

**No. 04-60041**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**JUPITER ENERGY CORPORATION,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**AUGUST 6, 2004**

## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Fifth Circuit Rule 28.2.4, Respondent joins with Petitioner to request oral argument in this case. Respondent agrees that oral argument would assist the Court's resolution of this case. The issue in this case is whether the Commission reasonably applied its "primary function" test in classifying Petitioner's pipeline as a jurisdictional transportation facility, and conversely, denying Petitioner's request to have the pipeline classified as a non-jurisdictional gathering facility. Oral argument will enable counsel to answer any questions the Court may have regarding the application of that technical, fact-intensive test.

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**COUNTER-STATEMENT OF JURISDICTION**

The Court has jurisdiction to review the challenged orders, but lacks jurisdiction to consider a number of Petitioner's specific objections, because Petitioner failed to make those objections on rehearing. *See* 15 U.S.C. § 717r(b).

## STATEMENT OF THE ISSUE

Did the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably apply its “primary function” criteria in continuing to classify Petitioner’s offshore facilities, which do not collect or aggregate natural gas, as transportation facilities?

## STATEMENT OF THE CASE

On November 4, 2002, Petitioner Jupiter Energy Corporation (“Jupiter”) filed an application under Section 7(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717f(b), seeking a Commission determination that its natural gas pipeline facilities, located approximately ten miles off the coast of Louisiana, are gathering facilities exempt from the Commission's NGA jurisdiction pursuant to NGA § 1(b), 15 U.S.C. § 717(b). *Jupiter Energy Corp.*, 103 FERC ¶ 61,184 at 61,712 ¶ 1 (2003).<sup>1</sup> Jupiter requested that the Commission rescind Jupiter's NGA certificates and authorize Jupiter's abandonment of its rate schedules and certificated service. *Ibid.* Jupiter represented that if the Commission granted the requested gathering determination and abandonment authority, Jupiter would transfer the facilities to its parent company, Union Oil Company of California (“Unocal”). *Ibid.*

The first challenged order found Jupiter's pipeline facilities to be primarily engaged in jurisdictional transportation, and denied Jupiter's request that FERC

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<sup>1</sup> Unless otherwise indicated, all citations to the *FERC Reports* are captioned *Jupiter Energy Corp.*

rescind Jupiter's certificates and authorize abandonment of its rate schedules and certificated service. 103 FERC ¶ 61,184. The second challenged order denied Jupiter's request for rehearing. 105 FERC ¶ 61,243 (2003). This petition for review followed.

## STATEMENT OF FACTS

### I. Statutory and Regulatory Framework

#### A. Natural Gas Act

NGA § 1(b) grants the Commission jurisdiction over, *inter alia*, the "transportation of natural gas in interstate commerce" but not over "production or gathering of natural gas." The section states, in pertinent part:

The provisions of this Act *shall apply to the transportation of natural gas in interstate commerce*, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas*.

15 U.S.C. § 717(b) (emphasis added).

The NGA does not define either jurisdictional "transportation" or non-jurisdictional "gathering." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1076 (D.C. Cir. 2002). The Commission has defined gathering as "the collecting of gas from various wells and bringing it by separate and several

individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 FPC 369, 372 (1957). See also *Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996) (defining gathering as "the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system.").

NGA § 7(c), 15 U.S.C. § 717f(c), prohibits persons from constructing or operating facilities subject to FERC jurisdiction (*i.e.*, transportation facilities) prior to obtaining a certificate of public convenience and necessity from the Commission. NGA § 7(b) requires pipelines to receive abandonment authority from the Commission prior TO abandoning such facilities or otherwise terminating jurisdictional services. FERC regulates transportation services over such facilities under NGA §§ 4 and 5, 15 U.S.C. §§ 717c, 717d.

### **B. The Primary Function Test**

The Commission utilizes a "primary function" test to determine whether a facility is primarily "devoted to the collection of gas from wells – gathering – or to the further ('downstream') long-distance movement of gas after it has been collected – interstate transportation." *ExxonMobil*, 297 F.3d at 1077 (quoting *Conoco*, 90 F.3d at 543). As applied to *onshore* facilities, the primary function test utilizes two subsidiary tests. The "behind-the-plant" test presumes that facilities located between the wellhead and the processing plant perform primarily a non-

jurisdictional gathering function, and that facilities downstream of the processing plant perform primarily a jurisdictional transportation function. *See Phillips Petroleum Co.*, 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). The "central-point-in-the-field" test, which applies to gas that requires no processing, classifies lateral lines that collect gas from separate wells before converging into a larger single line – typically at the point where the gas is compressed for transportation by the pipeline – as gathering facilities. *E.g., Barnes*, 18 FPC at 372.

The primary function test factors for onshore facilities include the:

1. Pipeline's length and diameter (larger facilities being more indicative of transportation);
2. Pipeline's proximity to the central point in a field (facilities' location "downstream" of that central point being more indicative of transportation);
3. Pipeline's geographic configuration (a web-like pattern, for example, suggesting a gathering function);
4. Pipeline's proximity to processing plants and compressors (the facilities' location downstream of either being more indicative of transportation);
5. Location of wells along all or part of the facilities (typically indicating gathering); and
6. Pipeline's operating pressure (with higher pressure generally associated with the need to propel gas in a transportation function).

*Farmland Indus., Inc.*, 23 FERC ¶ 61,063 at 61,143 (1983). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See, e.g., Williams Field Serv. Group v. FERC*, 194 F.3d 110, 116 (D.C. Cir. 1999) (“*Williams Field Service*”); *Farmland*, 23 FERC at 61,143.

The primary function test for offshore facilities located in the outer Continental Shelf (“OCS”) differs from the test applied to onshore facilities, because offshore and onshore patterns of delivering gas differ.<sup>2</sup> “Specifically, it is often not feasible to process raw gas on open water.” *ExxonMobil*, 297 F.3d at 1077. “As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS relatively long lines are constructed to carry the raw gas from offshore platforms, where ‘[o]nly the most rudimentary separation and dehydration operation’ are conducted, to the shore where it can be processed into ‘pipeline quality’ gas[,]” *i.e.*, gas that can be transported by an interstate pipeline. *Id.* at 1077-78 (quoting *EP Operating Co. v. FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989)).

The evolution of the current application of FERC’s primary function test to offshore facilities arguably began in the wake of the *EP Operating* decision. In

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<sup>2</sup> The “outer Continental Shelf” consists of all submerged lands that appertain to the United States and lie beyond the three-mile limit designated for state waters. 43 U.S.C. §§ 1301(a), 1331(a).



that case, the Commission denied a natural gas company's request for a declaratory order stating that the company's proposed 51-mile, 16-inch offshore pipeline (the "Green Canyon" pipeline) should be classified as a gathering facility. 876 F.2d at 48. The Court found that the pipeline bore "marked similarities in operational characteristics" to another offshore facility that the Commission had classified as gathering, reversed the Commission's decision, and held the Green Canyon pipeline to be a gathering pipeline facility. *Id.* at 49, 50.

In response to *EP Operating*, the Commission developed a "sliding scale" for assessment of physical characteristics of OCS facilities. The "sliding scale" allows for lines of increasing length and diameter to be classified as gathering in correlation to the increasing distance from shore and water depth of the offshore production area, *i.e.*, facilities deemed too large to be gathering onshore may be classified as gathering offshore. *See Amerada Hess Corp.*, 52 FERC **¶** 61,268 at 61,988 (1990). The Commission also developed a number of "non-physical" criteria to use in determining an offshore facility's primary function, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Id.* at 61,987-88.

Sea Robin Pipeline Co. v. FERC, 127 F.3d 365 (5th Cir. 1997) (“Sea Robin I”), provided the impetus for further changes in the Commission’s approach. There, the Commission denied an offshore pipeline’s request for a declaratory order that would have changed the classification of its 438-mile system from transportation to gathering. *Id.* at 367. The Commission principally relied on the facilities’ large size, prior certification and ownership by an interstate pipeline for its determination. *Id.* at 369-70.

This Court found the Commission’s analysis unsatisfactory. In relying heavily upon the facilities’ size, the Commission had neglected to consider its sliding scale, and had “excluded at least four other factors on grounds that they . . . . were not probative in the offshore context[.]” 127 F.3d at 370. In addition, the Commission’s focus on “business purpose, ownership and prior certification status” missed “the basic thrust of the primary function test—making a technical distinction between gathering and transportation based on the physical and operational characteristics of a pipeline facility.” *Ibid.* (citation omitted). Where a facility’s primary function is concerned, such considerations are “secondary.” *Id.* at 371. Rather, the question must be “when did gathering cease and transportation begin.” *Ibid.*

Unlike *EP Operating*, in which the Court declared the system to be a gathering facility, *Sea Robin I* vacated and remanded the orders, stating that the

Commission could “reformulate its primary function test if it so chose. 127 F.3d at 371. On remand, the Commission was to focus on the question that most concerned the Court – “when did gathering cease and transportation begin.” *Ibid.*

Accepting this Court’s invitation, the Commission reformulated its test for offshore facilities in three respects. First, in situations “where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation systems on OCS systems.” *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 at 62,428 (1999), *reh’g denied*, 92 FERC ¶ 61,072 (2000) (“*Sea Robin II*”), *aff’d*, *ExxonMobil*. The Commission later referred to this point of collection as a “centralized aggregation point,” *Sea Robin II*, 92 FERC at 61,289, and Commission orders finding centralized aggregation points feeding into more than one downstream transmission line, and feeding into a transmission line the same size as the principal upstream gathering line, have since been affirmed. *See Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115 at 61,440-41, *reh’g denied*, 97 FERC ¶ 61,296 (2001), *aff’d*, *Williams Gas Processing–Gulf Coast Co. v. FERC*, 331 F.3d 1011, 1021 (D.C. Cir. 2003) (“*Williams*”), *cert. denied sub. nom. Producer Coalition v. FERC*, 124 S. Ct. 1036 (2004); *Transcontinental Gas*

*Pipe Line Corp.*, 96 FERC ¶ 61,118 at 61,458, *reh'g denied*, 97 FERC ¶ 61,300 (2001), *aff'd*, *Williams*, 331 F.2d 1018-19. However, the Commission recognized “that not all OCS pipeline systems” would “exhibit a centralized aggregation point.” *Sea Robin II*, 87 FERC at 62,428. “For example, an OCS facility that has a straight spine-and-lateral type configuration” – where gas is gathered by laterals connected all along one or more transmission lines (the latter being the “spine”) – “may not have such a point.” *Ibid.* FERC’s second change in the primary function test was to de-emphasize the “behind-the-plant” criterion relating to the location of processing plants, stating that it would not be determinative on the OCS, *Sea Robin II*, 87 FERC at 62,426, and could “be outweighed by other factors[.]” 92 FERC at 61,290. The Commission’s final change, consistent with *Sea Robin I*, was to place its “primary focus on physical factors.” *Ibid.* In affirming *Sea Robin II*, *ExxonMobil* found the reformulated test to be “wholly consistent with past Commission precedent.” 297 F.3d at 1085.

## **II. Jupiter’s System**

Jupiter’s facilities have been classified as transportation for almost forty years. *See The Jupiter Corp.*, 35 FPC 1091, 1103-10 (1966). They consist of a 10.2-mile, 10¾” diameter line that transports gas from “Platform 39A” to a shoreline interconnect with Tennessee Gas Transmission Company and a 3.2-mile, 8 5/8” diameter line that transports gas from Platform 39A to a sub-sea

interconnect with Transcontinental Gas Pipe Line Corporation (“Transco”). 103 FERC at 61,712 ¶ 3. They operate at pressures that range from 750 psig to 950 psig and that are powered by compression facilities at Platform 39A owned by Unocal. *Ibid.*; 105 FERC ¶ 61,243 at 62,285 ¶ 3 (2003). Jupiter originally used the subject facilities to provide transportation service to three shippers under FERC-issued certificates and FERC-approved rate schedules. 103 FERC at 61,712 ¶ 4. Jupiter now provides such transportation only to Unocal. *Ibid.*

## SUMMARY OF ARGUMENT

The Commission's decision to continue to classify Jupiter's pipelines as transportation facilities was reasonable. In effect, the Commission's finding rested on a view that a system that does not gather gas from any source is not a gathering system. The facts that the dimensions and operating pressure of Jupiter's facilities were similar to, or smaller than, those of other facilities classified as gathering was less important than the salient fact that gas aggregation (*i.e.*, gathering) was complete once the gas reached a central aggregation point at Unocal Platform 39A, which was upstream of Jupiter's system. Thus, the Commission's demarcation of gathering and transportation at that platform was well within the "zone of reasonableness," as was the Commission's consequent classification of the Jupiter system as transportation.

A number of the arguments that Jupiter makes in its brief were not raised on rehearing before FERC. Thus, the Court lacks jurisdiction to consider those arguments. The arguments that the Court does have jurisdiction to consider do not survive scrutiny.

Jupiter's argument that the Commission inadequately considered the primary-function factors fails. The Commission properly focused on where gathering ended and transportation began. Jupiter would have the Court ignore the fact that Jupiter's facilities do not gather any gas. Moreover, the conclusion

dictated by the facilities' physical characteristics was sufficiently clear to preclude inquiry into non-physical factors asserted by Jupiter, particularly in light of *Sea Robin I*'s discounting of such factors.

Jupiter tries to make much of the fact that one of Jupiter's pipelines connects with a downstream lateral that has been classified as gathering. However, the Commission was unaware that the lateral was downstream of a transportation facility when it made the classification, and has initiated a proceeding to reconsider the lateral's classification.

Jupiter's call for the Court to reverse the Commission's ruling and declare Jupiter's system to be a non-jurisdictional gathering facility should be rejected. Should the Court take issue with some aspect of the orders, the only proper remedy would be to remand the orders for further consideration, as was done in *Sea Robin I*.

The only arguments that the brief *Amici Curiae* make are arguments that Jupiter did not make on rehearing and that the Court therefore lacks jurisdiction to consider. In any event, the arguments principally fault the Commission for failing to address issues that were never raised by any party below.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews the Commission's "primary function" determinations under the Administrative Procedure Act's "arbitrary and capricious" standard. *Sea Robin I*, 127 F.3d at 369. *See* 5 U.S.C. § 706(2)(A). Under this standard, FERC "must cogently explain why it has exercised its discretion in a given manner" and "must supply a reasoned analysis" for any departure from other agency decisions." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48, 57 (1983) ("*State Farm*"). Thus, courts "will uphold the Commission's application of the [primary function] test as long as it gives reasoned consideration to each of the pertinent factors and articulates factual conclusions that are supported in the record." *ExxonMobil*, 297 F.3d at 1084 (internal quotations omitted).

"[A] court is not to substitute its judgment for that of the agency[.]" *Sea Robin I*, 127 F.3d at 369 (quoting *State Farm*, 463 U.S. 29 at 43). Thus, it is not a court's role "to interpose its judgment" in primary function cases. *ExxonMobil*, 297 F.3d at 1084 (internal quotation omitted). Such deference acknowledges that the "line between jurisdictional transportation and non-jurisdictional gathering is not always clear." *ExxonMobil*, 297 F.3d at 1076-77 (quoting *Conoco*, 90 F.3d 542). Rather, application of the primary function test may present "a line-drawing



problem for which there is no easy answer." *Williams Field Service*, 194 F.3d at 118. Thus, in "evaluating and balancing the several factors of the primary function test, the Commission" requires latitude to utilize "its considerable expertise about the natural gas industry." *ExxonMobil*, 297 F.3d at 1084 (quoting *Conoco*, 90 F.3d at 544).

Moreover, the "burden is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a 'zone of reasonableness' as distinct from the question of whether the line is 'precisely right.'" *ExxonMobil*, 297 F.3d at 1084 (quoting *Hercules, Inc. v. EPA*, 598 F.2d 91, 107 (D.C. Cir. 1978) (additional internal quotation omitted)). "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 717r(b).

## **II. THE COMMISSION'S DECISION NOT TO RECLASSIFY PETITIONER'S FACILITIES WAS REASONABLE.**

### **A. The Commission Provided Sound Reasons For Its Conclusions.**

In addressing "when [does] gathering cease and transportation begin" relative to Jupiter's facilities, see *Sea Robin I*, 127 F.3d at 371, the Commission applied the primary function test to Jupiter's system to reach a result well within the "zone of reasonableness." See *ExxonMobil*, 297 F.3d at 1084. Although "the length, diameter and operating pressure of the pipeline facilities at issue are comparable to those of other facilities . . . found to be gathering facilities," those

factors were “outweighed by other physical factors in this case.” 105 FERC at 62,285 ¶ 11. Importantly, “gas aggregation is complete once the gas reaches” a central aggregation point located at Unocal's Platform 39A. 103 FERC at 61,713 ¶ 9. Whereas the “Unocal facilities upstream of Platform 39A are a spider-web configuration[,]” *ibid.*, and collect gas delivered “from 10 other production platforms[,]” 105 FERC at 62,286 ¶ 16, once the gas is aggregated at Platform 39A, “Jupiter's two pipelines move the gas to Tennessee's and Transco's systems, respectively, without collecting [i.e., gathering] any additional gas.” 103 FERC at 61,713 ¶ 9. Moreover, “compression facilities at Unocal's Platform 39A . . . compress production volumes to transmission pressures” so that “gathering ends at that point.” 105 FERC at 62,286 ¶ 12. Accordingly, “Unocal's Platform 39A is where a ‘marked change in the physical attributes and geographic configuration’ occurs[,]” and thus “serves as the central point of aggregation, delineating the point where gathering ends and jurisdictional transmission begins.” 103 FERC at 61,713 ¶ 10 (citing *Sea Robin II*, 87 FERC ¶61,384 at 62,430). It follows that “Jupiter's facilities, which are located downstream of that point, primarily serve a transmission function.” 103 FERC at 61,713 ¶ 10.

**B. Petitioner's Arguments to the Contrary Are Unavailing.**

1. The Commission's Determination Is Consistent With This Court's Precedent.

Jupiter asserts that the Commission's decision not to reclassify Jupiter's facilities as gathering is inconsistent with *EP Operating* and *Sea Robin I*. According to Jupiter, *EP Operating's* finding that the Commission erred by placing "particular emphasis" on the "central point in the field" precludes the Commission's analysis in the instant orders, which in Jupiter's view, place the greatest emphasis on their finding that the central aggregation point is located at Unocal Platform 39A. Br. at 22-24 (citation and internal quotation omitted).

Jupiter did not cite *EP Operating* for this proposition on rehearing. Rather, Jupiter stated only that *EP Operating* "overturned" the Commission "when it applied the central-point-in-the-field factor to isolated OCS operations[,]" and asserted that the Commission was making the same mistake by designating Unocal Platform 39A – in Jupiter's view, an "isolated unitary structure" – as the central aggregation point in the orders at issue. See R. Item No. 11 at 16-17.<sup>3</sup>

In the order denying Jupiter's rehearing request, the Commission pointed out that "Unocal's Platform 39A, the point which the Commission has determined to be the central aggregation point in this case[,]" was not an isolated unitary structure,

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<sup>3</sup> All citations to the record are to the Item No. of the document set out in the certified index to the record.

but instead collected gas “from 10 other production platforms[.]” 105 FERC at 62,286 ¶ 16. Unable to dispute that finding, Jupiter makes a wholly different argument – that *EP Operating* precludes the Commission from according “particular significance” to the location of a central point aggregation point, even if the gathering network is not isolated. However, Jupiter never cited *EP Operating* for that proposition – or otherwise advanced the proposition – on rehearing.

Petitioner’s failure to argue that FERC may not give additional weight to the location of the central point in the field, much less cite *EP Operating* in support of the argument, in its request for rehearing precludes the Court from considering the argument now. NGA § 19(b), 15 U.S.C. § 717r(b), precludes courts from considering an objection on judicial review that a petitioner omitted to raise on rehearing below, absent good cause for its omission. *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99 (1955); See *ECEE, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980) (requirement allows the agency to correct its errors, and provides the court the benefit of the agency's consideration and analysis of issues within its expertise).

The courts have strictly adhered to that requirement. See, e.g., *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 645 (1945) (petitioner precluded from raising objection on judicial review that was not raised on rehearing, despite petitioner’s having raised the objection earlier in the administrative proceeding);

ASARCO, Inc. v. FERC, 777 F.2d 764, 773-74 (D.C. Cir. 1985) (Scalia, J.) (petitioner precluded from raising objection on judicial review that petitioner failed to raise on rehearing, even though another party's request for rehearing had raised the objection); Domtar Me. Corp. v. FERC, 347 F.3d 304, 313 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2094 (2004) (even 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).<sup>4</sup>

Moreover, and contrary to Jupiter's contention, *EP Operating* does not require the Commission to give equal weight to every primary function factor in every situation. Rather, the Court took a more flexible approach, reasoning that “[t]he true test of primary function is whether, with particular reference to the specific facts and circumstances of this particular line, its primary function is gathering.” 876 F.2d at 49.

Indeed, the reformulated primary function test, which, in appropriate circumstances, gives “considerable weight” to the location of the central aggregation point, *see Sea Robin II*, 87 FERC at 62,428, was consciously developed and affirmed within the framework provided by this Court. The *Sea Robin II* orders were issued on remand from *Sea Robin I*, and *ExxonMobil* operated

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<sup>4</sup> *Domtar* interpreted Section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 825l(b), a provision virtually identical to NGA § 19(b). The two provisions are properly interpreted consistently with one another. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

within *Sea Robin I's* framework in affirming them. *See* 297 F.3d at 1084 (“we simply cannot conclude that the Commission’s choice of the Vermillion 149 Station as the dividing line was unreasonable, especially in light of the Fifth Circuit’s decision on remand”).

In any event, Jupiter mischaracterizes the Commission’s application of the primary function test. It is not accurate to say that the Commission gave the greatest weight to its designation of Unocal Platform 39A as the central aggregation point, because that designation was intertwined with the Commission’s analyses of other primary function test factors, such as its findings that Platform 39A “is both the last point at which gas is collected and the point at which gas is compressed to transmission pressures[,]” 105 FERC at 62,286 ¶ 15, and that the facilities upstream of Platform 39A manifest a spider-web configuration, 103 FERC at 61,713 ¶ 9, and collect gas from ten other production platforms. 105 FERC at 62,286 ¶ 16. Because the Commission’s designation of Platform 39A as the central aggregation point was the product of, or was supported by, all of these findings, it cannot be viewed apart from them.

Jupiter further claims that *Sea Robin I* warrants a remand of the instant orders because, contrary to that case’s teachings, the Commission failed to adequately consider physical and non-physical factors in applying the primary function test. Br. at 25-27. The contention does not withstand scrutiny.

The Commission did not ignore physical factors, but, instead, carefully balanced all of them. As discussed above, and in more detail below, the Commission carefully considered: length and diameter (105 FERC at 62,285 ¶ 11); geographic configuration (103 FERC at 61,713 ¶ 9); location of compressors and processing plants (105 FERC at 62,286 ¶ 12); location of wells (103 FERC at 61,713 ¶ 9); operating pressure (*ibid.*; 105 FERC at 62,286 ¶ 12); and the location of the central aggregation point. 103 FERC at 61,713 ¶ 10; 105 FERC at 62,286 ¶¶ 12, 15. As is also discussed *infra*, the Commission found these physical factors to be sufficiently definitive to obviate any analysis of non-physical factors.

**2. The Facilities' Physical Characteristics Demonstrate That They Are Engaged Primarily in Transportation.**

Jupiter claims that five of the six physical factors listed in *Farmland* dictate classification of the two pipelines as gathering. *Br.* at 26-36. Jupiter inaccurately analyzes some factors, while ignoring the countervailing weight of others.

**a. Pipeline Dimensions**

Jupiter first asserts that its pipelines' dimensions are comparable to, or smaller than, those of other facilities found to be gathering. *Br.* at 27-29. Specifically, Jupiter argues that numerous offshore pipelines larger than Jupiter's are classified as gathering. *Id.* at 27-28 & n.17 (citing numerous Commission

decisions).<sup>5</sup> Jupiter also argues that “the size of [its] facilities [are] simply a function of the distance between the production platforms in OCS waters and the nearest point of interconnection with another pipeline.” *Id.* at 29. Jupiter claims that “FERC failed to articulate any cogent reason for disregarding this factor.” *Br.* at 29.

The Commission did not disregard the dimensions of the Jupiter pipelines, but found a “cogent reason” for giving greater weight to other factors. While Jupiter’s dimensions were consistent with gathering, those facilities did not gather any gas. Accordingly, “[i]n this case, the factor bearing the greatest weight” was “the location of Jupiter’s pipeline facilities downstream of Unocal’s Platform 39A, which is both the last point at which gas is collected and the point at which gas is compressed to transmission pressures before entering Jupiter’s two pipelines which transport the gas to shore.” 105 FERC at 62,286 ¶ 15. See also 103 FERC at 61,713 ¶ 10 “a ‘marked change in the physical attributes and geographic configuration’ occurs” at Unocal’s Platform 39A, thereby “delineating the point where gathering ends and jurisdictional transmission begins”) (quoting *Sea Robin II*, 87 FERC ¶ 61,384 at 62,430.

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<sup>5</sup> Jupiter downplays the fact that despite that size, the facilities were classified as gathering, over Jupiter’s opposition, almost four decades ago. *The Jupiter Corp.*, 35 FPC at 1103-1100.



The Commission’s conclusion was reasonable. Facilities that do not collect gas – indeed, are not even close to wells – cannot be said to be engaged in gathering simply because, as Jupiter would have it, their dimensions are similar to those of other pipelines that actually gather gas. Significantly, Jupiter does not assert – and did not assert on rehearing – that any of the Commission orders it cites hold that the pipeline’s dimensions trump these countervailing considerations.<sup>6</sup>

**b. Geographic Configuration**

With respect to geographic configuration, Jupiter makes three arguments. First, it claims that its 10.2-mile line connecting to Tennessee’s system manifests a gathering configuration, because it makes a “U-turn,” going out to a now-closed platform and then veering back to shore. Br. at 30. Then, it claims that the 3.2-mile pipeline manifests a gathering configuration, because it is similar to a line found to be gathering in Pacific Offshore Pipeline Co., 64 FERC ¶ 61,167 at 62,510 (1993) (“POPCO”). Br. at 30-31. Finally, Jupiter claims that its facilities should simply be treated as an extension of Unocal’s non-jurisdictional gathering system. Id. at 31.

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<sup>6</sup> Most of the FERC decisions that Jupiter cites for its point pre-date FERC’s reformulation of its primary-function test in *Sea Robin II*. See Br. at 27-29. One of the exceptions, *Mahue Constr. Co.*, 94 FERC ¶ 61,118 (2001), involved *onshore* facilities located in the Appalachian region. See *id.* at 61,449. In addition, under FERC’s sliding-scale analysis, the fact that Jupiter’s facilities are located only ten miles from shore makes their dimensions less important. See *Amerada Hess*, 52 FERC at 61,987-88.

Jupiter made none of these arguments in its rehearing request to the Commission, and did not cite POPCO. See Record (“R.”) Item No. 11 at 7.<sup>7</sup> Petitioner’s failure to make these objections in its request for rehearing precludes the Court from considering them now. See *Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565. See also *Domtar*, 347 F.3d at 312 (petitioner’s failure to raise on rehearing an alleged inconsistency between challenged orders and prior FERC precedent precluded Court from considering the claimed inconsistency on judicial review).

In any event, the arguments lack substance. The Commission did consider how Jupiter’s and Unocal’s facilities interact, and contrasted the “spider-web configuration” of the Unocal facilities that gather gas upstream of Unocal Platform 39A with the two Jupiter pipelines that transport gas downstream of that platform. See 103 FERC at 61,713 ¶ 9. As Jupiter acknowledged on rehearing, its two pipelines “simply carry gas from an offshore production platform to the nearest interstate pipeline[.]” R. Item No. 11 at 7. To deliver gas after it has been aggregated and to compressed transportation-quality pressure is, plainly and simply, transportation.

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<sup>7</sup> All citations to the record are to Jupiter’s request for rehearing, which is listed as Record Item No. 11 in the certified index to the record.

**c. Location of Processing Plants and Compressors**

Jupiter claims its pipelines' proximity to (1) processing plants and (2) compressors support the lines' classification as gathering. Br. at 31-32. Though Jupiter prefers to lump these two considerations together, they actually require separate analysis.

Jupiter argues that its location upstream of the nearest processing plant suggests the facility is gathering, and cites two cases that it claims support its point. Br. at 31-32. (citing Green Canyon Pipeline Co., 59 FERC ¶ 61,109 at 61,410 (1992), and Texas Gas Transmission Corp., 85 FERC ¶ 61,108 at 61,409 (1998)).

Jupiter's request for rehearing included a single sentence regarding the pipelines' location upstream of processing plants, and did not cite Green Canyon or Texas Gas in connection with that point. See R. Item No. 11 at 7. Jupiter's failure to cite the cases in this connection on rehearing deprived the Commission of the opportunity to distinguish (or follow) them on rehearing, and deprives the Court of jurisdiction to consider them on judicial review. See *Domtar*, 347 F.3d 304, 312. See also *Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565.

In any event, FERC's reformulation of its primary function test after Green Canyon and Texas Gas de-emphasized the location of processing plants in

determining the primary function of offshore facilities. *Sea Robin II*, 87 FERC at 62,426 (the location of processing plants has less weight in the OCS). See also *ExxonMobil*, 297 F.3d at 1077 (as “it is often not feasible to process raw gas on open water[,] OCS pipelines “typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation”).

As to compression, Jupiter claims that it has none on its system, Br. at 26, that Unocal’s compression is not relevant to the primary function of Jupiter’s facilities, *ibid.*, and that in any event, Unocal’s compression is a part of the production, rather than the transportation, function. *Id.* at 32. As to the latter point, Jupiter quotes FERC’s statement in *Murphy Exploration & Prod. Co.*, 68 FERC ¶ 61,051 (1994), that compression “not intended to facilitate mainline transmission” is “consistent with a primary function of gathering.” Br. at 32 (quoting 68 FERC at 61,174).

The Commission found that the existence of “compression facilities at Unocal’s Platform 39A that bring the gas up from low-level well pressures up to line pressures” supported classifying Jupiter’s lines as transportation. 105 FERC at 62,286 ¶ 12. The fact that the facilities were owned by Unocal rather than Jupiter was less important than the fact that “the presence of these facilities that compress

production volumes to transmission pressures indicates that gathering ends at that point.” Ibid. (footnote omitted).

Again, the Commission’s reasoning was sound. In giving the physical effect of the compression greater weight than its ownership, the Commission properly gave the physical precedence over the non-physical. See *Sea Robin I*, 127 F.3d at 37). Moreover, the compression at Platform 39A had the very impact that was absent in *Murphy Exploration* – to “facilitate mainline transmission[.]” See 68 FERC at 61,174.<sup>8</sup> As Jupiter’s facilities are downstream of the platform, they serve a transmission function.

**d. Proximity of Wells**

Jupiter’s brief, for the first time in this case, attempts to deal with the absence of wells along its lines. Jupiter contends that Green Canyon held facilities located in “production areas” to be gathering notwithstanding their remoteness from wells, and cites *POPCO* for the proposition that absence of nearby wells does

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<sup>8</sup> Jupiter also cites *Pelican Interstate Gas Sys.*, 61 FERC ¶ 61,025 (1992), and *TOMCAT*, 59 FERC ¶ 61,340 (1992), in purported support of its argument. See Br. at 32. *Pelican* does not apply here, because it did not discuss whether the compression raised the pressures to transmission levels or even what the operating pressures were. See 61 FERC at 61,128-29. Jupiter’s failure to cite *TOMCAT* in its request for rehearing deprived the Commission of the opportunity to distinguish (or follow) it on rehearing and deprives the Court of jurisdiction to consider it on judicial review. See *Domtar*, 347 F.3d at 312. See also *Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565.

not preclude classification of offshore facilities as gathering. Br. at 33 (citing Green Canyon, 59 FERC at 61,411, and POPCO, 64 FERC at 62,509).

Jupiter preserved none of the foregoing arguments on rehearing. Jupiter did not discuss the absence of wells along its pipelines on rehearing, see R. Item No. 11, even though FERC relied on that absence in reaching its decision. 103 FERC at 61,713 ¶ 9. Jupiter's failure to raise these contentions on rehearing deprives the Court of jurisdiction to consider them on judicial review. Panhandle, 324 U.S. at 645; ASARCO, 777 F.2d at 773-74; ECEE, 611 F.2d at 565. In addition, Jupiter's failure to cite either Green Canyon or POPCO in its request for rehearing precludes the Court from considering those cases on this point. See Domtar, 347 F.3d at 312.

In any event, unlike the Green Canyon facilities, Jupiter's pipelines are not "designed to gather gas from various production platforms in the OCS," 59 FERC at 61,411, but to transport gas from one such platform. In fact, the absence of gas collection by Jupiter's lines contrasts markedly with the extensive collection by the lines upstream of Platform 39A. See 105 FERC at 62,286 ¶ 16 ("gas currently flows from 10 other production platforms to Platform 39A"). Thus, Jupiter cannot characterize its facilities as gathering, because they do not collect gas.

**e. Operating Pressure**

As to operating pressure, Jupiter asserts that the Commission has found pipelines that operate at a higher pressure than Jupiter's to be gathering facilities.

Br. at 33-34 (citing Natural Gas Pipeline Co., 94 FERC ¶ 61,186 (2001), and Murphy Exploration, 68 FERC at 61,174).

On rehearing, Jupiter did not cite Natural, Murphy Exploration or any other past Commission order for the proposition that its operating pressure is consistent with a gathering function. See R. Item No. 11.<sup>9</sup> Jupiter's failure to cite these orders deprives the Court of jurisdiction to consider them on judicial review. See *Domtar*, 347 F.3d at 312. See also *Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565.

In any event, the Commission acknowledged that the pipeline's operating pressure was consistent with gathering. Furthermore, unlike cases where such pressure reflects high-level well pressure, here "compression facilities at Unocal's Platform 39A . . . bring the gas from low-level well-pressures up to line pressure." 103 FERC at 61,713 ¶ 9. Jupiter ignores this point.

**f. Central Aggregation Point**

Finally, Jupiter claims that the Commission misapplied the central-aggregation-point test. See Br. at 34-36. Jupiter asserts that, unlike Sea Robin Pipeline Company, the pipeline in Sea Robin II, "Jupiter does not have a central aggregation point." Br. at 35. Jupiter bases this assertion on contrasts between its

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<sup>9</sup> Jupiter's only reference to operating pressure on rehearing is its quotation of the Commission's statement that Jupiter's operating pressure is consistent with a gathering function. See R. Item No. 11 at 6.

system and the Sea Robin system: (1) whereas the Sea Robin transmission pipeline is larger than Sea Robin’s upstream gathering lines, the Jupiter pipelines are roughly the same size as the Unocal facilities upstream of Platform 39A; (2) the Jupiter pipelines are smaller than the Sea Robin transmission pipeline; and (3) the compression Unocal provides on Platform 39A is less than that provided by Sea Robin at its central aggregation point. *Id.* at 35-36.<sup>10</sup>

None of those considerations outweighed the fact that “Unocal's Platform 39A . . . is both the last point at which gas is collected and the point at which gas is compressed to transmission pressures before entering Jupiter's two pipelines which transport the gas to shore.” 105 FERC at 62,286 ¶ 15. Moreover, whereas the “Unocal facilities upstream of Platform 39A are a spider-web configuration[,]” once the gas is aggregated at Platform 39A, “Jupiter's two pipelines” simply “move the gas to Tennessee's and Transco's systems[.]” 103 FERC at 61,713 ¶ 9. Accordingly, “Unocal's Platform 39A is where a ‘marked change in the physical attributes and geographic configuration’ occurs[,]” and thus “serves as the central point of aggregation, delineating the point where gathering ends and jurisdictional

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<sup>10</sup> Jupiter also contends that Jupiter differs from Sea Robin in that Jupiter does not “compress the gas it moves[.]” *Br.* at 36. Jupiter’s rehearing request did not contrast Jupiter’s and Sea Robin’s systems on this point, and did not otherwise raise this point in its discussion of the central-aggregation-point factor. *See R. Item No. 11* at 14-17. Jupiter’s omission deprives the Court of jurisdiction to consider the argument in this context. *See Panhandle*, 324 U.S. at 645; *Domtar*, 347 F.3d at 312; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565. In any event, the point is discussed *supra* under subheading c.



transmission begins.” 103 FERC at 61,713 ¶ 10 (citing *Sea Robin II*, 87 FERC ¶61,384 at 62,430).

Jupiter’s arguments on this point do not address this analysis, but derive solely from the fact that the *Sea Robin* transmission line is larger than Jupiter’s pipelines.<sup>11</sup> They are, then, no more than a reprise of Jupiter’s earlier argument that the Jupiter facilities are too small to be classified as transportation. Like those earlier arguments, Jupiter’s central-aggregation-point argument simply does not come to terms with the fact that the Jupiter facilities gather no gas, but instead deliver gas that has been compressed to transmission levels, i.e., provide jurisdictional transportation.

### **3. The Commission’s Reliance on the Facilities’ Physical Characteristics Was Proper.**

Jupiter contends that the Commission gave insufficient attention to non-physical factors. Br. at 37-40. Specifically, Jupiter faults the Commission for failing to consider that Jupiter transports gas only for its parent, Unocal, that the prospective transferee of the facilities, also Unocal, is engaged exclusively in production and gathering, and that continued classification of Jupiter’s facilities as

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<sup>11</sup> If Jupiter’s contention that its lines should be classified as gathering, because they are comparable in size to Unocal’s is also rebutted by *Williams*’ affirmation of Commission orders classifying as transmission a pipeline that was the same size as the system’s principal gathering line. See 331 F.3d at 1018-19.

jurisdictional transportation is not necessary to further the goals of the NGA. *Id.* at 37-38.

In rejecting that argument below, the Commission followed this Court's reasoning that "nonphysical factors, while relevant, remain 'secondary to the physical factors.'" 103 FERC at 61,713 ¶ 11 (quoting *Sea Robin I*, 127 F.3d at 370). The Commission reasoned that because "the physical factors of Jupiter's pipeline facilities" so clearly "demonstrate that they are used primarily to transport gas[.]" there was no "need to consider nonphysical factors, such as the nature of the prospective owner's business, in order to reach a finding regarding the primary function of facilities." *Ibid.*

Here the Commission followed *Sea Robin I*, which gave non-physical factors tangential relevance at best and emphasized instead the "the basic thrust of the primary function test—making a technical distinction between gathering and transportation, based on the physical and operational characteristics of a pipeline facility." 127 F.3d at 370. Such an emphasis was necessary, because "Congress drew a distinction based on the physical patterns of the industry, gathering versus transportation." *Id.* at 371. Indeed, the Court questioned the utility of some non-physical factors relied upon by Jupiter, noting that "the Commission's emphasis on ownership may be called into question" and reasoning that the "[n]eed for regulation cannot alone create authority to regulate." *Ibid.*

If the need to regulate, by itself, does not require that a facility be classified as transportation, then the alleged absence of the need to regulate Jupiter's facilities does not require that they be classified as gathering. In this case, the non-physical factors could not change the physical and operational factors that support classification of Jupiter's facilities as transportation. Accordingly, the Commission had no reason to consider the former.

**4. The Classification of a Downstream Pipeline Does Not Preclude the Commission's Classification of the Jupiter Facilities.**

Jupiter asserts that the existence of a connection between one of its pipelines and a downstream Transco lateral currently classified as a gathering facility in *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,246 at 61,976, *reh'g denied*, 97 FERC ¶ 61,298 (2001) ("*Transco*"), *aff'd Williams*, precludes the Commission from classifying either of the Jupiter lines as transportation. Br. at 40-43. Jupiter contends that the Commission's classification conflicts with (1) two Commission decisions, *Tarpon Transmission Co.*, 78 FERC ¶ 61,278 (1997), and *Trunkline Gas Co.*, 70 FERC ¶ 61,163 (1995) ("*Trunkline I*"), providing that facilities downstream of transportation facilities cannot be classified as gathering, and (2) one decision, *Cavallo Pipeline Co.*, 71 FERC ¶ 61,053 (1995), which classified a facility as gathering, and then directed other parties to classify certain upstream facilities as gathering. Br. at 41-42.

As to *Tarpon* and *Trunkline I*, the Commission acknowledged that “[t]he presence of upstream transmission facilities determines the classification of downstream facilities[.]” 105 FERC at 62,286 ¶ 13 n.8. The Commission did not apply that rule in the *Transco* proceeding, because the record “did not indicate that the facilities at issue were located downstream of Jupiter’s transmission facilities.” *Id.* at 62,286 ¶ 13.<sup>12</sup> However, it did not follow that the reverse was true. “If anything,” it was the *Transco* analysis that “should be reversed.” *Id.* n.8.

The Commission did not address *Cavallo*, because Jupiter’s request for rehearing cited the case as standing for the same proposition as *Trunkline I* and *Tarpon*, *i.e.*, as one more case standing for the proposition that facilities located downstream of transportation facilities could not be classified as gathering. *See* R. Item No. 11 at 13 n.32. Jupiter’s rehearing request did not cite *Cavallo* or any other Commission order as supporting the opposite point that Jupiter now tries to make in its appellate brief – that reclassification of a facility as gathering warrants similar reclassifications of upstream facilities.

Jupiter’s failure to invoke *Cavallo* in support of such an argument deprived the Commission of the opportunity to address any perceived inconsistencies

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<sup>12</sup> The *Transco* proceeding addressed classification of Transco’s Central Louisiana system, a spine and lateral configuration that includes 180 miles of lateral lines. *See* 96 FERC at 61,976. In classifying the 180 miles of lateral lines as gathering, including the lateral line that intersects with Jupiter’s line, the Commission necessarily focused on an entire system rather than individual facilities. *See ibid.*

between that order and the instant orders, *see ECEE*, 611 F.2d at 565, and deprives the Court of jurisdiction to consider the alleged inconsistencies on judicial review. *See Domtar*, 347 F.3d at 312. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74. Moreover, Jupiter cannot fault the Commission for failing to address alleged inconsistencies that Jupiter never brought to its attention.

In any event, the classifications in *Cavallo* were part of a comprehensive process that contrasts markedly with the classification of the downstream lateral in *Transco*. In *Cavallo*, the Commission was aware that facilities upstream of Cavallo Pipeline Company's facilities had been classified as transportation. *See* 71 FERC at 61,195. Having previously ruled "that a facility functionalized as gathering may not be located downstream of facilities functionalized as transmission[.]" *id.* at 61,197 (citing *Trunkline I*), the Commission had to determine whether to classify all of the facilities at issue as gathering or transportation. The Commission determined that the upstream facilities "primarily perform a gathering function[.]" a finding that was "[b]ased on [the facilities'] physical and geographic attributes[.]" and bolstered by the fact that the Commission had never previously examined "whether they actually would perform a gathering or transmission function," *Id.* at 61,198. In *Transco*, on the other hand, the Commission was not aware that facilities upstream of the Transco facilities at issue – Transco's Central Louisiana system – had been classified as

transportation, *see* 105 FERC at 62,286 ¶ 13, and thus could not make the kind of comprehensive determination made in *Cavallo*.

After finally having the opportunity to consider the Jupiter and Transco facilities together, the Commission is reconsidering its earlier classification of the downstream, Transco facilities. On May 6, 2004, the Commission issued an order in FERC Docket No. CP01-368 directing Transco and its affiliates to “show cause,” *inter alia*, why the lateral downstream of, and interconnected to, Jupiter’s facilities should not be reclassified as transportation. *Transcontinental Gas Pipe Line Corp.*, 107 FERC ¶ 61,122 (2004). Transco will have to demonstrate why the downstream facility upon which Jupiter relies should not be classified as transportation.<sup>13</sup>

## **5. The Orders Are Consistent With FERC Precedent.**

Jupiter also claims that the Commission departed from past precedent without a reasoned explanation. Br. at 43-49. Jupiter first argues that FERC ignored two decisions addressing offshore facilities owned by Texas Gas Transmission Corporation in reaching its decision. *Id.* at 43-45. Though Jupiter

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<sup>13</sup> The factors that had dictated that the upstream facilities in *Cavallo* be classified as gathering are not present in the instant case. The “physical and geographic attributes” of the Jupiter facilities dictate continued classification as transportation, and the Commission expressly considered the primary function of the Jupiter system when it classified the system as transportation nearly four decades ago. *See* Br. at 13 (classification made “over Jupiter’s strong protest”). *See also The Jupiter Corp.*, 35 FPC at 1103 (noting Jupiter’s claim that “all of its service, from beginning to end” is gathering).

now principally emphasizes an alleged inconsistency with *Texas Gas Transmission Corp.*, 98 FERC ¶ 62,018 (2002) (“*Texas Gas I*”), Jupiter never cited that case in its request for rehearing. *See* R. Item No. 11 at 11-13. Jupiter’s failure deprives the Court of jurisdiction to consider the decision now (*see Panhandle*, 324 U.S. at 645; *Domtar*, 347 F.3d at 312; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565), and certainly undermines Jupiter’s current claim that FERC should have addressed it.

Though Jupiter’s rehearing request cited the other decision involving Texas Gas, *Texas Gas Transmission Corp.*, 99 FERC ¶ 62,087 (2002) (“*Texas Gas II*”), *see* R. Item No. 11 at 11 & n.26, that decision addressed a single lateral that, at 4.436-miles, was less than half the length of Jupiter’s system. *See* 99 FERC at 64,276. Thus, the facts of *Texas Gas II* are distinguishable from those of the instant orders, and Jupiter’s rehearing request further confused the matter by inaccurately describing the *Texas Gas II* pipeline and the FERC decision addressing it. *Compare id. with* R. Item No. 11 at 11.

Jupiter cites other cases in which the Commission classified facilities larger than Jupiter’s as gathering. Br. at 46-49 (citing *Trunkline Gas Co.*, 95 FERC ¶ 61,337 (2001) (“*Trunkline II*”), *Superior Offshore Pipeline Co.*, 67 FERC ¶ 61,253

(1994), *POPCO*, 64 FERC ¶ 61,167,<sup>14</sup> and *Pelican*, *supra* n.8. Here, Jupiter argues that the Commission should have explained why it classified those facilities as gathering while classifying Jupiter's as transportation.

Jupiter's argument regarding these cases, as well as its argument regarding *Texas Gas I*, is simply a reprise of its earlier argument that the dimensions of its facilities are comparable to the dimensions of facilities that the Commission has previously found to be gathering. The Commission answered this, admitting that "the length, diameter and operating pressure of the pipeline facilities at issue are comparable to those of other facilities the Commission has found to be gathering facilities," but finding those factors to be "outweighed by other physical factors in this case." 105 FERC at 62,285 ¶ 11. Critically, "gas aggregation is complete once the gas reaches" a central aggregation point located at "Unocal's Platform 39A." 103 FERC at 61,713 ¶ 9. For this and other reasons, "Unocal's Platform 39A is where a 'marked change in the physical attributes and geographic configuration' occurs and that Unocal's platform serves as the central point of aggregation, delineating the point where gathering ends and jurisdictional

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<sup>14</sup> As discussed, Jupiter failed to cite *POPCO* in its rehearing request to FERC, and thereby deprived the Court of jurisdiction to consider alleged inconsistencies between *POPCO* and the instant orders on judicial review. *See Domtar*, 347 F.3d at 312. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74; *ECEE*, 611 F.2d at 565.



transmission begins.” 103 FERC at 61,713 ¶ 10 (quoting *Sea Robin II*, 87 FERC ¶ 61,384 at 62,430).

Jupiter does not contend that these countervailing factors were present in *Trunkline II*, *Superior* or *Pelican*. Accordingly, there was no reason for the Commission to explain what Jupiter sees as an inconsistency between the instant ruling and those orders. *See San Diego Gas & Elec. Co. v. FERC*, 904 F.2d 727, 729 (D.C. Cir. 1990) (FERC did not have to respond to an argument on rehearing that “presented no compelling reason” for FERC to depart from its initial ruling).

### **III. Petitioner’s Request That the Court Provide Relief in the Form of a Reversal Is Without Merit.**

Jupiter requests that the Court “hold that the Jupiter system is a non-jurisdictional gathering facility exempt from regulation under [NGA § 1(b)].” Br. at 49. However, such a holding would require the Court to apply the primary function test and to resolve all of the interrelated factual and legal questions that would arise. Should the Court take issue with some aspect of the orders, the better course would be to remand the orders to the Commission for further consideration. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-335 (1976). *See also Sea Robin I*, 127 F.3d 372 (remanding the orders to allow the Commission to “reconsider the applicability of the factors in its primary function test to offshore pipeline systems”).

#### **IV. The *Amici's* Contentions in Support of Petitioner Are Procedurally and Substantively Flawed.**

On June 17, 2004, Williams Gas Processing-Gulf Coast Company and Transco (collectively, the “*Amici*”) filed a brief *Amici Curiae* supporting Jupiter’s position. The contents of this brief need not detain the Court.

*Amici* claim that the Commission’s method of demarcating between offshore gathering and transportation facilities departs from, and is inferior to, its method of demarcating between comparable onshore facilities, and that the orders fail to adequately explain the alleged departure. Br. at 5-16, 19-21. *Amici* also assert that in the past, the Commission and the courts have rejected use of production platforms as central aggregation points. *Id.* at 17-19.

Absent “extraordinary circumstances,” an intervenor may not raise a matter on appeal that the petitioner has not brought before the court unless the intervenor has preserved the issue on rehearing below. *California Dep’t of Water Resources v. FERC*, 306 F.3d 1121, 1126-27 (D.C. Cir. 2002). It follows that *Amici*, which were not parties below,<sup>15</sup> and are not parties here, cannot raise any argument that Jupiter did not raise below. Jupiter did not raise any of these arguments below.

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<sup>15</sup> The Commission rejected the *Amici's* late intervention, thereby denying them party status. 105 FERC ¶ 61,243 at 62,285 ¶ 8, (2003), *reh’g denied*, 106 FERC ¶ 61,170 (2004). *Amici* did not appeal this disposition. Only parties may seek rehearing of Commission orders. See 15 U.S.C. § 717r(a). Accordingly, the request for rehearing that *Amici* filed below, *see* R. Item No. 11, did not preserve any of their arguments.

*See* R. Item No. 11. Accordingly, the Court lacks jurisdiction to consider any of the foregoing arguments. *Panhandle*, 324 U.S. at 645; *California*, 306 F.3d 1126-27; *ASARCO*, 777 F.2d at 773-74. Moreover, the Commission cannot be faulted on judicial review for failing to address arguments that were not raised below.

In any event, *Amici's* criticism of the reformulated primary function test that FERC uses to demarcate gathering and transportation in the OCS, Br. at 5-16, 19-21, is refuted by judicial affirmances of that test. *See ExxonMobil*, 297 F.3d at 1083-89; *Williams*, 331 F.3d at 1017-20. Accordingly, *Amici's* submission adds nothing to the discussion.

## CONCLUSION

For the foregoing reasons, the Commission requests that the Court affirm the challenged orders in their entirety.

Respectfully submitted,

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