IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 92-9121, *et al.*

ATLANTA GAS LIGHT COMPANY, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for Review of Orders of The

Federal Energy Regulatory Commission

INITIAL BRIEF OF INTERVENORS GEORGIA INDUSTRIAL GROUP,

PROCESS GAS CONSUMERS GROUP AND NATURAL GAS SUPPLY ASSOCIATION

IN SUPPORT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Pursuant to Federal Rule of Appellate Procedure 28 and 11th Circuit Rule 28, Intervenors Georgia Industrial Group ("GIG"), Process Gas Consumers Group ("PGC"), and Natural Gas Supply Association ("NGSA") hereby submit their initial brief in support of Respondent Federal Energy Regulatory Commission ("FERC" or "Commission").

STATEMENT OF JURISDICTION

This Court has jurisdiction over the proceeding pursuant to Section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C.

§ 717r(b)(1994).

STATEMENT OF ISSUES

1. Whether the Commission acted within its discretion in finding that the settlement agreement between Arcadian and Southern was in the public convenience and necessity.

2. Whether the argument that the Commission lacked authority to remedy undue discrimination by compelling a pipeline to construct minor facilities is moot.

3. If the argument is not moot, whether the Commission has authority under section 5 of the NGA to remedy undue discrimination by ordering a pipeline to construct minor facilities and provide direct service to a customer when it has done so for other similarly-situated customers.

4. Whether Dalton's attack on the Southern tariff provisions filed as part of the Arcadian settlement lacks merit.

STATEMENT OF THE CASE

This case involves the review of several FERC orders arising out of the complaint filed by Arcadian Corporation ("Arcadian") on May 17, 1990, in which Arcadian alleged that Southern Natural Gas Company ("Southern") violated section 5 of the NGA. *See* Arcadian Complaint, R. 137-459. The complaint alleged that, by refusing to provide direct service to Arcadian -- notwithstanding the fact that Southern had constructed facilities for and provided such service to other industrial end users (including a competitor of Arcadian) -- Southern had acted in an unduly discriminatory manner toward Arcadian. R. 176-81. Arcadian therefore asked the Commission to remedy this undue discrimination. After several years of proceedings before the Commission, Arcadian and Southern reached a settlement. Southern also reached settlements with Atlanta Gas Light Company ("AGL") and the Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia ("Dalton") in Southern's restructuring proceedings. *See Arcadian Corp. v. Southern Natural Gas Co.*, 77 FERC ¶ 61,210 at 61,856 (1996); R. 2228. Southern's settlement with Arcadian is the subject of this dispute.

Arcadian manufactures anhydrous ammonia, which requires natural gas as a primary feedstock. *Arcadian Corp. v. Southern Natural Gas Co.*, 55 FERC ¶ 61,207 at 61,683 (1991); R. 793. Arcadian's Augusta, Georgia plant is located within 50 yards of Southern's pipeline. *Id.*; R. 793. Arcadian sought to have Southern, an interstate natural gas pipeline, provide direct service to its plant. In this way, the natural gas that Arcadian needs for its manufacturing would not be transported by both Southern and AGL, a local distribution company ("LDC"). Southern, who at the time was an "open access" pipeline,[1] previously had

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[1] In a recent discussion of open access, the D.C. Circuit stated:

> In Order No. 436, the Commission began the transition toward removing pipelines from the gas-sales business and confining them to a more limited role as gas transporters. . . . [T]he Commission conditioned receipt of a blanket certificate for firm transportation of third-party gas on the pipeline's acceptance of non-discrimination requirements guaranteeing equal access for all customers to the new service. (footnotes omitted).

constructed facilities necessary for this type of service and had provided direct service to another maker of anhydrous ammonia, Air Products and Chemicals, Inc. ("Air Products"). *See* 55 FERC at 61,684; R. 795. However, Southern refused Arcadian's request for direct service, even if Arcadian would pay for any incidental construction that was required and even if Arcadian were to pay for any associated take-or-pay costs that Southern might incur as a result of the service. By this disparate treatment between the two manufacturers of anhydrous ammonia, Arcadian alleged, Southern was violating the open-access terms of its tariffs and was violating sections 4 and 5 of the NGA.

Initial Order on Complaint

In the Commission's initial order, FERC denied Arcadian's complaint. The Commission held that, if it found undue discrimination, it had the authority to grant the remedy that Arcadian sought, but FERC did not believe that Southern had unduly discriminated against Arcadian. 55 FERC at 61,687; R. 801.

In its Order 436[2] the Commission had adopted regulations

United Distrib. Cos. v. FERC, 88 F.3d 1105, 1123 (D.C. Cir. 1996).

[2]Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 1982-1985 FERC Stats. & Regs., Regs. Preambles, ¶ 30,665, *order on reh'g*, Order No. 436-A, 1982-1985 FERC Stats. & Regs., Regs. Preambles, ¶ 30,675 (1985), *order on reh'g*, Order No. 436-B, 1986-1990 FERC Stats. & Regs., Regs. Preambles, ¶ 30,688, *order on reh'g,* Order No. 436-C, 34 FERC ¶

governing the operation of open access pipelines. In that Order, the Commission invited interstate pipelines to accept broad blanket certificates that would enable them to provide transportation services to a wide group of customers without having to file individual applications under Section 7 of the NGA. A condition of the blanket certificates was the pipelines' agreement to provide transportation and the facilities necessary for such transportation on a non-discriminatory basis to all who sought such service. Southern voluntarily accepted such a blanket certificate and thereby agreed to abide by the conditions imposed by the Commission, including the furnishing of necessary transportation facilities on a non-discriminatory basis.

In its initial order in this proceeding, the Commission noted that, in Order 436, it had specifically and repeatedly stated that a pipeline's refusal to construct minor facilities and provide service in a non-unduly discriminatory manner would implicate FERC's broad remedial authority. 55 FERC at 61,687; R. 801-02. It

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61,404, *order on reh'g*, Order No. 436-D, 34 FERC ¶ 61,405, *order on reh'g*, Order No. 436-E, 34 FERC ¶ 61,403 (1986), *vacated and remanded sub nom.*, *Associated Gas Distributors v. FERC,* 824 F.2d 981 (D.C. Cir. 1987). Order 436 was overwhelmingly approved by the D.C. Circuit, but was vacated on the issue of take-or-pay. The Commission resolved the take-or-pay issue, and the Commission's Order 436 program was affirmed by the Court in *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990).

stated that, in "an unbroken line of cases, the Commission has construed the discussion in Order No. 436 at pages 31,550-51 to mean that 'if the pipeline decides to build facilities for one customer, it must build facilities for others on a nondiscriminatory basis.'" *Id.*; R. 802 (footnote citing cases omitted). The Commission distinguished *Panhandle Eastern Pipeline Co. v. FPC*, 204 F.2d 675 (3rd Cir. 1953), a case on which Southern and AGL had placed significant emphasis. FERC found that, unlike that case (which involved the Commission's authority under Section 7(a) to order "enlargements" to a pipeline system), the Arcadian complaint proceeding involved only an "improvement or extension" to a pipeline, which FERC had the power to order. *See id.* at 61,687; R. 802. After discussing what it termed "key facts," -- Southern increased its load with direct service to Air Products and it might not increase its load with direct service to Arcadian -- the Commission determined that the two manufacturers of ammonia were not similarly situated and that therefore Southern had not unduly discriminated against Arcadian in refusing to provide direct service; according to the Commission, Southern had a business justification for the discrimination. *See id.* at 61,687-88; R. 803.

Order on Rehearing

Following parties' requests for rehearing and clarification,[3]

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[3]Arcadian sought rehearing and argued, among other things, that the Commission erred by adopting the business justification

the Commission took the unusual step of hearing oral argument on the complaint. *See* R. 1-136. Each of the parties made submissions prior to oral argument and were given the opportunity to respond in writing to a list of specific questions the Commission had prepared.

On November 3, 1992, FERC issued its order on rehearing. *See* *Arcadian Corp. v. Southern Natural Gas Co.*, 61 FERC ¶ 61,183 (1992); R. 1386-1422. Based on further review and development of the record, the Commission granted rehearing. It found that Southern had built facilities and provided direct service to end users similarly situated to Arcadian and that, therefore, Southern's refusal to do the same for Arcadian was unduly discriminatory. FERC ordered Southern "to abide by the terms of its blanket certificate issued under Part 284 [of the Commission's regulations] as construed by the Commission, and thereby to provide the direct service to Arcadian as requested." 61 FERC at 61,675; R. 1400.

The Commission extensively treated AGL's, Southern's and others' contention that Section 7(a) of the NGA prohibited FERC

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standard or "commercial advantage" test for undue discrimination. R. 824-37. Arcadian submitted that using such a standard would write the prohibition against undue discrimination out of the NGA because only an irrational monopolist would unduly discriminate against a customer when it would be in the pipeline's commercial interest not to discriminate. *See* 834-37.

from exercising its broad remedial powers to cure undue discrimination. 61 FERC at 61,675-77; R. 1400-05. The Commission again rejected such a constrained reading of the NGA. Rather, it concluded that Section 7(a) was not applicable to the facts before it and did not limit its ability to remedy undue discrimination pursuant to a separate provision of the NGA. After surveying the NGA's legislative history, the Commission was satisfied that its interpretation of Section 5 was consistent with the history of the NGA.[4] The Commission further noted that Southern, when seeking to become an open access pipeline, had proposed tariff sheets that would have given Southern sole discretion to decide for whom it would provide an interconnection for direct service; FERC rejected these tariffs, stating "Southern may not arbitrarily build facilities for one customer and refuse to do so for another in similar circumstances." *See* 61 FERC at 61,678; R. 1407 (quotation and citation omitted).

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[4] FERC stated:

> None of this history interposes Section 7(a) as a bar to prevent the Commission from assuring, where service to individual markets and territories has been established, that the protections against undue discrimination provided by Sections 4, 5, and 7 of the NGA are available. Section 7(a) clearly established the means whereby the Commission could secure the benefits of gas service for certain communities, markets and territories adjacent to those originally established by the gas industry, where in the public interest. However, to read 7(a) as precluding assurance of non-discriminatory interstate service now, long after such service to a community has begun, makes little common sense and reads the "undue discrimination" authority out of the statute.

61 FERC at 61,676; R. at 1402.

Finally, the Commission dismissed as unsubstantiated and speculative the "slippery slope" argument presented by AGL that if Arcadian were allowed direct service, then many other industrials, to save money, would want direct service. 61 FERC at 61,680; R. 1411. Although noting that in individual instances the Commission's pro-competitive policies may put competitive pressure on LDCs that could cause the LDCs to lose customers, the Commission reaffirmed its policy as "allow[ing] increased direct access to transportation and supply markets, impos[ing] upon LDCs the need to discipline costs to maintain customers, allow[ing] pipelines to compete for markets served inefficiently, . . . and assur[ing] the benefits of competition to all market participants." *Id.*; R. 1411. The Commission therefore required that Southern construct the minor facilities necessary to provide direct service to Arcadian pursuant to its Part 157 blanket certificate.

Arcadian Settlement

Roughly a year after the Commission's rehearing order and after Arcadian had been receiving direct service from Southern, Arcadian and Southern entered into a stipulation and agreement ("Arcadian Settlement"), which resolved the issues between Southern and Arcadian associated with Southern's provision of direct service to Arcadian. R. 1694-1756. Southern agreed to withdraw its request for rehearing of the Commission's first rehearing order and its petition for review of the Commission's actions. Southern would voluntarily provide the service Arcadian requested pursuant to a service agreement. Finally, Southern proposed tariff sheets that would govern future requests by other end users seeking direct service. Arcadian, for its part, agreed to withdraw an antitrust lawsuit it had filed in federal district court and its complaint before the Commission. The settlement was intended to resolve all of the outstanding issues raised by Arcadian's complaint. *See Arcadian Corp. v. Southern Natural Gas Co.*, 67 FERC ¶ 61,176 at 61,533-34 (1994); R. 2044.

The parties were given an opportunity to comment on the stipulation, and AGL and Dalton opposed the settlement. AGL argued that the direct service to Arcadian would have a detrimental effect on AGL because Arcadian, prior to the direct service, had been an AGL customer. It restated its previous argument that, if the Commission allowed Arcadian to obtain direct service from Southern, many other end users would follow suit. R. 1788. In addition, AGL asserted that the provisions of the settlement itself were unduly discriminatory and created a price squeeze because of a discount given to Arcadian, but not to AGL.

Order Approving Settlement

The Commission, in its May 12, 1994 order, approved the settlement between Arcadian and Southern, finding that the settlement met the public convenience and necessity standard of Section 7(e) of the NGA. *See Arcadian v. Southern Natural Gas Co.*, 67 FERC ¶ 61,176 (1994); R. 2044-61. FERC determined that there was no evidence of unfair competition for Arcadian's business. 67 FERC at 61,535; R. 2048. The Commission further noted that FERC's "bypass policy is not based on an assumption that bypass will never result in detriment to an LDC or its ratepayers. Rather, it is based on the assumption that market forces operating in an environment of fair competition will promote the most efficient allocation of supplies and transportation capacity." 67 FERC at 61,536; R. 2049. Therefore, notwithstanding AGL's allegations that it might be harmed by the competition, absent evidence of unfair competition, the Commission's policy allows interstate pipelines to provide direct service to end users. The Commission also determined that AGL's evidence relating to the number of customers it could lose if it were forced to compete with Southern was not persuasive because it did not account for the steps AGL could take to retain end users' business. *Id.*; R. 2050. The Commission also discussed AGL's allegations of undue discrimination and price squeeze. *See* 67 FERC at 61,536-38; R. 2050-54. Given the record in the case, the Commission was dubious that AGL could establish its claims. However, the Commission held that AGL could pursue these claims in Southern's rate filing in another docket. 67 FERC at 61,537, 61,538; R. 2052, 2054.

Finally, the Commission turned to the allegations raised by AGL and others in their requests for rehearing of the Commission's first rehearing order. *Id.* at 61,538-40; R. 2055-59. Many of AGL's claims, according to the Commission, had been mooted by the Arcadian Settlement. First and foremost among these was AGL's contention that the Commission did not have the power to remedy undue discrimination by ordering a pipeline to provide an interconnection and direct service to a customer if the pipeline had voluntarily done so for another similarly-situated customer. *Id.* at 61,538-39; R. 2055. With respect to the other two issues raised by AGL, the Commission determined that it had sufficient evidence -- from the years of parties' submissions and the oral argument -- to make its decision. It therefore, in addition to approving the Arcadian Settlement as in the public convenience and necessity, denied AGL's and others' requests for rehearing. AGL and Dalton filed requests for rehearing.

AGL's and Dalton's Settlement with Southern

Subsequent to the Commission's order approving settlement, AGL and Dalton (and many other parties) reached a global settlement with Southern in its restructuring proceedings ("Restructuring Settlement").[5] The Restructuring Settlement resolved a host of issues on the Southern system associated with the Commission's restructuring of the natural gas industry.[6] In the Restructuring

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[5]*See Southern Natural Gas Co.*, 72 FERC ¶ 61,322 (1995), *reh'g denied and granted in part*, 75 FERC ¶ 61,046 (1996).

[6]*See* Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, 1991-1996 FERC Stats. & Regs., Regs. Preambles, ¶ 30,939, *order on reh'g*, Order No. 636-A, 1991-1996 FERC Stats. & Regs., Regs. Preambles, ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in part and remanded in part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105

Settlement, AGL and Dalton agreed that,

> [i]n recognition of the resolution of all issues in Docket No. RP93-15 and in consideration for the discounts and other economic incentives in this Article XII, Atlanta [AGL] and the supporting parties [including Dalton], as applicable, agree to withdraw, in all pending rate, certificate, and judicial proceedings, and to refrain from asserting in any future proceedings with respect to all periods in which the settlement rates are in effect, *any and all price squeeze and discrimination claims relating to the direct service by Southern to Arcadian* . . . pursuant to the November 1, 1993, Commercial Agreement [between] Southern . . . and Arcadian Corporation, and the Stipulation and Agreement filed November 30, 1993, in *Arcadian Corporation v. Southern Natural Gas Company*, Docket No. CP90-1391.

Stipulation and Agreement, Docket Nos. RP89-224, *et al.*, at 54 (March 15, 1995) (emphasis added), *quoted in* 77 FERC at 61,856; R. 2228. Pursuant to this agreement, AGL and Dalton voluntarily withdrew some of their claims. R. 2220-24; R. 2225-27.

Order on Rehearing of Order Approving the Arcadian Settlement

On November 26, 1996, the Commission denied rehearing of its May 12, 1994 order approving the Arcadian Settlement. *Arcadian Corp. v. Southern Natural Gas Co.*, 77 FERC ¶ 61,210 (1996); R. 2228-40. The Commission in its order interpreted the interplay between the Restructuring Settlement and AGL's and Dalton's requests for rehearing of the Commission's order approving the Arcadian Settlement. AGL still alleged that the Commission needed to conduct a formal evidentiary hearing in the complaint proceeding. The Commission determined, however, that the factual disputes on which AGL relied were grounded in its claims of

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(D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1723 (1997), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

discriminatory conduct and price squeeze. *Id.* at 61,858; R. 2233. The Commission therefore denied rehearing on this issue based on the Restructuring Settlement.

AGL also had argued that the Commission should not have approved the Arcadian Settlement because the direct service by Southern to Arcadian does not enhance competition. *Id. at 61,858-59*; R. 2233-34. The Commission denied rehearing on this point and reiterated that its bypass policy "rests on the assumption that market forces operating in fair competition will promote the most efficient allocation of supplies and transportation capacity." *Id.* at 61,858; R. 2234. Finally, the Commission denied as moot AGL's request to vacate its initial order, in which FERC had held that it possessed the authority under the NGA to remedy undue discrimination by ordering a pipeline to provide a direct interconnection and service to an end user if the pipeline had provided such interconnections to others. *Id.* at 61,859-60; R. 2235-37. Relying on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), the Commission determined that, because the alleged mootness of its initial order arises from the parties settling their disputes, it would not vacate the order. *See id.* at 61,859-60; R. 2235-2237.

AGL and Dalton have filed petitions for review of these Commission orders. The orders are subject to the standards of review of Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and the Administrative Procedure Act, 5 U.S.C. § 706.

SUMMARY OF ARGUMENT

The Commission acted within its discretion when it found that the Arcadian Settlement was in the public convenience and necessity. AGL, in the Restructuring Settlement, has received adequate protection from the potential negative effects it claimed would result from the Arcadian Settlement. On the merits, substantial evidence supports the Commission's decision. First, the Arcadian Settlement put an end to significant litigation between Southern and Arcadian. Second, the Arcadian Settlement provided substantial benefits not only to Arcadian ($4 million per year), but to the Southern system as a whole, including a reduction in the firm transportation rates of all customers within Zone 3. Finally, the Arcadian Settlement furthers the Commission's goal of promoting competition to reduce prices and allocate supplies and capacity efficiently. FERC provided sufficient procedural protections to all parties, and in any event, AGL waived its argument that the Arcadian Settlement did not comply with Commission regulations.

AGL's and AGA's argument that the Commission does not have the authority to remedy undue discrimination by ordering a pipeline to construct minor facilities and provide direct service to a customer, even though the pipeline voluntarily had done so for another similarly-situated customer, is moot. Pursuant to the settlement agreement, Southern *voluntarily* agreed to construct a sales tap for Arcadian and provide direct service. The Commission's approval of that Arcadian Settlement was not arbitrary and capricious. Therefore, AGL's and AGA's argument about whether the Commission has authority to *compel* a pipeline to provide such service is moot.

Even if AGL's and AGA's argument is not moot, the argument lacks merit. The Commission, pursuant to Section 5 of the NGA, has the authority to remedy undue discrimination by ordering a pipeline to construct minor facilities and provide direct service to a customer when the pipeline had previously constructed such facilities and provided direct service to another, similarly-situated customer. FERC analyzed the statute, the legislative history, and case law, and concluded that Section 5 gave it the power to remedy undue discrimination and that Section 7(a) was not applicable to the facts before it. The Commission's interpretation of its organic statute is entitled to deference, and in fact it was correct.

Dalton's claim that Southern potentially could use the tariff provisions filed by Southern as part of the Arcadian Settlement to unduly discriminate against Dalton is without merit. Dalton's argument relies upon a misinterpretation of Southern's tariffs. In addition to the full costs of the bypass facilities, a bypassing end user must pay its proportionate share of the fixed costs of the Southern system as part of its transportation rate. Dalton also misinterprets the meaning of "revenue neutral." Under the Commission approved tariff, Southern, in providing direct service to an end user, does make a profit on the transportation it provides to the end user. Further, Dalton's argument that it will lose customers because of the tariff provisions is speculative.

Dalton's real quarrel is with the Commission's bypass policy in general; this proceeding is not the appropriate forum for such a general attack on FERC policy. Finally, Dalton's attempt to distinguish decisions by other courts of appeals on the ground that they dealt only with individual bypass transactions, rather than a bypass tariff, is a distinction without a difference and should be rejected.

ARGUMENT

I. The Commission properly approved the Arcadian Settlement.

A. Through the Southern Restructuring Settlement, AGL has received protection from the potential negative effects it claimed would result from the Arcadian settlement, and no hearing was necessary.

In the Southern Restructuring Settlement, AGL received many concessions from Southern with respect to rates and service. In exchange, AGL gave up some of its legal rights. With respect to the Arcadian complaint proceedings, AGL agreed, in relevant part, "to withdraw, in *all* pending . . . judicial proceedings, and to refrain from asserting in any future proceedings with respect to all periods in which the settlement rates are in effect, *any and all* price squeeze and discrimination claims *relating* to the direct service by Southern to Arcadian . . . pursuant to the November 1, 1993, Commercial Agreement [between] Southern . . . and Arcadian Corporation, and the Stipulation and Agreement filed November 30, 1993." Stipulation and Agreement, Docket Nos. RP89-224, *et al.*, at 54 (March 15, 1995) (emphasis added) (App. at B-13). One would be hard pressed to draft language broader than that to make the point that AGL in fact gave up all of its claims related to price squeeze and undue discrimination arising out of the Arcadian Settlement. Yet, AGL here contends that the Commission interpreted its agreement with Southern too broadly and erroneously considered the mitigatory impact of the Restructuring Settlement in evaluating AGL's claim that it could not compete with Southern due to AGL's need to use Southern's facilities to deliver gas. AGL Br. at 36-38.

The Commission correctly evaluated AGL's claim in the context of the Restructuring Settlement, as well as the Arcadian Settlement, and determined that the Restructuring Settlement mitigated many of the harms of which AGL complains. AGL received many "economic incentives" in the Restructuring Settlement. In addition to the 100,000 Mcf per day reduction in firm service noted by the Commission, 67 FERC at 61,536; R. 2049, the Restructuring Settlement, in the same Article in which AGL agreed to give up its arguments relating to price squeeze and undue discrimination, provided AGL a significant discount on its firm transportation service. While Arcadian received, pursuant to the Arcadian Settlement, a then-discounted reservation fee of $12.50 per Mcf for its firm transportation service, *under the Restructuring Settlement AGL received a rate of only $10.50 per Mcf for 100,000 Mcf per day.*[7] In addition, for that 100,000 Mcf/d, Southern agreed to

[7] The 100,000 Mcf of gas per day at the discounted rate which

reduce AGL's Gas Supply Realignment charges to one-half the applicable surcharge. *See* Restructuring Settlement, Art. XII ¶ 2(f) at 48-49. (App. at B-7 to B-8). Moreover, AGL is permitted to reduce its firm service with Southern by an amount equivalent to the quantity of service taken by a bypassing end-use customer of AGL. See 77 FERC at 61,859; R. 2234; Restructuring Settlement, Art. XV, ¶ 1(b) at 59. (App. at B-15).

The Commission appropriately considered the protections for which AGL bargained in the Restructuring Settlement in evaluating the need for a hearing upon AGL's predictions of dire consequences resulting from the Arcadian Settlement. FERC correctly determined that there was no need for a formal evidentiary hearing to evaluate AGL's speculative contentions, and that decision was neither arbitrary nor capricious.

B. The Settlement between Arcadian and Southern was in the public convenience and necessity.

In its May 12, 1994 Order, the Commission found that the Arcadian Settlement (including the tariff sheets filed by Southern and the commercial agreement between Southern and Arcadian) met the public convenience and necessity standard in Section 7(e) of the NGA. AGL challenges that determination. On review, the Court must review FERC's decision deferentially. *See Chevron U.S.A., Inc. v.*

AGL receives is significantly more gas than Arcadian, under the Arcadian Settlement, receives at a higher (but discounted at the time given) rate.

Natural Resources Defense Council, 467 U.S. 837, 844-45 (1984); "Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze contracts. There is no doubt that the Commission has greater technical expertise than we do in resolving complex ratemaking disputes. We therefore apply substantial deference to FERC's" determinations. *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992)(citations omitted); *cf. Florida Power & Light Co. v. FERC*, 598 F.2d 370, 380 (5th Cir. 1979) (noting that when a Commission order has its origins in a policy decision, the standard of review is narrow).

The Commission properly determined, notwithstanding the opposition of AGL and some others,[8] that the Arcadian Settlement was in the public convenience and necessity. The Arcadian Settlement would resolve a plethora of litigation.[9] In addition,

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[8]Under the Commission's regulations, FERC may approve a contested settlement as in the public convenience and necessity "if the record contains substantial evidence upon which to base a reasoned decision." 18 C.F.R. § 385.602(h)(1)(i) (1997).

[9] In addition to the complaint proceeding which Arcadian had been pressing for several years, Arcadian had filed an antitrust action in federal district court arising out of Southern's initial refusal to provide direct service. For its part, Southern was intensely disputing Arcadian's claims in the complaint proceeding and had filed petitions for review of the Commission's orders. The

the Arcadian Settlement provided benefits to the Southern system as a whole. With the addition of Arcadian as a firm shipper, subject to demand charges, other firm shippers would see a reduction in firm transportation rates in Rate Zone 3 by approximately $.40 per Mcf. R. 1843-44. Further, the tariff Southern filed pursuant to the Arcadian Settlement sets forth with great clarity the conditions under which Southern will provide direct service to end users in the future. R. 1844-45. These benefits alone supported the Commission's conclusion that the Arcadian Settlement was in the public convenience and necessity.

Finally, the Commission found that the Arcadian Settlement furthers its goal of promoting competition within various segments of the natural gas industry -- at both the supply and delivery ends of the pipeline. As the Commission noted in its 1996 Order denying rehearing, its policy on bypass rests on its expert opinion "that market forces operating in fair competition will promote the most efficient allocation of supplies and transportation capacity." 77 FERC at 61,858; R. 2234. Thus, unless there is a showing that the bypass is a result of anticompetitive or unduly discriminatory behavior, the Commission, in furtherance of its consistent pro-competition policy, will honor the customer's choice of supplier. *See Texas Gas Transmission Corp.*, 79 FERC ¶ 61,293 at 62,311 (1997). "The Commission strives to honor the end user's decision

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Arcadian Settlement settled all of these and other proceedings between the parties.

as to whether it is economical to undertake direct service from a pipeline supplier. This allows all participants in the natural gas market greater access to the market." *Id.* As the Commission stated in Order 436:

> The Commission will not insulate the LDC markets from the competitive incentives that are the foundation of [Order 436]. In order to promote economic efficiency -- a necessary factor in providing gas to the consumers at the lowest reasonable rates -- the rule must provide sufficient competitive incentives to all elements of the market. This means making all market participants, including LDCs, accountable for the success or failure of their market participation.

Order 436, 1982-1988 FERC Stats. & Regs., Reg. Preambles ¶ 30,665, at 31,572. As the District of Columbia Circuit noted,

> a policy favoring effective competition necessarily brings with it the reality of economic pinch, present or threatened. . . . The hard problem then is not whether competition may hurt but rather where and how to draw the lines of acceptable range of competition and hurt . . . .
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> . . . .
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> The task of determining what interests should be protected, and to what extent, is a policy matter for the agency, utilizing its expertise, to state, defend and apply, subject to the settled rules of judicial review according deference to its standards and applications insofar as they are supported by substantial evidence . . . .

Atlantic Seaboard Corp. v. FERC, 404 F.2d 1268, 1272-74 (D.C. Cir. 1968). Because there was substantial evidence in the record to support the Commission's determination that Arcadian's settlement was in the public convenience and necessity,[10] and because FERC's

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[10]For example, Arcadian would save $4 million per year in gas costs, 61 FERC at 61,684 (Moler, dissenting); R. 1419, and Southern's customers in Rate Zone 3 would see a reduction in

pro-competition policy (which has been consistently affirmed by the courts), along with the underlying rationale, is not arbitrary and capricious, this court should uphold the Commission's approval of the Arcadian Settlement.

Notwithstanding the benefits to the Southern system, AGL argues that FERC should have held a hearing to determine if the public convenience and necessity required approval of the settlement. AGL asserts that it raised genuine issues of material fact, necessitating a hearing. Under the Commission's regulations, the Commission may approve a contested settlement if there is substantial evidence in the record upon which a reasoned decision may be based. 18 C.F.R. § 385.602(h)(1)(i) (1997). Here, as discussed above, there was substantial evidence before the Commission -- based on the submissions filed over several years and oral argument before the Commission -- from which it could make a reasoned decision.

Moreover, the issues that AGL continues to press and the evidence on which it continues to rely were fully considered by the Commission. Rather than ignoring the AGL's contentions, the Commission repeatedly gave AGL the opportunity to prove its allegations. However, FERC found that the evidence AGL presented, some of which the Commission characterized as speculative, was insufficient to overcome the many benefits for the Southern system and for competition supporting approval of the Arcadian Settlement.

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their firm transportation rates of $.40 per Mcf, R. 1843-44.

Specifically, AGL argues that the evidence it presented with respect to the effects of the Arcadian Settlement on the Georgia Public Service Commission's ("Georgia PSC") rate-setting policies and on AGL's captive customers warranted a hearing. *See* AGL Br. at 43-46. AGL submits that the Commission's decision to approve the Arcadian Settlement did not give enough consideration to the Georgia PSC's "value of service" rate policy. *See id.* at 44-46. However, the Commission correctly determined that AGL had not presented credible, specific evidence to support its contention. *See* 67 FERC at 61,539; R. 2056 ("Beyond general statements that bypass results in cost shifts, however, Atlanta presents little evidence to show what the ratemaking policies of the Georgia PSC actually are where bypass is concerned or how these policies would be affected."). The Commission noted that AGL's argument assumes that a number of customers would be likely to bypass AGL,[11] thus impacting the Georgia PSC's policies. *Id.*; R. 2057. FERC, however, found this underlying assumption to be speculative and without foundation because, whether other end users would seek direct service from Southern, would depend greatly upon how AGL and the Georgia PSC responded to competition. *Id.*; R. 2057.

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[11]Faced with a similar issue, the 10th Circuit mused, "It is not clear on what basis [the LDC] claims an entitlement to the continued captive patronage of consumers that have no further use of its services." *Cascade Natural Gas Corp. v FERC*, 955 F.2d 1412, 1423 n.12 (10th Cir. (1992).

The United States Court of Appeals for the Tenth Circuit faced arguments similar to AGL's in a case involving bypass. *See Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1424-25 (10th Cir. 1992). There, the Commission had approved the construction of a tap and metering facilities to allow the pipeline to provide direct service to two industrial end users. Both the bypassed LDC and the state utility commission sought review, raising many of the same claims as AGL. *See id.* at 1422-1426. With respect specifically to the petitioners' argument that FERC's approval of those facilities would interfere with the state's regulatory policies, the Commission argued that any potential effect was speculative because the state utility commission could discourage end users from bypassing "by promoting rate designs and other policies that will make service provided by LDCs efficient, competitive and, therefore, economical." *Id.* at 1424 (quotation and citation omitted). In response, the Tenth Circuit ruled that, "[w]hile this response perhaps demonstrates insensitivity to the state's current strategy of subsidizing services to residential consumers, again, *there is nothing in this response that would allow us to label the Commission's determinations as devoid of rational basis and therefore arbitrary and capricious*." *Id.* at 1425 (emphasis added).

Here too, given the lack of adequate evidence presented that Arcadian's settlement with Southern would undermine the Georgia PSC's policies, coupled with the lack of support for the underlying assumption that a group of end users might leave their LDCs en masse, the Commission's response to AGL's argument was not devoid of a rational basis or arbitrary and capricious.[12]

[12]U.S. courts of appeals have consistently affirmed Commission orders approving bypass. *See, e.g., Cascade Natural Gas Co. v. FERC*, 955 F.2d 1412 (10th Cir. 1992); *Kansas Power & Light Co. v. FERC*, 891 F.2d 939 (D.C. Cir. 1989); *Michigan Consolidated Gas Co. v. FERC*, 887 F.2d 1295 (6th Cir. 1989). In every one of these cases, the courts upheld the Commission's decisions to allow bypass. AGL attempts to undercut these cases on the basis of a recent decision by the Supreme Court of the United States, *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997). The Court in a footnote stated that it expresses no view on the correctness of the appellate court decisions that have held that FERC has jurisdiction to regulate bypass transactions. *Id.* at 827 n.14. That is all the Court said about bypass. AGL attempts to magnify the importance of this neutral statement by the Court on the ground that *Tracy* stands for the proposition that the Commission must be sensitive to states' interests. AGL Br. at 45. *Tracy*, however, is inapposite. It involved a company's dormant commerce clause challenge to an Ohio tax law that treated a group of in-state interests different from a group of out-of-state interests. The Court held in favor of the state on the basis of rational differences between the two groups. *See id.* at 830. Indeed, the Court noted that it would not adopt a commerce clause doctrine in which it would have to engage in predicting whether the likely benefits of a regulation would outweigh the burdens because "the Court is institutionally unsuited

AGL also submits that a hearing is necessary in this case because the Commission did not adequately consider the effects of approving the Arcadian Settlement on the captive customers, who, according to AGL, “are intended to be the primary beneficiaries” of the NGA.[13] AGL Br. at 45. Contrary to AGL’s assertion, the

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to gather the facts upon which economic predictions can be made, and professionally untrained to make them.” *Id.* at 829. Thus, on the basis of its own analysis of its competence and because it did not find the state’s action irrational, the Court upheld the state. In the bypass context, we can expect the Court similarly to find itself not competent to weigh the competing economic positions of the parties, and it will rely on the expertise of the Commission, whose decisions in the bypass area have been completely rational. Moreover, *Tracy* did not involve the Commission’s power under the NGA concerning transportation and deliveries of natural gas by interstate pipelines. There, the Commission’s power is paramount and exclusive of any state jurisdiction. *See FPC v. Louisiana Power & Light Co.,* 406 U.S. 621, 631-36 (1972). AGL’s attempt to stand *Tracy* on its head must be rejected.

[13]AGL’s assertion that only captive customers are the intended primary beneficiaries flies in the face of judicial precedent. *See, e.g.*, *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595-96 (1945) (“Industrial users are as much a part of the 'public’ as domestic users and other commercial users.”); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (“The primary aim of [the NGA]

Commission did consider the effects of the Arcadian Settlement on all, including captive, customers. The Commission has determined that, absent some evidence of discrimination or anticompetitive behavior, competition between pipelines and LDCs for customers benefits *all* customers because the competition leads to lower gas prices and the efficient allocation of transportation. *See* 67 FERC at 61,536; R. at 2049; *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991) (stating that protection of competition, not competitors (like AGL) "is most likely to maximize the satisfaction of consumers wants"). Further, the Commission found that AGL's evidence failed to demonstrate that these benefits would not be applicable in this instance, because AGL failed to consider what competitive steps it could take to prevent a large loss of load. Finally, the Commission examined the Southern Restructuring Settlement -- in which AGL received significant protections from alleged detrimental effects of bypass by end users -- to evaluate AGL's dire predictions that it would lose a substantial portion of its load and suffer devastating losses on account of bypass by end users other than Arcadian. As noted, the Commission found AGL's claims wanting on the merits. *See* 77 FERC at 61,858; R. 2234. Given its long and significant experience with bypass since the adoption of Order 436 in 1985, the Commission was entitled to make the expert judgment it did about AGL's (and

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was to protect *consumers* **[i.e., all consumers]** against exploitation at the hands of natural gas companies.").

Dalton's) speculative claims. Under these circumstances, the Commission had substantial evidence to support its reasoned decision that the Arcadian Settlement was in the public convenience and necessity. The Commission's decision was clearly not arbitrary and capricious.

C. AGL received all the procedural protections to which it was entitled, and the Arcadian Settlement should not be set aside.

AGL contends that, because Southern did not file an application with the appropriate information for a Section 7 certificate to provide the service to Arcadian, the Arcadian Settlement should be set aside. AGL's contention is barred because it did not raise the issue following the Commission's order approving the Arcadian Settlement and, on the merits, must be denied.

1. AGL has waived its argument that the Arcadian Settlement should be set aside due to Southern's failure to file a Section 7 application with the Commission.

AGL cannot argue here (AGL Br. at 48-52) that the Commission erred in approving the Arcadian Settlement under Section 7 because Southern did not file with the Commission a formal application under Section 7 and because the Commission committed other, related alleged procedural irregularities. AGL failed to raise these issues in its Request for Rehearing of the Commission's Order approving the Arcadian Settlement and specifically failed to include these alleged errors in its six specification of errors.

See R. 2086-87; *see generally* R. 2086-2188.[14] AGL is therefore precluded from arguing this point before the Court under Section 19(b) of the NGA. 15 U.S.C. § 717r(b); *North Carolina v. FERC*, 112 F.3d 1175, 1191-92 (D.C. Cir. 1997). AGL's attempt in its brief to blur the line between the Commission's initial 1992 Order and its 1994 Order approving the Arcadian Settlement through its argument that Southern at no time filed a Section 7 application (AGL Br. at 49-50) must be rejected. AGL cannot save this argument through its own "procedural sleight of hand."[15]

2. Even were this Court to treat AGL's argument on the merits, it should be rejected because the Commission did nothing to violate AGL's procedural rights.

Even if this court were to reach AGL's procedural arguments, they should be rejected. AGL recognizes that, under Southern's Part 157 blanket certificate, Southern was authorized to construct minor facilities subject to a prior notice requirement. *See* AGL

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[14]Four of the specifications of error related to plainly substantive matters. Of the remaining two, one claimed that the Commission erred by deciding controverted issues of fact without an evidentiary record. The other related to the Commission's alleged error in failing to vacate its 1992 Order. Neither one even mentioned the Commission's alleged failure to require the filing of a Section 7 application.

[15]AGL erroneously accuses the Commission of "procedural sleight of hand" (AGL Br. at 50).

Br. at 49 n.13. In its request for rehearing of the Commission's 1992 order compelling Southern to construct minor facilities, AGL contended that it did not have notice of the construction and did not have the opportunity to protest. *See* R. 2295-96. That contention is absurd on its face, since AGL fully participated in the proceeding, including oral argument. In any event, as correctly determined by the Commission, AGL's contentions with respect to the 1992 Order were mooted by the Arcadian Settlement. With respect to that Arcadian Settlement, AGL not only had adequate notice of the settlement, but it filed several sets of comments, with accompanying affidavits, participated fully in the oral argument before the Commission, and requested rehearing of the Commission's Order. AGL's procedural rights were more than amply protected throughout the Arcadian Settlement process.

It is fully within the Commission's authority to treat materials submitted in connection with a settlement as providing the basis for Commission action under Section 7 of the NGA. Indeed, AGL itself gladly accepted the benefits of exactly this procedure as part of the Restructuring Settlement between Southern and its customers, including AGL. Southern there agreed to construct brand new facilities for AGL and to sell certain existing Southern facilities to AGL. In approving the Arcadian Settlement, the Commission, over the strong objections of certain parties, including the Georgia Industrial Group, accepted the materials filed with the settlement by Southern as sufficient to support approval under Section 7. *See Southern Natural Gas Co.*, 72 FERC ¶

61,322 (1995). Southern (and the Commission) did no more procedurally in that instance than it did in the case of the Arcadian Settlement. The Commission here adequately followed its regulations governing issuance of certificates under Section 7(e) of the NGA, in the context of a settlement.[16]

II. Petitioners' argument that the Commission does not have authority under Section 5 of the NGA to remedy undue discrimination by ordering a pipeline to provide direct service is moot.

Petitioners AGL's and AGA's[17] primary argument is that the Commission is powerless under the NGA to remedy undue

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[16]The Commission has plenary authority to waive its regulations. *See Mississippi River Transmission Corp. et al.*, 42 FERC ¶ 61,171 at 61,612 (1988) ("The Commission unquestionably has authority both under the Natural Gas Act and its regulations to waive the procedural requirements in appropriate instances"). It should be apparent that the Commission did not discuss waiver of its regulations in its Orders on the Arcadian Settlement because neither AGL nor anyone else brought that issue to the Commission's attention in its request for rehearing of the order approving settlement.

[17]AGA joins in the initial brief only with respect to Part I.A, the argument that the Commission could not remedy undue discrimination. *See* AGL Br. at 1 n.1.

discrimination by ordering a pipeline to construct minor facilities and provide direct service to a customer in an instance in which the pipeline had voluntarily provided such construction and service to another similarly-situated customer. *See* AGL Br. at 15-34. The Court should not address Petitioners' argument on the merits, since, as the Commission correctly held in its Order approving the Arcadian Settlement, it is moot. As the Commission stated in that Order, "[t]he settlement offer submitted by Southern and supported by Arcadian has changed the nature of this proceeding substantially. . . . [T]he Commission is no longer faced with the need to remedy undue discrimination by directing an unwilling pipeline to provide direct service under the terms of its open-access tariff." 67 FERC at 61,534; R. 2045. The Commission's authority to compel a pipeline to provide direct service against its will is simply no longer in issue, assuming the Court upholds the Commission's Order approving the Arcadian Settlement.[18]

An argument becomes moot "'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Reich v. OSHA*, 102 F.3d 1200, 1201 (11th Cir. 1997) (quoting *Powell v. McCormick*, 395 U.S. 486, 496 (1969)). Here, if the Commission's Order approving the Arcadian Settlement is upheld by this Court, AGL does not present a live controversy with respect to the scope of the Commission's authority to remedy undue

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[18]The Court should affirm that Order for the reasons set forth in Part I, *supra*.

discrimination. With Commission approval of the Arcadian Settlement, the live matter before the Court would end, since no ruling by the Court on any other issue, including the scope of the Commission’s remedial authority under Section 5, could affect the service to Arcadian or the rights of any of the parties, including AGL and AGA.

Moreover, if the Court affirms the Commission’s Order approving the Arcadian Settlement, AGL and AGA would not be “aggrieved” within the meaning of Section 19(b) of the NGA by the Commission’s 1992 Order (and the predecessor order involving the Commission’s remedial authority under Section 5 of the NGA) and would not be entitled to review of that Order. *See Colorado Interstate Gas Co. v. FERC,* 83 F.3d 1298, 1300 (10th Cir. 1996) (“To be considered 'aggrieved’ under Section 19(b), we have held that a party must demonstrate a present and immediate injury in fact, or at least a looming *unavoidable* threat of injury.” (emphasis added) (citation and quotation omitted)); *Southwest Gas Corp. v. FERC*, 40 F.3d 464, 466-67 (D.C. Cir. 1994) (stating that, to be aggrieved with meaning of Section 19(b), petitioner must have suffered an “injury in fact”).

III. Petitioners’ argument concerning the scope of the Commission’s authority under Section 5 of the NGA is without merit.

If the Court does reach Petitioners’ Section 5 issue on the merits, it will address an issue of great importance and far-reaching impact on the natural gas industry and on the consumers the Commission is charged with protecting.[19] What is at stake here is the Commission's authority to prevent and remedy undue discrimination by pipelines with respect to a wide range of customers -- producers, end users, marketers. All whom the NGA was enacted to protect would be in jeopardy were the Court to limit the Commission's powers under Section 5 of the NGA, as urged by AGL.

Although this case involves only direct service at interstate pipeline delivery points, the same legal principles govern service at receipt points in the supply areas served by the pipelines. If Petitioners were to prevail on the merits, notwithstanding the Commission's open-access regulations upheld by the courts[20] and congressional intent favoring such open-access regime,[21] pipelines

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[19]See note 13, *supra*, and accompanying text.

[20]*See United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (upholding almost in toto Order 636); *Associated Gas Distribs.. v. FERC,* 824 F.2d 981 (D.C. Cir. 1987) (upholding FERC's Order 436 open access requirements).

[21]Congress has made clear that it is in favor of increased competition within the natural gas industry. *See* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) (completing the process of deregulating the producer sales market). The D.C. Circuit canvassed the legislative history of this Act and stated:

> [T]he Commission's creation of open-access transportation was essential to Congress' decision completely to deregulate wellhead sales. The committee report declared also that [b]oth the FERC and the courts are strongly urged to retain

would be free to pick and choose to whom they would and would not provide direct service. Neighboring producers in the supply area and neighboring factories in the market area might be arbitrarily granted or denied direct interconnections by pipelines, with impunity. The power of a monopolist, such as a pipeline, to discriminate is one of the most dangerous powers it can exercise. For a pipeline to be able to pick and choose who does and who does not receive service would be devastating. Whatever else Section 5 may mean, given its history before the Commission and the courts, it cannot mean that such selective pipeline conduct would be permissible. Yet, that is what Petitioners ask this Court to hold.

At the outset, the fact that the Commission has interpreted Section 5 to give it the authority to remedy Southern's unduly discriminatory action in denying service to Arcadian[22] is entitled to deference by this Court, since it is the agency to whom Congress

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> and improve the competitive structure in order to maximize the benefit of decontrol. The committee expected that, by ensuring that [a]ll buyers [are] free to reach the lowest-selling producer, open access transportation would allow the more efficient producers to emerge, leading to lower prices for consumers.

United Distrib. Cos. v. FERC, 88 F.3d 1105, 1125 (D.C. Cir. 1996) (quotations and citations omitted) (brackets in original).

[22]55 FERC at 61,687; R. 801-02; 61 FERC at 61,675-77; R. 1400-05. The facts underlying Arcadian's claim of undue discrimination are summarized above at pp. 2-4. We expect that others, namely, the Commission and Arcadian, will present argument regarding those facts, and, therefore, we shall not do so.

has entrusted enforcement of the NGA. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984); *SEC v. Chenery*, 332 U.S. 194, 207 (1947). Indeed, the Commission's holding in this case is a logical outgrowth of its prior invocations of Section 5, which had been upheld by the courts.[23]

A comprehensive discussion of the Commission's broad authority under Section 5 of the NGA appears in *Associated Gas Distribs.. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987).[24] In *AGD*, the D.C. Circuit held that "Congress has given the Commission in Section 5 of the NGA a broad power to stamp out undue discrimination." *Id.* at 1001 (emphasis added). Indeed, according to the court, the NGA "fairly bristles with concern for undue discrimination." *Id.* at 998. The genius of the NGA is that it provides a comprehensive system of regulation designed to protect all who seek service from interstate

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[23]*Cf. Public Service Comm'n v. FPC*, 487 F.2d 1043, 1078 (D.C. Cir. 1973) (discussing FPC's §§ 4 and 5 duties and noting "the breadth of agency discretion is, if anything, at its zenith when the action assailed relates . . . to policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives" (quotation and citation omitted) (first ellipsis in original)).

[24]The D.C. Circuit there upheld FERC's use in its Order 436 of Section 5 to create the open-access regime for interstate pipelines. Its discussion of the Commission's Section 5 powers was the most comprehensive to date.

pipelines. Sections 4, 5 and 7 give the Commission the tools it needs today to assure that pipelines treat all evenhandedly in the open-access era. As discussed below, the Commission's powers under Section 5 are not at all limited by Section 7. Indeed, Section 5, in conjunction with Section 4(b), is the linchpin of the Commission's authority to protect customers.[25]

A. Section 7(a) of the NGA does not preclude the Commission from ordering Southern to provide direct service to an end user.

AGL claims that Section 7(a) of the NGA[26] trumps FERC's authority to remedy undue discrimination under Section 5. AGL Br. at 15-24. AGL's argument rests almost entirely on its interpretation of *Panhandle Eastern Pipe Line Co. v. FPC,* 204 F.2d 675 (3d Cir.), *reh'g denied,* 204 F.2d 682 (1953).[27]

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[25] *I.e.*, shippers of gas in today's open-access, unbundled environment.

[26] Section 7(a) states in pertinent part: "[t]he Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." 15 U.S.C. § 717f(a) (1994).

[27] AGL also places heavy emphasis on the fact that the Federal Power Commission, in *Southern Natural Gas Co.*, 51 FPC 1517 (1974), rejected Arcadian's predecessor's request to have

In *Panhandle*, the Third Circuit was presented with the question of whether, after a finding of undue discrimination, the NGA "empowers [FERC] for the purpose of eliminating the discrimination, to order the [pipeline] to deliver to its customers *substantially more* gas than its pipeline system is designed to carry." 204 F.2d at 678 (emphasis added). The Commission had ordered Panhandle Eastern Pipe Line Company to *increase* the maximum daily delivery capacity of one of its lateral facilities by approximately 50 percent. *Id.* at 677. This increased delivery was to be to a gas distributor, albeit for the ultimate benefit of an end user behind the LDC city gate. On review, the Third Circuit concluded that Section 7(a) precluded the Commission from ordering Panhandle to enlarge its facilities in this way. Id. at 680.

FERC's order here involved no enlargement of the capacity on

Southern deliver additional gas to the Augusta area for its benefit. The case is wholly inapposite. At the time the FPC issued that order, Southern was not an open-access pipeline and did not offer general transportation service. Consequently, the issue of whether Southern was obligated to provide direct transportation service to an end user when it had provided such service to a similarly-situated end user was not before the Commission. At that time, there was no similarly-situated end user that had sought and received additional gas deliveries from Southern. Thus, the Commission’s Section 5 authority to remedy undue discrimination was not in issue.

Southern’s system. Rather, FERC merely directed Southern to change the delivery point, but not the quantity, of service that it already provided to Arcadian. FERC's November 3 order only required Southern to change Arcadian’s service from indirect to direct, without any enlargement of the capacity of Southern's system.[28]

In contrast, the Third Circuit in *Panhandle* viewed Section 7(a) as a provision to protect pipelines from being forced to invest capital to enlarge pipeline facilities against their will. *See Panhandle,* 204 F.2d at 680. Southern could make no claim that FERC required it to make an unwanted capital investment, however, because the Commission ordered Arcadian to reimburse Southern for the minimal capital costs expended to effectuate direct service to Arcadian. 61 FERC at 61,684; R. 1418. Thus the key pipeline interest that Section 7(a) is designed to protect -- protection from unwanted capital investment -- is not a factor in this case.

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[28] Both before and after the direct service to Arcadian, Southern was transporting gas under contract to Arcadian. The only difference between the direct service and indirect service was whether that gas would be delivered to AGL’s delivery point and then transported a very short distance to the plant or whether the gas would be delivered to Arcadian’s delivery point.

Finally, on rehearing, the Third Circuit explicitly limited its decision as follows:

> [FERC] is prohibited by the proviso in Section 7(a) from directing an improvement of the transportation facilities of a natural gas company which involves the *enlargement* of those transportation facilities, even though the purpose is to enable the delivery of *more* gas in order to eliminate undue discrimination between customers. Whether a given improvement does or does not involve a prohibited enlargement may be a close technical question, however....[I]t is a question which should be passed upon in the first instance by the Commission.

204 F.2d at 683 (emphasis added).[29] FERC addressed this issue in its Order, and it specifically found that the sales tap required to provide direct service to Arcadian was neither an extension nor an improvement to Southern's system. *Arcadian v. Southern*, 61 FERC ¶ 61,677. This Court should defer to FERC's determination that it did not order Southern to enlarge its system in a way that would be precluded by Section 7(a). *See American Public Gas Ass'n v. FPC*, 546 F.2d 983, 986 (D.C. Cir. 1976) (the Commission is entitled to

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[29]*Cf. Consolidated Edison Co. v. FERC*, 676 F.2d 763, 766 (D.C. Cir. 1982) ("[S]ection 7(a) only prohibits the Commission from ordering sales to new customers when to do so would impair service to existing customers." (citing *American Smelting & Refining Co. v. FPC*, 494 F.2d 925, 936 (D.C. Cir. 1974))). Here there was no impairment of service to anyone on account of the switch of Arcadian from indirect to direct service. Indeed, there was no change in Southern's operations or any of its procurement activities, other than the switch from the AGL delivery point to the nearby Arcadian delivery point.

deference "since it is a specialized agency created by Congress to deal with complex problems").

The issue before the Court (if it reaches it) boils down to the question whether Section 7(a) in any way limits the Commission's authority under Section 5 to remedy undue discrimination. The plain answer is that it does not. Under the comprehensive scheme of the NGA, an express grant of power in Section 7(a) to the Commission to order new service for local distribution companies and communities, an issue of importance in 1938 as pipelines began their expansion, simply has nothing to do with the Commission's broad remedial powers in Section 5. Moreover, the Commission is empowered to act under Section 7(a) whether or not undue discrimination or undue preference is involved; that section is completely separate and apart from Section 5 and the Commission's powers under Section 5.

An analysis of the Commission's powers must begin with Section 4(b), which, "with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission," prohibits undue preference or undue discrimination and the maintenance of "any unreasonable difference in . . . service . . . either as between localities or as between classes of service."[30] It is this

[30] 15 U.S.C. § 717c(b). AGL makes much of the point that the word "service" does not appear in Section 5 (AGL Br. at 19, 52). Section 5 gives the Commission the power to enforce on its own the substantive standards set forth in Section 4(b), and so "service"

substantive provision that the Commission enforces when it acts under Section 5 to remedy undue discrimination through a direct connection. Here, the Commission found that Southern was quite ready to give (and did give) a direct connection to Air Products in Louisiana, but was not willing to give a direct connection to Arcadian in Georgia. This kind of discrimination between similarly-situated persons and between the two localities is flatly prohibited by the NGA. Without this prohibition, pipelines would be empowered to play a large role in determining which of its customers will succeed and which will fail.

A first principle of statutory interpretation is that all parts of the statute must be implemented and enforced. AGL and AGA would write out of the NGA a significant part of the prohibition against undue discrimination and would gut the carefully constructed congressional plan for the comprehensive regulation of interstate pipelines. Section 7(a) speaks only to the subject of extension of service to LDCs and localities. The issue of undue discrimination is left entirely to Sections 4(b) and 5.

In sum, once the Commission adopted its open-access transportation regime[31] for pipelines under Order 436, the Commission not only had a right, but the duty under Sections 4(b) and 5 to assure that all similarly-situated pipeline customers are

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is implicated. In any event, Section 5 does contain the word "practice," which certainly implicates the concept of "service."

[31] *See* 18 C.F.R. §§ 284.8(b), 284.9(b).

treated equally. It did no more and no less in this case.

IV. Dalton's petition for review should be denied.

A. Dalton's unfair competition argument is seriously flawed and should be rejected by the Court.

Dalton argues that Southern's bypass tariff provisions,[32] approved by the Commission in its order approving the Arcadian Settlement, "enables Southern to utilize its Commission-regulated status to compete unfairly with Dalton." Dalton Br. at 17. In support of this argument, Dalton makes two plainly erroneous points: (1) Bypassing end users pay only the costs of hooking them up to the pipeline and certain other incidental costs (Tariff § 36(f)) and do not pay their share of the cost of the Southern system in general (Dalton Br. at 17, 34-35), whereas Dalton must pay its share of those system costs; (2) Southern's tariff requirement that a direct service to an end user be "revenue neutral" (Tariff § 36(e)(3)) means that Southern would have to provide the service even if it makes no money on the deal.

Dalton's analysis is simply wrong. *In addition to* the costs specified in Section 36(f) of the tariff, each bypassing end user must pay its share of system costs under its own transportation agreement with Southern (or through the transportation agreement of a marketer that sells gas to the end user). Dalton itself recognizes this in its brief in the course of discussing its own service from Southern. Dalton Br. at 22, n.26. Whether the end

[32] *See* App. at C-1 to C-3.

user has its gas transported under a firm or an interruptible contract, it still pays its share of the general costs of the Southern system.[33]

Dalton's complaint that end users may receive transportation rate discounts not available to it (Dalton Br. at 25-26) is pure speculation unsupported by anything in the record. Discounts have been permitted since the implementation of Order 436, and all pipeline customers, including LDCs like Dalton, have been eligible to receive them.

Dalton states in its brief (p. 18) that the term "revenue neutral" in Section 36(e)(3) of Southern's tariff means that Southern must do the bypass even if it "makes no money on the transaction." Dalton appears to imply that Southern must go forward even if it makes no profit. "Revenue neutral" does not mean that the deal with the end user is profitless. What it does mean is that Southern will not end up any worse off following the bypass than it was before the bypass. In other words, the rate and revenue it receives from the end user as a direct customer after the bypass will be no lower than were the rate and revenue it

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[33]If the end user has firm service, it pays a firm rate based on the SFV methodology. If it has interruptible service, its rate is derived from the firm rate and reflects all of the fixed costs of the system. For a description of how interruptible rates are derived, *see Elizabethtown Gas Co. v. FERC,* 10 F.3d 866, 871 (1993).

received from the end user when it received its service behind the LDC city gate. Southern will clearly continue to make money from its service to the end user.

B. Dalton's arguments regarding the potential loss of its large industrial customers and the resulting damage to it are speculative and should be rejected.

Dalton complains that Southern's bypass tariff, approved by the Commission, will expose it to the loss of its large industrial customers through bypass. The Commission found that Dalton's (and AGL's) speculation about future loss of industrial customers was just that -- speculation. As noted above (pp. 19-24), the Commission was fully competent, as an expert in bypass, to weigh claims of impending bypass. As the Commission pointed out in this case, LDCs are capable of taking steps to defend themselves against bypass. In fact, there has been very little bypass on the Southern system since Arcadian.

Given FERC's general policy in favor of bypass, Dalton's real quarrel is with that policy, not the Southern tariff approved as part of the Arcadian Settlement. With or without the Southern tariff, Dalton would be just as exposed to bypass either by a willing Southern or through a Commission order to remedy undue discrimination if Southern were unwilling to provide the direct service. What the tariff does is to make it easier for all to know the rules applicable to bypass on the system.

In any event, as Dalton acknowledges (Br. at 25) that, as a result of the Southern Restructuring Settlement in RP89-224 et al., it does not have to pay for the capacity on Southern represented by a bypassing industrial.[34]

C. Dalton's attack on past appellate cases involving bypass must be rejected.

As part of its attack on the Commission's bypass policy,[35] Dalton first argues that a consistent line of decisions by United States courts of appeals has been undermined by the recent Supreme Court case of *General Motors v. Tracy, supra.* As discussed above, note 12, *supra*, the Supreme Court did not cast any doubt on the bypass cases, and Dalton's argument is without merit.

Dalton next attempts to distinguish this case from other bypass cases by noting that the latter involved individual cases of bypass, whereas this case involves a generally applicable tariff governing bypass. *See* Dalton Br. at 38. This is a distinction without a difference. In each of the bypass decisions cited by Dalton, the court approved an individual bypass transaction. Under Southern's tariffs, each proposed bypass will be treated individually on a case-by-case basis, with its individual merits determined on the basis of an individual record. If, after final

[34]Dalton is entitled to relief from firm reservation fees even if the bypassing industrial is an interruptible customer.

[35]This Court's review of this case, involving as it does only service to Arcadian, which is not a customer of Dalton, is not the proper vehicle for a general attack by Dalton on FERC's bypass policy.

agency action on a proposed bypass, a party wishes to seek review in a court of appeals, it may do so. In short, the tariff has done nothing to change the nature of each individual bypass decision; it merely provides guidance to future potential shippers. Therefore, Dalton’s attempt to distinguish prior bypass decisions lacks merit.

CONCLUSION

WHEREFORE, Intervenors Georgia Industrial Group, Process Gas Consumers Group, and Natural Gas Supply Association respectfully request that the petitions for review of the Commission's orders in this case be denied.

Respectfully submitted,

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