ANR Pipeline Company v. Transcontinental Gas Pipe Line Corp.

Docket Nos. CP98-74-000, CP98-74-001, CP98-74-002

FEDERAL ENERGY REGULATORY COMMISSION - COMMISSION

91 F.E.R.C. P61,066; 2000 FERC LEXIS 823

ORDER DENYING REHEARING AND GRANTING COMPLAINT

April 14, 2000

CORE TERMS: interconnect, pipeline, shipper, mainline, facility, competitive, feeder, transportation, interconnection, natural gas, station, customer, pooling, anticompetitive, firm, regulation, interstate, undue discrimination, buyer, transportation service, initial decision, lateral, interruptible, tariff, sellers, filed, first, similarly situated, transport, construct

PANEL: [**1] Before Commissioners: James J. Hoecker, Chairman; William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

OPINION: [*61,232]

On November 7, 1997, ANR Pipeline Company (ANR) filed a complaint requesting the Commission to issue an order directing Transcontinental Gas Pipe Line Corporation (Transco) to install certain minor facilities interconnecting Transco's mainline facilities with those of ANR in Evangeline Parish, Louisiana (the Evangeline Interconnect). The purpose of the installation would be to allow ANR to deliver gas for certain of its shippers on a firm basis into Transco's mainline facilities near an active sales market, bypassing the need for interruptible service through Transco's Central Louisiana IT Feeder Lateral. n1 ANR argued that Transco has allowed the construction of many mainline interconnections with other [*61,233] pipelines and that the refusal of a similar interconnect for ANR shows undue discrimination, in conflict with the Commission's pro-competitive policies.

-Footnotes- - - - - - - - - - - - - - - - - -

n1 Several shippers filed in general support of ANR's complaint, including Union Pacific Fuels, Inc. (UP Fuels), Exxon Corp., Shell Offshore Inc., and BP Exploration & Oil Inc. The construction would be minor, involving the insertion of an interconnecting valve into Transco's pipe, the cost of which would be paid by ANR.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**2]

The Commission granted the complaint, n2 but thereafter set for hearing issues relating to the competitive impact of Transco's denial. Upon review of the record in this proceeding, the Evangeline Interconnect will be required under three analyses. First, the evidence shows that Transco has provided no reasonable justification for denying ANR's request, given Transco's history of granting such requests made by similarly situated parties. Second, the evidence developed at the hearing shows specific competitive harm to the operations of sales markets on Transco's mainline, which also fully supports granting the specific remedy sought by ANR. Further, the Commission has established a new policy regarding pipeline interconnects, and the establishment of the Evangeline Interconnect is required by the application of the factors established by that policy. Three independent analyses, each providing separate and sufficient reason to require the Evangeline Interconnect, thus support the Commission's directive. The Commission will deny Transco's application for rehearing of the July 30 Order and terminate the stay of that order, and will grant ANR's complaint and require that Transco allow the [**3] construction and operation of the Evangeline Interconnect as requested by ANR.

- -Footnotes- - -

n2 See *84 FERC P61,106 (1998).*

- -End Footnotes- - - - - - - - - - - - - - - -

Background

Transco stated that it refused ANR's request for the Evangeline Interconnect because, since the initial implementation in 1989 of the "IT Feeder" rate design on its system, n3 it has followed a policy of not allowing any new interconnects for the receipt of gas into its mainline system where, as here, (A) the party requesting the interconnect already has direct access to Transco's system in the area of the requested interconnect and (B) constructing the interconnect would cause Transco to bypass its own IT Feeder lateral for the benefit of the interconnecting party and its shippers, to the detriment of Transco and its ratepayers. n4

- -Footnotes- - -

n3 The IT Feeder rate design was initially approved in conjunction with Transco's open-access blanket certificate and confirmed in *Docket Nos. RP88-68, et al., Transcontinental Gas Pipe Line Corp., 48 FERC P61,399 (1989);* see also Transcontinental Gas Pipe Line Corp., 55 FERC P61,446 (1991). Transco's system relies on the use of interruptible transportation over its supply laterals to "feed" mainline pooling points, where gas purchasers with contractual rights to further mainline transportation obtain supplies for movement to retail markets. [**4]

n4 See Answer of Transco filed December 17, 1998, at 3; Reply of Transco filed January 30, 1998 at 2. Transco argued that a new interconnect would "benefit" the interconnecting shippers by "avoiding the IT Feeder rates." Transco's "detriment" would be the "loss of existing and potential throughput" on the IT Feeder system, which would purportedly cause business loss to Transco and would ultimately result in higher rates to Transco's ratepayers.

-End Footnotes-

All other relevant mainline interconnects, said Transco, were built before Order No. 636 restructuring n5 during the era when Transco provided bundled, city-gate sales and transportation services to its customers. The IT Feeder rates were approved in 1989, and the decision to refuse the Evangeline Interconnect was a legitimate business judgment, stated Transco, since ANR's purpose is to avoid paying just and reasonable rates. Transco argued that evidence of undue discrimination is required to support the remedy sought here, but that no such finding of undue discrimination is possible since no prior similar request for an interconnect had been granted.

-Footnotes-

n5 Pipeline Service Obligations and Revisions to regulations *Governing Self- Implementing Transportation, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, FERC Stat. & Regs., Regs. Preambles January 1991-June 1996 P 30,939 (1992).*

- -End Footnotes- - - - - - - - - - - - - - - - [**5]

On March 29, 1998, the Commission ordered Transco to show cause why ANR's request should not be granted. (See *82 FERC P61,212 (1998)).* The order noted that Transco had explained circumstances surrounding the construction of some but not all of the other pipeline interconnects and directed Transco to provide further factual background and to explain its policy more clearly. Transco filed its answer to the Order to Show Cause on April 1, 1998. Thereafter, in order to obtain further necessary information, Commission Staff sent a data request to Transco.

The July 30 Order

The Commission granted the complaint, n6 rejecting the argument that prior approval of the IT Feeder system constituted a legitimate business reason for Transco's refusal to deal. We found that ANR's shippers have been unlawfully precluded from access to Transco's mainline sales markets, noting the Commission's broad power to remedy discrimination, n7 and agreeing that "meaningful" access to gas markets was one of the primary objectives of Order No. 636. n8 ANR's shippers sought firm service [*61,234] to the sales markets on Transco's mainline, not the

interruptible service provided on the IT Feeder [**6] lateral, and the opportunity for a competitive delivery service to those markets was precluded by Transco's denial.

-Footnotes- - -

n6 *84 FERC P61,106 (1998).*

n7 Citing *Associated Gas Distributors v. FERC, 824 F.2d 981,1001 (D.C. Cir. 1987),* cert. denied *485 U.S. 1006 (1988).*

n8 Citing Order No. 636, FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 P30,939, at p. 30,393 (1992) ("The first goal is to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive national market to transact the most efficient deals possible.").

-End Footnotes- - - - - - - - - - - - - - - - -

Further, Transco had not stated any policy governing interconnects in its tariff. Indeed, ANR raised significant question about whether there has been in existence, prior to the complaint filed in this case, the policy articulated by Transco's pleadings. n9 Nor had Transco provided compelling evidence of the policy's [**7] use in its prior interconnection decisions. Further, ANR showed that Transco had initially responded favorably to ANR's request for several months, before the request was abruptly denied. The Commission noted that it must assure that customers seeking meaningful market access are turned away only for compelling and clear reasons, n10 and granted ANR's complaint.

-Footnotes-

n9 Transco neither reduced the policy to writing nor published it in tariff form for the use of its customers. See Section 4 of the Natural Gas Act, *15 U.S.C. § 717c* (1994); 18 C.F.R. § 154.1(b) ("Every natural gas company must file with the Commission and post in conformity with the requirements of this part, schedules showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission, and the classifications, practices, rules, and regulations affecting such rates, charges, and services, together with all contracts related thereto.").

n10 84 FERC at p. 61,534.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**8]

Hearing Order

On rehearing, Transco sought a stay, stating that the interconnect would have been constructed by the time an order on rehearing issued, thus denying Transco due process rights and causing "irreversible and irreparable harm to Transco," n11 in the form of $8.7 million per year reduction in the IT Feeder services' contribution to the recovery of Transco's system-wide cost of service. Transco also stated that the interconnect has a strong likelihood of "leading to similar interconnects with similar financial impact." The Commission granted a stay so that the parties could present evidence before a Presiding Administrative Law Judge (ALJ) supporting their contentions. n12 The hearing was thus conducted to resolve:

(1) The merit of Transco's claims that the requested interconnect could reasonably cause $8.7 million in lost revenues, and

(2) The merit of ANR's contention that Transco's denial of ANR's request was a) anticompetitive and b) impeded the operations of the competitive national gas market established under Commission policy, including specifically the nature and monetary extent of business opportunities foreclosed by reason of Transco's denial of the requested [**9] interconnect. n13

-Footnotes-

n11 Citing *Boston Edison Company, 81 FERC P61,102 (1997).* See Transco, Request for Rehearing and Stay at 1-3. Transco also raised other issues discussed below.

n12 *85 FERC P61,199 (1998).* The issuance of an initial decision within 120 days of the hearing order was required.

n13 See *85 FERC P61,199 at p. 61,807 (1998).*

- - -End Footnotes-

Initial Decision n14

- - -Footnotes- - - - - - - - - - - - - - - - -

n14 *86 FERC P63,010 (1999).*

- -End Footnotes-

Operational Facts

The Central Louisiana Lateral on which the current Eunice interconnection is located feeds into Transco's mainline at a compressor station known as Station 50, which is one of several compressor stations on the mainline serving as pooling points where gas feeds into the mainline from Transco's supply laterals. n15 At these pooling points, [**10] producers and marketers sell gas to LDCs and other buyers who hold firm capacity on the Transco mainline to move gas downstream to their markets. n16 Transco's pooling points, including the pooling point to which ANR seeks access here, Station 50, are important means of assuring appropriate and efficient usage of the Transco system. n17 Transco's witness Frank J. Ferazzi stated [Tr. 180] that a vibrant daily market for the sale of gas exists at these pooling points. Indeed, the spot price index for gas sold into Transco's system in Louisiana is generally higher than for gas sold into other pipeline systems in Louisiana. n18 The market for sale at Station 50 is thus a premium one, and ANR's shippers seek access to that [*61,235] market on Transco by means of the requested interconnect. n19

-Footnotes- - - - - - - - - - - - - - - - -

n15 Id. at pp. 65,069-70; Exh.T-1 at 4.

n16 86 FERC at p. 65,070; Transcript of Hearing (Tr.) at 179-80.

n17 See also Transcontinental Gas Pipe Line Corp., 86 FERC at pp. 61,613-14(1999).

n18 Exh. ANR-7 at 3.

n19 Exh. ANR at 2-3; ANR, Brief on Exceptions (BOE) at 28-29. [Briefs Opposing Exceptions are so titled in this order].

- - -End Footnotes- - - - - - - - - - - - - - - - - [**11]

Currently, minor metering facilities that could interconnect ANR's pipeline with Transco's lateral at Evangeline are not installed. In order for a shipper using ANR's supply area facilities to get gas to Station 50, the shipper must deliver gas from ANR to Transco at ANR's existing interconnection on Transco's Central Louisiana Lateral at Eunice, and then purchase interruptible transportation service on Transco for a distance of about 7.4 miles. Six interstate pipelines other than ANR currently have direct interconnections on Transco's mainline that were established prior to Transco's restructuring, n20 and shippers using such pipelines do not have to pay the IT rate in order to get gas to Transco's mainline markets. ANR witness Mr. Persells stated:

Because shippers have to pay an additional IT Feeder charge to gain access to Transco's markets via ANR, it is more economical for such shippers to transport their gas to Transco's mainline on either Transco or other pipelines that are

connected directly to Transco's mainline. If they transport on Transco, they pay only the IT Feeder rate to the mainline; and if they transport on other pipelines, they pay only that pipeline's rate to [**12] Transco's mainline. To utilize ANR, however, shippers would have to pay both an ANR rate and Transco's IT Feeder rate.

Exh. ANR-1 at 9. Further, Transco showed that, since 1989, it has granted 50 requests made by various parties for interconnection with its supply area mainline where such requested interconnects do not feed the same pooling point as an existing supply lateral interconnect. n21

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n20 Exh. ANR-1 at 10. The six interstate pipeline companies that already have direct mainline interconnections on Transco's mainline include Florida Gas Transmission Company, Tennessee Gas Pipeline Company, Trunkline Gas Company, Texas Gas Transmission Corporation, Columbia Gas Transmission Corporation, and Texas Eastern Transmission Corporation. Ex. ANR-1 at 10; Exh. ANR-3.

n21 Transco, Brief Opposing Exceptions at 28 n. 33; see also July 30 Order at p. 61,532 (the 50 interconnects were made with intrastate pipelines, local distribution companies, industrial customers, gatherers and producers, and miscellaneous others).

----------End Footnotes---------- [**13]

2. Conclusions

The ALJ issued an Initial Decision March 11, 1999, n22 accepting Transco's explanation of why it refused to allow ANR the access it sought, and construing the evidence submitted as not showing Transco's denial anticompetitive. The Initial Decision found (1) that the limitations of the current service, i.e. the absence of firm transportation service and the higher cost of transportation faced by ANR shippers, do not make the denial anticompetitive, (2) that Transco's policy was acceptable business judgement because the Commission had approved the IT Feeder system, and (3) that antitrust considerations do not require Transco to grant ANR's request.

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n22 See *86 FERC P63,010 (1999).*

--End Footnotes----

ANR and Commission Staff had argued that ANR cannot compete with Transco when ANR shippers must pay the IT Rate to get to the Transco mainline but can escape that charge by negotiating direct service from Transco. n23 ANR showed that it lost the business of Amerada Hess in part because Transco's service [**14] was more attractive than ANR's offer, which had to include the Transco IT rate. n24 Six major interstate pipelines have direct interconnections on Transco's mainline, and ANR and Commission Staff argued that Transco's refusal to allow ANR an interconnect was unduly discriminatory. No Transco "policy" has been shown even to exist, stated ANR. Transco answered that its IT service is not inferior, that the IT interruptible service has been reliable, that only one ANR shipper, UP Fuels, has been interested in firm service, and that ANR will be able, like all other interested shippers, to obtain service on Transco's new capacity proposed in its separate construction application.

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n23 ANR had pointed to Transco's own statements in other certificate cases showing that customers need firm service from the Louisiana Gulf to Transco's mainline. For example, Transco is quoted as stating in Docket No. CP99-76-000, the SELA Crossover Project, that "its proposal will allow Transco to compete for the business of producers and other shippers who want the assurance of firm service for their offshore supplies." Ex. ANR-9; Item by Reference E at 2. [**15]

n24 Indicated Shippers argued that cost is a central element of competition, and Transco's refusal here raises costs for consumers and is anticompetitive. See e.g., Indicated Shippers' BOE at 5-7.

-End Footnotes- - - - - - - - - - - - - - - -

Transco's response, noted the ALJ, amounted to a "shrug," since customers can always go elsewhere. The ALJ found nonetheless that the denial was not anticompetitive because Transco's interruptible service and the rates it charges were approved by the Commission, n25 and other paths to markets are available for ANR shippers.

- -Footnotes- - - - - - - - - - - - - - - - -

n25 86 FERC at pp. 65,072-73 (1999).

-End Footnotes-

Further, the ALJ found no undue discrimination, which he stated must involve an analysis of whether similarly situated entities have been treated differently. Order No. 636, the ALJ [*61,236] states, used the phrase "meaningful access" to indicate the importance of unbundling sales from transportation, as Transco argues. Even assuming the use of a "meaningful access" standard [**16] here to measure the lawfulness of Transco's denial, Order No. 636 "speaks to the national pipeline grid, not to any one pipeline, at any one pooling point," n26 and the Initial Decision found that ANR has access to the national grid even without the requested interconnect. n27

-Footnotes-

n26 Id. at pp. 65,074-75.

n27 The ALJ considered the question whether Transco had formally established a company policy regarding interconnects to be a "straw man." Transco drew a valid distinction, he stated, between pre-open-access requests for interconnects and those received after the IT Feeder structure was developed and which involved access to the same pooling points. "It is only good sense to attempt to protect, within reason, a Commission approved lateral structure." Id.

- - -End Footnotes- - - - - - - - - - - - - - - -

Citing antitrust policy, Commission Staff had argued that Transco controls a facility essential to access to the relevant markets, i.e., the "premium gas sale markets located at Transco's mainline pooling points" which can only be reached through [**17] Transco's mainline. n28 Staff stated that Transco has offered no reasonable excuse for refusing the interconnect, which is operationally feasible, having identified no impediments, either operational, environmental or legal.

- - -Footnotes- - - - - - - - - - - - - - - - -

n28 86 FERC at p. 65,076. Staff argues that the essential facilities doctrine as applied in this case involves review of the following factors: 1) whether Transco controls an essential facility; 2) whether ANR is unable reasonably to duplicate the essential facility; 3) whether Transco has a reasonable basis for denial of access; 4) whether it is feasible for Transco to accord access to ANR. See, e.g., *MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132* (7th Cir.), cert. denied, *104 S. Ct. 234 (1983).*

-End Footnotes- - - -

Transco responded that Staff and ANR fail to define a relevant market, access to which is dependent on the use of Transco's mainline, since all of its northeast LDC customers are served by [**18] at least one pipeline with which ANR is connected. Moreover, Transco argued that, should the relevant market be considered the pooling points on its mainline, there are 19 pipelines that can deliver gas to Transco's mainline in Texas and Louisiana, and ANR has interconnections with 8 of them. n29 Transco also claimed a legitimate business reason to decline the requested interconnect, because harm to Transco's existing customers would occur, resulting from Transco's loss of business and the greater cost allocations such existing customers would have to bear.

-Footnotes-

n29 See 86 FERC at p. 65,077.

- - -End Footnotes- - -

The ALJ found no violation of antitrust principles, stating that a plaintiff must show "more than inconvenience, or even some economic loss; [they] must show that an alternative to the facility is not feasible." n30 ANR failed to show, stated the ALJ, that Transco's system is "the only option for reaching the attractive East Coast market." n31

- - -Footnotes- -

n30 Citing *City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 at 648-49* (10th Cir.), cert. denied, *506 U.S. 831 (1992).* [**19]

n31 86 FERC at p. 65,077. Competition for the sale of gas on Transco's system is vibrant, finds the ALJ, but the "fact that ANR, among other companies, is priced out, harms ANR, but does not harm competition itself."

-End Footnotes-

As to the claims of lost business made by both ANR and Transco, the ID found that neither party had proved its arguments. The ALJ found no proof of any ANR business loss due to denial of the interconnect, stating that "mere allegations, without evidentiary support, is not persuasive [sic] ." n32 The ALJ stated that Transco's estimate of $8.7 million lost revenue is merely the extreme end of the spectrum of possible loss, and found that Transco has not proven that figure. n33 The ALJ did agree that if this interconnect is granted "the floodgates would be opened for future interconnections," and that the Commission "should not require a pipeline to 'shoot itself in the foot'." n34

-Footnotes-

n32 86 FERC at p. 65,078.

n33 Transco derived the $8.7 million from the daily IT feeder rate for Zone 3 ($.0786 per dekatherm) times 365 days per year, times 300 Mmcfd. Transco stated that other requests for interconnects would increase the loss. ANR and Commission Staff criticized the estimates as predicated on full capacity of the interconnect flowing every day, instead of volumes flowing under maximum IT rates. [**20]

n34 Id. at p. 65,079.

- - -End Footnotes- - -

Discussion

The following discussion considers all relevant issues, including the various issues raised by ANR regarding the Initial Decision n35 and the six specifications of error submitted by [*61,237] Transco on rehearing of the July 30 Order. n36 The Commission finds that the evidence submitted by the parties pursuant to the Hearing Order is correctly construed as supporting the specific findings of the July 30 Order. Further, the Commission's new policy concerning pipeline interconnects also requires that ANR's request for the Evangeline Interconnect be granted.

- - -Footnotes- -

n35 Citing Section 20 of the GT&C of Transco's FERC Gas tariff, Item by Reference C, ANR states that Transco's tariff, which commits to construct facilities necessary to connect gas supplies to its system, requires Transco to grant the request. Transco responds, Brief Opposing Exceptions at 74-75, that Section 20 is inapplicable to the facts here. The Commission finds no merit in ANR's suggested reading of the tariff. [**21]

n36 Transco argued that A) the Commission exceeded its legal authority by ordering construction of the requested interconnect; B) the Commission erred by departing from a similarly situated analysis; C) financial harm and wasteful

facility duplication will result; D) no meaningful access is inhibited by Transco's refusal; E) the Commission erred in rejecting Transco's policy; and F) the Commission misapplied the Panhandle orders to this case.

- -End Footnotes- - - -

1(A). The Facts of Record

ANR and Commission Staff argue that the evidence submitted shows clearly that Transco's denial was anticompetitive. ANR notes its evidence from credible witnesses, who had been extensively involved in numerous negotiations for new business dependent on the existence of the requested interconnect. n37 ANR's witness Mr. Hampton, Director of Pipeline Project Development, testified regarding the "extremely high" interest shippers have in delivering gas through ANR's system to Transco's mainline markets. n38 His testimony made clear that the inability of ANR and UP Fuels to consummate a multi-year firm service contract was caused by Transco's [**22] denial of the Evangeline Interconnect. n39 ANR states that the ALJ discounted down to nothing the weight of the evidence of that loss as caused by the denial of the Evangeline Interconnect. The Commission must recognize that a different contract for a different service was the parties' goal, states ANR, even though interruptible interim service was provided.

- -Footnotes- - -

n37 Citing Exh. ANR-7 at 3-7; Exh. ANR-1 at 5-7.

n38 Exh. ANR-7 at 2.

n39 See Initial Decision, 86 FERC at p. 65,078 (UP Fuels had contracted with ANR for firm transportation to Transco's mainline of 56,000 dth/day "subject to the construction of a new Evangeline interconnect with Transco."). Service was provided, but on an interim, interruptible basis, as discussed below.

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Mr. Hampton also testified that negotiations with Amerada Hess foundered because the existing interconnect with Transco's IT system would not, according to Amerada Hess, "provide a cost effective route in light of the IT feeder rate." n40 ANR states a $21.6 million [**23] loss over the life of the Hess contract, n41 and also argues that the Initial Decision ignored evidence showing its advanced negotiations with three other producers (Exxon, Producers Energy Marketing and BP Exploration) representing potential business of up to 300 Mmcf/d. ANR and Commission Staff conclude that the evidence showed ANR's shippers were forced to pay stacked rates for transportation through ANR's existing interconnect, that firm service is not available through the existing interconnect, and that ANR is unable to offer shippers a competitive firm transportation alternative, while Transco and the six other pipelines with existing interconnects can offer such service directly to Transco's mainline. n42

- - -Footnotes-

n40 Exh. ANR-7 at 4.

n41 BOE at 58-59.

n42 ANR cites the testimony of Mr. Persells, Exh. ANR-1 at 9.

-End Footnotes- - - -

Transco argues that 1) ANR has access to Transco's system already, n43 2) ANR's shippers have "innumerable" alternative transportation routes to interstate markets, n44 3) the requested interconnect [**24] would not necessarily lower the ANR shippers' costs, n45 4) UP Fuels, the only shipper seeking firm deliveries at the requested interconnect, transports gas on ANR for delivery to three other pipelines despite the lack of the requested interconnect, and 5) all other shipper inquiries received by Transco have been for interruptible service. Transco states that its denial can be found anticompetitive only if it harms the competitive process, and not just ANR.

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n43 The IT Feeder charge "does not foreclose anyone's access to any market on the Transco system." Exh. T-1 (Mr. Ferazzi) at 14.

n44 ANR has more than 4000 interconnections with other pipelines through which it receives gas from "virtually every supply basin in the United States and Canada" and transports gas to pipelines serving markets throughout the United States. Mr. Ferazzi, Exh. T-3 at 10-11; Transco, Brief Opposing Exceptions at 35.

n45 Transco states that ANR's shippers have no assurance that they would pay less for transportation from Eunice to the mainline than they do today on Transco, since ANR could charge up to nearly $.19 per dth for interruptible service on ANR from Eunice to the mainline. Mr. Ferazzi, Ex. T-3 at 23-24; Ex. T-11 at 9.

-End Footnotes- - - - - - - - - - - - - - - - - [**25]

We note substantial evidence, in the form of certain facts unmet by any controverting submissions from Transco, indicating harm to the competitive process, and not just to ANR, flowing from Transco's refusal to allow the Evangeline Interconnect. The pooling point sales market at Station 50 is an important sales market for ANR's shippers where buyers with downstream transportation rights can obtain gas supplies. UP Fuels was unable to negotiate a firm service contract to use ANR's transportation service. Amerada Hess selected Transco [*61,238] instead of ANR for firm transportation of its Louisiana Gulf gas supplies to market, based at least in part on Transco's preclusion of ANR service through the Evangeline Interconnect. n46 Discussions between ANR and other gas producers concerning the possibility of new transportation service business through the Evangeline Interconnect remained tentative.

-Footnotes-

n46 As ANR and Staff argue, Transco's Southeast Louisiana Crossover Project (SELA Crossover project) shows that the service that ANR seeks to offer is the type of service sought by shippers to sell gas at Station 50. Transco is allowed by that certificate to offer shippers a firm transportation service directly to its mainline, bypassing its own IT Feeder system. *87 FERC P61,113,* reh'g pending, (1999).

- -End Footnotes- - - - - - - - - - - - - - - - - [**26]

We are persuaded by the record in this case that ANR cannot offer a pipeline transportation service reasonably competitive with those provided by Transco and other interstate pipelines, without the Evangeline Interconnect, a minor facility consisting of valve access to Transco's mainline. ANR's shippers cannot access Station 50 at reasonably competitive rates in order to offer competitive sales of gas supplies, because the Evangeline Interconnect does not exist, and Station 50 buyers are precluded from access to competitively priced gas supplies that ANR's shippers seek to offer. Competition among pipelines to provide firm transportation service from the Louisiana Gulf to Louisiana sales markets and to develop the infrastructure needed to move gas from the incipient supply markets being developed in the Gulf n47 has thus been limited.

- -Footnotes- - -

n47 See *ANR Pipeline Company, 78 FERC P61,326 (1997),* order denying reh'g, *85 FERC P61,056 (1998).*

-End Footnotes- - - - - - - - - - - - - - - - -

Transco's response to ANR's evidentiary [**27] showing consists of testimony claiming the likelihood of future loss should the Evangeline Interconnect be built, but Transco submits no evidence to distinguish future competitive pressure from that which it has voluntarily accepted in the past and faces currently. Transco's witness Mr. Ferazzi admitted that Transco "virtually never" discounts its maximum IT Feeder rate, and that sellers on ANR's system operate at a "competitive disadvantage." n48 Mr. Ferrazi admitted Transco could offer discounts in response to the competitive pressure ANR might offer, n49 but should not need to do so because Transco is "different than other pipelines." n50 Transco states that it understands that "market forces and resulting competitive discounting will determine the actual

rate charged for any given transaction" n51 that might involve either ANR or Transco service to the mainline markets, but no discounting by Transco to retain IT Feeder system business has apparently been required.

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n48 ANR, BOE at 30.

n49 Tr. at 174 ("They charge 5 cents, if Transco wants to discount, I suppose it could.").

n50 Id. at 175. Mr Ferazzi stated that the "Commission has to keep in mind, though, what's called fair competition, they need to recognize that our service structure is different than other pipe lines, and treat us accordingly." [**28]

n51 Transco, Brief Opposing Exceptions at p. 32, n.35.

-End Footnotes- - - - - - - - - - - - - - - - -

The evidence Transco does offer shows neither that it is unable to compete with ANR's proposed service nor why it should be protected from such competition. Indeed, Transco's witness Mr. Lukens points out that, assuming construction of the Evangeline Interconnect, ANR would have to charge some as yet unspecified rate for its transportation service to Station 50. Whether such a rate would ultimately persuade any of the Gulf Coast shippers to select ANR's service over that of Transco or any of the many other interstate pipelines that are available to get gas to market is, as Transco argues, unclear. n52 ANR's current inability to offer Gulf Coast shippers any competitive service for such business, however, remains uncontroverted. Nor does Transco offer an efficiency defense to its policy, i.e., a showing that the sales markets on its system operate more efficiently without the requested Evangeline Interconnect. n53

-Footnotes-

n52 See Transco, BOE at pp. 31, and 41 at n. 44. Transco's position is consistent with the ALJ's conclusion that its claims of loss and injury were not proved; see also Transco's BOE at 10 (Transco's estimate of harm "is inherently subject to uncertainty."). [**29]

n53 Rather, Transco's witness Mr. Ferrazi testified that Transco denied Southern's request in 1996 and ANR's request in 1997 for the same reasons (Exh. T-1 at 7-8; T-3 at 8-9), i.e., that the removal of the competitive disadvantage currently faced by ANR would cause loss of Transco's IT revenues.

- -End Footnotes- - - - - - - - - - - - - - -

Transco states it must protect the revenues of the IT Feeder system to prevent loss of business through operation of the Evangeline Interconnect, but many other mainline interconnects already exist and no business loss from such interconnects is shown, or even attempted. Fifty such interconnects, not feeding into a pooling point, were established after Transco's restructuring. n54 Each of those interconnects, states Transco, compete with Transco's services and may cause business loss. More significantly, as Commission Staff shows, six other interstate pipelines currently use mainline interconnects (i.e., interconnects that would be denied under Transco's purported policy if requested today)[O>,<O] to compete with Transco, but no evidence indicates the extent [*61,239] of even arguably identifiable business loss from [**30] these pipeline competitors. That other interconnects were not built for the specific purpose of bypassing a particular portion of Transco's system does not preclude the inference that they can function in exactly that way.

-Footnotes-

n54 BOE at 9, citing Tr. 263-64; Brief Opposing Exceptions at 77.

-End Footnotes- - - - - - - - - - - - - - - - -

Transco introduced no evidence, for instance, of the volumes currently moving through such interconnects, or the extent to which such volumes show competitive business loss. Commission Staff, however, cites evidence showing that

the policy is unnecessary, i.e., low historic operating experiences at the other six interstate interconnects, with daily average use well below 100 percent load factor, ranging from 2.5 percent to 48.1 percent. n55 Staff also points out that Transco's mainline capacity at Evangeline often goes unused. n56 At the same time, Transco's historical response to interconnect requests has been, with the exception of the Southern Natural request, n57 to assume such competitive risk and to allow interconnects. n58 The [**31] Commission has before it neither any factual evidence nor a reasonable explanation of why the same result should not obtain here.

- - -Footnotes-

n55 Brief Opposing Exceptions at 18.

n56 See Brief Opposing Exceptions at 10-11 (during the period from December 1, 1997 through February 28, 1998, Transco's mainline flow at the point of the Evangeline Interconnect was at or below its minimum capacity available for firm transportation service on 91 of the 121 days. On only 30 of those days was Transco's flow above its minimum capacity).

n57 No testimony from Southern Natural representatives was introduced at hearing.

n58 Transco's asserted policy constitutes a classification, practice, rule, and regulation that affects service on Transco's system required to be set forth in Transco's tariff. See *Transcontinental Gas Pipe Line Corporation, 63 FERC P61,194 at pp. 62,524-26 (1993)* (Transco directed to revise tariff to conform to actual operating procedures regarding issue of scheduling); see also *City of Florence, Alabama v. Tennessee Gas Pipeline Co., et al., 24 FERC P61,395 (1983)* (pipeline directed to remove from tariff restrictions on resale activities); *Algonquin Gas Transmission Company, 36 FERC P61,204 at p. 61,513 (1986).*

- - - - -End Footnotes- - - - - - - - - - - - - - - - [**32]

1(B). Prior Commission Approval of IT Feeder System

The ALJ committed further error, states ANR, by concluding that the Commission's prior approval of the IT Feeder system precludes any current finding that Transco's denial of the requested interconnect is unduly discriminatory. ANR states that the ALJ simply disagreed with the Commission, and found without support that the Commission's prior approval of the IT Feeder system constituted good cause to deny ANR's request. n59 The Initial Decision, states ANR, was issued in error on this basis alone. Transco states that its restructuring of services and implementation of the IT feeder system in 1989 was such a fundamental change in its business and regulatory environment that its denial of the Evangeline Interconnect was justified by the threat of harm to Transco and its ratepayers. n60

-Footnotes-

n59 Citing 86 FERC at p. 65,075 n.30 (The ALJ "respectfully disagrees" with the Commission's treatment of this issue); it is "only good business sense to attempt to protect, within reason, a Commission approved lateral structure." 86 FERC at p. 65,075 (1999). [**33]

n60 Brief Opposing Exceptions at 57.

- -End Footnotes- - - -

The IT Feeder system of service and rates used by Transco on its laterals was established in 1989, before the restructuring of Transco's system occurred and after Transco had established the interconnects with the six other pipelines enjoying direct access to Transco's mainline. There were no comparable complaints, however, either formally pending against Transco or stated by way of comment when the Commission approved the settlements submitted involving the IT Feeder system.

The Commission made an initial finding regarding the stated competitive needs of participants in the various markets on Transco's system, but that finding did not freeze indefinitely the roles or market shares of Transco or of the buyers and sellers of goods and services on Transco's system. The Commission made no finding, for instance, that discounting

by Transco to attract and retain markets was precluded, or that the development of pooling point sales markets might not require further protection of competition. Indeed, Mr. Ferazzi's testimony discussed above shows that Transco recognizes [**34] that it is appropriately subject to such competitive pressure, even under the structure of the IT Feeder system. In a recent Transco order, the Commission found that the question of whether cost recovery may become more problematic is "no basis for departing from the Commission's flexible receipt and delivery point policy." If cost recovery is "a problem, the solution is to file under section 4 of the Natural Gas Act to redesign its zones or rates to ensure the recovery of those costs." That same rationale applies here. n61

- - -Footnotes- -

n61 *Transcontinental Gas Pipe Line Corporation, 86 FERC P61,175 at p. 61,611 (1999).*

-End Footnotes- - - - - - - - - - - - - - -

Neither Transco's arguments nor the Initial Decision's conclusions undercut the fundamental problem faced by ANR, ANR's shippers and Station 50 buyers -- no one of these parties can offer or obtain goods or services under conditions that may prove more efficient than current circumstances. Buyers cannot measure the competitive values of offers by Transco and [*61,240] ANR to transport Gulf Coast gas [**35] supplies from Evangeline to Station 50 and to choose between those services. We reject the Initial Decision's findings that (1) competition has not been injured at Station 50 and (2) the Commission's prior approval of the IT Feeder system constituted appropriate support for Transco's decision to deny the Evangeline Interconnect.

The opportunity to make such supplies available in a vibrant market such as Station 50 is the very essence of the competitive process we seek to encourage and are required to protect. The denial of the Evangeline Interconnect has been shown to have had specific impacts on the Station 50 sales market to which ANR's shippers seek direct access, and the Commission finds those impacts to be anticompetitive. Transco has provided no factual indications of whether or why the denial of the Evangeline Interconnect has been or is necessary to compete. Further, Transco has identified no differences, between its denial of the Evangeline Interconnect and its grant of other interconnect requests, reasonably supportive of such differing treatment.

2) Relevant policy

A) Undue Discrimination

ANR and a number of producer/marketer shippers argue that the ALJ's treatment of the [**36] July 30 Order and the Commission's policy of providing "meaningful access" to the national gas market would render that concept a nullity, and hamstring Commission efforts to promote competition in the gas markets. n62 The Initial Decision, states ANR, is based on a "profound misunderstanding" of the Commission's open access policies, unduly restrictive and contrary to precedent in its conclusions.

- - - - - - - - - - - - - -Footnotes- - - - - -

n62 Brief On Exceptions at 22. The ALJ stated that "meaningful access" to the national grid referred not to "any one pipeline, at any one pooling point" but to the grid as a whole. 86 FERC at pp. 65,074-75. Transco concurs.

- - - - - - - - - - - -End Footnotes- - - - - - - -

The heart of this complaint, states Transco, is the claim of undue discrimination, which the ALJ treated correctly. n63 Discrimination is unlawful only when undue, and undue discrimination means "substantially different treatment to 'similarly situated' entities without good reasons." n64 The July 30 order failed to offer a reasoned explanation for departing from the similarly situated [**37] standard, n65 states Transco, and the ALJ was correct in relying on that test. The Commission's Panhandle orders "are not relevant to the instant proceeding because, unlike here, those orders do not deal with a specific request for construction of an interconnect." n66

- -Footnotes- - -

n63 Brief Opposing Exceptions at 50, citing Initial Decision at p. 65,074.

n64 Citing Pacific Gas & electric *Co., 38 FERC P61,242 at p. 61,678 (1987); El Paso Natural Gas Co., 73 FERC P61,224 at p. 61,642 (1995).*

n65 Citing *Greater Boston Television Corp. V. FCC, 444 F.2d 841 at 852 (D.C. Cir. 1970),* et al.

n66 Transco, Request for Rehearing and Stay, at 17; see also brief Opposing Exceptions at 77.

- - - - - - -End Footnotes- - - - - - - - - - - - - -

As noted above, there are three separate analyses justifying the remedy we require here. We have established, in an order on remand in a separate proceeding discussed more fully below, a new policy regarding pipeline interconnects which, when applied to the facts of this complaint [**38] proceeding, require Transco to grant the continuing request ANR makes for the Evangeline Interconnect. Our discussion of the five factors involved in analysis of circumstances requiring interconnects makes clear that the interconnect sought by ANR is justified under that policy. In directing that the Evangeline Interconnect be established, the Commission is enforcing the terms of section 4(b) of the Natural Gas Act, n67 which provide:

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

The July 30 order applied the facts then available and found an anticompetitive preference and prejudice by Transco for its own services that impeded the access to sales markets protected under the Commission's open access policy. n68 That finding has been illuminated and [*61,241] supported more fully by the facts adduced at [**39] the hearing Transco sought. Transco has accorded itself an anticompetitive preference, also within the meaning of NGA section 4(b), to assure that its own IT service is used in lieu of the potential alternative proposed by ANR.

-Footnotes-

n67 *15 U.S.C. section 717*(c).

n68 See findings of anticompetitive effects resulting from Transco's denial of the Evangeline Interconnect made in Order to Show Cause, 82 FERC at p. 61,837 (1998), and July 30 Order, 84 FERC at pp. 61,532-34 (1998); see also *The Electric and Water Plant Board of the City of Frankfort, Kentucky v. Kentucky Utilities Co., et al.,(City of Frankfort), 12 FERC P61,004 at p. 61,008 (1980)*(the "general prohibition against undue discrimination does not exist wholly apart from competitive considerations."); *Town of Norwood v. FERC, 587 F.2d 1306, 1312 (D.C.Cir. 1978)*(concerns with fairness and the avoidance of competitive advantage are involved in Federal Power Act discrimination analysis). Constructions of the provisions of either the Natural Gas Act or the Federal Power Act are authoritative for the other. *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981).*

- -End Footnotes- - - - - - - - - - - - - - - - - [**40]

In addition, the record also shows that Transco has treated similarly situated requests for interconnects differently without a reasonable justification. The evidence shows unjustified, differing treatment accorded ANR and its shippers when compared to Transco's grant of the interconnects to the six other interstate pipelines, and the 50 other parties, with whom Transco states it has interconnected. No meaningful difference was established at hearing to support such disparate treatment.

The evidence presented at hearing is reasonably construed as showing that Transco is able to price its relevant IT Feeder system service at maximum levels, without any competitive pressures requiring the offer of discounts, that ANR is unable to offer a competitive transportation service direct to the Station 50 sales market, and that certain willing sellers of gas are unable to offer their supplies at that market at competitive prices. n69 The record shows current and

potential Station 50 buyers and sellers are prevented from the opportunity to obtain the benefits of competition's basic goals -- lower prices, better products, and more efficient production methods. n70

-Footnotes-

n69 The Initial Decision's discussion of whether ANR's shippers can access other markets is unresponsive to the evidence in this case. Shippers seek meaningful access to mainline sales markets, most notably Station 50, and the only facility that needs to be constructed to accomplish that access is minor, a tap into Transco's mainline, the Evangeline Interconnect. [**41]

n70 "Discrimination which is anticompetitive in effect is presumptively undue." City of Frankfort, 12 FERC at p. 61,008 (1980), citing *Missouri Power and Light Co., 5 FERC P61,086 (1978).* See, e.g., *Entergy Services, Inc., et al., 64 FERC P61,101 at p. 61,011 (1993),* citing *Town of Concord v. Boston Edison Company, 915 F.2d 17 at 21-22 (1st Cir. 1990),* cert.denied, 111 S. Ct.1337 (1991); *Missouri Public Service Company, 54 FERC P61,357 at p. 62,177 (1991)*(Commission responded to evidence of anticompetitive effect of certain company prohibitions regarding resale of power by applying a "per se rule against resale restrictions" in certain subsequent cases (see cases cited).

- - -End Footnotes- - -

The power to control market prices or to exclude competition are indications of market power. n71 Transco has presented as a defense a policy founded on fear of business loss, but has presented no factual evidence supporting the reasonableness of that fear. Thus, no reasonable explanation of its exclusionary [**42] conduct has been presented. n72 Nor has Transco offered any efficiency argument that market operations are improved (above and beyond its own collection of revenue) by means of that policy. The Commission remains concerned that customers seeking market access through the interstate pipeline system are turned away only for compelling reasons. n73

- - -Footnotes- -

n71 *United States v. E.I du Pont de Nemours & Co., 351 U.S. 377, 391(1956).*

n72 Apparently, Transco's policy, to the extent it existed as a company policy, was decided upon no earlier than 1996. See Answering testimony of Mr. Ferazzi at 8-9 (Transco decided how to respond to applicable interconnect requests in 1996, and "applied that 1996 conclusion when the ANR request reached our management in 1997. To my mind, applying the same reasoning to similar situations in this manner is indeed applying a defined, even if unwritten, 'policy.' "). A statement of Transco's policy was filed before the Commission for the first time September 30, 1998, in Docket No. RP98-430-000, and is pending review on its merits.

n73 See July 30 Order, 84 FERC at p. 61,534 (1998). Refusals to deal must be reviewed in order to identify whether legitimate business reasons support such refusals. See, e.g., MCI Communications Corp. v. AT&T, supra; *Tenneco Oil Co., 26 FERC P61,030 at p. 61,078 n.18 (1984)* (any competitive restrain proposed by a pipeline must be closely scrutinized to determine whether it serves some public policy objective or is merely intended to restrain competition).

-End Footnotes- - - - - - - - - - - - - - - - - [**43]

The principles of antitrust law necessary to support our analysis of the facts here are consistent with our underlying policy and supportive of our conclusion that the preferences Transco affords show undue discrimination. n74 The basic goal of antitrust law, efficient allocation of resources, is also that of administrative regulation in general and, more specifically, a key purpose of the Commission's open-access program. We established and monitor that program, as discussed more fully below, to assure that the jurisdictional services required to market natural gas are allocated efficiently in accordance with informed and voluntary choices of buyers and sellers.

- - -Footnotes- - - - - - - - - - - - - - - -

n74 See, e.g., *FPC v. Conway, 426 U.S. 271 at 279 (1976)* (The exercise by the Commission of powers within its jurisdiction "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations," citing *Gulf States Util. Co. v. FPC, 411 U.S. 747, 758-759*

(1973).); Northern Natural Gas Co. v. FPC, 399 F.2d 953 at 960 (D.C. Cir. 1968) (duty to act in favor of public convenience and necessity implies duty "to recognize and apply traditional antitrust concepts.").

-End Footnotes- - - - - - - - - - - - - - - - - [**44]

Thus, the directive to allow the Evangeline Interconnect is based in part on a showing that denial of that interconnect is undue discrimination, based on two separate and independent grounds concerning which the parties brought forth evidence at hearing. First, Transco's denial, [*61,242] when compared with its earlier grants of mainline interconnects, constitutes unjustified disparate treatment of similarly situated entities. The Commission has in the past ordered construction of interconnects in analogous circumstances. n75 Second, Transco's denial provides Transco's own service undue preference over ANR in the competition for transportation business, which also thereby impedes the efficient operations of sales markets on the mainline. This case provides the first opportunity to address the impacts of such a refusal to allow an interconnect, but the remedy we require is consistent with past Commission actions remedying pipeline practices that had provided advantages over competitors.

-Footnotes-

n75 See *Southwestern Public Service Co. v. Red River Pipeline Co. (Red River), 74 FERC P61,133 at p. 61,475 (1996)*(upon a finding that a pipeline's refusal to interconnect with a utility gave that pipeline's affiliate a competitive advantage, the Commission required that the interconnect be established, noting that "discrimination that is anticompetitive is presumptively undue."); see also *Arcadian Corp. v. Southern Natural Gas Co., 55 FERC P61,207 (1991); 61 FERC P61,183 (1992)*(the Arcadian orders, discussed below more fully, were vacated as moot because of a later settlement).

- - -End Footnotes- - - - - - - - - - - - - - - - - [**45]

The Commission's directive to require the Evangeline Interconnect will thus assure non-discriminatory treatment of ANR and its shippers and also protect the efficient operations of involved markets, consistent with the principles of antitrust as applicable to the involved regulatory program. n76 Transco's denial of the Evangeline Interconnect also violates the Commission's new policy on pipeline interconnects, as discussed below, which provides a third justification, separate and independent of the other two discussed above, for the Commission's decision here. The Commission views each of the three bases as independently providing the necessary support to impose the remedy required in this case.

- -Footnotes- -

n76 See *City of Florence, Alabama v. Tennessee Gas Pipeline Company, et al., 24 FERC P61,395 (1983)*(gas pipeline attempting to justify a resale restriction will have heavy burden to show need for such anticompetitive provision; pipeline directed to provide service to municipal distributor in potential competition with pipeline's affiliate).

-End Footnotes- - - - - - - - - - - - - - - - - [**46]

B) Policy Development and Authority

The Commission found in the July 30 Order that operations of the interstate markets have been impeded by Transco's denial, n77 and the reading of the phrase "meaningful access" urged by Transco and adopted by the ALJ is inconsistent with the language and intent of Order No. 636. The path to Station 50 sought here by ANR's shippers is well within the meaning of that order's cited language. To read the access to be guaranteed in the restructured interstate pipeline industry as necessarily ending at the periphery of each major interstate pipeline system is to reduce the Commission's policy to empty rhetoric. n78

-Footnotes-

n77 84 FERC at p. 61,534.

n78 Further Commission efforts to assure such access have included, for example, protection of market centers, of pooling points, and delivery of gas at any delivery point without penalty. See *United Distribution Companies, 88 F.3d 1105, 1126 (D.C.Cir. 1996).*

-End Footnotes-

It is within the interior of Transco's [**47] system where an active, important sales market has developed, n79 and it is at that market where ANR's shippers seek to sell their supplies. n80 Had such a sales market developed at a pooling point or market center on the edge of Transco's system, shippers would seek to move their gas there, and Transco's IT Feeder system would likely pose no barrier to such plans. That is not the case, however, since buyers' existing transportation rights to their markets start at Station 50 on Transco's mainline. Those buyers cannot weigh the value of the supplies to be offered by ANR's shippers unless those supplies can get to that market, and that market must be protected under Order No. 636.

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n79 The Commission seeks to assure pooling point development where buyers and sellers can meet in an efficient market, "either at points of interconnection between pipelines or at pooling points, where shippers can aggregate supplies from multiple receipt points." Transcontinental Gas Pipe Line Corporation, 86 FERC at p. 61,613 (1999).

n80 See testimony of Transco's witness, Mr. Ferazzi, cited and discussed above. Tr. at 180.

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - - [**48]

There is an abundance of case law supporting our decision here. The Commission's responsibility under the NGA is to protect consumers of natural gas from the exercise of monopoly power by pipelines in order to ensure consumers "access to an adequate supply of gas at a reasonable price." n81 Courts have long construed the NGA as envisioning substantial pipeline-on-pipeline competition to accomplish the legislative purpose. n82 Indeed, the NGA provides by its very terms that nothing in section [*61,243] 7 thereof "shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." n83 The immediate inference drawn by courts is that Congress "has not evinced an intention to restrict competition among qualified operators or a preference for monopoly service." n84 Certain restraints on such competition have drawn close consideration. The United Distribution Companies Court noted pipelines' ability to leverage power over access to retain transportation service markets:

Federal regulation of the natural gas industry is thus designed to curb pipelines' potential [**49] monopoly power over gas transportation. The enormous economies of scale involved in the construction of natural gas pipelines tend to make the transportation of gas a natural monopoly. Indeed, even with the expansion of the national pipeline grid, or network, in recent decades, many 'captive' customers remain served by a single pipeline." [footnotes omitted]. n85

- -Footnotes- - - -

n81 *Tejas Power Corp. v. FERC, 908 F.2d 998, 1003 (D.C.Cir. 1990).*

n82 "N]othing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier for distribution in a particular community the privilege of furnishing an increased supply . . ." *Panhandle Eastern Pipe Line Company v. Federal Power Commission, 169 F.2d 881, 884 (D.C.Cir. 1948),* cert denied, *335 U.S. 854 (1948);* see also *Atlantic Seaboard Corp. v. FPC, 397 F.2d 753 at 758-59 (4th Cir. 1968).*

n83 Section 7(g), *15 U.S.C. § 717f*(g). [**50]

n84 *Northern Natural Gas Co. v. FPC, 399 F.2d 953, 968 (D.C. Cir. 1968).*

n85 *United Distribution Companies v. FERC, 88 F.3d at 1122 (1996).* See also *Red River, supra, 74* FERC at p. 61,475 (any competitive restraint proposed by a pipeline must be closely scrutinized to determine whether it serves some public policy objective or is merely intended to restrain competition).

- - -End Footnotes- - -

The Commission issued Order No. 636 n86 to finalize the structural changes in the Commission's regulation of the natural gas industry brought about by the Natural Gas Policy Act of 1978, n87 the Commission's open-access program, Order No. 436, n88 and the Natural Gas Wellhead Decontrol Act of 1989. n89 In Order No. 436,

[in] effect, the Commission for the first time imposed the duties of common carriers upon interstate pipelines. [citations omitted] By recognizing that anti-competitive conditions in the industry arose from pipeline control over access to transportation capacity, the equal-access requirements of Order No. 436 regulated the natural-monopoly [**51] conditions directly. n90

Those natural monopoly conditions were modified by the Commission to assure that open-access became a reality and was denied only on the basis of "reasonable operational conditions," which must be "filed by the pipeline as part of its transportation tariff." n91

- - - - - - -Footnotes- - - - - - - -

n86 Pipeline Service Obligations and Revisions to regulations *Governing Self- Implementing Transportation, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, FERC Stat. & Regs., Regs. Preambles January 1991-June 1996 P 30,939 (1992).*

n87 *15 U.S.C. §§ 3301*-3432 (1988).

n88 *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, FERC Stats. & Regs., Regs. Preambles, 1982-1985 P 30,663 (1985).*

n89 Public Law No. 101-60, 103 Stat. 157 (1989).

n90 *United Distribution Companies, 88 F.3rd 1105 at 1123-1124 (D.C.Cir. 1996).*

n91 See, e.g., sections 284.8(c), 284.9(c).

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The discussion in Order No. 636 to which the Initial Decision makes brief allusion provides substantial support, when read in full, for granting the complaint in this case. The order stated the Commission's primary aim to be the improvement of the competitive structure of the gas industry, and the attainment of that aim by regulating pipelines both as merchants and as open-access transporters in a manner that accomplishes two goals, the first being to

ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible. As the House Committee Report to the Decontrol Act stated: 'All sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies.' n92

The second goal is "to accomplish the first goal in a way that continues to ensure consumers access to an adequate supply of gas at a reasonable price." Id. The Commission's intent has been and remains to harmonize both goals [**53] and thereby promote competition and protect gas consumers, and to "facilitate the unimpeded operation of market forces to stimulate the production of natural gas . . ." The Commission's description of the intended effect of Order No. 636 thus anticipates the facts of this case:

As stated above, this will permit gas purchasers and gas sellers to choose the exact transportation service that they want, including a combination of services that will ensure that the pipelines can deliver an adequate supply of gas to the city gate from various sources when that supply is needed. n93

-Footnotes-

n92 See Order No. 636 at p. 30,939 (1992).

n93 Id. 30,394; see also *Order No. 636-C, 78 FERC P61, 186 at pp. 61,766-67* (progress toward meaningful access evidenced by "creation of new paths from existing supply basins to additional markets.").

- - -End Footnotes- - - - - - - - - - - - - - - - [*61,244]

Further, in the Panhandle proceeding, Docket No. RP97-29-003, n94 the Commission's order on remand establishes a new policy involving pipeline interconnections, based in part on [**54] a finding that

continued use of the 'similarly situated' standard as a basis for allowing pipelines to deny interconnections impedes the Commission's ability to maximize the use of the national pipeline grid and can result in rates for natural gas consumers that are not just and reasonable.

Under the Commission's new policy, a party desiring access to a pipeline may obtain an interconnection if it satisfies five conditions. First, the party seeking the interconnection must be willing to bear the costs of the construction if the pipeline performs that task. In the alternative, the party seeking the interconnection could construct the facilities itself in compliance with the pipeline's technical requirements. Second, the proposed interconnection must not adversely affect the pipeline's operations. Third, the proposed interconnection and any resulting transportation must not diminish service to the pipeline's existing customers. Fourth, the proposed interconnection must not cause the pipeline to be in violation of any applicable environmental or safety laws or regulations with respect to the facilities required to establish an interconnection with the pipeline's existing facilities. [**55] Finally, the proposed interconnection must not cause the pipeline to be in violation of its right-of-way agreements or any other contractual obligations. When these conditions are met, the pipeline cannot deny an interconnection, regardless of whether it previously has allowed an interconnection for a similarly-situated shipper.

- -Footnotes- -

n94 *Panhandle Eastern Pipeline Co., 79 FERC P61,016 (1997),* order denying reh'g, *81 FERC P61,295 (1998),* remanded, Panhandle Eastern Pipeline Co. v. FERC, No. 98- 1048 (D.C. Cir., November 26, 1999), *Order On Remand, 91 FERC P61,037* (April 12, 2000).

-End Footnotes-

The Commission stated further that pipelines "may not deny requests for interconnections based upon economic arguments. However, we will not preclude pipelines or other parties from seeking, on a case-by-case basis, recovery of economic losses associated with an interconnection." n95 As discussed more fully above, the evidence presented at hearing in this proceeding [**56] supports no finding of economic loss associated with the establishment of the Evangeline Interconnect.

-Footnotes-

n95 Id., mimeo at 6-7 ("This would in no way relieve any pipeline from the obligation to mitigate its economic losses, including marketing any capacity directly attributable to the new interconnection.").

- - -End Footnotes- -

Jurisdictional Authority

Transco claims also that the Commission's power under section 5 of the NGA to remedy undue discrimination was not intended to override specific provisions of NGA Section 7(a), which Transco states sets forth the limited situations in which a natural gas company may be ordered to construct facilities. Transco cites, in its rehearing application regarding the July 30 Order, four cases in support. n96

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n96 Citing *FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 514 (1949); Panhandle Eastern Pipe Line Co. v. FPC, 204 F2d. 675,* reh'g denied, *204 F.2d 682 (3rd Cir. 1953)*(Panhandle Eastern); *Central West Utility Co. v. FPC, 247 F.2d 306, 313 (1957); Arcadian Corp. v. Southern Natural Gas Co., 61 FERC P61,183 at 184 (1992)*(Commissioner Moler, dissenting). In its Brief Opposing Exceptions, Transco also cites (at 93-94) several Commission cases discussed below.

- - - - - - -End Footnotes- - - - - - - - - - - - - - - [**57]

We disagree. The Commission's NGA Section 5 authority includes "broad power to stamp out undue discrimination." n97 Nothing in Section 5 purports to limit this authority to prevent the Commission from ordering an interconnect as an appropriate remedy for undue discrimination. n98 Indeed, NGA § 5(a) has been held to authorize the Commission to require pipelines to transport gas as a remedy to undue discrimination. n99 A logical and necessary extension of that holding is that the NGA also permits the Commission to compel pipelines to construct interconnects necessary to effect or facilitate that transportation, particularly when the construction is to be at the applicants' expense. The Commission has exercised its section 5 authority and ordered a pipeline to provide a requested interconnect under appropriate circumstances. n100 [*61,245] Nor does Section 7(a) operate in this case to limit this broad authority. n101

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n97 *Associated Gas Distributors v. FERC, 824 F.2d 981, 1001 (D.C. Cir. 1987),* cert. denied *485 U.S. 1006 (1988);* see also *Missouri Gas Energy v. Panhandle Eastern Pipe Line Co., 75 FERC P61,166 at p. 61,549 (1996).* [**58]

n98 *Niagara Mohawk Co. v. FPC, 379 F.2d 153, 159* (D.C.Cir., 1967)(Commission's authority considered "at its zenith" when used to fashion a remedy to effectuate legislative objectives).

n99 *Associated Gas Distribs. v. FERC, 824 F.2d 981, 998-1001 (D.C. Cir. 1987).*

n100 See *Southwestern Public Service Co. v. Red River Pipeline Co. (Red River), 74 FERC P61,133 at p. 61,475 (1996);* see also *Arcadian Corp. v. Southern Natural Gas Co., 55 FERC P61,207 (1991); 61 FERC P61,183 (1992).*

n101 To the extent necessary to respond to the specific argument Transco raises, the Commission adopts the analysis of the Commission's relevant authority provided in *Arcadian Corp. v. Southern Natural Gas Co., 55 FERC P61,207 (1991); Arcadian Corp. v. Southern Natural Gas Co., 61 FERC P61,183 (1992).* That analysis was unaffected by the opinion of the Court in *Atlanta Gas Light Co. v. FERC, 140 F.3rd 1392 (11th Cir. 1998)* (vacating the Commission's 1991 and 1992 orders on other grounds), and we assert that authority here.

- - -End Footnotes- - - - - - - - - - - - - - - - - [**59]

Section 7(a) of the Natural Gas Act authorizes the Commission to direct a natural gas company to extend its facilities to serve a municipality or local distribution company where the extension will not unduly burden the natural gas company. As relevant here, however, Section 7(a) also provides:

The Commission shall have no authority to compel the enlargement of transportation facilities for such purposes or to compel such natural gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

Transco claims this provision by its terms precludes the Commission from ordering an interconnect as a remedy under Section 5. n102 The Panhandle Eastern case is not reasonably construed to stand for such a proposition, however. Panhandle Eastern involved orders requiring the pipeline to expend substantial amounts of its own capital (a) to increase

the capacity of an entire pipeline lateral by approximately 50 percent and (b) to deliver to specific customers substantial amounts of natural gas (157,683 Mcf/day) above the approved design capacity of its system. n103

-Footnotes- - - -

n102 Citing *Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675,* reh'g denied, *204 F.2d 683 (3rd Cir. 1953)* (Panhandle Eastern); *Central West Utility Co. v. FPC, 247 F.2d 306, 313 (1957)* (case in which the Third Circuit Court of Appeals followed Panhandle Eastern in finding that the Commission could not require, under section 7(e), an enlargement sought by a customer of Panhandle's, where Panhandle did not seek such certificate authority). [**60]

n103 *204 F.2d at 676-677 (1953).*

- - - -End Footnotes- -

Faced with those facts, the Court of Appeals for the Third Circuit acknowledged a case of first impression, and did not accept the Commission's assertion of "power to direct a natural gas company to enlarge its transportation facilities or to sell and deliver gas beyond the capacity of such facilities." n104 The Court ruled that "the Commission 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." *Id. at 680* (emphasis supplied). n105 The instant case involves no enlargement of pipeline facilities, no assertion of authority to require a pipeline to provide service beyond capacity, and no expenditure of Transco's capital, since ANR will pay all involved costs. n106

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n104 *Id. at 680.*

n105 The Court did note on rehearing, however, that the decision as to what constitutes an "enlargement" is to be made initially by the Commission and that Commission directives not involving "enlargements" would not even implicate the terms of [O>s<O]Section 7(a). *Id. at 683.* [**61]

n106 "In the light of Section 7(a) we are compelled to conclude that Congress meant to leave the question whether to employ additional capital in the enlargement of its pipeline facilities to the unfettered judgement of the stockholders and directors of each natural gas company involved." See *204 F.2d at 680 (1953).*

-End Footnotes-

The more relevant analysis was performed by the Sixth Circuit Court of Appeals in Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., n107 which found that the Commission's power under Section 5(a) "in respect to undue preferences or advantages, is without limitation." n108 Were the law otherwise, there would be no effective means of eliminating unreasonable differences in service and facilities. The Court stated that

If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization . . . The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable [**62] implication, authority to regulate service.

-Footnotes- - - - - - - - - - - - - - -

n107 *173 F.2d 784 at 789 (6th Cir. 1949)*

n108 Id.

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Id. n109 Transco also argues that the Commission's regulations do not directly require an open-access pipeline to construct facilities to provide service. The meaning of those regulations -- sections 284.8(e) and 284.9(e) -- was

explained [*61,246] in Order No. 436 (at 31,550-51) where the Commission stated that while the language of the rule Transco cites

does not require pipelines to construct any facilities . . . [the] Commission has broad remedial powers to enforce valid regulations. Hence, a discriminatory application of a policy regarding the construction of such minor facilities might well be found to be a violation of the terms and conditions of the self-implementing authorization. n110

- - -Footnotes- - - - - - - - - - - - - - - - -

n109 "Section 7(a) is plainly intended to regulate expansions of service. The prohibitory proviso we have been discussing must be read in that context." *American Smelting & Ref'g Co. v. FPC, 494 F.2d 925, 936 (D.C. Cir. 1974).* This case involves no expansion of service. Further, the Commission has found that Section 7(a) applies only to sales service, not transportation service. *Rural Energy Systems, 34 FERC P61,389 at p. 61,723 n. 12 (1986).* [**63]

n110 See also Order No. 436 at p. 31,508 ("the fact "that construction of [minor] facilities is not required by rule does not mean that the Commission may not be empowered to require such construction as a remedy in an appropriate case, however.").

-End Footnotes- - - - - - - - - - - - - - -

Transco submits several unavailing citations to Commission orders regarding the extent of appropriate pipeline discretion to construct or deny construction of minor facilities. See BOE at 93-94. In Southwestern Glass, n111 the Commission reviewed Arkla's policy against installing delivery taps on certain types of gathering lines ("wet" lines) and noted the long-standing, well-documented safety concerns as sufficient reason for that policy. Transco's concerns here, loss of revenue, are quite different and insufficient to protect Transco against competitive market pressures. n112 Transco goes on to cite Southern Natural Gas Co., n113 where the pipeline itself had proposed a tariff provision allowing it to construct, even where a customer refused to pay for the facility, in order to meet market competition. Such decisions, noted the Commission, should be non-discriminatory. [**64]

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n111 *62 FERC P61,089 (1993).*

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n112 Transco also cites, from an El Paso Natural Gas Company case, language on its face irrelevant since that order spoke to the construction of "additional capacity," which is not involved here. *54 FERC P61,316 at p. 61,924 (1991).*

n113 *47 FERC P61,205 at p. 61,709 (1989).*

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Transco makes further, but incomplete, citation of language included in a 1987 ANR proceeding. n114 ANR had submitted a proposal under Order No. 436, then in its infancy, to transport gas for industrial customers. On exception to an Initial Decision making findings about the program's consistency with that order, ANR argued that it should not be required by its program to seek transportation authority where additional facilities would be required. The Commission accepted that part of ANR's experimental program, but noted it would "not tolerate the use of this exception by ANR to deny transportation for its customers on an unduly discriminatory [**65] basis," n115 particularly where, as here, a minor facility would need to be installed to allow service to begin.

- -Footnotes- - - - - - - - - - - - - - - - -

n114 *ANR Pipeline Company, 41 FERC P61,043 at p. 61,127 (1997).*

n115 Id.

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At bottom, Transco claims the right to define the limits of potential competition it must face from competing pipelines. The Commission must be able to review and revise as necessary the boundaries of anticompetitive market protection policies established or used by interstate pipelines in order that the directive of NGA Section 5 may be met. Such authority lies at the heart of the Commission's power to regulate, and the provisions of the NGA are appropriately construed to allow the Commission to attain the goals set out by Congress.

Clarification

We noted in the July 30 order that Transco has as of yet not implemented a "firm-to-the-wellhead approach approved" by the Commission and thus remains able to recover the costs of the IT Feeder system through the current rate structure. n116 Consolidated Edison [**66] Company of New York, Inc., Public Service Electric and Gas Company, and Piedmont Natural Gas Company seek clarification that the Commission's intention in the July 30 order, in stating that Transco's "firm-to-the-wellhead approach" had been "approved," was rather that Transco's proposal had been accepted for filing. n117

- -Footnotes- - -

n116 See 84 FERC at p. 61,533 (1998).

n117 Piedmont Natural Gas Company, Inc. moves for late intervention in light of its interest in this specific issue, agrees to accept the record as it currently exists, and states that no party will be prejudiced by its intervention. The Commission will grant Piedmont's motion, for good cause shown.

-End Footnotes-

As noted in Docket No. RP93-136-009, the Commission made a qualified finding "in Opinion No. 405, and reaffirmed in Opinion 405-A, that two-part rates were consistent with" the NGA, regardless of whether such rates were for service in the production area or market area of a pipeline's system as long as a pipeline's customers had the opportunity [**67] to choose between firm service with two-part and interruptible rates with a one-part rate. n118 The order went on to state that "these holdings are precedential and will be applicable if, or when, Transco makes a filing to implement a two-part rate structure." Id. The Commission clarifies that its reference in the July 30 order concerning Transco's firm-to-the-wellhead "approach" neither added anything to, nor detracted anything from, the Commission's statements in Docket No. RP93-136-009.

-Footnotes-

n118 See *Transcontinental Gas Pipe Line Corporation, 79 FERC P61,205 at p. 61,953 (1997).*

- - -End Footnotes- - - - - - - - - - - - - - - -

Summary [*61,247]

The facts shown at hearing indicate the merit of the Commission's policies in favor of open access pipeline systems and our decision to require, through exercise of the Commission's Section 5 authority and pursuant to new Commission policy regarding interconnects, the construction of the Evangeline Interconnect. The record provides factual evidence of undue discrimination through the anticompetitive effects resulting [**68] from Transco's undue preference and denial of the Evangeline Interconnect. Transco's denial also differs without reasonable justification from Transco's prior treatment of similar requests. Further, the construction of the Evangeline Interconnect is required as a separate matter by the Commission's new policy regarding pipeline interconnects. For each of these three independent reasons, the Commission will grant the remedy requested by ANR and require Transco to allow the construction and operation of the Evangeline Interconnect.

The Commission orders:

(A) Transco's application for rehearing is denied as discussed above. The stay granted by the July 30 Order is terminated, the complaint filed by ANR is granted, and Transco is directed to allow, as soon as operationally possible, the construction and operation of the Evangeline Interconnect as requested by ANR.

(B) The motion of Piedmont Natural Gas Company for late intervention is granted, as discussed above.

By the Commission