1998 WL 35240494 (C.A.D.C.) (Appellate Petition, Motion and Filing)
United States Court of Appeals, District of Columbia Circuit.

COLORADO INTERSTATE GAS COMPANY, et al., Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 97-1214.
April 1, 1998.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

Brief for Respondent Federal Energy Regulatory Commission

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*V *GLOSSARY*

ANR	ANR Pipeline Company, an interstate pipeline
CIG	Colorado Interstate Gas Company, an interstate pipeline
Downstream Pipeline	A pipeline closer to the market area than another pipeline with which it is interconnected.
FERC	Federal Energy Regulatory Commission
NGA	Natural Gas Act
Texas Eastern	Texas Eastern Transmission Corporation, an interstate pipeline
Unbundling	The separation of pipeline transportation service and sales service required by Order No. 636.

Upstream Pipeline	A pipeline closer to the production area than another pipeline with which it is interconnected.

***1** *STATEMENT OF THE ISSUE*

In Order No. 636, [1] the Federal Energy Regulatory Commission ("FERC" or "Commission") required interstate pipelines to afford their customers unimpeded access to the competitive wellhead market. To that end, FERC ordered pipelines to "unbundle" (separate) their sales merchant function from their transportation function, and to assign to their firm sales customers the right to transportation capacity held on other ***2** pipelines, except for a limited amount of capacity needed for operational purposes.

After all pipelines had generally complied with these requirements in individual Order No. 636 restructuring proceedings, one interstate pipeline, Texas Eastern Transmission Corporation ("Texas Eastern"), petitioned the Commission in 1995 for a declaratory order holding that Order No. 636 did not create a *per se* rule prohibiting interstate pipelines which have undergone restructuring from entering into contracts for transportation or storage capacity on other interstate pipelines ("offsystem capacity"). in the first order under review, FERC granted Texas Eastern's petition, but required that interstate pipelines intending to acquire such offsystem capacity notify the Commission in advance of the proposed service.

Two interstate pipelines, ANR Pipeline Company ("ANR") and Colorado Interstate Gas Company ("CIG"), then requested rehearing, contending that the case-specific authorization process that FERC required was unduly discriminatory against interstate pipelines because non-pipeline shippers are permitted to acquire capacity and ship gas on any pipeline without obtaining prior Commission approval. In the second order under review, the Commission denied rehearing. Although it agreed with ANR and CIG that unbundling had resolved many concerns, FERC nevertheless explained that concerns still remained that pipelines may be able to restrict access to markets and supplies by holding capacity on other pipelines, and that the cost of the ***3** acquired capacity could be higher than normal transportation rates, thereby resulting in unfair cross-subsidies.

The sole issue presented is whether the Commission's determination to require interstate pipelines to obtain prior approval to acquire offsystem capacity was a reasonable exercise of its Natural Gas Act ("NGA") authority and consistent with its regulations.

PERTINENT STATUTES AND REGULATIONS

The statutes and regulations applicable to this case are contained in an appendix to this brief.

STATEMENT OF THE CASE

I. *Nature Of The Case, Course of Proceedings, And Disposition Below*

On February 22, 1995, Texas Eastern filed a petition asking the Commission to confirm that Order No. 636 does not create a *per se* rule prohibiting interstate pipelines which have implemented Order No. 636 from entering into contracts for off-system capacity. The petition was then opened to public comment.

In the first order under review, issued January 31, 1996, FERC granted Texas Eastern's request after consideration of the comments, including shipper objections. *Texas Eastern Transmission Corp.,* 74 FERC ¶ 61,074 (1996) ("January Order"). The Commission reasoned that, under current market conditions, pipelines may need to be able to reach changing supply and market areas, and that constructing new pipeline facilities to reach those areas "could result in duplicative and unnecessary ***4**

facilities contrary to the Commission's goal of meeting new demand with both the least cost and least environmental impact." *Id.* at 61,220. Nonetheless, the Commission also agreed with suggestions by several parties (including Texas Eastern) that the Commission determine whether to allow pipelines to acquire upstream or downstream capacity on a case-by-case basis. *Id.*

ANR and CIG, two interstate pipelines which had originally intervened in support of Texas Eastern's petition, then jointly requested rehearing of the January Order. They essentially asserted that requiring interstate pipelines to seek case-by-case authorization from the Commission for new capacity acquisitions on other pipelines was unduly discriminatory because non-pipeline shippers may acquire capacity and ship gas on any pipeline without prior Commission authorization.

FERC addressed but rejected this contention in the second order under review. *Texas Eastern Transmission Corp.*, 78 FERC ¶ 61,277 at 62,161 (1997)("Rehearing Order"). Although it agreed with ANR and CIG that unbundling had resolved many concerns, it nonetheless concluded that specific authorization of new capacity acquisitions by interstate pipelines was still necessary to address, *inter alia*, concerns that pipelines could restrict access to markets and supplies by holding capacity on other pipelines. Accordingly, the Commission denied rehearing.

These petitions for review followed.

***5** II. *Statement Of The Facts*

A. *Statutory and Regulatory Background*

The NGA confers upon FERC comprehensive regulatory authority over companies that engage in either the sale of natural gas for resale or its interstate transportation. The Commission regulates market entry through NGA § 7, 15 U.S.C. § 717f, by issuing certificates of public convenience and necessity authorizing natural gas companies to transport or sell gas, or to construct facilities for those purposes. The Commission regulates market exit through its authority to abandon certificated service. NGA § 7(b), 15 U.S.C. § 717f(b). in addition, under NGA §§ 4 and 5, 15 U.S.C. §§ 717c and 717d, the Commission regulates the price and other terms of jurisdictional sales and transportation, ensuring that the rates and charges for such service, as well as all rules, regulations, practices, and contracts affecting those rates and charges, are just and reasonable, and not the product of undue discrimination. Although the Commission is not bound by the dictates of the antitrust laws, it is obliged to weigh antitrust policy in its NGA deliberations as well. *See Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 958-60 (D.C. Cir. 1968).

As this Court is aware, Order No. 636 culminated FERC's decade-long effort begun in Order No. 436 [2] to restructure its ***6** regulations to create a more efficient market for natural gas at the wellhead. To remedy aspects of pipeline operations that it found to be unduly discriminatory and anti-competitive, and hence unlawful under NGA § 5, the Commission in Order No. 636 fashioned remedial features intended to work together to afford pipeline customers (and the ultimate natural gas consumer) unimpeded access to the competitive wellhead market. *See UDC*, 88 F.3d at 1121-27.

As relevant here, the Commission ordered the "unbundling" of pipeline sales from transportation, thereby requiring interstate pipelines to sell gas and transportation services separately and allowing purchasers to take only services they need. Order No. 636 at 30,403-13; Order No. 636-A at 30,527-46; Order No. 636-B at 61,988-92. Moreover, "to ensure that all shippers have meaningful access to the pipeline transportation grid," Order No. 636 required downstream pipelines to assign capacity permanently on an upstream pipeline. Order No. 636 at 30,393. *See also* 18 C.F.R. § 284.242 (1993). [3] This requirement was imposed out of concern that a downstream pipeline could otherwise use its capacity rights on an upstream pipeline to favor its merchant ***7** function, to inhibit access by other merchants to the production area, or force its customers to pay for merchant-related services they do not use. *See* 74 FERC at 61,212, JA 50.

In Order No. 636, the Commission also carved out a limited exception to the general requirement that pipelines must assign upstream capacity to their firm shippers. Specifically, it allowed downstream pipelines to retain upstream capacity to. the extent necessary for operational purposes or to perform no-notice transportation service. Order No. 636, at 30,566-67. Moreover, in post-Order No. 636 proceedings, the Commission required interstate pipelines to justify on a case-by-case basis exceptions to the Order No. 636 policy against acquiring or retaining offsystem capacity. [4] Even in those cases, the Commission for the most part adhered to the prohibition against pipelines holding offsystem capacity other than for operational reasons. [5]

***8** B. *The Commission's Orders*

As noted, this proceeding commenced on February 22, 1995, when Texas Eastern petitioned FERC for a declaratory order confirming that Order No. 636 did not create a *per se* rule prohibiting interstate pipelines that have already unbundled from acquiring offsystem capacity. In support, Texas Eastern contended that, in the post-Order No. 636 environment, adherence to a policy prohibiting pipelines from acquiring firm capacity on other pipelines would foreclose the development of new services in circumstances where more than one pipeline would need to be involved, and thus undermine the Commission's efforts in Order No. 636 to create a flexible, competitively-responsive natural gas industry. JA 5. Texas Eastern further asserted that a *per se* rule against pipeline acquisition of offsystem capacity was unnecessary in all events because the Commission would still have jurisdiction to review contracts between pipelines and withhold approval where its finds them to be anti-competitive or otherwise contrary to the public interest. JA 5, 21.

After public notice, ANR and CIG jointly intervened in support of Texas Eastern, explaining that they had petitioned for ***9** review of the upstream capacity assignment requirement of Order No. 636 in UDC (which was still pending before the Court at the time), and that grant of Texas Eastern's petition would likely moot their appeal. [6] In addition, petitioners asserted that it should not be necessary for pipelines to seek authorization in advance, on a case-by-case basis, in order to hold capacity on other pipelines. JA 47.

FERC addressed these matters in the January Order. At the outset, the Commission found that in light of the fact that most pipelines had already complied with Order No. 636's unbundling requirement, the anti-competitive rationales that militated against allowing pipelines to hold capacity on other pipelines were no longer as great a concern. 74 FERC at 61,220, JA 58. Nonetheless, the Commission also stated that the proper pricing of services and the proper allocation of cost to those customers benefitting from those services did remain a concern. *Id.*

***10** In addition, the Commission took into account that pipelines and their shippers face a dynamic and rapidly changing market, and that allowing acquisition of new upstream or downstream capacity may offer a mechanism for interstate pipelines to provide shippers with access to new supply and market areas. *Id.* Apart from affording access to new markets, the Commission also found that allowing interstate pipelines to acquire capacity on other pipelines may produce other potential benefits for the acquiring pipeline's shippers, such as enabling them to avoid the administrative burdens of contracting, billing, scheduling, nominating, balancing, and dealing with penalties on multiple pipelines. *Id.* Further, the Commission reasoned that continuing a prohibition against pipeline acquisition of offsystem capacity could limit a pipeline to a choice between serving the markets it had traditionally served as of restructuring, or else physically expanding its system. In these circumstances, it perceived that the construction of new capacity that such expansion would entail "involves cost and environmental implications and could result in duplicative and unnecessary facilities contrary to the Commission's goal of meeting new demand with both the least cost and least environmental impact." *Id.*

FERC next considered assertions by several parties that it should examine each proposal to acquire upstream or downstream capacity for transportation service on a case-by-case basis. 74 FERC at 61,220; JA 58. The Commission here determined that

case-specific review of pipeline acquisitions of capacity on other ***11** pipelines was necessary to address several potential concerns, explaining as follows:

[T]he Commission is concerned about the possibility of interstate pipelines' gaining control over access to upstream capacity and supply sources in a manner which could permit a pipeline to limit customer choices or improperly tie use of the acquired capacity to other pipeline or pipeline affiliate services. To that end we share [one party's] concerns that customer choices on where to purchase gas supply should not be skewed by a pipeline's decision to hold capacity on other pipelines. We are also concerned about the rate impact on the acquiring pipeline's customers as well as the method the pipeline proposes to use to collect the costs of the upstream or downstream capacity. Furthermore, depending on how the costs of the capacity are reflected in rates, the acquiring pipeline's marketing affiliate may have an advantage over independent marketers, or choices among supply basins may be skewed. The Commission is also concerned about the possibility of preferential treatment for the pipeline purchasing capacity over the customers of the pipeline which is selling capacity to the other pipeline. Finally, the Commission is concerned about the manner in which the capacity will be managed, or otherwise integrated into its existing open access operations.

74 FERC at 61,220-21, JA 58.

In light of the above, the Commission granted Texas Eastern's petition. In doing so, however, the Commission further ruled that pipelines intending to acquire upstream or downstream capacity for transportation must notify the Commission in advance of the proposed service on the acquired capacity, and indicate the terms and conditions under which it will make the capacity available. In this regard, FERC explained that this notification ***12** would enable it to review specific proposals for acquisition of capacity and ensure that they were accomplished "in a manner consistent with the open access goals of Order No. 636." *Id* Lastly, the Commission made clear that the form of notice could be a request for a declaratory order, a certificate application, or a tariff filing. *Id.* at 61,221, JA 59.

CIG and ANR then jointly requested rehearing of the January Order, principally taking issue with the case-by-case authorization requirement. Among other things, CIG and ANR argued that this requirement was unnecessary, given the Commission's conclusion that the unbundling of sales from transportation services would answer its concerns about requiring a pipeline's ability to restrict a shipper's access to supplies and markets. JA 64. Further, they contended that in any event it was unclear from the January Order why or how the acquisition of upstream capacity would limit customer choices or skew a decision on where the customer will purchase gas supply. JA 66.

The Commission disposed of these arguments in the Rehearing Order. At the outset, the Commission explained that a major reason for allowing pipelines to acquire offsystem capacity is to prevent the unnecessary duplication of facilities and the accompanying environmental disturbance that could be caused by the construction of facilities. Thus, it reasoned, because the acquisition of offsystem capacity is a substitute for construction of new facilities, Commission review would be appropriate for the same reasons it reviews applications for ***13** construction certificates, *viz.* to be assured that "the capacity is needed and that the costs to be borne by the pipeline's shippers are in the public convenience and necessity." 78 FERC ¶ 61,277 at 62,161; JA 74.

Turning next to ANR and CIG's assertions regarding the relevant effect of unbundling on meeting Order No. 636 concerns, the Commission initially agreed that unbundling had resolved many concerns. Nonetheless, it further explained that concerns remained that pipelines may be able to restrict access to markets and supplies by holding capacity on other pipelines. *Id.* Moreover, the Commission took note that the cost of offsystem capacity acquired by the pipeline could still be higher than the pipeline's normal transportation rates, thereby leading to unfair cross-subsidies particularly if the primary user of the capacity was a marketing affiliate. 78 FERC at 62,161-62, JA 74-75. Finally, although acknowledging that issues of subsidization or improper allocation of costs could be addressed when a pipeline files rates to recover the cost of offsystem capacity, FERC nonetheless concluded that "the public interest is best served if proposals by pipelines to acquire capacity, like proposals to construct it, are reviewed beforehand." 78 FERC at 61,162, JA 75

***14** *SUMMARY OF ARGUMENT*

The Commission's determination to require interstate pipelines to obtain its approval before acquiring offsystem capacity was reasonable.

The Commission's core concern was that the open access transportation program crafted by Order No. 636 could be compromised by potential pipeline market power abuses or unnecessary pipeline acquisitions of offsystem capacity. These specific issues included potential cost shifts to the acquiring pipeline's captive customers, anti-competitive distortion of the market for transportation management services, tying of the acquired capacity with other pipeline services, and skewing customer choice of gas supplies. As these potential concerns easily justified a measured approach to pipeline reacquisitions of offsystem capacity in the post-Order No. 636 era, that determination should be affirmed as reasonable.

There can be no doubt that the Commission had ample authority under the NGA to review pipeline acquisitions of offsystem capacity on a case-by-case basis. As the Commission found, pipeline acquisitions of offsystem capacity are a substitute for construction of new capacity. Moreover, where, as here, potential concerns about offsystem capacity acquisitions will vary from pipeline to pipeline, the Commission was on solid ground under this Court's precedent to choose an individualized review process, rather than a generic, blanket-authorization process.

***15** None of petitioners' arguments compels a different result. Contrary to petitioners' claims, 18 C.F.R. § 284.223(a) does not in fact authorize interstate pipelines to acquire capacity on other pipelines without FERC approval. If it did, there would have been no need for Texas Eastern's petition for a declaratory order below. In truth, that rule merely authorizes pipelines to transport on their own facilities gas owned by “shippers,” a term that does not embrace interstate pipelines in the post-Order No. 636 environment.

Equally specious are petitioners' contentions that case-by-case approval is unnecessary because any potential for tying, capacity bottlenecks, capacity mismanagement, unfair rate impacts, and other anti-competitive concerns can be addressed in NGA § 4 or NGA § 5 proceedings. Nothing in the NGA circumscribes the Commission's authority to examine offsystem capacity acquisitions beforehand, and to impose protective conditions where public interest considerations warrant. Accordingly, this argument, too, should be rejected.

16** ***ARGUMENT

THE COMMISSION'S DETERMINATION TO REQUIRE INTERSTATE PIPELINES TO OBTAIN ITS APPROVAL BEFORE ACQUIRING OFFSYSTEM CAPACITY WAS REASONABLE AND CONSISTENT WITH THE NGA.

FERC decisions under the NGA are to be reviewed under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997). As now demonstrated, the Commission's determination here to. require interstate pipelines to obtain approval prior to acquiring offsystem capacity was reasonable and consistent with the NGA as well as all applicable regulations.

In determining whether to grant Texas Eastern's petition, the Commission initially framed the issue as whether it should continue its policy of preventing pipelines from acquiring upstream or downstream capacity for new or expanded transportation services now that the unbundling of the industry was complete. 74 FERC at 61,219-20, JA 57. Ultimately, in a determination not challenged here, the Commission granted that petition. Specifically, the Commission came to conclude that the new policy would further its goal of meeting new demand with both the least cost and least environmental impact, while providing pipelines with the flexibility to meet changing market demands post-Order No. 636. 78 FERC at 62,160, JA 73. Moreover, the Commission found that allowing pipelines to acquire offsystem capacity could confer significant benefits to shippers by providing them access to new supply and market areas, and relieving them from the administrative burdens of contracting, ***17** billing, scheduling, nominating, balancing, and dealing with penalties on multiple pipelines. *Id.*

At the same time, the Commission reasonably recognized that the acquisitions to be permitted under its new policy should not go unmonitored. First, as the Commission found, the acquisition of offsystem capacity is simply a substitute for construction of new facilities, and therefore, case-specific review would be appropriate for the same reasons the Commission reviews applications for construction certificates -- namely, to ensure that "the capacity is needed and that the costs to be borne by the pipeline's shippers are in the public convenience and necessity." *Id.* at 62,161, JA 74. Equally significant, the Commission was understandably concerned that the improved, open access transportation service fostered by Order No. 636 could be compromised by potential acquisitions that could lead to pipeline abuses of market power vis-a-vis offsystem capacity. Thus, as the Commission stated, the following issues should be monitored in its examination of a proposal:

> pipeline control over access to upstream capacity and supply sources that would limit customer choices or improperly tie use of the acquired capacity to other pipeline or pipeline affiliate services; the rate impact on the acquiring pipeline's customers; the method the pipeline proposes to use to collect the costs of the acquired capacity; preferential treatment of the acquiring pipeline's marketing affiliate; preferential treatment for the pipeline purchasing capacity over the customers of the pipeline which is selling capacity to the other pipeline and the manner in which the capacity ***18** will be managed, or otherwise integrated into its existing open access operations.

78 FERC at 62,160, JA 73. In all these circumstances, given the pipelines' history of monopolistic control over the chain of interstate distribution which lay at the heart of Order No. 636, *see* Order No. 636 at 30,394, and the access problems that pipeline retention of offsystem capacity had created prior to Order No. 636, *see* Order No. 636-A at 30,566, it was plainly reasonable for the Commission to adopt a measured approach to pipeline reacquisition of offsystem capacity, *i.e.*, to proceed on a case-specific approval basis.

Equally clear, the Commission was on "especially solid ground in choosing an individualized process where important factors may vary radically from case to case." *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990). As explained, in deciding to approach this potential problem on a case-by-case basis, the Commission cited possible concerns that are likely to vary from pipeline to pipeline. Specifically, the Commission's concerns included the manner in which acquired offsystem capacity will be managed, the rights of shippers to receipt and delivery points on the acquired capacity, the pipeline's need for the capacity, and the administrative benefits to shippers. *See* 74 FERC at 61,220-21, JA 58-59; 78 FERC at 62,161-62, JA 74-75. [7] Moreover, it also took into account ***19** anti-competitive risks and potential rate impacts for the acquiring pipeline's ratepayers. [8] Thus, this overall approach should also be sustained.

None of petitioners' arguments compels a different result. Petitioners initially assert that it was in effect unnecessary -- and thus by implication irrational--for the Commission to undertake case-specific review of pipeline acquisitions of offsystem capacity because the Commission's blanket certificate regulations already authorize these activities on a generic basis. (Br. 22-23.) This claim, however, profoundly mischaracterizes the existing regulatory scheme.

As a result of Order No. 636, downstream pipelines have since 1992 been prohibited from acquiring or retaining firm capacity on upstream pipelines, except for capacity needed for ***20** operational reasons or to provide no-notice transportation service. *See* 18 C.F.R. § 284.8(a)(1) (prohibiting bundled sales); *see also* 18 C.F.R. § 284.242 (requiring interstate pipelines to make permanent assignments of upstream capacity); Order No. 636-A at 30,566-67. [9] Consistent with this regulatory framework, the Commission has generally adhered to the prohibition against downstream pipelines' retaining or acquiring capacity on upstream pipelines that is not needed for operating reasons. *See, e.g.*, *TransColorado Gas Transmission Company*, 67 FERC ¶ 61,301 at 62,052-53 (1994). *See also National Fuel Gas Supply Corp.*, 67 FERC ¶ 61,270 at 61,938 (1994), *reh'g denied*, 68 FERC ¶ 61,278 (1994). More to the point, even in those instances in which the Commission has allowed interstate pipelines to retain or acquire offsystem capacity after Order No. 636 became effective, the Commission's authorization was based on the particular facts and circumstances of the individual case, *i.e.*, subject to prior Commission approval. *See* 74 FERC 61,212-214, JA 50-52,

citing, *e.g.*, *Iroquois Gas Transmission System, L.P.*, 62 FERC ¶ 61,167 (1993); *Florida Gas Transmission Company*, 63 FERC ¶ 61,093 (1993); *Tennessee Gas Pipeline Co.*, 64 FERC ¶ 61,020 (1993).

***21** Petitioners are additionally wrong in suggesting that interstate pipelines already possess authorization under 18 C.F.R. § 284.223(a) to acquire offsystem capacity without prior FERC approval. (Br. 21-23.) If that were true, Texas Eastern would never have had to file its petition for a declaratory order in this proceeding. In any event, this regulation cannot be read in isolation. To be sure, 18 C.F.R. § 284.223(a) provides in pertinent part that "any interstate pipeline issued [a blanket certificate] ... is authorized, without prior notice to or approval by the Commission, to transport natural gas for any shipper for any end-use by that shipper or any other person." However, Order No. 636-A requires "shippers" not only to possess the right to *use* pipeline capacity, but also to *hold title* to the gas while it is being transported. *See* Order No. 636-A at 30,544. [10] As the Commission made clear in the orders under ***22** review, when interstate pipelines acquire offsystem capacity, they will possess the right to use the capacity but are prohibited from holding title to the gas:

we are not changing our prohibition on pipelines' making bundled sales at pipeline interconnections. The downstream pipeline will not hold title to gas shipped on capacity it has acquired on an upstream pipeline. Rather, shippers on the downstream pipeline will hold title to the gas on the upstream pipeline. We will allow a pipeline to hold the upstream capacity; we will not, however, allow the pipeline to hold title to the gas being shipped. Thus, the downstream pipeline will be the shipper on the upstream pipeline, but will not hold title when the gas is being shipped. This results in a limited exception to the rule that a shipper must hold title to gas being shipped.

74 FERC at 61,221, JA 59. In sum, the fact that the Commission created in this case a limited exception to the "title-holding" requirement in order to allow pipeline acquisitions of offsystem capacity cannot be said to elevate interstate pipelines to the status of "shippers" within the meaning of 18 C.F.R. § 284.223.

Petitioners next contend that the Commission's prior approval is "unduly" discriminatory because non-pipeline shippers are not similarly required to obtain such approval before they acquire capacity on any pipeline system. (Br. 24-27; 35-37.) This discrimination claim fails as well.

First and foremost, there can be no cognizable claim of an undue discrimination here, as the alleged disparate treatment of ***23** pipelines and non-pipeline shippers has a rational basis in Order No. 636 and the NGA. As will be recalled, in Order No. 636, the Commission singled out *pipelines'* retention of upstream capacity, not *shippers'* use of pipeline capacity to move their own gas, as contributing to the wellhead access problems that Order No. 636 was designed to remedy. *See* Order No. 636 at 30,402, 30,417. Moreover, in Order No. 636-A, the Commission found that pipeline retention of offsystem capacity posed an unacceptable risk of frustrating the goal of Order No. 636, namely, to create an environment in which shippers of gas would have unfettered access to production areas. Order No. 636-A at 30,566. With this in mind, the Commission further noted in the Rehearing Order that it still had concerns peculiar to interstate pipelines, as opposed to shippers, namely, that such pipelines may be able to restrict access to markets and supplies by holding capacity on other pipelines. 78 FERC at 62,161, JA 74. Further, it took note that the cost of the offsystem capacity acquired by the pipeline could be higher than the pipeline's normal transportation rates, thereby resulting in unfair cross-subsidies, particularly if the primary user of the capacity was a marketing affiliate. *Id.* at 62,161-162, JA 74-75. Significantly, as petitioners point to no evidence that they presented to the Commission that would otherwise ameliorate these concerns, this assessment, too, is entitled to stand.

Stated another way, petitioners' real argument comes down to a conclusory claim that the market is now fully competitive, and ***24** that FERC vigilance in the form of prior approval is therefore unwarranted. As this Court has admonished, however, the NGA requires the Commission to protect consumers against pipelines' monopoly power. *UDC*, 88 F.3d at 1127. As this, of course, is precisely what the Commission endeavored to do here, this argument should be summarily rejected as well.

Wholly ignoring the broad range of competitive and other public interest considerations that underlay the Commission's decision, petitioners also contend that the orders should be reversed because FERC improperly analogized the acquisition of

existing capacity to the construction of new capacity. (Br. 27-29.) This claim fares no better. in the first place, the Commission found that offsystem capacity acquisition was a *substitute* for construction, not an *equivalent* to construction, because it enabled pipelines to reach supply and market areas that would not otherwise be available. 74 FERC at 61,220, JA 58. This, in the Commission's view, opened up other potential public interest concerns such as whether "the capacity is needed and ... the costs to be borne by the pipeline's shippers are in the public convenience and necessity." 78 FERC at 62,161, JA 74. More to the point, the Commission did not rely solely on an analogy to construction of new capacity; it also relied on potential concerns about access to the wellhead for gas customers -- the same concerns that led the Commission to exercise its NGA § 5 remedial authority to require unbundling and assignments of upstream capacity in the first place.

***25** At Br. 29, petitioners further assert that the Commission has, without authority, required each pipeline to file an NGA § 7 certificate application to acquire offsystem capacity. In fact, the Commission also gave pipelines the *option* of filing a petition for a declaratory order or a tariff filing. *See* 74 FERC at 61,221. Similarly, at Br. 33, petitioners argue that as pipelines may only pay or charge just and reasonable rates, the Commission must wait until a pipeline files under NGA § 4, or bring an NGA § 5 complaint proceeding itself, to consider the rate impact of offsystem capacity acquisition. The argument begs the question. To repeat, FERC's concern here was not justness and reasonableness of the rate levels which pipelines would pay or charge for this offsystem capacity, but whether these acquisitions would implicate future cross-subsidization or improper allocation of costs. *See* 78 FERC at 62,162, JA 75. To this end, it believed that the public interest lay on the side of reviewing these proposals beforehand. *Id.* As the Supreme Court has recognized, and petitioners do not contest, NGA § 7(e) requires the Commission "to evaluate *all* factors bearing on the public interest." *FPC v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 8 (1961), *citing Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 391 (1959).

These considerations similarly lay to rest petitioners' individual quibbles with each of the Commission's stated concerns about allowing pipelines to acquire capacity on other pipelines. (Br. 30-34.) As is now apparent, each of them was informed by ***26** FERC's prior experience in Order No. 636 (and even before), and are thus entitled to deference. *See Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991)(It is within scope of agency's expertise to make predictions about markets it regulates, and reasonable prediction deserves deference even if there might also be another reasonable view). *See also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. at 29 ("we think that a forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

In the final analysis, then, the Commission's determination to review pipeline acquisitions of offsystem capacity on a case-by-case basis was a reasonable exercise of its "broad discretion in determining how best to handle related yet discrete issues in terms of procedures," *see Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. 211, 230 (1991)(and cases cited therein), "as well as to decide what procedures to use in fulfilling its statutory responsibilities." *Kansas Power & Light Co. v. FERC*, 851 F.2d 1479, 1484 (D.C. Cir. 1988), *citing Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-45 (1978). As the record overwhelmingly confirms the wisdom of those choices here, the orders should be affirmed in all respects.

***27** *CONCLUSION*

For the foregoing reasons, the petitions for review should be denied.

Appendix not available.

Footnotes

* Cases chiefly relied upon are marked with an asterisk.

1 Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs. ¶ 30,939 (April 8, 1992); *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (November 27, 1992), *reh'g*

denied, 62 FERC ¶ 61,007 (January 8, 1993); *aff'd in part and remanded in part*, *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); ("UDC"); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

FN2. Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985), *order on reh'g*, Order No.436-A, FERC Stats. & Regs., Regulations Preambles ¶ 30,675 (1985), *vacated and remanded*, *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

3 An upstream pipeline is one located closer to the wellhead, or production area. A downstream pipeline is located closer to the burner-tip, or the end-user. *UDC*, 88 F.3d at 1136 n.36.

4 *See e.g., Iroquois Gas Transmission System*, 62 FERC § 61,167 (1992); *Florida Gas Transmission Co.*, 63 FERC ¶ 61,093 (1993); *Tennessee Gas Pipeline Co.*, 64 FERC ¶ 61,020 (1993); *ANR Pipeline Co.*, 64 FERC ¶ 61,140 (1993); *Midwestern Gas Transmission Co.*, 73 FERC ¶ 61,320 (1995).

5 *See, e.g.*, *CNG Transmission Corp.*, 67 FERC ¶ 61,030 (1994), *order on reh'g*, 69 FERC ¶ 61,152 (1994); *National Fuel Gas Supply Corp.*, 67 FERC ¶ 61,270 (1994), *order on reh'g*, 68 FERC ¶ 61,287 (1994); *TransColorado Gas Transmission Company*, 67 FERC ¶ 61,301 (1994) ("*TransColorado*"), *Tennessee Gas Pipeline Co.*, 70 FERC ¶ 61,076 (1995); *Riverside Pipeline Co.*, 71 FERC ¶ 61,240 (1995). In *TransColorado*, the Commission explained that "although Order No. 636 addressed the scenario of a downstream pipeline permanently releasing its capacity on an upstream pipeline, the policy behind the requirement is equally applicable to the less prevalent scenario in which an upstream pipeline holds capacity on a downstream pipeline." 67 FERC at 62,052. Moreover, the Commission went on to state that "[i]n either case, a pipeline's release of its capacity on another pipeline permits gas purchasers to have access to both the production areas and gas merchants reached through the capacity held on one pipeline by another pipeline and thus furthers the goals of Order No. 636." *Id.*

6 Ultimately, however, this Court in *UDC* declined to address CIG and ANR's claim that the Commission unlawfully refused in Order No. 636 to grant an exception to its upstream capacity assignment rule, 18 C.F.R. § 284.242, for "transportation-only" pipelines that "may wish to offer a customer a package of firm-transportation capacity on its pipeline as well as on a connecting upstream pipeline." *See* 88 F.3d at 1136. The Court noted that the initial order in the instant proceeding, to be described shortly, had mooted petitioners' general concern that the Commission did not in Order No. 636 allow pipelines to acquire or retain off-system capacity, even on a case-specific basis. Moreover, the Court went on to state that any further relief would be available in review of the declaratory-order proceeding. *Id.*

7 In its January 1996 order, the Commission did not find that these "administrative" benefits would necessarily inure to shippers in all cases. Rather, it found that "when a pipeline claims that such benefits will result from its acquisition of capacity, the Commission will give weight to shippers' affirmations of the pipeline's claimed benefits," thereby allowing them to "structure their own deals while assuring that pipelines cannot claim illusory benefits." 74 FERC at 61,220, JA 58. This need to weigh claimed benefits in individual acquisition cases, instead of merely presuming them to exist in all cases, provides additional support for the Commission's determination to review all pipeline acquisitions of off-system capacity on a case-by-case basis.

8 The Commission expressed similar concerns in a previous case denying a pipeline authorization to recover costs associated with the acquisition of offsystem capacity. *See Tennessee Gas Pipeline Co.*, 70 FERC ¶ 61,076 at 61,198 (citing concerns about "potential for pipelines to shift upstream transportation costs to other customers when it performs a bundled path transportation service on behalf of certain customers").

9 Even where there was remaining upstream capacity after the downstream customer assignments required by 18 C.F.R. § 284.242, downstream pipelines were expected to release that capacity pursuant to the upstream pipeline's capacity release program established by 18 C.F.R. § 284.243. *See* Order No. 636-B, 62 FERC ¶ 61,272 at 62,005 (1992); *see also* 74 FERC at 61,212. JA 50.

10 This "title-holding" requirement applied to open access transportation customers even before Order No. 636. Under Commission case law interpreting the open access rules under Order No. 436, in order to be considered a "shipper," one must hold title to gas while it is being shipped. *Texas Eastern Transmission Corp.*, 37 FERC ¶ 61,260 at 61,684-85 (1987) (*Texas Eastern I*). Although the Commission briefly departed from this "title-holding" requirement when it issued pipeline-specific capacity brokering certificates between 1989 and 1992, *see, e.g., Texas Eastern Transmission Corp.*, 48 FERC § 61,248 (1989) ("*Texas Eastern II*"), it reimposed the title-holding requirement in Order No. 636, and vacated all capacity brokering certificates in *Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,032 (1992). *See El Paso Natural Gas Co.*, 59 FERC ¶ 61,031 (1992) ("Under *Texas Eastern [I]*, we required that shippers hold title to the gas transported on interstate pipelines utilizing its transportation priority. Similarly, Order No. 636's capacity releasing mechanism requires that the shipper hold title to the gas").

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