ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 07-1015

WASHINGTON GAS LIGHT COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JUDITH A. ALBERT
SENIOR ATTORNEY

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

March 10, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and amici are as stated in the brief of Washington Gas Light Company.

B. Rulings Under Review:

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

1. *Dominion Cove Point LNG, LP*, Docket No. CP05-395, "Order Granting Authorization Under Section 3 of the Natural Gas Act," 115 FERC ¶ 61,336 (June 16, 2006);

2. *Dominion Cove Point LNG, LP, et al.*, Docket Nos. CP05-130, *et al*., "Order Issuing Certificates and Granting Section 3 Authority," 115 FERC ¶ 61,337 (June 16, 2006) ("Certificate Order");

3. *Dominion Cove Point LNG, LP*, Docket No. CP05-395, "Order Denying Rehearing and Clarification," 118 FERC ¶ 61,006 (January 4, 2007) ("Rehearing Order"); and

4. *Dominion Cove Point LNG, LP, et al.*, Docket Nos. CP05-130, *et al*., "Order on Rehearing," 118 FERC ¶ 61,007 (January 4, 2007).

C. Related Cases:

The orders on review have never been before this Court or any other court. Counsel is aware of no other related cases pending in this or in any other court.

_____

Judith A. Albert
Senior Attorney

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

Natural Gas Act

Administrative Procedure Act

GLOSSARY

Bcf	billion cubic feet
C5+	“heavy” hydrocarbons, containing five or more carbon atoms, within natural gas stream; includes pentanes, hexanes, heptanes, octanes, and nonanes
Columbia	Columbia Gas Transmission Corporation
Dekatherm	A measurement of heat equivalent to one million BTU; a BTU (British Thermal Unit) is the amount of heat required to increase the temperature of a pint of water by one degree Fahrenheit
FERC	Federal Energy Regulatory Commission
LNG	liquefied natural gas
NGA	Natural Gas Act
Transco	Transcontinental Gas Pipe Line Corporation

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

No. 07-1015

WASHINGTON GAS LIGHT COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably approved, after comprehensive review, the expansion of the Cove Point liquefied natural gas ("LNG") facility to provide needed additional natural gas supplies to the eastern United States.

2. Whether the Commission's conclusion that leaks on the Washington Gas Light Company ("Washington Gas") system resulted primarily from deficiencies in Washington Gas's own pipeline, not from the introduction of Cove Point LNG, was based on substantial evidence and arrived at after due process.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

STATEMENT OF THE CASE

The challenged orders authorized Dominion Cove Point LNG, LP ("Cove Point") and Dominion Transmission, Inc. ("Dominion") to construct and operate facilities (collectively, the "Expansion Project") to increase the LNG volumes that can be imported, stored, regasified, and delivered to satisfy growing natural gas demand in the Mid-Atlantic and northeastern United States. *Dominion Cove Point LNG, LP, et al*., 115 FERC ¶ 61,337 (June 16, 2006) ("Certificate Order") (R 296, JA 435), *order on rehearing*, 118 FERC ¶ 61,007 (January 4, 2007) ("Rehearing Order") (R 356 JA 554).

Washington Gas protested, contending that the higher volumes of regasified LNG would greatly increase the number of leaks on its system. After examining the evidence, the Commission concluded that existing leaks were due primarily to the condition of Washington Gas pipeline couplings. Consequently, the responsibility to prevent or repair future leaks was Washington Gas's, not Cove Point's or Dominion's. The Commission also found that, since the Cove Point Expansion Project would not go into service until late 2008, Washington Gas will have sufficient time to address the deficiencies in its system.

Dissatisfied with this result, Washington Gas now asks this Court to reconsider the same substantial evidence presented to and considered by the Commission.

STATEMENT OF FACTS

I. REGULATORY FRAMEWORK

A. Statutory Background

Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), an entity must obtain from the Commission a certificate of public convenience and necessity before engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission or constructing or operating any facilities for those purposes. *See*, *e.g.*, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (FERC is the guardian of the public interest and has a wide range of discretionary authority in determining whether certificates shall be granted).

A separate provision of the NGA, section 3, 15 U.S.C. § 717b, addresses natural gas imports. Under NGA § 3, "no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." *Id*. § 717b(a). NGA § 3 further provides that "[t]he Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest." *Id.* The Commission has the exclusive authority to approve or

deny an application for the construction or expansion of an LNG terminal. 15 U.S.C. § 717b(e)(1).

NGA § 4 requires interstate natural gas pipelines to file rates and contracts with the Commission. 15 U.S.C. § 717c(c). In a § 4 rate proceeding, the pipeline has the burden of proof to demonstrate that the proposed rate is just and reasonable. NGA § 4(e), 15 U.S.C. § 717c(e). The Commission, on its own motion or upon complaint, may also investigate an existing rate. NGA § 5, 15 U.S.C. § 717d. In a § 5 proceeding, the complainant has the burden to demonstrate that the existing rate is "unjust, unreasonable, unduly discriminatory, or preferential." *Id.*

B. Natural Gas Quality

Natural gas is principally methane but is commonly found in nature mixed with other hydrocarbons. *Natural Gas Interchangeability*, "Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs," 115 FERC ¶ 61,325 Paragraph ("P") 4 (June 15, 2006) ("Gas Quality Policy Statement"). The hydrocarbon gases that can be found in natural gas (and the number of carbon atoms in each) are: methane (C1), ethane (C2), propane (C3), butanes (C4), pentanes (C5), hexanes (C6), heptanes (C7), octanes (C8), and nonanes plus (C9+). *Id*. n. 2. "Heavy hydrocarbons" (or "C5+") are those hydrocarbons that are pentanes (C5) and heavier. Certificate Order P 46, n. 26, JA 452. Because of the processing it

undergoes, regasified LNG contains fewer heavy hydrocarbons than does much domestic natural gas.

"Gas quality" is concerned with "the impact of non-methane hydrocarbons on the safe and efficient operation of pipelines, distribution facilities, and end-user equipment." Gas Quality Policy Statement P 5. Gas quality is one of the many terms and conditions of service stated in a pipeline tariff, *id*. P 3, and only gas quality specifications contained in an approved gas tariff can be enforced. *Id*. P 29. "Natural gas interchangeability" is a significant consideration in the tariff specification of "pipeline quality" gas, and means the "extent to which a substitute gas can safely and efficiently replace gas normally used by an end-use customer in a combustion application." *Id*. P 7. No party disputes the fact that the regasified Cove Point LNG meets (and will continue to meet) the gas quality standards in the existing Cove Point and Washington Gas tariffs.

C. The Cove Point LNG Terminal And Related Facilities

Besides the LNG Terminal itself, Cove Point owns and operates the Cove Point Pipeline, which extends about 88 miles from the Terminal in Calvert County, Maryland to interconnections with Transcontinental Gas Pipe Line Corporation ("Transco") in Fairfax County, Virginia and with Columbia Gas Transmission Corporation ("Columbia") and Dominion in Loudon County, Virginia. Cove Point received authorization in 1972 to construct and operate these facilities as part of a

project to import LNG from Algeria and transport natural gas to United States markets. *See Columbia LNG Corp., et al*., 47 FPC 1624 (1972), *aff'd and modified*, 48 FPC 723 (1972). LNG shipments to Cove Point began in 1978, but ceased in 1980. Certificate Order P 5, JA 436.

In 1994, FERC authorized Cove Point to reactivate its mothballed onshore facilities and to construct a liquefaction unit for storing domestic natural gas during the summer for use during peak winter times. *Cove Point LNG Limited Partnership*, 68 FERC ¶ 61,377 (1994), *recon. denied*, 69 FERC 61,292 (1994). In 2001, the Commission authorized Cove Point to construct new facilities and to start importing LNG again at the Terminal. *Cove Point LNG Limited Partnership*, 97 FERC ¶ 61,043 (2001), *order on reh'g*, 97 FERC ¶ 61,276 (2001), *reh'g denied*, 98 FERC ¶ 61,270 (2002) ("2002 Cove Point Order"). Along with the construction, Cove Point proposed changing its existing gas specifications for the heat value of gas that it accepts. Washington Gas protested. Under an October 2002 Settlement, the parties agreed to sponsor a study by TIAX, LLC of interchangeability and adjustment gas composition, and Cove Point agreed to modify its tariff depending on the outcome of the study. *See Cove Point LNG Limited Partnership*, 102 FERC ¶ 61,227 (2003). Cove Point ultimately revised its tariff to reflect gas quality standards consistent with the TIAX study. Certificate Order P 16 n. 10, JA 441.

LNG service commenced in 2003. Since 2003, imports through the Cove Point LNG Terminal have provided more than 325 million dekatherms of needed gas supplies to major Eastern United States markets, making the Terminal the most active LNG receiving terminal in the country. *Id.* P 7, JA 437. In 2003 and 2004, Cove Point received certain additional authorizations.[1] The expansion at issue here will significantly increase the LNG volumes that can be imported, stored, regasified, and delivered. Certificate Order P 9, JA 437.

II. THE INSTANT PROCEEDING

A. The Applications

On April 15, 2005, Cove Point LNG filed an NGA § 3 application requesting authority to expand its LNG import facilities and an NGA § 7(c) application to expand its pipeline capacity in Calvert, Prince George's, and Charles Counties, Maryland. The LNG expansion will increase storage capacity by approximately 6.8 billion cubic feet ("Bcf") to a total of 14.6 Bcf, and will increase the send-out capability by 800,000 dekatherms per day. At the same time, Dominion filed an NGA § 7(c) application authorizing construction of additional

[1] In 2003, the Commission authorized Cove Point LNG to construct and operate two new pipeline compressor stations to provide additional west-to-east firm transportation capacity. *Dominion Cove Point LNG, LP*, 105 FERC ¶ 61,234 (2003). In 2004, FERC authorized Cove Point LNG to place into service a fifth LNG storage tank. *Dominion Cove Point, LNG*, 109 FERC ¶ 61,239 (2004).

pipeline and storage capacity in Pennsylvania, New York, Virginia, and West Virginia.

In its May 27, 2005 motion to intervene, Washington Gas stated that the Cove Point LNG pipeline extends through Washington Gas's distribution service territory, that six gate stations on that pipeline directly serve Washington Gas customers, and that Washington Gas could receive additional LNG through its connections with other interstate pipelines. Washington Gas Motion P 6 (R 39, JA 44). Washington Gas did not oppose the expansion, but requested FERC to affirm its right to have gas re-delivered "which meets quality standards specified in the Cove Point LNG tariff and industry interchangeability standards." *Id*. last (unnumbered) paragraph, page 6, JA 45.

Six months later, on November 2, 2005, Washington Gas filed supplemental comments protesting Cove Point's proposal. R 121, JA 48. Washington Gas stated that its contractor, ENVIRON International Corporation ("ENVIRON"), had determined that leaks on its Prince George's County distribution system were due to the low heavy hydrocarbon content of the Cove Point LNG. Consequently, the expansion application "should be denied until . . . it has been demonstrated at an evidentiary hearing that the imported LNG is fully interchangeable and the impacts on Washington Gas have been minimized." *Id*. page 2, JA 49.

Cove Point LNG and the supporting Shippers[2] objected to Washington Gas's late filing, contending that it sought a change in tariff gas standards that should be raised in an NGA § 5 complaint proceeding. The Commission, however, accepted the late protest because it raised serious questions about safety and reliability. Certificate Order P 50, JA 453. For the same reason, the Commission held a February 22, 2006 procedural conference to allow the parties and FERC staff to discuss the quality of the natural gas delivered and the potential effects on Washington Gas's facilities, and to consider the procedural options for processing the applications. Certificate Order P 55, JA 455. After the conference, parties filed comments addressing the conference presentations as well as responses to FERC staff data requests.

B. The Challenged Orders

The Certificate Order, issued June 16, 2006, approved the Expansion Project. In relevant respect, the Commission found that Washington Gas's argument, that the change in gas hydrocarbon composition was one of the key contributors to the increase in leaks, was not supported by the evidence. *Id.* P 70, JA 461. Rather, while the change in composition could not be ruled out entirely as a contributing factor, it would not have caused any increase in leak rates in the

[2] The Shippers consist of Statoil Natural Gas LLC, Shell NA LNG LCC, and BP Energy Company. Statoil will be the recipient of the expansion services. Certificate Order P 13, JA 439.

absence of more significant factors including the application of hot tar during the installation of mechanical couplings, an increase in operating pressure, and a decrease in temperatures. Certificate Order P 73, JA 463.

On July 17, 2006, Washington Gas filed both a rehearing request and new pressure data evidence. Cove Point and the Shippers objected to the filing of new evidence at the rehearing stage and Washington Gas replied. The Commission accepted all of the filings because they provided information helpful to the decision-making process. Rehearing Order P 10, JA 558.

The Commission denied rehearing on January 4, 2007. It reaffirmed its conclusion that the Expansion Project "can be approved consistent with the public interest, since there is no scientific evidence that regasified LNG presents safety issues in a properly maintained gas distribution system." *Id.* P 27, JA 564. The safety issues "will be resolved by [Washington Gas's] repair or replacement of its defective couplings. What Washington Gas continues to dispute is who should bear the burden of the costs of that effort." *Id*. P 30, JA 565. In view of this, the Commission concluded, the public interest required approval of the expansion project, which would increase the availability of needed gas supplies. *Id*.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission's determination that the Expansion Project is in the public interest was reasonable and should be sustained. The Project will help to satisfy the country's increasing demand for natural gas. The only safety issue is the readiness of the Washington Gas system to transport regasified LNG; this issue can (and should) be resolved by Washington Gas itself.

The Commission's conclusion, that the increase in leaks in the Washington Gas system was due primarily to defective mechanical couplings and not the introduction of regasified LNG, is supported by substantial evidence. This evidence, consisting of scientific tests and reports, testimony, and internal Washington Gas documents, demonstrates that seals in the pipeline couplings were compromised by the application of hot tar during installation and that changes in operating pressure and temperature also contributed to the increase in leaks.

The Commission properly exercised its discretion in declining to set the proceeding for a trial-type hearing, which is required only when a genuine issue of material fact exists that cannot be resolved on the written record. Here, Washington Gas raised a highly technical factual issue which FERC could resolve based on expert analysis of written data. Moreover, the Commission gave Washington Gas ample opportunity to submit evidence, including a procedural conference, data requests, and new evidence filed on rehearing.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "FERC's orders by applying the Administrative Procedure Act's 'arbitrary and capricious' standard." *See* 5 U.S.C. § 706(2)(A); *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). Under this deferential standard, this Court must affirm the Commission's orders so long as the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines, Inc. v United States*, 371 U.S. 156, 168 (1962)); *Wisconsin Public Power*, 493 F.3d at 256.

The Commission's factual findings are treated as conclusive if they are supported by substantial evidence. *See* NGA § 19(b), 15 U.S.C. § 717r(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). Moreover, "when agency orders involve complex scientific or technical questions," the Court

is "particularly reluctant to interfere with the agency's reasoned judgments." *B&J Oil and Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004), citing *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) (per curiam) ("We will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.").

II. THE COMMISSION'S CONCLUSION THAT THE EXPANSION PROJECT WILL SERVE THE PUBLIC INTEREST IS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

There is no dispute regarding the benefits the Expansion Project will provide. Natural gas production is declining in the United States and Canada. Cove Point § 3 Application page 14, R 1, JA 18. A National Petroleum Council study predicts that North American production will be able to supply only 75 percent of long-term United States gas needs. *Id*. page 15, JA 19. LNG is expected to be vital in meeting these needs. Certificate Order P 126, JA 484 (citing Interstate Natural Gas Association of America study). Similarly, the Energy Information Administration estimates that, by 2030, an eight-fold increase in LNG imports will be required to meet demand. Gas Quality Policy Statement P 25, n. 24; *see also* Cove Point § 3 Application page 15-16, JA 19-20.[3]

[3] *See also Exxon Mobil Corp. v. FERC*, 501 F.3d 204, 206 (D.C. Cir. 2007) (Congress has addressed the natural gas shortage by enacting statutes to encourage (so far unsuccessfully) the construction of a pipeline to carry natural gas from Alaska to the "contiguous States of the United States").

More specifically, the Expansion Project will result in new gas supplies in the Mid-Atlantic and northeastern United States where the demand for natural gas is growing. Certificate Order P 9 and 126; JA 437-38 and 484. In addition, the proposed facilities in Pennsylvania, Virginia, West Virginia, and New York will allow additional supplies to be stored in the summer and moved to the Northeast for peak period use in the winter. *Id.*

While it is vital to obtain new natural gas supply, public safety concerns are critical. The Commission, if appropriate, will deny applications for new LNG facilities for safety reasons. *See KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (2005); *on reh'g*, 114 FERC ¶ 61,054 (2006) (application denied where existing facility would not be upgraded to meet current safety regulations). Here, there are no allegations of safety issues arising from the proposed facilities themselves. The only safety-related issue is whether the Expansion Project will be responsible for leaks on the Washington Gas system. As discussed below, the Commission fully addressed this issue and properly concluded that leaks were due primarily to the condition of Washington Gas couplings, which Washington Gas itself should (and could) fix. Consequently, approval of the Expansion Project was in the public interest. Rehearing Order P 29-30, JA 565-566.

A. The Commission Fully Considered The Safety Issues.

Washington Gas contends (Br. at 12) that the challenged orders "ignore serious safety concerns." *See also* Br. at 21 (Commission "ignore[d] evidence of legitimate safety issues"). To the contrary, the Commission examined Washington Gas's safety concerns in considerable detail. The Commission permitted Washington Gas to file a supplemental protest six months after protests were due and considered its objections even though the LNG formulation at issue satisfied existing tariff standards. Certificate Order P 54, JA 455. FERC also heard procedural conference testimony, accepted post-conference comments, requested responses to data requests, and allowed Washington Gas to submit new evidence with its rehearing request. Moreover, as discussed *infra* at 23, the Commission provided extensive analysis of this evidence. Washington Gas's contention that FERC "ignored" safety concerns is simply without basis.

B. The Commission Reasonably Concluded That There Are No Safety Issues Which Warrant Conditioning Of The Applications.

(1) Proponents Of The Expansion Project Should Not Be Required To Fix Deficiencies In Connecting Pipelines.

Washington Gas contends that the challenged orders fail to comply with Commission policy requiring that, generally, applicants demonstrate that proposed facilities will not degrade existing services and that, specifically, safety issues be examined when LNG applications raise interchangeability issues. Br. at 29. As

demonstrated *infra* at 18 and 19-22, however, the challenged orders fully address these issues.

Moreover, Commission policy does not hold the proponents of new projects responsible for fixing existing deficiencies in connecting pipelines. In this case, a subset of the compression couplings on the Washington Gas system had been compromised during the installation process. Rehearing Order P 27, 50, 54, 64; JA 564, 576, 578, 583; Certificate Order P 73, JA 463. Even if the unblended, regasified LNG might have contributed to the leaks, it was not the original cause of Washington Gas's leak problems and would not have caused any increase in Washington Gas leak rates if the couplings had not already been deficient. Rehearing Order P 20, 54; JA 561, 578; Certificate Order P 73, JA 463. Consequently, if there are leaks, Washington Gas has the responsibility to repair or replace its defective couplings. Rehearing Order P 30, JA 565.

(2) After The Expansion, The Regasified LNG Will Retain The Same Formulation That Washington Gas Earlier Agreed To.

In its Gas Quality Policy Statement, the Commission sought "certainty in adopting a policy that takes a 'balanced approach' of ensuring a safe and reliable gas grid while at the same time providing the flexibility required to accommodate the expected increases in LNG imports." Rehearing Order P 28, JA 564-65, *quoting* Gas Quality Policy Statement P 24. An element of that certainty is that

pipelines with existing, adequate tariff provisions regarding gas quality and interchangeability may continue to rely on those provisions. Rehearing Order P 28, JA 565, *quoting* Gas Quality Policy Statement P 34, 37.

Imported LNG is an increasingly important means of meeting the nation's energy requirements, and has been a fact of life for Washington Gas since the original Cove Point LNG Terminal was authorized in 1972. Moreover, Washington Gas agreed to the existing gas quality standards, *see supra* at 6-7 (discussing 2002 settlement), and it is undisputed that Cove Point will hold shippers to these standards. Certificate Order P 53, JA 454; Rehearing Order P 20, JA 561. Under these circumstances, Washington Gas should have been prepared to accept additional amounts of regasified LNG:

> The problems [Washington Gas] identified as allegedly related to the reintroduction of regasified LNG into its system . . . were known to exist for decades on its system. . . . [T]here is no explanation as to why [Washington Gas's] system is not ready to accommodate regasified LNG supplies. [Washington Gas] has not shown that the expansion of the Cove Point LNG terminal will result in gas quality any different from that which it has already settled upon as acceptable. Nor has it shown why others should be responsible for upgrades to its system it believes are necessary simply for the purpose of receiving gas that meets existing tariff standards.

Rehearing Order P 20, JA 561. *See also infra* at 26 (another pipeline, Long Island Lighting Company, repaired or replaced its defective couplings itself after receiving low C5+ gas from Canada).

(3) The Commission's Finding That Washington Gas Is Responsible For Repairing Its Own Infrastructure Is Consistent With FERC Precedent.

Washington Gas (Br. at 12-15) and Intervenor Maryland People's Counsel (Br. at 9), citing cases, contend that the Commission failed to distinguish its precedent requiring LNG applicants to demonstrate that regasified LNG can be delivered safely. The circumstances in those cases, however, were different.

As the parties state, in *Columbia Transmission Corp.,* 13 FERC ¶ 61,102 (1980), the Commission accepted Columbia's proposal to reimburse two of its local distribution customers for costs they incurred to convert their facilities and their customers' appliances to accommodate regasified LNG. However, Columbia was introducing LNG into its system for the first time in order to meet its bundled sales service obligations, and customers had to adapt their systems to accommodate the new supplies. Rehearing Order P 17-18, JA 560.

In contrast, in today's marketplace, where gas sales and gas transportation are negotiated separately, shippers or customers, not the pipeline, own the gas being transported. Pipelines rely on the gas quality specifications in their tariffs to exercise control over the gas entering their systems. *Id*. P 28, JA 565; *see discussion supra* at 16-17. Here the Expansion Project will not change the tariff gas quality specifications that Washington Gas agreed to in 2002. *Id*. P 19, JA 561. Moreover, Washington Gas would not have incurred increased costs after the

introduction of regasified LNG but for the defects in its system. Rehearing Order P 20-21, JA 561.

Washington Gas (Br. at 14) and Maryland People's Counsel (Br. at 11) also cite the 2002 Cove Point Order. In that proceeding, the Commission rejected Cove Point's proposal to change the existing gas specifications for the heat value of gas that it accepts because of the possible hazards that sending out gas at a higher heat level could have on consumer appliances designed for lower heat value levels. *See Cove Point LNG Limited Partnership*, 97 FERC ¶ 61,276 at 61,267 (2001). Thus, the orders did not involve the repair or replacement of couplings that, absent already existing defects, would have accepted LNG without difficulty.

Finally, in *Colorado Interstate Gas Co*., 94 FERC ¶ 61,382 (2001), cited by Washington Gas (Br. at 29), the applicant proposed, as part of its pipeline project, to build facilities to blend gas necessary to meet long-standing gas quality specifications for deliveries to certain customers. As with the other cases, the issue was one of meeting existing expectations, not the repair of defective facilities.

(4) The Commission's Conclusion That Washington Gas Can Remedy Any Leakage Problem In A Timely Fashion Is Reasonable.

After analyzing the technical data and other submissions, the Commission found that "there is no scientific evidence that regasified LNG presents safety issues in a properly maintained gas distribution system." Rehearing Order P 27,

JA 564. Rather, the safety concerns here arise from existing defects in the Washington Gas pipeline couplings. Washington Gas will be able to address these defects by the Expansion Project's in-service date:

> [Washington Gas] has reduced operating pressures in Prince George's County, requested construction of a new tap on a Transcontinental Gas Pipe Line Corporation ("Transco") line to minimize deliveries of unblended LNG, and has begun to replace the facilities in the affected area. It estimates that effort will be completed by the end of 2007. The projected in-service date for Cove Point LNG's expansion facilities is not until the fall of 2008. Thus, there is time for [Washington Gas] to complete any remaining corrective measures that are needed on its system so that it can safely accommodate regasified LNG.

Rehearing Order P 29, JA 565 (footnote omitted).

Washington Gas concedes (Br. at 26) that it will have replaced the leaking couplings in Prince George's County by the end of 2007, but argues that "it has never stated that it will be able to replace all of the couplings on its system before the expansion is placed in service." This argument assumes that regasified LNG caused the leaks in Prince George's County and thus will cause leaks in the rest of Washington Gas's system. However, regasified LNG does not cause leaks in properly maintained systems. Rehearing Order P 27, JA 564. Leaks occurred in Prince George's County because a subset of couplings was defective. *Id*. P 96, JA 596-97. Similar deficiencies may or may not exist on other parts of the Washington Gas system, depending on the installation methods and the particular crews that performed the work.

Moreover, since the leaks affected only a subset of couplings in Prince George's County, even if Washington Gas experiences similar difficulties elsewhere, it likely will not be replacing "all" of its couplings. If leaks do arise, Washington Gas can do the same thing it safely and successfully did in Prince George's County: repair or replace the subset of couplings which are defective or run polyethylene through the affected areas of pipe. *See* Procedural Conference Transcript at 60, JA 216; *see also infra* at 26 (discussing repair or replacement of defective couplings on Long Island pipeline system). In addition, Washington Gas is also reducing operating pressures and obtaining a new tap on the Transco line (Rehearing Order P 29 (JA 56)) techniques it may also be able to use elsewhere.

Finally, even if the regasified LNG were to result in an increase in leaks in an already-compromised system, Washington Gas has not shown that such leaks are a safety hazard.[4] Both Washington Gas and Long Island have successfully and safely remedied the leak problems experienced on their respective systems. In sum, as the Commission found, the prospect of additional leaks presents a problem of expense rather than safety:

> The safety issues raised in this proceeding will be resolved by [Washington Gas's] repair or replacement of its defective couplings.

---

[4] The leaks arising from the defective couplings in Prince George's County were apparently primarily Class 2 leaks. Procedural Conference Transcript at 33, JA 208. These leaks are not considered currently hazardous, and the accepted time period for repairing such leaks is 15 months. *Id.* at 30, JA 205.

> What Washington Gas continues to dispute is who should bear the burden of the costs of that effort.

Rehearing Order P 30, JA 565. Consequently, as the Commission found, "the public interest requires that Cove Point LNG be allowed to proceed with its expansion project to increase the availability of needed gas supplies." *Id.*

III. THE COMMISSION'S CONCLUSION THAT COMPROMISED SEALS ON THE WASHINGTON GAS SYSTEM WERE THE PRIMARY CAUSE OF THE LEAKS WAS BASED ON SUBSTANTIAL EVIDENCE.

A. Compromised Seals Were The Primary Cause Of The Increase In Leaks.

The Washington Gas contention (Br. at 14-15) that the Commission "ignored" the fact that unblended LNG is the only factor unique to Prince George's County is wrong. Rather, the Commission examined an extensive amount of evidence (*see* Certificate Order P 57, JA 456 (providing lengthy list of evidence items considered)) and concluded that leaks would not have increased with the introduction of regasified LNG but for the fact that the couplings on the Washington Gas system were already defective:

> The Commission does not believe that the evidence is to demonstrate conclusively that the gas composition of the unblended, regasified LNG . . . can be ruled out entirely as a contributing factor to the increase in gas leaks. However, it is clear that any shrinkage due to the desorption of C5+ was small, particularly when compared to other contributing factors . . . and would not have caused any increase in leak rates on [Washington Gas's] system in the absence of those other more significant contributing factors, namely, the

> application of hot tar, the increase in operating pressure and a decrease in temperatures.

Certificate Order P 73, JA 463; Rehearing Order P 50, JA 576; *see id*. P 54, JA 578 ("the decrease in C5+ in the re-vaporized LNG would not have adversely affected Washington Gas's system if a subset of the compression couplings had not been compromised during the installation process"). The analysis on which the Commission based this conclusion was thorough, as an examination of the challenged orders demonstrates. *See, e.g*., Rehearing Order PP 54-55, 57-59, 62-79, 88-96, 99-104; JA 578-90, 593-600.

For its part, Washington Gas disputes the Commission's analysis of the technical evidence. As now demonstrated, its contentions lack merit.

B. Washington Gas's Criticisms Of The Commission's Analysis Lack Merit.

(1) Hot Tar

The Commission concluded that the application of hot tar to the seals as a means of corrosion control was a primary cause of the Washington Gas leaks. Rehearing Order P 7, JA 557. As the challenged orders explain, this conclusion is supported by substantial evidence including: (1) testimony from Normac's Mr. McMurray, stating that high temperatures change the physical properties of the seals; (2) Washington Gas internal documents dating back to the 1960's, which indicate that Normac couplings lost a significant amount of torque after application

of hot tar; (3) Washington Gas's own 2005 ENVIRON Report, referencing 1960 Washington Gas tests and agreeing that excessive temperatures from hot tar application could be detrimental; (4) testimony in another proceeding[5] that hot tar could adversely affect the seals by causing them to age the equivalent of 30 years in a matter of minutes; and (5) the tests conducted by Naeve & Associates, Inc., showing that hot tar application exposes seals to high temperatures. *See* Certificate Order PP 74, 82-85, JA 463, 466-68; Rehearing Order PP 69-79, JA 585-90.

Washington Gas simply disagrees with the Commission's analysis of the evidence pertaining to hot tar. *See* Br. at 18-23. However, FERC is entitled to "an extreme amount of deference" when evaluating scientific data within its area of expertise, as the evidence here is. *B&J Oil and Gas v. FERC*, 353 F.3d at 76. In any case, as discussed below, the Commission responded reasonably and in full to Washington Gas's arguments.

Washington Gas contends first (Br. at 19-20) that the challenged orders "do not explain why couplings supposedly damaged by hot tar performed without substantial problems" until Cove Point was reactivated. In fact, however, the orders do so explain: "[a]s a result of the degradation of the couplings' ability to

---

[5] *See AES Ocean Express LLC v. Florida Gas Transmission Company*, FERC Docket No. RP04-249-001. The Shippers submitted to the Commission *AES* transcript excerpts, together with accompanying exhibits, which pertain to the ENVIRON report. *See* Certificate Order P 75 n. 72, JA 464. Washington Gas was not a party in that case, but responded to the Shippers' arguments here.

seal, one small change to the system, such as pressure, temperature and change in C5+ concentration could have caused the increase in leak rates." Rehearing Order P 54, JA 578; *see also* Certificate Order P 100, JA 474 ("the shrinkage [in the seals] due to a change in [heavy hydrocarbons] is well within the design margin of safety and should not have caused the leaks"). Regasifed LNG was simply "the last change to an already compromised system." Rehearing Order P 67, JA 585.

Moreover, if there were only one cause for the increase in leak rates, as Washington Gas contends, and that one cause was removed from the system, then logically the leaks should be eliminated. However, attempts to eliminate the leaks by introducing additional C5+ into the gas stream have been unsuccessful. Rehearing Order P 68, 95; JA 585, 596. Similarly, Washington Gas's proposition that regasified LNG is the sole cause of the leaks is undercut by the fact that the LNG Terminal was reactivated in August 2003, but Washington Gas did not experience an increase in leak rates until December 2003 when winter temperatures occurred. Rehearing Order P 65, 67; JA 584, 585.

Washington Gas's second contention (Br. at 20) is that the Normac "margin of safety" theory fails to consider that Dresser Industries, Inc. ("Dresser") manufactured 75 percent of the mechanical couplings on the Washington Gas system. In fact, the Rehearing Order fully addresses this contention. *See*, *e.g.*, Rehearing Order P 69, JA 585 (record shows that Dresser couplings were damaged

by hot tar), and P 70, JA 586 (record shows that Washington Gas experienced leak problems with the Dresser couplings during the early 1960's).

Washington Gas's third contention (Br. at 20-21) is that the Commission "cavalierly dismissed" evidence demonstrating that another pipeline, Long Island, which had not used hot tar on its couplings, experienced a substantial increase in leaks a month after it began receiving Canadian gas with low C5+ levels. FERC, however, fully addressed the Long Island evidence. *See* Rehearing Order PP 99-104, JA 598-600.

The Commission concluded that Washington Gas had relied upon selected facts in arguing that Long Island's leaks were caused solely by low C5+ gas. *Id*. PP 99-100, JA 598. In fact, tests conducted by Normac in 1992 demonstrated that the Long Island couplings were not tightened properly at the time of installation. *Id*. P 101, JA 598. Moreover, contemporaneous Normac-Long Island documents pertaining to a 1993 insurance investigation of the Long Island leaks support the conclusion that, as with Washington Gas, the leaks were due primarily to deficient Long Island couplings. *Id.* P 102-03, JA 599-600.

(2) Cardboard molds

The Commission's conclusion that Washington Gas used cardboard molds during the application of hot tar (and thus exposing seals to higher temperatures for longer periods) rested on evidence, not "rank speculation," as claimed by

Washington Gas (*see* Br. at 20-21). At the procedural conference, Normac's Mr. McMurray provided a cardboard mold that Washington Gas had given to Normac during the 1960s when Normac was studying the leak problem. Rehearing Order P 79, JA 590. Moreover, Washington Gas internal memoranda from 1966 and 1968 state that molds were used during the application of hot tar. *Id.*, citing evidence in the *AES* proceeding. Consequently, the Commission's conclusion that molds were used is supported by substantial evidence.

(3) The Naeve Study And The Testimony By Dr. Loftus

Washington Gas argues (Br. at 22) that the Commission did not explain why it relied on the Naeve study, when the study contained "numerous errors." In fact, however, the Naeve study was not necessary to the Commission's findings:

> Coupled with the results from [Washington Gas's] tests from the 1960's, the Commission has sufficient evidence to demonstrate the adverse effects from the applications of hot tar on Normac couplings without the results from the Naeve test.

Rehearing Order P 79, JA 590.

The study, moreover, did not contain "numerous" errors. The Commission agreed with Washington Gas that there were some problems with the tests conducted by Naeve, Rehearing Order P 75, JA 589, but found that the study was representative of Washington Gas installation practices in important respects. *Id.* P 76, JA 589. Thus, the study results were sufficient to support the finding that the

application of hot tar had a detrimental effect on the couplings' ability to seal. *Id*. P 77, JA 589; Certificate Order P 86, JA 469.

Finally, the Commission did not, (as Washington Gas suggests, Br. at 23), cite Dr. Loftus for the proposition "that exposing rubber *inside a coupling* to high temperatures would create a gooey mess." Rather, FERC found that his testimony supported the proposition that high temperatures can compromise the seals:

> Dr. Loftus also agreed that the application of hot tar led to degradation in the ability of a coupling to seal. Further, Dr. Loftus agreed that if the temperature of the elastomer were to reach 400^0F, the elastomer would be a "gooey mess." While there is no evidence that the temperature of the seals on the [Washington Gas] system ever approached the 400^0F range, Dr. Loftus admitted that exposing the elastomers to high temperatures would accelerate age-related stress relaxation, creep and cold flow. The result is that the elastomers would be compromised, which would reduce the ability of the elastomer seal to prevent leaks.

Rehearing Order P 54, JA 578 [footnotes omitted].

(4) Increased operating pressure

Washington Gas contends (Br. at 24) that the challenged orders do not show how pressure changes, which all pipelines experience, could have caused leaks only after the reactivation of Cove Point. However, the Commission's central conclusion in this case is that the application of hot tar compromised the couplings during their installation. Rehearing Order P 7, JA 556-57. Once the couplings were compromised, one small change to the system, such as pressure, could increase leaks. *Id*. P 54, JA 578. Moreover, as the Commission found, the

proposition that changes in operating pressure did not have an impact on leak rates is contradicted by Washington Gas's reducing operating pressures during the spring of 2005 in order to reduce leak rates. Rehearing Order P 90, JA 594.

Washington Gas also contends (Br. at 24) that National Gas Technologies Center tests do not support the conclusion that changes in pressure may increase leak rates. In those tests, one of two sets of compression coupling samples lost pressure over a weekend. When the couplings were re-pressurized, three showed increased leak rates, four showed decreased leak rates, and one remained unchanged. *Id*. P 92, JA 595. Since the changes in pressure did, in fact, cause changes in leak rates, the Commission's conclusions that pressure changes were a contributing factor and that Washington Gas and ENVIRON should have conducted additional tests were reasonable. *See id*. P 94, JA 596. Moreover, the July 2005 ENVIRON Report recognized that an increase in pressure could overcome marginal seals and cause leaks, but ENVIRON did no testing or analysis of this possibility. Certificate Order P 93, JA 471.

Finally, Washington Gas argues (Br. at 24) that it is the Commission's fault that Washington Gas conducted no pressure tests because the Commission did not set the case for hearing. However, as discussed below, Washington Gas had ample opportunity to submit evidence in this proceeding.

IV. THE COMMISSION'S PROCEDURES WERE FAIR AND AFFORDED PARTIES DUE PROCESS IN ALL RESPECTS.

Washington Gas asserts (Br. at 30) that the Commission "failed to utilize fair and open procedures in the proceedings below." In particular, Washington Gas objects (Br. at 30) to the absence of a formal evidentiary, trial-type hearing before an administrative law judge on its particular claims.

However, the formulation of agency procedures is a matter of agency discretion. *See, e.g., Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992). The Commission need not hold an evidentiary hearing unless material issues of fact are in dispute, *see, e.g., Conoco, Inc. v. FERC*, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996), and, even then, the Commission "is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions," *id.* at 544. *See also, e.g., Arkansas Electric Energy Consumers v. FERC*, 290 F.3d 362, 369-70 (D.C. Cir. 2002) (agency's discretion to rely "on the written record" and "to forego an evidentiary hearing" subject to review only for "abuse of discretion").

Here, the Commission fully explained why its procedures were appropriate. *See* Rehearing Order PP 31-48, JA 566-76. In brief, Washington Gas raised a highly technical issue within the Commission's area of expertise and amenable to resolution by expert analysis of the record. *Id*. P 35, JA 568. This approach, moreover, is consistent with the Commission's practice in other cases involving

technical issues. *Id.* Washington Gas had all the normal procedures and processes afforded when there are no material issues of fact that cannot be resolved on the written record, plus it had additional, case-specific process including data requests, comments after the procedural conference, and the acceptance of evidence submitted on rehearing.

Washington Gas's contention that the procedural conference was "highly irregular" (Br. at 31) is also without merit. Technical conferences are not unusual. *See, e.g.*, *Lomak Petroleum, Inc. v. FERC,* 206 F.3d 1193 (D.C. Cir. 2000) (addressing petitioner's request for a technical conference). The procedural conference here afforded Washington Gas the same opportunity to submit evidence and to respond to Commission staff questions as would a technical conference. *Cf.*, *NE Hub Partners, L.P.*, 83 FERC ¶ 61,043 at 61,158 (1998) (describing technical conference convened to consider potential risks associated with proposal to construct and operate natural gas storage facilities in a salt bed located underneath an existing gas storage field). The difference is that the procedural conference here also provided opportunity for considering the procedural options for processing the applications, *see supra* at 9, and the Commission's Office of Dispute Resolution was available in case the parties were interested in initiating settlement talks. *See* Procedural Conference Transcript at 2, JA 177.

Finally, Washington Gas argues (Br. at 31-32) that it did not have an opportunity to respond to the final Naeve study, which addressed the effects of hot tar on seals, or to question witnesses whose credibility it contended was at issue. The Commission fully addressed these contentions in the Rehearing Order, PP 37-42, JA 569-72. In brief, as the issues were technical, witness credibility was not a central issue. Washington Gas had ample opportunity to challenge the witness testimony through the presentation of contrary technical evidence. *Id.* P 42, JA 571. Similarly, Washington Gas had ample opportunity to challenge the Naeve study on rehearing, and did so. Washington Gas could also have submitted additional evidence (as it did on rehearing, with the Commission's permission, with respect to operating pressure data) to refute the Naeve study results, but chose not to do so. *Id*. P 74, JA 588.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901
judith.albert@ferc.gov
December 18, 2007

Final brief: March 10, 2008

Washington Gas Light Company v. FERC **Docket No. CP05-130**
D.C. Cir. No. 07-1015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 7,366 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

_____

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6046
Fax: (202) 273-0901

March 10, 2008