ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 15, 2005

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

No. 04-1049

COLUMBIA GAS TRANSMISSION CORPORATION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: NOVEMBER 4, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. **Parties and *Amici***: All participants in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

B. **Rulings Under Review:**

1. *Nicole Gas Prod., Ltd.*, Docket No. RP03-243, 103 FERC ¶ 61,328 (2003) (JA 109-15).

2. *Nicole Gas Prod., Ltd.*, Docket No. RP03-243, 105 FERC ¶ 61,371 (2003) (JA 415-18).

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

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Attorney

November 4, 2004

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Columbia	Petitioner Columbia Gas Transmission Corporation
FPA	Federal Power Act, 16 U.S.C. § 791a, *et seq.*
NGA	Natural Gas Act, 15 U.S.C. 717, *et seq.*
Nicole	Collectively, Intervenor Nicole Energy Services, Inc. and Nicole Gas Production, Ltd.

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FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF JURISDICTION

A court reviewing orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC") under the Natural Gas Act ("NGA") has jurisdiction to consider only those objections that the petitioner has raised in its rehearing request to the Commission. 15 U.S.C. § 717r(b). Petitioner Columbia Gas Transmission Corporation ("Columbia"), which is challenging such orders,

makes a number of objections on judicial review that it failed to raise on rehearing. Accordingly, the Court lacks jurisdiction to consider those objections.

STATEMENT OF THE ISSUES

1. Did the Commission correctly interpret Columbia's FERC tariff as providing that, in the absence of an agreement to the contrary, Columbia must install, at its expense, meters necessary to measure the volumes of natural gas injected into Columbia's natural gas gathering and transportation system?

2. Does Columbia's failure to challenge the Commission's determination that it can enforce tariff language applying to non-jurisdictional facilities deprive the Court of jurisdiction to consider such a challenge on judicial review?

3. Assuming that the Court has jurisdiction to consider Columbia's challenge, did FERC correctly conclude that it can enforce tariff language applying to non-jurisdictional facilities?

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

Columbia, an interstate gas pipeline, seeks review of two orders, *Nicole Gas Prod., Ltd.*, 103 FERC ¶ 61,328 (JA 109-15), *reh'g denied*, 105 FERC ¶ 61,371 (2003) (JA 415-18), issued under the NGA. The orders interpret Columbia's FERC tariff as providing that, in the absence of an agreement to the contrary, Columbia must install and pay for meters necessary to measure the volumes of natural gas injected into its gathering and transportation system.

I. Statutory and Regulatory Framework

NGA § 1(b), 15 U.S.C. § 717(b), confers on the Commission jurisdiction to regulate (1) the transportation and sale for resale "of natural gas in interstate commerce," and (2) "natural gas companies engaged in such transportation or sale[,]"[1] but not "the production or gathering of natural gas[.]"

NGA § 4(a), 15 U.S.C. § 717c(a), requires that "[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, and all rules and regulations affecting or pertaining to such rates and charges, shall be just and reasonable[.]" To assure the effectuation of this requirement, each interstate

[1] The NGA rather redundantly defines "natural gas company" as a person that engages in the jurisdictional sale or transportation of natural gas. 15 U.S.C. § 717a(6).

pipeline must file "schedules" showing all jurisdictional "rates and charges" and all "practices and regulations affecting such rates and charges." 15 U.S.C. § 717c(c). Pipelines may not change "any such rate, charge . . . or service, or . . . any rule" or "regulation . . . relating thereto, except after thirty days' notice to the Commission and to the public." *Id.* § 717c(d). Under NGA § 5(a), 15 U.S.C. § 717d(a), if FERC finds (1) any "rate" or "charge" collected by a natural-gas company "in connection with" the jurisdictional "transportation or sale of natural gas," or (2) "any rule, regulation" or "practice affecting such rate" or "charge," to be "unjust, unreasonable, unduly discriminatory, or preferential," the Commission must replace it with a just and reasonable rate, charge, rule, regulation or practice.

Though the NGA expressly does not apply to production or gathering, NGA §§ 4 and 5 apply to gathering rates charged "in connection with" jurisdictional sales and transportation, *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1269 (8th Cir. 1991), and gathering services affecting such rates.

II. Statement of Facts

Nicole Gas Production, Ltd., and Nicole Energy Services, Inc. (collectively, "Nicole") are two affiliated companies engaged in the production and marketing of gas. On December 1, 1999, Nicole purchased 143 wells from Columbia Natural Resources, Columbia's affiliate. JA 2. All the wells are connected to Columbia's

natural gas gathering system, which, in turn, is connected to Columbia's gas transportation system. *Ibid.*

On the same date, Nicole entered into contracts with Columbia under which Columbia agreed to deliver Nicole's gas to three of Columbia's affiliated local distribution companies ("Columbia LDCs"),[2] which had contracted with Nicole to purchase the gas. JA 13. Columbia appears to have based the quantity of gas that it delivered to the Columbia LDCs on Nicole's behalf on Columbia's calculation of the volumes it received into its gathering system from Nicole. *See* JA 14.

Fifty-five of the wells purchased by Nicole did not have meters that could measure the gas volumes injected into Columbia's gathering system. JA 13 n.2. In the absence of meters, Columbia used a measurement methodology that allegedly understated the volumes that Nicole injected by "at least 550,000 dekatherms ['Dth']." JA 3. Such an understatement would have resulted in Columbia making equivalent under-deliveries to the Columbia LDCs on Nicole's behalf.

[2] These companies were: Columbia Gas of Ohio, Inc.; Columbia Gas of Kentucky, Inc.; and Columbia Gas of Pennsylvania, Inc. JA 14 n.3.

Subsequently, the Columbia LDCs filed a breach-of-contract suit in a state court, charging that Nicole had failed to supply contracted-for gas supplies. JA 13-14. Nicole filed a third-party complaint against Columbia, claiming that the latter had "failed to properly credit" Nicole's deliveries. JA 14. That litigation continues.[3]

During July 2002, Nicole became insolvent and filed for dissolution. JA 18. On September 6, 2002, Columbia cancelled its contracts with Nicole. JA 3, 13.

III. The Proceeding Below

On January 24, 2003, Nicole filed a Petition for Declaratory Order requesting that the Commission determine, as relevant here, that Columbia was required by its tariff to install and pay for meters at the points where Nicole injected natural gas into Columbia's system. JA 1. On June 11, 2003, the first challenged order concluded that Columbia's tariff required Columbia to install and pay for meters at those entry points, unless Columbia and Nicole had agreed to other arrangements. 103 FERC ¶ 61,328 (2003) ("June 11 Order") (JA 109-15). The Commission directed Columbia to file revised tariff sheets making these obligations clear, and stated that if Columbia believed the obligations were

[3] Columbia itself brought suit in federal court, claiming that Nicole owed it gas. JA 18.

onerous, it could file proposed tariff sheets that eliminated them. *Id.* at 62,262 ¶ 28 (JA 113).

On July 11, 2003, Columbia filed a request for clarification and rehearing of the June 11 Order. JA 144-341. On December 24, 2003, the second challenged order denied rehearing, but clarified that no ruling had been made on the question as to whether Columbia and Nicole had agreed to a meter-installation arrangement other than that prescribed in the tariff. 105 FERC ¶ 61,371 (2003) ("December 24 Order") (JA 415-18).

In the meantime, on July 14, 2003, Columbia filed new tariff sheets that eliminated the meter-installation requirement. On August 11, 2003, the Commission accepted Columbia's filing, effective August 15, 2003 and subject to conditions not relevant here. 104 FERC ¶ 61,194 (2003) ("August 11 Order") (JA 396-98).

SUMMARY OF ARGUMENT

The Commission's interpretation of Columbia's tariff was consistent with its plain language. Section 26.9(b) of Columbia's General Terms and Conditions stated that, in the absence of an agreement to the contrary, Columbia had to install meters and meter stations necessary to measure gas received into its natural gas gathering and transportation system: "Unless otherwise agreed to in writing," Columbia "will install, operate, and maintain measuring stations and equipment by which the volumes of natural gas . . . delivered by [Columbia] are determined."

None of Columbia's arguments to the contrary survive scrutiny. Columbia now asserts that the Commission lacked jurisdiction to require Columbia to install meters on gathering facilities, regardless of what the tariff said. But Columbia's request for rehearing failed to raise this point, which deprives the Court of jurisdiction to consider it on judicial review.

Alternatively, if the Court were to find that it has jurisdiction to consider Columbia's assertion, the December 24 Order provides a sound legal basis for FERC's position. The filed rate doctrine, which precludes pipelines from acting inconsistently with their filed tariffs, authorizes FERC to enforce tariff language requiring installation of meters on gathering facilities, regardless of whether FERC could require such installation in the absence of such language. The principal

rationale for the filed rate doctrine is to enable all parties to rely on a pipeline's filed tariffs, and the challenged orders further that end by validating Nicole's reliance on the tariff at issue.

Columbia contends that the Commission's interpretation of § 26.9(b) is inconsistent with another subsection of § 26.9 – § 26.9(m) – which states that "[n]othing in this Section 26.9 shall be construed to require [Columbia] to construct any facilities." However, the Commission interpreted § 26.9(m) as simply clarifying that the requirements in § 26.9 to install measuring equipment did not also obligate Columbia to construct facilities necessary to connect production to its system. As the Commission explained, this interpretation gave meaning to both §§ 26.9(b) and 26.9(m) and recognized that the words "install," used in § 26.9(b), and "construct," used in § 26.9(m), have distinctly different meanings.

Columbia argues that even if its tariff requires meter installation, that requirement is conditional upon the shipper's agreement to pay for such installation. As the Commission explained, this contention fails for two reasons.

First, an obligation to install equipment necessarily implies the obligation to pay for the installation in the absence of express language to the contrary. This interpretation is consistent with long-standing precedent holding that a contract

includes not only those promises set forth in express words, but also those implied provisions that are indispensable to effectuate the intentions of the parties.

Second, Columbia's interpretation would have nullified its obligation to install meters by making it conditional on the shipper's first agreeing to pay for the installation, an occurrence not even mentioned in the tariff. The absence of any reference to this occurrence contrasted sharply with § 26.9(b)'s express references to two other occurrences that would have relieved Columbia of its meter-installation obligation.

Columbia further asserts that the December 24 Order's determination that the unambiguous nature of the tariff language rendered extrinsic evidence irrelevant clashed with the June 11 Order's description of the tariff as ambiguous. This assertion ignores the December 24 Order's revised finding that the apparent ambiguity was the result of Columbia's improper and unreasonable interpretation of the tariff.

ARGUMENT

I. Standard of Review

In determining whether FERC has properly interpreted a tariff 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). *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814-15 (D.C. Cir. 1998). A court first looks "to see if the language of the tariff is unambiguous[.]" *Id.* at 814. "If so, the language . . . controls[.]" *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (applying *Chevron* to a settlement agreement).

A tariff or contract is ambiguous only "if 'it is reasonably susceptible of different constructions or interpretations.'" *See Ameren*, 330 F.3d at 499 (quoting *Consolidated Natural Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985) (citation and internal quotation omitted)). "The Commission may consider extrinsic evidence" as an aid to interpretation only if the tariff or settlement meets this definition of ambiguity. *Id.* at 498 n.7 (citations omitted); *Consolidated*, 771 F.2d at 1546.

II. The Commission Properly Interpreted Petitioner's Tariff.

A. The Commission's Interpretation Was Consistent with the Tariff's Plain Language.

Section 26.9(b) of Columbia's General Terms and Conditions ("GT&C") stated in its entirety:

> Unless otherwise agreed to in writing, or unless gas is being received from an interstate pipeline company which has an approved FERC Gas Tariff governing measurement of gas it delivers, [Columbia] will install, operate, and maintain measuring stations and equipment by which the volume of natural gas or quantities of energy received by [Columbia] are determined.

Br. App. B, First Revised Sheet 413.

Thus, as relevant here, § 26.9(b) provided that, in the absence of an agreement to the contrary, Columbia had "to install meters and meter stations to measure [the volume of] gas received into its system." 103 FERC at 62,262 ¶ 26 (JA 113). This provision differed from "other measurement provisions in the tariff, such as for temperature, static pressure, specific gravity, heating value, or gas super-compressibility" in that it did "not include provisions explaining what happens if there are no meters." *Id.* & nn. 16-19 (citing GT&C §§ 26.4-26.8). *See also* Br. App. B, First Revised Sheets 410-12. "Therefore," the Commission reasoned, "the tariff assumes that meters will be installed by Columbia at all

receipt points unless there is an agreement to the contrary as provided in Section 26.9(b)." 103 FERC at 62,262 ¶ 26 (JA 113).

This interpretation was consistent with the tariff's plain language. Moreover, the Commission's reliance upon the contrast between the existence in other GT&C § 26 subsections of procedures to be followed to determine various qualities of the gas where measurement equipment was not provided and the absence in § 26.9 of procedures to be followed to determine gas volumes where meters were not provided was consistent with this Court's determination in contract-interpretation cases that "the inclusion of one thing implies the exclusion of another thing." *See Ameren*, 330 F.3d at 500-01; *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997).

The Commission also found it "reasonable to interpret this obligation as requiring Columbia to pay for such installations." 103 FERC at 62,262 ¶ 26 (JA 113). In the Commission's view, "[a]n obligation to install equipment necessarily implies the obligation to pay for it in the absence of express language to the contrary." 105 FERC at 62,654 ¶ 12 (JA 417).

This interpretation followed the long established rule that "a contract includes not only the promises set forth in express words," but also "all such implied provisions as are indispensable to effectuate the intentions of the parties

and as arise from" – *inter alia* – "the language of the contract[.]" *Sacramento Navigation Co. v. Salz*, 273 U.S. 327, 329 (1927) (interpreting contractual promise to transport goods by barge as implying a promise to secure necessary towing for the barge). *See Union Pac. R.R. Co. v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 549 F.2d 114, 116 (9th Cir. 1976) ("[m]ost contracts include implied conditions that are indispensable in effectuating the intentions of the parties"). *See also City of Cleveland v. FERC*, 773 F.2d 1356, 1376 (D.C. Cir. 1985) (Scalia, J.) (statute's directive that a public utility's tariff recite the "practices . . . affecting" the utility's "rates and charges" does not require the recitation of practices that are "generally understood in any contractual relationship as to render recitations superfluous"). By expressly obligating Columbia to install the meters, the tariff also obligated the pipeline to make the payments necessary to implement that express obligation.

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

1. Columbia Must Comply with Tariff Language Governing Non-Jurisdictional Facilities.

Columbia asserts that the tariff did not and could not require installation of meters on gathering facilities under any circumstances. Br. at 12-15. According to Columbia, because the tariff at issue is a "FERC tariff," it governs only "FERC-jurisdictional services" and not "services . . . outside of FERC's jurisdiction." *Id.*

at 12. While admitting that "none of the references to meters or facilities" in the tariff "expressly limit[ed] their scope to FERC-jurisdictional meters or facilities," Columbia nonetheless argues that "such a limitation [was] plainly implied." *Id.* at 13. Alternatively, Columbia asserts that even if the tariff language required Columbia to install meters on its gathering facilities, such language would not have given the Commission jurisdiction to mandate the installation. *Id.* at 14.[4]

Columbia made neither of these arguments in its request for rehearing of the June 11 Order. That order identified two independent bases for concluding that FERC had authority to require Columbia to install meters on its gathering facilities: (1) the language of § 26.9(b); and (2) FERC's authority to regulate gathering services performed "in connection with" jurisdictional transportation services. 103 FERC at 62,262 ¶ 26 (JA 113). Responding to Columbia's assertion that FERC lacked authority under NGA § 5 to require installation of meters, *see id.* at 62,261 ¶ 24 (JA 112), the order stated: "The fact that the facilities on which the meters may be located may function in a gathering capacity is not relevant as the

[4] Columbia also contends that FERC's jurisdiction to regulate gathering services performed "in connection with" jurisdictional transportation services does not confer authority to require pipelines to install meters on gathering facilities. Br. at 10-12. However, the Commission did not rely on its "in connection with" jurisdiction as a basis for such authority in the December 24 Order, *see* 105 FERC at 62,653 ¶ 7 (JA 416), a point Columbia implicitly acknowledges. Br. at 9, 12. Thus, pages 10-12 of Columbia's brief address a straw man.

tariff does not limit the obligation to install meters only to transmission meters and, *in any event*, Columbia's gathering services are subject to our jurisdiction as they are in connection with Columbia's interstate transmission services." *Id.* at 62,262 ¶ 26 (JA 113) (emphasis added). The separate references to the language of § 26.9(b) and to NGA "in connection with" jurisdiction, as evidenced by the disjunctive phrase "in any event," made clear that these were two distinct bases of authority to order installation of the meters.

Columbia's request for rehearing, however, purported to interpret the June 11 Order as grounded solely on NGA "in connection with" jurisdiction: "The Commission apparently concludes that it has the authority to apply the requirements of Columbia's interstate pipeline tariff to Columbia's *gathering facilities* because of the fact that Columbia's *gathering services* are subject to Commission jurisdiction." JA 153 (citing 103 FERC at 62,262 ¶ 26 (JA 113)) (emphasis in original). The rehearing request then argued that NGA "in connection with" jurisdiction did not authorize FERC "to require Columbia to install or construct gathering facilities," and, "[t]hus, assuming *arguendo* that Columbia's tariff" did "require Columbia to install meters at its expense," this obligation could not have been "extended to gathering facilities." JA 155 (footnote omitted). *See also* JA 153-55 (discussing "in connection with" jurisdiction). The

rehearing request neither challenged FERC's conclusion that it could enforce § 26.9(b) without "in connection with" jurisdiction nor asserted that the tariff implicitly exempted gathering facilities from its reach.

Columbia's failure to make these objections on rehearing deprives the Court of jurisdiction to consider them now. NGA § 19(b), 15 U.S.C. § 717r(b), precludes courts from considering an objection on judicial review that a petitioner failed to raise on rehearing below, absent good cause for the omission. *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99 (1955). 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) (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) (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).[5]

Moreover, Columbia's position is invalid on the merits. In response to Columbia's "in connection with" assertions, *see* JA 152-55, the Commission framed the issue in the case as "not whether the Commission could order Columbia to include such a meter installation requirement in its tariff" but "whether Columbia's then-existing tariff obligated it" to effectuate the installation. 105 FERC at 62,653 ¶ 7 (JA 416). The Commission ruled that "[t]ariffs may contain provisions voluntarily filed by the pipeline . . . that the Commission may not have the authority to require the pipeline to agree to, but, once in the tariff, they become binding on the pipeline unless and until changed by a Commission order." *Ibid.* This ruling rested on "the filed rate doctrine," which requires that "the tariff on file with the Commission . . . be complied with by the pipeline and enforced by the Commission, until it is changed pursuant to [NGA §§ 4 or 5]." *Id.* (citing *Arkla*, *supra* n.5).

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

Thus, contrary to Columbia's bombastic assertion that the December 24 Order offered "no authority for the extraordinary claim that Columbia can vitiate the NGA's express exclusion of gathering by a simple [NGA § 4] tariff filing," Br. at 12, the "filed rate doctrine" provides ample support for the Commission's action. That doctrine, which, for NGA purposes, derives from NGA §§ 4(c) and (d), 15 U.S.C. §§ 717c(c) and (d), "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkla*, 453 U.S. at 577. The doctrine governs not only rates but also "ancillary conditions and terms included in the tariff." *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 416 (1st Cir. 2000) (citing *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 224-25 (1998)). Accordingly, utilities must comply with Commission orders directing them to comply with the non-rate terms of tariffs. *See, e.g., Entergy Servs., Inc. v. FERC*, 375 F.3d 1204 (D.C. Cir. 2004) (integrated energy company required to comply with tariff provision that prohibited company from reserving transmission capacity without also designating the "network resources" that would supply the power that was to be transmitted). Similarly, the Commission could properly direct Columbia to comply with its tariff's meter-installation requirement.

Indeed, enforcement of that requirement furthered the doctrine's principal purpose. '"Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine[.]'" *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (quoting *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985)). *Accord*, *Town of Concord v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1990). For example, the doctrine allows purchasers of services "to know in advance the consequences of the purchasing decisions they make." *Concord*, 955 F.2d at 75 (internal quotation omitted). The Commission's ruling here assures shippers, such as Nicole, that a pipeline will not be allowed to retroactively disavow tariff language that unambiguously requires the pipeline to provide a specific service.

None of the precedents cited by Columbia as support for its contrary position, Br. at 14, are apposite. Neither *Weinberger v. Bentex Pharm., Inc.*, 412 U.S. 645 (1973), *California Indep. Sys. Operator, Inc. v. FERC*, No. 02-1287 (D.C. Cir. June 22, 2004), *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003), nor *American Mail Line, Ltd. v. FMC*, 503 F.2d 157 (D.C. Cir. 1974), addressed the filed rate doctrine or otherwise discussed a utility's obligation to comply with its tariff.[6]

[6] Columbia's contention, that the Commission should have engrafted additional

2. FERC Articulated a Sound and Rational Basis for Its Tariff Interpretation.

Columbia next asserts that the Commission provided no rational basis for its conclusion that it possessed authority to require installation of the meters. Br. at 15-16. Columbia claims an inconsistency between what it sees as the June 11 Order's reliance on FERC's "in connection with" jurisdiction, and the December 24 Order's reliance on "the fact that Columbia voluntarily filed a tariff governing the installation of 'measuring equipment' and 'facilities.'" Br. at 15 (citing 103 FERC at 62,262 ¶ 26 (JA 113), and quoting 105 FERC at 62,653 ¶ 7 (JA 416)). Columbia then argues that the "December 24 Order cites to no precedent or statutory provision supporting the Commission's conclusion that generic provisions in Columbia's FERC tariff governing the installation of meters and measuring equipment are applicable to non-jurisdictional facilities owned by Columbia." *Id.* at 16 (citing 105 FERC at 62,653 ¶ 9 (JA 416)).

The claimed inconsistency does not exist: The June 11 Order relied not only on NGA "in connection with" jurisdiction, but also on FERC's authority to enforce the language of § 26.9(b). 103 FERC at 62,262 ¶ 26 (JA 113). *See supra* at 15-16. In reaffirming the latter ground, the December 24 Order invoked the filed rate

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language limiting the tariff's reach to FERC-jurisdictional facilities, *see* Br. at 12-13, is contrary to those cases providing that the plain language of FERC-jurisdictional documents controls. *See, e.g., Ameren*, 330 F.3d at 500-01.

doctrine, grounded on NGA § 4, and cited *Arkla*. *See* 105 FERC at 62,653 ¶ 7 & n.3 (JA 416). Moreover, because Columbia failed to object to the June 11 Order's reliance on FERC's authority to enforce language in Columbia's tariff, the Court lacks jurisdiction to consider that objection now. *See Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

3. FERC's Tariff Interpretation Harmonizes All Affected Provisions.

Columbia argues that requiring Columbia to install meters under § 26.9(b) is inconsistent with GT&C § 26.9(m), which states that "[n]othing in this Section 26.9 shall be construed to require [Columbia] to construct any facilities." Br. at 22-23. *See id.* at App. A, First Revised Sheet No. 415 (containing § 26.9(m)).

The Commission interpreted § 26.9(m) as "clarifying that the requirements in Section 26.9 to install measuring equipment, including the installation of meters and metering stations to measure gas volumes, [did] not obligate Columbia to construct taps, interconnects, or pipe facilities necessary to connect production to its system," and were, therefore, "consistent with its tariff's construction policy." 103 FERC at 62,262 ¶ 27 (JA 113).[7] "Thus, for example, Columbia would have no

[7] Columbia's construction policy is set out in GT&C § 27. 105 FERC at 62,653 ¶ 9 n.4 (JA 416).

obligation to construct a new line to connect a well to its existing system." 105 FERC at 62,653 ¶ 9 (JA 416).

Contrary to Columbia's claim (Br. at 23), this interpretation gave "meaning to both" §§ 26.9(b) and 26.9(m) by requiring Columbia to install meters, but not to construct new facilities. 103 FERC at 62,262 ¶ 27 (JA 113); 105 FERC at 62,653 ¶ 9 (JA 416). In contrast, under Columbia's interpretation, § 26.9(m) "trump[ed]" and "negate[d]" § 26.9(b) by eliminating the latter provision's requirement that Columbia install meters. 105 FERC at 62,653 ¶ 9 (JA 416). FERC's interpretation also recognized that § 26.9(b) required Columbia to "install" meters, whereas § 26.9(m) simply stated that § 26.9 did not require Columbia to "construct" facilities. 103 FERC at 62,262 ¶ 27 (JA 113). Columbia appears to concede this point, [8] making no attempt to equate the verbs "install" and "construct." [9]

[8] Although FERC never addressed the point, Columbia asserts that meters are "facilities" within the meaning of its tariff. Br. at 22-23. *See also* 103 FERC at 62,262 ¶ 27 (JA 113) (rejecting Columbia's interpretation of § 26.9(m), without construing term "facilities"). However, the Commission did not interpret the tariff as requiring Columbia to "construct" meters, but only to install existing meters on its system.

Finally, Columbia contends that § 26.9(b)'s opening clause ["[u]nless otherwise agreed to in writing"] "allows for the possibility that a third party will do the installation." Br. at 23. However, Columbia fails to coherently explain how language allowing the parties to agree to other arrangements, including have a third party install the meters, somehow supports the contention that Columbia was not required to install the meters in the absence of such an agreement.

4. The Tariff Required Columbia To Pay for Installation.

Columbia claims the orders lack a rational basis for concluding that the tariff required Columbia to pay for the installation of meters. Br. at 17-18. The pipeline contends that any obligation it may have had to install the meters was conditional on the shipper's agreement to pay for such installation. *See id.* at 17 ("Columbia has been willing to install meters for Nicole as long as Nicole paid for the meters").

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9 Columbia's failure to address the difference between "construct" and "install" also disposes of its claims that the Commission's interpretation is inconsistent with § 1(c) of the interruptible gathering agreement between Columbia and Nicole. Br. at 21. Echoing § 26.9(m), § 1(c) exempts Columbia from having "to *construct* facilities to provide any service requested hereunder[,]" *id.* n.20 (emphasis added), and thus does not speak to installation. In any event, the failure of Columbia's rehearing request to even cite § 1(c), *see* JA 144-70, deprives the Court of jurisdiction to consider this objection. *See Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

For its part, the Commission offered two related reasons for concluding that the obligation to install implicitly included an obligation to pay for the installation. First, the Commission reasoned that "[a]n obligation to install equipment necessarily implies the obligation to pay for it in the absence of express language to the contrary." 105 FERC at 62,654 ¶ 12 (JA 417). This reasoning is consistent with long-standing precedent holding that an express contract provision obligating a party to take an action necessarily obligates the party to take all subsidiary actions essential to effectuate the action. *See Sacramento Navigation*, 273 U.S. at 329; *Union Pacific*, 549 F.2d at 116.

Second, the Commission reasoned that placing the obligation to pay for installation of the meters on the transportation customer would have read § 26.9(b) "out of the tariff because [Columbia] would not" have been "obligated to install a meter if the shipper did not agree to pay for it." 105 FERC at 62,654 ¶ 12 (JA 417). Thus, the Commission refused to nullify Columbia's express obligation to

install meters by making that obligation conditional on a prerequisite – the shipper's agreement to pay for the installation – not mentioned in the tariff.[10]

That this kind of implicit nullification was contrary to the tariff's intent was further manifested by two conditions expressly set out in § 26.9(b), either of which, if met, would have nullified Columbia's obligation to install: (1) a written agreement with the shipper to proceed in a different manner, or (2) receipt of gas from another pipeline with a FERC-approved tariff governing gas measurement. *See* Br. App. B, First Revised Sheet No. 413. The tariff's express reference to two occurrences that would have nullified the meter-installation requirement, and the omission of any reference to the shipper's refusal to agree to pay for the installation as also nullifying that requirement demonstrate that such a refusal was never intended to effectuate such a nullification. *See Ameren*, 330 F.3d at 500-01 ("the inclusion of one thing implies the exclusion of another thing"); *Halverson*,

[10] Columbia's approach would make it impossible for shippers to rely on Columbia's discharging any express obligation in its tariff, because the shippers would never know the extent to which they – rather than Columbia – were responsible for taking the subsidiary actions necessary to discharge of the obligation. Thus, such an approach would erode "the necessary predictability" that "is the whole purpose" of the filed rate doctrine. *See Columbia*, 831 F.2d at 1141.

129 F.3d at 185 (same).[11] Thus, the tariff manifested an intent that Columbia not only install the meters but also pay for the installation.

Columbia claims that the Commission failed to consider precedent showing that "the question of who pays for pipeline facilities, including meters, is a separate and distinct issue from the question of who installs the meter." Br. at 18, citing *ANR Pipeline Co. v. Transcontinental Pipe Line Corp.*, 93 FERC ¶ 61,277 (2000), and *KN Wattenberg Ltd. Liab. Co.*, 83 FERC ¶ 61,191 (1998).

Columbia cited neither of these cases in its request for rehearing. *See* JA 161-62 (discussing obligation to pay). That failure denied the Commission the opportunity to consider them, and deprives the Court of jurisdiction to consider Columbia's contention that they are inconsistent with the instant orders. *See Domtar*, 347 F.3d at 312 (because petitioner's rehearing request did not allege that the challenged orders were inconsistent with prior FERC orders, the Court lacked jurisdiction to consider allegations of such inconsistency on judicial review).

In any event, *ANR* and *Wattenberg* are inapplicable because neither involved the tariff-interpretation issues present here. *ANR* addressed the circumstances under which the Commission would compel a pipeline to interconnect with another

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[11] While it is true that the orders did not rely on this ground, a court may properly consider additional arguments that support agency interpretations of jurisdictional statutes or documents. *See Ameren*, 330 F.3d at 501 n.10 (contract); *American Bankers Community v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (statute).

facility in the absence of a governing tariff provision, *see* 93 FERC at 61,904, and *Wattenberg* modified the pipeline's proposed revision of an existing tariff provision. 83 FERC at 61,796. In contrast, the instant orders interpret provisions already in existence. 105 FERC at 62,653 ¶ 7 (JA 417).

5. The Tariff's Unambiguous Language Obviated Consideration of Extrinsic Evidence.

Columbia asserts that the Commission erred by failing to consider extrinsic evidence. Br. at 19-20. According to Columbia, the evidence would have shown that the pipeline had required shippers to pay for meter installation in the past, and that requiring Columbia to pay for such installation would be wasteful and economically harmful. *Id.* at 20.

In the proceeding below, one argument Columbia offered in support of its claim that § 26.9(m)'s statement that § 26.9 did not require Columbia to construct new facilities effectively trumped § 26.9(b)'s requirement that Columbia install meters, *see supra* at 21-23, was that Columbia's interchangeable use of the verbs "construct" and "install" in its past tariff implementations demonstrated that the two verbs had the same meaning for purposes of the tariff. 105 FERC at 62,653 ¶ 8 (JA 416). In response, the December 24 Order concluded that "Columbia's past practices" were "irrelevant to the interpretation of [§ 26.9(b)]." *Id.* ¶ 10. Though "[e]xtrinsic evidence . . . is admissible to ascertain the intent of the parties when

the intent has been imperfectly expressed in ambiguous contract language," such evidence "is not admissible either to contradict or alter express terms." *Ibid.* Because § 26.9(b) was "clear and unambiguous in its requirement for Columbia to install meters and metering equipment[,]" the provision could be interpreted "without resorting to any extrinsic evidence." *Ibid.* This reasoning was consistent with this Court's holdings that FERC may not consider extrinsic evidence to aid interpretation of an unambiguous document. *Ameren*, 330 F.3d at 498 n.7; *Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996); *Consolidated*, 771 F.2d at 1546.

Columbia, however, claims that the December 24 Order's finding that the tariff language was unambiguous cannot be squared with the June 11 Order's statement "that 'portions of . . . Columbia's tariff regarding meters'" were '"ambiguous'" or with that order's directive that Columbia "'file revised tariff language that *makes it clear that it must install and pay for meters*.'" Br. at 19 (quoting 103 FERC at 62,262 ¶ 28 (JA 113)) (emphasis in brief). In Columbia's view, the fact that it was "directed to make a tariff filing clarifying who must 'install and pay for meters'" demonstrates that its "then-existing tariff" was not "unambiguous with respect to these issues." *Ibid.*

Columbia ignores the obvious fact that the December 24 Order revised the June 11 Order's determinations regarding ambiguity. The latter order found that the "only ambiguity in the tariff" was "one created wholly by Columbia" when it tried to interpret § 26.9(m) in a way that would have read § 26.9(b) out of the tariff. 105 FERC at 62,653 ¶ 9 (JA 416). *See id.* ¶ 10. The Commission also resolved any questions it may have had regarding the unambiguous nature of Columbia's obligation to pay for the installation. *Compare* 103 FERC at 62,262 ¶ 26 (JA 113) ("it is *reasonable* to interpret" the obligation to install meters "as requiring Columbia to pay for such installations") (emphasis added) *with* 105 FERC at 62,654 ¶ 12 (JA 417) ("[a]n obligation to install equipment *necessarily* implies an obligation to pay for it in the absence of express language to the contrary") (emphasis added).

The revision was entirely appropriate. The "very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny." *Ameren*, 330 F.3d at 499 n.8. Here, the Commission properly concluded on rehearing that Columbia's alternative interpretation of the tariff – that § 26.9(m)'s statement that § 26.9 did not require Columbia to construct new facilities nullified § 26.9(b)'s requirement that Columbia install meters – was unreasonable, because it would vitiate § 26.9(b). 105 FERC at 62,653 ¶ 9 (JA

416). Moreover, the tariff's silence regarding who would pay for meter installation proved nothing because the obligation to install the meters "necessarily" included a corresponding obligation to pay for such installation. *Id.* at 62,654 ¶ 12 (JA 417). Accordingly, Columbia had failed to show that its tariff was susceptible to more than one reasonable interpretation. *See Ameren*, 330 F.3d at 499 (a document is ambiguous only if it is subject to more than one reasonable interpretation); *Consolidated*, 771 F.2d at 1544 (same). Because no ambiguity existed, there was no need to examine extrinsic evidence.[12]

6. The Challenged Orders Are Consistent with Other Orders Issued in the Proceeding.

Columbia next argues that the reasoning underlying FERC's August 11 Order, which allowed Columbia to remove prospectively the meter-installation requirement from its tariff, *see* 104 FERC ¶ 61,194 (JA 396-98), is inconsistent with the result effectuated by the challenged orders. Specifically, Columbia claims that FERC "cannot conclude in August 2003 that the NGA requires that pipelines be given an opportunity to recover the costs of performing jurisdictional service, and then issue an order in December 2003 that denies Columbia the opportunity to recover its costs from Nicole." *See* Br. at 20-21.

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[12] Columbia's contention that this interpretation was inconsistent with the June 11 Order's directive that Columbia clarify its tariff, Br. at 19, is irrelevant because Columbia has not challenged that directive.

On rehearing, Columbia did not contend that the meter-installation requirement would prevent recovery of costs, but only that the requirement would increase expenditures and "lead to highly uneconomic results" in the form of inefficiencies. *See* JA 163-64. Columbia's failure to raise its cost-recovery objection on rehearing deprives the Court of jurisdiction to consider that objection now. *See Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

In any event, this argument is invalid on the merits. The Commission concluded that Columbia's economic arguments were "irrelevant to the issue of the case[,]" which is "what did Columbia's tariff require?" 105 FERC at 62,654 ¶ 13 (JA 417). That question is entirely different from the issue addressed in the August 11 Order, which was "should the tariff be revised?" *See also FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) (though the Commission may not impose a rate that provides a utility less than a fair return, the utility may agree to a contract that provides such a rate).

7. The Orders Are Consistent with Orders Addressing Petitioner's Cessation of Gathering Services.

Columbia's final argument is that the challenged orders are inconsistent with Commission orders "requiring Columbia to transition out of the gathering business." Br. at 25. However, the ruling did "not preclude Columbia from" transferring "any facilities[,]" but "simply provide[d] that its then-existing tariff

required it to install meters and meter stations on whatever facilities it still owns if needed to measure gas receipts or deliveries on its transmission system, unless agreed otherwise." 105 FERC at 62,654 ¶ 15 (JA 417). Accordingly, the ruling "was not inconsistent with any previous Commission orders regarding Columbia's transition out of the gathering business." *Ibid.*

CONCLUSION

For the foregoing reasons, the Commission requests that the orders under review be affirmed in their entirety.

Respectfully submitted,

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