ORAL ARGUMENT SCHEDULED FOR MAY 10, 2004

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

No. 03-1179, *et al.*

WILLIAMS GAS PROCESSING-GULF COAST COMPANY, *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 30, 2004

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.

B. ***Rulings Under Review*****:**

1. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, Docket Nos. RP02-99 & RP02-144, 98 FERC ¶ 61,253 (2002) (JA 85-90).

2. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, "Notice Denying Motion to Extend Initial Decision Date," Docket Nos. RP02-99 & RP02-144, *unreported*, (March 21, 2002) (JA 102).

3. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, Docket Nos. RP02-99 & RP02-144, 99 FERC ¶ 61,153 (2002) (JA 294-95).

4. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, Docket Nos. RP02-99 & RP02-144, 100 FERC ¶ 61,254 (2002) (JA 367-81).

5. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, Docket Nos. RP02-99 & RP02-144, 103 FERC ¶ 61,177 (2003) (JA 509-22).

C. ***Related Cases*****:** Counsel is not aware of any other related cases pending before this or any other Court.

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David H. Coffman
Attorney

March 30, 2004

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STATEMENT OF THE ISSUES

1. Did the Federal Energy Regulatory Commission ("Commission") properly reassert its Natural Gas Act ("NGA") "in connection with" rate jurisdiction over an interstate pipeline's gathering affiliate, where substantial evidence showed that the pipeline and the gatherer had acted in concert to transfer the pipeline's gathering facilities to the gatherer so that the latter could charge a gathering rate to "captive" shippers that was almost five times as high as the rate the pipeline would have been allowed to charge for the same service?

2. Did the Commission act lawfully and reasonably under the NGA by replacing the gatherer's existing "market-based" rate with a rate that properly reflected the gatherer's cost of service?

3. Should Petitioners' objections to the Commission's ruling that Petitioners violated the Outer Continental Shelf Lands Act ("OCSLA") be dismissed for lack of jurisdiction, given that Petitioners have not specified the statute providing jurisdiction, that the district courts have original jurisdiction to review such rulings, and that the ruling does not injure Petitioners?

4. Was the Commission's OCSLA ruling authorized and reasonable?

COUNTER-STATEMENT OF JURISDICTION

The Court lacks jurisdiction to review Petitioners' objections to the Commission's OCSLA rulings, because Petitioners have not specified the statute providing such jurisdiction, the district courts have original jurisdiction to review such rulings, and the rulings do not injure Petitioners.

STATUTES AND REGULATIONS

The statutes and regulations applicable to this case are set forth in an addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. The Natural Gas Act ("NGA")

1. Statutory Provisions

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 and sale for resale "of natural gas in interstate commerce," and "natural gas companies engaged in such transportation or sale," [1] but not, *inter alia*, "the production or gathering of natural gas." 15 U.S.C. § 717(b). This includes authority to regulate "[a]ll rates and charges made" or "demanded . . . for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission[.]" *Id.* § 717c(a). The NGA requires FERC to assure that all such rates are "just and reasonable," *ibid.*, and to replace prospectively any such rates that it finds to be "unjust, unreasonable, unduly discriminatory, or preferential" with rates that are just and reasonable. *Id.* § 717d(a).

NGA § 7(c)(1)(A) requires every natural gas company to obtain a "[c]ertificate of public convenience and necessity" from FERC before engaging in, *inter alia*, the jurisdictional transportation or sale of natural gas. 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 the approval of the Commission first

[1] A "natural gas company" is a person that engages in the jurisdictional sale or transportation of natural gas. 15 U.S.C. § 717a(6).

had and obtained," after a finding that, as relevant here, "the present and future public convenience or necessity permit such abandonment." *Id.* § 717f(b).

2. Limits of the "Production and Gathering" Exemption

Historically, pipelines have "bundled" their gathering costs into (*i.e.*, included the costs as a part of) their jurisdictional rates. The "production and gathering" exemption "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purpose of determining the reasonableness of rates subject to its jurisdiction." *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) ("*Colorado Interstate*"). Or, put another way, the exemption does not preclude the Commission from regulating "rates for gathering performed in connection with interstate sales[.]" *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1269 (8th Cir. 1991) ("*Northern Natural*"). *See also United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400-03 (1965) ("*United Gas*") (rejecting an attempt to structure what were effectively sales of gas so as to fall within the production and gathering exemption as contrary "to the national objectives of the [NGA]").

3. Commission Initiatives Following Deregulation of Wellhead Sales of Natural Gas

Consistent with Congress' deregulation of wellhead sales of natural gas in the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.*, and the Natural Gas

Wellhead Decontrol Act of 1989 ("Decontrol Act"), Pub. L. No. 101-60, 103 Stat. 157 (1989), the Commission promoted, and then mandated, "unbundling" of pipeline natural gas sales services. Previously, pipelines "bundled" the costs of purchasing, gathering and transporting gas into a single service for which pipelines charged a single rate. Commission Order No. 436 [2] changed the landscape by encouraging pipelines to obtain "blanket certificates" for transportation service. These certificates freed pipelines from having to obtain authorization under NGA § 7(c)(1)(A) prior to providing transportation to each individual shipper, but required them to provide all eligible shippers open and non-discriminatory access to such transportation. *See, e.g.,* Order No. 436 at 31,497 & 31,512-13. While pipelines continued to make bundled sales, the open-access requirement theoretically enabled other gas sellers to compete with pipelines. Commission Order No. 636 [3]

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[2] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regs. Pmbls. 1982-1985 ¶ 30,665, *order on reh'g*, Order No. 436-A, FERC Stats. & Regs., Regs. Pmbls. 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).

[3] *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. Pmbls. 1991-96 ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs., Regs. Pmbls. 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).

required each pipeline to unbundle its sales and transportation services, and to provide transportation to other sellers of gas on terms comparable to that which it provided for its own sales. Order No. 636 at 30,409 & 30,412-13. This initiative furthered Congress' goal of enabling all sellers "'to reasonably reach the highest-bidding buyer'" and all buyers "'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 (quoting H.R. Rep. No. 29, 101st Cong., 1st Sess. at 6 (1989)).

4. Commission Policy Regarding Spin-Down of Gathering Facilities

As a result of Order No. 636's mandate that pipelines unbundle their sales and transportation services, a number of pipelines decided to "spin off" their gathering facilities to non-affiliates, and to "spin down" such facilities to affiliates. The pipelines determined that they no longer needed the facilities, which had principally been used to gather gas for bundled sales. *See, e.g., Williams Gas Processing – Gulf Coast Co. v. FERC*, 331 F.3d 1011, 1020 (D.C. Cir. 2003) ("*Williams I*"), *cert. denied sub nom. Producer Coalition v. FERC*, 124 S. Ct. 1036 (2004).

Affecting the Commission's policy regarding spin-downs was the fact that Congress' deregulation of wellhead sales prices had not been accompanied by a corresponding deregulation of FERC's "in connection with" rate jurisdiction over gathering, or by any expression of congressional concern with *Colorado*

Interstate's holding that the NGA § 1(b) gathering exemption does not preclude an examination of gathering costs when setting jurisdictional rates. *Northern Natural*, decided two years after the Decontrol Act, held that *Colorado Interstate's* holding that the Commission may regulate "rates for gathering performed in connection with interstate sales" dictates the further conclusion that FERC may "regulate rates for transportation over a pipeline's own gathering facilities performed in connection with . . . jurisdictional interstate transportation." 929 F.2d 1261, 1269.

In *Arkla Gathering Servs. Co.*, 67 FERC ¶ 61,257 at 61,871, *order on reh'g*, 69 FERC ¶ 61,280 (1994), *reh'g denied,* 70 FERC ¶ 61,079, *reconsideration denied*, 71 FERC ¶ 61,297 (1995) (collectively, "*Arkla*"), *aff'd Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) ("*Conoco*"), the Commission announced its post-spin-down policy regarding rates charged by affiliated gatherers. While concluding that it has "no authority to regulate an affiliated gatherer because it is not a natural gas company under the NGA[,]" FERC announced that "if circumstances develop that would allow the pipeline and its affiliate to engage in anticompetitive activity, the Commission will exert jurisdiction over the gathering service to the extent needed to preserve the Commission's statutory mandates under the NGA." 69 FERC at 62,087. In *Conoco*, the Court agreed "that a non-jurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering,"

though the Court could at that time view the proposition only "[a]s an abstract matter[.]" 90 F.3d at 549. [4]

B. Section 5 of the Outer Continental Shelf Lands Act ("OCSLA")

As relevant here, Section 5(e) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334(e), authorizes the Secretary of Interior ("Interior") to grant rights-of-way for the transportation of, *inter alia*, oil and natural gas through the OCS. Such rights-of-way must contain an "express condition" requiring pipelines to transport OCS gas "without discrimination," and in "such proportionate amounts" as FERC determines to be reasonable after notice and hearing. 43 U.S.C. § 1334(e).

OCSLA § 5(f), 43 U.S.C. § 1334(f), which Congress added as part of the 1978 OCSLA amendments, *see* Pub.L. 95-372, Title II § 204, 92 Stat. 636 (Sept. 18, 1978), is titled "Competitive principles governing pipeline operation." OCSLA § 5(f)(1), 43 U.S.C. § 1334(f)(1), states that every "permit, license, easement, right-of-way, or other grant of authority" for pipeline transportation of natural gas across the OCS "shall require that the pipeline be operated in accordance with" certain "competitive principles" specified in the subsections of § 5(f)(1). OCSLA

[4] On the question of whether FERC's "in connection with" rate jurisdiction extends to gathering facilities owned by a pipeline affiliate acting independently of the pipeline, the Court found that "the statute itself does not resolve the question one way or the other, and the Commission's interpretation is a permissible resolution of the ambiguity." 90 F.3d at 545.

§ 5(f)(1)(A), 43 U.S.C. § 1334(f)(1)(A), requires pipelines to "provide open and nondiscriminatory access to . . . shippers[.]" OCSLA § 5(f)(1)(B), 43 U.S.C. § 1334(f)(1)(B), authorizes FERC, upon request by a shipper and after notice and hearing, to order such pipelines to expand their capacity. OCSLA § 5(f)(2), 43 U.S.C. § 1334(f)(2), authorizes FERC to exempt certain facilities from the requirements of OCSLA § 5(f)(1). OCSLA § 5(f)(3), 43 U.S.C. § 1334(f)(3), requires the Secretary of Energy ("Energy") and FERC to consult with the Department of Justice ("Justice") "on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority to ensure that pipelines are operated in accordance with the competitive principles set forth in [OCSLA § 5(f)(1)]."

II. The North Padre Island Spin-Down

Petitioner Transcontinental Gas Pipe Line Corporation ("Transco") is an interstate pipeline operating in the Gulf of Mexico and the eastern United States. Petitioners Williams Gas Processing – Gulf Coast Company, L.P. ("WGP") and Williams Field Services Company ("WFS") perform gas gathering services. WFS is a wholly owned subsidiary of WGP, and both Transco and WGP are wholly owned subsidiaries of the The Williams Companies ("TWC").

Prior to late 2001, Transco owned and operated the "North Padre Island Gathering System" ("North Padre"), which consists of two offshore pipeline legs:

the first consists of 3.83 miles of 10-inch (diameter) pipeline that begins on the upstream (closer to gas production) end in North Padre Block 967; the second consists of 18.79 miles of 20-inch pipeline that begins in North Padre Block A-42. At North Padre Block 956, the two lines converge, delivering gas into a separate, 24-inch pipeline, also owned and operated by Transco, for transportation to onshore points in Texas. At that time, North Padre and the separate 24-inch transportation line were classified as jurisdictional transportation facilities. *See Transcontinental Gas Pipe Line Corp.*, 55 FERC ¶ 61,446 at 62,352 & 62,390 (Ordering ¶ (D)), *order on reh'g*, 57 FERC ¶ 61,344 (1991), *order on reh'g*, 59 FERC ¶ 61,279 (1992), *aff'd sub nom. Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993) ("*Elizabethtown*").

In 2001, the Commission authorized the transfer, or "spin-down," of North Padre to WGP, and reclassified North Padre as a non-jurisdictional gathering facility. *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115, *reh'g denied*, 97 FERC ¶ 61,296 (2001) ("North Padre Spin-Down Orders"), *aff'd sub nom. Williams I*. FERC found the abandonment of North Padre and other gathering facilities would be "in the public interest." 97 FERC at 62,381. As a transportation-only pipeline, "Transco no longer require[d] its extensive gathering facilities to provide gas sales." 96 FERC at 61,433. Accordingly, "[a]pproval of the proposed abandonment" would "permit Transco to eliminate unnecessary

expenses associated with these facilities" and WGP to "make efficient use of the acquired facilities to provide open access gathering service." *Ibid.*

The Commission granted the abandonment in the face of shipper arguments that WGP, facing no competition, would be able to charge excessive rates, explaining that "the transfer of gathering services and facilities to nonjuridictional entities" was "consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." 96 FERC at 61,434-35. But, in any event, the larger point was that "if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion" under NGA § 7(b) "to withhold such authorization." *Id.* at 61,435.

This Court affirmed all of the foregoing determinations. *Williams I*, 331 F.3d at 1022.

III. The Proceedings Below

Intervenor Shell Offshore Inc. ("Shell") produces gas at North Padre Blocks 969 and 976, and delivers its gas into North Padre's 20-inch line *via* a Shell undersea gathering pipeline interconnect at North Padre Block 948 that is located 3.08 miles from the interconnection with Transco's 24-inch pipeline at North Padre

Block 956. *Shell Offshore Inc. v. Transcon. Gas Pipe Line Corp.*, 100 FERC ¶ 61,254 at 61,905 ¶ 5 (2002) (JA 369). [5]

Prior to the spin-down, Transco had charged Shell an "IT-feeder rate" of \$0.08 per dekatherm ("Dth") to deliver Shell's gas the entire 230-mile distance from Shell's interconnect at North Padre Block 948 to Transco's mainline pooling point at Station 30. 100 FERC at 61,904 ¶¶ 6, 7 (JA 368). [6] Shortly after the spin-down, in November 2001, WFS advised Shell that in return for delivering the gas 3.08 miles from North Padre Block 948 to the connection with Transco's 24-inch transportation line, WFS intended to charge an \$0.08/Dth gathering rate. That rate would be *in addition to* the \$0.08/Dth IT-feeder rate that Shell already had to pay to transport the gas the remainder of the distance (roughly 227 miles) to Station 30. *Id.* ¶ 7. Thus, WFS and Transco proposed to charge Shell \$0.16/Dth for the same service that Transco had provided for \$0.08/Dth prior to the spin-down.

Faced with this prospect, as well as other terms it considered onerous, Shell filed a complaint against Transco and its affiliates (JA 1-62), and shut in its gas. 100 FERC at 61,904 ¶ 7 (JA 368). The complaint alleged that Transco and its

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[5] Unless otherwise specified, all citations to unpublished FERC orders and to the *FERC Reports* are captioned *Shell Offshore Inc. v. Transcon. Gas Pipe Line Corp*.

[6] "IT-feeder" service is an interruptible transportation service that feeds directly into Transco's mainline facility, and which has "higher priority" than Transco's other interruptible transportation. *ExxonMobil Corp. v. FERC*, 315 F.3d 306, 308 (D.C. Cir. 2003).

affiliates were "acting in a manner that frustrate[d] the Commission's policies and the effective regulation of an 'integrated' interstate pipeline system." 98 FERC ¶ 61,253 at 62,015 (2002) (JA 87). Shell alleged that Transco and WFS had acted in concert to give WFS "operational control" not only of "the transferred North Padre facilities[,]" but also of Transco's "jurisdictional laterals through which Transco provides IT feeder service[,]" and then threatened to cut off Shell's gathering service if Shell did not execute a new gathering contract requiring it to: (1) pay unjust and unreasonable rates; (2) dedicate its "North Padre gas reserves for the life of production"; and (3) agree not to seek relief that would subject WFS to the Commission's NGA jurisdiction. *Ibid.* Shell requested that FERC reassert its jurisdiction under the NGA over the North Padre facilities upstream of North Padre Block 956. JA 21.

On January 15, 2002, Superior Natural Gas Corporation and Walter Oil & Gas Corporation (collectively, "Walter") filed a joint complaint against Williams. JA 63-84. The Walter complaint also alleged that Williams was imposing anti-competitive and discriminatory rates and terms and conditions for gathering service on North Padre (JA 71-73), but unlike the Shell complaint, asserted that these actions violated the OCSLA, and asked the Commission to use its OCSLA authority to remedy the situation. JA 73-80.

The first challenged order ("Hearing Order") established an expedited hearing in this proceeding to determine: (1) "if Transco and its affiliates acted in concert with one another in offering gathering services on the North Padre system and in a manner that frustrates the Commission's regulation of Transco" under the NGA; (2) "if the rates, terms and conditions of service offered by Transco's affiliates constitute a violation of the open and nondiscriminatory access requirement of the OCSLA"; and (3) what Commission actions would appropriately remedy any such transgressions as occurred. Hearing Order, 98 FERC ¶ 61,253 at 62,017 (JA 89). In the second challenged order, FERC denied a motion by WGP and others to extend the deadline for issuing an initial decision. "Notice Denying Motion to Extend Initial Decision Date," Docket Nos. RP02-99 and RP02-144, *unreported*, (March 21, 2002) (JA 102). In the third challenged order, the Commission denied the movants' request for rehearing of the second challenged order by operation of law. 99 FERC ¶ 61,153 (2002) (JA 294-95).

After conducting a hearing, an administrative law judge ("ALJ") determined that Transco and its affiliates had engaged in concerted activities that frustrated the Commission's regulation of the NGA. 99 FERC ¶ 63,034 (2002) (JA 296-328). The fourth challenged order affirmed the initial decision, found Transco and WFS acted as a single entity for purposes of offering services and rates on North Padre, reasserted "in connection with" rate jurisdiction under NGA §§ 4 and 5 over those

gathering rates, and imposed a just and reasonable gathering rate for the North Padre facilities of $0.0169/Dth. 100 FERC ¶ 61,254 at 61,912 ¶¶ 43-44 (JA 377), 61,915 ¶¶ 57-58 (JA 380). The Commission also found that the actions of Transco and its affiliates had violated the open and nondiscriminatory access requirement of OCSLA § 5(f). *Id.* at 61,914-15 ¶¶ 55-56 (JA 379-80). In the fifth challenged order, the Commission denied rehearing. 103 FERC ¶ 61,177 (2003) (JA 509-22). The petitions for review followed. [7]

SUMMARY OF ARGUMENT

I.

Regulatory agencies may prevent regulated companies from acting in concert with affiliates to effectuate ends that the law prevents the regulated companies from reaching on their own. Courts have been particularly vigilant where companies have attempted to circumvent FERC's NGA authority. Here, Transco and its affiliates acted in concert to frustrate FERC's NGA regulation of Transco by spinning down Transco's North Padre gathering facilities to WFS,

[7] The Walter complaint followed a different track. On April 11, 2002, five days after the hearing started, Walter and WFS announced a settlement in principle, the terms of which were not disclosed. 100 FERC at 61,915 ¶ 60. On June 12, 2002, the ALJ granted the joint motion of WFS and Walter to dismiss Walter's complaint. *Id.* ¶ 61. The Commission affirmed this ruling over the exceptions of an intervenor. *Id.* ¶¶ 61-62.

which then offered rates and terms for gathering that Transco could not have offered under the NGA. Accordingly, the Commission properly treated Transco and WFS as a single entity for purposes of North Padre, and ruled that Transco/WFS's gathering rates for North Padre were subject to FERC's NGA "in connection with" rate jurisdiction, just as Transco had been before the spin-down.

Petitioners do not challenge the Commission's findings of fact – which must therefore be accepted as conclusive – but, instead, urge that the assertion of "in connection with" jurisdiction is inconsistent with various legislative enactments, judicial decisions and FERC orders. In actuality, the instant orders follow from the cited statutes and precedents, and Petitioners' claims to the contrary are based on nothing other than a self-serving misreading of the relevant law.

II.

In requiring WFS/Transco to charge Shell a rate of $0.0169/Dth for gathering services on North Padre, FERC reasonably exercised its NGA authority. The Commission first determined that the proposed $0.08/Dth gathering rate was unjust and unreasonable, and that the replacement rate was just and reasonable, because it allowed recovery of the costs of operating the facilities, plus a reasonable return on investment. These determinations met NGA requirements for imposition of a new rate, and were based on substantial evidence.

III.

This Court lacks jurisdiction to consider Petitioners' challenges to FERC's OCSLA findings. Petitioners have failed to identify the statute on which they rely for jurisdiction on this issue, have raised this issue in the wrong forum, and have not demonstrated sufficient injury to claim standing.

Moreover, the Commission's findings were reasonable, because WFS denied Shell "open" access by charging it a gathering rate that served to double its cost of transporting gas to shore, and denied Shell "nondiscriminatory" access by increasing its rate but not increasing the rates of other shippers using North Padre. Shell's decision to shut in its gas reserves rather than pay the new rate underlines the adverse effect of this rate increase.

ARGUMENT

I. STANDARD OF REVIEW

A. Commission Construction of Jurisdictional Statutes and Orders

In determining whether an agency has properly interpreted a statute subject to its jurisdiction, courts use the two-step analysis established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). The first step asks whether Congress has directly spoken to "the precise question at issue" through the statute under consideration. *Id.* at 842. If "the intent of

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, Congress has not directly addressed the precise question at issue, then the court must uphold any permissible agency construction of the statute regardless of whether the court would have interpreted the statute differently. *Id.* at 843 & n.11. *Chevron* applies to FERC interpretations of NGA § 1(b), *see, e.g., Conoco*, 90 F.3d at 545, and of OCSLA § 5, *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1197 (D.C. Cir. 1995) ("*Shell*") (deferring to FERC's "permissible construction of that statute"). Similarly, this Court upholds the Commission's reasonable interpretations of its prior orders. *East Tex. Elec. Coop. v. FERC*, 218 F.3d 750, 753-54 (D.C. Cir. 2000) ("*East Texas*"); *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998) ("*Texaco*"); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997) ("*Clearinghouse*") (a court "must sustain the Commission's interpretation of the Order if it is reasonable").

B. Reasonableness of Commission Action

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.

The Commission's factual findings under the NGA, "if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 717r(b). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." *Secretary of Labor v. Federal Mine Safety and Health Review Comm'n*, 111 F.3d 913, 918 (D.C. Cir. 1997) (citations and internal quotations omitted).

II. THE COMMISSION PROPERLY ASSERTED ITS NGA "IN-CONNECTION-WITH" RATE JURISDICTION OVER THE NORTH PADRE GATHERING RATES.

A. The Commission's Assertion of Jurisdiction Was Authorized and Reasonable.

The Commission "has authority to assert NGA jurisdiction over an otherwise nonjurisdictional gathering affiliate in particular circumstances where such action is necessary to fulfill the Commission's obligations with respect to the transportation of natural gas in interstate commerce." 100 FERC at 61,913 ¶ 45 (JA 378) (citation omitted). In situations arising post-spin-down, the Commission

will "disregard the corporate form and treat pipeline and gatherer as a single natural gas company" if they act: (1) "in concert . . . in connection with the transportation of gas in interstate commerce; and (2) in a manner that frustrates the Commission's effective regulation of the interstate pipeline." *Id.* ¶ 46 (citing *Arkla*, 67 FERC at 61,871).

Applying that test to the facts, the Commission found that Transco and WFS acted "in concert in offering gathering services in a manner that frustrates the Commission's effective regulation of the jurisdictional pipeline, Transco." 100 FERC at 61,913 ¶ 47 (JA 378). The effect of these "concerted actions and abuse of market power was a demand for gathering rates, terms and conditions so anti-competitive that Shell jeopardized its OCS reserves by shutting them in and risked the loss of its . . . leases." *Ibid.*

In finding "concerted action," the Commission adopted the ALJ's decision. 100 FERC at 61,913 ¶ 48 (JA 378). The ALJ generally found that: "The concerted actions of TWC's corporate family . . . placed WFS and Transco in a position to manipulate the cost of gathering services through the exercise of their collective market power over the interstate natural gas transportation path through WFS's offshore [North Padre] facilities and Transco's IT-feeder system onto shore, and these affiliates . . . in fact abused their collective monopoly power." 99 FERC at 65,254 (JA 321).

In describing these concerted actions, the ALJ found "little to no controversy" that: WFS and Transco "worked together in planning and implementing the spindown of the [North Padre] facilities"; WFS not only negotiates North Padre gathering agreements, but also "acts as Transco's agent in contracting for transmission services across the Transco production area supply laterals for IT and IT-feeder services"; and WFS operates both the North Padre gathering facilities and Transco's jurisdictional production area facilities, which are physically integrated. 99 FERC at 65,240 (JA 307) (citations omitted). *See also* 100 FERC at 61,913 ¶ 48 (JA 378) (WFS continued "to operate the physically integrated [North Padre] WFS gathering and Transco production area facilities in essentially the same manner after the spindown as before[,]" and "acted as if it were a division of Transco rather than a separate company"). Although these actions, standing alone, might appear to be legitimate business practices, rather than an attempt to monopolize, they "establish[ed] that WFS and Transco . . . acted in concert." 99 FERC at 65,240 (JA 307).

Other instances of concerted action found by the ALJ demonstrated that TWC, Transco and WFS worked together to take advantage of shippers that had to use the North Padre facilities to ship their gas to shore:

> WFS and Transco collectively reviewed a corporate business plan that had incorporated a consultant firm's report (McKinsey Report) regarding the value associated with [North Padre] gathering services to customers with

> no other service options. The McKinsey Report also included analysis of the opportunity to collect 'IT-feeder rents' in gathering rates upon a shift in Transco's rate design.

99 FERC at 65,240 (JA 307) (citing JA: 570, 574; R. Item No. 208 at 2, 4, 6-7, 12-13; JA 179-81, 191-92, 199-206; JA 246, 250-52, 258). Accordingly, "WFS and Transco collectively with [their] corporate parent TWC . . . subsequently designed a corporate structure that intended to reap monopoly profits from captive producers, such as Shell, from the operations of the [North Padre] facilities." *Id.* at 65,254 (JA 321) (citing JA 219-20; JA 250-52, 256-60, 262-66; JA 558-59, 564-65; JA 570, 575-76). "From there WFS was directed to collect revenues *as high as the market would bear*." *Ibid.* (citing JA 180; JA 249-50) (emphasis added).

"The economic upside noted in the McKinsey report and collective business plan was achievable only through" a "corporate plan" that contemplated removing FERC jurisdiction over what was, in effect, a bundled gathering and transportation service rendered to shippers without competitive alternatives:

> WFS would not have been able to capture the increased rents for the combined gathering and transmission service from captive producers lacking a good alternative service if the facilities remained under FERC jurisdiction, *i.e.*, as a facility owned directly by Transco. [citing R. Item No. 208 at 2, 4, 5-7, 12-15; JA 178-79, 191-92, 199-206; JA 246-52, 258; JA 574]. All this could only be achieved due to lack of a good competitive alternative available to the captive producers, as noted in the WFS Business plan and the McKinsey report, and the fact that the gathering facilities are operationally and physically integrated with

> the Transco transmission facilities—and would remain owned and controlled by TWC. It can only be concluded that the services on [North Padre], at least with regard to Shell, are essentially one continuous transaction. [citing JA 544-45, 547; JA 147-48, 170-71; JA 531].

99 FERC at 65,241 (JA 308); *see* 100 FERC at 61,913 ¶ 48 (JA 378) (WFS's actions "effectively maintained the bundled transportation and gathering services that existed prior to spindown").

Implementing this plan, TWC, Transco and WFS acted in concert to keep the sale of the North Padre facilities off "the open market, which would have included non-affiliated gathering service providers as potential buyers." 99 FERC at 65,241 (JA 308) (citations omitted). This "foreclosed an opportunity for Shell to bid on the project either alone or as part of a working interest group of producers and/or gatherers . . . [and thus] to protect itself from the leverage WFS possessed[.]" *Id.* (citing JA 232-33; JA 546-48; JA 549). *See* 100 FERC at 61,913 (JA 378) (same). In the ALJ's view, "these first concerted actions . . . established the structure and environment in which TWC could extract the increased value for the combined service that Transco could not collect on its own." *Id.* at 65,241-42 (JA 308-09). *See also id.* at 65,254 (JA 321) (summarizing findings).

Reasoning that the concerted action of Transco and WFS justified attributing the actions of each to the other "as if the facilities were still part of the Transco system[,]" 100 FERC at 61,913 ¶ 49 (JA 378), FERC moved to the second prong

of its test to determine whether those actions frustrated its regulation of Transco. To answer this, the Commission compared Transco/WFS's proposed gathering rate to the rate to which "Transco would otherwise be limited" under "in connection with" rate regulation, "*i.e.*, a just and reasonable rate." 103 FERC at 61,666 ¶ 25 (JA 515).

Relevant to this determination was the Commission's finding that "Transco and WFS possess monopoly market power with respect to the gathering and transportation of natural gas" on the North Padre system, because "producers have no reasonable alternative but to flow their gas through WFS' gathering pipeline and into Transco's NGA jurisdictional IT-feeder transmission pipeline in order to access downstream gas markets." 100 FERC at 61,914 ¶ 50 (JA 379); *see* 103 FERC at 61,666 ¶ 25 n.40 (JA 515) (summarizing testimony on this point). Accordingly, though just and reasonable rates can be market-based or cost-based, the lack of "alternatives to Transco/WFS's gathering services" for Shell and other customers precluded a finding that Petitioners "lacked market power[,]" which, in turn, foreclosed classification of the 8-cent rate "as a just and reasonable market-based rate." 103 FERC at 61,666 ¶ 25 (JA 515). [8]

[8] Only "when there is a competitive market [may FERC] rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown*, 10 F.3d at 870 (citations omitted).

Thus, the Commission could determine the justness and reasonableness of the $0.08/Dth rate only "by comparing it to what an unbundled gathering rate that recovers the costs of providing the service, including a reasonable profit, would be for the subject services." 103 FERC at 61,666 ¶ 26 (JA 515). An analysis of the costs used in Transco's most recent rate filing, *see* 100 FERC at 61,915 ¶¶ 57-58 (JA 380) (citing Appendix, *id.* at 61,916 (JA 381)), revealed "that Transco/WFS's [$0.08/Dth] rate greatly exceeded a rate calculated on a cost basis[.]" 103 FERC at 61,666 ¶ 26 (JA 515). The cost-based rate was calculated as $0.0169/Dth. *See* 100 FERC at 61,915 ¶ 58 n.93 (JA 380) (noting rate derivation shown in Appendix). Accordingly, the Commission determined Transco/WFS' $0.08/Dth gathering rate frustrated NGA regulation by forcing shippers to pay "a monopolistically egregious rate." *Id.* ¶ 51.

These rates were not only unjust and unreasonable but also unduly discriminatory. WFS did not increase the gathering rates of two other shippers that "paid Transco the IT-feeder rate to have their gas transported from the receipt point on [North Padre's] 20-inch diameter line to Transco's mainline, approximately 230 miles away." 103 FERC at 61,667 ¶ 33 (JA 516); *see id.* ¶ 38, and 100 FERC at 61,907 ¶ 21 (JA 372) (same). It was unduly discriminatory to permit these two shippers "to pay 'nothing extra' to ship their gas on the same 20-inch diameter line" while demanding "an additional 8-cent rate from Shell." 103 FERC at 61,667

¶ 33 (JA 516).

Transco/WFS's rates also frustrated "the Commission's open access policies[,]" the "'first goal'" of which was "'to ensure that all shippers have meaningful access to the pipeline transportation grid'" so that all sellers would "'be able to reasonably reach the highest-bidding buyer in an increasingly national market'" and all buyers would "'be free to reach the lowest-selling producer[.]'" 103 FERC at 61,662 ¶ 8 (JA 511) (quoting Order No. 636 at 30,393; additional quotation omitted). By demanding "egregiously high rates for gathering," Petitioners "effectively barred access to the interstate grid of reasonably-priced supplies of natural gas[,]" as Shell's shut-in of its production demonstrated. *Id.* at 61,663 ¶ 9 (JA 512). To the extent other producers would shut in production rather than pay excessive rates, "the public would suffer from reduced competition in the interstate transportation and sale of natural gas because . . . '[d]istortions of price signals by monopoly abuse of rate-payer producers, on a long-term cumulative basis, cause distortions of production and development decisions that ultimately cause bad economic results.'" *Ibid.* (quoting 99 FERC 65,252 (JA 319)).

Petitioners further frustrated FERC regulation of Transco "by demanding anti-competitive, unduly discriminatory terms and conditions of service[,]" including "a non-negotiable dedication of reserves condition[,]" *i.e.*, a requirement that Shell agree to ship all gas reserves on WFS's facilities, which "would lock in

Shell" as WFS's "captive customer." 100 FERC at 61,914 ¶ 50 (JA 379). Such a condition would "protect [WFS's] monopoly leverage to demand egregious rates in the future" by preventing new gatherers from competing. *Ibid.* Another proposed term, which starkly highlighted Petitioners' attempt to frustrate FERC regulation, would have foreclosed Shell from taking "action that would result in the Commission's reassertion of NGA jurisdiction." *Ibid.*

In summary, the Commission found that Petitioners effectuated "a sham spin-down transaction designed to circumvent the Commission's regulation . . . [by] attempt[ing] to extract substantially higher charges for the same services previously provided by Transco." 103 FERC at 61,662 ¶ 7 (JA 511). Absent the spin-down, Transco would still own and control North Padre, and the Commission could continue to exercise jurisdiction over that facility's gathering rates as rates charged "in connection with" Transco's jurisdictional transportation. *Ibid.* Thus, the spin-down frustrated "the Commission's regulation by permitting the TWC corporate family to benefit from what Transco alone could not accomplish[.]" *Ibid.* Under these circumstances, the Commission properly "treated both entities as one entity[,]" and resumed "in connection with" jurisdiction over the North Padre gathering rates. *Ibid.*

The courts have long permitted regulatory agencies to disregard corporate structures where necessary to prevent frustration of the statutory purpose. *Capital*

Tel. Co. v. FCC, 498 F.2d 734, 738, n.10 (D.C. Cir. 1974) ("*Capital Telephone*") ("[w]here the statutory purpose could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation"); *Transcon. Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320-21 (5th Cir. 1994) ("*Transco*") (upholding FERC's determination that Transco and two marketing affiliates constituted a single entity where the three acted in concert to make sales that the NGA prohibited Transco from making on its own). *See also United Gas*, 381 U.S. at 401 (finding transactions characterized by parties as sales of gas "leases" to be sales of gas subject to the Commission's jurisdiction). The foregoing principles apply here, because, as the Commission explained, "[t]he sham spin-down along with the concerted action between Transco and WFS allowed them to evade the 'in connection with' link to our jurisdiction and permitted WFS to extract money that Transco, as a natural gas company, providing both services alone could not." 103 FERC at 61,664 ¶ 17 (JA 513).

Indeed, *Conoco* foresaw the possibility that the Commission would need to reassert jurisdiction over a pipeline's gathering affiliate's rates. FERC had determined that the "gathering affiliate would be exempt from NGA jurisdiction only as long as the affiliate maintains an independent, arms-length relationship with the interstate pipeline." 90 F.3d at 547. In the Court's view, this

determination addressed "the rationale underlying [*Northern Natural*]—the perceived danger that unregulated pipeline gathering rates might pose to effective regulation[.]" *Ibid.* (footnote omitted). For its part, the Court had "*no reason to doubt* the Commission's conclusion that a nonjurisdictional entity could act in a manner that would change its status[.]" *Id.* at 549 (emphasis added).[9]

B. Petitioners' Arguments to the Contrary Are Unavailing.

According to Petitioners, the instant orders: (1) exceed the Commission's jurisdiction (Br. at 9-10, 17-25, 27, 32-33); (2) misapply *Arkla* (*id.* at 26-31); (3) erroneously find Petitioners' actions to have contravened the Commission's open-access policies (*id.* at 25-26); and (4) are inconsistent with prior Congressional and Commission initiatives. *Id.* at 19, 31, 35-37, 39.

1. The NGA Authorizes Reassertion of "In Connection With" Rate Jurisdiction over North Padre.

a. Transco's Gathering Facilities Are Subject To Such Jurisdiction.

Petitioners claim that Order No. 636 precludes the Commission from reasserting "in connection with" jurisdiction over North Padre gathering rates. In Petitioners' view, *Northern Natural* permitted assertion of jurisdiction over gathering rates charged "in connection with" jurisdictional transportation solely for

[9] The foregoing also addresses Petitioners' curious claim that *Conoco* was skeptical of the Commission's authority to reassert jurisdiction over gathering affiliates. Br. at 21-23.

the purpose of preventing the pipeline from discriminating in favor of its bundled sales, Br. at 21-22, and by subsequently prohibiting pipelines from making such sales, Order No. 636 "*broke the connection* in the Commission's prior 'in connection with' jurisdiction over gathering previously owned by interstate pipelines." *Id.* at 18 (emphasis in original). *See id.* at 25. The logical conclusion of Petitioners' claim is that even if WFS were deemed to be a part of Transco, the Commission could not reassert "in connection with" jurisdiction.

Petitioners misread *Northern Natural*, which did not confine its analysis to attempts by the pipeline to discriminate in favor of its merchant sales. Rather the court asked: "May the Commission under the NGA's §§ 4 and 5, regulate rates charged for gathering on the pipeline's own gathering facilities in connection with jurisdictional interstate transportation, notwithstanding the explicit § 1(b) exclusion of gathering from the act?" 929 F.2d at 1269. Relying on "the Supreme Court's admonition that '[e]xceptions [such as the gathering exception] to the primary grant of jurisdiction are to be strictly construed'" as "an anchor for [its] analysis[,]" *ibid.* (quoting *Phillips Petroleum Co. v. FPC*, 347 U.S. 672, 679 (1954)), the court decided the Commission could effectuate such regulation. *Id.* at 1263. This ruling was based, in large part, on a concern that unreasonable gathering charges "'become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer.

It was to avoid such situations that the Natural Gas Act was passed.'" *Id.* at 1270 (quoting *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 693 (1947)). These considerations remain regardless of whether or not the pipeline provides bundled sales service.

The Commission noted that the orders affirmed by *Northern Natural* applied "in connection with" jurisdiction, because "'excessive rates for gathering services provided in connection with open-access transportation could be used as a barrier to open-access transportation and would also defeat the goal of lower prices to consumers.'" 103 FERC at 61,663 ¶ 12 (JA 512) (quoting *Northern Natural Gas Co.*, 43 FERC ¶ 61,473 at 62,161, *reh'g denied*, 44 FERC ¶ 61,384 (1988)). Similarly, in the instant orders, the fact "that Transco does not produce gas" that it must ship "in competition with shipper gas supplies is irrelevant since the impact of Transco's and WFS's actions with respect to gathering is to effectively cut off the market from potential suppliers at the wellhead, thereby contravening the Commission's, and, indeed, Congress's open-access goals." *Ibid.*

Conoco recognized the breadth of *Northern Natural's* holding, describing the underlying concern as "the perceived danger that unregulated pipeline gathering rates might pose to effective regulation[.]" 90 F.3d at 547. *Conoco* also recognized the Commission's continued assertion of "in connection with" rate jurisdiction over pipeline-owned gathering – a direct contradiction of Petitioners'

assertion that Order No. 636 ended such jurisdiction – observing that FERC "required pipelines to file their separately stated gathering rates" and "statements that their gathering services are non-discriminatory, not unduly preferential and not inconsistent with" the pipelines' open-access certificates. *Id.* at 540 (citations omitted).

b. The Reassertion of Jurisdiction Is Consistent with the Jurisdictional Rulings in *Conoco* and the Statements in FERC's Previous Spin-Down Orders.

Petitioners contend throughout their brief that the reassertion of jurisdiction in the instant case is inconsistent with statements in *Conoco* and in FERC spin-down orders that the Commission lacks jurisdiction over gathering affiliates. Petitioners cite *Conoco's* holding that the Commission lacked jurisdiction to condition the *Arkla* spin-down on the gathering affiliate's executing two-year "default contracts." Br. at 19-20 (citing 90 F.3d at 550-53). Petitioners also point to statements in spin-down orders that: (1) the gatherer's prospective opportunity to charge monopoly rents did not warrant denial of the North Padre spin-down (Br. at 9-10 (citing one of the North Padre Spin-Down Orders, 97 FERC at 62,381-82), and at 37); (2) the absence of competition was irrelevant to jurisdiction over gathering facilities (*id.* at 27 (citing *Arkla*, 67 FERC at 61,872)); and (3) FERC lacks jurisdiction to require that gatherers charge just and reasonable rates. *Id.* at 32-33 (citing *Mid-Louisiana Gas Co.*, 65 FERC ¶ 61,166 (1993), *reh'g denied*, 67

FERC ¶ 61,255 at 61,852, *reh'g denied*, 69 FERC ¶ 61,303 at 62,170 n.26 (1994) ("*Mid-La*")).

Petitioners ignore the critical distinction made in *Conoco* "between 'a truly independent gatherer,' which it recognized would not be subject to a reassertion of jurisdiction under *Arkla*, and a gatherer like WFS acting in 'collusion' with its affiliate pipeline such that the corporate structure could be ignored." 103 FERC at 61,663 ¶ 10 (JA 512) (quoting 90 F.3d at 549). This distinction marks the antipodes of FERC's spin-down policy: (1) under normal circumstances, the Commission lacks jurisdiction over a pipeline's gathering affiliate; but (2) in the face of certain kinds of concerted action between pipeline and a gathering affiliate, the Commission has authority to reassert "in connection with" rate jurisdiction over the latter. *See, e.g., Arkla,* 67 FERC at 61,871.

The cases cited by Petitioners, *Conoco*, *Mid-La* and the North Padre Spin-Down Orders (Br. at 9-10, 32-33, 37), involved claims of jurisdiction where no predicate for a reassertion of jurisdiction had occurred. Thus, *Conoco* found that requiring a gatherer to execute post-spin-down contracts with the pipeline's former customers was inconsistent with the absence of jurisdiction over the gatherer that existed without such a predicate. 90 F.3d at 552-53. FERC's statements in *Mid-La* and the North Padre Spin-Down Orders that its lack of jurisdiction over post-spin-down gathering facilities' rates made the lack of competition irrelevant were made

in the same context. *See* North Padre Spin-Down Orders, 97 FERC at 62,381-82; *Mid-La*, 67 FERC at 61,852 & 69 FERC at 62,170 n.26. In the instant case, however, such a predicate does exist. [10]

2. The Commission Properly Applied the *Arkla* Test.

a. Petitioners' Actions Frustrated the Commission's Regulation of Transco.

Petitioners assert that the standard set out in *Arkla* for reassertion of jurisdiction was not met, because the Commission failed to find any actions by the affiliates that undermined its "ongoing regulation of the jurisdictional pipeline, in and of itself." Br. at 27. According to Petitioners, their actions were not found to have had "any direct effect on regulated transmission service." *Id.*

Arkla targets concerted action that "frustrates effective regulation of the interstate pipeline[.]" 67 FERC at 61,871. The Commission found concerted action between Petitioners that frustrated the Commission's regulation of Transco. *See, e.g.*, 100 FERC at 61,914 ¶ 51 (JA 379) ("[b]y demanding a monopolistically egregious rate in conjunction with anti-competitive terms and conditions of service, Transco and WFS tried to obtain monopoly rents from the

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[10] Petitioners assert that *Arkla* rejected claims that NGA regulation was necessary to protect shippers from gatherer abuses of monopoly power, including frustration of open-access and imposition of higher rates. Br. at 27. This is not true. *Arkla* simply states that the Commission lacks jurisdiction over gathering facilities, absent actions by the affiliates warranting reassertion of such jurisdiction. 67 FERC at 61,871.

nonjurisdictional gathering that the Commission's regulation would prohibit[,]" thereby "frustrat[ing] the Commission's regulation over the rates and services provided on Transco") (citing 99 FERC at 65,252 (JA 319) and exhibits cited therein). The concerted actions were designed to frustrate regulation of the pipeline's combined gathering and transportation services. *See* 103 FERC at 61,665 ¶ 17 (JA 514) ("the concerted action between Transco and WFS allowed them to evade the 'in connection with' link to our jurisdiction and permitted WFS to extract money that Transco, as a natural gas company, providing both services alone could not").[11] Accordingly, the Commission determination that Petitioners' conduct fell within *Arkla's* parameters was reasonable, supported by the evidence, and should be upheld. *See, e.g.*, *East Texas*, 218 F.3d at 753-54; *Texaco*, 148 F.3d at 1095; *Clearinghouse*, 108 F.3d at 399.

b. The Commission's Reassertion of Jurisdiction Is Justified by Petitioners' Frustration of NGA Mandates.

Nonetheless, Petitioners claim that in the instant orders, the Commission "revised" the *Arkla* test "*specifically and automatically* to provide a basis for

[11] The Commission and ALJ also found that Transco/WFS raised Shell's gathering rate while leaving the rates of other North Padre shippers unchanged. *See:* 100 FERC at 61,908 ¶ 21; 103 FERC at ¶ 38; 99 FERC at 65,256-57. Prior to the spin-down, the NGA prohibited Transco from acting in such an unduly discriminatory manner.

finding virtually all gathering spin-downs to affiliates to be abusive." Br. at 28 (emphasis in original). Petitioners cite FERC's explanation that the abuses providing a predicate for Commission action" are those "'directly related to the affiliate's unique relationship with an interstate pipeline[,]'" *ibid.* (quoting 103 FERC at 61,665 ¶ 20 (JA 514)), and FERC's statement that Petitioners' actions enabled them "'to evade the "in-connection with" link'" to NGA regulation. *Id.* at 29 (quoting 103 FERC at 61,664 ¶ 17 (JA 513)). [12]

The Commission did not revise *Arkla*. The "directly related to the affiliate's unique relationship with an interstate pipeline" language that Petitioners quote from one of the instant orders comes directly from *Arkla*, something Petitioners' erroneous citation fails to disclose. *See* Br. at 28 (quoting 103 FERC at 61,665 ¶ 20 (JA 514), but failing to show the internal quotation or the citation to *Arkla*).

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[12] Petitioners also suggest that the Commission broadened *Arkla* by not restricting itself to *Arkla's* examples of affiliate behavior that would serve as predicates for reassertion of Commission jurisdiction. *Id.* at 28. Petitioners do not make the corresponding argument that the inapplicability of the *Arkla* examples to their conduct demonstrates that *Arkla* does not apply. *See id.* at 27. In any event, the Commission explained that "*Arkla* does not provide an exclusive list of concerted actions that would trigger the Commission's authority to disregard the corporate form." 103 FERC at 61,665 ¶ 20. Rather, after setting out these examples, *Arkla* expressly stated that "'other types of anti-competitive activities'" by the affiliate would also warrant reassertion of FERC jurisdiction if "'the abuse [were] directly related to the affiliate's unique relationship with an interstate pipeline.'" *Id.* (quoting 67 FERC at 61,171).

Moreover, Petitioners' contention that the instant orders somehow broaden *Arkla* to cover all spin-downs omits FERC's reaffirmation of a critical aspect of the test: the necessity for "abuse." Petitioners ignore FERC's statement that *Arkla* reassertion of jurisdiction is warranted only "'where the *abuse* is directly related to the affiliate's unique relationship with an interstate pipeline.'" *See* 103 FERC at 61,665 ¶ 20 (JA 514) (quoting 67 FERC at 61,871) (emphasis added). Similarly, the Commission's reference to Petitioners' efforts to "evade" NGA regulation concerned much more than a mere attempt to shed regulatory burdens: Here Transco/WFS managed "to evade the 'in connection with' link to [FERC] jurisdiction and permitted WFS to extract money that Transco, as a natural gas company, providing both services alone could not." 103 FERC at 61,664 ¶ 17 (JA 513).[13]

Petitioners' contention that the *Arkla* test necessarily encompasses all spin-downs of gathering facilities is further refuted by considerable experience, and by common sense. Since issuing Order No. 636, the Commission has approved

[13] The foregoing also responds to Commissioner Brownell's dissent. *See* Br. at 28. While she correctly notes that frustration of the NGA cannot be grounded solely on cooperation between a parent and an affiliate in implementing a spin-down, 103 FERC at 61,672 ¶ 3, here the spin-down was a sham that served to eliminate regulatory protections and allow the corporate parent to capture the monopoly rents that those protections would have prevented. *See, e.g.*, 100 FERC at 61,907-08 ¶ 21 (explaining evidence of abuse in spin-down); 103 FERC at 61,665 ¶¶ 20-21 (same).

numerous spin-downs. *See* Br. at 35-36 n.23 (citing spin-down orders). This is the first case in which the evidence of abuse of the spin-down process has been sufficient to compel reassertion of "in connection with" rate jurisdiction over gathering. The Commission reasserted that jurisdiction here only because a complainant was able to prove at an evidentiary hearing that Transco and WFS acted in concert to commit abuses that the NGA prohibited Transco from committing on its own. [14] Regulatory agencies have the authority and the duty to act as FERC has acted here. *See Capital Telephone*, 498 F.2d at 738 n.10; *Transco*, 998 F.2d at 1320-21. Gathering affiliates can avoid – as all such affiliates other than WFS have avoided – reassertion of Commission "in connection with" jurisdiction by not abusing their unique relationship with their pipeline affiliates to extract monopoly rents and to impose anticompetitive conditions for what is, in effect, a bundled gathering and transportation service.

c. The Commission Properly Determined Gathering Rates That Were Permissible Under the NGA.

[14] This factor is highlighted by Petitioners' requirement that, as a prerequisite for obtaining gathering service, Shell "agree not to take action that would result in the Commission's reassertion of NGA jurisdiction." 103 FERC at 61,665 ¶ 21. It is difficult to imagine any purpose for that prerequisite other than to evade and thereby frustrate FERC regulation.

Petitioners also claim that imposing an NGA cost-of-service rate framework, comparing the affiliate's gathering rate with a just and reasonable gathering rate is circular, because it assumes authority to use an NGA-set rate. Br. at 29-30.

The Commission's rate analysis is discussed *supra* at 25-26. Essentially, the Commission concluded that a determination of whether Transco/WFS's proposed gathering rate frustrated NGA regulation of Transco required a comparison of that rate with the rate to which "Transco would otherwise be limited" under "in connection with" rate regulation, "*i.e.*, a just and reasonable rate." 103 FERC at 61,666 ¶ 25 (JA 515). This approach was entirely consistent with the rule that agencies may treat a regulated entity and affiliates as a single entity if the regulated entity and the affiliates act in concert to achieve ends that the former is not allowed to effectuate on its own, *see Transco*, 998 F.2d at 1319-20, *Capital Telephone*, 498 F.2d at 738, n.10, because application of that rule necessarily requires determining whether the non-jurisdictional behavior would be allowed were the entities jurisdictional.

The foregoing analysis also addresses Petitioners' claim that the Commission erred by not considering comparable market rates. *See* Br. at 32-34. To reiterate, the only way to determine whether Transco/WFS's gathering rate frustrated FERC's NGA regulation was to compare that rate to the rate Transco could charge under the NGA. *See* 103 FERC at 61,666 ¶ 25 (JA 515), and

discussion in preceding paragraph. Under the NGA, a regulated entity may not utilize market-based rates unless "there is a determination that the provider of the service lacks market power," which, in turn, "requires a showing that the customers have 'good alternatives" in the relevant geographic market that are 'available' to the customers." *Ibid.* (citations omitted). *Accord*, *Elizabethtown*, 10 F.3d at 870. Here the record showed "no alternative pipelines to Transco's transmission and affiliated gathering network" and that Petitioners had a "100 percent share" of the market for transportation from North Padre to onshore markets. 103 FERC at 61,666 ¶ 25 (JA 515). *See also id.* n.40 (summarizing evidence). Because "Transco and WFS possess[ed] monopoly market power with respect to the gathering and transportation of natural gas" on the North Padre system, FERC at 61,914 ¶ 50 (JA 379), an inquiry into comparable market-based rates was irrelevant to whether Transco/WFS frustrated the Commission's regulation of the NGA. [15]

d. Spin-Offs Do Not Present the Same Potential Threat To the Public Interest As Spin-Downs.

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[15] Petitioners' contention that the Commission erred in ignoring Shell's "12.2-cent gathering rate at North Padre[,]" Br. at 34, is untrue. The Commission agreed with the ALJ that "the Shell rate, which is a non-jurisdictional rate Shell charges itself and a co-owner in unknown and possibly substantially different circumstances over different-sized facilities upstream of the subject facilities, provides no support for WFS's argument." 103 FERC at 61,667 ¶ 29 (citing 99 FERC at 65,250).

Petitioners further contend that an unaffiliated facility owner could have imposed the same anti-competitive rates and terms that were imposed by WFS without being subject to FERC regulation. Br. at 30-31.

The Commission holds affiliated gatherers to "a different standard" from that for unaffiliated gatherers, because the former "pose a greater potential risk of concerted action that could circumvent or frustrate the Commission's regulation of interstate pipelines." 103 FERC at 61,667 ¶ 31 (JA 516). The vertical integration of regulated monopolies "'are more likely to involve net adverse economic effects'" by enabling the regulated entity "'to obtain from an unregulated activity the monopoly profits which effective regulation of the franchised monopoly precludes.'" *Ibid.* (quoting III Areeda & Turner, Antitrust Law ¶ 726(e) (1978)). Here, spinning down North Padre put the Williams corporate family "in a better position to obtain" the very "monopoly profits that the Commission's regulation" of Transco "is intended to prevent." *Ibid.* In contrast "an unaffiliated gatherer" has "no tie-back to the regulated pipeline, which could result in the frustration of the Commission's effective regulation of the pipeline." 100 FERC at 61,914 ¶ 52 (JA 379).

In addition, the "continued regulation of Transco may . . . protect the combined entity against the adverse consequences of raising rates[,]" whereas "an independent gatherer that raised rates" would have difficulty sustaining the "loss in

throughput resulting from such an increase." 103 FERC at 61,667 ¶ 31 (JA 516). Thus, FERC's decision to treat unaffiliated gatherers differently is amply supported.

3. Petitioners' Actions Frustrated the Commission's Implementation of Order No. 636.

Petitioners dispute that Transco/WFS's "prohibitively high" gathering rates frustrated implementation of Order No. 636 by denying access to reasonably priced gas. Br. at 25-26 (discussing 103 FERC at 61,662-63 ¶¶ 8-9 (JA 511-12)). According to Petitioners, the record shows that Shell has substantial monopsony power, and Petitioners' rates do not affect prices to consumers. *Id.* at 25. Petitioners also claim that "the notion that [Transco/WFS] would attempt to raise prices to the point of 'prohibiting' gas to flow" is "absurd on its face." *Ibid.*

Petitioners' contentions regarding Shell's "monopsony power," were rejected because Petitioners failed to show at hearing that "Shell had power as a buyer of WFS's [North Padre] gathering services, either alone or with other producers, that counteracted WFS and Transco's exercise of market power." 99 FERC at 65,252-53 n.44 (JA 319-20). Moreover, the ALJ noted, Petitioners "effectively abandoned" this theory on brief. *Ibid.*

Petitioners claim that their actions did not affect prices to consumers, because market forces at Station 30, rather than Transco/WFS's $0.08/Dth gathering rate, determines the price paid by consumers for gas. Br. at 25.

However, Petitioners' gathering rate and Shell's consequent shut-in of its production adversely affected those market forces by reducing competition and the volume of available gas. Looking from a long-term perspective (an approach endorsed in *Williams I*, 331 F.3d at 1022), the Commission found that "if such behavior happens repeatedly it may have a significant cumulative effect on downstream consumers' markets by distorting producers' price signals. The public would thereby suffer from the reduced competition in the interstate transportation and sale of natural gas." 100 FERC at 61,914 ¶ 53 (JA 379) (citing 99 FERC at 65,252 (JA 319)).[16] Finally, Petitioners' claim that they would never charge rates that would drive away business, Br. at 25, ignores that they did charge such rates, causing Shell to shut in production. 103 FERC at 61,663 ¶ 9 (JA 512) (Petitioners' rate increase "effectively barred access to the interstate grid of reasonably-priced supplies of natural gas" by causing Shell to "shut-in its production").

4. The Challenged Orders Are Consistent with Past Legislative Mandates and Commission Orders.

[16] Petitioners characterize this finding as "speculative." Br. at 25. In response to a similar contention, the ALJ, who viewed Petitioners' Station 30 argument as "a cynical attempt to deflect attention from WFS's and Transco's abuse of monopoly power, and . . . frustration of the Commission's regulation[,]" asked rhetorically: "If abusive, concerted monopoly market behavior and frustration of Commission regulation is acceptable in this and other specific individual cases because it is small, how then can it be remedied and prevented before multiple . . . occurrences have a cumulative effect on downstream consumers' markets?" 99 FERC at 65,252.

a. The Rulings Are Well Within Congressional Parameters.

As relevant here, Petitioners contend that reassertion of "in connection with" jurisdiction over North Padre rates "has effectively undermined all of the legislative mandates" and "administrative initiatives" in "seeking to re-impose regulation of gathering." Br. at 19. As Petitioners see it, "the Commission has ignored, and now ventures repeating, the devastating failure of historical imposition of NGA price controls in the production area." Br. at 37. According to Petitioners, FERC's "insouciant setting aside of law and precedent here constitutes a serious reversal of over two decades of Congressional . . . policy aimed at freeing the production area from harmful command-and-control NGA regulation so as to allow market forces to govern." *Ibid.*

Congress' deregulation of wellhead sales prices was not accompanied by any corresponding rollback of FERC's "in connection with" rate jurisdiction over gathering rates. Indeed, *Northern Natural*, which held that FERC had such jurisdiction over gathering rates charged "in connection with" jurisdictional transportation, *see* 929 F.2d at 1263, was decided two years after the Decontrol Act. The Commission's reassertion of jurisdiction in this case is not inconsistent with congressional policy allowing market forces to govern, but shows FERC's willingness to step in when market forces are being skewed by concerted

anticompetitive conduct.

Likewise, Petitioners' contentions that the OCSLA, rather than the NGA, should serve as the vehicle for protecting the rights of OCS shippers, *see* Br. at 31 ("it is other statutes, such as the OCSLA, that are about protecting shippers from alleged anticompetitive abuses"), is misplaced. OCS pipelines are subject to the NGA to the same extent as onshore pipelines. No language in the OCSLA suggests it was intended to diminish NGA jurisdiction on the OCS. *See, e.g.*, *Williams I*, 331 F.3d at 1013 (noting continued NGA authority in the OCS). Contrary to Petitioners' assertions, *see* Br. at 19, 39, past Commission statements that the OCSLA provides FERC authority to assure "fair and unrestricted access" to gathering facilities and to protect shippers "from discriminatory, exorbitant charges" are not inconsistent with reassertion of NGA authority here. The OCSLA simply provides the Commission additional regulatory tools to protect against abuses. Accordingly, FERC's reassertion of its NGA jurisdiction is not precluded by the OCSLA.

b. The Orders Are Consistent with Past Spin-Down Approvals.

Petitioners also contend that by micromanaging North Padre, the challenged orders depart without explanation from FERC's past unbundling policies. Br. at 35. Petitioners do not attempt to explain the alleged inconsistencies between FERC unbundling policies and the orders.

In fact, the Commission's reassertion of jurisdiction promotes the principal purpose of unbundling, which is customer choice (*see, e.g.*, Order No. 636 at 30,393), by making Shell's gas available to purchasers at onshore markets. Moreover, any unbundling resulting from the North Padre spin-down was illusory: After the spin-down, "WFS acted as a division of Transco, rather than a separate company, which effectively maintained the bundled and transportation services that existed prior to the spindown." 100 FERC at 61,913 ¶ 48 (JA 378). Moreover, the spin-down did not promote customer choice, because North Padre provided Shell and other customers the only means of shipping their gas to onshore markets. *See* 103 FERC at 61,666 ¶ 25 & n.40 (JA 515).

Petitioners further claim that the Commission's reassertion of "in connection with" jurisdiction is inconsistent with FERC's prior approvals of North Padre and other OCS spin-downs. Petitioners contend that the orders will embolden Shell and other large producers to block spin-downs so as to acquire gathering facilities. Br. at 35-37.

However, "the Commission's spin-down policies include the opportunity to file a complaint and to seek reassertion of NGA jurisdiction." 103 FERC at 61,664 ¶ 16 (JA 513). FERC acted in response to such a complaint here.

Moreover, the instant orders neither rescinded the spin-down nor paved the way for its rescission. The orders did "not revoke the transfer to WFS," or

"reassert NGA Section 7 jurisdiction over the subject facilities," but instead reinstated only "the Commission's 'in connection with' rate and service NGA jurisdiction under NGA Sections 4 and 5 in the same manner as if Transco still owned the facilities." 103 FERC at 61,664 ¶ 14 (JA 513). That reinstatement does not pave the way for reclassification of the facilities as transportation, because the facilities' prior reclassification from transportation to gathering was not dependent on the rates charged, but rested on "the physical characteristics of the facilities." *Ibid.* *See Williams I*, 331 F.3d at 1017-20.

Finally, by reinstating "in connection with" rate jurisdiction over North Padre, the Commission was not reversing the results of a prior policy decision. The Commission reclassified the facilities from transportation to gathering because of "the physical characteristics of the facilities." 103 FERC at 61,664 ¶ 14 (JA 513). Having thus reclassified the facilities, the Commission had "no discretion" under NGA § 7(b) "to withhold such authorization." North Padre Spin-Down Orders, 96 FERC at 61,435. *See Williams I*, 331 F.3d at 1022 (affirming determination). Accordingly, irreversible facts and law – rather than policy – drove the Commission's approval of the spin-down.

Petitioners also argue that the North Padre Spin-Down Orders preclude a finding that subsequent gathering rates were "egregiously high," because the Commission "recognized that gathering rates would likely go up, and that this

alone . . . does not confer jurisdiction on the Commission to regulate gathering." Br. at 24. However, that recognition did not grant "'free license for the pipeline and its affiliate to abuse their market power once the spin-down is implemented.'" 103 FERC at 61,664 ¶ 15 (JA 513) (quoting 99 FERC at 65,237 (JA 304)). Similarly, those Orders never stood "for the proposition that the Commission expected or endorsed the imposition of anticompetitive rates, and terms and conditions of service following the spin-down by an affiliate acting in concert with Transco." *Id.* ¶ 16. In any event, because the $0.0169/Dth gathering rate was added to the pre-existing rate ($0.08/Dth) that Shell paid to ship its gas to Station 30, Petitioners did receive a rate increase – just not the exorbitant increase they sought.

III. THE COMMISSION'S REMEDY WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commission used its NGA § 5(a) authority to redress the situation. Imposition of a rate under that provision requires two findings: (1) that the existing rate is unjust and unreasonable; and (2) that the new, Commission-imposed rate is just and reasonable. *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183-84 (D.C. Cir. 1986).

The Commission followed these prescribed steps. As discussed, Transco/WFS's ability to exercise market power precluded it from charging a just and reasonable market-based rate. 103 FERC at 61,666 ¶ 25 (JA 515). The

Commission, therefore, compared Transco/WFS's $0.08/Dth rate to a just and reasonable cost-based rate. *Id.* at ¶¶ 25-26. An analysis of cost-of-service data supplied by Transco in its most recent rate filing revealed that the $0.08/Dth rate was unjust and unreasonable and that a just and reasonable rate was $0.0169/Dth. *See* 100 FERC at 61,915 ¶¶ 57-58 (JA 380) (citing Appendix, *id.* at 61,916 (JA 381)).

The Commission thus found that no market-based rate would be just and reasonable, that the existing $0.08/Dth rate was not cost-justified and therefore was unjust and unreasonable, and set a new rate that is just and reasonable, grounded on cost data filed by Transco. Thus, the Commission's remedy was a reasonable application of its NGA § 5(a) powers.

Petitioners argue that the Commission had to give Transco/WFS the opportunity to file a new rate under the auspices of the NGA before replacing Transco/WFS's "non-NGA" $0.08/Dth rate with a new one. Br. at 41-43.

Under Petitioners' theory, the Commission could legitimately investigate the North Padre rates, determine them to be subject to its "in connection with" NGA § 5(a) jurisdiction, yet still be powerless to impose a just and reasonable gathering rate until Petitioners decided to propose one. That theory would preclude FERC from ever using NGA § 5(a) when reasserting "in connection with" rate jurisdiction. In any event, once the Commission reasserted jurisdiction, the

existing rate, Transco's $0.08/Dth rate for the entire gathering and transportation service from North Padre Block 948 to Transco's mainline pooling point at Station 30 was the last Commission-approved rate. *See* 100 FERC at 61,904 ¶¶ 6, 7 (JA 369). The Commission's remedial action served to *increase* that rate by $0.0169/Dth. [17]

IV. THE COMMISSION'S OCSLA FINDINGS SHOULD BE SUSTAINED.

A. The Court Lacks Jurisdiction To Review the Commission's Findings.

Petitioners have failed to identify the jurisdictional basis for their challenges to FERC's OCSLA findings. *See* Fed. R. App. P. 28(a)(4) (mandating a detailed jurisdictional statement). This omission cannot be rectified in Petitioners' reply brief. *See, e.g.*, *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 754 (D.C. Cir. 2002) (Court generally refuses to entertain arguments raised for the first time in a reply brief); *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992) (explaining rationale for rule). In any event, the appropriate forum for challenges to FERC's OCSLA rulings is the district court. *See Shell*, 47

[17] Petitioners also grumble about use of Transco's most recent rate filing to calculate a just and reasonable rate. Br. at 41-42. Petitioners fail to explain why such actions were improper, and more significantly, do not suggest that the cost data – which Transco itself provided – was inaccurate.

F.3d at 1192-94 (the district courts have original jurisdiction over challenges to Commission OCSLA orders involving pipeline transmissions). Accordingly, the Court lacks jurisdiction to consider Petitioners' challenges to the Commission's OCSLA findings.

In addition, Petitioners lack standing to challenge these findings. To establish standing under Article III of the Constitution, "a complainant must allege, *inter alia*, personal "injury-in-fact." *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993). To satisfy the injury-in-fact requirement, a petitioner must allege facts "sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature[.]" *North Carolina Utils. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981) ("*North Carolina*") (citation and internal quotation omitted). Moreover, petitioner's injury "must be present and immediate, or at least must be demonstrably a looming unavoidable threat." *Northwestern Pub. Serv. Co. v. FPC*, 520 F.2d 454, 458 n.6 (D.C. Cir. 1975).

The petitioner has the burden of alleging such injury. *North Carolina*, 653 F.2d at 663 ("It is not this court's job to ferret out or even to speculate as to possible impacts of possible outcomes of existing lawsuits upon future litigation; it is the petitioner's responsibility to show the specifics of the injury alleged"). The burden is not met simply by showing that FERC has adopted "uncongenial legal principles that do not have immediate adverse effect or even immediate prospect of

adverse effect[.]" *Transwestern Pipeline Co. v. FERC*, 747 F.2d 781, 785 n.5 (D.C. Cir. 1984) (Scalia, J.) ("*Transwestern*").[18]

Petitioners have not established that they sustained "injury-in-fact" as a result of the Commission's finding that Petitioners violated the OCSLA. That finding, by itself, does not require Petitioners to take or refrain from taking any action. *See* 100 FERC at 61,915 ¶ 56 (JA 380) (imposition of NGA remedy negates need to impose a separate OCSLA remedy). Accordingly, the OCSLA findings did not result in the concrete, immediate harm necessary to satisfy the injury-in-fact requirement, despite their being "uncongenial" to Petitioners. *See* *Transwestern*, 747 F.2d at 785 n.5.

B. Assuming Jurisdiction, the Commission's Findings Were Reasonable, Authorized and Supported by the Record.

1. The Findings Were Reasonable.

WFS's action violated the prohibitions set out in OCSLA § 5(f)(1)(A), because "the gathering rates, terms and conditions of service [offered by WFS] constitute a barrier to open and nondiscriminatory access[.]" 103 FERC at 61,668 ¶ 37 (JA 517) (internal quotation omitted). Because the OCSLA requires "open"

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[18] *Northwestern*, *North Carolina* and *Transwestern* interpreted the phrase "injury-in-fact" to determine if the petitioner was "aggrieved" for purposes of NGA § 19(b). However, ("to establish [NGA § 19(b)] aggrievement," a petitioner "must, at a minimum, show that it has suffered an Article III 'injury in fact.'" *Southwest Gas Corp. v. FERC*, 40 F.3d 464, 466-67 (D.C. Cir. 1994)) (citation omitted).

as well as “nondiscriminatory” access, “[c]harging high rates may have the effect of violating the OCSLA's open access requirement, particularly if the service provider's customers lack any transportation alternatives.” *Id.* ¶ 38. Here, Shell lacked any gathering and transmission alternatives, *id.* at 61,666 ¶ 25 & n.40 (JA 515), and “the rates, terms and conditions of service offered to Shell were so uneconomic and anticompetitive that they compelled Shell to shut-in its gas and therefore acted as a barrier to Shell's access to the [North Padre] system facilities.” *Id.* at 61,668 ¶ 38 (JA 517). Moreover, Transco/WFS denied Shell “nondiscriminatory” access by increasing its rates “while not increasing the rates for other similarly-situated shippers . . . for services provided them on the same [North Padre] system facilities.” *Ibid. See id.* at 61,667 ¶ 33 (JA 516).

2. Petitioners’ Arguments to the Contrary Are Unavailing.

Petitioners challenge the factual and legal bases for the ruling, claiming (1) that FERC lacks jurisdiction under *The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003) (“*Williams II*”), and (2) that the record was inadequate to support the Commission’s OCSLA findings.

a. FERC Has Authority To Enforce Open-Access Policies Applicable to Natural Gas Pipelines Operating in the Outer Continental Shelf.

Petitioners assert that *Williams II’s* statement that OCSLA §§ 5(e) and (f) do “‘not grant FERC general powers to create and enforce open access rules on the

OCS, or authority to enforce open and non-discriminatory access in the OCS, but merely assign it a few well-defined tasks'" invalidates the instant rulings. Br. at 39-40 (quoting 345 F.3d at 916). *Williams II* set aside FERC industry-wide reporting regulations on grounds that OCSLA § 5(f)(1)(A) does not require that each pipeline grant open and non-discriminatory access, but instead requires that each instrument authorizing OCS pipeline construction and operation contain a condition requiring the pipeline to provide such access, and that Congress intended the agency that conditioned the document to also enforce it. The Court found that FERC is not authorized to issue permits to gathering facilities, and, therefore, does not have authority to enforce the OCSLA § 5(f)(1)(A) open and nondiscriminatory access requirements against the owners of such facilities. *See* 345 F.3d at 913-14.

In contrast, *Shell*, 47 F.3d at 1193, affirmed a FERC order enforcing OCSLA open-access requirements, stating that "the statutory authority derived from [OCSLA] § 5(f) was vested in the first instance in FERC." *See also ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002) ("[u]nder the OCSLA, [FERC] is responsible for ensuring open and nondiscriminatory access for all shippers on the [OCS]"). *Williams II* distinguished *Shell* by explaining that in the latter case, "the parties had not questioned FERC's general authority to order open-access enhancing conduct on the OCS[,]" whereas "here they have." 345 F.3d at 916.

The instant rulings do not involve issuance of rules, as was the case in *Williams II*, but resolve adjudicatory matters between parties, as was the case in *Shell*. Thus, *Williams II* does not invalidate the instant orders' OCSLA findings. *See Williams II*, 345 F.3d at 914 (citing *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376 (D.C. Cir. 1992)).[19]

Moreover, the Commission's action falls within the *Williams II* rationale that FERC may enforce any open-access condition imposed under the NGA. *See* 345 F.3d at 914. All NGA-jurisdictional pipelines must file statements in their tariffs

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[19] In *Williams II*, the Court understood FERC to argue "that both [OCSLA §§ 5(e) and 5(f)] 'require that gas service providers offer nondiscriminatory access on the OCS[,]'" but found that "the provision" actually "requires the Secretary of Interior to condition grants of rights-of-way on the holder's agreeing to non-discriminatory transportation duties." 345 F.3d 913 (quoting FERC's initial brief at 19). The Court did not understand FERC to argue that – and, apparently, did not consider whether – FERC, rather than Interior, has authority to impose and, therefore, to enforce, open-access conditions contained in rights-of-way issued to gatherers.

The language of OCSLA § 5(f)(3) indicates that Congress intended FERC to determine the specific terms of such conditions. That provision does not mention Interior, but requires FERC and Energy to formulate in consultation with Justice (but not Interior) "specific conditions to be included in any . . . right-of-way . . . in order to ensure that pipelines are operated in accordance with the competitive principles set forth in [§ 5(f)(1)]." 43 U.S.C. § 1334(f)(3). FERC and Energy were made responsible for determining the content of such conditions, and Interior was excluded from the process deliberately in response to the Department of Energy Organization Act, 42 U.S.C. § 7101, *et seq.* *See* H.R. Cong. Rep. No. 95-1474 at 88, *reprinted in* 1978 U.S.C.C.A.N. 1674, 1687. As Congress intended FERC, rather than Interior, to dictate the terms of open-access conditions contained in OCS rights-of-way, *i.e.*, to impose those conditions, it follows that Congress intended FERC to enforce those conditions.

"that their gathering services are non-discriminatory" and "not inconsistent with the terms and conditions" of their open-access blanket certificates, *Conoco*, 90 F.3d at 540 (citing *Natural Gas Gathering Servs. Performed by Interstate Pipelines & Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136 at 61,689 (1993)); such tariff provisions serve to impose the open-access mandate of OCSLA § 5(f)(1)(A) on pipeline-owned gathering facilities operating in the OCS. At the very least, North Padre was subject to FERC's "in-connection-with" jurisdiction as of the time Transco and WFS acted in concert to frustrate FERC's regulation of the former, *see Transco*, 998 F.2d at 1322-23 (sustaining FERC's imposition of a retrospective remedy), and thus subject to the provision in Transco's tariff effectively imposing OCSLA § 5(f)(1)(A) open-access. Under the logic of *Williams II*, having required and approved that condition, the Commission could enforce it.

b. Petitioners Had Ample Opportunity To Litigate the Underlying Facts upon Which the Commission's OCSLA Findings Were Based.

Petitioners claim that because the only OCSLA complaint was dismissed, the parties did not litigate OCSLA issues, and the record does not support the Commission's findings regarding them. Br. at 40-41.

This claim ignores that "[t]he ALJ was specifically instructed by the [Hearing Order] to develop a factual record to determine whether the open and nondiscriminatory access requirements of OCSLA Section 5 have been or will be

violated, and if so, what the appropriate remedies should be under the OCSLA." 103 FERC at 61,669 ¶ 39 (JA 518) (citing 98 FERC at 62,014 (JA 86)). Though the ALJ "did not render an initial decision on those issues," the Commission "found that the factual record the ALJ developed sufficed to render OCSLA rulings." *Ibid.* (footnote omitted). "Thus, the parties were on notice that OCSLA issues were to be addressed," the Commission's initial order "addressed them based on the record evidence," and after rehearing, the parties "had their due process opportunity to respond to the Commission's decision thereon." *Ibid.* Accordingly, "[n]o error was committed." *Ibid.*

The Commission's reasoning is solidly grounded on the procedural record. WFS's private settlement with the OCSLA complainants did not invalidate the Hearing Order's directive to develop a record regarding OCSLA violations, and the factual record subsequently developed "sufficed to render OCSLA rulings." 103 FERC at 61,669 ¶ 39 (JA 518) (footnote omitted). Nor do Petitioners dispute the factual basis for the OCSLA findings – that Petitioners doubled Shell's rates, while leaving those of other North Padre gatherers undisturbed, or that Shell shut in its production. *See* 103 FERC at 61,667-68 ¶¶ 33, 37-38 (JA 516-17). Finally, Petitioners do not identify what evidence could have been offered, but was not. Accordingly, Petitioners' procedural contentions need not detain the Court.

V. PETITIONERS RECEIVED DUE PROCESS.

Finally, Petitioners claim they were denied due process by the expedited hearing schedule. Br. at 43-44. The Commission set this schedule in the Hearing Order, *see* 98 FERC at 62,018 ¶ (B) (JA 90), and Petitioners failed to object to it on rehearing of the order. *See* JA 103-17.

Petitioner's failure precludes the Court from considering that contention 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 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) (the courts lack discretion to consider such objections); *New 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) (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).[20]

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[20] *Domtar* interpreted Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), a provision virtually identical to NGA § 19(b). The two provisions are (continued)

In any event, the argument fails on the merits. Agencies enjoy broad discretion in determining how best to handle procedural matters. *Mobil Oil Exploration & Producing Southeast v. United Distribution Cos.,* 498 U.S. 211, 230 (1991); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 547 (1978); *Swinomish Tribal Community v. FERC*, 627 F.2d 499, 510 (D.C. Cir. 1980). The Commission had valid grounds to expedite the proceeding as Shell had shut in its gas supply rather than pay Petitioners' rates. 100 FERC at 61,904 ¶ 7 (JA 369). Moreover, Petitioners do not make any specific claim of prejudice.

CONCLUSION

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

Respectfully submitted,

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properly interpreted consistently with one another. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

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