

**ORAL ARGUMENT IS SCHEDULED FOR MARCH 15, 2004**

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

**NO. 03-1166**

**GAS TRANSMISSION NORTHWEST 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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WASHINGTON, D.C. 20426**

**JANUARY 15, 2004**

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## CIRCUIT RULE 28(a)(1) CERTIFICATE

- A. *Parties and Amici:*** All participants in the proceedings below and in this Court are listed in petitioners' Circuit Rule 28(a)(1) certificate at pp. i-ii.
- B. *Rulings Under Review:***
1. *PG&E Gas Transmission, Northwest Corp.*, Docket Nos. RP02-362-001, and RP02-362-002, 102 FERC **&**61,044 (2003) (JA 1-3).
  2. *PG&E Gas Transmission, Northwest Corp.*, Docket Nos. RP02-362-003, and RP02-362-004, 103 FERC **&**61,061 (2003) (JA 4-6).
- C. *Related Cases:*** Counsel is not aware of any related cases before this or any other Court.

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January 15, 2004

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**GLOSSARY**

Commission or FERC	Federal Energy Regulatory Commission
Dth/d	Dekatherms per day
NGA	Natural Gas Act, 15 U.S.C. § 717, <i>et seq.</i>
Petitioner	Petitioner Gas Transmission Northwest Corporation
ROFR	Right of first refusal provided in 18 C.F.R. § 284.221(d)(2)

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**BRIEF FOR RESPONDENT  
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**STATEMENT OF THE ISSUE**

Did the Commission reasonably find that Petitioner had failed to justify its request for waiver of a regulation that provides shippers judicially mandated protections against termination of service, where Petitioner's sole justification for the waiver was the claim that the waiver would facilitate implementation of a proposal that might result in more efficient utilization of capacity on Petitioner's system?

## **PERTINENT STATUTES AND REGULATIONS**

The statutes and regulations applicable to this case are contained in an appendix to this brief.

### **STATEMENT OF THE CASE**

#### **I. Statutory and Regulatory Background**

##### **A. The Natural Gas Act**

The Natural Gas Act (“NGA”), 15 U.S.C. § 717, *et seq.*, confers on the Federal Energy Regulatory Commission (“Commission” or “FERC”) jurisdiction to regulate “the transportation of natural gas in interstate commerce . . . the sale in interstate commerce for resale for ultimate public consumption,” and “natural gas companies<sup>1</sup> engaged in such transportation or sale . . .” 15 U.S.C. § 717(b). NGA § 4(a) requires that rates for jurisdictional sales and transportation, and “all rules and regulations affecting or pertaining to such rates” be “just and reasonable,” *id.* § 717c(a), and NGA § 4(b) prohibits a natural gas company from maintaining any “unreasonable difference” between “classes of service.” *Id.* § 717c(b).

NGA § 4(e), 15 U.S.C. § 717c(e), empowers the Commission to suspend a proposed tariff revision for a period of up to five months while it investigates the

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<sup>1</sup>A “natural gas company” is a person that engages in the jurisdictional sales or transportation of natural gas. 15 U.S.C. § 717a(6).

lawfulness of the proposal. A pipeline has the burden of showing that the proposed revision is "reasonable and fair," *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1971) ("LP&L"), and the Commission may reject any portion of the proposal not shown to be just and reasonable, while accepting the rest. *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993). NGA § 5(a), 15 U.S.C. § 717d(a), authorizes the Commission to revise prospectively any rates it finds to be "unjust, unreasonable, unduly discriminatory, or preferential . . . ."

NGA § 7(c)(1)(A) requires a natural gas company to obtain a "[c]ertificate of public convenience and necessity" before engaging "in the transportation or sale of natural gas, subject to the jurisdiction of the Commission," or constructing or operating "any facilities therefor . . . ." 15 U.S.C. § 717f(c)(1)(A). NGA § 7(b) prohibits a natural gas company from abandoning "any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without . . . . a finding by the Commission . . . that the present and future public convenience or necessity permit such abandonment." *Id.* § 717f(b).

## **B. Order No. 636**

Following passage of the Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 158 (1989), which lifted all regulation of wellhead sales of natural gas as of

1993, the Commission issued Order No. 636<sup>2</sup> to promote competition in the industry. Because pre-Order 636 regulatory structures had failed to effectuate Congress' intent that "[a]ll sellers [of natural gas] . . . be able to reasonably reach the highest-bidding buyer in an increasingly national market, [and that all] buyers . . . be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies[,]" Order No. 636 at 30,393 (citing H.R. Rep. No. 29, 101st Cong., 1st Sess. at 6 (1989)), the Commission deemed those structures unduly discriminatory, anti-competitive, and, therefore, unlawful under NGA §§ 4(b) and 5(a). *Id.* at 30,405.

New structures designed to result in just and reasonable rates and practices required that pipelines: (1) "unbundle" their sales and transportation services (that is, sell gas and transportation services separately) and thus enable customers to take only such services as they required; (2) transport other sellers' gas on the same terms that they transported their own sales gas; and (3) institute mechanisms to reallocate pipeline capacity efficiently (*e.g.*, "capacity release"). *See* Order No. 636 at 30,412-13.

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<sup>2</sup>*Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regs. Pmbles. 1991-96 &30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regs. Pmbles. 1991-96 &30,950, *order on reh'g*, Order No. 636-B, 61 FERC &61,272 (1992), *reh'g denied*, 62 FERC &61,007 (1993), *aff'd in part, remanded in part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) ("UDC").

### C. The Right of First Refusal (“ROFR”)

Order No. 636 also amended 18 C.F.R. § 284.221 (d) to provide “pre-granted abandonment authority,” under which a pipeline could terminate service to a shipper once the parties’ transportation contract expired without obtaining abandonment authority under NGA § 7(b). Order No. 636 at 30,394. This Court had remanded earlier Commission attempts to implement this authority on the ground that the resulting regulatory framework did not appear to protect “gas customers from pipeline exercise of monopoly power through refusal of service at the end of a contract period.” *American Gas Ass’n v. FERC*, 912 F.2d 1496, 1518 (D.C. Cir. 1990) (“AGA”).

Order No. 636 remedied this problem by amending 18 C.F.R. § 284.221(d)(2) to provide a “right of first refusal” (“ROFR”) to shippers operating under long-term (e.g., twelve consecutive months) firm transportation contracts at the maximum tariff rate. Order No. 636 at 30,448-50. The ROFR mechanism allows a shipper, when such a transportation contract expires, to retain its contracted-for capacity by matching any competing bids for the capacity as to term and as to rate up to the maximum lawful rate. See 18 C.F.R. § 284.221(d)(2)(ii) (2003). *UDC* found that the ROFR

mechanism filled the gap left by pre-granted abandonment, providing a framework in which “even a captive customer served by a single pipeline can exercise its right of first refusal and retain its long-term firm-transportation service against rival bidders.” 88 F.3d at 1140.

**D. Limited Waiver of the ROFR for Expansion-Related Reservations of Capacity**

The Commission has temporarily waived its ROFR regulation in one group of cases (“capacity reservation cases”) involving reservation of existing excess capacity for use in major system expansions. The need for such reservations of capacity may arise in situations where a pipeline with excess capacity in one part of its system plans an expansion to remedy anticipated constraints in another part.

For example, assume the following: A pipeline, diagrammed below, has capacity of 1,000,000 dekatherms per day (“Dth/d”) on a part of its system connecting points A, B and C. Shippers utilize only 800,000 Dth/d of the capacity on the segment connecting points A and B, leaving excess capacity of 200,000 Dth/d. The segment connecting points B and C is fully subscribed.

A	B	C
200,000 Dth/d of excess capacity from A to B	I	Fully subscribed from B to C
I		
1,000,000 Dth/d of capacity from A to C		

The pipeline decides to expand to meet demand from prospective shippers seeking to transport 200,000 additional Dth/d from point A to point C (“expansion shippers”). The most economical means of effectuating this expansion would be to construct additional capacity only from point B to point C, and let the expansion shippers use existing excess capacity to ship their gas from point A to point B:

A	B	C
200,000 Dth/d excess capacity	I	Fully subscribed
	I	
	I	
-----Expansion of 200,000 Dth/d-----		

However, under current open-access rules, which require the pipeline to make existing capacity available to all eligible shippers, there is always the risk, however remote, that other shippers will claim the existing excess capacity from point A to point B prior to the date the pipeline is able to make the combination of that excess capacity and the newly constructed capacity available to the expansion shippers. If this occurs, then the expansion shippers, whose shipments originate at point A, will be unable (1) to ship gas to point B, and, therefore, (2) to use the newly constructed capacity from point B to point C. This will leave the pipeline with unused capacity and stranded costs, until it is able to construct a new segment from A to B.



The only way to assure that shippers have adequate capacity to ship from point A to point C is to construct an additional 200,000 Dth/d of capacity connecting those two points, including the segment from point A to point B:

A	B	C
200,000 Dth/d excess capacity	I	Fully subscribed
	I	
	I	
-----200,000 Dth/d of Expansion-----		

Once the pipeline builds the additional capacity from point A to point B, it may well find that it still has the existing 200,000 Dth/d of excess capacity on that segment. Thus, the pipeline will have built the additional capacity on that segment unnecessarily. Accordingly, the Commission has allowed pipelines to reserve existing unsubscribed capacity for a temporary period so that the capacity can be included as a part of a future expansion project. *See, e.g., Iroquois Gas Transmission Sys., 100 FERC ¶ 61,279 at 62,189 ¶ 5 (2002) (“Iroquois”)*. In the above example, such action would permit the hypothetical pipeline to reserve the excess capacity from points A to B, and to construct additional capacity only from point B to point C, with the assurance that the expansion shippers eventually will have sufficient capacity to ship from point A to point C:

A	B	C
200,000 Dth/d excess capacity reserved for expansion	I I I	Fully subscribed
-----Expansion of 200,000 Dth/d-----		

The Commission has found that such “reservation of capacity will minimize facility construction and associated environmental impacts, will encourage fuller utilization of capacity,” and will minimize “the rate impact of allocating costs of unsubscribed capacity to existing customers once the expansion is completed.” *Northwest Pipeline Corp.*, 85 FERC ¶ 61,335 at 62,312 (1998).<sup>3</sup>

The Commission has permitted pipelines to market the reserved capacity on an interim basis, *i.e.*, until it is needed on a more permanent basis by expansion shippers.

The Commission has waived its ROFR regulation for such capacity during the interim period, reasoning that interim shippers’ exercise of ROFR rights would defeat the point of reserving the capacity. *Tennessee Gas Pipeline Co.*, 84 FERC ¶ 61,304 at 62,394-95 (1998), *order on reh’g*, 86 FERC ¶ 61,066 (1999).

## II. The Proceeding Below

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<sup>3</sup>Participating pipelines reserving capacity must comply with a number of conditions, including posting the subject capacity for bidding by interested shippers prior to reserving it, and providing information describing the contemplated expansion project and the location and amount of the capacity to be reserved. *See, e.g., Iroquois*, 100 FERC at 62,189-90 ¶¶ 5, 7.

During the period June 6, 2002 through October 15, 2002, Petitioner filed three proposals that would permit it to offer “prearranged deals” – contracts that would take effect at a future date – for excess transportation capacity on its system that previously has been made available to all eligible shippers. *See PG&E Gas Transmission, Northwest Corp.*, 102 FERC ¶61,044 at 61,098-99 ¶¶ 2-4 (2003) (JA 1-2).<sup>4</sup> In the third and final proposal, Petitioner proposed some new elements. First, Petitioner sought to offer prospective shippers the opportunity to contract up to three years in advance for capacity that was or was expected to become available. *Id.* at 61,099 ¶ 4 (JA 2). In addition, Petitioner proposed to market the capacity on an interim basis. *Ibid.* Finally, and significantly for this case, Petitioner sought authority to deny the “interim shippers” ROFR protections they would otherwise have. *See ibid.* Thus, Petitioner requested that the Commission waive 18 C.F.R. § 284.221(d)(2), which guarantees those protections, with respect to interim shippers.

On January 16, 2003, in the first challenged order, the Commission authorized Petitioner to enter into the prearranged deals described in its final proposal, and to market interim capacity, but refused to allow Petitioner to deny the interim shippers their ROFR protections. 102 FERC ¶61,044 (JA 1-3). On April 14, 2003, in the

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<sup>4</sup> Unless otherwise indicated, all citations to the *FERC Reports* are captioned *PG&E Gas Transmission, Northwest Corp.*

second challenged order, the Commission denied Petitioner's request for rehearing. 103 FERC ¶ 61,061 (2003) (JA 4-6).

This petition followed.

### **SUMMARY OF ARGUMENT**

The Commission properly found that Petitioner failed to justify its request for waiver of the long-standing ROFR regulation. Petitioner's burden was particularly heavy, because of the significant protections provided by the regulation, the discrimination that might result from granting the request, and the extent to which the Commission was being requested to depart from past practice.

Faced with this burden, Petitioner failed to establish that its proposed prearranged deal proposal, which essentially facilitates the marketing of excess capacity, advances any of the significant policy goals advanced by the limited number of proposals for which the Commission has been willing to waive its ROFR regulation. Absent such justification, Petitioner must propose programs that operate within the framework of existing regulations. In this case, the Commission specified how Petitioner could implement interim sales within its prearranged deal program without waiving the ROFR regulation.

Accordingly, as Petitioner has failed to justify depriving interim shippers of their ROFR rights, the orders should be upheld in all respects.

## ARGUMENT

### I. STANDARD OF REVIEW

Judicial scrutiny of the Commission's determinations under the NGA "is limited to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record." *Pennsylvania Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185-86 (D.C. Cir. 1997) (internal quotation omitted). *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (internal quotation and citation omitted), explained the reason for this deferential standard:

Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake the heavy burden of making the convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

### II. PETITIONER HAD TO SATISFY A HEAVY BURDEN TO JUSTIFY DEPRIVING INTERIM SHIPPERS OF THEIR ROFR PROTECTIONS.

To “overturn the Commission’s judgment” here, Petitioner must meet a particularly “heavy burden.” The ROFR regulation addresses “a significant

concern[,]” namely protection of “existing long-term maximum rate customers from pipelines' exercise of market power.” 103 FERC at 61,199 ¶ 6 (JA 5) (footnotes omitted); *see AGA*, 912 F.2d at 1518. In addition, the proposal would allow Petitioner to “insulate itself from its decision to enter into a pre-arranged agreement for future service” – *i.e.*, eliminate the risk that an interim shipper would claim the capacity, thereby requiring Petitioner to find or construct new capacity for the prearranged shipper – “at the expense of shippers who enter into service agreements in the interim.” 102 FERC at 61,100 ¶ 12 (JA 3) (citing *Williams Gas Pipelines Cent., Inc.*, 97 FERC ¶ 61,249 at 62,110 (2001) (“*Williams*”). The insulation would come “at the expense of” maximum-rate, long-term interim shippers that would lose ROFR protections afforded to other maximum-rate, long-term shippers on Petitioner’s system. *Williams*, which rejected a similar request, explained the discriminatory nature of this deprivation pointing out that the interim shipper would receive “a different quality of service” from that “accorded to other firm shippers under [the pipeline’s] tariff.” 97 FERC at 62,110. Such disparate treatment of similarly situated customers amounts to discrimination, which the actor must show is not undue. *See Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 857 (D.C. Cir. 1979). *See also* 102 FERC at 61,098 ¶ 1 (JA 1) (Commission’s order assures implementation of Petitioner’s proposal “without undue discrimination”). Finally, Petitioner sought a

unilateral right to waive an interim shipper's ROFR protections with respect to any capacity committed under a prearranged deal, something the Commission had never before allowed. 102 FERC at 61,100 ¶ 12 (JA 3).

### **III. THE COMMISSION PROPERLY FOUND THAT PETITIONER HAD FAILED TO SATISFY THIS BURDEN.**

The Commission properly found that Petitioner had “not justified its waiver request.” 103 FERC at 61,199 ¶ 6 (JA 5). As is discussed, *infra*, Petitioner has failed to demonstrate that its prearranged deal proposal, essentially a device to facilitate the marketing of excess capacity, would produce benefits that would offset concerns that it would subject interim shippers to abuses of market power, and to undue discrimination in quality of service.

#### **A. Petitioner Failed To Establish Any Material Similarity Between the Cases in Which the Commission Waived Its ROFR Regulation and the Instant Case.**

##### **1. Petitioner's Proposal Serves None of the Goals Served In the Capacity Reservation Cases.**

Petitioner claims that “its prearranged deal program advances the same goals that the Commission identified in the capacity reservation cases.” Br. at 20. According to Petitioner, these goals include: (1) minimization of facility construction and related environmental impacts; (2) efficient use of available capacity; and (3) minimization of the burden of the costs of unsubscribed capacity on existing

customers. Br. at 21-25. Petitioner claims the capacity reservation proposals and the prearranged deal proposal at issue here are so similar in their effects that the Commission's refusal to waive its ROFR regulation here constitutes an unexplained departure from past precedent. *Id.* at 25-31.

The Commission rejected Petitioner's contention "that its desire to sell capacity into the future is akin to cases where a pipeline reserves capacity for an expansion project." 102 FERC at 61,100 ¶ 12 (JA 3). Unlike the proposals in the capacity reservation cases, which assure that "a general system expansion [will] be optimally sized" and, therefore, will not result in "stranded capacity/costs that could burden other shippers on the system[,]” *ibid.*, Petitioner's proposal is not made in conjunction with any kind of planned expansion.

Petitioner asserts that "its prearranged deal program takes this policy goal one step further by possibly obviating the need to construct any facilities." Br. at 21. Petitioner's sole assertion in this regard is that the "prearranged deal program will obviate the need to construct expansion capacity to serve a *prearranged shipper* by providing certainty that the *prearranged shipper's* future capacity needs will be able to be serviced with existing capacity." *Ibid.* (emphasis added).

The situations are not comparable. The dangers of overbuilding that the capacity reservation cases address arise out of the pipeline's need to expand to meet



future demand. Pipeline expansion is essential to assure an infrastructure that continues to meet the nation's energy needs, and proposals that mitigate the attendant risks of overbuilding serve the public interest in a vital way. In contrast, the prearranged deal proposal does not obviate the need for any construction whatsoever. At most, granting the requested waiver would prevent only that construction necessitated by *prearranged deals*, *i.e.*, from Petitioner's committing capacity that becomes unavailable prior to the commencement date of the prearranged deal. Thus, the prearranged deal proposal does not serve to prevent construction, unnecessary or otherwise, and the waiver Petitioner seeks does no more than alleviate a problem that its prearranged deal proposal creates.

Petitioner further argues that its prearranged deal program assures utilization of specific capacity at a future date, and thereby satisfies the goal of more fully utilizing capacity. Br. at 22 (citing *Viking Gas Transmission Co.*, 87 FERC ¶ 61,215 at 61,852 (1999) ("*Viking*"). Petitioner contrasts this assurance of use with the degree of uncertainty in capacity reservation cases as to whether the projects for which the capacity was reserved will ever materialize. *Id.* at 23.

The Commission explained that such marginal efficiencies did not justify waiving rights put in place "to protect existing long-term maximum rate customers from pipelines' exercise of market power." 103 FERC at 61,199 ¶ 6 (JA 5) (footnotes

omitted). Although more efficient use of existing capacity remains a Commission goal, “in this instance efficiency concerns alone” are “an insufficient basis for denying shippers” such a valuable protection. *Ibid.*<sup>5</sup>

Petitioner’s assertion that its prearranged deal program results in capacity-utilization benefits akin to those provided by proposal in *Viking*, Br. at 22, is procedurally and substantively deficient.

Petitioner did not cite *Viking* in its request for rehearing, much less claim that its proposal produced benefits similar those in the proposal that *Viking* approved. Petitioner’s failure precludes the Court from considering those contentions now. NGA § 19(b), 15 U.S.C. § 717r(b), precludes a petitioner from raising an objection on judicial review that it omitted to raise on rehearing below, in the absence of good cause for the omission. *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99 (1955); *see Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 77-78 (D.C. Cir. 1988) (“the obvious (and salutary) purpose” of this rule is to afford the Commission “an opportunity to bring its knowledge and expertise to bear on an issue before it is presented to a generalist court”); *ASARCO v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985) (“ASARCO”) (the courts lack discretion to consider such objections); *New*

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<sup>5</sup>This is particularly true because alternative means of achieving the claimed efficiencies that do not involve waiver of ROFR rights are available. *See infra* at 24-25; 102 FERC at 61,100 ¶ 12 (JA 3).

*Jersey Zinc Co. v. FERC*, 843 F.2d 1497, 1503 (D.C. Cir. 1988) (the rule must be applied "punctiliously"); *Domtar Me. Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003) ("*Domtar*") (FERC's concession that two arguments are closely related does not justify a petitioner's raising one on rehearing and the other on judicial review).

Moreover, *Viking* illustrates the difference between the significant capacity-utilization benefits in the capacity reservation cases and the marginal benefits that implementation of Petitioner's prearranged deal proposal will produce. In *Viking*, the pipeline proposed to use existing excess capacity to assure a properly sized expansion. *See* 87 FERC at 61,852-53. In contrast, Petitioner's prearranged deal proposal is simply a device to market existing capacity, which may result in more shippers using Petitioner's system. Such an innovation is to be encouraged, but not to the point of abrogating valuable shipper protections.

Petitioner further contends that its prearranged deal program avoids some uncertainties that are tolerated in capacity reservation cases by assuring that the reserved capacity will be utilized. Br. at 22-23. Here, however, Petitioner is not even contending that its proposal provides benefits comparable to those provided in the capacity reservation cases, but only that it might not entail the same degree of uncertainty.

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In its request for rehearing, Petitioner acknowledged the insubstantiality of this claim, noting that the “Commission has found the harm” from the uncertainty resulting from the capacity reservation program “to be minimal because the reservation imposes only temporary delay in the award of long-term contracts and allows the capacity to be awarded on a short-term basis for the interim period.” R. Item No. 31 at 5 (citing *Tennessee Gas Pipeline Co.*, 82 FERC ¶ 61,288 at 62,115 (1998)). Petitioner also acknowledged that the Commission has taken steps to protect against even this minimal harm, requiring the pipeline to submit information regarding the proposed expansion project and the expected in-service date. *Ibid.* (citing *Iroquois*, 100 FERC at 62,190). Yet here Petitioner seeks to inflate the claimed absence of this minimal harm into a benefit that justifies waiving a regulation designed to provide significant protections.

Finally, Petitioner asserts that its prearranged deal program furthers the goal of minimizing costs to ratepayers of unsubscribed capacity by assuring that: (1) the pipeline does not have to expand capacity to serve prearranged shippers; (2) the capacity will be utilized; and (3) prospective customers do not go elsewhere. Br. at 24-25.

Petitioner failed to raise the latter two claims in its request for rehearing. Petitioner's failure precludes the Court from considering those contentions now. *See* 15 U.S.C. § 717r(b); *ASARCO*, 777 F.2d at 775.

In any event, all three claims are variants, in a rate context, of Petitioner's arguments that granting its waiver will assure that Petitioner will not have to build facilities to meet a prearranged shipper's needs, and that its prearranged deal proposal will result in greater utilization of Petitioner's system. As explained, Petitioner's prearranged deal proposal does not prevent construction, necessary or otherwise, and the Commission properly found that the marginal efficiencies in capacity utilization that may result from marketing prearranged deals do not justify waiving shippers' ROFR protections.

Accordingly, Petitioner has failed to demonstrate that its prearranged deal program furthers any significant objective promoted in the capacity reservation cases. Petitioner thus fails to provide any reason why the Commission should have denied interim shippers their important and judicially mandated ROFR rights.

**2. The Commission Has Never Given Pipelines Discretion To Waive Shippers' ROFR Protections On a System-Wide Basis.**

In response to the Commission's point that Petitioner's request for authority "to unilaterally waive the [ROFR] requirement" as it entered into individual shipper service agreements is unprecedented, 102 FERC at 61,100 ¶ 12 (JA 3), Petitioner

asserts that in the capacity reservation cases the Commission granted pipelines the very authority that Petitioner seeks – the authority to waive ROFR requirements for individual contracts with interim shippers. Br. at 29 & n.88. This argument is procedurally and substantively deficient.

Petitioner failed to make this argument on rehearing. See JA 66-69. Petitioner's failure precludes the Court from considering the contentions now. See 15 U.S.C. § 717r(b); *ASARCO*, 777 F.2d at 774-75.

Moreover, Petitioner misapprehends the Commission's point. The capacity reservation cases contemplate waiver of ROFR rights only for specific blocks of excess capacity that can be used for specific expansion projects. See, e.g., *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,136 at 61,518 ¶¶ 11, 12 (2002). In contrast, Petitioner's program would permit such waivers for any capacity subject to a prearranged deal. As Petitioner has system-wide latitude to negotiate prearranged deals for excess capacity, it also has system-wide latitude to deny ROFR rights in individual service agreements. Thus, the situations are not comparable.

### **3. The Commission's Refusal To Waive Shippers' ROFR Protections Is Not a Departure From Past Policies.**

Petitioner contends that its prearranged deal program provides benefits so similar to those arising out of the capacity reservation cases, that the Commission's refusal to authorize Petitioner's proposed abrogation of shippers' ROFR rights as part

of that program constitutes a departure from past FERC policies without explanation. Br. at 25-31.

The argument, too, is procedurally and substantively deficient. Petitioner never claimed on rehearing that denial of the waiver departed from past precedent, only that the prearranged deal program served some of the policies found in the capacity reservation cases. *See* JA 66-69. Petitioner's failure to assert on rehearing that FERC was departing from past precedent precludes this Court from considering that assertion on judicial review. *See* 15 U.S.C. § 717r(b); *Domtar*, 347 F.3d at 313; *ASARCO*, 777 F.2d at 774-75. Moreover, as discussed in the preceding subsections, Petitioner's proposal differs sharply from those in the capacity reservation cases, and provides none of the latter proposals' major benefits.

**B. The Value of Retaining Shipper Protections Outweighs Any Negative Effects Such Protections May Have on Petitioner's Prearranged Deal Proposal.**

Petitioner asserts that denial of the ROFR waiver request renders its prearranged deal proposal unworkable because "granting the interim shipper a ROFR places the interim shipper in complete control of the capacity and destroys the prearranged shipper's ability to rely on the fact that the capacity will be available to meet its future

needs.” Br. at 33 (internal quotation omitted).<sup>6</sup> Petitioner contends that by granting its prearranged deal proposal but not its request for waiver of the ROFR regulation, the Commission “imposed conditions . . . that negated the effect of the waiver[,]” and thus engaged in the very kind of action proscribed by *Ozark Gas Transmission Sys. v. FERC*, 897 F.2d 548 (D.C. Cir. 1990). Br. at 37-38.

In *Ozark*, the Commission waived a regulation, promulgated under Order No. 436,<sup>7</sup> to avoid causing a pipeline to default on its loans, but then imposed “conditions which would themselves require default.” 897 F.2d at 552. The Court remanded on the ground that this treatment thwarted Order No. 436’s purpose of promoting “competition in gas markets” by effectively putting the pipeline out of business, and thereby preventing it from delivering gas to those markets. *Id.* at 550.

The instant case presents an entirely different situation. The Commission is “not imposing a new condition” – as under Order No. 436 – but is simply requiring Petitioner to follow “an existing requirement” as part of its “prearranged capacity

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<sup>6</sup>This ignores the fact that Petitioner’s original proposal did not involve denying ROFR protections to any class of shipper. *See supra* at 9-10; 102 FERC at 61,098-99 ¶¶ 2, 3 (JA 1-2).

<sup>7</sup> *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Pmbles. 1982-1985 ¶ 30,665, *order on reh’g*, Order No. 436-A, FERC Stats. & Regs., Regs. Pmbles. 1982-1985 ¶ 30,675 (1985), *reh’g denied*, Order No. 436-B, 34 FERC ¶ 61,404, Order No. 436-C, 34 FERC ¶ 61,403 (1986), *aff’d in relevant part*, *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (1987).



program.” 103 FERC at 61,199 ¶ 8 (JA 5). Nor has Petitioner shown that following the existing regulation will render it insolvent or cause any other comparable injury. Because Petitioner’s proposal seeks “to address perceived needs on its system[,]” Petitioner has the “responsibility to propose a program that works with current Commission policy.” *Ibid.*

In addition, waiver of the Commission’s ROFR regulation was not the only way to implement Petitioner’s proposed program. As noted, waiver was not included in the original proposal. *See supra* at 9-10, 23 n.6. The Commission explained that “[a] shipper that desires capacity only at a future date can insulate itself from the risk that capacity may not be available at that time or from the risk of marketing such capacity by purchasing capacity and releasing it until it has a use for it.” 102 FERC at 61,100 ¶ 12 (JA 3). As Petitioner concedes, *see* Br. at 39 & n.121, replacement shippers have no ROFR rights. Thus, unlike the alternative offered in *Ozark*, which would still have resulted in the pipeline’s insolvency, the alternative proposed here permits Petitioner to implement arrangements akin to prearranged deals. Prospective prearranged shippers can guard against ROFR uncertainties by purchasing and releasing capacity that they do not need until the prearranged date to those shippers that Petitioner would otherwise market on an interim basis. As replacement shippers have no ROFR rights, the prearranged shipper will be assured that its capacity will be available at that future

time and use of the capacity will be maximized.

Petitioner contends that because replacement shippers have no ROFR rights, they would be in “the same situation the shipper would face under [Petitioner’s] proposal.” Br. at 39. This argument does not survive scrutiny.

First, Petitioner never made the argument on rehearing. *See* JA 72-73. Accordingly, the Court lacks jurisdiction to consider the argument on judicial review. *See* 15 U.S.C. § 717r(b); *ASARCO*, 777 F.2d at 774-75.

Moreover, the contention is without merit. Whereas the ROFR requirement protects the shipper against the pipeline’s exercise of market power in the capacity market, *UDC*, 88 F.3d at 1139, replacement shippers obtain their capacity in the secondary market from other shippers that lack market power. Indeed, if these two situations were equivalent, as Petitioner suggests, there would be no need for ROFR protections, because no such protections exist in the secondary market. This Court has already rejected that outcome. *AGA*, 912 F.2d at 1518.<sup>8</sup>

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<sup>8</sup> Petitioner also claims support from *North Carolina v. FERC*, 584 F.2d 1003 (D.C. Cir. 1978), Br. at 38, a claim it failed to make on rehearing. *See* JA 69-74; *see also* 15 U.S.C. § 717r(b); *ASARCO*, 777 F.2d at 774-75. In any event, as Petitioner acknowledges, in *North Carolina*, the Court remanded a Commission-approved curtailment plan “because the Commission failed to consider whether the plan would actually distribute gas without undue preference.” Br. at 38 (citing 584 F.2d at 1014). In the instant case, the Commission indicated that waiving of its ROFR regulation could subject interim shippers to undue discrimination. *See* 102 FERC at 61,098 ¶ 1 (JA 1) (order assures implementation of Petitioner’s proposal “occurs without undue

**C. The Commission’s Denial of Petitioner’s Waiver Request Is Well Supported.**

Petitioner argues that *Williams*, the “only case” cited in support of the waiver denial, is inapposite. Petitioner contends that, unlike *Williams* where the pipeline sought to waive the ROFR requirement for a single shipper, Petitioner’s waiver requirement “would be explicitly set forth in the tariff and thus would apply to all shippers on a not unduly discriminatory basis.” Br. at 41.

Petitioner, however, had the burden of justifying its request, because it was seeking a tariff change, *see LP&L*, 406 U.S. at 645 (the pipeline has the burden of showing its proposed tariff change is reasonable), and because it was seeking a waiver of an existing regulation. *See* 103 FERC at 61,199 ¶ 6 (JA 5) (stating that the Commission’s “regulations require a ROFR to be given to shippers with contracts of a year or more at maximum rates” and citing 18 C.F.R. § 284.221(d)). *Williams* aside, Petitioner did “not justif[y] its waiver request.” *Ibid.*

In any event, *Williams* supports the Commission’s determination. First, just as the pipeline in *Williams* sought to discriminate against a single shipper, Petitioner’s proposal would discriminate against an entire class of shippers, namely interim

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discrimination”); *id.* at 61,100 ¶ 12 (JA 3) (stating that waiver of the ROFR regulation would be “at the expense of shippers who enter into service agreements in the interim” and citing *Williams*). Thus, granting Petitioner’s waiver request would have resulted in the kind of undue discrimination that concerned the Court in *North Carolina*.

shippers. The proposal would deny ROFR rights to interim shippers operating under long-term, maximum-rate contracts while continuing to provide those rights to other shippers operating under equivalent contracts. In the absence of substantial justification – which Petitioner has failed to provide – such disparate treatment of similarly situated shippers amounts to undue discrimination, which the Commission “has not allowed.” 102 FERC at 61,100 ¶ 12 (JA 3). Second, and contrary to Petitioner’s contention, *Williams* was concerned with the importance of ROFR rights, noting “that a regulatory right of first refusal may be broadened but not curtailed . . . .” 103 FERC at 61,199 ¶ 9 (JA 5). *See Williams*, 97 FERC at 62,110. Just as granting the waiver request in *Williams* would have set a precedent permitting a pipeline to curtail ROFR rights by using its market power to negotiate waiver of ROFR requirements in individual cases, so, too, Petitioner’s prearranged deal proposal would use a tariff change to curtail the ROFR protections for a class of shippers. Thus, the principle underlying *Williams* supports the Commission’s actions in the instant orders.<sup>9</sup>

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<sup>9</sup>Petitioner contends that *Williams* does not address the proposition that Petitioner should not be permitted to insulate itself from the risks inherent in making prearranged deals by removing interim shippers’ ROFR protections. Br. at 41. However, *Williams* explains how Petitioner’s proposal would come “at the expense of” interim shippers, *see* 102 FERC ¶ 61,100 ¶ 12 (JA 3), by demonstrating that a provision allowing a pipeline to waive an interim shipper’s ROFR would provide that shipper “a different quality of service” than that “accorded to other firm shippers

**D. Petitioner Is Responsible for Implementing Its Prearranged Deal Program in Accordance With Commission Regulations.**

Petitioner further asserts that the “Commission’s requirement” that Petitioner “offer an interim shipper a ROFR would subject the prearranged shipper to the prior claim of the interim shipper and would thus violate Section 284.7(a)(3) of the Commission’s regulations [18 C.F.R. § 284.7(a)(3)][,]” which defines “firm service” as “service that is not subject to a prior claim by another customer.” Br. at 43-44.

“[P]roviding a ROFR is an existing requirement” that Petitioner must “account for . . . when it administers its prearranged capacity program.” 103 FERC at 61,199 ¶ 8 (JA 5). If Petitioner wishes to implement its prearranged deal proposal, it must do so without denying ROFR protections to affected shippers. One way to do this is to have the shipper that makes the prearranged deal reserve the capacity for the interim period, and then release it to an interim shipper. 102 FERC at 61,100 ¶ 12 (JA 3).

**E. The Commission Satisfactorily Explained Its Reasons for Denying Petitioner’s Waiver Request.**

Petitioner claims that “the Commission denied the requested waiver of the ROFR regulation” simply “because a ROFR is required by regulation.” Br. at 44. But

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under [the pipeline’s] tariff.” 97 FERC at 62,110. In order to make its prearranged deals more marketable, Petitioner would deny interim shippers their ROFR protections and thus provide this class of shippers a transportation service that would be inferior to the service offered other, similarly situated shippers on Petitioner’s system.

as the language quoted by Petitioner (*id.*, citing 103 FERC at 61,199 ¶¶ 6 and 8 (JA 5)) shows, Petitioner offered claimed efficiencies (in this case, fuller use of capacity) as grounds for waiver, and the Commission found these claimed efficiencies were not enough.

Petitioner seeks waiver of a long-standing regulation that has been found necessary to assure shipper protection from pipeline monopoly power. *See UDC*, 88 F.3d at 1139; *AGA*, 912 F.2d at 1518. Efficiency justifies waiver only “[w]ith respect to the expansion projects . . . so that a general system expansion may be optimally sized.” 102 FERC at 61,100 ¶ 12 (JA 3). Not to grant a waiver in the expansion context would increase the risk of “stranded capacity/costs that could burden other shippers on the system.” *Ibid.*

Petitioner failed to demonstrate that its prearranged deal program would accomplish similarly beneficial ends. *See Br.* at 22-25; JA 66-69. This failure precluded waiving interim shippers’ ROFR rights, in view of the “significant concern underlying the availability of a ROFR[:] to protect existing long-term maximum rate customers from pipelines’ exercise of market power.” 103 FERC at 61,199 ¶ 6 (JA 5) (citation omitted). Although efficiency remained a Commission goal, “in this instance efficiency concerns alone” were “an insufficient basis for denying shippers” such a valuable protection. *Ibid.*

Petitioner's failure to show that its prearranged deal program would create benefits for shippers approaching those in capacity-reservation situations effectively closed the debate. Petitioner's contention that retaining shippers' ROFR protections would impede the operation of its prearranged deal program was answered by the alternative of the prearranged shipper reserving interim capacity and releasing it to replacement shippers, 102 FERC at 61,100 ¶ 12 (JA 3), and by the need for Petitioner to propose and administer "a program that works with current Commission policy to address perceived needs on its system." 103 FERC at 61,199 ¶ 8 (JA 5). Accordingly, the Commission satisfactorily explained its decision not to waive a long-standing regulation that provides critical shipper protections.

**CONCLUSION**

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

Respectfully submitted,

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January 15, 2004