced in Oklahoma should promote the development of new prolific sources of supply there"), JA 16.

The Commission recognized that some Enogex shippers might have "valid business reasons" not to purchase firm service from Midcontinent,[12] but concluded that "the fact that certain of Enogex's shippers did not see bidding for firm service on Midcontinent to be an attractive business choice does not alter the fact that capacity for firm service on Enogex's facilities was available to all shippers on a nondiscriminatory basis through Midcontinent's lease of Enogex's capacity." Rehearing Order at P 13, JA 76; *cf.* Certificate Order at P 56, JA 20-21.

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[12] In this regard, Apache characterizes itself as a "captive customer" of Enogex based on its contractual dedication of its output to Enogex. Br. 12, 38; *see* Certificate Order at P 54, JA 19-20.

IV. THE COMMISSION APPROPRIATELY DECLINED TO CONDITION APPROVAL OF THE LEASE ON A REQUIREMENT THAT ENOGEX OFFER FIRM INTERSTATE SERVICE

Finally, the Commission appropriately declined to create a capacity lease exception to its longstanding policy of allowing NGPA § 311 pipelines to choose whether to offer firm service. Apache acknowledges that interruptible service, by its nature, lacks the certainty of firm service (*see* Br. 6), but argues that the Commission must grant interruptible shippers greater rights as to leases on intrastate pipelines. Specifically, Apache contends that the Commission must either guarantee that the lease will not harm any class of shippers, regardless of priority, or condition approval of the lease on the lessor pipeline's willingness to offer firm service under § 311. Br. 42-43.

Apache argues that the Commission owes it relief because the Commission caused Apache's predicament — that is, Apache's inability to obtain firm interstate service from Enogex, which has elected not to offer it.[13] But Apache's argument is premised on impermissible collateral attacks on prior FERC orders: namely, the seminal rulemaking in Order No. 436, issued a quarter-century ago and affirmed in relevant part by this Court in *Associated Gas Distributors* (*see, e.g.*, Br. 39-40, 44), and a more recent rate proceeding in which the Commission invalidated a

[13] Though Apache urged the Commission in the proceeding below to condition approval of the lease, its argument that the Commission is *obligated* to do so to mitigate effects of its past policy choices is new on appeal.

preferential form of interruptible service in Enogex's system (*see* Br. 41 n.8). *See supra* pp. 13-14.

First, Apache assails a key holding of Order No. 436: the Commission's policy not to mandate firm service by intrastate pipelines under NGPA § 311. Br. 40. As explained more fully *supra* at pp. 6-7, in Order No. 436 the Commission decided not to require intrastate pipelines providing transportation under NGPA § 311 on behalf of interstate pipelines to offer firm service, in response to concerns that such pipelines could be compelled to serve out-of-state shippers against their will, or to disrupt the priority given to intrastate services. *See* Order No. 436 at pp. 31,502, 31,514, *quoted supra* at p. 7. Thus, the Commission made a deliberate policy judgment to allow intrastate pipelines such as Enogex to choose whether to offer firm interstate service to shippers. *Id.* at p. 31,502 ("there is no requirement that intrastate pipelines under section 311 provide transportation on a firm basis"); *id.* at p. 31,514 ("intrastate pipelines are expressly free to choose whether or not to offer firm transportation, interruptible transportation, or both").

Apache blames Order No. 436 for Enogex's choice not to offer firm service, asserting that "*FERC itself* is responsible for the shippers' inability to purchase anything more definite than interruptible service." Br. 23 (emphasis in original); *see also* Br. 37, 39. (At one point, Apache goes so far as to remove the pipeline's

choice from the equation, declaring that "FERC itself has restricted captive shippers to interruptible service on Section 311 pipelines." Br. 44.) Yet even Apache concedes that the Commission exercised its "considerable regulatory discretion" in making that "policy choice." Br. 40.

Second, moving from general policy to the Enogex system, Apache likewise blames the Commission for invalidating the special priority that Enogex had afforded to certain interruptible shippers, including Apache. Br. 41 n.8 ("FERC's reliance on the interruptible nature of Apache's service is particularly arbitrary and capricious given FERC's 2003 decision to nullify Apache's priority over other interruptible shippers."); *see also* Br. 28 ("FERC has stripped Apache of its contractual priority on Enogex's system"). This too is an impermissible collateral attack, this time on previous FERC orders that Apache never challenged on appeal (instead agreeing to resolve any objections by settlement). *See supra* pp. 13-14 (discussing 2001 rate proceeding). *See also, e.g.*, *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 822, 825 (D.C. Cir. 2008) (dismissing appeal as an "impermissible collateral attack" on earlier FERC orders).

In any event, Apache's frustration with the effects of longstanding FERC policies, which allow Enogex to choose not to offer firm service and prevent it from offering higher-priority interruptible service based on contractual preferences, does not justify the remedy Apache seeks: forcing the Commission to create a

special rule for capacity leases by NGPA intrastate pipelines. Though Apache insists that "FERC had no reasonable basis for rejecting" Apache's requested remedy (Br. 43),[14] the Commission in fact explained its reasoning, based both on its policy judgment and on its determinations on the merits.

The Commission was appropriately mindful of its longstanding policy. *See* Rehearing Order at P 17 (noting that Enogex does not provide firm NGPA transportation service, "nor is it required to under our regulations"), JA 78; *id.* at P 19 & n.34 (same, citing Order No. 436), JA 79. *See also Cranberry Pipeline Corp.*, 97 FERC ¶ 61,280, at p. 62,278 & n.5 (2001) (declining to require NGPA intrastate pipeline to provide firm service, citing Order No. 436: "The Commission has long held that intrastate pipelines that provide transportation service under section 311 are exempt from offering firm interstate transportation service."), *cited in* Certificate Order at P 52 & n.42, JA 19.

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[14] Notwithstanding Apache's unusual framing of the standard of review, the Commission in fact would have had wide latitude in crafting its own solution — unconstrained by Apache's particular preference — if it had found the lease unduly discriminatory or harmful. *See, e.g., La. Pub. Serv. Comm'n*, 522 F.3d at 393 ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions") (internal quotation marks and citation omitted); *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) ("the Commission has extremely broad authority to condition certificates of public convenience and necessity") (citing *Atl. Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378 (1959)).

The Commission did not, however, "reflexively" (Br. 45) apply that policy. Rather, the Commission determined that a new policy was unwarranted in the circumstances of this case. Having found no merit to Apache's discrimination argument, the Commission was "not persuaded it was necessary" to compel Enogex to provide firm service as a condition of the certificate in order to prevent undue discrimination. Rehearing Order at P 17, JA 78. Similarly, having found that any adverse effects Apache might experience as a result of the lease were inherent to the nature of interruptible service, the Commission concluded that such effects "do not warrant the rejection of the Midcontinent-Enogex lease or the imposition of a condition requiring an intrastate pipeline to offer firm section 311 transportation service against its will." *Id.* at P 19, JA 79.

CONCLUSION

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

Respectfully submitted,

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Apache Corporation v. FERC
D.C. Cir. No. 09-1204

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent contains 9,674 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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July 16, 2010

ADDENDUM
Statutes and Regulations

Table of Contents

Page

Section 7(c)(1)(A), (e) of the Natural Gas Act, 15 U.S.C. §§ 717f(c)(1)(A), (e), provides as follows:

(c) Certificate of public convenience and necessity
(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

* * *

(e) Granting of certificate of public convenience and necessity
Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), provides as follows:

(b) Review of Commission order

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

Section 301(a)(2)(A) of the Natural Gas Policy Act, 15 U.S.C. § 3431(a)(2)(A), provides as follows:

(a) Jurisdiction of the Commission under the Natural Gas Act
(2) Transportation

(A) Jurisdiction of the Commission

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. 717 (b)] the provisions of such Act [15 U.S.C. 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 3362 (c) or section 3363 (b), (c), (d), or (h) of this title; or

(ii) authorized by the Commission under section 3371 (a) of this title.

Section 311(a)(2)(A) of the Natural Gas Policy Act, 15 U.S.C. § 3371(a)(2)(A), provides as follows:

(a) Commission approval of transportation

(2) Intrastate pipelines

(A) In general

The Commission may, by rule or order, authorize any intrastate pipeline to transport natural gas on behalf of—
(i) any interstate pipeline; and
(ii) any local distribution company served by any interstate pipeline.

18 C. F.R. § 284.7 provides as follows:

Act and the jurisdiction of the Commission under such Act shall not apply to any transportation or sale in interstate commerce of natural gas if such a transaction is authorized pursuant to section 311 or 312 of the NGPA.

(b) For purposes of the Natural Gas Act, the term ''natural gas company'' (as defined by section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transaction involving natural gas if the provisions of the Natural Gas Act do not apply to such transaction by reason of paragraph (a) of this section.

(c) The Natural Gas Act shall not apply to facilities utilized solely for transportation authorized by section 311(a) of the NGPA.

[44 FR 52184, Sept. 7, 1979, as amended by Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.4 Reporting.

(a) *Reports in MMBtu.* All reports filed pursuant to this part must indicate quantities of natural gas in MMBtu's. An MMBtu means a million British thermal units. A British thermal unit or Btu means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit, determined in accordance with paragraphs (b) and (c) of this section.

(b) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (c) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(c) *Standard conditions.* The standard conditions for purposes of paragraph (b) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

[Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.5 Further terms and conditions.

The Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part.

§ 284.6 Rate interpretations.

(a) *Procedure.* A pipeline may obtain an interpretation pursuant to subpart L of part 385 of this chapter concerning whether particular rates and charges comply with the requirements of this part.

(b) *Address.* Requests for interpretations should be addressed to: FERC Part 284 Interpretations, Office of General Counsel, Federal Energy Regulatory Commission, Washington, DC 20426.

[44 FR 66791, Nov. 21, 1979; 44 FR 75383, Dec. 20, 1979, as amended by Order 225, 47 FR 19058, May 3, 1982; Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.7 Firm transportation service.

(a) *Firm transportation availability.* (1) An interstate pipeline that provides transportation service under subpart B or G or this part must offer such transportation service on a firm basis and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on a firm basis.

(3) *Service on a firm basis* means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.

(4) An interstate pipeline that provided a firm sales service on May 18, 1992, and that offers transportation service on a firm basis under subpart B or G of this part, must offer a firm transportation service under which firm shippers may receive delivery up to their firm entitlements on a daily basis without penalty.

(b) *Non-discriminatory access.* (1) An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under subpart B, C or G must provide such service without undue discrimination, or preference,

18 C. F.R. § 284.7 provides as follows:

including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(2) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller.

(3) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may not include in its tariff any provision that inhibits the development of market centers.

(c) *Reasonable operational conditions.* Consistent with paragraph (b) of this section, a pipeline may impose reasonable operational conditions on any service provided under this part. Such conditions must be filed by the pipeline as part of its transportation tariff.

(d) *Segmentation.* An interstate pipeline that offers transportation service under subpart B or G of this part must permit a shipper to make use of the firm capacity for which it has contracted by segmenting that capacity into separate parts for its own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible.

(e) *Reservation fee.* Where the customer purchases firm service, a pipeline may impose a reservation fee or charge on a shipper as a condition for providing such service. Except for pipelines subject to subpart C of this part, if a reservation fee is charged, it must recover all fixed costs attributable to the firm transportation service, unless the Commission permits the pipeline to recover some of the fixed costs in the volumetric portion of a two-part rate. A reservation fee may not recover any variable costs or fixed costs not attributable to the firm transportation service. Except as provided in this paragraph, the pipeline may not include in a rate for any transportation provided under subpart B, C or G of this part any minimum bill or minimum take provision, or any other provision that has the effect of guaranteeing revenue.

(f) *Limitation.* A person providing service under Subpart B, C or G of this part is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.

[Order 436, 50 FR 42493, Oct. 18, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 284.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 284.8 Release of firm capacity on interstate pipelines.

(a) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must include in its tariff a mechanism for firm shippers to release firm capacity to the pipeline for resale by the pipeline on a firm basis under this section.

(b)(1) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(2) The rate charged the replacement shipper for a release of capacity may not exceed the applicable maximum rate, except that no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release. Payments or other consideration exchanged between the releasing and replacement shippers in a release to an asset manager as defined in paragraph (h)(3) of this section are not subject to the maximum rate.

(c) Except as provided in paragraph (h) of this section, a firm shipper that wants to release any or all of its firm capacity must notify the pipeline of the terms and conditions under which the shipper will release its capacity. The firm shipper must also notify the pipeline of any replacement shipper

18 C.F.R. § 284.9 provide as follows:

of this section is any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers.

[Order 636, 57 FR 13318, Apr. 16, 1992, as amended by Order 636–A, 57 FR 36217, Aug. 12, 1992; Order 577, 60 FR 16983, Apr. 4, 1995; Order 577-A, 60 FR 30187, June 8, 1995. Redesignated and amended by Order 637, 65 FR 10220, Feb. 25, 2000; Order 637–A, 65 FR 35765, June 5, 2000; Order 712, 73 FR 37092, June 30, 2008; Order 712–A, 73 FR 72714, Dec. 1, 2008; 73 FR 79628, Dec. 30, 2008]

§ 284.9 Interruptible transportation service.

(a) *Interruptible transportation availability*. (1) An interstate pipeline that provides firm transportation service under subpart B or G of this part must also offer transportation service on an interruptible basis under that subpart or subparts and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on an interruptible basis.

(3) *Service on an interruptible basis* means that the capacity used to provide the service is subject to a prior claim by another customer or another class of service and receives a lower priority than such other classes of service.

(b) The provisions regarding non-discriminatory access, reasonable operational conditions, and limitations contained in §284.7 (b), (c), and (f) apply to pipelines providing interruptible service under this section.

(c) *Reservation fee*. No reservation fee may be imposed for interruptible service. A pipeline's rate for any transportation service provided under this section may not include any minimum bill provision, minimum take provision, or any other provision that has the effect of guaranteeing revenue.

[Order 436, 50 FR 42494, Oct. 18, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §284.9, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 284.10 Rates.

(a) *Applicability*. Any rate charged for transportation service under subparts B and G of this part must be established under a rate schedule that is filed with the Commission prior to commencement of such service and that conforms to the requirements of this section.

(b) *Rate objectives*. Maximum rates for both peak and offpeak periods must be designed to achieve the following three objectives:

(1) Rates for service during peak periods should ration capacity;

(2) Rates for firm service during offpeak periods and for interruptible service during all periods should maximize throughput; and

(3) The pipeline's revenue requirement allocated to firm and interruptible services should be attained by providing the projected units of service in peak and off-peak periods at the maximum rate for each service.

(c) *Rate design*—(1) *Volumetric rates*. Except as provided in §284.7(e), any rate filed for service subject to this section must be a one-part rate that recovers the costs allocated to the service to the extent that the projected units of that service are actually purchased and may not include a demand charge, a minimum bill or minimum take provision or any other provision that has the effect of guaranteeing revenue. Such rate must separately identify cost components attributable to transportation, storage, and gathering costs.

(2) *Based on projected units of service*. Any rate filed for service subject to this section must be designed to recover costs on the basis of projected units of service. The fixed costs allocated to capacity reservations, as determined in accordance with §284.7(e), should be used along with the projected nominations accepted by the pipeline to compute the unit reservation fee. The remaining fixed costs and all variable costs should be used to determine the volumetric rate computed on the basis of projected volumes to be transported. The units projected for the service in rates filed under this section

18 C.F.R. § 284.121 provide as follows:

they flow directly to retail end-users as measured by average deliveries over the preceding three calendar years; and,

(3) Storage providers.

[Order 720, 73 FR 73517, Dec. 2, 2008]

Subpart B—Certain Transportation by Interstate Pipelines

§ 284.101 Applicability.

This subpart implements section 311(a)(1) of the NGPA and applies to the transportation of natural gas by any interstate pipeline on behalf of:

(a) Any intrastate pipeline; or

(b) Any local distribution company.

§ 284.102 Transportation by interstate pipelines.

(a) Subject to paragraphs (d) and (e) of this section, other provisions of this subpart, and the conditions of subpart A of this part, any interstate pipeline is authorized without prior Commission approval, to transport natural gas on behalf of:

(1) Any intrastate pipeline; or

(2) Any local distribution company.

(b) Any rates charged for transportation under this subpart may not exceed the just and reasonable rates established under subpart A of this part.

(c) An interstate pipeline that engages in transportation arrangements under this subpart must file reports in accordance with § 284.13 and § 284.106 of this chapter.

(d) Transportation of natural gas is not on behalf of an intrastate pipeline or local distribution company or authorized under this section unless:

(1) The intrastate pipeline or local distribution company has physical custody of and transports the natural gas at some point; or

(2) The intrastate pipeline or local distribution company holds title to the natural gas at some point, which may occur prior to, during, or after the time that the gas is being transported by the interstate pipeline, for a purpose related to its status and functions as an intrastate pipeline or its status and functions as a local distribution company; or

(3) The gas is delivered at some point to a customer that either is located in a local distribution company's service area or is physically able to receive direct deliveries of gas from an intrastate pipeline, and that local distribution company or intrastate pipeline certifies that it is on its behalf that the interstate pipeline is providing transportation service.

(e) An interstate pipeline must obtain from its shippers certifications including sufficient information to verify that their services qualify under this section. Prior to commencing transportation service described in paragraph (d)(3) of this section, an interstate pipeline must receive the certification required from a local distribution company or an intrastate pipeline pursuant to paragraph (d)(3) of this section.

[Order 436, 50 FR 42495, Oct. 18, 1985, as amended by Order 526, 55 FR 33011, Aug. 13, 1990; Order 537, 56 FR 50245, Oct. 4, 1991; Order 581, 60 FR 53072, Oct. 11, 1995; Order 637, 65 FR 10222, Feb. 25, 2000]

§§ 284.103–284.106 [Reserved]

Subpart C—Certain Transportation by Intrastate Pipelines

§ 284.121 Applicability.

This subpart implements section 311(a)(2) of the NGPA and applies to the transportation of natural gas by any intrastate pipeline on behalf of:

(a) Any interstate pipeline, or

(b) Any local distribution company served by any interstate pipeline.

§ 284.122 Transportation by intrastate pipelines.

(a) Subject to paragraphs (d) and (e) of this section, other provisions of this subpart, and the applicable conditions of Subpart A of this part, any intrastate pipeline may, without prior Commission approval, transport natural gas on behalf of:

(1) Any interstate pipeline; or

(2) Any local distribution company served by an interstate pipeline.

(b) No rate charged for transportation authorized under this subpart may exceed a fair and equitable rate under § 284.123.

(c) Any intrastate pipeline engaged in transportation arrangements authorized under this section must file reports as required by § 284.126.

Apache Corporation v. FERC **Docket No. CP08-6**
D.C. Cir. No. 09-1204

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of July 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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