ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 05-1285

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MAY 22, 2006

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Columbia Gas Transmission Corporation*, 109 FERC ¶ 61,152 (November 5, 2004); and

2. *Columbia Gas Transmission Corporation*, 111 FERC ¶ 61,338 (June 2, 2005).

C. Related Cases:

This case has not previously been before this Court or any other court. There are no related cases pending judicial review.

_____
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Senior Attorney

May 22, 2006

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GLOSSARY

Cincinnati Gas	Cincinnati Gas and Electric Company
Cities	Cities of Charlottesville and Richmond, Virginia
Columbia	Columbia Gulf Transmission Company and Columbia Gas Transmission Corporation
Columbia Gas	Columbia Gas Transmission Corporation
Columbia Gulf	Columbia Gulf Transmission Company
Discount shippers	Mountaineer Gas Company, Cincinnati Gas and Electric Company, and Union Light, Heat and Power Company
Mountaineer	Mountaineer Gas Company
NGA	Natural Gas Act
Order on Discounted Rate	*Columbia Gas Transmission Corp.*, 109 FERC ¶ 61,152 (2004)
Recourse rate	Rate provided in Columbia's tariff
Rehearing Order	*Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 (2005)
Union Light	Union Light, Heat and Power Company

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STATEMENT OF THE ISSUES

The issues presented for review are:

1. Whether there is subject matter jurisdiction to consider the contentions Petitioners raise for the first time on appeal.

2. Whether the Commission reasonably rejected, as an unsupported material deviation from the applicable tariffs, a rate filing offering a discount in exchange for the shipper's broad waiver of its statutory complaint rights under Section 5 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

COUNTER-STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under Section 19(b) of the NGA, 15 U.S.C. § 717r(b). Pet. Br. at 2. Under that provision, "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so."

As shown in Point I of the Argument below, Petitioners did not raise in an application for rehearing (or in any other filing) to the Commission many of the issues they now raise on appeal. Accordingly, Petitioners are precluded from raising those issues now. *See*, *e.g.*, *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985); *see also Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990) ("[E]ven if the changes wrought by the rehearing order were considered sufficiently minimal that [petitioner] could rely on its first rehearing application for jurisdiction in this court, it would still be confined in this petition to those objections that were actually 'urged before the Commission.'") (quoting a

virtually identical jurisdictional provision in Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b)).[1]

INTRODUCTION

This proceeding involves the Commission's review of rate filings, made under Section 4 of the NGA, 15 U.S.C. § 717c, by Columbia Gulf Transmission Company ("Columbia Gulf") and Columbia Gas Transmission Corporation ("Columbia Gas") (collectively, "Columbia"). R. 1, JA 1-25; R. 2, JA 26-95. The filings proposed to provide three of the pipelines' customers with a specific service discount in exchange for the customers' agreement to waive their NGA § 5 complaint rights regarding any Columbia service, even those not covered by the discounted rate.

The Commission rejected the filings, finding that they were unsupported material deviations from Columbia's tariffs. *See Columbia Gas Transmission Corp., et al*., 109 FERC ¶ 61,152 (2004) ("Order on Discounted Rate"), JA 118-24, *order denying rehearing*, 111 FERC ¶ 61,338 (2005) ("Rehearing Order"), JA 153-62. While, as a matter of general policy, pipelines can provide discounts or enter into fixed rate contracts with their shippers, the Commission found that Columbia

[1] Decisions interpreting virtually identical provisions of the NGA and the Federal Power Act may be cited interchangeably. *E.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

had failed to justify the specific proposal here. The proposed discount rates were offered to only a limited number of customers, the discount customers would have to waive their rights to later challenge generally applicable recourse rates (*i.e.*, all Columbia rates, not simply the rates for the discounted service), and Columbia would retain full rights to later file to change its rates. This unique proposal raised market power concerns, was unduly discriminatory, and required an overly broad waiver of shipper complaint rights.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

"The Natural Gas Act requires that 'all rates and charges made, demanded, or received by a natural gas company . . . be just and reasonable' and declares 'any such rate or charge that is not just and reasonable . . . unlawful." *Chevron Texaco Exploration & Production Co. v. FERC*, 387 F.3d 892, 895 (D.C. Cir. 2004) (quoting NGA § 4, 15 U.S.C. §717c). NGA § 4 requires pipelines to file all their rates with the Commission. *Id.*; *see also* 18 C.F.R. § 154.1(b) (same). "The pipeline bears the burden of showing its proposed rate is just and reasonable." *Chevron Texaco*, 387 F.3d at 895.

The Commission's regulations regarding the filings required by NGA § 4 provide that "any contract that conforms to the form of service agreement that is

part of the pipeline's tariff . . . does not have to be filed." 18 C.F.R. § 154.1(d). However, "[a]ny contract or executed service agreement which deviates in any material respect from the form of service agreement in the tariff is subject to the filing requirements of this part." *Id.*

Under NGA § 5(a), if the Commission finds, upon its own motion or upon complaint by a third party, that a previously approved rate has become "unjust, unreasonable, unduly discriminatory, or preferential," the Commission "determines the just and reasonable rate . . . to be thereafter observed and in force."

II. Events Leading To The Challenged Orders

A. Columbia's Filings

On October 8, 2004, Columbia filed for Commission review and approval, under NGA § 4, several letter agreements reflecting discounted rates for service to three shippers, Mountaineer Gas Company ("Mountaineer"), Cincinnati Gas and Electric Company ("Cincinnati Gas") and Union Light, Heat and Power Company ("Union Light") (collectively "discount shippers"). R. 1, JA 1-25; R. 2, JA 26-95.

Each letter agreement proposed that, in exchange for a discounted rate for a *specific* service, the discount shippers would give up their NGA § 5 complaint rights regarding the rates for *all* Columbia services, even those not covered by the discounted rate. R. 1 at 6-9 (JA 6-9), 11-13 (JA 11-13), 15-17 (JA 15-17), 19-22

(JA 19-22); R. 2 at 9-12 (JA 34-37), 15-18 (JA 40-43), 19-21 (JA 44-46), 23-25 (JA 48-49). If a discount shipper were to file, or participate in support of, an NGA § 5 complaint asserting that *any* of Columbia's rates are unjust and unreasonable, it would forfeit its discount and would be required to pay the maximum tariff rate (also called the maximum "recourse" rate) for the service in question. R. 1 at 8-9 (JA 8-9), 12-13 (JA 12-13), 16-17 (JA 16-17), 20-22 (JA 20-22); R. 2 at 11-12 (JA 36-37), 17-18 (JA 42-43), 20-21 (JA 45-46), 24-25 (JA 49-50).

B. Protest by the Cities of Charlottesville and Richmond, Virginia

The Cities of Charlottesville and Richmond, Virginia ("Cities") protested Columbia's filing, contending that the letter agreements could be approved only as negotiated, rather than discounted, rate agreements. R. 12. The Cities' contention was based on the fact that the reduced rates were not being provided to dissuade shippers from leaving Columbia for competing pipelines (the basis on which discounted rates can be justified in an NGA § 4 rate proceeding [2]), but, rather, to persuade the discount shippers to waive their NGA § 5 complaint rights. R. 12 at 3-5 (citing R. 1 at 2, JA 2; R. 2 at 2, JA 27). Additionally, the Cities noted, all of

[2] *See Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309 at P 3, *reh'g denied*, 113 FERC ¶ 61,173 (2005), *appeals pending*, D.C. Cir. Nos. 06-1006, *et al.* (filed Jan. 4, 2006).

the precedent cited by Columbia in support of their filings involved negotiated, not discounted, rates. R. 12 at 5-8, JA 100-03.

C. Columbia's Answer

Columbia answered the protest, contending that the rates at issue were discounted, not negotiated, rates. R. 19 at 3, 4-6, JA 109, 110-12. In any event, Columbia added:

> The Cities ignore the fundamental purpose of the filings submitted by [Columbia]: to obtain, out of an abundance of caution, assurances from the Commission that the discount letters do not qualify as non-conforming service agreements under [18 C.F.R.] Section 154.1(d) due to the Section 5 waiver provisions.

R. 19 at 4, JA 110; *see also id.* at 6, JA 112 (pointing out that the "central issue before the Commission in the instant proceedings is whether the discount letters' Section 5 waiver provisions constitute deviations from the *pro forma* service agreements underlying the transactions"). Moreover, Columbia asserted, the "same type of material deviation analysis" applies to Commission review of proposed negotiated rates and proposed non-conforming contract provisions. *Id.* at 7.

III. The Challenged Orders

A. The Order on Discounted Rates

The Commission denied Columbia's proposal to broadly limit its discount shippers' complaint rights. In support, the Commission rejected the general proposition that discount rate shippers could waive their "right to complain under

NGA section 5 that the maximum recourse rate has become unjust and unreasonable and must be lowered." Order on Discounted Rates at P 12, JA 122; *see also id.* at P 13, JA 122. In any event, however, the Commission further determined that "[t]he broad waiver of section 5 rights included in the discount agreements at issue here would . . . be inappropriate even if included in a negotiated rate agreement." *Id.* at P 11, JA 122 (citing *CenterPoint Energy Gas Transmission Co.*, 104 FERC ¶ 61,281 at PP 44-45 (2004) (rejecting provision in negotiated rate agreement that required parties to an agreement to surrender their right to petition the Commission for changes to any of the pipeline's rates even if those rates should become unjust and unreasonable and even if the rates were for services not provided pursuant to that agreement)).

As the Commission explained:

> Here, not only do Columbia Gulf and Columbia Gas seek permission to include a waiver of section 5 rights in discounted recourse agreements, but the proposed waiver provisions are significantly broader than any the Commission has approved in negotiated rate transactions. Under the waiver provisions in the discounted rate agreements at issue here, the Columbia Gulf shippers would waive their right to challenge all the base rates, and the entire rate structure, of both Columbia Gulf and its affiliate Columbia Gas. The Columbia Gas shippers would agree to a similarly broad waiver of section 5 rights. Thus, the waiver goes far beyond the discounted rates agreed to for the service to be provided under the service agreements in question, and would apply to the pipelines' recourse rates for all their services, including service not covered by the subject

> service agreements but which the shippers could conceivably contract for in the future.

Order on Discounted Rates at P 10, JA 121. By contrast, the Commission noted, "it is permissible to limit challenges to the specific rate(s) included in [a] negotiated rate agreement so as to ensure rate certainty." *Id.* at P 13, JA 122.

Thus, the Commission found Columbia's argument that the rates at issue were discounted, not negotiated, rates, and the cases upon which the argument was based,[3] irrelevant. *Id.* at P 14, JA 123. "[T]he issue here is not the nature of the rate, but the conditions that Columbia Gulf and Columbia Gas have imposed on the shippers' rights under section 5 of the NGA." *Id.*

The Commission directed Columbia either to remove the clauses restricting the shippers' statutory complaint rights from all the discount agreements at issue, or to "refile those agreements as negotiated agreements with clauses that are consistent with the holding in this order." *Id.* at P 15, JA 123.

B. Columbia's Request for Rehearing

The bulk of Columbia's request for rehearing focused on the Commission's determination that NGA § 5 waivers of shipper complaints cannot be included in discounted rate agreements. R. 28 at 2-12, JA 137-47.

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[3] *See Northern Natural Gas Co. v. FERC*, 335 F.3d 1089, 1092-93 (D.C. Cir. 2003), and *Northern Natural Gas Co.*, 90 FERC ¶ 61,181 at 61,145-50 (2000).

Petitioners also challenged the Commission's determination that "the Section 5 waiver clauses at issue here are 'significantly broader than any the Commission has approved in negotiated rate transactions' . . . ." R. 28 at 12, JA 147 (quoting Order on Discounted Rates at P 10, JA 121). In support of this challenge, Petitioners made the following specific arguments:

- A case cited by the Commission in support of that determination, *CenterPoint*, 104 FERC at PP 44-45, was distinguishable. R. 28 at 12, JA 147;

- The "Commission's holding that – even in the context of negotiated rate agreements – it is inappropriate for pipelines and customers to agree to such broad waivers of such Section 5 rights is at odds with the fact that the Commission routinely has approved such broad Section 5 waivers in the context of general rate case settlements." R. 28 at 13, JA 148;

- The "Commission has in cases involving negotiated rates approved Section 5 waivers that are broader in scope than the 'narrow' provision described in the Order [on Discounted Rates]." R. 28 at 13 and n. 11, JA 148 (citing *Vector Pipeline L.P.*, 85 FERC ¶ 61,083 at 61,294 (1998), *reh'g denied*, 87 FERC ¶ 61,225 (1999); *Alliance Pipeline, L.P.*, 80 FERC ¶ 61,149 at 61,592 (1997), *modified in part*, 84 FERC ¶ 61,239, *reh'g denied*, 85 FERC ¶ 61,331 (1998));

- "The Commission's flawed reasoning for why pipelines and shippers cannot agree to the conditional waiver of Section 5 rights with respect to all of the pipeline's rates in the context of a discounted rate agreement does not amount to reasoned decisionmaking." R. 28 at 13, JA 148; and

- "The Commission erred by upsetting the bargain reached by these shippers and the pipelines to achieve rate certainty throughout the term of the service agreements in question." R. 28 at 13, JA 148.

C. The Rehearing Order

On rehearing, the Commission agreed with Columbia "that the section 5 waiver provision does not require [the discount shippers] to completely waive their rights to file a section 5 complaint against Columbia's recourse rate. Rather, they may file such a complaint, subject to loss of their discounts . . . ." Rehearing Order at P 10, JA 156. Moreover, the Commission "recognize[d] that the agreements at issue are discounted rate agreements and not negotiated rate agreements as they are (1) within the range of the maximum and minimum recourse rate, and (2) do not depart from the standard . . . rate design." *Id.*

Nonetheless, the Commission explained:

> the central issue here is the fact that the waiver of the section 5 rights provision at issue is a non-conforming clause that is a material deviation from the pipeline's form of service agreement, and as such must be reviewed to determine whether it is a permissible deviation regardless of whether the rate at issue would be characterized as a discount or a negotiated rate.

Rehearing Order at P 10 (footnote omitted), JA 156-57. And, the Commission noted, a clause that is contrary to Commission policy or presents a danger of undue discrimination would constitute an impermissible deviation. *Id.* at P 11 and n. 12, JA 157 (citing, *e.g.*, *CenterPoint*, 104 FERC at PP 22, 31, 42-52; *CenterPoint Gas Transmission Co.*, 102 FERC ¶ 61,059, *order on reh'g*, 103 FERC ¶ 61,228 (2003)).

The Commission determined that the broad NGA § 5 waivers at issue were impermissible material deviations because they were contrary to Commission policy due to market power concerns. Rehearing Order at PP 12-14, JA 157-59. As the Commission explained, "[t]he basic reason Congress authorized the Commission to regulate pipeline rates under NGA sections 4 and 5 is that interstate gas pipelines have market power over many of the markets and shippers that they serve." Rehearing Order at P 12, JA 158. Moreover, "[w]hile shippers may have some leverage in negotiating specific rates and services in some markets, this leverage does not necessarily extend to the broader range of services contained in the pipeline's tariffs at recourse rates." Rehearing Order at P 14, JA 158-59 (citing *Northern Natural Gas Co.*, 105 FERC ¶ 61,299 at P 3 (2003)).

Thus, the Commission noted, it "has been reluctant to sanction a section 5 waiver in a particular service agreement for a particular transaction, where the customer waives its section 5 rights not only as to the rate for its particular transaction at issue, but as to the pipeline's rates for all services." *Id.*, JA 158. As a matter of policy, "[t]he Commission does not believe that the pipeline should be permitted to condition the offering of a discount for one service for which a shipper may have competitive alternatives on limiting the shipper's section 5 rights

to challenge the pipeline rates for other services over which the pipeline does have market power." Rehearing Order at P 14, JA 159.

As a separate matter, the broad waiver provisions raised undue discrimination concerns. Rehearing Order at PP 15-20, JA 159-61.

> [A] pipeline may offer favorable rates solely to its larger customers with greater resources to litigate the justness and reasonableness of the pipeline's recourse rates, in return for their agreement not to challenge the pipeline's recourse rates and rate structure. The larger customers may be willing to accept such an offer, since they obtain the benefit of reduced rates for the services of interest to them. However, smaller customers with fewer resources may not receive the benefit of the deal offered the large customers. In short, the Commission is concerned that such broad waiver provisions may increase the risk of undue discrimination among customer classes unless the terms of the agreement are offered to all similarly situated customers.

Rehearing Order at P 15, JA 159.

The Commission recognized that it has approved general NGA § 5 waivers as part of NGA § 4 rate case settlements. Rehearing Order at P 16, JA 159. The Commission explained, however, that it has done so because those settlements "not only limited the shippers' rights to challenge the pipeline's rate under section 5, but also limit the pipeline's right to file rate increases under NGA section 4, which Columbia has not agreed to do here." *Id.* In addition, the Commission pointed out that the recourse rates established in a general rate settlement are available to all of the pipeline's shippers, providing all shippers an opportunity to benefit from the

rates established under the settlement. *Id.* By contrast, the discount rate at issue here is available only to the discount shippers. *Id.*

Unlike cases in which the Commission has approved NGA § 5 waiver provisions, therefore, the instant case fell "within the Commission's particular concern that agreements that effectively reduce the recourse rates for a selected set of the pipeline's shippers may have an undue risk of discrimination when coupled with a waiver of the shippers' section 5 rights and no corresponding agreement by the pipeline not to file a generally applicable rate increase under NGA section 4." Rehearing Order at P 18, JA 160. Accordingly, the Commission found that discounts conditioned on broad waivers of the shippers' NGA § 5 right to challenge the pipeline's recourse rates are more appropriately addressed in broad based proceedings: settlement discussions in which all shippers can participate; or, as in *Algonquin Gas Transmission, LLC*, 111 FERC ¶ 61,003 (2005), negotiated rate transactions in which all shippers can participate on equal terms. Rehearing Order at P 21, JA 162.

The petition for review followed.

SUMMARY OF ARGUMENT

The Commission's determinations that the broad NGA § 5 complaint waivers at issue were unjustified, impermissible material deviations because they

raised market power and undue discrimination concerns were first made in the Rehearing Order. As Columbia chose to proceed directly to appeal, rather than to make the Commission aware, in a rehearing application, of any objections it had to those determinations, Columbia is jurisdictionally foreclosed from challenging them on appeal.

On the merits, the Commission appropriately rejected the broad NGA § 5 waivers as unjustified, impermissible material deviations from Columbia's tariffs. The specific waivers proposed here required each discount shipper, in exchange for a discounted rate for *one* service, to waive its NGA § 5 complaint rights regarding *all* Columbia rates and services, without a corresponding limit on Columbia's rights to file rate increases under NGA § 4. The Commission reasonably found that the inequities inherent in the proposed agreements raised market power and undue discrimination concerns.

In rejecting Columbia's broad NGA § 5 complaint waiver proposals, the Commission did not prohibit fixed rate contracts or announce a new policy inhibiting their execution. The denial of Columbia's specific proposal, in the specific circumstances presented, does not indicate that Columbia or another pipeline will be unable to justify other discount proposals in other circumstances.

ARGUMENT

I. Many Of Columbia's Arguments Are Not Properly Before The Court

NGA § 19(b), 15 U.S.C. § 717r(b), provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." Courts strictly construe this jurisdictional requirement, as the express statutory limit it imposes on a court's jurisdiction cannot be relaxed. *California Department of Water Resources*, 306 F.3d at 1125; *Norwood*, 906 F.2d at 774-75; *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d at 1107, 1109 (D.C. Cir. 1989); *ASARCO*, 777 F.2d at 775. In fact, "even if the changes wrought by [a] rehearing order were considered sufficiently minimal that [petitioner] could rely on its first rehearing application for jurisdiction in this court, it would still be confined in this petition to those objections that were actually 'urged before the Commission.'" *Norwood*, 906 F.2d at 775.

In addition to being a jurisdictional prerequisite, rehearing at the Commission level regarding *all* objections to be raised on court review serves an important purpose. It "enables the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's

objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).[4]

The Commission's determinations that the broad NGA § 5 complaint waivers at issue were unjustified, impermissible material deviations because they raised market power and undue discrimination concerns were first made in the Rehearing Order. Rehearing Order at PP 12-20, JA 157-61. Rather than make the Commission aware of any objections regarding those determinations, Columbia instead chose to proceed directly to appeal rather than seeking rehearing of those determinations in a second rehearing application.

To get to court, Columbia was not obligated to file a second request for rehearing of the order providing additional rationale in support of the same

[4] *See also*, *e.g.*, *Ameren Services Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."); *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) ("Simply put, the court cannot review what the Commission has not viewed in the first instance."); *Granholm ex rel. Michigan Dep't of Natural Res. v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999) (explaining that the "obvious (and salutary) purpose of the petition-for-rehearing requirement 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. The requirement also permits the agency an initial opportunity to correct its errors." (internal quotation omitted)); *ASARCO*, 777 F.2d at 772 ("the purpose of the application-for-rehearing requirement that § 19(b) makes a condition of judicial review" is "to insure that the Commission has an opportunity to deal with any difficulties presented by its action *before* the reviewing court intervenes.")(quoting *Rhode Island Consumers' Council v. FPC*, 504 F.2d 203, 212 (D.C. Cir. 1974) (emphasis supplied by *ASARCO* court)).

outcome (here, denial of Columbia's non-conforming waiver proposal). *See Allegheny Power v. FERC*, No. 04-1340, slip op. at 12-13 (D.C. Cir. Feb. 7, 2006). Nevertheless, having chosen to proceed directly to court, Columbia cannot also challenge the Commission's determinations (based on market power and undue discrimination concerns) addressed for the first time in the Rehearing Order. *See Clifton Power Corp. v. FERC*, 294 F.3d 108, 110-11 (D.C. Cir. 2002) (explaining that when the Commission denied petitioner's request for rehearing, petitioner "had to choose between rehearing before the agency or immediate court review") (internal quotation omitted). Accordingly, Columbia's challenges to those determinations on appeal (*see, e.g.*, Br. at 16-26) are foreclosed. *Norwood*, 906 F.2d at 775; *see also* authority cited in n. 4, *supra; Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 296-97 (D.C. Cir. 2001) ("if a party properly seeks rehearing and secures modification of some parts of an order, it may go directly to court on the issues as to which there was *no* modification without seeking rehearing again on those issues; only on matters where the rehearing order introduces a new source of complaint need the party file another rehearing petition.").

Columbia cannot successfully argue that there was a "reasonable ground for failure," NGA § 19(b), to raise its new objections on rehearing. That "exception is

reserved for an 'extraordinary situation,'" *Sebasticook*, 431 F.3d at 381-82 (quoting *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)), not present here.

In the Order on Discounted Rates, the Commission found the proposal to limit the discount shippers' complaint rights unsupported and impermissible for two reasons: (1) shippers' complaint rights waivers could appropriately be included only in negotiated, not discount, rate agreements, Order on Discounted Rates at PP 12-13, JA 122; and (2) the unprecedented, specific waivers proposed here would be unjustified even if included in a negotiated rate agreement because they required the shippers to waive their statutory complaint rights regarding all of Columbia's services, not just regarding the services for which the shippers would receive a discount, *id.* at PP 10, 11, 13, 14, JA 121-23.

After considering the matters raised by Columbia on rehearing, *see supra* p. 10 (enumerating matters Columbia raised on rehearing), the Commission abandoned its prior determination that complaint rights waivers could appropriately be included only in negotiated, not discounted, rate agreements. Rehearing Order at PP 12-20, JA 157-61. The Commission, however, provided additional rationale for its alternative determination that the proposed statutory complaint waivers were, in any event, unjustified. *Id.* at PP 10-21, JA 156-62.

Specifically, the Commission found that these specific, broad statutory complaint waivers raised market power and undue discrimination concerns. *Id.*

These unexceptional circumstances do not provide "reasonable ground" for Columbia's failure to raise any objections it had to the market power and undue discrimination findings on rehearing to the Commission. Accordingly, Columbia cannot raise challenges to those findings on appeal.

Should the Court determine, nonetheless, that there is subject matter jurisdiction to address the matters Columbia raises for the first time on appeal, the Court cannot fault the Commission for not responding to matters not raised before it. *See Ameren*, 330 F.3d at 500 n.10 ("Ameren mistakenly claims that the Commission's reliance on section A.4 constitutes an 'impermissible *post hoc* rationalization' because the agency did not rely on the provision in either of the orders under review. Although *post hoc* rationalizations cannot support an affirmance of an agency decision based on an otherwise invalid rationale, the Commission does not ask us to substitute a *post hoc*, and therefore, unacceptable rationale for an otherwise invalid rationale rejected by the court on review.") (citation and internal quotation omitted).

II. THE COMMISSION REASONABLY FOUND THAT COLUMBIA DID NOT JUSTIFY ITS NON-CONFORMING PROPOSAL TO OFFER A DISCOUNTED RATE IN EXCHANGE FOR A BROAD WAIVER OF SHIPPERS' NGA § 5 COMPLAINT RIGHTS

A. Standard of Review

Assuming jurisdiction, the Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b).

As shown below, the Commission's determination that Columbia had failed to justify its non-conforming proposal to offer a discounted rate in exchange for a broad waiver of NGA § 5 complaint rights was reasonable and fully supported by the record.

B. The Commission Appropriately Rejected The Broad NGA § 5 Waivers As Impermissible Material Deviations

Columbia's first contention, that FERC "failed to acknowledge that parties have entered into contracts prohibiting rate changes for many years," Br. at 14 (capitalization in heading altered), is a red herring. The Commission did not prohibit fixed rate contracts or announce a new policy inhibiting their execution. Rather, the Commission simply reviewed Columbia's non-conforming waiver

proposals to determine whether they were justified under the specific circumstances presented.

Contracts containing provisions that materially deviate from the Commission's *pro forma* service agreements, including those that prohibit price changes, must be filed with the Commission for review as to whether the material deviation is permissible. Rehearing Order at P 10, JA 156-57. *See* 18 C.F.R. § 154.1(d); *Northern Natural Gas Co.*, 105 FERC at P 2 ("When a pipeline enters into a discounted rate agreement, it generally need not file the discount agreement with the Commission. Since the rate falls within the range permitted by the tariff, the discount would not be considered a material deviation from the pipeline's form of service agreement under § 154.1(d) of the Commission's regulations. However, if the discount is granted subject to the shipper meeting conditions not provided for in the tariff, then the pipeline would have to file the discount agreement.") (footnote omitted).

Columbia filed the instant discount agreements with the Commission for that very reason. *See* R. 1 at 3, JA 3; R. 2 at 4, JA 29 (explaining that the filings were made to obtain a Commission determination whether the agreements materially deviated from the *pro forma* service agreements, and if so, whether the material deviations were permissible). *See also* R. 19 at 4, JA 110 ("the fundamental

purpose of the filings submitted by Columbia [Gas] and Columbia Gulf [was] to obtain, out of an abundance of caution, assurances from the Commission that the discount letters do not qualify as non-conforming service agreements under [18 C.F.R.] Section 154.1(d) due to the Section 5 waiver provisions."); *id.* at 6, JA 112 (Columbia pointing out that the "central issue before the Commission in the instant proceedings is whether the discount letters' Section 5 waiver provisions constitute deviations from the *pro forma* service agreements underlying the transactions."). Thus, Columbia recognized that the discount rate agreements' broad NGA § 5 provisions might be rejected as impermissible material deviations.

There also is no merit to Columbia's attempt to castigate the Commission for purportedly being unable to settle on a single rationale. Br. at 13, 16-17. The Commission's principle rationale throughout this proceeding has focused on the unjustified broadness of the waiver proposal. The Commission consistently found that "[t]he broad waiver of section 5 rights included in the discount agreements at issue here would . . . be inappropriate even if included in a negotiated rate agreement" because "the waiver goes far beyond the discounted rates agreed to for the service to be provided under the service agreements in question, and would apply to the pipelines' recourse rates for all their services, including service not covered by the subject service agreements but which the shippers could

conceivably contract for in the future." Order on Discounted Rates at PP 10, 11, JA 121-22; *see also id.* at P 14, JA 123; Rehearing Order at PP 10, 12, 14, JA 156-59.

That the Rehearing Order provided rationale in addition to that included in the Order on Discounted Rates, *i.e.*, the market power and undue discrimination concerns, does not indicate that the Commission's determination was unreasoned. *See Ameren*, 330 F.3d at 499 n.8. The purpose of rehearing is to give the Commission the opportunity to consider and respond to the matters raised regarding its orders. *See*, *e.g.*, *Sebasticook*, 431 F.3d at 381.

C. The Commission Reasonably Found That Columbia's Rate Proposal Was One-Sided And Inequitable

In furtherance of its efforts to paint the Commission's determinations as unreasonable, Columbia describes the proposed agreements as providing an equitable *quid pro quo*. Br. at 14-16. Under Columbia's description of the agreements, "the [discount] shippers are protected against rate increases, but will receive any applicable rate decreases, and they are not prohibited from exercising their rights under Section 5, but may not do so without giving up their discounted rates." Br. at 15.

That description omits the portion of the agreements the Commission found inequitable: that in exchange for a discounted rate for *one* service, the discount

shipper had to waive its NGA § 5 complaint rights regarding *all* Columbia rates, without a corresponding limit on Columbia's rights to file rate increases under NGA § 4. Order on Discounted Rates at PP 10, 13, JA 121, 122; Rehearing Order at PP 12-14, 16, JA 157-59. Understandably, the Commission did "not believe a pipeline should be permitted to condition the offering of a discount for one service for which a shipper may have competitive alternatives on limiting the shipper's section 5 rights to challenge the pipeline rates for other services over which the pipeline does have market power." Rehearing Order at P 14, JA 159. Thus, although Columbia attempts to frame the matter as FERC "upset[ting] the balance struck by the parties through arms' length negotiations," Br. at 15-16, *see also* Br. at 27, the inequities inherent in the proposed agreements indicated to FERC that the negotiations were not really arms' length but, rather, raised market power concerns.

As part of their *quid pro quo* argument, Columbia seems to suggest that it must still provide the discounts discussed in the proposed agreements even though the broad NGA § 5 waivers were rejected. Br. at 15-16. Nothing in the challenged orders requires Columbia to do so. To the contrary, the Commission explicitly afforded Columbia the opportunity, if it did not simply remove the offending waiver provision, to refile the proposed agreements in conformance with

Commission instructions. *See* Order on Discounted Rates at P 15 and Ordering P (A), JA 123, 124.

Columbia next complains that FERC did not "adequately explain how parties can enter into fixed price contracts if Section 5 waivers are unduly discriminatory." Br. at 16. The challenged orders, however, did not find that **all** NGA § 5 waivers are impermissible material deviations. Rather, they found only that, under the circumstances here, the **broad** NGA § 5 waivers **at issue** were impermissible. Order on Discounted Rates at PP 10, 11, 13, JA 121-22; Rehearing Order at PP 10, 14-16, 18, JA 156-57, 158-59.

In addition, the orders explained that fixed price contracts permissibly can include NGA § 5 waivers that are limited to the specific rates addressed in the contract. Order on Discounted Rates at P 13, JA 122; Rehearing Order at P 14, JA 158-59. The Commission further explained that broader NGA § 5 waivers might be permissible if the pipeline correspondingly agrees to limit its own NGA § 4 rights to increase its recourse rates. Rehearing Order at PP 16-18, 21, JA 159-60, 162.

Thus, the challenged orders do not state "that Columbia must waive its rights to make Section 4 filings applicable to *all* shippers in order to provide discounts to three shippers . . . ." Br. at 22. Only if Columbia insists on broad, rather than rate-

and service-specific, NGA § 5 waivers would it correspondingly have to agree to waive its own NGA § 4 rights.

D. The Commission Acted In Accord With Its Precedent In Reviewing Columbia's Non-Conforming Proposal

Next, Columbia complains that the "orders on review fail even to refer to *East Tennessee* [*Natural Gas Co., L.L.C.*, 107 FERC ¶ 61,197 (2004),] or *Gulfstream* [*Natural Gas System, L.L.C.*, 107 FERC ¶ 61,303 (2004),] and therefore, do not constitute reasoned decisionmaking." Br. at 18. Columbia did not mention either case to the Commission on rehearing. *See* R. 28, JA 136-49. Accordingly, it is jurisdictionally foreclosed from asserting on appeal that the Commission erred in failing to address them. NGA § 19(b); *California Department of Water Resources*, 306 F.3d at 1125; *Norwood*, 906 F.2d at 774; *Tennessee Gas*, 871 F.2d at 1107, 1109; *ASARCO*, 777 F.2d at 775.

In any event, there is no merit to Columbia's claim that *East Tennessee* "makes clear that the Section 5 waiver provisions at issue in this case do not constitute material deviations from Columbia's pro forma service agreements." Br. at 18. Unlike the broad NGA § 5 waiver at issue here, the NGA § 5 waiver proposed in *East Tennessee* was limited to the specific negotiated rate at issue there. *East Tennessee*, 107 FERC at P 14 ("a rate document setting forth a

negotiated rate might contain a provision waiving a customer's right to seek to change *the* negotiated rate pursuant to NGA § 5 . . . .") (emphasis added). [5]

Also for the first time on appeal, Columbia challenges the Order on Discounted Rates' distinction between this case and *Gulf South Pipeline Co., L.P.*, 98 FERC ¶ 61,318 (2002). Br. at 28-29. Columbia notes that the Commission "distinguish[ed] *Gulf South* on grounds that the Section 5 waivers in that case only applied to the specific rate and not to other rates or the rate design." Br. at 28 (citing Order on Discounted Rates at P 13, JA 122). Columbia now contends that,

[5] Columbia's brief does not raise any substantive argument regarding *Gulfstream*.

unlike in *Gulf South*, where the discounted service was the only service subscribed to by the shippers receiving the discount, the discount shippers here "take service under multiple rate schedules." Br. at 29. In Columbia's view, this makes it "entirely reasonable for Columbia to include all other services within the scope of the Section 5 waivers as consideration for granting the discounts." Br. at 29-30.

As the Commission explained, however, "[w]hile shippers may have some leverage in negotiating specific rates and services in some markets, this leverage does not necessarily extend to the broader range of services contained in the pipeline's tariffs at recourse rates." Rehearing Order at P 14, JA 158-59 (citing *Northern Natural Gas Co.*, 105 FERC at P 3). Thus, a pipeline cannot "be permitted to condition the offering of a discount for one service for which a shipper may have competitive alternatives on limiting the shipper's section 5 rights to challenge the pipeline rates for other services over which the pipeline does have market power." Rehearing Order at P 14, JA 159.

Although on appeal Columbia contends that the "orders on review do not acknowledge the fact that a shipper cannot, under longstanding principles of ratemaking, make a filing to change other pipeline rate schedules (or a pipeline's rate design), without also affecting its own specific rate," Br. at 29 n.30, it did not

raise that contention to the Commission. Accordingly, Columbia is barred from raising that contention on appeal.

In any event, Columbia's contention is significantly overstated. An NGA § 5 complaint filing could impact the discounted rates at issue only if the Commission's decision regarding the filing lowered the maximum rate for the discounted service below the discounted rate. *See* Br. at 25 (stating that in order for the discount rate to be reduced in an NGA § 5 proceeding, the maximum, or recourse rate would have to be reduced below the discount rate). Thus, it is far from certain that a discount shipper's filing to change other pipeline rate schedules (or the pipeline's rate design), would affect its own specific discounted rate. If Columbia wanted a rate that would remain fixed regardless of any changes in the maximum just and reasonable rate, it should have entered into negotiated, rather than discounted, rate contracts.

Columbia also never previously challenged the Commission's explanation for why *Vector Pipeline L.P.*, 85 FERC ¶ 61,083 (1998), *reh'g denied*, 87 FERC ¶ 61,225 (1999), and *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 (1997), *modified in part*, 84 FERC ¶ 61,239, *reh'g denied*, 85 FERC ¶ 61,331 (1998), were inapposite here. In those cases, the Commission approved proposals to offer negotiated rates to "shippers that agreed not to contest certain elements of the [pipeline's] cost of

service . . . in exchange [for the pipeline] agree[ing] not to change those elements for the length of the primary term and any extension under the firm service agreements." *Vector*, 85 FERC at 61,294; *see also Alliance*, 80 FERC at 61,592 (same).

On appeal, Columbia claims that the Rehearing Order explained that "the Section 5 waivers in *Vector* and *Alliance* were acceptable because Vector and Alliance were new pipelines, but offers no explanation as to why new pipelines are afforded more leeway when offering discounted or negotiated rates than established pipelines." Br. at 29. The Commission did not find *Vector* and *Alliance* inapposite simply because the pipelines at issue in those cases were new. Rather, the Commission found those cases inapposite because, unlike here, they "involved negotiated rates available to all shippers," there was "no significant discussion of the waiver issue," and "[n]either case addressed the market and discrimination issues analyzed in [the instant orders] involving the settlement recourse rates for an existing service." Rehearing Order at n.25, JA 162. In short, *Vector* and *Alliance* do not undercut the Commission's findings here.

Columbia also erroneously asserts that the Commission's "general policy of restricting the use of [broad NGA § 5 waivers] to relatively narrow situations" is a new policy for which the Commission provided no citation. Br. at 21-22 (quoting

Rehearing Order at P 20, JA 161). The challenged orders fully discuss the limited situations in which the Commission historically has approved broad NGA § 5 waivers. Rehearing Order at P 16, JA 159 (explaining that the Commission "has approved section 5 rate moratorium provisions as part of settlements of general section 4 rate cases" because "those provisions not only limit the shippers' rights to challenge the pipeline's rate under section 5, but also limit the pipeline's right to file rate increases under NGA section 4"); Rehearing Order at P 17, JA 159-60 (explaining that the "agreements in *Algonquin* accomplished much the same purpose as a section 4 settlement" because the pipeline agreed that it would not file to increase its recourse rates under NGA § 4 and offered to execute such agreements with all of its similarly situated customers); Rehearing Order at n.25, JA 162 (explaining that, among other things, the broad NGA § 5 waivers approved in *Vector* and *Alliance* were part of negotiated rate agreements that were available to all shippers).

E. The Commission's Concern For Discrimination Among Shippers Was Reasonable

Columbia then turns to the Commission's separate "concern[] that such broad waiver provisions may increase the risk of undue discrimination among customer classes unless the terms of the agreement are offered to all similarly situated customers." Rehearing Order at P 15, JA 159. First, Columbia asserts, the

Commission "ignore[d] the fact that no party has claimed to be similarly situated" to the discount shippers. Br. at 19-20. The Commission did not ignore that purported "fact;" no one ever raised it to the Commission. In any event, Columbia's bald assertion that no shipper has **claimed** to be similarly situated does not mean none is.

In fact, the 1996 Settlement case Columbia points to as supposedly demonstrating the "differences between the Cities and the three discounted rate shippers," because the latter "received rates subsidized by all shippers on Columbia Gas' system, including the Cities," Br. at 22-23 (citing *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,044 at 61,200 (1997)), notes that the same subsidized rates also were provided to shippers other than the discount shippers here. *Columbia Gas*, 79 FERC at 61,200 (noting that the subsidized rates were provided not only to Mountaineer, Cincinnati Gas and Union Light, but also to Dayton Power & Light Company and West Ohio Gas Company). Moreover, while the discount shippers and the Cities may not have been similarly situated for purposes of the subsidy provided as part of the 1996 Settlement, that does not mean they are not similarly situated for purposes of the discount rate at issue here.

Next, Columbia attempts, for the first time, to undermine the Commission's distinction on rehearing between the instant case and *Algonquin Gas Transmission,*

LLC, 111 FERC ¶ 61,003 (2005). Br. at 20-21. The Commission had found the broad NGA § 5 waiver in *Algonquin* permissible because:

> Algonquin's agreements provided not only that the customers would not challenge any of the pipeline's recourse rates under NGA section 5, but also that the pipeline would not file to increase its recourse rates under NGA section 4. To assure that there was no undue discrimination among customers Algonquin offered to execute such agreements with all of its similarly situated customers if the customer so desired, and in fact has done so. Moreover, to further guard against discrimination, the Commission required Algonquin to offer the discounts to all similarly situated existing and new shippers that later receive service under the same rate schedules. In short, the negotiated rate agreements in *Algonquin* accomplished much the same purpose as a section 4 settlement.
>
> By contrast, in the instant case the discounts involve the lowering of certain rates for a limited number of relatively large customers without offering comparable rate reductions to other shippers. Moreover, Columbia has not agreed to not file a rate increase under NGA § 4.

Rehearing Order at PP 17-18 (footnote omitted), JA 159-60. Unlike *Algonquin*, "[t]he instant case therefore [fell] within the Commission's particular concern that agreements that effectively reduce the recourse rates for a selected set of the pipeline's shippers may have an undue risk of discrimination when coupled with a waiver of the shippers' section 5 rights and no corresponding agreement by the pipeline not to file a generally applicable rate increase under NGA section 4." Rehearing Order at P 18, JA 160.

Columbia asserts that the "Commission found that the Section 5 waivers were acceptable if Algonquin agreed to comply with the longstanding requirement to treat all similarly situated shippers in the same manner," Br. at 20, and that the "orders on review offer no explanation as to why this condition was inadequate to guard against undue discrimination by Columbia," Br. at 20-21. These assertions ignore that the Commission found Algonquin's agreement not to file a generally applicable NGA § 4 rate increase critical to its determination there. Rehearing Order at PP 17-18, JA 159-60.

In a footnote, Columbia finally acknowledges that the agreements in *Algonquin* also included the pipeline's waiver of its right to file an NGA § 4 rate case seeking to change its recourse rates, but argues that such a waiver is inapplicable here for two reasons. Br. at 20-21 n.17. First, it asserts, Algonquin entered into agreements with all of its shippers, leaving Algonquin no reason to seek to adjust its rates. Br. at 21 n. 17. That is not true. The agreements at issue in *Algonquin* applied to only 90 percent of its contract demand. *Algonquin*, 111 FERC at P 1.

Second, Columbia contends that the instant "discounted rate agreements preclude Columbia from increasing the rates applicable to those shippers pursuant to Section 4." Br. at 20-21 n.17; *see also* Br. at 22. That is true only as to the rates

for which the discount shippers receive discounts. Although the proposed agreements required the discount shippers to waive their NGA § 5 complaint rights regarding all of Columbia's rates, only their discounted rates were protected from any NGA § 4 rate increases Petitioners might seek during the lengthy terms of the agreements. Order on Discounted Rates at P 10, JA 121; Rehearing Order at PP 12-14, 17-18, JA 157-60.

Finally, challenging the Commission's concern that the broad NGA § 5 waiver proposed here would leave it to smaller shippers, with their smaller resources, to raise and litigate claims regarding the level of the pipelines' recourse rates, Rehearing Order at P 15, JA 159, Columbia cites to a few NGA § 5 cases filed since 2000, Br. at 24-25. Those filings, however, do not change the fundamental fact, leading to the Commission's logical concern, that smaller shippers have fewer resources than larger shippers to raise and litigate NGA § 5 matters.[6]

[6] Columbia incorrectly asserts that the Commission "seem[ed] to assume, without evidence, that small shippers will always reap the benefits of Section 5 complaints filed by large shippers." Br. at 25-26. The Commission was concerned with ensuring that NGA § 5 complaint rights are not improperly curtailed to some, and thus remain available to all, shippers. Accordingly, Columbia's citation to *El Paso Natural Gas Company*, 108 FERC ¶ 61,284 (2004), Br. at 26, which did not address litigation resources, is inapposite.

Moreover, while Columbia correctly notes that the Commission itself can institute NGA § 5 proceedings regarding a pipeline's recourse rates, Br. at 25 n.25, NGA § 5 recognizes that customer complaints are an important part of ensuring that a pipeline's rates remain just and reasonable and not unduly discriminatory. Because of their different perspectives, customers may be aware of matters affecting the justness and reasonableness and discriminatory nature of a pipeline's rates and practices about which the Commission is unaware.

This does not mean, as Columbia posits, that large customer discounts could never pass muster. Br. at 25 n.25. The Commission's litigation resource concern, like the rest of the discussion in the challenged orders, was directed at the specific proposal at issue, not just "*any*" large customer discount. The denial of Columbia's specific proposal, in the specific circumstances presented, does not mean that Columbia or another pipeline will be unable to justify other discount proposals in other circumstances.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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