

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 13-1278

**MISSOURI PUBLIC SERVICE COMMISSION,
*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**

**DAVID L. MORENOFF
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**CAROL J. BANTA
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

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CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order on Initial Decision, Opinion No. 525, *Missouri Interstate Gas, LLC*, FERC Docket No. CP06-407, 142 FERC ¶ 61,195 (Mar. 21, 2013) ("Remand Order"), R. 351, JA 1106; and
2. Order Denying Rehearing, Opinion No. 525-A, *Missouri Interstate Gas, LLC*, FERC Docket No. CP06-407, 144 FERC ¶ 61,220 (Sept. 19, 2013) ("Remand Rehearing Order"), R. 357, JA 1173.

C. Related Cases

As more fully described in this brief, this is the second case arising from a natural gas pipeline certificate proceeding. In 2010, this Court remanded the matter for the Commission to resolve the question of an alleged acquisition premium in the pipeline's initial rates. *Mo. Pub. Serv. Comm'n v. FERC*, No. 09-1121, 601 F.3d 581 (D.C. Cir. 2010). Petitioner Missouri Public Service Commission now seeks review of the Commission's two orders issued on remand.

/s/ Carol J. Banta
Carol J. Banta
Attorney

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GLOSSARY

2002 Certificate Order	<i>Missouri Interstate Gas, LLC</i> , FERC Docket Nos. CP02-399, <i>et al.</i> , 100 FERC ¶ 61,312 (2002)
2007 Certificate Order	<i>Missouri Interstate Gas, LLC</i> , FERC Docket Nos. CP06-407, <i>et al.</i> , 119 FERC ¶ 61,074 (2007), R. 33, JA 1
2008 Certificate Rehearing Order	<i>Missouri Interstate Gas, LLC</i> , FERC Docket Nos. CP06-407, <i>et al.</i> , 122 FERC ¶ 61,136 (2008), R. 62, JA 25
Act or NGA	Natural Gas Act
Certificate Policy Statement	<i>Certification of New Interstate Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)
Commission or FERC	Respondent Federal Energy Regulatory Commission
Missouri or Missouri Commission	Petitioner Missouri Public Service Commission (and/or the State of Missouri, which briefly substituted for the Missouri Public Service Commission in the underlying FERC proceedings)
Missouri Gas	Missouri Gas Company, LLC, which previously owned and operated a pipeline system offering intrastate natural gas service, and which merged into MoGas in 2007
Missouri Interstate	Missouri Interstate Gas, LLC, which was formed in 2001 to own and operate the TransMississippi facilities, and which merged into MoGas in 2007
Missouri Pipeline	Missouri Pipeline Company, LLC, which previously owned and operated a pipeline system offering intrastate natural gas service, and which merged into MoGas in 2007

GLOSSARY

MoGas	Intervenor MoGas Pipeline LLC
Remand Order	Order on Initial Decision, Opinion No. 525, <i>Missouri Interstate Gas, LLC</i> , FERC Docket No. CP06-407, 142 FERC ¶ 61,195 (2013), R. 351, JA 1106, on review in this case
Remand Rehearing Order	Order Denying Rehearing, Opinion No. 525-A, <i>Missouri Interstate Gas, LLC</i> , FERC Docket No. CP06-407, 144 FERC ¶ 61,220 (2013), R. 357, JA 1173, on review in this case
TransMississippi [pipeline/facilities]	A 5.6-mile pipeline extending under the Mississippi River between Missouri and Illinois

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) properly applied its longstanding benefits test for including acquisition premiums in natural gas pipeline rates, and reasonably determined that the premium for a former oil pipeline converted to new use satisfied that test.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

INTRODUCTION

This case concerns a single issue arising from proceedings on remand from this Court. *See Mo. Pub. Serv. Comm’n v. FERC*, 601 F.3d 581 (D.C. Cir. 2010) (“*Missouri*”). In orders approving the certification of an interstate pipeline system, the Commission declined to consider whether the pipeline’s initial rates included an acquisition premium (and, if so, whether such a premium satisfied the Commission’s test to be included in rates); this Court remanded that specific issue to the Commission. On remand, the Commission set the matter for an administrative hearing to develop a factual record, then issued two lengthy orders addressing a number of disputed issues, most of which are not contested in this appeal. *See Missouri Interstate Gas, LLC*, Opinion No. 525, 142 FERC ¶ 61,195 (“Remand Order”), R. 351, JA 1106, *reh’g denied*, Opinion No. 525-A, 144 FERC ¶ 61,220 (2013) (“Remand Rehearing Order”), R. 357, JA 1173.¹

Of relevance here, the Commission concluded that the interstate pipeline met the longstanding test for inclusion in rates. Petitioner Missouri Public Service Commission (“Missouri” or “Missouri Commission”) does not dispute any of the Commission’s factual findings on remand (including that the purchase price of the disputed pipeline facilities was less than the cost of constructing new facilities) or

¹ “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

its determination that the pipeline was converted to a new use. Missouri challenges only the Commission's determination that the pipeline company had shown that the pipeline facilities provided specific benefits in accordance with Commission precedents.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Natural Gas Act ("NGA" or "Act") confers upon the Commission jurisdiction to regulate (1) the transportation and sale for resale "of natural gas in interstate commerce" and (2) "natural-gas companies engaged in such transportation or sale." NGA § 1(b), 15 U.S.C. § 717(b). Under section 7(c)(1)(A), the Commission has authority to approve construction or expansion of an interstate natural gas pipeline. 15 U.S.C. § 717f(c)(1)(A). *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 319 (D.C. Cir. 2003) ("Any pipeline seeking to build or to expand its facilities must first apply for a certificate of public convenience and necessity from FERC."); *see also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is the guardian of the public interest and has a wide range of discretionary authority in determining whether certificates shall be granted).

In 1999, the Commission established its policy for certificating new pipeline construction. *See Certification of New Interstate Gas Pipeline Facilities*, 88 FERC

¶ 61,227 (1999) (“Certificate Policy Statement”). The Commission sought to balance anticipated growth in demand for natural gas against concerns about overbuilding, subsidization by existing captive customers, and unnecessary exercise of eminent domain. *Id.* at 61,736-37.

In certificating a pipeline, the Commission sets initial rates under the “public interest” standard of section 7 of the Act, 15 U.S.C. § 717f, as a temporary mechanism until permanent rates are established under the regular rate-setting provisions (and the “just and reasonable” standard) of sections 4 and 5 of the Act, 15 U.S.C. §§ 717c, 717d. *See Missouri*, 601 F.3d at 583 (citing cases). Cost of service ratemaking generally is based on the depreciated original cost of a facility (also called the “net book value”). *See id.* Any cost above that amount is known as an acquisition premium or adjustment. *See id.* The Commission generally disallows acquisition premiums in cost of service ratemaking, unless its “benefits exception” applies: “The Commission has allowed exceptions to this rule . . . only when the purchaser has demonstrated specific dollar benefits resulting directly from the sale. However, the benefits must be tangible, non-speculative, and quantifiable in monetary terms.” *Kansas Pipeline Co.*, 81 FERC ¶ 61,005 at 61,018 (1997), *quoted in Missouri*, 601 F.3d at 584; *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 536 (D.C. Cir. 1999) (“[T]he Commission has created an exception to this general rule for cases where it is shown that the ‘acquisition

results in substantial benefits to ratepayers.”) (quoting *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 at 62,112 (1995)). This exception, which is at the heart of the instant appeal, is discussed more fully in the Part II.A of the Argument, *infra*. See generally *Longhorn*, 73 FERC at 61,112 (setting forth a “two-prong test” for substantial benefits).

II. BACKGROUND

This Court is familiar with the history, from 2002 forward, of the TransMississippi facilities’ acquisition and conversion to interstate natural gas service. See generally *Missouri*, 601 F.3d at 583-85. This brief provides the following overview of the relevant background.

A. Background of Acquisitions

This case concerns 5.6 miles of pipeline connecting Missouri and Illinois under the Mississippi River (the “TransMississippi” facilities). From the 1940s to the early 1980s, that segment was operated as part of an oil pipeline system. See Remand Order at P 59, JA 1115; *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312 at P 4 (2002) (“2002 Certificate Order”), *on reh’g and clarification*, 102 FERC ¶ 61,172 (2003). That system was idle for several years, until Missouri Pipeline Company, LLC acquired approximately 70 miles of the system, including the TransMississippi portion, in 1987. Remand Order at P 9, JA 1107. Missouri Pipeline sought approval from the Missouri Commission in 1989 to offer intrastate

natural gas service using a system that included the former oil pipeline facilities. *Id.* at P 10, JA 1107. Missouri conditioned its approval on the severance of that new intrastate system from the 5.6-mile TransMississippi pipeline. *Id.* Missouri Pipeline's affiliate, Missouri Gas Company, LLC, later received the Missouri Commission's approval to construct and operate other intrastate pipeline facilities. *Id.* at P 11, JA 1107.

In 1994, Missouri Pipeline, Missouri Gas, and the TransMississippi facilities were sold to UtiliCorp United Inc. The Missouri Commission approved the transactions but again prohibited the connection of the TransMississippi facilities to the intrastate system. *Id.* at P 12, JA 1107-08.

In 2001, UtiliCorp entered into a Stock Purchase Agreement with Gateway Pipeline Company to sell the intrastate companies and the TransMississippi pipeline. The Stock Purchase Agreement allocated the \$63.4 million purchase price largely to the assets of the subsidiaries, Missouri Pipeline and Missouri Gas (at \$32.7 million and \$20.4 million, respectively), with the remaining \$10.3 million attributed to the corporate entity that owned only the TransMississippi facilities. At closing, the final price was adjusted to \$62.4 million, with \$10,088,925 attributable to the TransMississippi owner. Remand Order at PP 16-18, JA1108-09.

The Missouri Commission approved the acquisition and modified its previous condition prohibiting interconnection of the TransMississippi segment,

instead requiring that those facilities must be held in a separate company and that natural gas could only flow into Missouri, so that the rest of the system would continue to be subject to state regulatory jurisdiction under the so-called “Hinshaw exemption” from federal jurisdiction under the Natural Gas Act. *Id.* at P 20, JA 1109; *see* 15 U.S.C. § 717(c). Accordingly, the TransMississippi facilities were to be held by a separate, newly-formed Gateway subsidiary, Missouri Interstate Gas, LLC.

B. The 2002 Certificate Proceeding: Conversion of the TransMississippi Facilities to Interstate Natural Gas Service

In 2002, Missouri Interstate filed for FERC approval under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, to acquire the TransMississippi facilities, to interconnect them to the intrastate system, and to construct and operate a one-mile extension to interconnect with another system in Illinois. The project would “place an existing facility, a former oil pipeline, into natural gas service for the first time” to transport up to 20 million cubic feet of gas per day into Missouri from Illinois. 2002 Certificate Order at P 1.

The Commission approved the application and granted a certificate of public convenience and necessity, finding that it was “in the public interest to approve the proposed project . . . because the project will provide Missouri customers the opportunity to diversify their gas supply options with the installation of minor pipeline facilities and a minimal impact to the environment.” *Id.* at P 2.

Consistent with the Certificate Policy Statement, the Commission “balance[d] the public benefits against the potential adverse consequences.” *Id.* at P 11; *see also id.* at P 12 (“This is essentially an economic test.”). In finding that the benefits “outweigh[ed]” the potential downsides (*id.* at P 18), the Commission determined that “introduction of supply options into the area by adding . . . another interstate transporter will improve reliability and diversity of supply consistent with the Commission’s goals.” *Id.* at P 15. Noting that certain areas in Missouri had access “only to the midcontinent and western supply areas accessible through the Panhandle system [another interstate pipeline],” the Commission found that the project would “increase competition and offer new sources of gas supply and transportation to Missouri customers served by [Missouri Pipeline]” (which would interconnect with the TransMississippi pipeline to receive incoming gas). *Id.* at P 18. For those reasons, the Commission determined that the project was “required by the public convenience and necessity.” *Id.*

The Commission also determined that Missouri Interstate could include the acquisition premium in its rate base: “Because the [TransMississippi] facilities will be devoted to gas utility service for the first time, we will permit Missouri Interstate to include the \$10,088,000 purchase price of the existing facilities as the original cost in rate base for recourse ratemaking purposes” *Id.* at P 26.

The Commission further directed Missouri Interstate to file a rate proceeding, either justifying its existing rates or proposing new ones, within three years of placing the pipeline in service. Accordingly, Missouri Interstate filed a cost and revenue study in a separate new docket in 2006. That proceeding was terminated in the 2007 Certificate Order, discussed *infra*.

No party sought judicial review of the 2002 Certificate Order.

C. The 2006 Certificate Proceeding: Reorganization Into an Interstate Natural Gas Company

In June 2006, Missouri Interstate, Missouri Gas, and Missouri Pipeline filed applications with FERC to reorganize themselves into a single interstate natural gas company (which is now Intervenor MoGas Pipeline LLC (“MoGas”)), to construct certain new facilities, and to offer interstate natural gas transportation service. The Missouri Commission protested the application on various grounds, including that the consolidation was not required by the public convenience and necessity. *See Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 at P 10 (2007) (“2007 Certificate Order”), R. 33, JA 1, *on reh’g and compliance*, 122 FERC ¶ 61,136 (2008) (“2008 Certificate Rehearing Order”), R. 62, JA 25, *reh’g denied*, 127 FERC ¶ 61,011 (2009), R. 90. Another party, AmerenUE, contended that the proposed merger would not achieve any benefits for customers. *See* 2007 Certificate Order at P 11, JA 3.

The Commission, however, disagreed and granted the certificate, finding that “the project will provide benefits that support a determination that it is required by the public convenience and necessity.” *See* 2008 Certificate Rehearing Order at P 81, JA 40; *see also id.* at PP 48, 77-80, JA 33, 39-40; 2007 Certificate Order at PP 42-51, JA 8-9.

The Commission began its analysis by explaining the scope of its statutory responsibilities:

The Commission understands the obligation that the states have in protecting the interests of natural gas consumers in their respective states. While the Commission takes a broader view of the public interest because it focuses on the national market, we nevertheless consider the effects of any proposal on existing shippers as well as on other state interests, such as the environment.

2007 Certificate Order at P 28, JA 6. The Commission went on to consider the benefits of the proposal, consistent with the criteria of the Certificate Policy Statement. In particular, the Commission found that the proposal “will enhance competition in the area” (*id.* at P 50, JA 9) and provide shippers with “all of the benefits afforded interstate shippers, such as flexible receipt and delivery rights, and capacity release” (*id.* at P 51, JA 9). In addition, the Commission found that the merger of the companies would provide “more efficient and cost-effective operation of the merged pipelines since the procedures for obtaining, scheduling and paying for service will not require three separate systems.” *Id.*

On rehearing, the Commission again discussed the benefits of certification. The Commission explained that, for purposes of certification under the Natural Gas Act, “benefits are not defined only by the needs of existing customers, but also by national needs.” 2008 Certificate Rehearing Order at P 79, JA 40. (Nevertheless, responding directly to the Missouri Commission’s contention that there would be no benefits to existing customers, the Commission disagreed, finding a variety of additional benefits to those customers. *See id.* at PP 77-78, JA 39-40.) The combined pipeline would “be able to operate in an entirely different manner than the three separate pipelines could” — specifically, to increase widespread access to new gas supplies:

MoGas will be able to flow gas out of Missouri and attract customers from the market for west-to-east natural gas transportation. At this time, with recent development of new gas supplies in the Rocky Mountain basin, additional west-to-east pipeline capacity will allow more consumers anywhere east of that area, including the existing customers of the three Missouri pipelines, to access these supplies.[]

2008 Certificate Rehearing Order at P 79 (citation omitted), JA 40. “For all of these reasons,” the Commission concluded that the merging pipelines had “adequately demonstrated that benefits will flow from the merger” (*id.*) and that those benefits “support a determination that [the project] is required by the public convenience and necessity.” *Id.* at P 81, JA 40.

The Commission also approved initial recourse rates for the interstate system. The Commission directed MoGas to file a Natural Gas Act section 4 rate

case within 18 months after interstate service commenced on the newly-configured system. *Id.* at P 8, JA 26.

After further rehearing (concerning issues not relevant here), 127 FERC ¶ 61,011 (2009), the Missouri Commission petitioned this Court for review.

D. The *Missouri* Decision and Remand to the Commission

In its appeal to this Court, the Missouri Commission raised only “a single issue”: whether the Commission had improperly included the alleged acquisition premium in MoGas’s initial rates while deferring resolution of the issue to a future Natural Gas Act section 4 rate proceeding. *Missouri*, 601 F.3d at 585. As discussed more fully in Part II.A.3 of the Argument, *infra*, the Court found that the Commission “did not directly evaluate the . . . premium according to any of the elements of the benefit exception test.” *Id.* at 586. Therefore, the Court “vacate[d] FERC’s order with respect to the alleged acquisition premium issue” and remanded the case “for a prompt resolution of th[at] question” *Id.* at 588.

E. The 2009 Rate Proceeding and 2010 Rate Settlement

Meanwhile, MoGas had already filed a general section 4 rate case in June 2009. The Commission set the filing for hearing. *MoGas Pipeline LLC*, 128 FERC ¶ 61,101 (2009). MoGas subsequently filed an uncontested settlement (with the Missouri Commission’s support), which the Commission approved in July 2010, that resolved the rate case and included a moratorium through the end of

2012 on any rate-change filings by MoGas or the other parties to the proceedings. *MoGas Pipeline LLC*, 132 FERC ¶ 61,092 (2010).

Because the new rates were effective as of January 1, 2010 (*see id.*), the initial rates that are at issue in the instant case were effective only for a locked-in period from June 1, 2008 through the end of 2009. *See* Remand Order at P 5, JA 1107. (The Commission acknowledged, however, that its determination on the merits regarding the acquisition premium could have an effect in a future rate proceeding. *Id.* (citation omitted).)

III. THE COMMISSION REMAND PROCEEDINGS AND ORDERS

A. The Administrative Hearing and ALJ Decision

On remand, MoGas submitted additional information regarding the acquisition premium that raised material issues of fact; the Commission set the matter for hearing before an administrative law judge. *Missouri Interstate Gas, LLC*, 133 FERC ¶ 61,115 (2010), R. 114. Following an evidentiary hearing, the presiding judge issued a lengthy Initial Decision addressing numerous factual disputes and legal determinations. *Missouri Interstate Gas, LLC*, 137 FERC ¶ 63,014 (2011), R. 327, JA 949.

B. Remand Order

On exceptions, the Commission affirmed the Initial Decision in part and reversed it in part. *See* Remand Order at P 2, JA 1106. In sum, the Commission found: (1) that the TransMississippi pipeline included an acquisition premium that

could not be included in rates unless MoGas satisfied the benefits exception (*id.* at PP 59-64, 75-78, JA 1115-16, 1118); (2) that the purchase price of the 5.6-mile TransMississippi pipeline in the 2001 sale was \$10,088,925 (*id.* at PP 85-87, JA 1120); (3) that the cost to replace the TransMississippi pipeline with new construction would exceed the purchase price (*id.* at P 110, JA 1124)²; and (4) that the 2001 sale was an arms-length transaction between unaffiliated parties (*id.* at PP 125-26, JA 1126-27).

In addition, the Commission summarily affirmed the undisputed finding that the conversion of the TransMississippi facilities from oil to gas met the “new use” requirement of the substantial benefits test (the first prong of the *Longhorn* test). Remand Order at P 95, JA 1121. As discussed more fully in the Argument, *infra*, the Commission further determined that the TransMississippi acquisition premium met the standard for demonstrating substantial benefits in conversion cases (the second prong of the *Longhorn* test), i.e., that the purchase price was less than the cost of new construction, and thus that MoGas had demonstrated specific dollar benefits to include the acquisition premium in its initial rate base. *Id.* at PP 109-13, JA 1124.

² The Commission found it unnecessary to resolve whether the construction cost would be \$13.9 million, according to a study that MoGas submitted, or \$11.5 million, based on exclusion of certain equipment costs that the administrative law judge had found to be inadequately supported. *Id.*

C. Remand Rehearing Order

Missouri filed a timely request for rehearing. R. 354, JA 1133. (Though Missouri sought rehearing as to the amount of the purchase price, it has not pursued that issue on appeal.) As discussed more fully in the Argument, the Commission reaffirmed and further explained its rulings in the Remand Rehearing Order. This appeal followed.

SUMMARY OF ARGUMENT

On remand, the Commission appropriately developed a factual record and considered all issues concerning the alleged acquisition premium. As to the sole issue challenged in this appeal — the specific, quantifiable benefits of the premium — the Commission reasonably determined that the TransMississippi pipeline satisfied the substantial benefits test.

First, the reason for the Commission’s general policy against including an acquisition premium in rate base is to protect customers from paying twice for depreciation. Therefore, the Commission has consistently allowed premiums to be included in rates where a facility is converted to a new use — for example, acquisition of a crude oil pipeline to provide natural gas service. The TransMississippi pipeline is just such a converted facility; Missouri does not dispute the Commission’s “new use” finding. Second, in such conversion cases, the Commission has consistently found that, if the purchase price is less than the

cost of building a comparable new pipeline, that differential demonstrates commensurate benefits.

Here, the conversion to new use is undisputed, the benefits of placing the pipeline into interstate service was determined in earlier orders, and the Commission reasonably found, based on the record, that the purchase price was less than the cost of construction. Accordingly, the Commission complied with this Court's directive on remand to resolve the premium issue. Furthermore, Missouri's arguments on appeal misread the Commission's precedents, draw unsupported inferences from those orders, and impermissibly revive failed objections to the Commission's certification of former intrastate pipelines as an interstate system under federal jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Rio Grande*, 178 F.3d at 541; *accord Missouri*, 601 F.3d at 585. A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. 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)).

The Commission’s policy assessments are owed “great deference.” *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002); *see also W. Area Power Admin. v. FERC*, 525 F.3d 40, 51 (D.C. Cir. 2008) (“When FERC’s orders concern ratemaking, we are particularly deferential to the Commission’s expertise.”) (internal quotation marks and citation omitted). This Court also “defer[s] to the Commission’s interpretations of its own precedents.” *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007); *accord NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

The Commission’s factual findings are conclusive if supported by substantial evidence. 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.” *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

In proceedings on remand, the Commission’s determinations are reviewed to ensure that they are responsive to the Court’s mandate. *See, e.g., Process Gas Consumers Grp. v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). While it is for the Court, of course, to construe its own mandate (*see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940)), “the court’s opinion may be consulted to ascertain the

intent of the mandate.” *City of Cleveland v. FPC*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

II. THE COMMISSION PROPERLY FOUND THAT THE TRANSMISSISSIPPI PIPELINE MET THE REQUIREMENTS OF THE BENEFITS TEST

The question before the Court is narrow — even more so than the “single issue” that was presented in *Missouri*. Though the administrative hearing and the Commission’s subsequent review addressed a number of fact-intensive matters, nearly all of those issues are absent from this appeal. There is no dispute on appeal that the \$10,088,925 purchase price for the TransMississippi pipeline in the 2001 acquisition constituted an acquisition premium. *See* Remand Order at PP 59, 85, JA 1115, 1120. Nor is there any question that the acquisition was an arms-length transaction between unaffiliated parties. *See id.* at PP 125-26, JA 1126-27. And it is undisputed, as it was before the Commission, that the conversion of the TransMississippi pipeline from oil to natural gas (certificated in 2002 and put into service in 2003) constituted a “new use.” *See id.* at P 95 (absent any exceptions from the Initial Decision on the issue, Commission summarily affirmed the “finding that the conversion of the [TransMississippi] facilities from oil to gas met the new use requirement of the substantial benefits test”), JA 1121.

Thus, the sole question before the Court is whether the Commission appropriately determined that the acquisition premium met the remaining requirement(s) of the benefits test.

A. The Commission Found Commensurate Benefits Under Its Established Approach To Conversion Cases

1. The Commission's Ruling Followed Its Precedents

Contrary to Missouri's claim (Br. 3, 51), the Commission's policy in this case is not "new." Rather, the Commission's approach is consistent with numerous precedents in similar cases over several decades.

In general, in cost-of-service ratemaking, the Commission requires a utility to include in its rate base the "net book value" of facilities, which is the original cost with accumulated depreciation. *See Kansas*, 81 FERC at 61,017-18. The Commission ordinarily considers any purchase price above the depreciated original cost to be an "acquisition premium" or adjustment that should be absorbed by shareholders and thus is excluded from rates. *See id.* at 61,018. *See also Rio Grande*, 178 F.3d at 535 ("Normally, a purchaser . . . is only permitted to include the seller's depreciated original cost in its cost-of-service calculations"); *id.* at 541 ("[N]ormally . . . the purchaser may only include the seller's depreciated original cost in its rate base, even though the price paid by the purchaser may exceed that amount.")).

The Commission has explained that, though its general rule against inclusion is “strong, . . . that policy is not inflexible.” *Cities Serv. Gas Co.*, 4 FERC ¶ 61,268 at 61,596 (1978), *cited in* Remand Rehearing Order at P 57, JA 1183. The Commission has long allowed exceptions to the general rule where utilities can show that the acquisition premium would provide benefits to consumers. *See Cities*, 4 FERC at 61,596 (“Where the transfer at a price above book value benefits consumers, it is sometimes appropriate to permit the entire purchase price to go into the rate base.”). That requirement is known, variously, as the benefits exception, the substantial benefits test, or the commensurate benefits test.

In practice, proving specific, quantifiable benefits resulting from an acquisition of facilities is often an uphill climb. The Commission has characterized the regulated utility’s burden of proof as “heavy.” *Kansas*, 81 FERC at 61,018; *see also Enbridge Pipelines (KPC)*, 109 FERC ¶ 61,042 at P 30 (2004) (burden of proving measurable benefits that result from purchase price “may be practically ‘impossible’ to meet”) (quoting *United Gas Pipe Line Co.*, 25 FPC 26, 51 (1961)).³ And, indeed, the Commission has denied inclusion of premiums in many cases involving acquisitions of existing natural gas facilities. *See generally*

³ In *United*, the Commission found the proof particularly “difficult to present under any circumstances” because benefits such as increased growth in facilities and expanded service may be due to factors that are “wholly unrelated” to the purchase price. *United Gas*, 25 FPC at 51.

p. 23, *infra* (citing cases in which acquisitions of natural gas facilities failed the benefits test).

But the Commission has, for several decades, taken a different approach to the “special circumstances” of acquiring facilities to be converted to new uses. *Cities*, 4 FERC at 61,596. In such cases, the Commission has generally allowed the full purchase price — an acquisition premium — to be included in the rate base. *See, e.g., Enbridge Pipelines (S. Lights) LLC*, 121 FERC ¶ 61,310 at PP 1, 38 (2007) (allowing premium for crude oil pipeline converted to move diluent, light liquid hydrocarbons used to dilute heavy oil); *Enbridge Energy Co.*, 110 FERC ¶ 61,211 at P 29 (2005) (direction of crude oil pipeline would be reversed, transporting “a fundamentally different range of products than those originally transported”); *Questar S. Trails Pipeline Co.*, 89 FERC ¶ 61,050 at 61,146-47 (1999) (oil to natural gas); *KN Interstate Gas Transmission Co.*, 79 FERC ¶ 61,268 at 62,147, 62,151 (1997) (same); *Longhorn*, 73 FERC ¶ 61,355 at 62,110-11 (reversal of flow of crude oil pipeline and conversion to transport refined petroleum products); *Crossroads Pipeline Co.*, 71 FERC ¶ 61,076 at 61,262 (1995) (crude oil to natural gas); *Delhi Gas Pipeline Corp.*, 43 FERC ¶ 61,024 at 61,068 (1988) (new use for interstate gas service); *Natural Gas Pipeline Co.*, 29 FERC ¶ 61,073 (1984) (crude oil and gas oil pipeline converted to natural gas); *Cities*, 4 FERC ¶ 61,268 (same). *See generally* Remand Rehearing Order at P 57

(“Significantly, we have approved rate base treatment for acquisition adjustments under the substantial benefits test in a number of conversion cases including *Cities*, *Natural*, and *Crossroads*. Our decision here . . . is in accord with these decisions.”), JA 1183.

The Commission has repeatedly explained why this approach to conversions is consistent with its general policy against inclusion: conversion to new use “means that gas consumers will not be burdened twice for the costs of depreciating the facilities.” *Cities*, 4 FERC at 61,596 (finding conversion “significant” for that reason). *See also Natural*, 29 FERC at 61,150 (finding that, as in *Cities*, “gas customers would not be burdened twice” for depreciation costs); *Longhorn*, 73 FERC at 62,113 (shippers who had paid for crude oil pipeline were “quite different from those shippers who would be charged for the use of the converted line” to transport refined products); *Delhi*, 43 FERC at 61,068 (following *Cities* and other cases where “inclusion of the facilities’ purchase price in the pipeline’s rate base would not result in gas consumers paying twice for the facility’s depreciation”). *Cf. KN Wattenberg Transmission L.L.C.*, 85 FERC ¶ 61,204 at 61,854 (1998) (in denying a premium for acquisition of existing natural gas facilities, Commission distinguished it from the conversion cases because, here, shippers who had already paid rates that reflected the original cost would be “paying twice”).

This Court has taken the same view: “From the perspective of an acquiring entity, concepts of ‘depreciation’ are normally inapposite in such circumstances. Thus, it hardly makes sense for FERC to require the use of a depreciated figure in this situation where the use is brand new.” *Rio Grande*, 178 F.3d at 542.

This fundamental difference accounts for the split in FERC precedents that Missouri misconstrues as “muddled.” Br. 32. The Commission’s approach has, in fact, been consistent over several decades: acquisition premiums for facilities being converted to a new use have been allowed in rate base, while premiums for transfers of existing natural gas facilities have failed the benefits test. *See supra* p. 21 (citing conversion cases from *Cities* in 1978 to *Enbridge Pipelines (S. Lights)* in 2007); *contra Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310 at P 8 (2003); *Black Marlin Pipeline Co.*, 93 FERC ¶ 61,188 at 61,626 (2000); *KN Wattenberg*, 85 FERC at 61,853 (distinguishing transfer of existing gas pipeline from oil-to-gas conversions in *Crossroads* and *Delhi*); *Kansas*, 81 FERC at 61,018; *N. Natural Gas Co.*, 35 FERC ¶ 61,114 at 61,236 (1986); *Mid-La. Gas Co.*, 7 FERC ¶ 61,316 at 61,685 (1979) — all disallowing premiums for existing gas facilities. *Cf.* Remand Rehearing Order at P 57 (though Commission said in *Enbridge (KPC)* that burden is heavy and perhaps impossible, “that case did not involve the conversion of the pipeline from one utility service to another, e.g., oil to gas”), JA 1182-83.

Furthermore, the Commission reasonably disagreed with Missouri’s policy view that the test in conversion cases is too easy for pipelines to meet (*see* Br. 13, 52-53), because Missouri disregards the critical “new use” requirement. *See* Remand Rehearing Order at P 57, JA 1183.⁴

Thus, notwithstanding Missouri’s claim (Br. 3, 51), the instant case does not mark a change in policy — to the contrary, it reflects the Commission’s longstanding fact-based treatment of the “special circumstance[]” of conversion. *Cities*, 4 FERC at 61,596.

2. The Commission Reasonably Found That The TransMississippi Pipeline Provided Commensurate Benefits

The Commission based its determination that the TransMississippi pipeline provided substantial benefits on two findings: first, its previous finding that putting the acquired facilities into interstate service would provide benefits to customers; and second, its finding in the remand proceeding that the purchase price

⁴ Missouri also does not explain why Commission policy should not favor conversions of pipeline facilities over new construction; before the Commission, Missouri warned of potential for abusive cycles of conversions to exploit acquisition premiums. The Commission rejected that concern because a pipeline seeking rate recovery for converting a gas pipeline *back* to oil would be confounded by the “new use” prong. *Id.* This Court dismissed similar concerns in *Rio Grande*, finding that it was “not clear how there could even be sham transactions, given the requirement that there must be a *new use* for the facility” 178 F.3d at 542-43.

was less than the cost of new construction. The Commission's determinations were reasonable and consistent with its precedents in both respects.

a. The Commission Properly Relied On Its Previous Finding That The TransMississippi Pipeline Would Provide Benefits

The Commission's finding of benefits rested, in part, on its previous findings that placing the TransMississippi facilities into interstate service (in 2002) and approving their integration into a larger interstate system (in 2007) would benefit customers: "We find that the Commission, in its decision to issue a certificate of public convenience and necessity placing the [TransMississippi] facilities into interstate service, already addressed the initial question as to whether there are benefits to including the cost of the [TransMississippi] facilities in initial rates." Remand Rehearing Order at P 49 (citing 2002 Certificate Order at P 18), JA 1181.

In particular, the Commission had found that putting the converted oil pipeline into service (at first, flowing gas only into Missouri) "will provide Missouri customers the opportunity to diversify their gas supply options with the installation of minor pipeline facilities and a minimal impact to the environment." 2002 Certificate Order at P 2. *Cf.* Certificate Policy Statement, 88 FERC at 61,737 ("In considering the impact of new construction projects on existing pipelines, the Commission's goal is to appropriately consider the enhancement of competitive

transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.”). The Commission also determined that “introduction of supply options into the area by adding . . . another interstate transporter will improve reliability and diversity of supply” (2002 Certificate Order at P 15), including to areas of Missouri that previously had access only to supplies available through the Panhandle system (*id.* at P 18). For that reason, the project would also increase competition. *Id.* In approving the creation of the MoGas interstate pipeline system (in which the TransMississippi facilities would no longer be limited to flowing gas into Missouri), the Commission found more benefits, including the additional west-to-east pipeline capacity to provide access for new gas supplies in the Rocky Mountain basin. 2008 Certificate Rehearing Order at P 79, JA 40. *See supra* pp. 10-11.⁵

⁵ The Commission also found additional benefits of the merged operation for existing customers (*see* 2007 Certificate Order at P 51, JA 9; 2008 Certificate Rehearing Order at PP 77-78, JA 39-40; *supra* pp. 10-11); the Commission did not, however, rely on those findings in evaluating the acquisition premium. Remand Order at P 114 (“Because we find that MoGas has demonstrated that it meets the second prong of the *Longhorn* test because the purchase price of the [TransMississippi] facilities is less than the cost of constructing comparable facilities, there is no need to address . . . additional arguments” regarding MoGas’s efforts to quantify the specific dollar impacts of those additional benefits), JA 1125.

The Commission has found these kinds of benefits in conversion cases from the start. *See Cities*, 4 FERC at 61,595 (finding that pipeline “would link Cities Service’s system to new supplies” being developed nearby; also noting that “[c]ompetition is an important social value”); *Crossroads*, 71 FERC at 61,261 (finding that project had “the potential to create a market center or hub in the Midwest region that will allow shippers in the area to access sources of gas that are not currently available to them”). In *Enbridge Energy*, the Commission found benefits to shippers and the public from more efficient and cost-effective access to Western Canadian crude oil supplies, which would “enhanc[e] supply diversification, . . . increasing refiners’ security of supply.” 110 FERC ¶ 61,211 at P 32; *see also Enbridge Pipelines (S. Lights)*, 121 FERC ¶ 61,310 at P 38 (likewise citing benefits of access to new Canadian production to “increase U.S. refiners’ security of supply”). (Missouri cites those findings in *Enbridge Energy*, *Enbridge Pipelines (S. Lights)*, and *Cities* in its effort to distinguish the instant case (Br. 29-31, 36) — ignoring the Commission’s similar findings in the 2002 and 2007 Certificate Orders.)

Moreover, the Commission views conversion itself as a benefit. *See Crossroads*, 71 FERC at 61,261 (citing “the fact that the pipeline already exists and modifications will disrupt the environment much less significantly than the construction of a new pipeline”); *Enbridge Energy*, 110 FERC at ¶ 61,211 at P 32

(“Permitting the efficient re-use of a currently underutilized infrastructure asset also reduces environmental impacts that would result from the construction of a new pipeline.”). Indeed, as a policy matter, the Commission noted that its ruling — in this case about a former oil pipeline that lay dormant for more than 20 years before being repurposed to increase access to new natural gas supplies — provides “appropriate incentives to purchase and utilize existing facilities in lieu of constructing new facilities, thereby avoiding unnecessary construction and the attendant environmental impacts.” Remand Order at P 113, JA 1124; *accord* Remand Rehearing Order at P 58, JA 1183.

b. The Commission Reasonably Relied On Its Finding That The Purchase Price Was Less Than The Cost Of Building A New Pipeline

In its line of conversion-to-new-use cases, the Commission has routinely allowed the purchase price of a converted pipeline to be included in the rate base if the pipeline showed that the price was less than the cost of building a new pipeline. *See, e.g., Cities*, 4 FERC at 61,596 (allowing inclusion of purchase price that exceeded the depreciated book value six-fold, because the record showed that it would cost more than twice the purchase price to build a new pipeline); *Natural*, 29 FERC at 61,150; *Crossroads*, 71 FERC at 61,262; *Longhorn*, 73 FERC at 62,113; *Enbridge Energy*, 110 FERC ¶ 61,211 at P 31.

Put differently, once the Commission has determined that certification of a pipeline converted to a new use is in the public interest, a purchase price that is less than the cost of new construction readily quantifies the commensurate benefits of that converted facility — the amount that is saved by purchasing and converting facilities, as compared with constructing new ones for that purpose, is the measurable benefit:

Ordinarily, the Commission does not approve the inclusion of a facility in the rate base at more than its depreciated original cost, unless the pipeline can show that the ratepayers will realize benefits commensurate with the acquisition costs that exceed the depreciated original costs. In the instant case, we conclude that the costs associated with the acquisition of the pipeline . . . along with . . . new construction costs, will be considerably less than the costs associated with constructing [a new comparable facility]. Thus, Crossroads' ratepayers will receive commensurate benefits from the acquisition of the oil pipeline.

Crossroads, 71 FERC at 61,262; *see also Natural*, 29 FERC at 61,150 (allowing \$20 million purchase price, where depreciated original cost was \$6 million but replacement cost would be \$21 million). “By converting an existing asset rather than constructing an entirely new system, the pipeline will be able to provide service at a greatly reduced price” compared to the cost of new construction.

Enbridge Energy, 110 FERC ¶ 61,211 at P 31. *See also Longhorn*, 73 FERC at 62,113 (“The conversion will result in utilization of a currently-underutilized

facility, which could not be replicated for the price that [Longhorn] is willing to pay.”).⁶

The Court recognized this iteration of the substantial benefits test in *Rio Grande*. In that case, involving a company that had acquired an existing refined products pipeline for conversion to transport natural gas liquids, the Court followed *Longhorn* in properly defining the benefits exception as allowing an acquisition premium “if the pipeline can show that: (1) an acquired facility is being put to new use, and (2) the purchase price is less than the cost of constructing a comparable facility.” 178 F.3d at 542 (citing *Longhorn*, 73 FERC at 62,112-13). (The Commission had denied the pipeline’s request to include the purchase price in its rate base on other grounds — concern as to whether the transaction was arms-length, as the seller had acquired an interest in the purchaser — which the Court held “def[ied] good reason” and remanded the case to the Commission to apply the two-prong *Longhorn* test. *Id.* at 543.)

⁶ Because of the new-use limitation, which is grounded in the concern about double-paying for depreciation, the Commission has also consistently held that the less-than-construction price calculation is not sufficient for facilities that are merely transferred to a new owner to provide the same kind of service. *See, e.g., Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310 at P 20 (“The Commission reiterates that construction costs are not relevant where facilities performing gas service are already in existence.”).

Accordingly, here the Commission appropriately applied the commensurate benefits test “to determine the exact level of costs of the [TransMississippi] facilities to include in rates by evaluating whether it would cost more to construct new comparable facilities.” Remand Rehearing Order at P 49, JA 1181. The conversion to new use was not disputed, nor was the fact that the purchase price (\$10.1 million) was less than the cost of new construction (at least \$11.5 million⁷). Therefore, the Commission’s determination is reasonable, consistent with precedent, and supported by substantial evidence.

Furthermore, based on the stated rationale in *Crossroads* and other cases, the Commission found no support for Missouri’s argument that a utility must prove *other* quantifiable benefits *in addition to* the showing that the acquisition premium is less than the cost of new construction. *See* Remand Rehearing Order at P 50, JA 1181. *Cf. infra* Part II.B.1 (discussing Missouri’s efforts to reinterpret key orders).

3. The Commission’s Orders Are Consistent With This Court’s Mandate On Remand

The Commission’s determination also is consistent with this Court’s directive on remand. In the *Missouri* opinion, this Court held that the Commission

⁷ The precise differential, though disputed before the Commission (*see* Remand Order at PP 97-110, JA 1122-24; *supra* note 2), is not at issue on appeal.

improperly declined to consider Missouri’s challenge to MoGas’s initial rates, deferring resolution of the acquisition premium to the separate rate proceeding. 601 F.3d at 586-87. In the orders now on review, the Commission developed a factual record and applied its benefits test and, as discussed *supra*, reasonably concluded that the TransMississippi purchase price could be included in MoGas’s initial rates. *See* Remand Order at PP 89-114, JA 1120-25; Remand Rehearing Order at PP 47-58, JA 1181-83.

In the earlier MoGas certificate proceeding, the Commission explained that it would, for purposes of setting the initial rates, adhere to its previous determination (in the 2002 Certificate Order at P 26), that the \$10.1 million TransMississippi purchase price could be included in Missouri Interstate’s initial rate base, because the facilities would be devoted to gas utility service for the first time and because the Missouri Commission had approved the arms-length sale at that price between non-affiliated parties. 2008 Certificate Rehearing Order at P 55, JA 35.⁸ On appeal, this Court found such reliance on the 2002 Certificate Order “entirely inadequate” because the Commission had not — either in 2002 *or* in

⁸ The Missouri Commission had challenged the acquisition premium in Missouri Interstate’s 2006 rate proceeding that had followed from the 2002 certification; in certifying the MoGas merger, the Commission terminated that rate proceeding as “moot.” 2007 Certificate Order at PP 102, 104, JA 18.

2007 — “directly evaluate[d] the [TransMississippi] premium according to any of the elements of the benefits exception test.” *Missouri*, 601 F.3d at 586.⁹

Moreover, the Missouri Commission had submitted uncontested evidence that the TransMississippi facilities did contain an acquisition premium resulting from the 2001 sale, contrary to Missouri Interstate’s claims in the earlier proceeding. *See id.* Therefore, the Court concluded that “[t]he threshold question of whether or not an acquisition premium exists . . . appears to be a straightforward accounting question” that the Commission “could have resolved . . . [on] the uncontested paper record before it” *Id.* at 587. The Court vacated the 2007 Certificate Order “with respect to the alleged acquisition premium issue” and remanded the case “for a prompt resolution of th[at] question.” *Id.* at 588. On remand, following an evidentiary hearing,¹⁰ the Commission found that the

⁹ Nothing in *Missouri*, however, precluded the Commission from referencing, as part of its benefit exception analysis, its particular findings (in 2002 and again in 2007) that the pipeline’s acquisition and conversion to interstate natural gas service provided benefits to consumers by increasing competition and access to new supplies — findings that were never challenged on appeal from either certification. The Commission appropriately relied on its previous determinations for that single aspect of its multi-factor analysis in the instant case. *See* Remand Rehearing Order at P 49, JA 1181.

¹⁰ Shortly after the Court issued its *Missouri* opinion, MoGas filed supplemental information before FERC regarding the acquisition of the TransMississippi facilities; the Missouri Commission argued that the supplemental filing raised material issues of fact that required a hearing. The Commission agreed and set the issue for hearing. 133 FERC ¶ 61,115 at PP 9-11, JA 90-91.

purchase price for the TransMississippi facilities did indeed contain an acquisition premium. *See* Remand Order at PP 75-78, JA 1118. The Commission then applied its benefits exceptions test. *See supra* Part II.A.2.

In the *Missouri* opinion, this Court did not mandate specific elements of the test, but drew upon a number of FERC precedents (as well as its own *Rio Grande* opinion) in noting that:

The benefits exception to the rule disallowing acquisition premiums takes into account (1) whether the acquired facility is being put to a new use; and (2) whether the “purchaser has demonstrated specific dollar benefits resulting directly from the sale.” FERC has also considered (3) whether the transaction at issue is an “arms length” sale between affiliated parties; and (4) whether the purchase price of the asset at issue is less than the cost of constructing a comparable facility.

601 F.3d at 586 (internal citations omitted). The Court faulted the Commission for failing to address any of those factors (“FERC did not directly evaluate the [TransMississippi] premium according to any of the elements of the benefits exception test” (*id.*)), or to offer any “meaningful distinction” between the alleged TransMississippi premium and other premiums that the Commission had

“Courts generally accord agencies broad discretion in fashioning hearing procedures.” *See, e.g., Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 125 (D.C. Cir. 1989) (internal quotation marks and citations omitted); *see generally Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (agencies generally “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties”) (internal quotation marks and citations omitted).

disallowed (*id.* at 588), or even to determine whether the 2001 purchase price did include a premium (*see id.* at 587).

The Court did not, however, suggest that its enumeration of factors constituted a four-pronged test, as to which an applicant must separately meet every factor, nor would FERC precedent support that interpretation. *See* Remand Rehearing Order at P 48 (“We do not interpret” the Court’s list in *Missouri* of past factors “as requiring that both elements two and four must be separately met”; that reading would be “at odds with Commission precedent”), JA 1181. Indeed, as noted above, this Court had previously (in a case involving a conversion to new use) summarized the two-prong test as allowing an acquisition premium on a showing “that: (1) an acquired facility is being put to new use, and (2) the purchase price is less than the cost of constructing a comparable facility.” *Rio Grande*, 178 F.3d at 542 (citing *Longhorn*, 73 FERC at 62,112-13).

Missouri contends — incorrectly — that the Commission viewed satisfaction of the fourth factor as the “sole, determinative” criterion. Br. 39; *see also* Br. 19 (“FERC asserts that because the Court’s fourth factor . . . is met, FERC’s inquiry is at an end.”). In fact, the Commission also made specific findings — unchallenged here — that the acquired facility is being put to a new use (the first factor) and that the TransMississippi acquisition was an “arms length” sale between unaffiliated parties (the third factor), and declined to revisit its

previous determination that the converted facility provided benefits (the second). *See* Remand Order at PP 95, 125-26, JA 1121, 1126-27; *supra* pp. 13-14. And, in claiming that the Commission did not “examine[] all four factors identified by the Court” (Br. 19), Missouri ignores the Commission’s long-held view that, in conversion cases, the fourth quantifies the specific dollar benefits as proof of the second. *See supra* Part II.A.2.b. The Commission merely rejected Missouri’s claim that a pipeline must show *other* specific benefits *in addition to* showing that the purchase price was less than the cost of new construction. *See* Remand Rehearing Order at P 50, JA 1181.

Therefore, the challenged orders, in which the Commission carefully considered whether the TransMississippi purchase price contained an acquisition premium and whether its inclusion in rate base was allowed under FERC precedent, provided the factual determinations and legal analysis that this Court found lacking in the previous orders and are consistent with this Court’s instructions on remand.

B. Missouri’s Remaining Arguments Are Without Merit

As noted *supra* at p. 18, Missouri does not challenge the Commission’s numerous findings of fact or its determinations as to other factors (i.e., new use and arms-length) on appeal. The arguments that it does present — that the relevant precedents should be interpreted differently and that the TransMississippi facilities

do not benefit customers because state regulators did not want a FERC-jurisdictional system — are without merit.

1. Missouri Disregards The Commission’s Actual Reasoning And Offers Alternative Interpretations Of FERC Precedents Based On Unsupported “Inferences”

Missouri asserts that FERC precedent is “muddled.” Br. 32. As discussed *supra* in Part II.A.1, however, the Commission’s approach to the “special circumstances” of pipeline facilities converted to a new use (usually, as here, oil to natural gas) has in fact been consistent for decades.

Moreover, this Court affords substantial deference to the Commission’s interpretation of its own precedents. *See Columbia Gas*, 477 F.3d at 743; *NSTAR Elec. & Gas*, 481 F.3d at 799. Nevertheless, Missouri urges its own alternative readings of past FERC orders that disregard the Commission’s stated rationales and rest entirely on creative extrapolation. In its protracted dissection of key precedents (*see* Br. 20-44), Missouri strains to distinguish the Commission’s holdings with “inference” (Br. 29, 33, 34) and “suggest[ion]” (Br. 31, 34). *See also* Br. 25, 37 (constructing “[t]he totality of the facts” and “totality of circumstances” in *Natural*); 21 (assuming basis for finding in *Longhorn* “although it was unstated in FERC’s decision”); 35 (distinguishing *Crossroads* based on factors that Missouri admits the Commission “did not explicitly state”); 29 n.99

(conceding that the Commission, in *Enbridge Energy*, “didn’t specifically state reliance” on facts from which Missouri nevertheless draws a “strong inference”).

In drawing its own suppositions, Missouri attributes particular significance to an apparent absence of customer opposition to the acquisition premiums in numerous cases (Br. 24, 25, 30, 31, 34, 37, 38-39, 44), concluding that the lack of opposition served as proof of benefits to customers (in contrast, presumably, to the opposition here). *See* Br. 34 n.114 (“the absence of objection suggests benefits”). Missouri’s reading, however, is not supported by the Commission’s stated rationale in the orders themselves — “There is no language in . . . *Cities*, *Natural*, or *Crossroads* that suggests that customer support or a lack of customer opposition was an essential factor in the Commission’s findings” Remand Rehearing Order at P 50, JA 1181.¹¹ *See also id.* at PP 51-54, 57 (refuting Missouri’s various interpretations, JA 1181-83).

If, instead, Missouri means to argue that the Commission found it unnecessary to consider the benefits fully where (indeed, *because*) customers did not object, that argument ignores the Commission’s statutory responsibilities in

¹¹ Moreover, the Commission reasonably rejected what would amount to a presumption, based on negative inference (i.e. absence of opposition), as sufficient proof of commensurate benefits — an approach that, in any event, might be difficult to square with the substantial evidence standard — concluding that it was “at odds with” the Commission’s independent statutory obligation to protect the public interest. *Id.*

every certification case. The Commission “has an independent obligation under [Natural Gas Act] section 7 to ensure that initial rates are in the public interest.” *Id.*; see also *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003) (“Section 7 imposes a duty on FERC to determine for itself whether the rates it approves are in the public interest.”), cited in Remand Rehearing Order at P 50 n.88, JA 1186. Cf. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (even where Commission “may be able to infer” from shippers’ agreement that a certain charge served their interests, it had an independent obligation to determine whether the charge served the public interest: “the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate supply of gas at a reasonable price.”) (citations omitted). Thus, the Commission fully considered whether the benefits exception was met in each case, whether or not any party objected to the costs.

2. Missouri’s Argument That It Did Not Want The Facilities Revisits Its Unsuccessful Opposition To The Jurisdictional Change

Missouri’s arguments on appeal, aside from its efforts to explain away FERC precedents, seek to revive its core objection from the outset of the 2006 certificate proceeding: that MoGas chose to consolidate the intrastate pipeline systems of Missouri Pipeline and Missouri Gas, formerly subject to the Missouri Commission’s jurisdiction, into a single interstate system under FERC’s exclusive

jurisdiction. State regulators had prevented that outcome since the late 1980s, first by mandating that the TransMississippi facilities remain idle, and later by requiring that Missouri Interstate flow gas only into Missouri to preserve the rest of the system's intrastate status. *See supra* pp. 6-7. In the 2006 certificate proceeding, Missouri argued that the change to federal jurisdiction was improper — a position that the Commission rejected and that Missouri never pursued on judicial review. *See* 2007 Certificate Order at P 30 (rejecting Missouri's objections that MoGas was improperly seeking to change its jurisdictional status and that it should be required to show changed circumstances to warrant a jurisdictional change), JA 6; 2008 Certificate Rehearing Order at PP 7, 46, 48 (same), JA 26, 33.

Thus, Missouri contends that the TransMississippi purchase price was not a benefit, even though it was less than the cost of construction, because one or more customers (and state regulators) *did not want this interstate pipeline system at all*. *See* Br. 42 (arguing that customers had previously used intrastate facilities, and that one particular customer, Ameren, had not needed or used the TransMississippi pipeline); *id.* n.151 (“By way of analogy, a car sales person may tout the value of a piece of used versus new equipment added to a customer[']s car, but if the customer finds no value in the equipment, both options are only an extra cost.”). (Missouri concedes that, following the merger, “Ameren was able to make certain new uses of the [TransMississippi] Facilities” (Br. 43) (though Missouri and

Ameren still took the position that such uses did not provide sufficient benefits to justify the acquisition premium).)

As discussed *supra* in Part II.A.2.a, however, the Commission had already determined that certificating the interstate pipeline would serve the public interest. In deciding to issue a certificate of public convenience and necessity placing the TransMississippi facilities into interstate service under federal regulation, the Commission “already addressed the initial question as to whether there are benefits to including the cost of the [TransMississippi] facilities in initial rates.” Remand Rehearing Order at P 49 (citing 2002 Certificate Order at P 18), JA 1181. And in deciding to approve the merger of the Missouri Gas and Missouri Pipeline systems with the TransMississippi pipeline to create the single interstate MoGas system, the Commission likewise already determined that authorizing that interstate service would benefit the public interest. *See* 2008 Certificate Rehearing Order at PP 79, 81, JA 40. Accordingly, the Commission appropriately declined to revisit the fundamental question of whether certificating MoGas’s interstate pipeline system was in the public interest:

Missouri’s . . . assertion that the Commission ignored the “fact that rates would be lower still if the [TransMississippi] facilities were excluded altogether” appears to challenge the Commission’s issuance of a certificate of public convenience and necessity to place the . . . facilities in interstate service, an issue not before us in this proceeding.

Remand Rehearing Order at P 55 n.93, JA 1187.

To the extent that Missouri seeks to relitigate those matters decided in prior FERC orders (without challenge on judicial review), such efforts constitute impermissible, untimely collateral attacks. *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (under substantially identical provisions of Federal Power Act, courts lack jurisdiction over collateral attacks on prior FERC orders). Therefore, the underlying question whether the Commission appropriately authorized MoGas to integrate its formerly intrastate facilities into a FERC-jurisdictional interstate pipeline is not before this Court.

CONCLUSION

For the reasons stated, the petition should be denied and the challenged FERC Orders should be affirmed.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ Carol J. Banta
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901

June 25, 2014
Final Brief: August 25, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent contains 9,646 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Carol J. Banta
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901

August 25, 2014

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§ 715l. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

- 717. Regulation of natural gas companies.
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§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to

the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

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

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

- (1) not otherwise a natural-gas company; or
- (2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102-486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109-58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109-58 inserted “and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,” after “such transportation or sale.”

1992—Subsec. (d). Pub. L. 102-486 added subsec. (d).

(6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) of this section in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, §3A, as added Pub. L. 109–58, title III, §311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations af-

fecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such

suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87-454, May 21, 1962, 76 Stat. 72; Pub. L. 109-58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95-621, Nov. 9, 1978, 92 Stat. 3350, as

amended, which is classified generally to chapter 60 (§3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109-58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87-454 inserted “or gas distributing company” after “State commission”, and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102-104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102-486, title IV, §408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c-1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, §4A, as added Pub. L. 109-58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

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(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87-454, May 21, 1962, 76 Stat. 72; Pub. L. 109-58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

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(June 21, 1938, ch. 556, §4A, as added Pub. L. 109-58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the juris-

diction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the juris-

diction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter “without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States” are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

“Chapter 51 and subchapter III of chapter 53 of title 5” substituted in text for “the Classification Act of 1949, as amended” on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted “Classification Act of 1949” for “Classification Act of 1923”.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No 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 so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review**(1) In general**

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or oper-

ated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85-791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89-454, as added by Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amend-

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 25th day of August 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

Amy Wagenfeld Beizer
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW, Suite 700
Washington, DC 20007-3877
Email

Paul Korman
Van Ness Feldman LLP
1050 Thomas Jefferson Street, NW, Suite 700
Washington, DC 20007-3877
Email

Stephen Charles Pearson
Spiegel & McDiarmid LLP
1875 Eye Street, NW, Suite 700
Washington, DC 20006
Email

Lera Shemwell
Missouri Public Service Commission
Harry S. Truman Office Building
PO Box 360
Jefferson City, MO 65102-0000
Email

/s/ Carol J. Banta
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: 202 502-6433
Fax: 202 273-0901
Email: carol.banta@ferc.gov