ORAL ARGUMENT SCHEDULED FOR APRIL 8, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 92-1567, ET AL.

ASSOCIATED GAS DISTRIBUTORS, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission") acted within the lawful scope of its authority under Section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c) when it modified through a notice-and-comment rulemaking certain procedures of its blanket certificate transportation regulations.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set out in the appendix to this brief.

JURISDICTION

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

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The instant case involves the lawfulness of a final Commission rule, adopted pursuant to the notice-and-comment procedures of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, which, among other things, eliminates a time limit on automatic authorization and a notice-and-protest procedure from the Commission's blanket certificate transportation regulations issued under Section 7(c) of the NGA. 1/

The orders from which review is sought are: (1) Order No. 537, Revisions to Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates, "Final Rule," Docket Nos. RM90-7, et al., III FERC Stats. & Regs. [Regulations Preambles] ¶ 30,927 (Sept. 20, 1991) (R 863-923, JA 129-185); and (2) Order No.

1/ As relevant here, Section 7(c)(1)(A) of the NGA provides:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . .

15 U.S.C. § 717f(c)(1)(A).

537-A, Revisions to Regulations Governing Transportation Under Section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates, "Order on Rehearing," Docket Nos. RM90-7, et al., III FERC Stats. & Regs. [Regulations Preambles] ¶ 30,952 (Sept. 21, 1992) (R 1018-1043, JA 216-241).

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

Relevant to this case is the Commission's construction and transportation authority under Section 7(c) of the NGA, 15 U.S.C. § 717f(c) and Section 311 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3371.

1. **Construction Under the NGA:** Beginning in 1982, the Commission promulgated rules (see 18 C.F.R. Subpart F) providing for Section 7(c) "blanket" certificates that, subject to a notice-and-protest procedure, preauthorized a broad range of routine construction projects. Thus, under 18 C.F.R. § 157.205(b), a pipeline seeking construction authority must file with the Commission a written "request for authorization" of the project, which the Commission "as soon as practicable" must publish in the Federal Register. See 18 C.F.R. § 157.205(e). 2/ If within 45 days after publication no protest is filed, the pipeline may, without further Commission authorization, proceed with the project. 18 C.F.R. § 157.205(i).

2/ The Commission's regulations also refer to requests for authorization as "prior notice" filings. See, e.g., 18 C.F.R. §§ 157.203, 157.211(a)(2), 157.212(a), 157.213(b), and 157.214.

If any person files a protest within the 45-day period, Section 157.205(g) provides that the pipeline must meet the protestor's objection within thirty days; if the protest is not withdrawn within 30 days, the pipeline may not lawfully construct the facility pursuant to its blanket certificate. See 18 C.F.R. § 157.205(g). Instead, its request for authorization is converted by operation of law into an individual, case-specific NGA Section 7(c) certificate application, which, in turn, will be processed under the more elaborate and formal procedures set out in 18 C.F.R. § 157.5 - § 157.21. These blanket "notice-and-protest" procedures regarding construction under NGA Section 7 are still in effect.

2. **Transportation Authority Under the NGA:** In 1983, the Commission, in Order No. 234-B, 3/ broadened the scope of its blanket certificate rules to include NGA § 7(c) transportation services.

However, unlike the blanket construction rules, which withheld authorization for commencement of construction until at least the protest period had ended, under Order No. 234-B blanket certificate transportation transactions were "automatically authorized" for a 120-day period and thus could commence without notice to the Commission or third parties. If, however, the pipeline wished to continue the transportation beyond the 120th

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3/ Order No. 234-B, Interstate Pipeline Blanket Certificate and Routine Transactions and Sales and Transportation by Interstate Pipelines and Distributors, III FERC Stats. & Regs. [Regulations Preambles] ¶ 30,475 (July 20, 1983).

day, it had to file a request for authorization early enough in the 120-day period (i.e., by the 75th day of service) so as to allow the entire 45-day protest period to run. Pipelines filing later than the 75th day of service had to seek a Commission waiver of the 120-day limit on automatic authorization.

3. **Changes Instituted By Order No. 436:** On November 1, 1985, the Commission replaced the Order No. 234-B program with the Order No. 436 transportation program 4/ which, among other things, conditioned blanket certificate transportation authorization on the requirement that a pipeline agree to transport for all customers on a nondiscriminatory, "open access" basis. In Order No. 436, the Commission determined to retain the same 120-day limitation on automatic authorization and the same notice-and-protest procedure that had been in force under Order No. 234-B. At the same time, however, the Commission made it clear that it did not consider these procedures to be a permanent fixture of its blanket certificate transportation program, but that:

> [i]f experience under the new [Order No. 436] transportation rules demonstrates that prior notice filings for these transactions serve no useful function, the Commission may entertain petitions to modify the rules accordingly.

4/ 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).

Order No. 436, ¶ 30,665, at p. 31,554.

4. Construction and Transportation Under Section 311 of the Natural Gas Policy Act: With the adoption of the NGPA in 1978, Congress established a regulatory framework, covering transportation and construction activity which was not subject to the Commission's jurisdiction under the NGA. See NGPA Section 601(a)(2)(A), 15 U.S.C. § 3432; 5/ see also Associated Gas Distributors v. FERC, 824 F.2d 981, 1040 (D.C. Cir. 1987 ("AGD I").

Under Section 311(a) of the NGPA, the Commission may, by rule or order, "authorize any interstate pipeline to transport natural gas on behalf of (i) any intrastate pipeline, and (ii) any local distribution company"; correspondingly, under NGPA § 311(a)(2) the Commission is authorized to permit intrastate pipelines to transport gas "on behalf of" any interstate pipeline or LDC served by an interstate pipeline. Between 1979 and 1985,

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5/ The NGPA "revis[ed] a comprehensive federal regulatory scheme [established in the NGA] to give market forces a more significant role in determining the supply, demand, and the price of natural gas," Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409, 422 (1986), and to break down the regulatory barriers between the interstate and intrastate markets.

In addition to setting a phased timetable for NGA deregulation of wellhead gas sales -- which were ultimately deregulated in the Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) -- the NGPA modified regulation of pipelines to 'facilitate[] development of a national natural gas transportation network without subjecting intrastate pipelines, already regulated by State agencies, to FPC regulation over the entirety of their operations.'" 824 F.2d at 1001, quoting H.R. Rep. No. 543, 95th Cong., 1st Sess. 45 (1977).

the Commission authorized § 311 transportation only for gas destined for the "system supply" of the "on behalf of" LDC or intrastate pipeline. However, in 1985, Order No. 436 expanded the range of transactions qualifying for self-implementing § 311 transportation authorization by eliminating the system supply restriction, thereby allowing § 311 transportation of gas directly to end-users without prior Commission authorization so long as the transaction was "on behalf of" an interstate pipeline, intrastate pipeline, or LDC under NGPA §§ 311(a) or (b). 6/

B. This Court's Remand In AGD-Hadson

a. In three companion orders issued in 1988, Hadson - Cascade - Texas Eastern, 7/, the Commission interpreted the "on behalf of" condition of § 311 expansively by finding that the

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6/ Coupled with 18 C.F.R. § 284.3(c), which excludes the construction of § 311 facilities from the Commission's NGA oversight, this new transportation authority made it possible for end-users for the first time to bypass LDCs by arranging for interstate pipelines to construct delivery taps under § 311, and to transport gas directly to them under § 311 authority.

In light of this new opportunity for end-users to bypass LDCs without case-specific Commission review of either the construction of the bypassing facilities or the transportation service under NGPA § 311, the Commission in Order No. 436-A, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, III FERC Stats. & Regs. ¶ 30,675, at p. 31,697 (1985) required interstate pipelines, before commencing transportation service, to provide written notification to bypassed LDCs and their state commissions. See 18 C.F.R. § 284.106(a)(4).

7/ Hadson Gas Systems, Inc., 44 FERC ¶ 61,082 (1988); Cascade Natural Gas Corp., 44 FERC ¶ 61,081 (1988); Texas Eastern Transmission Corporation, 44 FERC ¶ 61,080 (1988).

condition would be satisfied whenever the "on behalf of" entity derived "some economic benefit" from the transaction. On review of these orders, this Court found that the Commission's interpretation of the "on behalf of" language in NGPA § 311 was impermissibly broad, and remanded the case. Associated Gas Distributors v. FERC, 899 F.2d 1250, 1260 (D.C. Cir. 1990) ("AGD-Hadson). On remand, the Commission was authorized to determine the proper scope of the "on behalf of" language in § 311, provided that the "on behalf of" entity in the transaction "is related to the transportation of gas by an interstate pipeline in a way that reflects its status as an intrastate pipeline or LDC." Id.

C. The Proceedings In This Case

1. The Proposed Rulemaking

Following the remand in AGD-Hadson, the Commission issued a notice of proposed rulemaking ("NOPR"), R 27-78, JA 1-52, proposing to revise its interpretation of NGPA § 311's "on behalf of" standard to conform to AGD-Hadson, and also to eliminate the 120-day limit on automatic authorization as well as the notice-and-protest procedure for NGA § 7(c) blanket certificate transportation transactions.

Concerning the Section 7(c) proposal, which is the focus of petitioners' claims here, the Commission noted in the NOPR that the 120-day limit and the notice-and-protest procedure for blanket certificate transportation: 1) had created unnecessary

administrative burdens for the Commission, pipelines and shippers (since less than one percent of blanket certificate transportation transactions had been protested) R 56, JA 29; 2) had created unwarranted incentives for pipelines to transport under the authority of NGPA § 311 instead of their blanket Section 7 certificates (since they exposed participants to the risk that their transportation service would be halted within 120 days if a protest were filed and not withdrawn) R 55-56, JA 28-29; and 3) had impeded the goal of moving gas as quickly as possible to a ready market, since pipelines' reliance on § 311 authority necessitates locating and involving the additional "on behalf of" party. R 64, JA 37. In the Commission's view, there was no reason in these circumstances why the rules for implementing blanket certificate transportation service should differ from procedures for implementing § 311 transportation service. R 56, JA 29.

2. The Orders Under Review

a. In Order No. 537, the Commission adopted the proposal to repeal the 120-day time limit on automatic authorization and to eliminate the notice-and-protest procedure required in 18 C.F.R. § 284.221 for blanket certificate transportation services, 8/

8/ As a consequence of this action, pipelines are no longer required to make prior notice filings, i.e., requests for authorization that were formerly published in the Federal Register. If they provide service directly to a customer in an LDC's service area, however, they must provide written notification to the LDC (and its state regulatory commission) before commencing the service. See 18 C.F.R. § 284.223(d)(1)(vi). On the other hand, the pipelines' (continued...)

and thereby to subject § 7(c) blanket certificate transportation transactions to the same procedural requirements that have governed § 311 transportation since the Commission issued Order No. 436. Hence, like NGPA § 311 transporters, blanket certificate transporters now have automatic authority to perform transportation service for the full contract term, subject only to an NGA § 5 complaint procedure. 9/

In reaching this result, the Commission found that the notice-and-protest procedures were unduly burdensome, and had created a "nonmarket incentive for parties to gas supply arrangements to rely on section 311 authority rather than section 7 blanket authority." R 900, JA 166. The Commission noted that of the 5,409 blanket certificate transactions that have occurred since issuance of Order No. 436, only 84 (or 1.5 %) have been protested, R 902 n.40, JA 168 n.40, and "not one of these protested proceedings resulted in a finding that the pipeline had engaged in unduly discriminatory or anticompetitive practices." R 902, JA 168.

8/(...continued)
obligation to file initial reports, see 18 C.F.R. § 284.223(d)(1), and the Commission's policy (discussed infra) of publishing in the Federal Register on a monthly basis notice of all reported transportation transactions under NGPA § 311 and NGA § 7(c) blanket certificates, were unaffected by Order No. 537.

9/ Under Order No. 537, if the Commission receives a complaint concerning a pipeline's commencement of a blanket transportation service, the matter will be processed under NGA § 5 and 18 C.F.R. § 385.206, and the pipeline will be permitted to continue the service without interruption until the Commission issues an order requiring that the transportation service be halted.

The Commission further found, R 902-03, JA 168-69, that only ten of 84 protests involved LDC challenges to a proposed bypass; the remaining 74 involved general policy issues that were not limited solely to the transportation transactions that were protested. These policy issues, the Commission held, were of the type that had traditionally been processed as complaints under NGA § 5, 15 U.S.C. § 717d. The Commission also concluded, R 904, JA 170, that, as a practical matter, the notice-and-protest procedure was not necessary to assure timely resolution of protested transactions because protesters could avail themselves of the NGA § 5 complaint procedure, where the Commission believed that it could act on most complaints within 60 days.

The Commission, R 900, JA 166, also rejected arguments made by petitioners that the notice-and-protest procedure was statutorily required in order to satisfy the notice and hearing requirement of NGA § 7(c). On the contrary, it held that § 7(c)'s procedural requirements can be satisfied by a rule-making, and concluded that "[t]his rulemaking proceeding satisfies those statutory requirements." Id. The Commission also rejected petitioners' arguments that the substitution of a simple written notice (see supra n. 8) for the notice-and-protest procedure would prejudice LDC efforts to minimize the risk of bypass. In this regard, the Commission reasoned that its blanket certificate construction rules under Section 7 continue to have prior

notice-and-protest procedures. R 906, JA 172. 10/ Thus, if the bypassing facilities have not yet been constructed, LDCs can raise their concerns through the notice-and-protest procedure still applicable to Section 7(c) blanket certificate construction. Id. If, on the other hand, the bypassing facilities have already been constructed by the time the blanket certificate transportation service has commenced, the LDC would already have had the opportunity to protest their construction. Id.

b. The Commission denied petitioners' rehearing requests in Order No. 537-A. First, it reaffirmed its prior determination that the Order No. 537 rulemaking itself satisfies § 7(c)'s notice and hearing requirement, R 1036, JA 234, and then rejected petitioners' suggestion that the blanket certificate transportation regulations must at least provide 30 days advance notice in order to allow LDCs to respond competitively, stating that "such a requirement would unnecessarily delay service and would conflict with our goals of creating an efficient market for natural gas." R 1038, JA 236.

Commissioner Moler (now Chair) dissented, objecting to the majority' decision not to require pipelines to provide 30 days advance notice to affected LDCs, and concluding that, as written, Order No. 537 does not provide LDCs with "a reasonable

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10/ Order No. 537 did not in any way affect the blanket certificate notice-and-protest procedures applicable before the construction of bypassing facilities such as delivery taps can lawfully commence. See pp. 2-3, supra.

opportunity to respond to the threat of being bypassed." R 1044-46, JA 211-214.

This appeal followed.

SUMMARY OF ARGUMENT

I.

A. The Commission acted well within its authority under Section 7(c) of the Natural Gas Act to eliminate the 120-day limit on automatic authorization and the notice-and-protest procedure for individual transportation services authorized by virtue of blanket certificates. Advance authorization by blanket certificate for individual NGA § 7 transportation transactions is statutorily permissible because: 1) it is well-established that the Commission is free to rely on its rulemaking authority to determine issues that do not require case-by-case determination; 2) the hearing requirements of NGA § 7 do not require the Commission to make specific findings as to the public convenience and necessity in individual cases when the issues involved are general; and 3) Order No. 537 applies only to blanket transportation services, i.e., transactions that are not unique.

Petitioners' arguments that the Commission is precluded by this Court's decisions in AGD I and AGD-Hadson from implementing NGA § 7(c) transportation services under procedures that are identical to NGPA § 311 procedures should be dismissed on jurisdictional grounds because petitioners failed to raise them in a request for rehearing, and because they are diametrically opposed to arguments presented to the Commission on rehearing -- where petitioners argued that the procedures for implementing NGA § 7(c) transportation services should as a matter of "policy" be identical to the procedures for implementing NGPA § 311

transactions. In any event, neither AGD I nor AGD-Hadson ruled that the Commission must maintain different procedures for § 311 and § 7(c) transportation services.

B. In eliminating the 120-day automatic authorization limit and the notice-and-protest procedure, the Commission in Order No. 537 clearly acknowledged that it was departing from prior policy and practice, and provided a full and reasoned analysis for the policy change.

When it issued Order No. 436 in 1985, the Commission made plain that it did not necessarily consider the notice-and-protest procedure to be a permanent fixture of its blanket certificate transportation program. The Commission's additional experience with the notice-and-protest procedure since 1985 confirmed that the procedure was rarely used (only 84 protests out of 5,409 transactions), and therefore, the administrative burdens and expense of the procedure were not deemed justified. In addition, not a single protest had resulted in a finding that a pipeline had engaged in unduly discriminatory or anticompetitive practices.

The Commission further reasoned that the notice-and-protest procedure had been misused by protesters to raise general policy issues which were not case-specific to a particular transportation transaction, and which are the kind of issues that the Commission normally resolves through its complaint process. The Commission also found administratively burdensome the processing of pipeline waiver requests that became necessary

whenever the 120 day automatic authorization period would end before the 45-day protest period expired. The Commission explained that the notice-and-protest procedure was unnecessary to provide LDCs and other parties the opportunity to have their objections to blanket transportation services addressed by the Commission in a timely manner because those parties may use the NGA section 5 complaint procedure, where the Commission expects to be able to act on most complaints within 60 days.

Finally, the Commission reasoned that notice-and-protest procedures were unnecessary to provide LDCs adequate notice and an opportunity to be heard in cases where they wish to challenge a bypass. As the Commission explained, LDCs are procedurally protected in bypass situations by the effect of a combination of Commission regulations which collectively: 1) afford LDCs and their state commissions a notice-and-protest procedure before any blanket certificate construction of facilities that could be used to bypass the LDC can commence; and 2) require pipelines to provide written notice of bypassing transportation service to affected LDCs and their state commissions before the transportation service commences.

c. The Commission in Order No. 537 reasonably declined to require that written notice be provided 30 days in advance because this would create an undue advantage for LDCs and be counterproductive to the Commission's goal of promoting competition by ensuring a level playing field. Petitioners' assertion that LDCs are unlikely to become aware that a bypass is

imminent, absent a 30-day advance notice requirement, must be considered highly questionable.

Apart from the Commission's construction rules, which still afford LDCs a notice-and-protest procedure for bypass facilities such as delivery taps and metering equipment, it would be difficult for LDCs not to be in a position to know when a bypass is likely to occur. Initially, the LDC/end-user's service contract termination date will provide LDCs with an important clue as to when a potential bypass is likely to occur. Moreover, it would be against the end-user's financial self-interest (as a beneficiary of competition) to conceal the fact that it is negotiating with the interstate pipeline for better terms than the user is currently receiving from its LDC.

II.

Petitioners' remaining claims have no merit.

A. Petitioners' claim that the Commission's Notices of Self-Implementing Part 284 Transactions provides less timely notice of new transportation transactions is barred from review because it was not raised on rehearing. In any event, it has no merit because, even under the former notice-and-protest procedure, notice of a new service might not be published until well into the 120-day period of automatic authorization.

B. Petitioners also argue, without merit, that this Court should discount the Commission's projection that it will be able to deal with most complaints within 60 days because they have located two Commission cases in which the Commission has taken

longer than 60 days to adjudicate. This assertion, however, hardly impeaches the Commission's projection that it expects to resolve most complaints within 60 days.

C. Finally, petitioners also argue insubstantially that the complaint procedure is a legally insufficient substitute for the notice-and-protest procedure because when a protest was filed under the former procedure, it maintained the status quo ante until the Commission made a case-specific finding approving the transaction. However, there is nothing in the NGA, or case law relevant thereto, remotely suggesting that the Commission has a nondiscretionary duty to enjoin transactions -- already found, by rule, to be in the public convenience and necessity -- while protested matters are being adjudicated.

ARGUMENT

I. THE COMMISSION'S ELIMINATION OF BOTH THE 120-DAY LIMIT ON AUTOMATIC AUTHORIZATION AND THE NOTICE-AND-PROTEST PROCEDURE FOR BLANKET CERTIFICATE TRANSPORTATION SERVICE WAS A LAWFUL AND REASONABLE EXERCISE OF THE COMMISSION'S AUTHORITY UNDER THE NATURAL GAS ACT.

A. The Commission's Ruling Is Consistent With Settled Judicial Precedent

In the orders on review, the Commission expressly found that it was:

> not required to make every individual blanket certificate transportation service subject to notice and protest procedures like those of the current regulations in order to satisfy the notice and hearing requirements of section 7(c) of the NGA. This rulemaking satisfies those statutory requirements.

R 900; 1036, JA 166; 234. This ruling is amply supported by the decisions of the Supreme Court and this Court. 11/

1. In Heckler v. Campbell, 461 U.S. 458 (1983), the Supreme Court ruled that even when a statutory scheme requires an agency to hold a hearing, "the agency may rely on its rulemaking authority to determine issues that do not require case-by-case determination." More recently, this Court has recognized that "it is far too late in the day to claim that an agency may not simplify adjudications by resolving issues in a rulemaking."

11/ Even though, as a result of Order No. 537, the Commission no longer requires pipelines to subject each individual transaction to an adjudicatory process (i.e., a notice-and-protest procedure) before the transaction receives an unqualified authorization, pipelines must obtain blanket certificate authority to perform Order No. 436 open access transportation only in a traditional, adjudicatory section 7(c) proceeding, with notice to interested persons and an opportunity for a hearing. See 18 C.F.R. § 284.221(b); see also 18 C.F.R. § 157.11.

Panhandle Eastern Pipe Line Corp. v. FERC, 907 F.2d 185, 187 (D.C. Cir. 1990) ("Panhandle"), citing Heckler. Finally, relying on both Heckler and Panhandle, the Supreme Court in Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies, 498 U.S. 211, 228 (1991), specifically ruled that the hearing requirements of NGA § 7 do not require the Commission to make specific findings as to the public convenience and necessity in individual cases "when the issues involved are general." Id. Rather, "general factual issues may be resolved as fairly through rulemaking as by considering specific evidence when the questions under consideration are not unique to the particular case." Id., quoting Heckler, 461 U.S. at 468. 12/

The Commission's blanket transportation authority is governed by the Mobil Oil, Heckler, and Panhandle decisions because its authority has been exercised here only as to transportation services that are not unique. Under the Commission's rule, all NGA § 7 blanket certificate transporters

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12/ Although Mobil Oil and Panhandle both involved challenges to the Commission's authority under NGA § 7(b) to approve abandonments as in the public convenience and necessity, by rulemaking and without case-specific adjudication for each abandonment, its reasoning is equally applicable to the notice and hearing requirement of Section 7(c) of the NGA, which also requires a Commission finding that proposed transportation transactions are in the "public convenience and necessity."

Indeed, in Panhandle, this Court approved the Commission's reliance solely on a pipeline's acceptance of a blanket transportation certificate -- the same criterion involved here -- as authority for finding interstate pipeline abandonments of purchase obligations to be in the public convenience and necessity. 907 F.2d at 188.

must satisfy uniform terms and conditions prescribed by Commission Order No. 436, such as the requirement to offer both firm and interruptible transportation to all persons on an open access, nondiscriminatory basis, 18 C.F.R. §§ 284.8, 284.9; the obligation to provide the same quality of service to firm transportation customers as is enjoyed by firm sales customers, 18 C.F.R. § 284.10; the requirement to offer firm sales customers the option to convert to firm transportation service, 18 C.F.R. § 284.8(b); and the obligation to subject open access transportation services to flexible rates. 18 C.F.R. § 284.7.

2. Petitioners contend, however, that these general principles do not apply here since the decisions of this Court in AGD-Hadson and AGD I require a different result. According to petitioners, Pet. Br. 18-22, the AGD-Hadson and AGD I decisions stand for the propositions that NGA § 7 and NGPA § 311 are distinct statutory authorizations with differing levels of regulatory oversight; that therefore NGA § 7 transportation must always be subject to more stringent procedures than apply to § 311 transportation; and that, accordingly, the elimination of the notice-and-protest procedure and 120-day time limit by Order No. 537 must fall since it undermines these holdings. These contentions do not survive analysis.

a. As a threshold matter, these arguments should be dismissed on jurisdictional grounds because petitioners failed to raise them in a request for rehearing, as NGA § 19(b), 15 U.S.C.

§ 717r(b), requires. See, e.g., East Tennessee Natural Gas Co. v. FERC, 953 F.2d 675, 679 n.5 (D.C. Cir. 1992); Williams Natural Gas Co. v. FERC, 943 F.2d 1320, 1328 (D.C. Cir. 1991); Asarco, Inc. v. FERC, 777 F.2d 764, 774 (D.C. Cir. 1985) ("Asarco").

Indeed, petitioners' suggestion (Pet. Br. 18-22) that the Commission is statutorily required always to impose different procedural requirements for NGA § 7 and NGPA § 311 transportation services is diametrically opposed to petitioner AGD's earlier position, as expressed in its rehearing request to the Commission, R 947-963, JA 191-209. In that rehearing request, AGD argued to the Commission that the notification requirements and implementation procedures for § 7(c) blanket certificate transportation transactions and NGPA § 311 transportation transactions should be identical. As it stated:

> [F]undamentally, the Commission should avoid implementing rules and regulations which would provide an incentive for parties to elect to engage in Section 311 transportation over Section 7 transportation, or vice versa. There is no reason to think that Congress intended to create different incentives for these different transportation forms; both remain of great concern to the public, and the Commission's charge to protect the public interest can be served only by creating a level playing field.

R 958-59, JA 202-03.

b. Even apart from their binding jurisdictional effect, petitioners' views stated to the Commission plainly undercut the merits of the contrary position raised now before this Court. Thus, their concession that the procedures for implementing NGPA § 311 and NGA § 7(c) transportation services are "policy"

matters 13/ for the Commission to decide completely erodes petitioners' position urged for the first time to this Court that distinct procedures are statutorily required, and that § 311 transportation service must always be implemented on terms procedurally less restrictive than § 7 blanket certificate transportation service.

But, even apart from the weight of the concession, there is in no substance to the claim (Pet. Br. 19) that Order No. 537 fails because it "subject[s] NGA § 7 blanket certificate transportation to no greater regulatory requirements than exist for NGPA § 311" transportation. To the contrary, interstate pipelines seeking authority to transport under blanket certificates must first subject themselves to an elaborate NGA § 7(c) certification process, in which the Commission must find, after notice and an opportunity for a hearing, that the pipeline's application for blanket certificate authority is required by the public convenience and necessity. See 18 C.F.R. § 284.221; AGD I, 824 F.2d at 1039. No such requirement exists for § 311 transportation.

13/ Thus, in its rehearing request, petitioner AGD argued to the Commission that "[t]here is a very strong policy argument in support of the proposition that the same notice-and-protest procedures should govern transportation pursuant to NGPA Section 311 and blanket certificates issued under NGA Section 7(c)." R. 958, JA 202. (Emphasis added.) Likewise, petitioner WGL's rehearing request also effectively argued that both NGPA Section 311 transportation and NGA Section 7 transportation "should" be subject to the same procedures. See R 943; JA 187.

At all events, petitioners' claim that Order No. 537 undermines AGD I and AGD-Hadson is wrong even if there were no difference in the way the Commission authorizes NGA § 7(c) and NGPA § 311 transportation service. To be sure, this Court in AGD I observed that the "value of fulfilling § 311's purpose of integrating the formerly segregated interstate and intrastate markets . . . supports less stringent rules for § 311 transportation." 824 F.2d at 1039. The AGD I Court never stated, however, that § 311's purpose always requires less strict rules for § 311 transportation than for § 7 transportation; 14/ nor did it ever reach the question whether a notice-and-protest procedure is mandated by NGA § 7(c). In short, the AGD I Court never suggested that after interstate pipelines have completed the traditional NGA § 7(c) certification process to obtain a blanket certificate, they may not commence individual NGA § 7(c) transportation transactions under procedures identical to NGPA § 311 procedures.

Likewise, there is nothing in this Court's AGD-Hadson decision requiring the Commission to devise different procedures

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14/ To the contrary, in AGD I, the Court specifically stated:

> the purpose of § 311 -- so far as we are able to discern -- is not to bestow special benefits on any of the parties on whose behalf it authorizes transportation . . . but to reduce the barriers between the interstate and intrastate gas markets.

824 F.2d at 1042.

for § 311 and § 7(c) transportation services. In AGD-Hadson, this Court simply invalidated a Commission interpretation of § 311's "on behalf of" language because it effectively would have done away with the need for any pipeline to obtain NGA certification before performing interstate transportation services.

Far from undermining AGD-Hadson, Order No. 537 actually supports that decision by eradicating a bias favoring § 311 transportation. Thus, the Commission's elimination of notice-and-protest procedures for blanket certificate transportation reduces a "nonmarket incentive" among pipelines and shippers to rely on NGPA § 311 instead of NGA § 7(c) for authorization, which is consonant with AGD-Hadson's holding, 899 F.2d at 1261-64, that Congress did not intend to create in NGPA § 311 a far-reaching exception to NGA § 7 transportation.

B. The Commission's Elimination of The 120-Day Authorization Limit And The Notice-And-Protest Procedures Is the Product of Reasoned Decisionmaking

1. The Commission's Orders Fully Acknowledge And Explain the Departure From Prior Policy Effected By Order No. 537

The Commission explicitly recognized, R 904, 1037, JA 170, 235, that in eliminating the 120-day automatic authorization limit and the notice-and-protest procedure, it was departing from prior policy and practice. 15/ As the Commission itself

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15/ Thus, petitioners' repeated claims (Pet. Br. 22, 25) that in abandoning the notice-and-protest procedures, the Commission failed to acknowledge its departure from its own precedent is baseless.

(continued...)

acknowledged, "an administrative agency may change an existing policy or an earlier interpretation of a regulation if the departure is adequately explained and justified," R 1037, JA 235, citing Acadian Gas Pipeline System v. FERC, 878 F.2d 865 (5th Cir. 1989); see also Greater Boston Television Corp. v. FERC, 444 F.2d 841, 852 (D.C. Cir. 1970). Indeed, as previously noted, see p. 5, supra, when it issued Order No. 436 in 1985, the Commission made plain that it did not necessarily consider the notice-and-protest procedure to be a permanent fixture of its blanket certificate transportation program. Rather, the Commission specifically stated that it may revisit the need for notice-and-protest procedures if its experience under the new transportation rules shows that such procedures serve no useful function. Order No. 436, III FERC Stats. & Regs. [Preambles] ¶ 30,665, at p. 31,554. Thus, the Commission did not regard its retention of the notice-and-protest procedures for the time being in Order No. 436 to be a matter of statutory coercion, but rather simply an

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15/(...continued)

> Similarly unfounded is petitioners' assertion (Pet. Br. 23) that "[t]he Commission has relied on the presence of notice-and-protest procedures from the inception of its regulation of interstate transportation by blanket certificate." This is simply not the case. In 18 C.F.R. §§ 284.225 (b) and 284.226, the Commission, by rule, has granted interstate pipelines blanket certificates under NGA § 7(c) to transport gas released due to an abandonment or termination of gas sales contracts resulting from an invocation of the "good-faith negotiation" procedure prescribe in 18 C.F.R. § 270.201. Blanket certificate transportation under 18 C.F.R. §§ 284.225 and 284.226 is automatically authorized and is not subject to any notice-and-protest procedure.

exercise of "legislative" discretion, see Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968), which might be changed at some future date. See also R 904, JA 170. As we now demonstrate, it provided a reasoned analysis for adopting a change in policy in Order Nos. 537 and 537-A.

a. Initially, the Commission found that "[a]though the 120-day limitation on automatic authorization was originally adopted to prevent the indefinite continuation of successfully protested services," since its inception only 84 of 5,409 blanket transportation services (or 1.5 percent) had been protested. R 902 n.40, JA 168 n.40. Given the infrequency of protests, the Commission reasonably concluded that the notice-and-protest procedure could no longer be justified in light of the administrative burden and expense associated with notice in the Federal Register of each individual transportation transaction, 16/ and

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16/ Petitioners complain (Pet. Br. 30) that there is nothing in the record to support a finding that the burden and expense of publishing individual transportation notices in the Federal Register under the former notice-and-protest procedure are materially different from the burden and expense of the Commission's substitute notice procedure, i.e., the Commission's publication monthly in the Federal Register of "Notices of Self-Implementing Part 284 Transactions" ("Part 284 Notices").

Initially, petitioners did not raise this matter on rehearing, and therefore it is barred from further consideration. Asarco, 777 F.2d at 774. In any event, it is self-evident that the burden and expense of publishing Part 284 Notices is materially lighter and less costly because it involves a single, "omnibus" publication of all transportation transactions reported since the last Part 284 Notice was published, instead of publishing each notice as it is filed for every individual transaction.

the Commission's processing of more than 150 requests for waiver of the 120-day authorization limit. R 901-02, JA 167-68. 17/

b. The Commission also explained that while "not one" of the 84 protests challenging a blanket transportation transaction "has resulted in a finding that the pipeline had engaged in unduly discriminatory or anticompetitive practices" R 902, JA 168, the processing of each such application had the effect of greatly increasing the burdens on both the Commission and pipelines. Thus, frequent protests to blanket certificate activities

> either contain no specific allegations of undue discrimination or anticompetitive practices or provide no support or inadequate support for such allegations. In some instances, protests have merely stated that the prior notice filing is being protested and that the protester requests conversion of the prior notice filing to a case-specific proceeding.

R 901 n.39, JA 167 n.39.

c. The Commission further stated its view that the notice-and-protest procedure for blanket certificate transportation

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17/ One of the burdens attributed to the notice-and-protest procedure, i.e., the requirement that pipelines pay a filing fee of $ 34,550 if a filed protest is not withdrawn, was repealed after Order No. 537 became effective (and indeed after this appeal had already commenced). See Order No. 548, Elimination of Filing Fees, III FERC Stats. & Regs. ¶ 30,960 (1993). The fact that this requirement is no longer in effect is not a proper basis for challenging Order No. 537. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554-55 (1978). In any event, the filing fee was not the sole burden cited in the Order No. 537 as justifying repeal of the notice-and-protest procedure, and thus the repeal of the filing fee should not affect this case.

services had been misused by protesters to raise the kinds of issues that the Commission normally resolves through its complaint process. 18/ As the Commission explained, 74 of the 84 protests filed since Order No. 436 blanket certificate transportation commenced were in the nature of complaints raising general policy issues that were not case-specific to the particular transportation transaction protested. R 903, JA 169. 19/

d. The Commission also found that unless the 120-day limitation on automatic authorization were eliminated, the need to address waiver requests would be ongoing. As the Commission stated in the NOPR, R 62, JA 35, new waiver requests are being

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18/ As examples of general policy issues which were not specific to the particular transportation transaction protested, the Commission cited questions raised by protestors: 1) concerning the extent to which a gas customer should remain liable for its LDC's costs when the customer switches to direct transportation service from a pipeline; 2) whether a pipeline should condition new transportation services to ensure that new capacity will be available to meet its sales customers' future requests for conversions to transportation service; 3) and whether a pipelines' capacity allocation practices are consistent with the first-come, first-served rule of open access transportation. R 903, J.A. 169.

Contrary to petitioners' claims (Pet. Br. 33-34), the Commission reasonably concluded that these types of issues are not appropriately resolved in a notice-and-protest procedure because they reflect policy matters that do not identify any illegality associated with a particular transportation transaction.

19/ Petitioners (Pet. Br. 34) assert that the Commission may not relegate policy issues that are not transaction-specific to its NGA section 5 complaint procedure. As this assertion flies in the face of the broad discretion conferred on administrative agencies to develop procedures as they see fit, see Kansas Power & Light, 851 F.2d 1479, 1484 (D.C. Cir. 1988), it should be rejected.

filed almost daily, and therefore, the Commission would have to "continue devoting significant resources to reviewing and responding to these requests." In light of the fact that protests were rarely (if ever) successful, and given the infrequency of protests generally, the Commission reasonably concluded that the burdens of waiver requests outweighed the benefits of the 120-day limit on automatic authorization.

e. At the same time, the Commission explained, that notice-and-protest procedures are not necessary to provide LDCs and other parties the "opportunity to have their objections to blanket transportation services addressed by the Commission in a timely manner." R 904, JA 170. This was so, the Commission reasoned, because the parties may file complaints under NGA § 5, and it expects to be able to act on most complaints within 60 days. R 904, JA 170. As the Commission further pointed out, it had already been addressing protests to blanket transportation services in the same fashion that it addresses complaints against NGPA § 311 transportation service. R 905, JA 171. On these bases, the Commission reasonably concluded that "there is no good reason for different processing and treatment of complaints against blanket services and section 311 services." Id.

f. Lastly, the Commission explained that notice-and-protest procedures were unnecessary to provide LDCs adequate notice and an opportunity to be heard in cases where they wish to challenge a bypass. To begin with, the Commission found little evidence that blanket certificate transportation authority had been used

to bypass LDCs, noting that only ten transactions (out of 5,409) were protested based on arguments that the Commission should not allow pipelines to bypass LDCs. R 902-03, JA 168-69.

In any event, the Commission determined, R 905-07, JA 171-73, that even with the elimination of notice-and-protest procedures for blanket certificate transportation services, LDCs are procedurally protected in bypass situations by the effect of a combination of Commission regulations which collectively: 1) afford LDCs and their state commissions a notice-and-protest procedure before any blanket certificate construction of facilities that could be used to bypass the LDC can commence; and 2) require pipelines to provide written notice of bypassing transportation service to affected LDCs and their state commissions before the transportation service commences.

2. The Commission's Determination Not To Impose A 30-Day Advance Notice Requirement On Transactions Involving LDC Bypass Reflects A Proper Exercise Of Its Authority To Make Reasoned Policy Decisions.

In cases involving bypass, Order No. 537 imposed the same notification requirements on pipelines transporting under NGA § 7(c) blanket certificates that have applied to NGPA § 311 transportation since Order No. 436-A became effective in 1985. Thus, pipelines must now provide the bypassed LDC and its state commission written notification before the service commences, regardless of whether they transport under NGA § 7(c) or NGPA § 311. See 18 C.F.R. §§ 284.106(a)(4), 284.223(d)(1)(vi).

On the other hand, the Commission in Order No. 537 declined to require that written notice be provided 30 days in advance

because this "would create an advantage for LDCs under the regulations which would be counterproductive to the Commission's goal of promoting competition by ensuring a level playing field." R 907, JA 173. 20/ The Commission also found, R 905-06, JA 171-72, that LDCs were in any event adequately protected by the notice-and-protest procedure that is still in effect for blanket certificate construction of facilities (e.g., delivery taps) needed to implement the bypassing transportation service -- which afford LDCs notice and an opportunity to have their bypass claims addressed before construction begins.

Petitioners argue nonetheless (Pet. Br. 40-43) that the Commission's decision does not reflect reasoned decisionmaking because it does not require 30 days advance notice in bypass cases, and thus deprives LDCs of "the necessary tools for meaningful competition in the marketplace." Id. at 43. This argument fails on a number of grounds.

a. As an initial matter, by insisting that LDCs must be afforded 30 days advance notice, petitioners are in effect saying that LDCs are powerless to deal with the risk of bypass, until they are actually notified that a transportation agreement has been reached between an interstate pipeline and an end-

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20/ Likewise, in Order No. 537-A, the Commission, R 1038, JA 236, found 30 days advance notice unnecessary "to allow LDC[s] to respond competitively," and, in any event, "would unnecessarily delay service and would conflict with our goals of creating an efficient market for natural gas." Id.

user, 21/ and unless LDCs are given 30 days thereafter to respond. This contention, however, runs counter to a consistent line of Commission cases demonstrating that LDCs and state commissions must take the initiative to adjust their operations, policies and practices to make local service competitive -- in order to minimize the risk of bypass before it is threatened. E.g., Northern Natural Gas Company, 48 FERC ¶ 61,232, at p. 61,829 (1989); Northwest Pipeline Corporation, 52 FERC ¶ 61,053, at p. 61,227 (1990); Texas Gas Transmission Corp., 65 FERC ¶ 61,275, at 62,264 (1993); see also Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412, 1422 (10th Cir. 1992). Indeed, requiring transportation arrangements to be delayed 30 days to provide LDCs "an opportunity to compete" would have the opposite effect of insulating LDCs from competitive pressures, altering the level playing field of competition between LDCs and interstate pipelines, and delaying transportation transactions unnecessarily.

Second, petitioners' assertion (Pet. Br. 42) that LDCs are unlikely to become aware that a bypass is imminent, absent a 30-day advance notice requirement, is highly questionable. Before a bypass can occur, facilities such as delivery taps and metering equipment must be constructed which require either a notice-and-protest procedure or formal NGA § 7(c) review before construction may lawfully commence. See 18 C.F.R. §§ 157.202(b)(10); 157.211.

21/ The 30-day period cannot begin to run before an agreement is reached, because the parties will not be in a position to make the notification until a contract is formed.

As the Commission found, R 905-06, JA 171-72, LDCs will be afforded notice of the potential bypass no later than the construction phase of the bypass arrangement. Thus, by the time the transportation service commences, the LDC will already have had an opportunity to raise bypass challenges. 22/

Third, even apart from the notice provided by the construction of the bypass facilities, it would be difficult for LDCs not to be in a position to know when a bypass is likely to happen. For one thing, the LDC/end-user's service contract termination date will provide the LDCs a strong hint as to when a potential bypass is likely to occur. 23/ Moreover, in Cascade, (see n. 22) the Commission stated that it must be presumed that an end-user has chosen to bypass its LDC "on the basis of sufficient and accurate information," and with the belief that it has made "the best available bargain[] in the market." Id. Inasmuch as the end-user would be the beneficiary

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22/ At Br. 46-47, petitioners mischaracterize the facts in Cascade Natural Gas Co. v. Northwest Pipeline Co., 44 FERC ¶ 61,081 (1988), as involving a situation where an interstate pipeline was able to bypass an LDC by arranging for an end-user to build a nonjurisdictional pipeline to serve a second end-user. To the contrary, there was no second end-user involved; instead, the case involved only a situation where a single, existing customer of an interstate pipeline constructed a 1,700 foot line between plants on the same industrial sites, both owned by that same customer. In any event, the LDC in Cascade already had an opportunity to raise bypass concerns at the time the line connecting the customer's first plant with the interstate pipeline was constructed.

23/ Should the end-user breach its contract with the LDC, and discontinue taking service from the LDC before the contract termination date, the LDC would of course be protected by its contractual remedies.

of any competition between the interstate pipeline and the LDC, it would be against the end-user's financial self-interest to conceal the fact that it is negotiating with the interstate pipeline for better terms than the user is currently receiving from its LDC. In other words, since the end-user stands to profit from a "bidding war" between the interstate pipeline and LDC, the user can be expected to notify the LDC that it is considering competitive alternatives before it reaches any agreement with an LDC's competitor. 24/

b. Petitioners (Pet. Br. 43-44), however, take issue with the Commission's statement in Order No. 537, R 905-06, JA 171-72, that there are LDC notification requirements in cases of § 311 construction, contending that there has never been a public notice requirement or LDC notice requirement to bypassed LDCs in the case of § 311 construction. But petitioners did not raise this claim on rehearing, and thus are barred from raising it on judicial review. See NGA § 19(b); Asarco, supra, 777 F.2d at 774.

In any event, this assertion is entirely irrelevant to this case because the absence of notice requirements for § 311

24/ It should also be pointed out that the prior written notice that pipelines must now give LDCs which are bypassed goes beyond even what was required before Order No. 537. Before Order No. 537, bypassing transportation service could commence without notice to LDCs and their state commissions. LDCs would first receive notification of the bypassing transportation service well into the 120-day period of automatic authorization, whenever the pipeline filed the notice that commenced the notice-and-protest procedure. Under Order No. 537, LDCs will receive notice much earlier -- before the service commences.

construction can have no effect on transportation services rendered pursuant to NGA § 7(c). Order No. 537's elimination of the notice-and-protest procedure affects only transportation services rendered pursuant to NGA § 7 blanket certificates. The Commission has repeatedly declared that NGA § 7(c) transportation service cannot be performed over facilities constructed under NGPA § 311 without converting those facilities for NGA § 7(c) usage, which entails submitting them to a facility-specific NGA § 7(c) certification process, i.e., either a notice-and-protest procedure or a full-blown NGA § 7(c) adjudication. See Order No. 436-A, ¶ 30,675, at p. 31,697; see also Order No. 537-B, R 1077-82, JA 242-250. Thus, before NGA § 7(c) transportation service could ever bypass an LDC over facilities constructed under NGPA § 311 authority, the LDC would be afforded notice and an opportunity to raise bypass claims in proceedings to convert the § 311 facilities to NGA § 7(c) usage. 25/

25/ Petitioners take issue with the Commission's observation that if an LDC does not participate in the transportation of gas to a customer in its service area, NGPA § 311 will not authorize the construction or transportation. Pet. Br. 45, citing Peoples Natural Gas Co. v. Williams Natural Gas Co., 59 FERC ¶ 61,121 (1992). This argument likewise was not raised on rehearing, and thus, the Commission has not had an opportunity to address it.

Regardless of whether the Commission's observation is correct or not, it is irrelevant to the issues in this case because, as shown above, facilities constructed under NGPA § 311 cannot be used for Section 7 transportation services. Moreover, Order No. 537 amends only the procedures for implementing NGA § 7 transportation services, and does not have any effect on the implementation procedures for construction and transportation under NGPA § 311. Thus, even if a pipeline were to rely on NGPA § 311 to transport

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c. Finally, on this point we would note that the Commission's determination in Order No. 537 not to provide LDCs 30 days advance notice of a bypassing transportation service is simply a straightforward application of its policy to "foster a vigorously competitive open-access transportation market, even where bypass may occur." Northwest Pipeline Corp., 52 FERC ¶ 61,053, at 61,226 (1990). This pro-competition policy has been upheld by this Court. See Kansas Power & Light v. FERC, 891 F.2d 939, 941-42 (D.C. Cir. 1989); Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 122-23 (D.C. Cir. 1989).

II. PETITIONERS' REMAINING CLAIMS HAVE NO MERIT

A. Petitioners' Claim That There Is No Longer Any Way For Affected Parties To Receive Timely Notice Of New Transportation Transactions Is Jurisdictionally Barred From Review And, In Any Event, Is Without Merit.

In Order No. 537, R 907, JA 173, the Commission found that interested LDCs and state agencies would, despite elimination of the notice-and-protest procedure, still have notice of transportation transactions as well as "access to sufficient information to enable them to determine in a timely manner whether they wish to file complaints against particular transactions." In support, the Commission cited, among other things, its "Notices of Self-Implementing Part 284 Transactions," which the Commission publishes at roughly monthly intervals in

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25/(...continued)
into an LDC's market area without the LDC's participation, this authority would have existed prior to Order No. 537, and was not changed in any way by Order No. 537.

the Federal Register, as providing timely notice of the "identities of service agreement parties and the firm or interruptible nature of services." Id. 26/

1. Petitioners argue (Pet. Br. 36-37) that this form of notice is untimely and "an inadequate substitute for the Federal Register notice eliminated by this rule." 27/ Inasmuch as petitioners' rehearing requests failed to even mention the Commission's monthly "Notices of Self-Implementing Part 284 Transactions," the Commission itself did not have an opportunity itself to address this claim. Consequently, petitioners are barred from raising it now. Asarco, supra 777 F.2d at 774.

This claim is, in any event, without merit. The timeliness of the public notice provided by the monthly "Notices of Self-Implementing Part 284 Transportation Transactions does not differ materially from the "after-the-fact" timing of the public notice afforded under the pre-Order No. 537 notice-and-protest procedures. As previously noted, supra pp. 4-5, even before

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26/ The information published in the monthly "Notices of Self-Implementing Part 284 Transactions" is drawn from "initial reports" which pipelines must file with the Commission within 30 days after commencing a § 7(c) blanket transportation service or a § 311 transportation service. As the Commission found, R 907, JA 173, these reports include the "identities of parties, contract term, receipt and delivery points, and the firm or interruptible nature of a service."

27/ Petitioners also complain (Pet. Br. 36-37) that in one case reporting did not occur until three years after the service commenced. But this is a separate matter, apparently caused by a pipeline's failure to file an initial report within 30 days after the start of the transaction as required by 18 C.F.R. §§ 284.106(a), 284.223(d). It does not reflect the inadequacy of the Commission's notice procedures.

Order No. 537, pipelines holding blanket certificates were authorized to commence transportation service for up to 120 days without notice to the public. If the pipeline wished to continue the service beyond 120 days, it had to file notice (i.e., a request for authorization) no later than the 75th day after the service began in order to allow the 45-day protest period to run. In at least 150 cases, pipelines could not meet this deadline and had to file waiver requests. See R 901, JA 167; see also R 61-62 n.44, JA n.44. Therefore, even under the Commission's former notice-and-protest procedures, potential protesters generally did not receive notice that a transportation service had commenced until well after-the-fact. 28/ Accordingly, it is clear that the Commission's substitution of the "Notices of Self-Implementing Transportation Transactions" for the notice requirements that existed before Order No. 537 did not

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28/ Petitioners also complain (Pet. Br. 36) that the Commission's policy, reaffirmed in Order No. 537, R. 907, JA 173, of publishing "Notices of Self-Implementing Transactions monthly in the Federal Register" is inadequate because the Commission has not bound itself by any rule requiring it to do so, and therefore could change the amount of published information, or eliminate publication entirely "at its pleasure."

This claim was likewise argued for the first time on appeal and therefore is barred by NGA § 19(b), see Asarco, 777 F.2d at 774. In any event, "a settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." Motor Vehicles Mfrs. Assn. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-42 (1983). If the Commission were to change its established policy of publishing monthly in the Federal Register the details of self-implementing transportation transactions, it would be legally required to supply a reasoned analysis which would, in turn, be subject to judicial review.

significantly impair the timing of the public notice of new transportation services. 29/

B. Petitioners' Claim That The Commission's Complaint Procedure Is An Inadequate Substitute For A Notice-And-Protest Procedure Is Also Insubstantial.

Petitioners also raise a number of arguments attempting to show that the Commission's NGA § 5 complaint procedure is an inadequate substitute for the notice-and-protest procedure. None has substance.

1. Petitioners argue (Pet. Br. 19 n.12) that elimination of notice-and-protest procedures effectively makes the presumption that blanket certificate transportation transactions are in the public convenience and necessity "unrebuttable." But, this is clearly not the case since the Commission is affording interested persons the opportunity to file complaints against transportation transactions that are implemented in a manner (i.e., unduly discriminatorily or anticompetitively) that violates the NGA, Commission rules or Commission policy. 30/

29/ Petitioners' contention (Pet. Br. 36) that the information contained in these notices is "thoroughly inadequate" is also barred because it was not raised on rehearing, NGA § 19(b), Asarco, 777 F.2d at 774. It is in any event baseless. See note 26, supra.

30/ There is also very little difference, as a practical matter, in the burden of producing evidence that objectors were required to satisfy under the former notice-and-protest procedures, which as petitioners concede (Pet. Br. 19 n.12) required a protestor to come forward with evidence to rebut a presumption that a blanket certificate transaction is in the public interest, and the burden on a complainant under section 5 to show that a particular transaction violates the NGA, Commission rules or Commission policy. As the Commission explained, R 905, JA 171, it "already has been

(continued...)

2. Next, petitioners urge (Pet. Br. 38) that the Commission's projection that it will be able to deal with most complaints within 60 days should be discounted because they have located two Commission cases -- i.e., Panhandle Eastern Pipeline Co., 39 FERC ¶ 61,276 (1987) and Arizona Corporation Commission v. El Paso Natural Gas Company, 59 FERC ¶ 61,183 (1992) -- which the Commission has taken longer than 60 days to adjudicate. This claim, however, hardly impeaches the Commission's projection here, R 904, JA 170, that it expects to resolve most complaints within 60 days. In any event, as Petitioners concede (Pet. Br. 39), the two cases involved matters of significant complexity which clearly explains the additional time need to resolve the matters at issue. 31/

30/(...continued)
addressing protests to blanket transportation services in the same fashion that it addresses complaints against section 311 transportation services."

31/ Intervenor Atlanta Gas Light Company cites a third case which took the Commission more than 60 days to resolve, Arcadian Corp. v. Southern Natural Gas Co., 55 FERC ¶ 61,207 (1991), reh'g granted, 61 FERC ¶ 61,365 (1992) (Arcadian). But that case is inapposite because the complainant in Arcadian was not challenging a particular transportation transaction authorized under sections 7(c) or 311; rather, it was contesting an allegedly discriminatory application of the Commission's blanket certificate construction rules (which still involve a notice-and-protest procedure).

In any event, any prejudice that the complainant may have suffered as a result of the case taking longer than sixty days was entirely self-inflicted because the complainant had an opportunity to protest a pipeline's allegedly discriminatory conduct in the notice-and-protest procedure prior to construction (and thereby temporarily enjoin the construction while its claim awaited resolution), yet failed to avail itself of that opportunity. See Southern Natural Gas Co., 55 FERC ¶ 61,224, at p. 61,732 n.1 (1991).

3. Petitioners contend next (Pet. Br. 37) that the complaint procedure is an inadequate substitute for the notice-and-protest procedure because when a protest was filed under that procedure, the status quo ante was maintained until the Commission made a case-specific finding approving the transaction, while the complaint procedure adopted in Order No. 537 does not temporarily enjoin the transaction. This argument is also flawed.

As we have already explained the Commission has ample authority, by rule, to find that transportation transactions which meet certain prescribed conditions will be deemed to be in the "public convenience and necessity." This authority relieves the Commission from having to adjudicate each and every transportation transaction before it may be deemed lawful. See pp. 18-20, supra. 32/ Petitioners have pointed to no provision in the NGA, or case law relevant thereto, remotely suggesting that the Commission has a nondiscretionary duty to enjoin transactions -- already found, by rule, to be in the public convenience and necessity -- while protested matters are being adjudicated.

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In the last analysis, Order No. 537 reflects nothing more than the Commission's reasoned exercise of its broad authority to

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32/ Petitioners have already conceded to this Court (Pet. Br. 19 n.12) that they "do not contest FERC's assertion that it may, as a matter of law, make the NGA § 7 public convenience and necessity determination for a class of defined transactions through the rulemaking process."

devise procedures that, in its judgment, will most fairly and efficiently carry out its statutory mission. It is well-established that "[a]n agency enjoys broad discretion in determining how best to handle related yet discrete issues in terms of procedures." Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies, 498 U.S. 211, 230 (1991); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-45 (1978); Kansas Power & Light Co. v. FERC, 851 F.2d 1479, 1484 (D.C. Cir. 1988); Southern Union Gas Co. v. FERC, 840 F.2d 964, 971 (D.C. Cir. 1988).

CONCLUSION

For the foregoing reasons, the Commission's orders should be affirmed.

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January 19, 1994