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

NO. 92-1573

KN ENERGY, INC.,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

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

STATEMENT OF THE ISSUE

Whether the Commission reasonably concluded that the X-3 transportation service, which Williston Basin Interstate Pipeline Company (Williston) contracted to provide KN Energy, Inc. (KN), ranks below all firm sales and transportation services in priority for the use of pipeline capacity, if and when Williston must interrupt pipeline services to some of its customers during periods of peak usage.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory provisions are Sections 4, 5, and 7 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, and 717f. The pertinent regulatory provisions are 18 C.F.R. §§ 284.8, 284.10. These provisions are contained in the Statutory and Regulatory Appendix to this brief.

JURISDICTION

The jurisdiction of this Court arises under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

REFERENCE TO PARTIES AND RULINGS

Petitioner, KN, is an interstate natural gas pipeline that transports natural gas from production fields in Montana to a receipt point on its pipeline system in Wyoming under a Commission-certificated transportation and exchange arrangement with intervenor Williston, under Williston's X-3 rate schedule. The instant case concerns a tariff filing made by Williston under Section 4 of the Gas Act to provide "open access" transportation services pursuant to Part 284 of the Commission's regulations, which classified the X-3 transportation service, for purposes of capacity allocation, as ranking lower in priority to all firm services, whether sales or transportation.

The orders for which review is sought are: (1) Williston Basin Interstate Pipeline Company, 56 FERC ¶ 61,103 (1991) (R. 1321-1348; J.A. 52-64); (2) and Williston Basin Interstate Pipeline Company, 60 FERC ¶ 61,262 (1992) (R. 1349-1375; J.A. 65-78).

STATEMENT OF THE CASE

A. Background

1. The X-3 Transportation Contract Between Williston's Predecessor And KN

In May 1974, KN and Montana Dakota Utilities, Inc. ("MDU"), Williston's predecessor, 1/ executed an agreement (the X-3

1/ In 1982, MDU underwent a corporate reorganization intended to separate its federally regulated interstate pipeline facilities and services from its state-regulated facilities and retail services. MDU created Williston, a wholly owned subsidiary, to serve as the sole entity regulated by the (continued...)

agreement) that provides for the transportation (by exchange) of natural gas by MDU for KN. Under the X-3 agreement, KN's gas is delivered to MDU at an MDU-owned compressor located near the Bowdoin Gas Field in Montana, while thermally equivalent volumes of gas are concurrently redelivered to KN by MDU at a KN receipt point in Wyoming. Article I, Section 1 of the X-3 agreement provides:

> KN agrees to deliver volumes of natural gas and MDU agrees to receive such gas up to the capacity of MDU's existing facilities as set out in Exhibit "A" hereto and by reference hereby incorporated herein which is in excess of that capacity needed for MDU's own volume requirements.

(R. 1964; J.A. 90) (Emphasis added.) Section 6 of Article I of that agreement also provides:

> In the event, during peak loads on MDU's gas facility, as set out in exhibit "A," it becomes necessary to temporarily interrupt the redelivery of natural gas to KN at the redelivery point, MDU agrees that prior to such temporary interruption of redelivery to KN, it will curtail the delivery to its interruptible industrial customers, however, under this agreement, MDU shall never be required to interrupt or suspend service to its firm customers.

(R. 1971; J.A. 97) (Emphasis added.) On May 11, 1977, the Commission's predecessor, the Federal Power Commission issued a certificate of public convenience and necessity allowing the X-3

1/(...continued)
Commission, while MDU, thereafter an owner of only local distribution companies, would thenceforth be regulated solely by state commissions.

service to become operational. Kansas-Nebraska Natural Gas Company, Inc., et al., 58 FPC 1738 (1977).

2. **The Subsequent Rate Design Rulings Of The Commission Regarding the X-3 Rate**

a. In 1985, the Commission approved a settlement granting Williston a certificate of public convenience and necessity to operate MDU's former interstate gas transmission facilities, and to provide the services (including the X-3 service) which previously had been certificated to MDU, and authorizing MDU to abandon these facilities and services. A number of issues, however, were reserved for evidentiary hearing before an Administrative Law Judge (ALJ), including the proper design of rates for Williston's X-3 rate schedule. Williston Basin Interstate Pipeline Co., et al., 30 FERC ¶ 61,143 (1985).

Among the reserved issues was whether the X-3 service should be considered "firm" or "interruptible." 2/ Williston proposed to treat the X-3 service as firm (since it had never been interrupted) to justify allocating it a full share of fixed costs (i.e., pipeline capacity costs). On the other hand, KN's

---

2/ As this Court recognized in Hadson Gas Systems, Inc. v. FERC, 877 F.2d 66, 67 (D.C. Cir. 1989), in the natural gas industry:

> [a] shipper may contract for two types of transportation: firm service and interruptible service. A contract for firm service guarantees that a certain capacity will be available to the shipper at a certain time. An interruptible service contract, in contrast, does not guarantee fixed capacity at a set time, but ensures only that transportation will be provided "as available," subject to firm service contracts.

witnesses opposed this full allocation of capacity costs asserting that the X-3 service was "interruptible."

Following the hearings, the ALJ issued an initial decision, Williston Basin Interstate Pipeline Company, 35 FERC ¶ 63,064 (1986), ruling that it would not be proper to charge KN the same costs as a firm customer, when its service was subject to interruption. In his view, KN had bargained for interruptible service and, therefore, that was "the level of service to which it is entitled, and the level of service which it may demand . . . . which must be considered in designing a just and reasonable rate." 35 FERC at p. 65,223.

b. The Commission affirmed the ALJ's initial decision declaring the X-3 service to be interruptible. Williston Basin Interstate Pipeline Company, 48 FERC ¶ 61,034 (1989). Recognizing, however, that the X-3 service was almost firm in quality because it had never in fact been interrupted, the Commission ordered a one-part 100% load factor rate for that service, 3/ which would allocate a full apportionment of fixed costs to KN for that service -- but only when KN actually used the service. Despite the fact that the 100% load factor rate would increase the share of fixed costs allocated to the X-3 service, the Commission determined that the substituted rate

---

3/ A 100% load factor rate is "the rate paid by a customer that uses all of the units of gas it has contracted to use. As load factor declines from 100%, the per-unit cost to the customer increases, because the costs allocated to the service must be recovered over a smaller number of units." Public Service Commission of the State of New York v. FERC, 813 F.2d 448, 452 n.3 (D.C. Cir. 1987).

still reflected the interruptible nature of the service because KN would not be assessed any demand charges for the service, and thus, unlike firm customers, KN would "not bear any costs if it chooses not to transport or if it is interrupted . . . ." 48 FERC at p. 61,178.

c. On rehearing, certain producers from the Bowdoin Field intervened raising concerns about the Commission's characterization of the X-3 service as interruptible, given the possible implications of that finding for Williston's recently filed open access tariff, 4/ which had been set for hearing to determine, inter alia, KN's priority to pipeline capacity under Williston's new open access regime. 5/ Rejecting the

---

4/ Prior to open access, there had not been any firm transportation customers on Williston's system. On June 24, 1988, Williston filed tariff sheets with the Commission pursuant to Section 4 of the Natural Gas Act to provide open access transportation under Section 311 of the NGPA and Part 284 of the Commission's regulations, 18 C.F.R. Part 284. See Williston Basin Interstate Pipeline Company, Docket No. RP88-197-000, 44 FERC ¶ 61,129 (1988).

Pursuant to 18 C.F.R. §§ 284.8(a) and 284.10, Williston's tariff sheets included a Rate Schedule FT-1 to govern the firm transportation service offered by Williston, and also provided the opportunity for firm sales customers to convert to firm transportation. The Commission suspended the tariff filing, and made it subject to evidentiary hearings and to refund. Williston's open access transportation service commenced on October 3, 1988.

5/ Section 284.10 of the regulations requires open access pipelines to offer their existing firm sales customers the option of converting to firm transportation service. In its open access case (Docket No. RP88-197-000), Williston proposed to rank the X-3 service priority (when capacity was constrained due to peak demand) below its firm sales and all transportation customers, converting and nonconverting.

(continued...)

producers' suggestions that by finding the X-3 service to be interruptible, the Commission "had somehow changed the nature of the X-3 service," the Commission, 50 FERC ¶ 61,284 (1990), declared:

> Whether a given service is firm or interruptible depends upon whether the rate schedule provides that the customer can demand service. If a service is interruptible, then no demand charge may be billed, and, in fact, none is provided for in the X-3 rate schedule. The charge as filed in this proceeding is a one-part volumetric rate.

Id. at p. 61,909; see also note 2, supra, at p.4.

The Commission went on to explain, however, that while it did "not hold that KN's service is interruptible only for rate design purposes," it would not, in the context of a rate design case, decide issues "regarding the priority KN's interruptible X-3 service should receive under Williston's open access allocation procedures . . . which are better addressed in the context of Williston's open access proceedings." 50 FERC at p. 61,910. The Commission further explained that resolving capacity allocation issues in the open access proceeding involves

---

5/(...continued)

> KN and the producers opposed this capacity allocation priority scheme, initially claiming that KN's X-3 service should have priority over all new firm transportation services. However, these parties later acquiesced, see 56 FERC at p. 61,357; R. 1341; J.A. 61, to the ALJ's finding that Williston's converting firm transportation customers had priority over X-3 service.

an interpretation of the X-3 contract that was executed in 1974. 50 FERC at p. 61,910 n.73. 6/

B. The Rulings in the Instant Open Access Case

1. The Decision of the ALJ. Following completion of hearings on Williston's open access tariff filing, an ALJ issued an initial decision on the X-3 service's priority. Noting that Article 1, section 1 of the X-3 agreement provided that MDU would transport gas for KN only "up to the capacity of MDU's existing facilities . . . which is in excess of that capacity needed for MDU's own volume requirements," the ALJ interpreted MDU's "own volume requirements" to include not only the capacity needed to serve the present and future demand of MDU sales customers in existence in 1974 when the agreement was executed, but also the initial and future sales demand of any entities that may become MDU customers at any time during the 20-year life of the X-3 agreement. 51 FERC ¶ 63,007, at p. 65,030; R. 1312; J.A. 45. The ALJ also found that firm transportation customers that had

---

6/ On July 20, 1990, over KN's protest (in Docket No. RP90-148), Williston filed a new tariff which, inter alia, specified that the X-3 service shall have the highest priority of all interruptible services, but also clarified that capacity would not be reserved for any interruptible transportation services, including the X-3 service.

The Commission, 52 FERC ¶ 61,197 (1990), accepted these tariff sheets subject to the outcome of the proceedings under review here. In its orders denying rehearing, see 52 FERC ¶ 61,309 (990) and 53 FERC ¶ 61,068 (1990), the Commission rejected KN's and other parties' claims that this tariff filing so changed the X-3 service that the Commission could not accept the tariff without acting under NGA § 5. This Court thereafter vacated these orders as moot in Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992).

exercised their option to convert from firm sales to firm transportation service pursuant to 18 C.F.R. § 284.10 likewise had priority over X-3 service, since:

> [w]hether their gas is the subject of firm purchase or firm transportation should make no difference. The same capacity is needed, and it was that capacity which the parties envisioned as having priority under the contract.

51 FERC at p. 65,030, R. 1313; J.A. 46.

KN thereafter acquiesced in the ALJ's findings that converted firm transportation service enjoyed a priority higher than the X-3 service. See 56 FERC at p. 61,357; R. 1341; J.A. 61. However, it filed exceptions to the decision concerning the ALJ's failure explicitly to hold that the X-3 service's priority should take precedence over nonconverted firm transportation service. R. 3316. 7/

2. The First Order Of the Commission. On July 23, 1991, the Commission issued the first of the two orders here under review. The Commission agreed with the ALJ that the X-3 service was required to be interrupted to satisfy the volume requirements of firm sales service and converting firm transportation service, but found that the initial decision failed to "expressly determine" the priority of X-3 service vis-a-vis the volume

---

7/ In an order denying KN's motion for clarification, R. 2979-80; J.A. 143-44, the ALJ appeared to agree with KN that the initial decision "implicitly" held that the X-3 service was not subordinate to nonconverted firm transportation service in terms of capacity allocation priority.

requirements of Williston's nonconverting firm transportation customers. 56 FERC ¶ 61,103 (1991) at p. 61,357; R. 1340; J.A. 61. As to the latter issue, the Commission held that the X-3 service is also interruptible for capacity allocation priority purposes, and thus ranked lower that nonconverted firm transportation service. 56 FERC at p. 61,358; R. 1343; J.A. 62. In arriving at this conclusion, the Commission examined the parties' intent as gleaned from the language of the contract, its regulatory context and other extrinsic evidence. Id.

First, the Commission analyzed the interrelationship of Sections 1 and 6 of Article I to find that "the plain language of the X-3 contract is most reasonably read as providing for an interruptible service." 56 FERC at p. 61,359; R. 1344; J.A 63. The Commission thus found that MDU's reservation unto itself of all capacity needed to satisfy its "own volume requirements" (Article I, Section 1), coupled with the proviso in Article I, Section 6 that "MDU shall never be required to interrupt or suspend service to its firm customers," to be compelling evidence that MDU did not intend to guarantee KN any reservation of capacity in 1974 when the agreement was executed. Thus, while the Commission agreed with KN that the parties had intended the X-3 service to have the highest priority of all of Williston's interruptible transportation services, it pointed out that a high priority interruptible service is not the same as having a "firm" service. 56 FERC at p. 61,359; R. 1345; J.A. 63. A firm service, the Commission explained, "by its very nature, must be

scheduled ahead of an interruptible service," and may "bump" a high priority interruptible service. Id.

The Commission also considered conditions prevailing in the natural gas industry, and the regulatory context in which the X-3 agreement was executed, as bolstering its conclusion that Williston did not intend to extend any capacity guarantees on its system to the X-3 rate. Specifically, the Commission reasoned that because of the preeminence of its merchant (as opposed to transportation) function in 1974, the only capacity that MDU agreed to make available for transportation on its system was interruptible capacity surplus to its firm sales. Id.

It further observed, however, that by 1988 when Williston commenced service as an open access transporter, the prevailing circumstances had changed following the Commission's adoption of its open access transportation regulations, 18 C.F.R. Part 284. The Commission explained that, once the Commission issued its open access regulations, and Williston decided to provide open access transportation, the regulations required Williston not only to offer firm transportation service, but also to accord that service (whether converted or nonconverted) the same priority for capacity allocation purposes that was previously enjoyed by firm sales. 56 FERC at p. 61,359-60; R. 1345; J.A. 63-64. See also 18 C.F.R. § 284.8(b).

3. The Commission's Order On Rehearing. On rehearing, the Commission adhered to its conclusion that X-3 service was interruptible by all firm transportation, converted and

nonconverted, reasoning that the X-3 agreement did not preclude Williston from offering firm transportation service that would take precedence over X-3 service. The Commission found that KN did not anticipate that MDU might provide such service during the 20-year term of the contract, and therefore had not negotiated any contract language barring such a result. 60 FERC at p. 61,877; R. 1372; J.A. 76.

The Commission further found that nothing in the X-3 agreement restricted Williston from filing its open access tariff equating firm transportation services with firm sales service in terms of capacity allocation priority. 60 FERC at p. 61,877; R. 1372; J.A. 76. Finally, the Commission concluded that this tariff filing did not degrade the X-3 service or change unilaterally any contract obligation that Williston owed KN. Id. at 61,877-78; R. 1372; J.A. 76-77.

This appeal followed.

SUMMARY OF ARGUMENT

I.

Petitioner has satisfied the jurisdictional prerequisites for review under Section 19(b) of the Natural Gas Act, and this case is ripe for immediate judicial review. The orders under review confirm the legality of the capacity allocation priorities established by Williston's open access tariff, and consequently, if KN wishes to obtain guaranteed access to capacity on Williston's pipeline system for transportation of gas from the Bowdoin Field region, it must contract separately with Williston for firm transportation services. The orders under review also appear likely to have direct impact on issues pending in collateral U.S. district court litigation involving Williston and KN.

II.

The Commission reasonably held the X-3 agreement provided for a transportation service that was subordinate to firm sales and all firm transportation for capacity allocation purposes.

A.

This Court has repeatedly recognized that the Commission's construction of ambiguous provisions in agreements on file with it, if reasonable, is entitled to deference. Deference is particularly appropriate here where the Commission had previously approved the X-3 agreement, making it more closely akin to an order of the Commission than to an agreement between private parties.

B.

1. The X-3 agreement was ambiguous. Thus, Sections 1 and 6 of Article I of the X-3 agreement did not simply reserve priority over X-3 service for those who are or would become MDU/Williston's firm sales customers. Instead, these sections of the contract reserved a priority over X-3 for MDU's "own volume requirements" and for MDU's "firm customers." Thus, an ambiguity arose from the contract language because it was unclear whether the agreement reserved capacity for firm sales and transportation customers, or only firm sales customers.

2. The Commission's construction of the ambiguous X-3 agreement was a reasonable one, and therefore should be upheld. It is fair to read that agreement as providing that KN would be entitled to a transportation service that would always be subject to MDU's own volume requirements, and would always be interrupted before service to MDU's "firm customers" would be suspended, regardless of whether firm sales or firm transportation is involved. Extrinsic evidence attending the parties' execution of the X-3 agreement in 1974 also supports the Commission's conclusion that the parties did not provide for the eventuality of firm transportation taking place on the system. All that KN has shown is that it did not accurately project the degree and type of firm service that would be provided in the future when it signed the subject X-3 service agreement.

3. The Commission's refusal to rewrite sections 1 and 6 of Article I to place X-3 service ahead of Part 284 nonconverted

firm transportation service was consistent with well-established principles of contract law, which hold that courts are not free to save parties from contractual mistakes or oversights. As the Commission correctly found, if KN had wanted to assure its priority over any firm transportation service that MDU might offer in the future, it could have said so in the X-3 agreement. As the Commission observed, firm transportation service was "not unthinkable" at the time of the X-3 contract's execution.

4. The Commission also reasonably found that nothing in the X-3 contract prohibited Williston from unilaterally filing an open access transportation tariff. Article VIII, section 1, of the X-3 agreement provides that "the agreement is subject to all valid legislation . . . and to all valid present or future orders, rules, or regulations," and thus expressly provides for interpretation of that agreement in light of subsequent regulatory policies.

5. It was especially reasonable for the Commission to base its construction primarily on the express language of the agreement where parties had shifted positions in recent years about the nature of the X-3 service, which tended to obfuscate rather than clarify the evidence of their intent at the time of the contract's execution.

C.

Petitioner's claims to the contrary are without merit.

1. The Commission did not "override the conclusions" of its ALJ in this case that nonconverting firm transportation

service was subordinate in capacity allocation priority to X-3's priority. On the contrary, a careful review of the ALJ's decision reveals that he did not analyze Rate Schedule X-3's priority vis-a-vis nonconverted firm transportation service; rather, his initial decision was completely silent on that issue.

2. Petitioner's claims that express language in the X-3 agreement and the language of the authorizing transportation certificate support its interpretation of that agreement are groundless.

a. The phrase in the preamble that in 1974 MDU had capacity on its pipeline in excess of its "own gas requirements," does not imply transportation or sales, and, in any event, was not repeated in Article I of the agreement where the parties employed the broader terminology to describe what would rank higher than X-3 service in capacity allocation priority.

b. Similarly, the words "temporarily interrupt" in Article I, section 6, do not suggest that KN was guaranteed only minor interruptions of the kind experienced by short-lived cold weather conditions. The words "temporarily interrupt" and "peak loads" necessarily take their meaning from the case-specific instances in which there arises a need to serve MDU's volume requirements to the exclusion of all or part of KN's X-3 service needs.

c. Petitioner's reliance on a generalized "Remedies" provision in the X-3 agreement is equally misplaced because this

remedies clause would be equally useful to the parties regardless of X-3's capacity allocation ranking.

d. The Commission's characterization of the X-3 service as "required by the public convenience and necessity," in its 1977 certificate order, did not reflect anything special about the X-3 service. That language is a common expression that the Commission used in virtually all of its certificate orders authorizing interruptible transportation service around the time that it issued the X-3 certificate.

3. Petitioner's own brief illustrates that in settling on the language of the X-3 contract, KN conducted its own risk assessment without much thought given as to how its service might be affected when and if MDU/Williston ever offered firm transportation service.

4. The Commission reasonably concluded that Williston's open access tariff filing did not degrade the X-3 service to the point of abandoning the service, because the tariff provisions were consistent with the Commission's construction of the X-3 agreement, which called for interruptible service.

5. Nor is there any merit to the claim that, by filing the open access tariff, Williston changed its obligations under the X-3 contract. To the contrary, as the Commission held, this filing made clear that the X-3 service was interruptible, not firm.

6. Finally, petitioner contends that Williston's open access tariff filing, which ranked new firm transportation

service ahead of X-3 service, was "voluntary." This view, however, ignores the relevant market circumstances which, in a practical sense, more than likely compelled the filing.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER SECTION 19(b) OF THE NATURAL GAS ACT, AND THIS CASE IS RIPE FOR JUDICIAL REVIEW.

As the parties were briefing an earlier, related appeal, KN filed the petition for review in this case. Recognizing that the orders under review here contained a more comprehensive analysis of the X-3 service's capacity allocation priority, and that there was no longer any purpose to be served by litigating the earlier case (No. 92-1182), 8/ the Commission and KN jointly filed a motion for voluntary remand. On May 17, 1993, this Court granted the joint motion and remanded the case. Following the remand of Case No. 92-1182, the Commission, 63 FERC ¶ 61,260 (1993), partially vacated its orders in the complaint proceeding to remove the challenged reasoning. 9/

Manifestly, the Commission's partial vacatur of the orders in the earlier case did not moot the issue of the lawfulness of Williston's open access tariff and the orders under review in

---

8/ In this earlier case, the Commission, 58 FERC ¶ 61,001 (1992), reh'g denied, 59 FERC ¶ 61,011 (1992), dismissed Williston's administrative complaint, holding that the parties should pursue their contract claims and defenses in the courts, but also expressing the view that the open access tariff, which established the X-3 service as subordinate to all firm services for capacity allocation purposes, should be considered lawful subject to the final outcome of this proceeding. KN thereafter filed a petition for review in this Court, docketed as KN Energy, Inc. v. FERC, No. 92-1182, challenging the Commission's reasoning that Williston's open access tariff should be considered lawful until this proceeding becomes final.

9/ The orders remained in effect to the extent that the Commission ruled that the parties should pursue their contract claims and defenses in the courts.

this case. The orders under review thus confirm the legality of the capacity allocation priorities established by Williston's open access tariff, and consequently, if KN wishes to obtain firm transportation service for Bowdoin Field gas, it must contract separately with Williston for such firm services.

As Petitioner points out (Pet. Br. 17), moreover, there are two lawsuits related to two Williston/KN transportation service contracts, separate from the X-3 contract, currently pending in U.S. district court, sub. nom., KN Energy, Inc. v. Williston Basin Interstate Pipeline Co., U.S.D.C. Montana, Billings Division. No. CV91-96-BLG-JSD; and Williston Basin Interstate Pipeline Co. v. KN Energy, Inc., U.S.D.C. Montana, Billings Division, No. CV92-216-BLG-JDS. The orders under review thus would appear not only to have an immediate effect of the X-3 service's capacity allocation priority, but also appear likely to have some impact on issues pending in the collateral litigation between the parties. See Great Lakes Gas Transmission Corp., v. FERC, 984 F.2d 426, 430-31 (D.C. Cir. 1993); compare Judith A. Moreau v. FERC, 982 F.2d 556, 567 (D.C. Cir. 1993).

II. THE COMMISSION REASONABLY HELD THE X-3 AGREEMENT PROVIDED FOR A TRANSPORTATION SERVICE THAT WAS SUBORDINATE TO FIRM SALES AND ALL FIRM TRANSPORTATION FOR CAPACITY ALLOCATION PURPOSES

A. The Commission Is Entitled To Deference In Its Construction Of Ambiguous Contractual Terms So Long As Its Construction Is Reasonable.

This Court has repeatedly recognized that the Commission's construction of ambiguous provisions in agreements on file with it, if reasonable, is entitled to deference. See, e.g., Williams

Natural Gas Company v. FERC, 3 F.3d 1544, 1549 (D.C. Cir. 1993); Alabama Power Co. v. FERC, 993 F.2d 1557, 1560 (D.C. Cir. 1993); Cajun Electric Power Cooperative, Inc. v. FERC, 924 F.2d 1132, 1135 (D.C. Cir. 1991); Tarpon Transmission Company v. FERC, 860 F.2d 439, 441-42 (D.C. Cir. 1988).

In National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1569 (D.C. Cir. 1987), cert. denied, 484 U.S. 869 (1987), this Court ruled that, unless the terms of an agreement are clear and unambiguous, a reviewing court is required to give deference to an agency's reading of the agreement "even where the issue simply involves the proper construction of language." In this Court's view, id. at 1569-70, that result follows from the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.11 (1984), that an agency's construction of ambiguous statutory provisions it is responsible for administering must be adopted so long as the interpretation is permissible, even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." 10/

10/ To the extent that Petitioner (Pet. Br. 19-20) relies on Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960) to suggest that this Court owes no deference to the Commission's construction of ambiguous agreements on file with it, that position has specifically been rejected twice by this Court. See Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1549 (D.C. Cir. 1993); National Fuel Gas Supply Corp. v. FERC, 811 F. 2d 1563, 1570. These cases both ruled that Texas Gas does not survive the Chevron decision.

This Court further explained in National Fuel that this rule of deference is rooted in the Commission's special expertise to construe agreements on file with it "where the understanding of the documents involved is enhanced by technical knowledge of industry conditions and practices." 811 F.2d at 1570-71, quoting Columbia Gas Transmission Corp. v. FPC, 530 F.2d 1056, 1059 (D.C. Cir. 1976). More recently, in Cajun Electric Power Cooperative, Inc. v. FERC, 924 F.2d 1132, 1135 (D.C. Cir. 1991) ("Cajun"), this Court noted that this deference principle is particularly appropriate where the agency has approved an agreement, thus making it more closely akin to an order of the Commission than to an agreement between private parties. According to this Court, "when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest," and therefore is entitled to just as much benefit of the doubt "as it would in interpreting its own orders, . . . its regulations . . . , or its authorizing statute." Id.

These principles are fully applicable here, since as we next show, the X-3 agreement is ambiguous, and the Commission's construction is a reasonable one.

B. The Commission's Interpretation Of The X-3 Agreement Should Be Affirmed Since The Agreement Is Ambiguous And The Commission's Construction Is Reasonable.

1. The X-3 agreement provides that X-3 service would be available only to the extent MDU had capacity in excess of its "own volume requirements" (Article I, section 1), and that KN shall be subject to temporary interruption during peak loads on

MDU's system because "MDU shall never be required to interrupt or suspend service to its firm customers." (Article I, section 6.) Indeed, KN does not dispute that this language places X-3 behind the priority enjoyed by MDU/Williston's firm sales customers, as well as firm sales customers that exercise their option to convert to firm transportation pursuant to 18 C.F.R. 284.10. See 56 FERC at p. 61,357; R. 1341; J.A 61. Reasoning, however, that MDU was only providing firm sales service at the time of the contract's execution, KN argues (Pet Br. 14) that the X-3 agreement places the X-3 service ahead of any new (e.g., nonconverting) firm transportation service that MDU or Williston might subsequently offer.

As the Commission correctly recognized, however, the language in sections 1 and 6 of Article I did not expressly limit the priority over X-3 service to those who are or were MDU/Williston's firm sales customers. 56 FERC at p. 61,359; R. 1344; J.A. 63. Instead, these sections of the contract reserved a priority over X-3 for MDU's "own volume requirements" and for MDU's "firm customers."

Thus, an ambiguity arose from the contract language because the agreement did not specify whether the terms "own volume requirements" of Article I, section 1 referred only to the volume requirements needed to serve MDU's firm sales customers, as opposed to both firm sales and transportation customers, and whether the term "firm customers" in section 6 of that article referred only to sales, or extended as well to such firm

transportation services as MDU might offer in the future. In the orders on review, the Commission recognized and resolved this ambiguity by stating:

> [t]he most reasonable interpretation we can draw from the express language of these provisions is that X-3 service was an interruptible service which was, in fact, subject at all times to interruption by all firm service, whether sales or transportation . . . .

56 FERC at p. 61,359; R. 1344; J.A. 63. (Emphasis added.) 11/

2. The Commission's construction of the ambiguous X-3 agreement was a reasonable one, and therefore should be upheld. Thus, it is fair to read that agreement as providing that KN would be entitled to a transportation service that would always be subject to MDU's own volume requirements, and would always be interrupted before service to MDU's "firm customers" would be suspended. See 56 FERC at p. 61,359; R.1344; J.A. 63. As the Commission correctly found, "the X-3 agreement puts the X-3 service in a lower priority to all firm service, without limiting that priority to being lower than all existing firm services." 60 FERC at p. 61,877; R. 1371; J.A. 76. (Emphasis in original.) The Commission therefore properly concluded that Williston was free as a contractual matter to enter upon firm transportation

---

11/ Petitioner is simply wrong in asserting (Pet. Br. 20) that the "Commission found no ambiguity in the X-3 agreement." By referring to its construction of the X-3 agreement as "the most reasonable interpretation," 56 FERC at p. 61,359; R. 1344; J.A. 63, the Commission implicitly conceded that there were other reasonable interpretations that could be accorded to that agreement.

agreements with other shippers without reserving pipeline capacity for the X-3 service.

The Commission also examined the extrinsic evidence attending the parties' execution of the X-3 agreement in 1974, and found that "the parties did not provide for the eventuality of firm transportation taking place on the system." 60 FERC at p. 61,879; R. 1374; J.A. 78. Petitioner now challenges that determination pointing (Pet. Br. 27-32) to the industry conditions that existed in 1974, and the elaborate steps KN had taken during an era of nationwide gas shortages to secure gas supplies off of its system, as extrinsic evidence showing KN's need for a high priority transportation service. This contention is without merit.

While the Commission agreed that the parties intended the X-3 service to be the highest priority interruptible service, that in and of itself would never transform X-3 transportation into firm service. 60 FERC at p. 61,877; R. 1371; J.A. 76. Thus, the Commission found nothing in the X-3 agreement that would indicate "that KN's interruptible priority was to change in response to future firm service agreements." Id. Accordingly, fully aware of KN's recitation of the general industry circumstances surrounding the contract's execution, as well as KN's efforts to secure gas supplies that would be transported under the X-3 agreement, 12/ the Commission nonetheless

---

12/ Most of the extrinsic evidence that KN relied on is presented at pp. 25-32 of Petitioner's opening brief filed with this Court.

concluded that KN had bargained for interruptible service, and that "[a]ll that KN has shown is that it did not accurately project the degree and type of firm service that would be provided in the future when it signed the subject X-3 service agreement." 60 FERC at p. 61,877; R. 1371-72; J.A. 76. In the Commission's view, this was "a latent deficiency in the contract and certificate that only manifested itself later with the advent of open access firm transportation." Id; R. 1372; J.A. 76.

3. Further, the Commission correctly found that the change in MDU/Williston's pipeline operations, from predominantly that of a merchant to primarily an open access transporter, was not a basis for rewriting the parties' contract. Indeed, the Commission's refusal to rewrite sections 1 and 6 of Article I to place X-3 service ahead of Part 284 nonconverted firm transportation service was consistent with well-established principles of contract law, which hold that courts are "not free to save parties from what it [i.e., the court] believes are contractual mistakes or oversights." Towers Hotel Corp. v. Rimmel, 871 F.2d 766, 773 (8th Cir. 1989); see also Morello v. Federal Barge Lines, Inc., 746 F.2d 1347, 1351 (8th Cir. 1984). As the First Circuit has explained:

> When the transaction is commercial, the principals practiced and represented by counsel, and the contract itself reasonably clear, it is far wiser for a court to honor the parties' words than to imply other and further promises out of thin air. We quite agree with Judge Learned Hand that, in business dealings, it does not in the end promote justice to seek strained

> interpretations in aid of those who do not protect themselves.

Triple-A Baseball Club v. Northeastern Baseball, 832 F.2d 214 (1st Cir. 1987) (inside quotations and case citations omitted).

To be sure, the Commission was well aware that, based on prevailing economic and industry circumstances in 1974 when the agreement was executed, both parties initially anticipated that the X-3 service would be infrequently interrupted. See 60 FERC at p. 61,877; R. 1371; J.A. 76. 13/ As the Commission explained, however, any expectations of "almost firm" service did not translate into a contractual guarantee of "firm" service. 14/ As the Commission also stated, in order to obtain firm service, a customer must specifically contract to reserve capacity. But, as the Commission found, the X-3 agreement did not extend KN any right to reserve capacity because its use of capacity was always subject to interruption. 60 FERC at p. 61,877; R. 1371; J.A. 76.

Thus, as the Commission correctly found, if KN had wanted to assure its priority over any firm transportation service that MDU

13/ Thus, the Commission did consider the industrial, economic and regulatory backdrop attending the X-3 contract's execution, consistent with Pennzoil Company v. FERC, 645 F.2d 360, 388 (5th Cir. 1981), but simply concluded that there was no evidence implying that MDU had intended to subordinate to X-3's priority any firm transportation service that it might wish to offer in the future.

14/ The Commission also observed that historically (and throughout the period at issue here), the Commission recognized only two types of service: firm and interruptible. The Commission concluded that "the X-3 service cannot be considered both . . . ." 60 FERC at p. 61,877; R. 1371; J.A. 76.

might offer in the future, it could have said so in the X-3 agreement. As the Commission observed, even though a pipeline's merchant function may have predominated in the natural gas industry when the contract was executed, firm transportation service was "not unthinkable" at that time. 60 FERC at p. 61,879; R. 1373; J.A. 78.

4. The Commission also reasonably rejected KN's claims that the X-3 contract somehow prohibited Williston from unilaterally filing an open access transportation tariff. Initially, the Commission stated that "KN has not shown what provision of the X-3 service agreement precludes Williston from becoming an open access transporter." 60 FERC at p. 61,878; R. 1372; J.A. 77. In addition, the Commission relied on Article VIII, section 1 of the X-3 agreement, which provides that "the agreement is subject to all valid legislation . . . and to all valid present or future orders, rules, or regulations." As the Commission correctly found:

> the agreement expressly provided for changes pursuant to legislation such as the NGPA, Commission regulations such as those concerning open access transportation under Part 284, and Commission orders such as the Commission's order accepting Williston's proposal to become an open access transporter under section 311 of the NGPA. Therefore, KN is in error in arguing that the Commission may not interpret KN's rights under Rate Schedule X-3 in light of subsequent open access policies, and is in error in arguing that its rights to capacity could never be made subservient to services that were not contemplated in 1974.

60 FERC at p. 61,877; R. 1371; J.A. 76.

5. Finally, it was especially reasonable for the Commission to base its construction primarily on a fair reading of the express language of the agreement, as opposed to either of the conflicting positions advocated by the parties, where as here the parties' shifting positions in recent years about the nature of the X-3 service have tended to obfuscate rather than clarify the evidence of their intent at the time of the contract's execution. 15/ For example, Williston had argued in several recent rate cases 16/ that the X-3 service was a firm transportation service for all purposes, because that service had never been interrupted, and therefore KN in fact had been receiving what amounts to a firm transportation service. It has since argued, however, that the X-3 service is interruptible for capacity allocation purposes (and thus ranks below all firm sales and transportation services), based on the Commission's holding in a separate rate case, see 48 FERC at p. 61,178-79, 50 FERC at

---

15/ Although it had an opportunity to do so at the hearing in this case, see Hearing Transcript ("Tr.") 1523; 2124; J.A. 161, 190, KN declined to proffer any witness to testify in support of its interpretation of the X-3 contract, i.e., that MDU intended to grant KN a priority over any future firm transportation service it might eventually provide, while also allowing KN to enjoy a lower, interruptible rate for service that ranks ahead of firm transportation service.

16/ See e.g., Williston Basin Interstate Pipeline Company, 35 FERC ¶ 63,064 (1986) at p. 65,223; Williston Basin Interstate Pipeline Company, 41 FERC ¶ 63,035 (1988), at p. 65,246; Williston Basin Interstate Pipeline Company, 51 FERC ¶ 61,208 (1990) at p. 61,585.

p.61,908-09, that the X-3 service is interruptible for rate design purposes. 17/

Conversely, KN had argued in those same rate cases, see, e.g., Tr. 1518, J.A. 158, that the X-3 service was interruptible for rate purposes (even though it had never been interrupted), but argued here (Tr. 1510-12, 1514-15, J.A. 150-152, 154-155) that it should be treated as firm transportation service. The Commission quite properly attributed little weight to these shifting interpretations -- offered fifteen years after the contract's execution -- and correctly relied on its own understanding of the type of service it had previously certificated based on the plain meaning of the X-3 contract. 60 FERC at p. 61,879; R. 1374; J.A. 78.

Moreover, contrary to Petitioner's position, see Tr. 2112-13, J.A. 186-187, there is nothing in the X-3 agreement remotely suggesting that MDU had agreed to provide Petitioner an interruptible rate, i.e., one that is lower than what it must charge firm customers, while also providing Petitioner a priority to capacity allocation that is higher than what must be afforded firm customers. Indeed, the Commission's refusal to interpret the X-3 contract as providing KN a lower interruptible rate,

---

17/ After the Commission on rehearing in the rate case, see 50 FERC at pp. 61,908-10, reaffirmed that the X-3 service was interruptible for rate design purposes, Williston commenced making arguments in this case, see R. 2971; J.A. 139, that the term "volume requirements" in Article I, section 1 of the X-3 agreement, and the term "firm customers" in section 6 of Article I, properly construed, did not reserve to the X-3 service a capacity allocation priority that ranked higher than new firm transportation service.

while at the same time according KN a capacity allocation priority above firm customers, was consistent with reasoning it articulated in CNG Transmission Corp., 45 FERC ¶ 61,191 (1988), at p. 61,359. There, the Commission ruled that existing interruptible customers must always be subordinated to new firm customers willing to pay for firm services:

> Interruptible transactions, by definition, are subordinate to the higher-valued firm service. The desire of existing customers to preserve less expensive interruptible capacity is understandable; however, it is no basis for denying firm service to a customer that is willing to pay for it.

Although the firm service at issue in CNG was firm sales service, not firm transportation service, the reasoning applies equally here because of the Commission's open access rules, see 18 C.F.R. § 284.8(b), which require both firm sales and firm transportation to be accorded equality of service, and thus to be ranked equally for capacity allocation purposes. See also 56 FERC at p. 61,359-60; R. 1345; J.A. 63-64.

C. Petitioner's Remaining Contentions Are Without Merit.

In an effort to bolster its claim that the X-3 service ranked second in priority only behind MDU's firm sales customers and those who converted to firm transportation, petitioner (Pet. Br. 21) raises a plethora of additional claims. As we next show, none has merit.

1. To start with, petitioner argues (Pet. Br. 13, 20-21) that the Commission "improperly overrode" a conclusion of its ALJ in this case that nonconverting firm transportation service was

subordinate in capacity allocation priority to X-3's priority. A careful review of the ALJ's decision reveals, however, that he did not analyze Rate Schedule X-3's priority vis-a-vis nonconverted firm transportation service, but was completely silent on that issue. This led the Commission, in both of its orders on review, to find that the ALJ did not "expressly determine whether X-3 service should have a capacity allocation priority above firm transportation requests by shippers who are not requesting to use converted capacity." 56 FERC at p. 61,357; R. 1340; J.A. 61; 60 FERC at p. 61,875; R. 1368; J.A. 74. 18/ This finding is fully supported by the record, and KN therefore gets no support from the ALJ's ruling for its position here.

2. Petitioner also seeks support -- to no avail we submit -- from the language in the X-3 agreement and the authorizing Commission certificate.

a. First, it cites (Pet. Br. 21-22) the phrase in the preamble that in 1974 MDU had capacity on its pipeline in excess of its "own gas requirements." Assuming, arguendo, that the

---

18/ The Commission did state, 56 FERC at p. 61,359; R. 1343-44; J.A 63, that the ALJ may have "summarily rejected" the argument that nonconverting firm transportation service ranks ahead of the X-3 service priority, on the basis of statements made in the related rate case, 50 FERC at p. 61,910 n.73, which the ALJ may have misinterpreted as identifying Article I, section 1 as the only contract term relevant to resolving the capacity allocation priority dispute in this case. In any event, the Commission found that the ALJ's analysis was neither "complete or accurate enough" to be of any value in resolving the X-3 priority vis-a-vis Part 284 nonconverted firm transportation service. 56 FERC at 61,359; R. 1344; J.A. 63.

quoted term meant only gas sales requirements 19/ -- because sales service was all that MDU had offered at the time -- this reference to "gas requirements" in the preamble is not repeated in Article I, section 1. Rather, the parties chose to use the broader term "volume requirements," which applies equally to transportation capacity and sales capacity, when they described what requirements would rank higher in priority to the X-3 service.

b. Equally untenable is Petitioner's reliance (Pet Br. 24) on the words "temporarily interrupt" in Article I, section 6, to suggest that KN was guaranteed only minor interruptions of the kind experienced by short-lived cold weather conditions. As the ALJ recognized, 51 FERC at p. 65,030; R. 1312; J.A. 45, KN conceded that the X-3 service priority ranked behind not only those entities that were MDU sales customers in 1974, but also all entities that might become sales customers over the next 20-year period. The parties had no way of knowing in 1974 whether MDU's sales load during that extended period of time might grow to such an extent that interruptions of the X-3 service would become the rule rather than the exception. Thus, the "temporary interruption" language of Article I, section 6 does not afford KN the degree of protection suggested by its brief.

19/ It is not at all clear that the term "gas requirements" was necessarily restricted for all time only to sales gas, because in section 6 of Article I of that agreement the parties refer to MDU's pipeline, which would thereafter be used to perform both sales and the X-3 transportation service, as a "gas facility."

In any event, the words "temporarily interrupt" and "peak loads" are empty vessels which take their meaning from the case-specific instances in which there arises a need to serve MDU's volume requirements to the exclusion of all or part of KN's X-3 service needs. In other words, under Article I, section 6, when MDU/Williston's own volume requirements at any particular time reach a level that requires interruption of the X-3 service, that appears to be the situation characterized as "peak load" by Article I, section 6. Likewise, the term "temporary" does not impose any limit on the duration of time that Williston may interrupt the X-3 service. Instead, it appears only to confirm Williston's contractual duty to resume the X-3 service when the volumes needs of its "firm customers" have been met and no longer require X-3 service interruption.

c. Petitioner also relies (Pet. Br. 23) on a generalized "Remedies" provision in the X-3 agreement, which provides that parties would be irreparably damaged in the event either party failed to perform its side of the bargain, and also provides for specific performance in the event of a breach of contract. But this remedies clause says nothing about "firm" or "interruptible" service, and would be equally useful to the parties regardless of X-3's capacity allocation ranking. 20/

20/ The Commission itself interpreted this "Remedies" provision as merely specifying that the parties "had to perform their obligations as agreed upon in the contract: that is, Williston was to provide an interruptible service." 60 FERC at p. 61,879; R. 1373; J.A. 78.

d. Petitioner finally asserts in this regard (Pet. Br. 31-32) that the Commission ignored provisions in its own certificate order purportedly showing that the Commission itself contemplated that KN's X-3 service would have a "high priority access" on MDU's system. But, contrary to KN's claim, the certificate order's characterization of the X-3 service as "required by the public convenience and necessity" did not reflect anything special about the X-3 service. That language is a common expression that the Commission used in virtually all of its certificate orders authorizing interruptible transportation service around the time that it issued the X-3 certificate, see, e.g., Consolidated Gas Supply Corp., 58 FPC 1666, 1668 (1977); Columbia Gas Transmission Corp., 58 FPC 1662, 1664 (1977); Id., 58 FPC 1559, 1563 (1977); Panhandle Eastern Pipe Line Corp., 58 FPC 1569, 1571 (1977), and thus was in no way indicative of the Commission's view of the firmness or interruptibility of the X-3 service.

3. Apart from the textual claims just discussed, petitioner (Pet. Br. 25) further complains that the Commission failed to consider what it describes as substantial investments it made in the early 1970s to secure gas supplies (including gas purchase contracts with take-or-pay requirements) in the Bowdoin Field region that could not be transported to KN's pipeline absent the X-3 exchange service. Petitioner maintains that it would be "absurd" to conclude that KN would have gone to such

lengths and expense without securing guaranteed service on Williston's pipeline.

Yet, as Petitioner's own brief illustrates, in settling on the language of the X-3 contract, KN conducted its own risk assessment without much thought given as to how its service might be affected when and if MDU/Williston ever offered firm transportation service:

> KN was quite able to assess the risk of interruption under the terms of the X-3 agreement and to conclude that the risk would be quite low. MDU's service area was predominantly rural, heavily dependent on agriculture and energy-related (oil and gas exploration and production) activities. There were few actual or potential industrial customers. There was little expectation of economic growth . . . . The interference with the X-3 service brought into being by Williston Basin's open access section 4 tariff filing is quite different in character.

Pet. Br. 35. This admission amply supports the Commission's findings that "the parties did not provide for the eventuality of firm transportation taking place on the system," 60 FERC at p. 61,879; R. 1374; J.A. 78, and that KN "did not accurately project the degree and type of firm service that would be provided in the future." 60 FERC at p. 61,877; R. 1372; J.A. 76. 21/

21/ Petitioner also argues (Pet. Br. 30) in effect that it should not be treated the same as other interruptible customers because the rate that KN agreed to pay MDU did not reflect all of the economic value to be derived by Williston from the X-3 service. Petitioner maintained that under the X-3 agreement MDU/Williston obtained an option to purchase gas produced from the Bowdoin Field, and has in the past (continued...)

4. Petitioner also asserts (Pet. Br. 25-26) that by finding that the X-3 service is not entitled to any reservation of capacity, the Commission has effectively degraded its X-3 service from a "virtually firm" service to an interruptible service, and has allowed Williston to abandon the X-3 service without complying with the requirements of Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b). However, the Commission properly dismissed that argument, reasoning correctly that

> [t]he Commission never changed or degraded the X-3 service, but merely interpreted the existing service agreement as always providing for a service that is inferior to any firm service, i.e., an interruptible service.

60 FERC at p. 61,878; R.1372; J.A. 77.

Petitioner's reliance (Pet. Br. 26 n.3) on Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204 (D.C. Cir. 1960) (MichCon), and Granite City Steel Corp. v. FPC, 320 F.2d 711 (D.C. Cir. 1963) (Granite) is misplaced. In MichCon, there was no tariff provision or transaction at issue that allegedly created an abandonment within the meaning of section 7(b) of the NGA. Rather, an interstate pipeline applied under section 7(b) to abandon a sales service, and the questions presented in

---

21/(...continued)
exercised that option, which should be reflected in the value of the X-3 service. The Commission, 60 FERC at p. 61,878, R. 1372, J.A. 77, properly rejected this claim, finding that the X-3 service was not being treated the same as other Williston interruptible services, and finding that the gas purchase option was one of the justifications for ranking the X-3 service's capacity allocation priority ahead of all other interruptible services.

MichCon were limited to whether the Commission had applied appropriate standards in granting a pipeline authorization to abandon particular services. 283 F.2d at 216-226. And by Petitioner's own admission (Pet. Br. 26 n.3), Granite did not involve any actual or alleged abandonment of service under section 7(b), but instead involved nothing more than a literal application of section 7(a) of the NGA, where this Court rejected Commission orders that compelled a pipeline to provide service to new customers, where to do so would impair service to existing customers.

5. Relying on Mobile-Sierra, 22/ and this Court's decision in Papago Tribal Authority v. FERC, 610 F.2d 914 (D.C. Cir. 1980), Petitioner also argues (Pet. Br. 32-33) that Williston's open access tariff filing was invalid because it changed Williston's X-3 contractual obligations to provide essentially firm service that ranked only behind Williston's duty to serve residential sales customers. In its order on rehearing, 60 FERC at p. 61,878.; R. 1372; J.A. 77, however, the Commission rejected these arguments, correctly reasoning that "[n]o changes have been made to the provisions of the X-3 service agreement" because "the Commission has interpreted the X-3 tariff and contract in the instant proceeding as providing for an interruptible service." The Commission went on to conclude that, by filing the open access tariff, Williston did not change any of

---

22/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 340 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

its obligations under the X-3 contract; rather, Williston "only clarified in its section 311 tariff sheets that the service was, in fact, interruptible." Id.

6. Finally, petitioner argues that Williston's open access tariff filing under section 4 was purely voluntary insofar as Williston was not legally compelled to become an open access transporter. But as this Court determined in Associated Gas Distributors v. FERC, 824 F.2d 981, 1026 (D.C. Cir. 1981), it is to ignore "current market circumstances" to conclude that the decision of a pipeline to provide open access transportation was truly "voluntary" in a practical sense.

* * *

In sum, none of petitioner's claims in any way weakens the reasonableness of the Commission's construction of the X-3 agreement. In such circumstances, the Commission's determination should be sustained.

CONCLUSION

For the reasons stated herein, the Commission's orders should be affirmed and the petition for review denied.

Respectfully submitted,

Susan Tomasky
General Counsel

Jerome M. Feit
Solicitor

Edward S. Geldermann
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
(202) 208-0177

November 30, 1993