

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

No. 16-1244

---

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

---

CITY OF CLARKSVILLE, TENNESSEE,  
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT

TODD COUNTY, KENTUCKY,  
INTERVENOR

---

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

---

**BRIEF FOR PETITIONER**

James R. Choukas-Bradley  
Joshua L. Menter  
Jeffrey K. Janicke  
McCarter & English, LLP  
Twelfth Floor  
1015 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 753-3438  
jmenter@mccarter.com

*Attorneys for City of Clarksville,  
Tennessee*

October 25, 2016

---

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

### A. Parties and Amici

The following parties and intervenors appeared in the proceeding below before the Federal Energy Regulatory Commission:

Atmos Energy Corporation  
City of Clarksville, Tennessee  
Todd County, Kentucky

The parties, intervenor and amici in this court are:

American Public Gas Association (Amicus)  
American Public Power Association (Amicus)  
City of Clarksville, Tennessee (Petitioner)  
Federal Energy Regulatory Commission (Respondent)  
Todd County, Kentucky (Intervenor)

**Rule 26.1 Corporate Disclosure Statement:** The City of Clarksville, Tennessee (Clarksville) is a municipal corporation and is therefore a governmental entity exempt from the reporting requirements under Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1. Clarksville does not have a parent company and there is no publicly held company that has a 10% or greater ownership interest in Clarksville.

### B. Rulings Under Review

Petitioner seeks review of the following orders of the Federal Energy Regulatory Commission:

1. *City of Clarksville, Tennessee*, Order Granting Service Area Determinations, 146 FERC ¶ 61,074 (Feb. 7, 2014) (FERC Docket No. CP13-508-000)
2. *City of Clarksville, Tennessee*, Order Denying Rehearing, 155 FERC ¶ 61,184 (May 19, 2016) (FERC Docket No. CP13-508-001)

### C. Related Cases

This case was not previously before this court or any other court. There are no related cases.

Respectfully submitted,

/s/ Joshua L. Menter

James R. Choukas-Bradley

Joshua L. Menter

Jeffrey K. Janicke

McCarter & English, LLP

Twelfth Floor

1015 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 753-3438

jmenter@mccarter.com

*Attorneys for City of Clarksville,  
Tennessee*

October 25, 2016

## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES .....	i
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
GLOSSARY .....	ix
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES .....	2
STATUTES AND REGULATIONS .....	2
STATEMENT OF THE CASE .....	2
1. The Regulatory Context .....	4
2. The Proceedings Below .....	6
SUMMARY OF ARGUMENT .....	11
STANDING .....	13
ARGUMENT .....	17
I. Standard Of Review .....	17
II. The FERC’s interpretation of the NGA that it may extend NGA jurisdiction over municipal operations must be rejected under <i>Chevron</i> step one, as it is contrary to the plain, unambiguous meaning of the relevant NGA provisions.....	19
A. Prior FERC decisions, which fully performed the <i>Chevron</i> step one analysis, amply demonstrate that there is no NGA jurisdiction over municipal sales or transportation. ....	20
B. An analysis and application of the relevant NGA provisions and legislative history confirm the uniform conclusion of the numerous prior FERC decisions that the NGA is clear and unambiguous that municipal sales and transportation are not within the ambit of NGA jurisdiction. ....	25
C. Despite the opportunity and clear obligation to do so, the orders under review fail to provide any contextual analysis of the NGA or analysis of its legislative history that would counter the NGA’s express, unambiguous language that NGA jurisdiction does not extend to municipal sales or transportation.....	28

III. The FERC’s interpretation of the NGA to extend NGA jurisdiction to a municipality is not premised on reasoned decision-making, but is arbitrary and capricious.....29

A. The principal FERC rationales asserted to support NGA jurisdiction must be rejected. ....30

B. Ancillary FERC rationales in response to Clarksville’s Rehearing Request must be rejected. ....52

CONCLUSION .....58

ADDENDUM A

ADDENDUM B

ADDENDUM C

## TABLE OF AUTHORITIES

### COURT CASES

<i>Bell Atl. Tel. Co. v. FCC</i> , 131 F.3d 1044 (D.C. Cir. 1997).....	20
* <i>Bonneville Power Administration v. FERC</i> , 422 F.3d 908 (9th Cir. 2005).....	32, 33, 34, 46, 51
<i>California v. Southland Royalty Co.</i> , 436 U.S. 519 (1978).....	39
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	12, 13, 17, 18, 19, 28, 29, 53
<i>Dominion Transmission, Inc. v. FERC</i> , 533 F.3d 845 (D.C. Cir. 2008) .....	14
<i>Federal Power Comm’n v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961).....	49
<i>Great Lakes Gas Transmission Ltd. P’ship v. FERC</i> , 984 F.2d 426 (D.C. Cir. 1993) .....	17
<i>Greater Boston Television Corp. v. FCC</i> , 444 F.2d 841 (D.C. Cir. 1970) .....	19
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	13, 15
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015).....	18
<i>Nat’l Ass’n of Clean Air Agencies v. EPA</i> , 489 F.3d 1221 (D.C. Cir. 2007).....	19
<i>Northern Natural Gas Co. v. State Corp. Comm’n of Kansas</i> , 372 U.S. 84 (1963).....	49
<i>Okla. Natural Gas Co. v. FERC</i> , 28 F.3d 1281 (D.C. Cir. 1994) .....	50

Authorities upon which we chiefly rely are marked with asterisks.

<i>Public Service Co. of North Carolina v. FERC</i> , 587 F.2d 716 (5th Cir. 1979) .....	39, 40, 41, 56, 57
<i>Sierra Club v. EPA</i> , 292 F.3d 895 (D.C. Cir. 2002) .....	13, 15, 17
<i>United Distribution Companies v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996) .....	53
<i>United Municipal Distributors Group v. FERC</i> , 732 F.2d 202 (D.C. Cir. 1984) .....	19, 38, 42, 45
<i>United States v. Public Utilities Comm’n of Calif.</i> , 345 U.S. 295 (1953) .....	30, 31, 32, 35, 36, 37, 38
* <i>Western Minnesota Municipal Power Agency v. FERC</i> , 806 F.3d 588 (D.C. Cir. 2015) .....	18, 28, 29, 37
<b>ADMINISTRATIVE CASES</b>	
<i>Freebird Gas Storage, LLC</i> , 111 FERC ¶ 61,054 (2005) .....	25, 53
<i>Intermountain Mun. Gas Agency</i> , 97 FERC ¶ 61,359 (2001), <i>order on reh’g</i> , 98 FERC ¶ 61,216 (2002), <i>affirmed on other grounds, Intermountain Mun. Gas Agency v. FERC</i> , 326 F.3d 1281 (D.C. Cir. 2003) .....	5, 6, 7, 9, 45, 52, 53
<i>New West Energy Corp.</i> , 83 FERC ¶ 61,004 (1998) .....	34
<i>Northwest Alabama Gas District</i> , 42 FERC ¶ 61,371 (1988) .....	9, 10, 22, 23, 42
<i>Panhandle Eastern Pipe Line Co. v. City of Rolla, Kansas</i> , 26 FPC 736 (1961) .....	4, 5, 9, 10, 20, 21, 22, 33, 42
<i>Prairieland Energy Inc.</i> , 92 FERC ¶ 61,139 (2000) .....	34
<i>Somerset Gas Service</i> , 59 FERC ¶ 61,012 (1992) .....	9, 10, 23, 42

<i>*Tennessee Gas Pipeline Co.,</i> 69 FERC ¶ 61,239 (1994), <i>order on reh'g</i> , 70 FERC ¶ 61,329 (1995) .....	23, 24, 38, 40, 41, 42, 43, 44, 45, 49, 51, 54, 55, 56, 57
<i>*Tennessee Gas Pipeline Co.,</i> 70 FERC ¶ 61,329 (1995) .....	41, 43, 44, 47
<i>Texas Gas Transmission Corp.,</i> 3 FERC ¶ 61,135 (1978) .....	21, 22
<i>Texas Gas Transmission Corp.,</i> 55 FERC ¶ 61,208 (1991) .....	25
<i>United Gas Pipeline Co.,</i> 46 FERC ¶ 61,060 (1989) .....	24

## RULEMAKING PROCEEDINGS

<i>Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation</i> , Order No. 636, 57 Fed. Reg. 13,267, FERC Stats. & Regs. ¶ 30,939 (1992), <i>order on reh'g</i> , Order No. 636-A, 57 Fed. Reg. 36,128, FERC Stats. & Regs. ¶ 30,950 (1992), <i>order on reh'g</i> , Order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992), <i>reh'g denied</i> , 62 FERC ¶ 61,007 (1993), <i>affirmed in part and remanded in part sub nom. United Distribution Companies v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996).....	25, 54, 55
<i>Sales and Transportation by Interstate Pipelines and Distributors</i> , Order No. 319, 48 Fed. Reg. 34,875, FERC Stats. & Regs. ¶ 30,477 (1983), <i>order on reh'g</i> , Order No. 319-A, 48 Fed. Reg. 51,436, FERC Stats. and Regs. ¶ 30,512 (1983) .....	10, 11, 21, 22, 55, 56

## STATUTES

Administrative Procedure Act 5 U.S.C. § 706(a) .....	18
Natural Gas Act *Section 2, 15 U.S.C. § 717a .....	1, 3, 9, 12, 21, 22, 25, 26, 27, 36
Section 4, 15 U.S.C. § 717c .....	3, 16, 26, 27, 36
Section 5, 15 U.S.C. § 717d .....	3, 25, 26, 27, 44

Section 7, 15 U.S.C. § 717f.....1, 3, 7, 11, 12, 13, 21, 24,  
25, 26, 27, 29, 36, 43, 55

Section 19, 15 U.S.C. § 717r..... 1

Federal Power Act

Section 3, 16 U.S.C. § 796 .....33

Section 201, 16 U.S.C. § 824 .....30

**REGULATIONS**

18 C.F.R. § 284.224..... 8

18 C.F.R. § 284.402.....8, 14

18 C.F.R. § 284.403 .....14

**LEGISLATIVE HISTORY**

H.R. Rep. No. 75-709 (1937).....27

S. Rep. No. 75-1162 (1937) .....27

## GLOSSARY

APA	Administrative Procedure Act
Clarksville	City of Clarksville, Tennessee
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPC	Federal Power Commission
Guthrie	City of Guthrie, Tennessee
NGA	Natural Gas Act
NGPA	Natural Gas Policy Act
Order No. 319	<i>Sales and Transportation by Interstate Pipelines and Distributors</i> , Order No. 319, 48 Fed. Reg. 34,875, FERC Stats. & Regs. ¶ 30,477 (1983).
Order Nos. 636-A and 636-B	<i>Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation</i> , Order No. 636-A, 57 Fed. Reg. 36,128, FERC Stats. & Regs. ¶ 30,950 (1992), <i>order on reh'g</i> , Order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992), <i>reh'g denied</i> , 62 FERC ¶ 61,007 (1993), <i>affirmed in part and remanded in part sub nom. United Distribution Companies v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996).
Rehearing Order	<i>City of Clarksville, Tennessee</i> , Order Denying Rehearing, 155 FERC ¶ 61,184 (2016)
Rehearing Request	Limited Request for Rehearing of Clarksville, <i>City of Clarksville, Tennessee</i> , FERC Docket No. CP13-508-000 (Feb. 28, 2014)
Service Area Order	<i>City of Clarksville, Tennessee</i> , Order Granting Service Area Determinations, 146 FERC ¶ 61,074 (Feb. 7, 2014)

## JURISDICTIONAL STATEMENT

The Federal Energy Regulatory Commission (FERC) had subject-matter jurisdiction under Sections 2 and 7 of the Natural Gas Act (NGA) to address and rule upon the application for Section 7(f) service area determinations filed by the City of Clarksville, Tennessee (Clarksville).<sup>1</sup>

This court has jurisdiction under Section 19(b) of the NGA.<sup>2</sup> FERC issued its order granting service area determinations on February 7, 2014. *City of Clarksville, Tenn.*, 146 FERC ¶ 61,074 (2014) (Service Area Order).<sup>3</sup> Clarksville timely filed a request for rehearing of that order on February 28, 2014, pursuant to Section 19(a) of the NGA.<sup>4</sup> FERC issued its order denying Clarksville's request for rehearing on May 19, 2016. *City of Clarksville, Tenn.*, 155 FERC ¶ 61,184 (2016) (Rehearing Order).<sup>5</sup> Clarksville timely filed with this Court a petition for review on July 18, 2016, pursuant to Section 19(b) of the NGA.<sup>6</sup>

---

<sup>1</sup> 15 U.S.C. §§ 717a, 717f, 717f(f).

<sup>2</sup> 15 U.S.C. § 717r(b).

<sup>3</sup> JA 91-98.

<sup>4</sup> 15 U.S.C. § 717r(a).

<sup>5</sup> JA 107-120.

<sup>6</sup> 15 U.S.C. § 717r(b).

## STATEMENT OF ISSUES

1. The Natural Gas Act authorizes the FERC to issue a certificate of public convenience and necessity for the transportation or the sale for resale of natural gas by a “natural gas company,” which “shall not include municipalities.” May the FERC exercise Natural Gas Act jurisdiction and issue such a certificate for a Tennessee municipality to provide such services on its own local distribution system in Tennessee?

2. Did the FERC reasonably explain its decision to depart from over 50 years of precedent and practice by interpreting the Act to authorize it to issue such a certificate to a municipality if the natural gas is ultimately consumed in another state?

## STATUTES AND REGULATIONS

The relevant parts of pertinent statutes and regulations are set forth in Addendum A.

## STATEMENT OF THE CASE

Under the NGA, the FERC has jurisdiction to regulate a “natural gas company” with respect to its sales for resale of natural gas in interstate commerce and its transportation of natural gas in interstate commerce. Specifically, before it engages in any such transactions, a “natural gas company” must obtain from the

FERC a certificate under Section 7 of the NGA.<sup>7</sup> The rates that a “natural gas company” may thereafter charge for the service and the terms it may thereafter impose on that service must be just and reasonable and are regulated by the FERC under Sections 4 and 5 of the NGA.<sup>8</sup>

Section 2 of the NGA<sup>9</sup> defines a “natural gas company,” and hence specifies the entities that the FERC may regulate under NGA Sections 4, 5 and 7. Section 2(6) of the NGA defines a “natural gas company” as a “person” that engages in a jurisdictional transaction. Section 2(1) defines “person” as either an “individual” or a “corporation.” Section 2(2) defines a “corporation” to include many specific entities, but states that it “shall not include municipalities as hereinafter defined.” Section 2(3) defines “municipality” as “a city, or other political subdivision or agency of a State.”

In the proceedings below, the FERC exercised NGA jurisdiction over Clarksville, a municipality, as a wholeseller and transporter of natural gas performed on Clarksville’s municipal local distribution system in Tennessee. According to the FERC, those services required NGA Section 7 certificate authorization. At issue is whether the FERC under the NGA has such authority.

---

<sup>7</sup> 15 U.S.C. §717f.

<sup>8</sup> 15 U.S.C. §§ 717c, 717d.

<sup>9</sup>15 U.S.C. § 717a.

## 1. The Regulatory Context

In the orders under review, the FERC exercised jurisdiction over Clarksville, a municipality, as a seller and transporter of natural gas performed on Clarksville's municipal local distribution system which, according to FERC, required NGA Section 7 certificate authorization.

Until the issuance of such orders, the FERC and its predecessor, the Federal Power Commission (FPC), had without exception ruled that the agency had no jurisdiction to regulate a municipality that engaged in such transactions.

The first such decision, *Panhandle Eastern Pipe Line Co. v. City of Rolla, Kansas (Rolla)*,<sup>10</sup> is illustrative of the FERC's analysis of this issue. There, the FPC noted that the City of Rolla, Kansas had engaged in a sale of natural gas for resale—an activity that if performed by a natural gas company, would be subject to regulation under the NGA. The FPC focused on whether Rolla was a “natural gas company,” and hence was subject to NGA jurisdiction. The FPC ruled that the “plain language” of the NGA “expressly” excludes municipalities from “the ambit of Commission jurisdiction.”<sup>11</sup>

The analysis in *Rolla* was as follows:

---

<sup>10</sup> 26 FPC 736 (1961).

<sup>11</sup> *Id.* at 737.

[T]he question for us to decide is whether Rolla, a municipality and coowner of the gas produced and sold in interstate commerce, is a “natural gas company” subject to regulation under the Act.

We hold that the plain language of the Act, found in Section 2, subsections (1), (2), (3) and (6) expressly exclude municipalities from the ambit of Commission jurisdiction. Specifically, subsection (6) defines a “natural gas company” to mean: a *person* engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce for resale.

In the preceding subsections (1), (2) and (3), a “person” is defined as “an individual or a corporation.” It is then provided that a “municipality,” meaning “a city, county, or other political subdivision or agency of a State,” shall not be included within the definition of the term “corporation.”

From this it is clear that municipalities cannot be “natural gas companies” as that term is used by the Act. We are not, therefore, vested with jurisdiction to regulate municipalities.<sup>12</sup>

Apart from *Rolla* and its progeny, the other relevant FERC precedent is *Intermountain Municipal Gas Agency*.<sup>13</sup> There, the FERC ruled that it would have NGA jurisdiction over the operations of an entity that was a municipality, but only to the extent, in the FERC’s view, that the entity had ceased to be a “municipality”—where its facilities crossed a state line and were operating outside

---

<sup>12</sup> *Id.* at 737-38 (emphasis in original).

<sup>13</sup> 97 FERC ¶ 61,359 (2001), *order on reh’g*, 98 FERC ¶ 61,216 (2002), *affirmed on other grounds*, *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281 (D.C. Cir. 2003).

its state of origin. The FERC acknowledged that in prior decisions the FERC had ruled that the municipal exemption applied to municipally-owned pipelines.

However, it stated that those cases did not apply where the pipeline crossed a state line and operated outside its state of incorporation.

The relevant ruling in *Intermountain* is set forth below:

It seems axiomatic that a state government can only create a governmental entity in its own state. One state cannot create an entity with powers in another state. Therefore, the Commission believes that under the NGA a municipal entity that is created under an individual state law is only authorized to exist as a municipal entity within that state. *Intermountain* cites to *Tennessee Gas Pipeline . . .* and *Somerset Gas Service . . .* to support its argument that any municipally-owned pipeline is exempt from the Commission's jurisdiction. *Intermountain's* reliance on those cases is misplaced. In those cases the facilities were located totally within one state. The proposed ABC Pipeline will cross the state line and will operate in two states. Therefore, those case [sic] do not apply to the facts in this case.<sup>14</sup>

## 2. The Proceedings Below

The orders under review were issued in a proceeding that was initiated by an application of Clarksville to seek a service area determination under Section 7(f) of the NGA, an authorization that allows pared-down regulation for a natural gas pipeline that is providing local distribution service in an adjoining state.

---

<sup>14</sup> *Intermountain*, 97 FERC ¶ 61,359 at P 29 (citations omitted). The FERC repeated this same ruling in its order on rehearing. *Intermountain*, 98 FERC ¶ 61,216 at PP 18-19.

Clarksville requested such authorization to cover the operation of its facilities that cross the Tennessee/Kentucky border and provide distribution service in Kentucky. In doing so, Clarksville filed its application for a Section 7(f) authorization in conformance with the FERC's existing interpretation of the NGA as set forth in *Intermountain*—that to the extent Clarksville was operating facilities outside of its state of incorporation to provide distribution service, Clarksville was no longer a municipality, but a natural gas pipeline company.<sup>15</sup>

In the course of the proceeding, Clarksville provided information to the FERC on the range of services it provides on its municipal local distribution system in Tennessee, which included a sale of natural gas to the City of Guthrie, Kentucky (Guthrie).<sup>16</sup> Clarksville reported that this sale occurs entirely within Tennessee, and stated its assumption that Guthrie owns and operates the pipeline that crosses the Tennessee/Kentucky border and delivers gas to Guthrie's Kentucky local distribution operations.<sup>17</sup>

---

<sup>15</sup> In that regard, Clarksville's challenge to the orders under review relates to a distinctly different issue—the validity of FERC's new interpretation of the NGA that the agency has NGA Section 7 jurisdiction to regulate the sale or transportation by a municipality that occurs entirely within the municipality's state of incorporation.

<sup>16</sup> JA 69.

<sup>17</sup> JA 79.

The FERC issued the Service Area Order on February 4, 2014, granting the requested service area determination.<sup>18</sup> In a brief footnote, the FERC *sua sponte* ruled that (a) the sales to Guthrie were covered under a blanket marketing certificate issued under Section 7 of the NGA and (b) should Clarksville desire to transport gas in interstate commerce in a certain specified manner, it would also be required to obtain a different blanket certificate, also issued under Section 7 of the NGA. The footnote reads in its entirety:

Clarksville's sales to Guthrie are covered under the blanket marketing certificate granted by 18 C.F.R. § 284.402 (2013). Should Clarksville desire to transport natural gas in interstate commerce in the same manner as an intrastate pipeline may under section 311 of the [Natural Gas Policy Act], it must first obtain a [blanket] certificate under section 284.224 of the Commission's regulations [18 C.F.R. § 284.224].<sup>19</sup>

Clarksville sought rehearing of the Service Area Order, seeking reversal of the above-quoted FERC rulings.<sup>20</sup> As to the sale of gas to Guthrie, Clarksville repeated that the sale occurs entirely within Tennessee and, hence, was not subject to any NGA regulation.<sup>21</sup> Clarksville cited three FERC decisions—its *Rolla*

---

<sup>18</sup> JA 91-99.

<sup>19</sup> Service Area Order at P 20 n.15, JA 97.

<sup>20</sup> JA 100-104.

<sup>21</sup> JA 102-103.

decision as well as other decisions in *Somerset Gas Service*<sup>22</sup> and *Northwest Alabama Gas District*<sup>23</sup>—to support its argument that the FERC had long and repeatedly held that any sales by a municipality are not subject to NGA jurisdiction. In doing so, Clarksville cited in particular the ruling of *Rolla* that the “plain language of the [NGA] found in Section 2, subsections (1), (2), (3) and (6) expressly exclude municipalities from the ambit of Commission jurisdiction.”<sup>24</sup>

Clarksville distinguished the *Intermountain* order where the FERC had ruled that an entity ceases to be a municipality to the extent it operates facilities outside its state of origin, because the sales to Guthrie occurred entirely within Tennessee and thus, even under *Intermountain*, were sales by a municipality exempt from NGA jurisdiction.<sup>25</sup>

As to transportation that Clarksville may desire to provide interstate commerce, Clarksville argued that any such transportation that occurs entirely within Tennessee is not subject to NGA jurisdiction.<sup>26</sup> As support, Clarksville cited the FERC precedents of *Somerset* and *Northwest Alabama* for the proposition

---

<sup>22</sup> 59 FERC ¶ 61,012 (1992)

<sup>23</sup> 42 FERC ¶ 61,371 (1988).

<sup>24</sup> JA 103. In its rehearing request, Clarksville cited to the *Rolla* order as the *Panhandle* order. For clarity, Petitioner in this brief uses the short-hand reference, *Rolla*, used in the Rehearing Order.

<sup>25</sup> JA 102-103.

<sup>26</sup> JA 103-104.

that the FERC has repeatedly determined that it is “well settled that [the Commission] cannot regulate a municipality under the NGA.”<sup>27</sup> Clarksville also noted that the rulemaking order providing for the blanket certificate authorization that the FERC stated Clarksville would be required to obtain, Order No. 319,<sup>28</sup> had explicitly ruled that such authorization was inapplicable to municipalities because municipalities were not subject to NGA regulation.<sup>29</sup>

More than two years later, the FERC issued the Rehearing Order.<sup>30</sup> The FERC acknowledged its precedent in *Rolla*, *Somerset*, and *Northwest Alabama* that ruled that municipalities are not subject to NGA regulation.<sup>31</sup> However, the FERC stated that it was reconsidering its precedent “at least to the extent it would allow municipal gas utilities to avoid NGA jurisdiction over the transportation and sale of gas for consumption in *other states*, because such an interpretation would create a regulatory gap.”<sup>32</sup> The FERC then ruled that Clarksville’s sales of gas to Guthrie

---

<sup>27</sup> JA 104 n.7.

<sup>28</sup> *Sales and Transportation by Interstate Pipelines and Distributors*, Order No. 319, 48 Fed. Reg. 34,875, FERC Stats. & Regs. ¶ 30,477 (1983), *order on reh’g*, Order No. 319-A, 48 Fed. Reg. 51,436, FERC Stats. and Regs. ¶ 30,512 (1983).

<sup>29</sup> JA 103-104.

<sup>30</sup> JA 106-120.

<sup>31</sup> Rehearing Order at P 10, JA 110.

<sup>32</sup> *Id.* at P 11, JA 111(emphasis in original).

required not only an NGA Section 7 sales certificate but also an NGA Section 7 transportation certificate, which it issued.<sup>33</sup>

In a footnote, the Rehearing Order addressed the argument in the Clarksville rehearing request that the FERC erred in its ruling that Clarksville could obtain a blanket certificate under Order No. 319 for certain interstate transportation.<sup>34</sup> The Rehearing Order acknowledged, as Clarksville had argued, that Order No. 319 had ruled that such a blanket certificate could not be issued to a municipality. However, the Rehearing Order noted that Order No. 319 also stated that the ruling did not preclude the possibility that the FERC may nevertheless assert its NGA jurisdiction in other transactions.

### **SUMMARY OF ARGUMENT**

In the orders under review, the FERC exercised NGA jurisdiction over transportation and sales by Clarksville, a municipality, that occur entirely on Clarksville's municipal distribution system, and required Clarksville to obtain NGA Section 7 certificate authorization for such transactions. The rulings represent a clear and marked departure from numerous prior FERC decisions that established a policy that has been in effect for more than 50 years that the agency has no NGA jurisdiction over a municipality under NGA Section 7 of the NGA.

---

<sup>33</sup> *Id.* at P 20, JA 118.

<sup>34</sup> Rehearing Order at P 20 n.34.

Under the directly applicable rulings of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*<sup>35</sup> and its progeny, in reviewing the FERC's new interpretation of the NGA in the orders under review, the court must give effect to the plain, unambiguous meaning of the relevant statutory provisions. The plain, unambiguous meaning of the relevant NGA provisions is that the FERC has no NGA jurisdiction to regulate a municipality under NGA Section 7. Under NGA Section 7, the FERC must assert jurisdiction to regulate sales for resale of gas or transportation of gas in interstate commerce, but can only do so if such sales or transportation are performed by a "natural gas company." Section 2 of the NGA clearly excludes "municipalities" from the definition of a "natural gas company."

Notably, many of the numerous prior decisions that ruled that FERC had no NGA jurisdiction over municipalities undertake precisely the above contextual analysis of the NGA to conclude that its plain meaning is that there is no NGA jurisdiction to regulate municipalities as sellers or transporters of gas, including one decision in which the FERC stressed that its conclusion was based on an exhaustive analysis of the NGA, its legislative history and the relevant judicial and FERC precedents.

---

<sup>35</sup> 467 U.S. 837, 842-43 (1984).

In contrast, in the orders under review, the FERC performs *no* contextual analysis to support its new interpretation of the NGA or to show that there is any ambiguity in the NGA's plain meaning that there is no NGA jurisdiction to regulate municipalities as sellers or transporters of natural gas. Accordingly, under *Chevron*, this court must vacate and remand in relevant part the orders under review and find that the NGA does not vest the FERC with jurisdiction to regulate municipalities as sellers or transporters of natural gas under NGA Section 7.

In any event, the orders under review fail to meet the standard of reasoned decision-making. The Service Area Order provides no rationale for the FERC's new interpretation. The Rehearing Order seeks to justify the FERC's new interpretation by asserting rationales that are legally unfounded or inconsistent with applicable judicial precedent, represent in numerous instances unexplained departures from directly applicable FERC precedents and established policy, and are otherwise not a product of reasoned decision-making.

### STANDING

The three elements of constitutional standing are injury-in-fact, causation, and redressability.<sup>36</sup> As noted, in the orders under review, the FERC held for the first time that it has NGA jurisdiction to regulate a municipality's transportation

---

<sup>36</sup> *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

and wholesale sale of natural gas that occur entirely within the municipality's state if the gas will be resold and consumed in another state.<sup>37</sup> The FERC has thus placed new regulatory burdens on Clarksville with respect to both gas sales and gas transportation.

First, with respect to gas sales, the FERC, in finding that it has jurisdiction over Clarksville's sales to Guthrie, ruled that the sales are covered under the "blanket marketing certificate" granted by 18 C.F.R. § 284.402.<sup>38</sup> In so ruling, the FERC has placed Clarksville under an immediate obligation to comply with all existing and future regulations and requirements applicable to holders of such certificates.<sup>39</sup> For example, Clarksville is now subject to certain data retention and price reporting requirements, and it is expressly obligated to "adhere to any other standards and requirements for price reporting as the Commission may order."<sup>40</sup> The imposition of a direct regulatory burden on a petitioner undoubtedly constitutes a concrete and actual injury-in-fact.<sup>41</sup>

---

<sup>37</sup> Service Area Order at P 20 n.15, JA 97; Rehearing Order at PP 11-19, JA 111-116.

<sup>38</sup> Service Area Order at P 20 n.15, JA 97; Rehearing Order at P 20, JA 116-118.

<sup>39</sup> 18 C.F.R. § 284.402(a) (subjecting certificate holders to regulations set forth in 18 C.F.R. Part 284, Subpart L).

<sup>40</sup> 18 C.F.R. § 284.403.

<sup>41</sup> *See, e.g., Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008) ("Indeed, it would be difficult to see how FERC could order Dominion to

Second, as to gas transportation, the Service Area Order ruled that Clarksville must apply for and receive authorization from the FERC to engage in the relevant services.<sup>42</sup> Although the Rehearing Order granted Clarksville a “case-specific” certificate authorizing Clarksville’s existing transportation service for the Guthrie transaction,<sup>43</sup> the order makes clear that any additional transportation service of a like nature will require a full application and prior authorization from FERC with its attendant regulatory and cost burdens.<sup>44</sup> In fact, the Rehearing Order clearly indicates that even a new agreement with Guthrie for use of the same transportation facilities will require such authorization, as the case-specific certificate that the FERC granted applies only to the “current arrangement” and the “existing transportation service.”<sup>45</sup> Further, to the extent that FERC exercises

---

disclose private data about its operations and that Dominion could nonetheless lack standing to challenge the order.”); *Sierra Club*, 292 F.3d at 899-900 (“if the complainant is ‘an object of the action . . . at issue’ – as is the case usually in review of a rulemaking and nearly always in review of an adjudication – there should be ‘little question that the action or inaction has caused him injury’”) (quoting *Lujan*, 504 U.S. at 561-62).

<sup>42</sup> Service Area Order at P 20 n.15, JA 97.

<sup>43</sup> Rehearing Order at P 20, JA 116-118.

<sup>44</sup> *Id.* at PP 11-19, JA 111-116.

<sup>45</sup> *Id.* at P 20, JA 116-118.

jurisdiction over any these transactions, Clarksville's rates, terms and conditions of service would be subject to FERC regulation.<sup>46</sup>

As discussed in the attached Affidavit of Pat Hickey, General Manager of Clarksville's gas and water utility operations, the term of the current contract with Guthrie will terminate in June 2019.<sup>47</sup> In addition, Clarksville has been approached by other potential customers about the prospect of entering into transportation arrangements similar to the transaction with Guthrie.<sup>48</sup> In response to each of these requests, Clarksville has refused to date to commit to providing service and, in doing so, stressed that a key consideration is whether providing such service will expose its municipal operations to FERC regulation under the NGA.<sup>49</sup> The exposure to such regulation would also be a key consideration with respect to any Clarksville decision as to whether it would continue service to Guthrie upon expiration of its current contract with Guthrie, as Mr. Hickey explains.<sup>50</sup> In short, the prospect of new FERC regulatory burdens weighs heavily

---

<sup>46</sup> 15 U.S.C. § 717c.

<sup>47</sup> Addendum B at ¶ 2.

<sup>48</sup> *Id.* at ¶ 3.

<sup>49</sup> *Id.* at ¶ 4.

<sup>50</sup> *Id.*

in Clarksville's current consideration of all of these matters. This current impact on Clarksville's business decisions constitutes an additional injury-in-fact.<sup>51</sup>

Accordingly, Clarksville has suffered injuries-in-fact that are actual, concrete and particularized. The FERC's orders are the direct cause of Clarksville's injuries, and this court can provide redress by vacating the orders in relevant part and remanding the case to FERC for further proceedings. Clarksville therefore has standing to challenge the orders before this court.<sup>52</sup>

## ARGUMENT

### I. Standard Of Review

The court reviews an agency's interpretation of a statute that it administers under the two-step analysis established by the Supreme Court's decision in *Chevron*. This court aptly summarized the two-step analysis in *Western Minnesota Municipal Power Agency v. FERC*:

Under step one, the court must determine "whether Congress has directly spoken to the precise question at issue." If so, then the court and the agency must "give effect to the unambiguously expressed intent of Congress." If the court determines that "the statute is silent or ambiguous with respect to the specific issue,"

---

<sup>51</sup> See *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 430 (D.C. Cir. 1993) ("We find that Great Lakes is currently aggrieved because the [FERC ruling] has a present injurious effect on Great Lakes' business decisions and competitive posture within the industry.").

<sup>52</sup> See *Sierra Club*, 292 F.3d at 895.

then under step two, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>53</sup>

As the Supreme Court observed in *Michigan v. EPA*, under the second step, “*Chevron* directs courts to accept an agency’s reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation.”<sup>54</sup>

In that regard, as the *Michigan* Court observed, even when a court applies the second step of *Chevron*, “Federal administrative agencies are required to engage in reasoned decisionmaking. Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.”<sup>55</sup>

The last observation by the *Michigan* Court is consistent with the “arbitrary and capricious” standard also applicable to the FERC orders under the Administrative Procedure Act (APA).<sup>56</sup> Under that standard, the FERC “must conform to its prior practice and decisions or explain the reason for its departure

---

<sup>53</sup> 806 F.3d 588, 591 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43).

<sup>54</sup> 135 S. Ct. 2699, 2707 (2015) (internal citation and quotation omitted).

<sup>55</sup> *Id.* at 2706 (internal citation and quotations omitted).

<sup>56</sup> 5 U.S.C. § 706(a).

from such precedent.”<sup>57</sup> As this court observed, “an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”<sup>58</sup>

**II. The FERC’s interpretation of the NGA that it may extend NGA jurisdiction over municipal operations must be rejected under *Chevron* step one, as it is contrary to the plain, unambiguous meaning of the relevant NGA provisions.**

As noted, under *Chevron* step one, this court is to determine if Congress has spoken directly to the precise question at issue and if so, it must give effect to the unambiguous intent of Congress.

Courts have provided further guidance in implementing step one. To begin with, as this court has ruled, it will not defer to any agency determination that a statute is ambiguous, but rather will conduct its own de novo review.<sup>59</sup> Moreover, as this court has also ruled, to determine if Congress has expressed its intent unambiguously, the court will examine the statute’s text, structure, purpose and

---

<sup>57</sup> *United Municipal Distributors Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984).

<sup>58</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted).

<sup>59</sup> *Nat’l Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007).

legislative history.<sup>60</sup> Yet in the orders under review the FERC did not perform this basic analysis. The only such analyses performed by the FERC were in its *prior* orders, which, repeatedly and without exception, determined that the plain meaning of the relevant statutory provisions of the NGA is to exempt municipalities from the ambit of NGA jurisdiction.

- A. Prior FERC decisions, which fully performed the *Chevron* step one analysis, amply demonstrate that there is no NGA jurisdiction over municipal sales or transportation.

As discussed, *Rolla* was the first time the agency analyzed whether it had NGA jurisdiction over municipal sales or transportation; there, based on an analysis of the relevant statutory provisions, the FPC (the FERC's predecessor) concluded that the "plain language" of the NGA "expressly" excludes municipalities from "the ambit of Commission jurisdiction."<sup>61</sup>

*Rolla* is only one example of numerous agency decisions issued over the decades that demonstrate the thoroughness with which the FERC has analyzed this issue to conclude, without exception, that municipal sales or transportation are not within the ambit of NGA jurisdiction, as demonstrated by the following, illustrative post-*Rolla* summary:

---

<sup>60</sup> *Bell Atl. Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

<sup>61</sup> *Rolla*, 26 FPC at 737.

1. In *Texas Gas Transmission Corp.*,<sup>62</sup> the FERC ruled that a municipality, the City of Memphis, Tennessee, was not subject to NGA jurisdiction and, thus, would not need certificate authorization under Section 7 of the NGA that would otherwise be required for the acquisition and operation of facilities that would transport gas in interstate commerce. The conclusion was based on an analysis of Section 2 of the NGA which excludes municipalities from the entities to be regulated under the NGA, and a citation to the *Rolla* decision.

2. In Order No. 319 (the rulemaking previously discussed in Clarksville's rehearing request and the Rehearing Order), the FERC amended its regulations to broaden the scope of entities that were subject to NGA jurisdiction that could take advantage of a special blanket certificate issued under Section 7 of the NGA. However, in that order, the FERC ruled that it could not extend this blanket certificate to municipal local distribution companies because municipalities are not subject to NGA jurisdiction. Specifically, the FERC reasoned that the special blanket certificate, as with all certificates, was to be issued under Section 7 of the NGA, which was applicable only to a "natural gas company," and the NGA expressly excludes municipalities from the definition of a "natural gas company."

The analysis in Order No. 319 was as follows:

---

<sup>62</sup> 3 FERC ¶ 61,135 (1978).

The blanket certificate, however, is a certificate of public convenience and necessity issued to a natural gas company under section 7 of the Natural Gas Act. Section 2 of the Act defines “natural gas company” to mean a person engaged in the sale for resale or transportation of natural gas in interstate commerce. Municipalities are expressly excluded from the definition of “natural gas company.” Therefore, municipalities cannot be issued certificates under section 7(c) of the Natural Gas Act and are not eligible to receive . . . blanket certificates.<sup>63</sup>

3. In *Northwest Alabama Gas District*,<sup>64</sup> a gas district formed by six municipalities under state enabling legislation owned and operated a natural gas pipeline that transported gas into an interstate natural gas pipeline and, hence, in interstate commerce. The FERC found that the gas district qualified as a municipality under the NGA and that “[i]t is well settled that we cannot regulate a municipality under the NGA . . . .”<sup>65</sup> As it did in *Rolla, Texas Gas* and Order No. 319, the FERC analyzed the relevant provisions of the NGA—including Section 2, which defines a “natural gas company”—to conclude that “we are not vested with the authority to regulate a municipality under the NGA.”<sup>66</sup> As the FERC also later

---

<sup>63</sup> Order No. 319, FERC Stats. & Regs. ¶ 30,477 at p. 30,621.

<sup>64</sup> 42 FERC ¶ 61,371(1988).

<sup>65</sup> *Id.* at p. 62,086.

<sup>66</sup> *Id.*

concluded, the gas district “is determined to be a municipality under Section 2(3) of the NGA, which makes it exempt from our jurisdiction.”<sup>67</sup>

Notably, the above ruling compelled the FERC in that same order to overrule a prior FERC order that imposed regulation on the gas district under the provisions of the Natural Gas Policy Act (NGPA),<sup>68</sup> another statute administered by the FERC. The FERC stated that its new ruling was required because the NGPA was not intended to expand the scope of entities regulated under the NGA.

4. In *Somerset Gas Service*,<sup>69</sup> the FERC undertook the identical analysis of the provisions of the NGA as performed in its prior decisions to conclude that it was not vested with the authority to regulate a municipality under the NGA even when the municipality transported gas in interstate commerce. As with its ruling in *Northwest Alabama*, the FERC then ruled that it could not regulate a municipality under the NGPA either, overruling a prior FERC order that imposed NGPA regulation on the municipality.

5. In *Tennessee Gas Pipeline Co.*,<sup>70</sup> a municipality, the City of Decatur, Alabama, planned to construct and operate 37 miles of high-pressure

---

<sup>67</sup> *Id.*

<sup>68</sup> 15 U.S.C. §§ 3301-3432.

<sup>69</sup> 59 FERC ¶ 61,012 (1992).

<sup>70</sup> 69 FERC ¶ 61,239 (1994), *order on reh'g*, 70 FERC ¶ 61,329 (1995).

pipeline facilities in the State of Tennessee that would transport gas in interstate commerce. The FERC rejected the argument that the municipality was required to obtain a Section 7(c) certificate for the proposed pipeline. Instead, the FERC found that it had no jurisdiction to regulate the municipality as a transporter of natural gas. The finding was based on the same analysis of the provisions of the NGA undertaken in its prior orders that defined a “natural gas company.”<sup>71</sup> In arriving at that conclusion the FERC stressed that it had “exhaustively analyzed the NGA, its legislative history and judicial and Commission precedent.”<sup>72</sup>

Indeed, as will be shown, the exhaustive *Tennessee Gas* analysis undermines *all* of the principal rationales as well as other rationales set forth in the orders under review to exercise jurisdiction over Clarksville, as a municipal seller or transporter. Accordingly, petitioner sets forth in Addendum C the two orders that compose the *Tennessee Gas* decision.

6. The above orders are examples of the decisions by the FERC that a municipality is not a natural gas company and therefore the FERC has no jurisdiction under the NGA to regulate it. Other such orders include *United Gas Pipeline Co.*,<sup>73</sup> *Texas Eastern Transmission Corp.*,<sup>74</sup> *Texas Gas Transmission*

---

<sup>71</sup> *Tennessee Gas*, 69 FERC at p. 61,903.

<sup>72</sup> *Tennessee Gas*, 70 FERC at p. 61,102.

<sup>73</sup> 46 FERC ¶ 61,060 (1989).

*Corp.*,<sup>75</sup> and *Freebird Gas Storage, LLC*,<sup>76</sup> as well as the FERC's series of orders in its Order No. 636 rulemaking.<sup>77</sup>

- B. An analysis and application of the relevant NGA provisions and legislative history confirm the uniform conclusion of the numerous prior FERC decisions that the NGA is clear and unambiguous that municipal sales and transportation are not within the ambit of NGA jurisdiction.

Applying the explicit language of the relevant NGA provisions and related legislative history to the facts confirms the conclusion that the FERC does not have NGA jurisdiction to regulate the sales or transportation of Clarksville, precisely because Clarksville is a municipality:<sup>78</sup>

- In the orders under review, the FERC exercised jurisdiction over Clarksville, a municipality, with respect to certain sales for resale and transportation in

---

<sup>74</sup> 48 FERC ¶ 61,248 (1989).

<sup>75</sup> 55 FERC ¶ 61,208 (1991).

<sup>76</sup> 111 FERC ¶ 61,054 (2005).

<sup>77</sup> *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation*, Order No. 636, 57 Fed. Reg. 13,267, FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128, FERC Stats. & Regs. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *affirmed in part and remanded in part sub nom. United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

<sup>78</sup> The relevant NGA statutory provisions, including Section 2(1), (2), (3) and (6) and the text of Sections 4, 5 and 7 are included in Addendum A of this brief.

interstate commerce which, according to the FERC, required Section 7 certificate authorization under the NGA.

- Section 7 is unambiguous that the only entity that requires either a transportation or a sales certificate is a “natural gas company.”
- As noted, the only other type of regulation of interstate sales for resale or transportation in interstate commerce is pursuant to Sections 4 and 5 of the NGA. Both Sections 4 and 5 of the NGA are unambiguous that the only entity that is subject to regulation under Sections 4 and 5 is a “natural gas company.”
- Section 2(6) of the NGA plainly states that a “natural gas company” must be a “person” engaged in transportation or sale for resale in interstate commerce.
- Section 2(1) of the NGA plainly states that a “person” must be an “individual” or a “corporation.”
- Section 2(2) of the NGA defines a “corporation” to include many specific entities, but states that it “shall not include municipalities as hereinafter defined.”
- Section 2(3) defines a “municipality” as “a city, county or other political subdivision or agency of a State.”

A review of the legislative history of the above definitional provisions of Section 2 confirms that the meaning of the terms therein defined is plain and unambiguous. Relevant House and Senate reports state that the definitions of these terms “are self-explanatory and necessary to the proper administration of the bill.”<sup>79</sup>

The plain meaning of the relevant provisions of the NGA and related legislative history (as well as the numerous FERC orders that without exception applied this plain meaning) compel the conclusion that Clarksville was not required to obtain either an NGA Section 7 transportation or sales certificate, because Clarksville is not a natural gas company, but rather is a municipality that is exempt from regulation under NGA Section 7. Moreover, the other provisions of the NGA pursuant to which the FERC may regulate sales for resale and transportation in interstate commerce—namely Sections 4 and 5 of the NGA—confirm this conclusion as they too expressly limit the FERC scope of regulation to a “natural gas company.”

---

<sup>79</sup> H.R. Rep. No. 75-709, at 4 (1937); S. Rep. No. 75-1162, at 4 (1937).

- C. Despite the opportunity and clear obligation to do so, the orders under review fail to provide any contextual analysis of the NGA or analysis of its legislative history that would counter the NGA's express, unambiguous language that NGA jurisdiction does not extend to municipal sales or transportation.

Notably, the orders under review do not address, much less criticize, the contextual analysis provided by the prior FERC orders, nor do the orders under review provide *any* different contextual analysis of these provisions that would suggest a different meaning.

Nor do the FERC orders discuss *any* other provisions of the NGA or the structure of the NGA that would suggest that the meaning of the relevant provisions is ambiguous.

Nor do the FERC orders cite or discuss *any* specific legislative history of the NGA that would render the operative provisions ambiguous.

In strikingly similar circumstances, this court in its recent *Western Minnesota* decision rejected an interpretation by the FERC of a provision of another statute FERC administers, the Federal Power Act (FPA),<sup>80</sup> where the FERC interpretation of the specific statutory provision was not consistent with its plain meaning. While the FERC in that case sought to convince the court that the meaning of the provision was ambiguous, the court rejected that effort as an attempt by the FERC to manufacture ambiguity, which ignored the requirements of

---

<sup>80</sup> 16 U.S.C. §§ 791-828c.

*Chevron* step one altogether.<sup>81</sup> In particular, the court stated that the FERC had failed to demonstrate how the text or the structure of the FPA, including any of its other provisions, or its legislative history, made the meaning of the relevant provisions ambiguous.<sup>82</sup>

The sum of the foregoing is that Congress has spoken directly and expressly that municipalities are exempt from NGA jurisdiction as sellers or transporters of gas and, in particular, are exempt from regulation under NGA Section 7. There is no ambiguity on this point. Indeed, despite the opportunity to do so, the orders under review do not demonstrate that these statutory provisions are in any way ambiguous. As required by *Chevron*, this court must give effect to the plain meaning of the NGA by reversing the orders under review and by ruling that the FERC is not vested with NGA jurisdiction to impose regulation under NGA Section 7 on Clarksville's municipal transactions.

**III. The FERC's interpretation of the NGA to extend NGA jurisdiction to a municipality is not premised on reasoned decision-making, but is arbitrary and capricious.**

A court is to review an agency interpretation of a statute under *Chevron* step two only if there is an ambiguity in the statute's meaning. As demonstrated, there is no ambiguity in the relevant NGA provisions.

---

<sup>81</sup> *Western Minnesota*, 806 F.3d at 592.

<sup>82</sup> *Id.* at 592-96.

In any event, the interpretation of the NGA in the orders under review to impose NGA jurisdiction on Clarksville, a municipality—an interpretation which is a marked departure from numerous FERC decisions—is not a product of reasoned decision-making, but is arbitrary and capricious, and thus must be reversed.

- A. The principal FERC rationales asserted to support NGA jurisdiction must be rejected.

As noted, the Service Area Order exercised NGA jurisdiction over the Clarksville municipal transactions without providing any reasons for doing so. The Rehearing Order set forth three principal rationales for the exercise of NGA jurisdiction. As shown below, these rationales represent an unexplained departure from directly applicable FERC precedents and policy, are inconsistent with judicial precedents, are otherwise ill-founded and are not a product of reasoned-decision making.

1. The primary rationale of the Rehearing Order is its application<sup>83</sup> of the Supreme Court precedent in *United States v. Public Utilities Commission of California*.<sup>84</sup> That case involved whether the FERC had authority to regulate sales to a municipality pursuant to FPA Section 201, which states that the “[t]he term

---

<sup>83</sup> Rehearing Order at PP 12 and 13, JA 111-112.

<sup>84</sup> 345 U.S. 295 (1953).

‘sale of electric energy at wholesale’ . . . means a sale of electric energy to any person for resale.”<sup>85</sup> As stated in the Rehearing Order, for purposes of the FERC’s jurisdiction under Section 201 of the FPA, one must refer to FPA Section 3(4) which states that “person means an individual or corporation,” which is defined not to include a municipality.<sup>86</sup> Nevertheless, the Rehearing Order states, the Court found that there was sufficient ambiguity for the Court to hold that the FERC had jurisdiction over a sale to a municipality.<sup>87</sup>

In the Rehearing Order, the FERC states that the NGA’s provisions are modeled substantively after the FPA’s provisions, and are typically read *in pari materia*. The FERC then concludes that if one applies the reasoning of the *California* decision, the FERC may properly find that a municipality can be a jurisdictional “person” and therefore can be a “natural gas company” under the NGA.<sup>88</sup>

The FERC’s reasoning is obviously invalid in a number of respects.

First, the *California* decision is clearly inapposite. In the instant case the issue is whether NGA jurisdiction applies to a sale for resale or transportation in

---

<sup>85</sup> 16 U.S.C. § 824(d).

<sup>86</sup> Rehearing Order at P 12, JA 111.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at P 13, JA 112.

interstate commerce *by* a municipality. In *California*, the issue was whether a sale for resale of electricity *to* a municipality was subject to FPA jurisdiction. The *California* decision did not purport to address whether a sale of electricity *by* a municipality in interstate commerce would be subject to FPA jurisdiction. Indeed, the Court explicitly distinguished the two issues—stating that the legislative history of the FPA provided support for its finding that sales *to* a municipality were subject to FPA jurisdiction, while there was evidence in the FPA legislative history that sales *by* a municipality were not subject to FPA jurisdiction.<sup>89</sup>

There is, in fact, a directly analogous court ruling on the FERC’s authority under the FPA: the Ninth Circuit’s decision in *Bonneville Power Administration v. FERC*.<sup>90</sup> Under the FPA, the FERC may regulate the rates for electric sales for resale and transportation in interstate commerce but only can do so if such sales or transportation are performed by a “public utility,” the counterpart to a “natural gas company” under the NGA. On review by the *Bonneville* court were FERC orders where the agency sought to impose a refund obligation for sales for resale of electricity in interstate commerce by governmental entities, including municipalities, which are not included in the FPA’s definition of a “public utility.” As with the orders under review, the FERC orders reviewed in the *Bonneville*

---

<sup>89</sup> 345 U.S. at 313-14.

<sup>90</sup> 422 F.3d 908, 910-11 (9th Cir. 2005).

decision had conceded that the FERC had issued other orders in other contexts that stated that it does not have FPA jurisdiction over an entity that is not a “public utility,” but that the agency sought an exception there based on particular circumstances.<sup>91</sup>

The court remanded the FERC orders and found that the FERC was without FPA jurisdiction to require governmental entities to order refunds. It did so based on an examination of the intent of the relevant FPA provisions defining a “public utility.” As the *Bonneville* court stated, under the FPA, a “public utility” is a person that engages in jurisdictional activities.<sup>92</sup> The analysis of the *Bonneville* court was as follows:

The FPA’s definition of “person” does not include municipalities or state agencies. “Person” means an “individual or a corporation,” FPA §3(4) . . . . and the definition of “corporation” specifically excludes “municipalities,” FPA §3(3) . . . . As noted earlier, “municipality” includes, cities, counties, irrigation and drainage districts, and other state agencies and subdivisions that are in the power business. FPA §3(7).<sup>93</sup>

Notably, the above examination of the relevant FPA provisions by the *Bonneville* court is in all substantive respects identical to the examination in *Rolla* and other prior FERC orders of very similar definitional NGA provisions that were

---

<sup>91</sup> *Id.* at 913.

<sup>92</sup> *Id.* at 917.

<sup>93</sup> *Id.*

the basis for the repeated FERC rulings that sales or transportation by municipals may not be regulated under the NGA.

Finally, the *Bonneville* court stressed the fact—which had been extensively discussed and demonstrated by the FERC in its earlier decision in *New West Energy Corp.*<sup>94</sup>—that the legislative history of the FPA shows clearly that “Congress deliberately put governmental entities, such as states and municipalities, outside of FERC’s [FPA] jurisdiction.”<sup>95</sup> Indeed, in the *New West* order, the FERC stressed that it was prohibited by the FPA from regulating a sale or transportation by a state agency or municipality.<sup>96</sup> Subsequent to the *New West* order, the FERC issued its decision in *Prairieland Energy Inc.*,<sup>97</sup> which likewise ruled that the FERC may not regulate a municipality under the FPA because of its status as a municipality.

The sum of the foregoing is that the *Bonneville* decision—as well as repeated FERC rulings—demonstrates that the FPA exempts sales and transportation of electricity by municipalities from FPA jurisdiction. If, as the Rehearing Order demonstrates, one should apply the principle that the FPA and

---

<sup>94</sup> 83 FERC ¶ 61,004 (1998).

<sup>95</sup> *Bonneville*, 422 F.3d at 920-21 & nn.9-10.

<sup>96</sup> *New West*, 83 FERC at p. 61,015.

<sup>97</sup> 92 FERC ¶ 61,139 (2000).

NGA should be read *in pari materia*, doing so requires the reversal of the ruling in the orders under review that exercise NGA jurisdiction over sales and transportation of natural gas by municipalities.

It is in any event surprising and disheartening for the Rehearing Order to cite the *California* decision's interpretation of an irrelevant FPA provision concerning electric sales to a municipality to support its assertion of NGA jurisdiction over sales and transportation by a municipality, while not disclosing the relevant FERC decisions that interpret the FPA to consistently rule that it has no FPA jurisdiction to regulate sales for resale or transportation of electricity by a municipality.

Second, while the FERC argues that the reasoning of the *California* Court should apply, it fails to set forth what that reasoning was, presumably because doing so shows that the *California* Court's reasoning does not apply. In *California*, the Court acknowledged that the definitional sections of the FPA excluded "municipality" from the definition of "person."<sup>98</sup> However, the Court declined to apply the definitional sections to the issue there involved—whether a sale to a municipality was subject to FPA jurisdiction—for three key reasons. First, the Court ruled that the use of these sections to support the interpretation that sales to municipalities are not subject to FPA regulation "has no support in the

---

<sup>98</sup> *California*, 345 U.S. at 312.

statutory scheme as a whole.”<sup>99</sup> Indeed, the Court continued, such an interpretation would be directly inconsistent with, and in fact would thwart, the purpose of other specific provisions of the FPA, which were intended to provide protection to municipalities as purchasers of a sale of electricity regulated by the FPA.<sup>100</sup>

The *California* Court then examined the legislative history of the FPA and found that the definitional sections were not intended to be a limitation on the FERC’s jurisdiction to regulate sales for resale to municipalities.<sup>101</sup> Finally, the Court stressed the fact of the “long assertion” by the FPC (the predecessor to the FERC) “that it has authority over rates of sales to municipalities has probably risen to the dignity of an agency ‘policy.’ We have often stated our sympathy with established administrative interpretations such as this.”<sup>102</sup>

None of the three factors that were the basis for the *California* decision apply here. In the Rehearing Order, the FERC did not cite, discuss or analyze any other provision of the NGA that was in any way inconsistent with the plain meaning of Sections 2, 4 and 7 of the NGA that municipalities are exempt from NGA regulation—and there are no such inconsistent NGA provisions. Thus,

---

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 313.

<sup>102</sup> *Id.* at 314-15 (citation omitted).

unlike in *California*, this court is not faced here “with two statutory provisions having differing mandates, creating a fundamental ambiguity that would warrant application of the Commission’s expertise.”<sup>103</sup>

Next, the Rehearing Order did not cite any specific legislative history that counters the plain meaning of the specifically applicable NGA provisions that exclude municipalities from NGA jurisdiction, but rather stated its view that “the legislative history of the NGA sheds little light on Congressional intent . . . .”<sup>104</sup> In fact, as demonstrated, the relevant legislative history confirms that the meaning of those provision is plain and unambiguous.

Finally, there are no prior FERC decisions that support its ruling that NGA jurisdiction extends to municipal sales or transportation. Indeed, as demonstrated, just the opposite is true—there are numerous past FERC decisions that uniformly and unequivocally hold that the plain meaning of the NGA is that a municipality is exempt from NGA regulation.

Third, the FERC has itself *expressly rejected the very position* set forth in the Rehearing Order—that application of the *California* decision would allow the FERC to regulate municipalities under the NGA. The FERC did so in *Tennessee*

---

<sup>103</sup> *Western Minnesota*, 806 F.3d at 593-94 (internal quotation omitted).

<sup>104</sup> Rehearing Order at P 16, JA 113.

*Gas*.<sup>105</sup> As the FERC there ruled, the *California* decision does not involve an analogous issue—which would be whether the FERC under the FPA may regulate a sale or transportation *by* a municipality—but rather an irrelevant issue—whether FERC may regulate a sale *to* a municipality. Moreover, the FERC found, unlike in *California*, where legislative history of the FPA was useful in determining congressional intent, the “legislative history of the NGA is of no help in gleaning Congress’ intent when it exempted municipalities from Commission jurisdiction under the Act.”<sup>106</sup>

Ironically, the Rehearing Order provides a brief description of the overall ruling of *Tennessee Gas* to support its assertion of NGA jurisdiction over a municipality.<sup>107</sup> Yet that very FERC decision entirely undermines the FERC’s reliance on the *California* decision to assert such jurisdiction. The unexplained departure by the Rehearing Order from the ruling in *Tennessee Gas* is by itself sufficient to reject as arbitrary and capricious the reliance by the Rehearing Order on the *California* decision.<sup>108</sup>

---

<sup>105</sup> *Tennessee Gas*, 69 FERC at pp. 61,907-908.

<sup>106</sup> *Id.* at p. 61,908.

<sup>107</sup> Rehearing Order at P 18 n.25, JA 114.

<sup>108</sup> *United Municipal*, 732 F.2d at 210.

2. As its second argument, the Rehearing Order asserts that even if a municipality is not a “natural gas company” for purposes of NGA jurisdiction, the “reasoning” of the decision in *Public Service Co. of North Carolina v. FERC*<sup>109</sup> supports its ruling to extend NGA jurisdiction over a municipality.<sup>110</sup> In that decision, the Fifth Circuit upheld a FERC ruling that the FERC could require the State of Texas to obtain abandonment authorization prior to terminating a sale of natural gas because the State had allowed its gas to be dedicated to interstate service. In that context, the court ruled, whether the state agency was a natural gas company was beside the point.

The *North Carolina* decision is inapposite by its own terms. In that case, the court ruled that it was applying a Supreme Court decision in *California v. Southland Royalty Co.*,<sup>111</sup> which the court viewed as “closely analogous,” to rule that Texas must obtain NGA authorization if it wanted to abandon gas that had been dedicated to the interstate market, even though Texas was not a natural gas company.<sup>112</sup> In so ruling, however, the court strongly emphasized that its holding was limited to the “convergence” of the particular facts of the case—the fact that

---

<sup>109</sup> 587 F.2d 716 (5th Cir. 1979).

<sup>110</sup> Rehearing Order at P 14, JA 112.

<sup>111</sup> 436 U.S. 519 (1978).

<sup>112</sup> *North Carolina*, 587 F.2d at 719.

the royalty owner, Texas, had fully acquiesced to the dedication of interstate gas pursuant to an NGA certificate issued to a natural gas company that gives rise to a continuing service obligation.<sup>113</sup> Moreover, the court expressly stated that it was not deciding whether Texas would be subject to NGA regulation if it had initially sold directly to the interstate market.<sup>114</sup> In that regard, the court took pains to note that FERC counsel had conceded to the court that Texas could directly sell its gas in the interstate market without FERC authorization and terminate such sales without abandonment authorization.<sup>115</sup>

The obvious reason for the FERC concession is that Texas was not a “natural gas company” and, hence, NGA jurisdiction could not extend to its sales. The same conclusion applies to sales or transportation by Clarksville which, as a municipality, is also excluded from the definition of a “natural gas company.”

In fact, in *Tennessee Gas*, the FERC *repeatedly and expressly rejected the very position* set forth in the Rehearing Order—that the application of the *North Carolina* decision supports assertion of NGA jurisdiction over a municipality:

The effect of [*North Carolina*] was to preclude a state royalty owner from frustrating a certificate issued to a natural gas company . . . . Such facts are not present here. Even if the case were not distinguishable on these

---

<sup>113</sup> *Id.* at 719-20.

<sup>114</sup> *Id.* at 720.

<sup>115</sup> *Id.* at 720 n.13.

grounds, however, we find that the court's decision . . . would not be controlling. The court strongly emphasized that its decision was limited to the facts before it. Those facts are not present here. [Here, the municipality] is not attempting to abandon a certificated service without Commission oversight of its interest in "securing a continuous supply of natural gas in interstate markets" as was the case in [*North Carolina*].<sup>116</sup>

Moreover, in *Tennessee Gas*, the FERC stressed that the application of the *North Carolina* decision to impose jurisdiction on a municipality was unreasonable because it would violate long-standing FERC precedents and would lead to the unacceptable result that the FERC could impose NGA jurisdiction on local distribution companies and industrial end-users.<sup>117</sup>

As noted, in the Rehearing Order, the FERC provided only a brief discussion of the general holding of *Tennessee Gas* to support its assertion of NGA jurisdiction over a municipality,<sup>118</sup> and yet that very decision undermines the reliance on the *North Carolina* decision to assert such jurisdiction. Here, too, the unexplained departure by the Rehearing Order from the repeated rulings in

---

<sup>116</sup> *Tennessee Gas*, 69 FERC at p. 61,907 (quoting *North Carolina*, 587 F.2d at 712); see also *Tennessee Gas*, 70 FERC at p. 62,015.

<sup>117</sup> *Tennessee Gas*, 70 FERC at p. 62,015.

<sup>118</sup> Rehearing Order at P 18 n.25, JA 114.

*Tennessee Gas* is by itself sufficient to reject this rationale as arbitrary and capricious.<sup>119</sup>

3. Finally, the FERC reasons that in order to fill a regulatory gap, it is necessary to regulate municipal transactions that occur entirely within the municipality's state if the gas thereafter leaves the state.<sup>120</sup> According to the Rehearing Order, a state has authority only to regulate a municipality's services and rates to end-users within the state and has no authority to regulate a municipality's transaction where gas thereafter leaves the state and is consumed in another state.<sup>121</sup> This regulatory gap, the Rehearing Order asserts, was created by a series of Supreme Court decisions finding that states could not regulate interstate transportation of gas or wholesale gas sales in interstate commerce.<sup>122</sup> Based on the foregoing, the FERC concludes that its prior orders in *Rolla*, *Somerset*, and *Northwest Alabama* "relied on an interpretation and application of the NGA's exemption for municipalities that was too expansive to the extent they would

---

<sup>119</sup> *United Municipal*, 732 F.2d at 210.

<sup>120</sup> Rehearing Order at PP 15-19, JA 113-116.

<sup>121</sup> *Id.* at P 16, JA 113; see also, *id.* at P 18; JA 114-115.

<sup>122</sup> *Id.* at PP 15-20, JA 113-117.

support Clarksville's position that its status as a municipality in Tennessee allows it to set its own rates for service for customers in another state."<sup>123</sup>

The rationale of the Rehearing Order should be rejected for each of several separate reasons.

- (i) The regulatory gap rationale of the Rehearing Order is fundamentally inconsistent with directly applicable FERC precedent and established FERC policy.

The regulatory gap argument is fundamentally and directly inconsistent with FERC precedent and policy. For example, in *Tennessee Gas* the FERC rejected the rationale that exempting a municipality from NGA Section 7 regulation would somehow frustrate the purposes of the NGA. The FERC's response in *Tennessee Gas* was simple and explicit: "Since the NGA exempts municipalities as entities from our jurisdiction, there is no basis for the argument that our refusal to exert jurisdiction over [a municipality] frustrates the NGA's purpose."<sup>124</sup>

In that regard, in *Tennessee Gas* the FERC devoted many pages of analysis to reject numerous arguments urged to impose jurisdiction over a municipality—that, as the Rehearing Order asserts, the extension of NGA jurisdiction was essential to cover a regulatory gap;<sup>125</sup> that the municipal exemption should be

---

<sup>123</sup> Rehearing Order at P 20, JA 116-117.

<sup>124</sup> *Tennessee Gas*, 70 FERC at pp. 62,012-13.

<sup>125</sup> *Tennessee Gas*, 69 FERC at pp. 61,903-04.

narrowed given the language “in connection with” set forth in NGA Sections 4 and 5;<sup>126</sup> that the FERC could exert jurisdiction over a transaction even if it was not performed by a natural gas company;<sup>127</sup> and that the FERC has in previous instances recognized that it could regulate an entity that is not a natural gas company.<sup>128</sup>

Based on what the FERC in *Tennessee Gas* stressed was its “exhaustive” analysis of the NGA, the relevant legislative history, and judicial and FERC precedents, the FERC’s answer to these arguments was that it was the entity’s *status* as a municipality that exempted its sales or transportation of gas from NGA regulation.<sup>129</sup> In so ruling, the *Tennessee Gas* orders expressly rejected the position of the Rehearing Order that the FERC should look at the specific details of the transaction in which the municipality engaged: “[T]he NGA’s exception *on its face* applies to municipalities as entities, not to the municipal distribution . . . [W]e do not see *any* basis under the NGA to interpret which municipal activities are and are not under our jurisdiction.”<sup>130</sup> The Rehearing Order fails to acknowledge,

---

<sup>126</sup> *Id.* at pp. 61,905-06.

<sup>127</sup> *Id.* at pp. 61,906-07.

<sup>128</sup> *Id.* at pp. 61,907-08.

<sup>129</sup> *Tennessee Gas*, 70 FERC at pp. 62,012-13.

<sup>130</sup> *Id.* (emphasis added).

much less address, the specific rulings and policy reflected in *Tennessee Gas*, which is reason alone to reject the regulatory gap rationale.<sup>131</sup>

Moreover, the reason why the FERC cannot assert jurisdiction over a municipality is that there is, in fact, no regulatory gap. As the FERC itself reasoned in the *Intermountain* decision: “The Commission believes that a reasonable interpretation of congressional intent in excluding municipalities from the NGA was because they are governmental entities created by a state government and the purpose of the NGA was not to occupy a field in which the states were already acting.”<sup>132</sup> In other words where, as here, a state or municipality is regulating services, the state through its municipality is already acting, and thus NGA regulation of that activity was not intended and is inappropriate.

The contrary assertion by the orders under review—that there is a regulatory gap—is directly inconsistent with the above finding in *Intermountain* that the congressional intent underlying the NGA was not to regulate municipal services. Here, too, the Rehearing Order does not address, much less explain, the departure from this finding in *Intermountain*, providing yet another reason to reject the regulatory gap rationale.

---

<sup>131</sup> *United Municipal*, 732 F.2d at 210.

<sup>132</sup> *Intermountain*, 97 FERC ¶ 61,359 at P 28.

- (ii) Judicial precedent compels rejection of the regulatory gap rationale.

The *Bonneville* decision discussed above directly rebuts a key assumption of the regulatory gap rationale—that the FERC may extend jurisdiction to a sale or transportation by an entity that is exempt from NGA jurisdiction if thereafter the gas leaves the state. As noted, *Bonneville* reversed a ruling of the FERC that the agency may require a municipality to provide refunds from that municipality’s sales for resale of electricity, precisely because the plain meaning of the relevant FPA provisions exempted municipalities from FPA jurisdiction. In doing so, the *Bonneville* court rejected the FERC’s attempts to counter “the clear language of the FPA by shifting the analysis away from the identity of the sellers and focusing instead on the nature of their transactions . . . .”<sup>133</sup> The court also held that “FERC’s attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce . . . contravenes the more *specific* provisions of the FPA that limit FERC’s authority over governmental agencies . . . .”<sup>134</sup>

Consistent with *Bonneville*, here, too, this court must reject the attempt of the FERC to counter the clear language of the NGA that exempts municipalities

---

<sup>133</sup> 422 F.3d at 918.

<sup>134</sup> *Id.* at 920 (emphasis in original).

from NGA jurisdiction by inappropriately shifting the focus to the nature of the transaction. This is so particularly where the FERC itself has stated that “we do not see *any* basis under the NGA to interpret which municipal activities are and are not under our jurisdiction.”<sup>135</sup>

- (iii) The key assumption of the regulatory gap rationale—that NGA jurisdiction can extend to any municipal transaction potentially affecting an out-of-state ultimate consumer—is based on a factual mischaracterization and is legally unfounded.

As noted, the Rehearing Order seeks to extend jurisdiction over a municipality based on the rationale that a municipality cannot “set its own rates for service for customers in another state.”<sup>136</sup> It is first worth emphasizing that the Rehearing Order mischaracterizes the facts. Contrary to the Rehearing Order, Clarksville is *not* setting rates for “customers in another state.” At issue here are municipal transactions by Clarksville that occur entirely within Tennessee. In those transactions, Clarksville only seeks to charge customers in Tennessee that are served by its municipal system, as it would do for any customers for service provided by its municipal facilities. The Rehearing Order provides no tenable reason why the FERC may subject Clarksville to NGA regulation for service to these customers.

---

<sup>135</sup> *Tennessee Gas*, 70 FERC at pp. 62,012-13 (emphasis added).

<sup>136</sup> Rehearing Order at P 20, JA 117.

The Rehearing Order, in fact, looks beyond the specific Clarksville transactions to rule that no state or municipality can regulate the rates to its customers if the gas will be consumed outside of its state. Thus, the Rehearing Order is concerned with the possible impact not on Guthrie or any entity that Clarksville directly serves in Tennessee, but on ultimate consumers of the gas outside of Tennessee. Yet the Rehearing Order provides precious little legal basis for its assertion that states or municipalities cannot impose regulation in that instance, and the support it does provide does not withstand scrutiny. To begin with, the Rehearing Order concedes there is no legislative history to support this assertion; however, the Rehearing Order seeks to divine congressional intent based on the NGA definition of a “municipality” and by a brief discussion of a Supreme Court decision.<sup>137</sup>

The Supreme Court decision, *Northern Natural Gas Co. v. State Corp. Commission of Kansas*,<sup>138</sup> is clearly inapposite. There, the Court invalidated a state statute based on the finding that the statute invaded the exclusive jurisdiction which the NGA conferred on the FPC, the predecessor to the FERC. No such finding can be made here. As the *Northern Natural* Court stated, state regulation is subordinated to federal regulation “when Congress has so *plainly* occupied the

---

<sup>137</sup> Rehearing Order at P 16 & n.23, JA 113-114.

<sup>138</sup> 372 U.S. 84 (1963).

regulatory field.”<sup>139</sup> In making its ruling, the Court applied a criterion set forth in a prior Supreme Court decision.<sup>140</sup> The criterion, set forth in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.(Transco)*,<sup>141</sup> is as follows: “in a *borderline* case where congressional authority is *not explicit* we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.”<sup>142</sup>

The finding of *Northern Natural* obviously does not apply, as the NGA plainly states that municipalities are not subject to NGA jurisdiction.

The FERC’s decision in *Tennessee Gas* confirms the obvious validity of this conclusion. There, the FERC applied the *Transco* criterion *to reject the very position* set forth in the Rehearing Order—that it may assert jurisdiction over a municipality. As stressed in *Tennessee Gas*, this is not an instance of a borderline case where congressional authority is not explicit: “In this case, congressional authority is *explicit*. The NGA excludes municipalities from Commission jurisdiction.”<sup>143</sup>

---

<sup>139</sup> *Id.* at 93 (emphasis added).

<sup>140</sup> *Id.*

<sup>141</sup> 365 U.S. 1 (1961).

<sup>142</sup> *Id.* at 19-20 (emphasis added).

<sup>143</sup> *Tennessee Gas*, 69 FERC at p. 61,904 (emphasis added).

The recitation by the Rehearing Order of the NGA definition of “municipality” to seek to support its assertion of NGA jurisdiction is equally unavailing. There is nothing in that definition that addresses much less supports the assumption that states and municipalities cannot regulate transactions because gas leaves the state after such transactions take place.

- iv. The assertion of the Rehearing Order that NGA jurisdiction is required over municipal transactions to protect ultimate out-of-state consumers is inconsistent with fundamental precedent on NGA jurisdiction and makes no sense.

The assertion that the FERC must exercise NGA jurisdiction over a municipal transaction to protect an out-of-state ultimate consumer is inconsistent with “longstanding precedent” standing for the principle that “gas commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas, even though the gas in question leaves the interstate stream before it crosses any state border.”<sup>144</sup> In direct contravention of this precedent, the Rehearing Order reasons that NGA jurisdiction may be imposed on transactions on Clarksville’s municipal system where the gas thereafter leaves the state, while insulating the remainder of the Clarksville system and transactions from NGA jurisdiction where gas does not leave the state.<sup>145</sup> In other words, in a strained

---

<sup>144</sup> *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284-85 (D.C. Cir. 1994).

<sup>145</sup> Rehearing Order a P 20, JA 117-118.

attempt to exercise jurisdiction over a discrete municipal transaction, the FERC is attempting to make an artificial distinction about state borders that was discredited decades ago.

Against this backdrop, it is clear that the rationale of the rehearing order defies common sense. The *only* reason for the municipal exemption is to exclude municipalities that, *but for* the exemption, would be subject to NGA jurisdiction as sellers of gas for resale or transporters of gas in interstate commerce. Ultimate consumers (whether in-state or out-of-state) in any transaction properly subject to NGA jurisdiction would be beneficiaries of, and protected by, FERC regulation. Thus, if, contrary to the *Bonneville* decision and FERC decisions such as *Tennessee Gas*, one puts aside the status of a seller or transporter as a municipality, and focuses on ultimate consumers—as FERC here proposes— that rationale would apply to allow NGA jurisdiction covering all municipal interstate sales for resale and all transportation in interstate commerce— regardless of whether the particular gas molecules at issue actually cross a state border – thereby nullifying any application of the municipal exemption. Such a result further confirms the conclusion that the assertion of NGA jurisdiction over municipal transactions in the orders under review is untenable.

- B. Ancillary FERC rationales in response to Clarksville's Rehearing Request must be rejected.

In the Rehearing Order, the FERC sets forth ancillary rationales to support its exercise of NGA jurisdiction over municipalities as sellers or transporters of natural gas. For completeness, Clarksville here shows that such arguments are clearly without merit.

1. In its rehearing request, Clarksville noted that the *Intermountain* order stood for the limited proposition that NGA jurisdiction could apply to an entity that is a municipality only to the extent that it ceases to be a municipality, i.e., where it operates outside its state of incorporation.<sup>146</sup> The Rehearing Order sets forth two responses, both of which are clearly ill-founded.

First, the Rehearing Order attempts to distinguish *Intermountain* by arguing that the decision was limited to the question of whether the FERC could assert NGA jurisdiction over a pipeline that crosses a state boundary.<sup>147</sup>

Clarksville agrees entirely. That was the point of Clarksville's rehearing request. As noted, in *Intermountain* the FERC explicitly distinguished past decisions where the FERC ruled that it could not assert NGA jurisdiction over a municipality's activities precisely because such activities took place entirely within

---

<sup>146</sup> JA 102.

<sup>147</sup> Rehearing Order at P 19, JA 116-117.

its state—as is the case with Clarksville’s activities here. There was no suggestion in *Intermountain* that such past decisions were being overturned, and the fact that the FERC sought to distinguish them confirms that they were not overturned. In fact, after its *Intermountain* decision, the FERC has issued at least one order that references FERC precedent to continue to exempt municipalities as sellers or transporters from NGA jurisdiction.<sup>148</sup>

Second, the Rehearing Order noted that in *Intermountain* the FERC also referenced the discussion in *United Distribution Companies v. FERC*,<sup>149</sup> where this court (a) ruled that the FERC could require municipalities to comply with the agency’s regulations on capacity release, and (b) stated that this ruling should not be read as either approving or disapproving the FERC’s consistent position that municipalities are not subject to the NGA’s transportation jurisdiction.

This argument is obviously unpersuasive for several reasons. First, the fact that the court in *United Distribution* did not rule on whether there is NGA jurisdiction over a municipality as a gas seller or transporter offers no guidance on how this court should now rule on this issue. For all the reasons demonstrated above, the FERC’s interpretation of the NGA that it has such jurisdiction fails *Chevron* step one and in any event is not supported by reasoned decision-making.

---

<sup>148</sup> *Freebird*, 111 FERC ¶ 61,054 at P 4.

<sup>149</sup> 88 F.3d 1105, 1153-54 (D.C. Cir. 1996).

Next, while the *United Distribution* court declined to rule on the specific issue here involved—whether FERC may exercise NGA jurisdiction over municipalities as gas sellers or transporters—the FERC itself has ruled consistently until the orders under review that it has no such NGA jurisdiction, as previously demonstrated. As also demonstrated, the FERC in the orders under review fails to justify the departure from that established agency policy and precedent.

Third, the FERC has in fact issued decisions where it specifically ruled *both* that the FERC could require municipalities to comply with the capacity release regulations *and* that the FERC had no NGA jurisdiction to regulate municipalities as gas sellers or transporters. For example, in Order No. 636-B, the FERC ruled as follows:

While the Commission has no NGA jurisdiction over municipalities as gas sellers or transporters, the Commission has exclusive preemptive jurisdiction over access to interstate pipeline capacity. The Commission's authority over transportation by a pipeline under the NGA includes the eligibility criteria for becoming a shipper. The Commission sees this as no different from its authority to determine terms and conditions of service . . . .<sup>150</sup>

---

<sup>150</sup> 61 FERC at p. 62,003 (footnotes omitted); *see also* Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 at p. 30,551.

Subsequent to Order No. 636-B, in *Tennessee Gas* the FERC rejected emphatically the argument that its capacity release regulations provided any basis to impose jurisdiction to regulate a municipality as a gas seller or transporter:

[The] reliance on Order No. 636-B to justify Commission jurisdiction over [a municipality] to avoid a regulatory gap is misplaced. Order No. 636-B states that since the Commission requires capacity releases to be effected by and through interstate pipelines, a municipality must comply with the pipeline's capacity release mechanism just as it must comply with any other pipeline term or condition of service. This requirement *is in no way comparable* to requiring a municipality to obtain a section 7(c) certificate. Indeed, Order No. 636-B *plainly states* that the Commission has no NGA jurisdiction over municipalities as gas sellers or transporters.<sup>151</sup>

The lesson of those repeated FERC decisions is clear: The FERC's NGA authority to regulate the capacity and operations of a natural gas pipeline (a "natural gas company") does not provide any basis for the agency to regulate the capacity and operations of a municipality (an entity exempt from such NGA jurisdiction). The orders under review do not address much less dispute these rulings, and provide no basis for deviating from them.

2. In its rehearing request, Clarksville argued that the ruling of the Service Area Order that Clarksville would be required to obtain the blanket certificate authorization provided in Order No. 319 for certain types of

---

<sup>151</sup> *Tennessee Gas*, 69 FERC at p. 61,904 (footnote omitted; emphasis added).

transportation was, in fact, inconsistent with the ruling in Order No. 319 that such authorization was inapplicable to municipalities precisely because they were not subject to Section 7 NGA regulation.<sup>152</sup>

In response, the Rehearing Order does not dispute the clear ruling of Order No. 319, but notes a statement in that order that its ruling “does not preclude the possibility that the Commission may nevertheless assert its Natural Gas Act jurisdiction in other types of transactions.”<sup>153</sup> The Rehearing Order then cites the *North Carolina* decision as an example of the other type of transactions over which the FERC could assert NGA jurisdiction.<sup>154</sup>

The rationale of the Rehearing Order does not withstand even casual analysis. As noted previously, the ruling in Order No. 319 that the blanket certificate authorization did not apply to municipalities was based on its ruling that the agency had no authority under Section 7 to issue *any* certificates to a municipality. Thus, Order No. 319 cannot be read any way other than as ruling that the FERC has no NGA Section 7 jurisdiction over a municipality, the very jurisdiction it seeks to impose on Clarksville in the orders under review.

---

<sup>152</sup> JA 103-104.

<sup>153</sup> Rehearing Order at P 20 n.34, JA 117 (quoting Order No. 319, FERC Stats. & Regs. ¶ 30,477 at pp. 30,625-26 n.26).

<sup>154</sup> *Id.*

Notably, in its decision in *Tennessee Gas*, the FERC directly rejects the entirety of the very argument made in the Rehearing Order:

Alabama-Tennessee's reference to Order No. 319 is also unavailing. The Commission's statement in Order No. 319 regarding the possibility that it may assert NGA jurisdiction over municipalities "in other types of transactions" is in a footnote to the statement that the Commission cannot issue section 7(c) certificates to municipalities. Since the NGA authority that Alabama-Tennessee urges we exercise over Decatur [a municipality] is NGA section 7(c) authority, we fail to see how Order No. 319 advances Alabama-Tennessee's position. Further, in the footnote, the Commission cites [*North Carolina*] as an example of "other types of transactions" over which the Commission could possibly assert jurisdiction. As discussed above, that case addresses abandonment of certificated services and offers no support for Alabama-Tennessee's argument.<sup>155</sup>

The advancement by the Rehearing Order of the very argument that the FERC has rejected is yet another example of an unexplained departure by the orders under review of directly applicable precedent, and underscores why such orders must be vacated and remanded.

---

<sup>155</sup> *Tennessee Gas*, 69 FERC at p. 61,907 (quoting Order No. 319, FERC Stats. & Regs. ¶ 30,477 at pp. 30,621, 30,625 n.6 (footnotes omitted)).

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this court find that the FERC has no jurisdiction under the Natural Gas Act over Clarksville as a municipal wholeseller or transporter of natural gas in interstate commerce, and that the court vacate and remand the Service Area Order and the Rehearing Order to the extent that such orders are inconsistent with that finding.

Respectfully submitted,

/s/ Joshua L. Menter

James R. Choukas-Bradley

Joshua L. Menter.

Jeffrey K. Janicke

McCarter English, LLP

Twelfth Floor

1015 Fifteenth Street, N.W.

Washington, DC 20005

(202) 753-3438

jmenter@mccarter.com

*Attorneys for City of Clarksville, Tennessee*

October 25, 2016

**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,397 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Respectfully submitted,

*/s/ Joshua L. Menter*

James R. Choukas-Bradley

Joshua L. Menter

Jeffrey K. Janicke

McCarter & English, LLP

Twelfth Floor

1015 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 753-3438

jmenter@mccarter.com

*Attorneys for City of Clarksville,  
Tennessee*

October 25, 2016

**ADDENDUM A****Table of Contents***Natural Gas Act*

Section 2, 15 U.S.C. § 717a ..... A-1

Section 4, 15 U.S.C. § 717c ..... A-2

Section 5, 15 U.S.C. § 717d..... A-5

Section 7, 15 U.S.C. § 717f..... A-6

*Federal Power Act*

Section 3, 16 U.S.C. § 796 (excerpt)..... A-9

Section 201, 16 U.S.C. § 824.....A-10

*Regulations*

18 C.F.R. § 284.224.....A-13

18 C.F.R. § 284.402.....A-16

18 C.F.R. § 284.403.....A-17

## Natural Gas Act Section 2

### 15 U.S.C. § 717a. Definitions

When used in this Act, unless the context otherwise requires—

- (1) “Person” includes an individual or a corporation.
- (2) “Corporation” includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.
- (3) “Municipality” means a city, county, or other political subdivision or agency of a State.
- (4) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.
- (5) “Natural gas” means either natural gas unmixed, or any mixture of natural and artificial gas.
- (6) “Natural-gas company” means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
- (7) “Interstate commerce” means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.
- (8) “State commission” means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.
- (9) “Commission” and “Commissioner” means the Federal Power Commission, and a member thereof, respectively.
- (10) “Vehicular natural gas” means natural gas that is ultimately used as a fuel in a self-propelled vehicle.
- (11) “LNG terminal” includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—
  - (A) waterborne vessels used to deliver natural gas to or from any such facility;or
  - (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.

## Natural Gas Act Section 4

### 15 U.S.C. § 717c. Rates and charges

**(a) Just and reasonable rates and charges.** All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

**(b) Undue preferences and unreasonable rates and charges prohibited.** 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.

**(c) Filing of rates and charges with Commission; public inspection of schedules.** Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d) Changes in rates and charges; notice to Commission.** Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

**(e) Authority of Commission to hold hearings concerning new schedule of rates.** Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) New natural gas storage facilities.** (1) In exercising its authority under this Act or the Natural Gas Policy Act of 1978 (*15 U.S.C. 3301 et seq.*), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after the date of enactment of the Energy Policy Act of 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

## Natural Gas Act Section 5

### 15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

**(a) Decreases in rates.** Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract, affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

**(b) Costs of production and transportation.** The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

## Natural Gas Act Section 7

### 15 U.S.C. § 717f. Construction, extension, or abandonment of facilities

**(a) Extension or improvement of facilities on order of court; notice and hearing.** Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That 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.

**(b) Abandonment of facilities or services; approval of Commission.** No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

**(c) Certificate of public convenience and necessity.**

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and

without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

**(d) Application for certificate of public convenience and necessity.** Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

**(e) Granting of certificate of public convenience and necessity.** Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance [sic] of the certificate and to the exercise of the rights

granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

**(f) Determination of service area; jurisdiction of transportation to ultimate customers.**

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

**(g) Certificate of public convenience and necessity for service of area already being served.** Nothing contained in this section 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.

**(h) Right of eminent domain for construction of pipelines, etc.** When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$ 3,000.

### **Federal Power Act Section 3**

#### **16 U.S.C. § 796. Definitions**

The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) “public lands” means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include “reservations,” as hereinafter defined;

(2) “reservations” means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interest in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) “corporation” means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include “municipalities” as hereinafter defined;

(4) “person” means an individual or a corporation;

(5) “licensee” means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

(6) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) “municipality” means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

[Subsections (8) through (29) omitted.]

## **Federal Power Act Section 201**

### **16 U.S.C. § 824. Declaration of policy; application of Part**

**(a) Federal regulation of transmission and sale of electric energy.** It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

#### **(b) Use or sale of electric energy in interstate commerce.**

(1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding section 201(f) [subsec. (f) of this section], the provisions of sections 203(a)(2), 206(e), 210, 211, 211A, 212, 215A, 216, 217, 218, 219, 220, 221, and 222 [*16 USCS §§ 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v*] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [*16 USCS §§ 791a et seq.*] with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 203(a)(2), 206(e), 210, 211, 211A, 212, 215A, 216, 217, 218, 219, 220, 221, or 222 [*16 USCS § 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v*], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

**(c) Electric energy in interstate commerce.** For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

**(d) “Sale of electric energy at wholesale”.** The term “sale of electric energy at wholesale” when used in this Part means a sale of electric energy to any person for resale.

**(e) “Public utility” defined.** The term “public utility” when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215A, 216, 217, 218, 219, 220, 221, or 222).

**(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt.** No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (*7 U.S.C. 901* et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

**(g) Books and records.**

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission’s regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”, “holding company”, “subsidiary company”, and “exempt wholesale generator” shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

**18 C.F.R. § 284.224. Certain transportation and sales by local distribution companies.**

(a) *Applicability.* This section applies to local distribution companies served by interstate pipelines, including persons who are not subject to the jurisdiction of the Commission, by reason of section 1(c) of the Natural Gas Act.

(b) *Blanket certificate*—(1) Any local distribution company served by an interstate pipeline or any Hinshaw pipeline may apply for a blanket certificate under this section.

(2) Upon application for a certificate under this section, a hearing will be conducted under section 7(c) of the Natural Gas Act, §157.11 of this chapter, and subpart H of part 385 of this chapter.

(3) The Commission will grant a blanket certificate to such local distribution company or Hinshaw pipeline under this section, if required by the present or future public convenience and necessity. Such certificate will authorize the local distribution company to engage in the sale or transportation of natural gas that is subject to the Commission's jurisdiction under the Natural Gas Act, to the same extent that and in the same manner that intrastate pipelines are authorized to engage in such activities by subparts C and D of this part, except as otherwise provided in paragraph (e)(2) of this section.

(c) *Application procedure.* Applications for blanket certificates must be accompanied by the fee prescribed in §381.207 of this chapter or a petition for waiver pursuant to §381.106 of this chapter, and shall state:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation or otherwise; the state under the laws of which it is organized or authorized; the agency having jurisdiction over rates and tariffs; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed;

(2) The volumes of natural gas which:

(i) Were received during the most recent 12-month period by the applicant within or at the boundary of a state, and

(ii) Were exempt from the Natural Gas Act jurisdiction of the Commission by reason of section 1(c) of the Natural Gas Act, if any;

(3) The total volume of natural gas received by the applicant from all sources during the same time period;

(4) Citation to all currently valid declarations of exemption issued by the Commission under section 1(c) of the Natural Gas Act if any;

(5) A statement that the applicant will comply with the conditions in paragraph (e) of this section;

(6) A form of notice suitable for publication in the FEDERAL REGISTER, as contemplated by §157.9 of this chapter, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose; and

(7) A statement of the methodology to be used in calculating rates for services to be rendered, setting forth any elections under §284.123 or paragraph (e)(2) of this section and a sample calculation employing the methodology using current data. If a rate election is made under paragraph (e)(2) of this section, this statement shall contain the following items (reflecting the 12-month period used to justify costs in the most recently approved rate case conducted by an appropriate state regulatory agency):

(i) Total operating revenues,

(ii) Purchase gas costs,

(iii) Distribution costs (which include that portion of the common costs allocated to the distribution function),

(iv) The volume throughput of the system categorized by sales, transportation and exchange service, and

(v) A study which determines transportation costs on a unit revenue basis in accordance with paragraph (e)(2) of this section, including any supporting work papers.

(d) *Effect of certificate.* (1) Any certificate granted under this section will authorize the certificate holder to engage in transactions of the type authorized by subparts C and D of this part.

(2) Acceptance of a certificate or conduct of an activity authorized thereunder will:

(i) Not impair the continued validity of any exclusion under section 1(c) of the Natural Gas Act which may be applicable to the certificate holder, and

(ii) Not subject the certificate holder to the Natural Gas Act jurisdiction to the Commission except to the extent necessary to enforce the terms and conditions of the certificate.

(e) *General conditions.* (1) Except as provided in paragraph (e)(2) of this section, any transaction authorized under a blanket certificate is subject to the same rates and charges, terms and conditions, and reporting requirements that apply to a transaction authorized for an intrastate pipeline under subparts C and D of this part.

(2) *Rate election.* If the certificate holder does not have any existing rates on file with the appropriate state regulatory agency for city-gate service, the certificate holder may make the rate election specified in §284.123(b)(1) only if:

(i) The certificate holder's existing rates are approved by an appropriate state regulatory agency,

(ii) The rates and charges for any transportation are computed by using the portion of the certificate holder weighted average annual unit revenue (per MMBtu) generated by existing rates which is attributable to the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service), and

(iii) The Commission has approved the method for computing rates and charges specified in paragraph (e)(2)(ii) of this section.

(3) *Volumetric test.* The volumes of natural gas sold or assigned under the blanket certificate may not exceed the volumes obtained from sources other than interstate supplies.

(4) *Filings.* Any filings made with the Commission that report individual transactions shall reference the docket number of the proceeding in which the blanket certificate was granted.

(5) *Filing Requirements.* Filings under this section must comply with the requirements of §284.123 (f) of this part. The tariff filing requirements of Part 154 of this chapter shall not apply to transactions authorized by the blanket certificate.

(f) *Pregrant of abandonment.* Abandonment of transportation services or sales, pursuant to section 7(b) of the Natural Gas Act, is authorized upon the expiration of the contractual term of each individual arrangement authorized by a blanket certificate under this section.

(g) *Hinshaw pipeline without blanket certificate.* A Hinshaw pipeline that does not obtain a blanket certificate under this section is not authorized to sell or transport natural gas as an intrastate pipeline under subparts C and D of this part.

(h) *Definitions.* For the purposes of this section:

(1) A *Hinshaw pipeline* means any person engaged in the transportation of natural gas which is not subject to the jurisdiction of the Commission under the Natural Gas Act solely by reason of section 1(c) of the Natural Gas Act.

(2) *Interstate supplies* means any natural gas obtained, either directly or indirectly, from:

(i) The system supplies of an interstate pipeline, or

(ii) Natural gas reserves which were committed or dedicated to interstate commerce on November 8, 1978.

**18. C.F.R. § 284.402. Blanket marketing certificates.**

(a) *Authorization.* Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas Act jurisdiction. A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate.

(b) The authorization granted in paragraph (a) of this section will become effective on January 7, 1993 except as otherwise provided in paragraph (c) of this section.

(c)(1) The authorization granted in paragraph (a) of this section will become effective for an affiliated marketer with respect to transactions involving affiliated pipelines when an affiliated pipeline receives its blanket certificate pursuant to §284.284.

(2) Should a marketer be affiliated with more than one pipeline, the authorization granted in paragraph (a) of this section will not be effective for transactions involving other affiliated interstate pipelines until such other pipelines' meet the criterion set forth in paragraph (c)(1) of this section. The authorization granted in paragraph (a) of this section is not extended to affiliates of persons who transport gas in interstate commerce and who do not have a tariff on file with the Commission under part 284 of this subchapter with respect to transactions involving that person.

(d) Abandonment of the sales service authorized in paragraph (a) of this section is authorized pursuant to section 7(b) of the Natural Gas Act upon the expiration of the contractual term or upon termination of each individual sales arrangement.

**18. C.F.R. § 284.403. Code of conduct for persons holding blanket marketing certificates.**

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in §260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller shall adhere to any other standards and requirements for price reporting as the Commission may order.

(b) A blanket marketing certificate holder shall retain, for a period of five years, all data and information upon which it billed the prices it charged for the natural gas sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

**ADDENDUM B**

**Table of Contents**

Affidavit of Pat Hickey .....B-1

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

City of Clarksville, Tennessee,	)	
Petitioner	)	
	)	No. 16-1244
v.	)	
	)	
Federal Energy Regulatory Commission,	)	
Respondent	)	

**AFFIDAVIT OF PAT HICKEY**

PAT HICKEY, being duly sworn, deposes and says:

1. I, Pat Hickey, am the General Manager of Clarksville Gas & Water, an organization of the City of Clarksville, Tennessee (“Clarksville”). As General Manager, I have overall responsibility for the operation of Clarksville’s local natural gas distribution system and directly participate in the decisions of Clarksville to respond to requests to provide service that will have a significant effect on the operations and costs of the local gas distribution system. I was also one of the Clarksville employees principally responsible for the application of Clarksville for the authorization requested in Federal Energy Regulatory Commission (FERC) Docket No. CP13-508 and the orders that were issued in response to that application, which I shall refer to as the orders under review.
2. As set forth in the orders under review, Clarksville currently has a contract with the City of Guthrie, Kentucky (“Guthrie”). Pursuant to that contract,

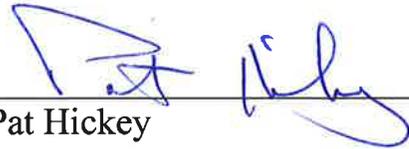
Clarksville is obligated to sell up to 1,000 Mcf of natural gas each day for delivery within the state of Tennessee. As noted in the orders under review, upon receipt of the gas, Guthrie transports the gas across the Tennessee/Kentucky border so that it can sell that gas on Guthrie's local distribution system in Kentucky to meet the needs of Guthrie's retail customers. The contract will terminate in June 2019.

3. Clarksville has received new requests for sales or transportation service on its local natural gas distribution service that, like its current arrangement with Guthrie, (i) will take place entirely on Clarksville's municipal system within the state of Tennessee but thereafter (ii) will require transportation of gas across the Tennessee/Kentucky border. Specifically, Clarksville has received a request from Oak Grove, Kentucky for Clarksville to sell or transport gas on Clarksville's municipal system. Clarksville has also received a request from Hopkinsville, Kentucky to sell or transport gas on Clarksville's municipal local distribution system. Should Clarksville provide the transaction requested by Oak Grove or Hopkinsville, there would need to be a subsequent transportation of gas across the Kentucky/Tennessee border to Oak Grove or Hopkinsville.

4. In response to each of these requests, Clarksville has refused to date to commit to providing service and, in doing so, stressed that a key consideration is whether providing such service will expose its municipal operations to FERC regulation under the Natural Gas Act (NGA). Such regulation would include the

requirement to prepare and support an application for NGA certificate authorization to proceed with the requested transactions. Moreover, the rates, terms and conditions for that service would also be subject to FERC regulation. The exposure to such regulation would also be a key consideration with respect to any Clarksville decision as to whether it would continue service to Guthrie upon expiration of its current contract with Guthrie.

Further Affiant sayeth not.

  
Pat Hickey

Sworn and subscribed before me this the  
19 day of October, 2016.

Sara A. Phillips  
Notary Public



My Commission Expires: 12/12/17

**ADDENDUM C**

**Table of Contents**

*Tennessee Gas Pipeline Co.,*  
69 FERC ¶ 61,239 (1994) .....C-1

*Tennessee Gas Pipeline Co.,*  
70 FERC ¶ 61,329 (1995) .....C-17

**[¶ 61,239]**

**Tennessee Gas Pipeline Company, Docket No. CP94-219-000  
Order Denying Protests and Authorizing Construction Under Blanket Certificate**

**(Issued November 18, 1994)**

**Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.**

On February 8, 1994, Tennessee Gas Pipeline Company (Tennessee) filed a prior notice application pursuant to section 7(c) of the Natural Gas Act (NGA) and sections 157.205 and 157.212 of the Commission's regulations<sup>1</sup> requesting authorization to establish a new delivery point for delivery of natural gas to Decatur Utilities, City of Decatur, Alabama (Decatur). On September 19, 1994, Tennessee filed a supplement to its application.

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), American Maize-Products Decatur Inc. (AM Decatur), Monsanto Company (Monsanto), and North Alabama Gas District (NAGD) and Tuscumbia Utilities, jointly, filed protests to Tennessee's application.<sup>2</sup> Tuscumbia Utilities subsequently withdrew its protest.

For the reasons discussed below, we will deny the protests and approve Tennessee's proposal to construct a sales tap for delivery of natural gas to Decatur.

With the exception of Tuscumbia, no party withdrew its protest within the 30-day reconciliation period provided in section 157.205(g) of the Commission's regulations. Therefore, by operation of section 157.105(g), we will treat Tennessee's prior notice requests as applications for specific authorization under NGA section 7(c). However, based upon our rejection of the protests, as discussed below, and in keeping with the Commission's policy of not granting case-specific authority where the applicant may perform the service under a blanket certificate, we will authorize Tennessee to construct

<sup>1</sup> 18 C.F.R. §§ 157.205 and 157.212 (1993).

<sup>2</sup> Monsanto states that if the Commission approves Alabama-Tennessee's pending application in Docket No. CP93-256-000 to bypass Decatur Utilities and directly serve Monsanto, it has no objections to Tennessee's prior notice request in this proceeding to

provide direct service to Decatur. Since we are authorizing Alabama-Tennessee's proposed construction in Docket No. CP93-256-000 in an order being issued simultaneously with this order, we will not address the arguments raised by Monsanto in its protest in this proceeding.

**FERC Reports**

**¶ 61,239**

and operate the sales taps under its Part 157 blanket certificate.

### I. Background

Decatur is a municipally-owned local distribution company (LDC) which provides natural gas sales and transportation service to residential, commercial, and industrial customers in the City of Decatur, Alabama, and the surrounding area. Decatur is not regulated by a state commission but by the Decatur City Council (City Council) which sets and approves Decatur's rates. Decatur receives firm and interruptible transportation service from Alabama-Tennessee and Tennessee, and firm storage service from Tennessee. Currently, Alabama-Tennessee is the only interstate pipeline directly connected to Decatur. All deliveries of gas to Decatur from Alabama-Tennessee's system are first transported over Tennessee's system since Alabama-Tennessee's system begins at points of interconnection with Tennessee. Thus, Tennessee's proposal would permit Decatur to bypass Alabama-Tennessee.<sup>3</sup>

On September 1, 1982, in Docket No. CP82-413-000, the Commission issued a blanket certificate to Tennessee authorizing it to perform the activities specified in subpart F of Part 157 of the Commission's regulations.<sup>4</sup> Under this blanket certificate, Tennessee is authorized, among other things, to add new delivery points for a customer<sup>5</sup> pursuant to the prior notice procedures of section 157.205 of the Commission's regulations.<sup>6</sup> In accordance with those requirements, Tennessee filed its requests to add a new delivery point. Under the notice procedures, Tennessee is authorized to conduct the proposed activity within 45 days after publication of notice of the proposed activity in the *Federal Register* if no protests to the request are filed.<sup>7</sup> If a protest is filed and not withdrawn within 30 days after the 45-day notice period, the prior notice request proceeds as an application under section 7(c) of the NGA.<sup>8</sup> Since only one of the protests was withdrawn, Tennessee's request will proceed as an application under section 7(c).

<sup>3</sup> The Commission notes that, contemporaneously with the instant order, the Commission is approving in a separate order Alabama-Tennessee's prior notice applications to construct and operate new sales taps for direct delivery of natural gas to three industrial end-users in Docket Nos. CP93-232-000, CP93-256-000 and CP93-275-000. The result will be Alabama-Tennessee's bypass of Decatur Utilities to serve these end-users.

<sup>4</sup> *Tennessee Gas Pipeline Co.*, 20 FERC ¶ 62,409 (1982).

<sup>5</sup> See 18 C.F.R. § 157.212 (1993).

¶ 61,239

### II. Proposal

Tennessee proposes to construct a new delivery point in order to deliver up to 24,000 Dekatherms (the maximum capacity of the meter) of natural gas per day to Decatur under one or more of Decatur Utilities' existing transportation contracts with Tennessee. The gas will be transported pursuant to Tennessee's Part 284 blanket certificate.

Tennessee proposes to install, own, operate and maintain a six-inch hot tap assembly and data acquisition and control equipment (DAC) at the new delivery point in Colbert County, Alabama. In its original application, Tennessee stated that the hot tap assembly would be constructed on its existing right-of-way at M.P. 522-2+6.09 and the DAC equipment will be located adjacent to its right-of-way on property provided by Decatur. However, in the supplement to its application, Tennessee requests to change the location of the proposed delivery point 370 feet northeast to M.P. 522-2+6.16. Tennessee states that Decatur informed it that this is necessary because Alabama-Tennessee purchased the one-acre site adjacent to Tennessee's right-of-way that Decatur intended to buy for use as a metering site for pipeline extension that Decatur will construct to receive gas directly from Tennessee's proposed delivery tap.<sup>9</sup>

Tennessee states that the estimated cost of the hot tap facilities is \$52,302, of which 100 percent will be reimbursed to Tennessee by Decatur. Further, states Tennessee, the addition of the requested delivery point will have no impact on Tennessee's peak day and annual deliveries and will be without detriment or disadvantage to Tennessee's other customers.

Tennessee states that Decatur will install, own, and maintain the interconnecting pipe and measurement facilities between Tennessee and Decatur.

In its protest, Alabama-Tennessee states that, in order to receive gas at the proposed delivery point, Decatur is proposing to construct approximately 37 miles of new mainline trunk facilities which would be operated at high pressure and which would extend from Tennessee's proposed tap near Barton, Ala-

<sup>6</sup> 18 C.F.R. § 205 (1993).

<sup>7</sup> 18 C.F.R. § 157.205(i) (1993).

<sup>8</sup> 18 C.F.R. § 157.205(g) (1993).

<sup>9</sup> Decatur Utilities also has informed Tennessee that Alabama-Tennessee also has purchased an additional 150 acres which give it control of all four corners where Tennessee's pipeline crosses U.S. Highway 20 and Alternate 72. Most of Decatur's planned system extension is to be installed in the rights-of-way for those two highways.

Federal Energy Guidelines

bama, to a point of interconnection with Decatur's system in Courtland, Alabama. There, these new facilities would connect with Decatur's existing 20-mile 10-inch-high-pressure pipeline which extends from Courtland to the Decatur municipal area. Together, these two segments of mainline trunk facilities would be used to deliver gas approximately 57 miles, from Barton to Courtland to the Decatur municipal area.

Decatur's governing body, the Municipal Utilities Board of the City of Decatur, recommended to the City Council of the City of Decatur that the Board be authorized to construct and operate the above-described extension to Decatur's facilities. The City Council approved the proposal on February 7, 1994.<sup>10</sup>

### III. Interventions

Notice of the application in Docket No. CP94-219-000 was published in the *Federal Register* on February 23, 1994 (59 Fed. Reg. 8612). Eleven parties filed timely motions to intervene.<sup>11</sup> Reynolds Metals Company (Reynolds) filed a motion to intervene out-of-time.

Timely, unopposed motions to intervene are granted by operation of rule 214 of the Commission's regulations.<sup>12</sup> rule 214(b) provides that an out-of-time motion to intervene must show good cause why the time limitation should be waived.<sup>13</sup> Reynolds states that it has good cause for failing to file on time, since it did not become apparent that it had an interest in the proceeding until after the due date for interventions had passed and other intervenors had included in their pleadings issues directly bearing on Reynolds. Since Reynolds has a direct interest in this proceeding and its participation will not delay the proceeding or prejudice the rights of any other party, we will grant its late motion to intervene for good cause shown.

Decatur and Reynolds filed answers to the protests and Alabama-Tennessee filed an answer to Decatur's answer. While our rules do not permit the filing of such pleadings,<sup>14</sup> we may, for good cause shown, waive a rule.<sup>15</sup> We find good cause in this instance, specifically to achieve a complete, accurate, and fully argued record. Accordingly, we will accept all plead-

ings tendered for filing in this proceeding, and grant all motions to achieve that end.

### IV. Environmental Issues

Alabama-Tennessee argues that, assuming the Commission finds Decatur's proposed extension to be non-jurisdictional, a sufficient nexus exists between the jurisdictional and the non-jurisdictional facilities at issue to warrant the Commission's full environmental review of Decatur's project in connection with any consideration of Tennessee's request.<sup>16</sup> AM-Decatur expresses concern that Tennessee's application fails to provide information to enable the Commission to determine whether there is sufficient federal control and responsibility over the project as a whole to warrant environmental analysis of the non-jurisdictional portions of the project. It further argues that, under the four-factor test adopted by the Commission in *Algonquin Gas Transmission Company (Algonquin)*,<sup>17</sup> the Commission is required to review the environmental impact of the Decatur bypass facilities in connection with any approval of Tennessee's request.

On September 19, 1994, Tennessee filed its response to the Commission's data request for environmental information on Decatur's proposed facilities. Based on that response, we find that, under the four-factor test, the Commission is not required to examine the environmental impact resulting from the construction of those facilities as discussed below.

The first *Algonquin* factor is whether the regulated activity comprises merely a link in a corridor-type project (e.g., a transportation or utility transmission project). Alabama-Tennessee argues that Tennessee's jurisdictional tap facilities would not be a mere link, but would be Decatur's gateway to and from Tennessee's entire interstate transportation system.

We find that Tennessee's proposed tap is "merely a link in a corridor-type project." The tap will connect Tennessee's pipeline to Decatur's proposed extension thus linking the two facilities. Alabama-Tennessee's argument that the tap is not a mere link because it would provide Decatur a "gateway" to Tennessee's system is without merit. The four *Algonquin* factors are only used to decide whether the

<sup>10</sup> See Decatur Resolution 94-015 in appendix A to Alabama-Tennessee's protest.

<sup>11</sup> Parties filing timely interventions are Alabama-Tennessee, AM Decatur, City of Florence Natural Gas Department, Decatur Utilities, Huntsville Utilities Natural Gas Department, Monsanto, Niagara Mohawk Power Corporation, Russellville Gas Board, Sheffield Utilities, Tennessee Valley Municipal Gas Association, and Tuscumbia Utilities.

<sup>12</sup> 18 C.F.R. § 385.214 (1993).

<sup>13</sup> 18 C.F.R. § 385.214(b)(3) (1993).

<sup>14</sup> 18 C.F.R. § 385.213(a)(2) (1993).

<sup>15</sup> 18 C.F.R. § 385.101(e) (1993).

<sup>16</sup> Citing *Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,233, at p. 61,934 (1992) (citing *Henry v. FPC*, 513 F.2d 395 (D.C. Cir. 1975)).

<sup>17</sup> 59 FERC ¶ 61,255 (1992).

Commission must examine the environmental impact of non-jurisdictional facilities, not whether those facilities would affect access to the interstate transportation system.

The second *Algonquin* factor is whether there are aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity which affect the configuration and location of the regulated activity. Alabama-Tennessee submits that Decatur's routing options are limited due to its lack of the power of eminent domain outside Decatur's city limits. Instead, Decatur must secure a right-of-way by negotiating the necessary easements for its proposed pipeline. As a result, the location of Decatur's non-jurisdictional facilities would dictate the location of the Tennessee tap.

There is nothing about the design of Tennessee's delivery point that has been uniquely influenced by the location of Decatur's facilities. The location of the delivery point could be at any point along Tennessee's system in this area. This fact is supported by the change in the proposed tap location between the original prior notice filing and Tennessee's supplement. Nor are there any particular aspects of the design or construction of Decatur's facilities that have any relevant impact on the location of the tap. The fact that the tap will be located at a point on the system most convenient for connection with the Decatur facilities is a logical aspect of the proposal, but does not establish a federal control that would justify environmental review of the non-jurisdictional facilities.

The third *Algonquin* factor is the extent to which the entire project will be within Commission jurisdiction. Alabama-Tennessee argues that these facilities will enable Decatur to obtain greater control of interstate capacity that is subject to the Commission's jurisdiction.

Since the project consists of Decatur's 37-mile non-jurisdictional extension and Tennessee's single delivery point, we find that the proposal does not meet the third *Algonquin* factor. Alabama-Tennessee's argument addresses its concern that Decatur will control interstate capacity without Commission jurisdiction. We disagree that Decatur will be gaining greater control of interstate capacity through its extension. Decatur will be merely receiving directly the service from Tennessee that it currently receives indirectly through Alabama-Tennessee.

The fourth *Algonquin* factor is the extent of cumulative federal control and responsibility

over the project. Alabama-Tennessee states that since Decatur's proposed pipeline would cross at least five streams,<sup>18</sup> it will be required to obtain crossing permits from the United States Army Corps of Engineers (COE) for each of the streams and permits and rights-of-way from the Tennessee Valley Authority (TVA) for three of the five streams which cross TVA land.<sup>19</sup> Alabama-Tennessee argues that the extensive compliance process required to obtain a permits and rights-of-way from the TVA coupled with the process required to acquire crossing permits from the COE amount to the kind of cumulative federal control contemplated in *Algonquin*.

We find that the required approvals/permits from the TVA and the COE do not amount to significant federal control over Decatur's project. Further, Alabama-Tennessee's argument that the TVA's and COE's compliance processes magnify the federal control is without merit. The stream crossings are a minor portion of the 37-mile project. Whether these federal agencies' compliance processes are extensive does not extend their control beyond the stream crossings.

Alabama-Tennessee asserts that the Commission has stated that the four *Algonquin* factors are to be applied flexibly on a case-by-case basis and are subject to being modified as additional field experience develops.<sup>20</sup> It maintains that the facts of this case strongly argue for the adoption of an additional factor: "whether the construction and operation of extensive, allegedly non-jurisdictional mainline facilities which will be operated at high-pressure will escape any comprehensive environmental review by any governmental agency, state or federal, in the event the Commission declines to review the environmental issues connected with these facilities."<sup>21</sup> Alabama-Tennessee maintains that, since Decatur is not regulated by either the Commission or the State of Alabama, it is very likely that the proposed facilities' construction would escape any meaningful environmental review other than in connection with the stream crossings, if the Commission declines to undertake such a review.

Decatur states that two Alabama agencies—the Department of Environmental Management and the Alabama Public Service Commission—have permitting authority over the environmental aspects of Decatur's project. Therefore, Alabama-Tennessee's concerns are moot.

<sup>18</sup> Those streams are Cane Creek, Little Bear Creek, Dry Creek, Town Creek and Big Mance Creek.

<sup>19</sup> The streams subject to TVA authorization are Cane Creek, Little Bear Creek and Dry Creek.

<sup>20</sup> *Algonquin*, 59 FERC at p. 61,934.

<sup>21</sup> Alabama-Tennessee's protest at p. 42.

Based on the above application of our four-factor procedure for determining the need to include non-jurisdictional facilities in our environmental review, we have determined that Decatur's non-jurisdictional facilities are not subject to our review.

An environmental assessment (EA) was prepared for Tennessee's proposal. The EA addresses cultural resources, federally listed threatened and endangered species, soil, land use, wetlands and waterbodies, and alternatives.

Based on the discussion in the EA, we conclude that, if constructed in accordance with Tennessee's application and supplement, approval of this project would not constitute a major federal action significantly affecting the quality of the human environment.

Finally, we note that any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction of facilities approved by this Commission.<sup>22</sup>

#### V. Discussion

In their protests, the parties argue that (1) Tennessee's application is incomplete, (2) its request is a legal nullity, (3) Decatur's facilities are duplicative, (4) the Commission has jurisdiction over Decatur's facilities, and (5) the Commission must conduct a full environmental review of Decatur's facilities. We have discussed the environmental issues above. We will address each of the other issues below.

##### A. Whether Tennessee's Application Is Incomplete

Alabama-Tennessee argues that, as a matter of law, Tennessee's request cannot be approved because it is incomplete in several ways. First, Alabama-Tennessee states that Tennessee's request contains no information regarding Decatur's bypass facilities. As a result, the Commission cannot evaluate all factors bearing on the public interest as required under NGA section 7. Second, Alabama-Tennessee submits that Tennessee has not complied with section 157.205(b)(6) of the Commission's regulations, which requires (1) Tennessee's request to in-

clude the identities and docket numbers of any related applications and (2) the filing of all related applications within 10 days of the first filing to avoid rejection of the applications on file.<sup>23</sup> Further, Alabama-Tennessee asserts, this lack prevents the Commission from fulfilling its obligation under the National Environmental Policy Act (NEPA) which requires that all related applications supporting a given proposal be filed concurrently. Finally, Alabama-Tennessee states, Tennessee's request does not describe the end-use of the gas as required under section 157.212(b)(3) of the Commission's regulations.

##### Commission Response

We do not find Tennessee's application to be incomplete or in noncompliance with sections 157.205(b)(6) or 157.212(b)(3). As discussed below, Decatur is a municipality and thus not a person under the NGA. Therefore, we have no authority to grant a certificate of public convenience and necessity to Decatur and Decatur is not required to file an application with the Commission for a certificate. Tennessee has not failed to comply with section 157.205(b)(6) because there are no related applications in this proceeding. In response to Alabama-Tennessee's concern regarding the end-use of the gas, Decatur states that it does not intend to serve Reynolds, one of Alabama-Tennessee's customers, through its proposed extension and that the facilities are intended solely for use by Decatur's local distribution system. We have addressed above Alabama-Tennessee's arguments relative to NEPA in our discussion of the other environmental issues raised by Alabama-Tennessee.

##### B. Whether Tennessee's Request Is a Nullity Under Alabama Law

Alabama-Tennessee argues that Tennessee's request is a nullity as a matter of law because Alabama law does not authorize Decatur (1) to construct and operate high-pressure natural gas pipeline facilities approximately 57 miles outside its corporate limits or (2) to exercise any right of eminent domain to obtain the necessary rights-of-way for its facilities.<sup>24</sup> Alabama-Tennessee also maintains that Decatur has not secured the rights to locate its pipeline along the public road rights-of-way as it intends, and to Alabama-Tennessee's knowledge, Decatur has not negotiated for the rights-of-way that may be necessary. Since Tennessee's request relates to facilities that Decatur cannot lawfully construct and operate under state law,

<sup>22</sup> See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1989); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

<sup>23</sup> 18 C.F.R. § 157.205(b)(6).

<sup>24</sup> Alabama-Tennessee states that, to the best of its knowledge, Decatur Utilities has not obtained through negotiation the easements necessary for its project.

61,900 asserts Alabama-Tennessee, the Commission cannot approve Tennessee's tap.

Decatur responds that Alabama law does not prohibit Decatur's proposed construction. Further, Decatur points out that it once before extended its system approximately 20 miles to its present terminus.

Decatur also states that its local counsel has determined that, under Alabama statutory and case law, the City of Decatur may exercise its power of eminent domain outside its city limits for the purpose of constructing and maintaining a gas transmission line. Alabama-Tennessee responds that its counsel has determined that the single case cited by Decatur, *Ex Parte City of Bessemer*,<sup>25</sup> is inapposite with respect to Decatur's position that it may exercise a right of eminent domain beyond its city limits.<sup>26</sup> Alabama-Tennessee's counsel cites an Alabama Supreme Court case, *Coden Beach Marine, Inc. v. City of Bayou La Batre*,<sup>27</sup> which finds that, under the Alabama Code, a municipality may exercise a right of eminent domain outside its municipal boundaries for three enumerated purposes.<sup>28</sup>

Both Decatur and Alabama-Tennessee agree that an Alabama state court, and not the Commission, is the appropriate forum in which to decide a dispute over the proper interpretation of Alabama law. However, Alabama-Tennessee asserts that to the extent there are genuine questions of Alabama law in connection with Decatur's ability to proceed with its project, such as the power of eminent domain, the Commission should hold in abeyance its consideration of Tennessee's proposal until the matters of Alabama law are resolved.

#### Commission Response

We agree with the parties that an Alabama state court is the appropriate forum in which to decide a dispute over the interpretation of Alabama law. However, we do not agree that the Commission must hold in abeyance its decision regarding Tennessee's request until such a dispute is resolved. Whether Decatur possesses the power of eminent domain for purposes of its proposed extension is not relevant to our decision here. In more typical bypass cases, inter-

state pipelines seek to bypass LDCs to directly serve the LDCs' end-user customers. The end-users often must build facilities to make possible the interconnection with the interstate pipelines. There is no question that these end-users must obtain any required right-of-way without the power of eminent domain. We have never denied a bypass request on the grounds that the beneficiary of the bypass lacked the power of eminent domain. The fact that Decatur is a governmental entity whose power of eminent domain is in question does not alter our analysis. We see no reason to treat Decatur any differently from the end-users in the more typical bypass situation.

We note that Decatur has received approval from the Alabama Department of Transportation to construct the pipeline on the relevant state highway rights-of-way which comprises the major portion of the 37 miles of pipeline.

#### C. Whether Decatur's Facilities Are Duplicative

In its protest, NAGD asserts that the Commission must examine the effects which duplicative facilities may have on ratepayers and make certain that the cost will not be passed on to customers.<sup>29</sup> AM-Decatur also is concerned that Decatur's proposed facilities may unnecessarily duplicate Alabama-Tennessee's interstate facilities. AM-Decatur, currently a captive customer of Decatur, argues that this is particularly problematic given that the facilities consist of 37 miles of pipeline and that the \$6 million cost of construction will be passed through to captive customers.

#### Commission Response

The Commission has recognized that, in every case of bypass, some duplication of facilities may occur.<sup>30</sup> Further, the Commission has approved duplicate facilities where, as here, they serve to promote the Commission's pro-competition policies.<sup>31</sup> First, we note that in Docket No. CP92-232-000, *et al*, we are denying Decatur's protests to Alabama-Tennessee's proposals to bypass Decatur and directly serve three of Decatur's industrial end-user customers. Decatur's proposal is a legitimate market-induced response to Alabama-Tennessee's com-

<sup>25</sup> 197 So. 20 (Ala. 1940).

<sup>26</sup> See Memorandum to Marvin T. Griff attached to Alabama-Tennessee's June 9, 1994 response.

<sup>27</sup> 228 So. 2d 468 (Ala. 1969).

<sup>28</sup> The enumerated purposes are to obtain a water supply, to provide sewerage or drainage, and to change the grade of any street, sidewalk or public place. Alabama-Tennessee also cites two cases in which an Alabama municipality sought to condemn land outside its corporate limits for a purpose that was not enumerated in the statute. In each case, the court held that the municipality did not have the

power to condemn the land. See *City of Birmingham v. Brown*, 2 So.2d 305, 309 (Ala. 1941), and *City of Huntsville v. Brown*, 611 So. 2d 372 (Ala. Civ. App. 1992).

<sup>29</sup> Citing *Kansas Power and Light Company v. FERC*, 891 F.2d 939 (D.C. Cir. 1989).

<sup>30</sup> *Panhandle Eastern Pipe Line Co.*, 52 FERC ¶ 61,048, at p. 61,216 (1990).

<sup>31</sup> *Northwest Pipeline Corp.*, 53 FERC ¶ 61,130, at pp. 61,447-448 (1991), and *Southern Natural Gas Co.*, 51 FERC ¶ 61,186, at pp. 61,507-508 (1990).

petitive actions. Decatur is aggressively pursuing alternatives to its exclusive reliance on Alabama-Tennessee's service to reduce its customers' gas costs. We believe that such competition ultimately benefits natural gas consumers by resulting in improved services at lower costs, the desired goal of the Commission's policies.

NAGD submits that under *Kansas Power and Light*, we must take into consideration the effect of the bypass on Decatur's ratepayers. In the usual bypass case, the end-user rather than the interstate pipeline pays for the necessary facilities. Therefore, the costs of the bypass are not shifted to the pipeline's ratepayers and thus meet the concerns of the court in *Kansas Power and Light*. Further, the pipeline is benefiting an individual end-user who expects to lower its gas costs through the bypass. The pipeline's remaining customers receive no benefit from the bypass and thus should not be burdened with its costs. In this case, Decatur, a not-for-profit municipally-owned LDC, is paying for its facilities and any unmitigated costs may be passed through to its ratepayers since there are no shareholders to bear the costs. However, unlike the usual bypass case, it is Decatur's ratepayers who will ultimately benefit from the bypass. Decatur seeks to bypass Alabama-Tennessee not to gain new direct customers and increase profits as pipelines do in the typical bypass case, but to lower its gas costs to benefit its customers. Under these circumstances, we do not find that *Kansas Power and Light* requires the Commission to deny Tennessee's request to bypass Alabama-Tennessee. Further, this is Decatur's business decision to secure a direct source of transportation service even though that choice means that it will have to pay for duplicate facilities. The Commission is reluctant to second-guess this business decision.

We do not find that Decatur's facilities will constitute wasteful duplication. The new facilities will allow Decatur to take advantage of the competitive opportunity to obtain gas at lower costs. It will no longer be required to pay Alabama-Tennessee for transportation between Tennessee and its facilities. Finally, the effect of the costs of Decatur's facilities on its ratepayers is an issue for the Decatur City Council to address. We have previously stated our belief that the state commission may take a number of steps to mitigate against any adverse effects of a bypass.<sup>32</sup> Since the City Council

regulates Decatur's rates, it is the appropriate agency to address the issue.

#### D. Whether the Commission Has Jurisdiction over Decatur's Proposed Facilities

Alabama-Tennessee argues that the Commission has primary and exclusive jurisdiction over the construction and operation of Decatur's proposed project. Alabama-Tennessee does not suggest that the Commission assert jurisdiction over Decatur's traditional distribution activities but over the construction and operation of high-pressure mainline facilities extending well outside Decatur's corporate limits especially where these facilities would be used to serve customers as distant as Reynolds. Decatur argues that it is exempt from Commission jurisdiction as a local distribution company, a Hinshaw pipeline and a municipality. We will address each of these issues below.

##### 1. Whether Decatur's Proposal Constitutes the Local Distribution of Natural Gas Under Section 1(b) of the NGA

We begin with the statute. Section 1(b) of the NGA states:

The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.<sup>33</sup>

Alabama-Tennessee states that Decatur's project consists of the construction and operation of high-pressure trunklines to deliver gas moving in interstate commerce from Tennessee's pipeline system to Decatur' municipal service area. Alabama-Tennessee submits that, as such, the project fits squarely within the Commission's jurisdiction under NGA section 1(b).<sup>34</sup> On the other hand, Decatur argues that its plans are shielded from our jurisdiction by section 1(b)'s clear and unambiguous exemption for the local distribution of gas and the facilities used for such distribution.

Decatur asserts that Congress expressly intended that the intrastate facilities of an LDC used for the local distribution of gas to its system customers would be exempt from the Commission's jurisdiction. Decatur submits that the legislative history of the NGA is ex-

<sup>32</sup> 48 FERC ¶ 61,232, at p. 61,829 (1989).

<sup>33</sup> 15 U.S.C. § 717(b).

<sup>34</sup> 15 U.S.C. § 717(b).

61,902 61,909 FERC ¶ 11,111

695 12-1394

plitic that the Commission was given no power over the local distribution of natural gas:

[D]istribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.<sup>35</sup>

Accordingly, argues Decatur, as a local distributor of gas it is exempt from the Commission's NGA rate-setting and certificate jurisdiction.

Alabama-Tennessee argues that, under *FPC v. East Ohio Gas Company (East Ohio)*,<sup>36</sup> Decatur's proposed service does not qualify as local distribution exempt from Commission jurisdiction under section 1(b) because it will be transporting gas through high-pressure transmission lines.<sup>37</sup> Alabama-Tennessee points to the Commission's recent holding regarding its section 1(b) jurisdiction in *Mojave Pipeline Company (Mojave)*.<sup>38</sup>

#### Commission Response

In *Mojave*, citing *FPC v. East Ohio Gas Company (East Ohio)*, the Commission stated:

The Commission's jurisdiction extends over the transportation of gas in interstate commerce through high-pressure transmission lines, and that distribution does not begin until the point where pressure is reduced and the gas enters into local mains. The Court [in *East Ohio*] stated that "[w]hat Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among customers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains."<sup>39</sup>

Since Decatur's proposed facilities will transport gas in interstate commerce through high-pressure transmission lines to its local mains, it appears that, under *East Ohio*, the facilities do not qualify as local distribution exempt from Commission jurisdiction under NGA section 1(b).

<sup>35</sup> H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937).

<sup>36</sup> 338 U.S. 464 (1950).

<sup>37</sup> Alabama-Tennessee, in its protest, had a second point to this argument. It argued that Decatur Utilities plans to serve Alabama-Tennessee's largest customer, Reynolds, located approximately 50 miles west of Decatur's corporate limits, through its proposed extension. However, we will not address this point because Decatur Utilities and Reynolds state that their negotiations regarding a joint project did not come to fruition and that Decatur Utilities neither plans nor intends to serve Reynolds with the facilities it will construct.

¶ 61,239

2. Whether Decatur's Proposed Facilities Qualify as a Hinshaw Pipeline Under Section 1(c) of the NGA

We begin with the statute. NGA section 1(c) exempts from Commission jurisdiction:

any person . . . engaged in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed with such State, or . . . any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.<sup>40</sup>

Decatur emphasizes that Congress responded to the narrow holding of *East Ohio* by enacting section 1(c) of the NGA, the Hinshaw amendment. Therefore, Decatur implies, its high-pressure pipeline does not preclude its exemption from Commission jurisdiction because it qualifies as a Hinshaw pipeline.

Alabama-Tennessee responds that Decatur's analysis ignores Commission precedent which rejects the specific argument that local regulation by a city council equates to regulation by a "state commission" for NGA section 1(c) purposes.<sup>41</sup> Furthermore, Alabama-Tennessee maintains, assuming *arguendo* that regulation by the Decatur City Council can satisfy the state commission requirement on a definitional level, it cannot on a substantive level. This is so, Alabama-Tennessee submits, because the Commission has established that the state commission's regulation must be "as complete as the Commission's" to qualify a pipeline for exemption from the Commission's jurisdiction under section 1(c).<sup>42</sup> Alabama-Tennessee asserts that the Decatur City Council does not engage in any environmental oversight approximating that of the Commission on the Alabama Public Service Commission. Further, Alabama-Tennessee states, the Decatur City Council has set rates which, among other things, include charging for costs unrelated to natural gas service.

<sup>38</sup> 66 FERC ¶ 61,194 (1994).

<sup>39</sup> *Mojave*, 66 FERC at p. 61,435 (quoting *FPC v. East Ohio Gas Co.*, 338 U.S. 464, at pp. 469-70 (1950)).

<sup>40</sup> 15 U.S.C. § 717(c).

<sup>41</sup> See *Midcoast Ventures*, 61 FERC ¶ 61,029 (1992); see also *Midcoast Ventures, Order Disclaiming Jurisdiction*, 66 FERC ¶ 61,285 (1994).

<sup>42</sup> Citing *Commonwealth Gas Pipeline Corp.*, 28 FERC ¶ 61,223, at pp. 61,416-417 (1984).

Federal Energy Guidelines

*Commission Response*

Contrary to Alabama-Tennessee's claim, *Midcoast Ventures I* does not determine that regulation by a city council can not satisfy the requirements of section 1(c).<sup>43</sup> Rather, the Commission found that the facilities at issue were not regulated by state or local authorities and therefore were subject to Commission jurisdiction.<sup>44</sup> However, that does not support Decatur's claim that it qualifies as a Hinshaw pipeline. Section 1(c) of the NGA exempts "persons" from Commission jurisdiction if they meet the other requirements of section 1(c). Since Decatur is not a "person" under the NGA, as discussed below, it does not qualify for a Hinshaw exemption. Nevertheless, as discussed more fully below, the Commission has found that a municipality can transport and sell gas to interstate commerce without a section 7(c) certificate.<sup>45</sup>

### 3. Whether the Commission Can Assert Jurisdiction over Decatur or its Facilities Despite its Exemption as a Municipality Under NGA Section 2

Alabama-Tennessee urges the Commission to require Decatur to obtain an NGA section 7(c) certificate in order to construct its facilities. Section 7(c) of the NGA provides, in part, that:

No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission.<sup>46</sup>

Section 2(6) of the NGA defines "natural-gas company" as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." section 2(1) of the NGA defines "person" to include an "individual" or "corporation." Section 2(3) defines "municipality" as a "city, county, or other political subdivision or agency of a state" and section 2(2) excludes "municipalities" from the definition of "corporation." Therefore, since a municipality is not an individual and cannot be a corporation under NGA section 2, it cannot be a

person and thus cannot be a natural-gas company subject to the Commission's NGA jurisdiction.

Alabama-Tennessee argues that, notwithstanding the fact that Decatur cannot be a natural gas company, the Commission nevertheless can assert jurisdiction over Decatur's activities in interstate commerce. Alabama-Tennessee's argument against Decatur's claim of exemption based on its status as a municipality is four-pronged. First, Alabama-Tennessee argues that absent Commission jurisdiction there will be a regulatory gap creating access to interstate capacity without federal or state commission review. Second, Alabama-Tennessee argues that the "in connection with" language of NGA sections 4 and 5 empower the Commission to exercise jurisdiction over Decatur's proposed facilities. Third, Alabama-Tennessee argues that under the NGA the Commission's jurisdiction to the transportation of natural gas in interstate commerce can be applied separately from the Commission's jurisdiction over natural gas companies. Fourth, Alabama-Tennessee asserts that the Commission has recognized that a municipality is not exempt from NGA jurisdiction in all instances.

#### a. Regulatory Gap

Alabama-Tennessee submits that, in Order No. 636-B, the Commission would not exempt municipalities from the requirements of the capacity release mechanism because to do so "would create a regulatory gap that would frustrate the non-discrimination feature of Order No. 636."<sup>47</sup> The Commission, Alabama-Tennessee states, also found that a municipality's exemption from NGA jurisdiction is irrelevant to the Commission's plenary authority under the NGA over access to interstate pipeline capacity.<sup>48</sup> Further, the Commission stated that since most municipalities are not subject to state commission authority, to allow municipalities to release capacity without restriction would create a class of shipper controlling access to interstate capacity without federal or state commission review.<sup>49</sup>

Alabama-Tennessee argues that the reasons for regulating Decatur's activities in this case are even more compelling than in the case of capacity releasing. Alabama-Tennessee asserts that Decatur's project poses a threat to the

<sup>43</sup> *Id.* at p. 61,159.

<sup>44</sup> *Midcoast Ventures I*, 61 FERC ¶ 61,029, at p. 61,159 (1992) (note that the State Corporation Commission of the State of Kansas subsequently asserted jurisdiction over the facilities at issue so that they qualified as a Hinshaw pipeline; see *Midcoast Ventures I*, 66 FERC ¶ 61,285, at p. 61,813 (1994).

<sup>45</sup> See Order No. 319, *Sales and Transportation by Interstate Pipelines and Distributors; Expansion*

*of Categories of Activities Authorized Under Blanket Certificate, FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,477 at p. 30,621, 48 Fed. Reg. 34875 (August 1, 1983).

<sup>46</sup> 15 U.S.C. 717(f).

<sup>47</sup> Order No. 636-B at p. 62,003.

<sup>48</sup> Order No. 636-B, 61 FERC at p. 62,003.

<sup>49</sup> *Id.*

Commission's future ability to oversee the regulation of the interstate gas market under the NGA. Alabama-Tennessee states that the Commission's primary aim in adopting Order No. 636 is to improve the competitive structure of the natural gas industry and at the same time maintain an adequate and reliable service.<sup>50</sup> It argues that Decatur's control over 24,000 MMBtus per day of firm capacity on Tennessee<sup>51</sup> multiplies Decatur's opportunities to discriminate and create undue preferences in favor of its own interstate transportation and sales at the expense of the procompetitive purposes of Order No. 636 and the consumer protection mandate of the NGA.

Moreover, argues Alabama-Tennessee, this threat is not an isolated problem. It contends that municipalities throughout the country, including Alabama-Tennessee's 15 other self-regulated municipal distribution customers, could be expected to initiate similar bypass projects thereby further eroding the Commission's jurisdiction over, and competition in, the interstate gas market.

AM-Decatur is concerned that as a captive customer of Decatur, without close scrutiny of the entire project under section 7(c), AM-Decatur would be forced to shoulder a disproportionate and unnecessary economic burden as a result of Decatur's significant expansion.

NAGD argues that where a regulatory gap would result if the Commission ignores local concerns, the public convenience and necessity standard of NGA section 7 requires the Commission to consider those local concerns.<sup>52</sup> Therefore, it argues, the Commission is obligated to examine whether the loss of Reynolds as a customer would have an impermissible negative impact on NAGD.

Decatur states that if there is a regulatory gap, it was intended by Congress' explicit exemption of local distribution from the Commission's jurisdiction. Further, Decatur states that the Commission's exclusive federal jurisdiction over access to interstate pipeline capacity, and thus over releasing such capacity, is not implicated in any way by Tennessee's application. Decatur maintains that Tennessee's application involves nothing more than a change of delivery point for an existing transportation service to an existing customer, as permitted by section 4.7 of Tennessee's FERC Gas Tariff.

<sup>50</sup> Order No. 636 at p. 30,393.

<sup>51</sup> Alabama-Tennessee states that between Tennessee's Cosmic Settlement and Alabama-Tennessee's restructuring proceeding, Decatur Utilities acquired the rights to 24,000 MMBtus per day of firm capacity on Tennessee formerly held by Alabama-Tennessee.

<sup>52</sup> Citing *FPC v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961).

#### Commission Response

In *FPC v. Transcontinental Gas Pipeline*, the court stated that "in a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."<sup>53</sup> In this case, congressional authority is explicit. The NGA excludes municipalities from Commission jurisdiction. Further, the fact that Alabama has not chosen to subject municipalities to its regulation does not mean that it cannot. The state can regulate Decatur's proposed extension if it chooses to do so. In other words, there is no regulatory gap because the state could regulate Decatur effectively if it so chooses.

Alabama-Tennessee's reliance on Order No. 636-B to justify Commission jurisdiction over Decatur to avoid a regulatory gap is misplaced. Order No. 636-B states that since the Commission requires capacity releases to be effected by and through interstate pipelines, a municipality must comply with the pipeline's capacity release mechanism just as it must comply with any other pipeline term or condition of service.<sup>54</sup> This requirement is in no way comparable to requiring a municipality to obtain a section 7(c) certificate. Indeed, Order No. 636-B plainly states that the Commission has no NGA jurisdiction over municipalities as gas sellers or transporters.<sup>55</sup>

Alabama-Tennessee's argument that Decatur's bypass is anticompetitive is without merit. We have found above that Decatur's proposal is a legitimate market-induced response to Alabama-Tennessee's competitive actions. Our bypass policy assumes that an LDC will not passively stand by while its industrial customers one by one seek a lower delivered cost of gas elsewhere. Decatur's proposal is consistent with our assumption. Decatur is aggressively pursuing alternatives to its exclusive reliance on Alabama-Tennessee's service to reduce its customers' gas costs. The Commission has previously stated that it is not willing to shield LDCs from the effects of competitive forces because it believes that in the final analysis, all consumers will benefit from the Commission's pro-competitive policies.<sup>56</sup> Similarly, we are not willing to protect interstate pipelines from competition. Further, Alabama-Tennessee

<sup>53</sup> *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 at pp. 19-20 (1960).

<sup>54</sup> Order No. 636-B, 62 FERC at p. 62,003.

<sup>55</sup> Order No. 636-B, 62 FERC at p. 62,003.

<sup>56</sup> *Northwest Pipeline Corp.*, 54 FERC ¶ 61,191, at p. 61,574 (1991).

nessee, like all market participants, is accountable for the success or failure of its market participation.<sup>57</sup> We find that, in this case, Decatur's bypass promotes competition in the interstate gas market.

We dismiss as speculative Alabama-Tennessee's assertion that municipalities throughout the country could initiate similar bypasses of interstate pipelines. Similarly, its statements regarding possible undue discrimination by Decatur in favor of its own transportation and sales are equally speculative. Decatur's only use of its proposed extension will be to connect its local distribution system more directly to its source of gas. Thus, the proposed extension would create no more opportunities than currently exist for Decatur to discriminate. As Alabama-Tennessee has alleged no actual discrimination by Decatur, we find this argument to be without merit.

AM-Decatur's concerns should be alleviated because the Commission is granting Alabama-Tennessee's request in Docket No. CP93-232-000 to bypass Decatur. Thus, AM-Decatur will no longer be a captive customer. Further, since Decatur and Reynolds state that Decatur will not be serving Reynolds, NAGD's concerns regarding the loss of Reynolds as a customer are moot.

b. *Whether the "In Connection With" Language of Sections 4 and 5 of the NGA Empower the Commission to Exercise Jurisdiction over Decatur's Proposed Facilities*

We begin with the statute. NGA section 4(a) states in part that:

[all] rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable [].<sup>58</sup>

NGA section 5(a) states in part that:

[w]hensoever the Commission . . . shall find that any rate . . . charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate. . .<sup>59</sup>

<sup>57</sup> See *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665 at p. 31,572 (1985).

<sup>58</sup> 15 U.S.C. § 717c.

<sup>59</sup> 15 U.S.C. § 717d.

<sup>60</sup> 929 F.2d 1261, 1273 (8th Cir.), cert. denied, 112 S.Ct. 169 (1991). see also *KN Energy, Inc., et al.*, 65 FERC ¶ 61,168, at p. 61,853 (1993).

Alabama-Tennessee asserts that the "in connection with" language of sections 4 and 5 of the NGA empower the Commission to narrow any exceptions to its jurisdiction over interstate commerce. Alabama-Tennessee cites *Northern Natural Gas Company v. FERC* (*Northern Natural*) in which the court concluded that, based on the "in connection with" language, the Commission could assert jurisdiction over gathering facilities even though gathering is explicitly excluded under NGA section 1(b).<sup>60</sup>

Decatur argues that the plain meaning of the "in connection with" language demonstrates that it relates to the Commission's statutory authority to determine the justness and reasonableness of rates and charges "in connection with" the transportation or sale of natural gas subject to the Commission's jurisdiction i.e., natural gas service in interstate commerce, and not to intrastate natural gas service.

*Commission Response*

Alabama-Tennessee's "in connection with" argument is without merit. Whether the transportation Decatur will provide through its proposed extension is "in connection with" jurisdictional transportation is not relevant because NGA sections 4 and 5 refer to rates charged by a "natural-gas company." As discussed elsewhere in this order, pursuant to NGA section 2, Decatur, as a municipality, cannot be a natural gas company under the NGA.

Further, Alabama-Tennessee's reliance on *Northern Natural* is misplaced. In that case, the court limited its decision to the specific finding<sup>61</sup> that the "in connection with" language permits the Commission to regulate rates charged for transportation in interstate commerce provided on gathering facilities owned or operated by an interstate pipeline, its parent, affiliate, subsidiary or lessors in connection with jurisdictional interstate transportation.<sup>62</sup> Furthermore, the court stated that it was not deciding the issue more relevant here: whether gathering performed by producers or independent gatherers for transportation by an interstate pipeline is sufficiently connected to interstate transportation to justify rate regulation under sections 4 and 5.<sup>63</sup>

<sup>61</sup> *Id.* at p. 1271.

<sup>62</sup> *Northern Natural*, 929 F.2d at p. 1263.

<sup>63</sup> *Id.* at p. 1274. The Commission has since found that it would not exercise its jurisdiction pursuant to NGA sections 4 and 5 to regulate the gathering rates and services of an interstate pipeline's unregulated parent, affiliate, subsidiary, or lessor absent undue discrimination by the affiliate. See, e.g., *Northwest Pipeline Corp.*, 59 FERC ¶ 61,115 (1992), reh'g de-

The narrow decision in *Northern Natural* is not applicable to the facts in this proceeding. Decatur is a municipality transporting gas in interstate commerce to its local distribution facilities for retail sales. We note in this regard, although the court in *Northern Natural* does not mention municipalities, the court did specifically state that it was not deciding whether the gathering performed by producers or independent gatherers is "in connection with" interstate transportation.

*c. Whether the Commission Has Jurisdiction over Decatur's Facilities Even Though Decatur Utilities Is Not a Natural Gas Company Under the NGA*

Alabama-Tennessee argues that under the NGA, the Commission's jurisdiction attaches independently to (1) "the transportation of natural gas in interstate commerce" and (2) "to natural gas companies engaged in such transportation".<sup>64</sup> Alabama-Tennessee submits that the transportation through Decatur's proposed facilities will be in interstate commerce. Therefore, argues Alabama-Tennessee, even if the Commission does not assert jurisdiction over Decatur because it is not a person under section 2 of the NGA, it must assert jurisdiction over Decatur's high-pressure mainline facilities and require Decatur to obtain a certificate of public convenience and necessity to construct and operate its bypass facilities. Alabama-Tennessee notes that, in Order No. 319, the Commission recognized the possibility of asserting its NGA jurisdiction over certain transactions involving municipalities.<sup>65</sup>

Alabama-Tennessee relies on *California v. Southland Royalty Company (Southland)*<sup>66</sup> and *Public Service Company of North Carolina, Inc. v. FERC (PSC of North Carolina)*<sup>67</sup> to argue that the Commission can assert its NGA jurisdiction over a transaction involving an entity which is not a "natural gas company" under the NGA's definitions. It argues that there is no meaningful distinction between the requirement that a non-natural gas company must obtain abandonment authority as held in

*Southland* and *PSC of North Carolina*, and the need for the Commission to require Decatur to obtain certificate authority in this instance.

Decatur disagrees. Decatur maintains that if its transportation of gas in its proposed facilities is jurisdictional because the gas is moving in interstate commerce, there would be no local distribution of gas except that transported by an LDC from local production located within the same state as the LDC. Decatur states that "[t]he exception for 'local distribution' facilities assumes that there is interstate gas in the pipelines; otherwise, FERC would have no jurisdiction to begin with, and there would be no need for an exception."<sup>68</sup>

*Commission Response*

The court in *PSC of North Carolina* relies on *Southland*<sup>69</sup> as precedent for the proposition that "any party, whether a 'natural gas company' or not, that acquiesces in the 'dedication' of its gas to interstate commerce becomes obligated to continue the dedicated service or seek Commission approval to abandon it."<sup>70</sup> Unlike *Southland*, the court in *PSC of North Carolina* directly faced the issue of jurisdiction over an entity, the State of Texas, that could not be a natural gas company under the NGA. In that case, Texas had issued gas leases covering state-owned land to Superior Oil Company, a producer of gas, and retained a royalty interest in the gas. Pursuant to Superior's Commission-issued certificate, all the gas produced by Superior, including that attributable to Texas' royalty share, was then sold in interstate commerce to Natural Gas Pipeline Company. Subsequently, Texas agreed to sell its royalty share to the Public Service Company of North Carolina. The Commission informed the parties that section 7(b) abandonment by the parties was required before the transaction could take place.

The court stated that it is irrelevant that a state can never become a "natural gas company" once it has allowed its gas to be dedicated to interstate service.<sup>71</sup> However, the court expressly limited its holding to the facts

(Footnote Continued)

nied, 60 FERC ¶ 61,213 (1992), appeal dismissed sub nom. *Williams Gas Processing Co. v. FERC* (10th Cir., Feb. 28, 1994) D.C. Cir. Sept. 15, 1992; *KN Energy, Inc. and KN Interstate Gas Transmission Co., et al.*, 65 FERC ¶ 61,168 (1993).

<sup>64</sup> Citing *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947), and *Mojave*, 66 FERC slip op. at p. 6.

<sup>65</sup> Order No. 319, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,621 n.26.

<sup>66</sup> 436 U.S. 519 (1978).

<sup>67</sup> 587 F.2d 716 (5th Cir. 1979).

<sup>68</sup> Quoting *Oklahoma Natural Gas Co. v. FERC*, 940 F.2d 699, 702 (D.C. Cir. 1991).

<sup>69</sup> 436 U.S. 519 (1978).

<sup>70</sup> *PSC of North Carolina* at p. 719.

<sup>71</sup> The court also found that under *National League of Cities v. Usery*, 426 U.S. 833 at p. 854 n.18 (1976), Texas' oil and gas business did not amount to a traditional governmental function exempt from federal control but was not distinguishable from similar private commercial activities and thus may be subject to federal regulation. *Id.* at p. 721. However, the Supreme Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), including the "traditional

before it. The court stated that "we are deciding only the fate of royalty-owning states that seek to abandon interstate service after having consented to interstate transmission of gas pursuant to a Commission certificate issued to a natural gas company."<sup>72</sup>

The effect of *PSC of North Carolina* was to preclude a state royalty owner from frustrating a certificate issued to a natural gas company, Superior Oil Company. Such facts are not present here. Even if the case were not distinguishable on these grounds, however, we find that the court's decision in *PSC of North Carolina* would not be controlling. The court strongly emphasized that its decision was limited to the facts before it. Those facts are not present here. Decatur is not attempting to abandon a certificated service without Commission oversight of its interest in "securing a continuous supply of natural gas in interstate markets" as was the case in *PSC of North Carolina*.<sup>73</sup> In fact, Decatur is enhancing rather than impeding the Commission's "important federal interest" in promoting competition in the marketplace for the ultimate benefit of the public. Decatur is not seeking to abandon a certificated service but to continue the same service it currently receives indirectly from Tennessee. We do not find that *PSC of North Carolina* requires the Commission to assert NGA section 7(c) jurisdiction over Decatur.

Alabama-Tennessee's reference to Order No. 319 is also unavailing. The Commission's statement in Order No. 319 regarding the possibility that it may assert NGA jurisdiction over municipalities "in other types of transactions" is in a footnote to the statement that the Commission cannot issue section 7(c) certificates to municipalities.<sup>74</sup> Since the NGA authority that Alabama-Tennessee urges we exercise over Decatur is NGA section 7(c) authority, we fail to see how Order No. 319 advances Alabama-Tennessee's position. Further, in the footnote, the Commission cites *PSC of North Carolina* as an example of "other types of transactions"

(Footnote Continued)

governmental function" test of Congress' power under the Commerce Clause to regulate state and local governments. Therefore, we do not address that aspect of the *PSC of North Carolina* court's rationale.

<sup>72</sup> *Id.* at p. 720.

<sup>73</sup> *Id.*

<sup>74</sup> Order No. 319, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* at p. 30,621.

<sup>75</sup> *Id.* at p. 30,625 n.26.

<sup>76</sup> 362 F.Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (mem., Rehnquist, dissenting (1974)).

<sup>77</sup> 345 U.S. 295 (1953).

over which the Commission could possibly assert jurisdiction. As discussed above, that case addresses abandonment of certificated services and offers no support for Alabama-Tennessee's argument.<sup>75</sup>

d. *The Commission Has Recognized That a Municipality Is Not Exempt from NGA Jurisdiction in All Instances*

Citing *FPC v. Corporation Commission of Oklahoma (CCO)*,<sup>76</sup> Alabama-Tennessee maintains that the Commission has recognized that a municipality can be deemed a "person" within the meaning of NGA section 2 and therefore subject to the Commission's NGA jurisdiction. Further, Alabama-Tennessee asserts, the court in *United States v. Public Utilities Commission of California (CPUC)*<sup>77</sup> held that the Commission can assert its Federal Power Act jurisdiction over a county despite the literal meaning of the definitions, which parallel those in the NGA, contained in the statute.

Decatur responds that, even assuming that its proposed extension involved jurisdictional transportation in interstate commerce, the NGA expressly exempts municipalities from the Commission's jurisdiction.

Alabama-Tennessee also argues that the Commission is not required to accept Decatur's definition of exempt municipal status if to do so would frustrate the implementation of the purpose of federal statutes.<sup>78</sup>

*Commission Response*

In *CPUC*,<sup>79</sup> the Court found that the definitional sections of the Federal Power Act which exclude municipalities from being persons under the Act did not preclude the Commission from regulating the rates for wholesale sales of electric energy to municipalities despite section 201(d) which limits such sales to "persons."<sup>80</sup> The Court based its decision on the legislative history of the Act and the fact that three federal courts<sup>81</sup> and the Commission's policy rejected the contention that the Act precluded Commission regulation of wholesale sales of electric energy to municipalities.

<sup>78</sup> Citing *Stowers Oil & Gas Co.*, 33 FERC ¶ 61,207 (1985), and *Mississippi Valley Gas Co. v. Gulf Fuels, Inc.*, 48 FERC ¶ 61,178, at p. 61,656 (1989) (Commission viewed as "irrelevant" state's definition of intrastate pipeline for purposes of determining whether entity is an intrastate pipeline under the NGPA).

<sup>79</sup> 345 U.S. 295 (1953).

<sup>80</sup> *Id.* at pp. 312-313.

<sup>81</sup> *California Electric Power Co. v. Federal Power Commission*, 199 F.2d 206; *Wisconsin v. Federal Power Commission*, 201 F.2d 183; *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F.2d 472.

We find that CPUC does not support Alabama-Tennessee's contention that the Commission should regulate the construction and operation of Decatur's extension. The legislative history of the NGA is of no help in glean- ing Congress' intent when it exempted municipalities from Commission jurisdiction under that Act. In addition, the Commission's authority over the rates for sales of natural gas for resale to municipalities under the NGA has never been questioned. Furthermore, that is not the issue in this case. The issue is whether the Commission has NGA section 7(c) jurisdic- tion over Decatur's facilities.

The court in *CCO* found, among other things, that the Corporation Commission of Oklahoma, a state agency, could be a person under the NGA and thus not immune to suit by the Commission pursuant to NGA section 20. We do not find *CCO* to be controlling. Even though the Commission took the position in *CCO* that it could sue to enjoin a state agency from enforcing a state regulation that violated the Commerce Clause and conflicted with Commis- sion jurisdiction, it has never interpreted the NGA to assert regulatory jurisdiction over mun- icipalities. On the contrary, the Commission has consistently declined to assert jurisdiction over municipalities based on the NGA's exemp- tion of municipalities as demonstrated by the cases discussed below.

In a series of cases, the Commission consid- ered its jurisdiction over Somerset Gas Service (Somerset), a Kentucky intrastate pipeline wholly owned and operated by the City of Somerset, Kentucky. Somerset provided NGPA section 311 service to Columbia Gulf Transmis- sion Company, an interstate pipeline. In the first order, the Commission found that, in Som- erset's capacity as an intrastate pipeline it was not exempt from Commission filing fees be- cause it served only an interstate pipeline and not the general public.<sup>82</sup> On rehearing, the Commission found that Somerset was a municipa- lity exempt from filing fees but still required

that Somerset continue to file petitions for rate approval for its section 311 transportation ser- vice.<sup>83</sup> In the final order, the Commission held that it did not have authority to regulate a municipality under the NGA or NGPA and found that it had no authority to regulate Som- erset's rates.<sup>84</sup>

In Order No. 319, the Commission extended to LDCs eligibility for Order No. 63 blanket certificates.<sup>85</sup> Order No. 63 allows Hinshaw pipelines to apply for blanket NGA section 7(c) certificate authority to sell and transport gas to the interstate market under the same condi- tions applicable to intrastate pipelines under NGPA sections 311 and 312.<sup>86</sup> In Order No. 319, the Commission found that since Order No. 63 blanket certificates are issued to natu- ral gas companies under NGA section 7, and since the NGA expressly excludes municipali- ties from the definition of natural gas com- pany, municipalities cannot be issued a certificate under NGA section 7(c).<sup>87</sup> Thus, municipalities are not eligible to receive Order No. 63 blanket certificates.<sup>88</sup>

Citing *Panhandle Eastern Pipe Line Com- pany v. City of Rolla, Kansas (Panhandle)*,<sup>89</sup> the Commission noted in Order No. 319 that even though municipalities could not receive section 7(c) certificates, they could engage in section 311 and 312 types of transactions without certificate authority. In *Panhandle* the Commission found that it had no jurisdiction over the City of Rolla even though it sold gas to an interstate pipeline company which trans- ported and resold the gas in interstate com- merce.<sup>90</sup>

In *Northwest Alabama Gas District*,<sup>91</sup> six communities formed a gas district which trans- ported and sold gas over 250 miles of pipeline in Alabama to residential and commercial cus- tomers in each community. The Commission found Northwest Alabama to be a municipa- lity<sup>92</sup> and thus not subject to the Commission's

<sup>82</sup> 37 FERC ¶ 61,025 (1986) (The Bureau of the Budget Circular No. A-25 provided that an agency may not charge for its services when the service benefits the general public. (Circular at p. 2)). In Order No. 395, which promulgated the exemption from filing fees rule in section 381.108 of the Commission's regulations, the Commission stated that States and municipalities are exempt from filing fees when they use a Commission service to serve the general public. *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,592 at p. 31,117 (1984).

<sup>83</sup> 43 FERC ¶ 61,271 (1988).

<sup>84</sup> 59 FERC ¶ 61,012 (1992).

<sup>85</sup> Order No. 63, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,118 (1980), 45 Fed. Reg. 1872 (January 9, 1980).

<sup>86</sup> Order Nos. 63 and 319 are codified under sec- tion 284.224 of the Commission's regulations.

<sup>87</sup> Order No. 319, *FERC Statutes and Regula- tions, Regulations Preambles 1982-1985* at p. 30,621.

<sup>88</sup> *Id.*

<sup>89</sup> 26 FPC 736 at p. 738 (1961).

<sup>90</sup> *Id.* at p. 738 (1961).

<sup>91</sup> 42 FERC ¶ 61,371 (1988).

<sup>92</sup> The Commission concluded that Northwest Ala- bama is a municipality under the NGA based on the public purpose behind the creation of a gas district as stated in the Alabama code (aiding the state in pro- viding gas service to Alabama citizens), the statutory language that governs the formation and operation of a gas district, and the control over the gas district

jurisdiction.<sup>93</sup> The Commission cited many other cases in which it found that gas districts qualified as municipalities and thus were exempt from Commission jurisdiction.<sup>94</sup>

The Commission held in *Texas Eastern Transmission Corporation*<sup>95</sup> and *Texas Gas Transmission Corporation*<sup>96</sup> that with respect to capacity brokering, municipalities are not subject to the Commission's NGA section 7(c) jurisdiction because they are not "persons" under the NGA. In *Texas Eastern*, the Commission responded to the specific argument that the Commission's jurisdiction under NGA sections 7(c) and 16 attaches independently to the transportation of natural gas in interstate commerce. The Commission stated that these sections of the NGA refer to "persons" and since municipalities could not be "persons" under the NGA, they are not subject to the Commission's jurisdiction.<sup>97</sup>

Finally, Alabama-Tennessee argues that we are not required to accept Decatur's definition of exempt municipal status if to do so would frustrate the implementation of the purpose of federal statutes. We do not find that Decatur's proposed extension frustrates the purpose of the NGA. In addition to defining natural gas companies to exclude municipalities, the NGA specifically exempts local distribution from Commission jurisdiction. Further, Congress amended the NGA to exclude Hinshaw pipelines from Commission jurisdiction in response to the *East Ohio* decision. The facts in *East Ohio* are identical to those in this case with the exception that the LDC building the extension was not a municipality. Taking into consideration Congress' expressed exemption from Commission jurisdiction of municipalities, local distribution and Hinshaw pipelines, it is apparent that Congress did not intend activities such as those Decatur proposes to fall within the Commission's NGA jurisdiction.

#### E. Request for Hearing

If the Commission does not reject Tennessee's request, Alabama-Tennessee argues that an evidentiary hearing is required to examine and resolve issues which cannot be settled by written submission alone. These issues include not only Alabama-Tennessee's concerns regarding the bypass' effect on interstate transportation but also the local effects such as duplication and sizing of facilities, the possibility of cheaper alternatives, cost apportionment and rate design.

(Footnote Continued)

exercised by member municipalities. 42 FERC at pp. 62,086-087.

<sup>93</sup> 42 FERC at pp. 62,086-087.

<sup>94</sup> *Id.*

#### Commission Response

Alabama-Tennessee has raised no issues of material fact in regard to Tennessee's proposal which require additional inquiry by the Commission. Further, Alabama-Tennessee has failed to set forth any factual dispute which warrants delaying or deferring a decision in this matter through an evidentiary hearing. We find that sufficient facts upon which to base a decision in this matter, including a finding that the proposal is in the public convenience and necessity, are set forth in the parties' filings. Accordingly, we will deny Alabama-Tennessee's request for an evidentiary hearing.

In light of the foregoing considerations, we find that approval of Tennessee's application is in the public convenience and necessity. Tennessee will be authorized to construct and operate the facilities as set forth in the prior notice filing described herein, under Tennessee's Part 157 blanket certificate.

At a hearing held on November 9, 1994, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application and exhibits attached thereto, submitted in support of the record.

#### The Commission orders:

(A) Tennessee is authorized to construct and operate the proposed facilities in Docket No. CP94-219-000, as described in this order and more fully described in Tennessee's prior notice filings, pursuant to its Part 157 blanket certificate.

(B) The protests and request for hearing are denied.

(C) Reynold's motion to intervene out-of-time is granted.

#### Appendix A

##### Intervenors

Alabama-Tennessee Natural Gas Company  
American Maize-Products Decatur Inc.  
City of Florence Natural Gas Department  
Decatur Utilities, City of Decatur, Alabama  
Huntsville Utilities Natural Gas Department  
Monsanto Company  
Niagara Mohawk Power Corporation  
Reynolds Metal Company (out-of-time)  
Russellville Gas Board  
Sheffield Utilities  
Tennessee Valley Municipal Gas Association  
Tuscumbia Utilities

<sup>95</sup> 51 FERC ¶ 61,170 (1990).

<sup>96</sup> 55 FERC ¶ 61,208 (1991).

<sup>97</sup> *Texas Eastern*, 51 FERC at p. 61,454.

FERC Reports

¶ 61,239

61,910

Cited as "69 FERC ¶ . . ."

69-12-15-94

*Protestors*

Alabama-Tennessee Natural Gas Company  
American Maize-Products Decatur Inc.

Monsanto Company

North Alabama Gas District (protest only - not  
an intervenor)

¶ 61,240

Federal Energy Guidelines

## [¶ 61,329]

**Tennessee Gas Pipeline Company, Docket No. CP94-219-001****Order Denying Rehearing and Request for Clarification**

(Issued March 22, 1995)

**Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.**

On December 19, 1994, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee) filed a request for rehearing and clarification of the Commission's November 18, 1994 Order Denying Protests and Authorizing Construction Under Blanket Certificate.<sup>1</sup> For the reasons discussed below we will deny rehearing and clarification.

**I. Background**

On February 8, 1994, as supplemented on September 19, 1994, Tennessee Gas Pipeline Company (Tennessee) filed a prior notice application requesting authorization to establish a new delivery point for delivery of natural gas to Decatur Utilities, City of Decatur, Alabama (Decatur).<sup>2</sup> Decatur is a municipally-owned local distribution company (LDC) which provides natural gas sales and transportation service to residential, commercial, and industrial customers in the City of Decatur, Alabama, and the surrounding area. Decatur is regulated by the Decatur City Council (City Council) rather than the Alabama Public Service Commission.

On February 7, 1994, the City Council approved Decatur's proposal to construct approximately 37 miles of new mainline trunk facilities to connect Decatur's system with Tennessee's. Decatur's proposed extension would connect with its existing high pressure

pipeline which extends 20 miles from Decatur's municipal area to Courtland, Alabama.

Alabama-Tennessee is currently the only interstate pipeline directly connected to Decatur. Consequently, Tennessee's proposed point of delivery to Decatur would result in the bypass of Alabama-Tennessee.

Alabama-Tennessee, among others,<sup>3</sup> filed a protest to Tennessee's prior notice application. Alabama-Tennessee's arguments centered around its contention that the Commission has jurisdiction over Decatur and its proposed pipeline and therefore should require Decatur to apply for a Natural Gas Act (NGA) section 7 certificate to construct its extension. The November 18 order denied the protests and found, among other things, that the Commission does not have jurisdiction over Decatur since Decatur is a municipality.

We note that, at the time of Tennessee's application, Alabama-Tennessee had three prior notice applications pending before the Commission requesting authorization to directly connect with three of Decatur's end-user customers and bypass Decatur. We considered Tennessee's and Alabama-Tennessee's applications contemporaneously,<sup>4</sup> and, as in this proceeding, we denied protests to Alabama-Tennessee's proposal and granted the necessary certificates. No party sought rehearing of the Alabama-Tennessee order.

<sup>1</sup> *Alabama-Tennessee*, 69 FERC ¶ 61,239 (1994).

<sup>2</sup> Tennessee filed its application pursuant to section 7(c) of the Natural Gas Act (NGA) and sections 157.205 and 157.212 of the Commission's regulations. See 18 C.F.R. § 157.205 and 157.212 (1993).

<sup>3</sup> American Maize-Products Decatur Inc., Monsanto Co., and North Alabama Gas District and Tus-

cumbia Utilities, jointly, filed protests to Tennessee's application. Tusculumbia Utilities subsequently withdrew its protest.

<sup>4</sup> Alabama-Tennessee's applications were considered in *Alabama-Tennessee Natural Gas Co.*, 69 FERC ¶ 61,246 (1994).

FERC Reports

[¶ 61,329]

## II. Rehearing Request

Alabama-Tennessee argues that the Commission erred because it did not (1) assert NGA jurisdiction over the construction and operation of Decatur's pipeline, (2) find Tennessee's request premature, (3) undertake a full environmental review of Decatur's project, and (4) order a formal hearing.

### A. Jurisdiction over Decatur

Alabama-Tennessee requests that the Commission reconsider its finding that Decatur and its project are exempt from Commission jurisdiction because Decatur is a municipality. It incorporates by reference the comprehensive arguments it made on this issue in its protest.<sup>5</sup> The Commission exhaustively responded to those arguments in the November 18 order. Since they are not new arguments and were adequately addressed in the November 18 order, we need not address them here. We will respond to new arguments raised in Alabama-Tennessee's rehearing request below.

#### 1. NGA Exemptions

Alabama-Tennessee argues that the Commission's determination, based on NGA exemptions, that it lacks power to assert jurisdiction over Decatur's project ignores the requirement that any "exception to the [Commission's] primary grant of jurisdiction . . . [under NGA section 1(b) is] to be strictly construed."<sup>6</sup> If the Commission strictly construed the municipality exception, submits Alabama-Tennessee, the Commission's decision that it has no jurisdiction over Decatur or its proposed pipeline could not be reconciled with its findings that Decatur meets neither the requirements of the NGA section 1(b) local distribution exception nor of the Hinshaw exemption.

Alabama-Tennessee also argues that the Commission erred when it determined that finding Decatur's project exempt from federal jurisdiction would not frustrate the NGA's purpose. Alabama-Tennessee reiterates its concern that Decatur intends to serve new customers along the length of its proposed pipeline. Alabama-Tennessee filed along with its rehearing request a copy of a newspaper article in the October 25, 1994 Decatur Daily which related that the Decatur utilities board discussed but took no action on a proposal by the City of Russellville, Alabama, a current Alabama-Tennessee customer, to become a partner in Decatur's proposed pipeline. Decatur would own and operate the pipeline but Russellville would have rights to transport gas. In exchange, Rus-

sellville would absorb some of the costs. Citing *FPC v. East Ohio Gas Company*,<sup>7</sup> Alabama-Tennessee contends that this is not the type of municipal activity Congress had in mind when it devised the NGA section 2 exemptions.

Further, Alabama-Tennessee states that the Commission's reliance on Decatur's statement, without any independent verification, that its proposal was intended to serve its local distribution system does not satisfy the requirement in section 157.212(b)(3) of the Commission's regulations that there must be full disclosure with respect to the current and potential uses of the gas. Alabama-Tennessee requests that the Commission not authorize Tennessee's tap until there is such disclosure.

If the Commission does not grant rehearing on the issue of jurisdiction, Alabama-Tennessee seeks clarification that the authorization granted to Tennessee will be limited to the provision of service to Decatur in connection with its traditional local distribution service. Alternatively, Alabama-Tennessee seeks rehearing in this regard and requests that the Commission make this finding.

#### Commission Response

Alabama-Tennessee's arguments are aimed at preventing Decatur from delivering gas to new customers along the length of its proposed pipeline without Commission certification. Alabama-Tennessee contends that such activity will be beyond the exemption for municipalities since the deliveries will be outside of the Decatur's municipal boundaries and over a high pressure pipeline. In our November 18 order, we exhaustively analyzed the NGA, its legislative history, and judicial and Commission precedent and concluded that the Commission does not have jurisdiction over Decatur because it is a municipality. We found no support for the view that Decatur may be considered other than a municipality with respect to its activities involving its planned 37-mile extension on the basis that the extension will be outside Decatur's municipal boundary.

In this regard, the NGA's exception on its face applies to municipalities as entities, not to municipal distribution. If it were applicable to municipal distribution there would be room for differing opinions as to what qualifies for the exception. For example, the Commission previously found that an LDC transporting its gas to its distribution system through a high pressure pipeline was subject to Commission jurisdiction despite the NGA's section 1(b) provision that the NGA is inapplicable to the

<sup>5</sup> See Alabama-Tennessee's Protest at pp. 16-24.

<sup>6</sup> Citing *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 679 (1954) (quoting *Interstate Natural Gas Co. v. FPC*, U.S. 682, 690-691 (1947).

<sup>7</sup> 338 U.S. 464 (1950).

local distribution of natural gas or to the facilities used for such distribution. The Supreme Court upheld the Commission's finding in *Federal Power Commission v. East Ohio Gas Co.*<sup>8</sup> Unlike that situation, we do not see any basis under the NGA to interpret which municipal activities are and are not under our jurisdiction.

Alabama-Tennessee contends that not extending our jurisdiction over Decatur's transportation of gas to municipalities and end-users along the proposed extension's route would frustrate the NGA's purpose. We disagree. Since the NGA exempts municipalities as entities from our jurisdiction, there is no basis for the argument that our refusal to exert jurisdiction over Decatur frustrates the NGA's purpose.

Prior to Order No. 436, the Commission established procedures that permitted interstate pipelines to transport gas for end-users under blanket certificate authorization. End-users were divided into high priority and low priority categories with different requirements for each category. Under those circumstances the Commission needed to know the end-use of gas to determine whether a prior notice application was appropriate. Therefore, when section 157.212(b)(3) was promulgated, the end-use of gas was relevant to approval of an application under the prior notice procedures.<sup>9</sup> In Order No. 436, the Commission promulgated the regulations governing open access transportation under Part 284 blanket certificates. Among other things, Part 284 requires an interstate pipeline that offers firm transportation service under a subpart G blanket certificate, as Tennessee does, to provide such service to all shippers without undue discrimination. The Commission stated in Order No. 436 that it would not require pipelines to file the proposed end-use of gas transported under a Part 284 blanket certificate since there were no longer any restrictions on end-use of the gas.<sup>10</sup> Since we no longer monitor end-use, the reporting requirement in section 157.212(b)(3) is not material to our determination of whether to approve Tennessee's application. Therefore, we do not consider section 157.212(b)(3) to be a reason for denying Tennessee's proposal.

For all of these reasons, we will not grant Alabama-Tennessee's request for clarification

<sup>8</sup> 338 U.S. 464 (1950). Congress subsequently amended the NGA to exempt companies like East-Ohio from Commission jurisdiction. See NGA section (c) (the Hinshaw amendment).

<sup>9</sup> See Order No. 234, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,368 (1982); Order No. 234-A, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,389 (1982).

**FERC Reports**

that Decatur will be limited to serving only its traditional local distribution system. For the same reasons we will deny rehearing.

## 2. Competition

Alabama-Tennessee argues that there is no record support for the Commission's conclusion in the November 18 order that Decatur's project will enhance rather than impede the Commission's interest in promoting competition in the marketplace for the ultimate benefit of the public. It also contends that there is no record support for the Commission's belief that Alabama-Tennessee will have a fair opportunity to compete for services against Decatur since it will not be subject to the same rules and regulations. Finally, Alabama-Tennessee argues that the Commission did not consider its concern that unless the Commission acts in this proceeding to establish limits to the NGA's exemption for municipalities so that regulated pipelines will have a fair opportunity to compete with these projects, other municipalities are likely to initiate similar bypasses which would further threaten the Commission's NGA jurisdiction and frustrate the policies of Order No. 636 [*FERC Statutes and Regulations* ¶ 30,939].

### Commission Response

We stated in the November 18 order that Decatur's proposal is a legitimate market-induced response to Alabama-Tennessee's competitive actions in bypassing Decatur to directly serve three of Decatur's end-user customers. We stated that "such competition ultimately benefits natural gas consumers by resulting in improved services at lower costs, the desired goal of the Commission's policies."<sup>11</sup> Alabama-Tennessee argues that there is no record support for these statements. However, the Commission does not need "to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need [it] do so for predictions that competition will normally lead to lower prices."<sup>12</sup> We do have authority under the NGA to address anticompetitive activities of jurisdictional pipelines when confronted with actual instances of such activity.

In the November 18 order, we dismissed as speculative Alabama-Tennessee's concerns regarding possible undue discrimination by De-

<sup>10</sup> Order No. 436, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665, at p. 31,559 (1985).

<sup>11</sup> 69 FERC at p. 61,901.

<sup>12</sup> *AGD v. FERC*, 824 F.2d 981, at pp. 1008-1009 (D.C. Cir. 1987).

¶ 61,329

catur in favor of its own transportation and sales and the possibility that municipalities all over the country would follow Decatur's lead. It reiterates its concern that the Commission must exert jurisdiction over municipalities in these circumstances to prevent unfair competition. As we stated above, after exhaustive analysis in the November 18 order, we determined that we do not have jurisdiction over municipalities. Speculation that a municipality could discriminate against a competing pipeline, or that many municipalities will bypass competing pipelines and discriminate against them does not change the results of our analysis.

### 3. *Northern Natural Gas Company v. FERC*

Alabama-Tennessee argues that the Commission erred by dismissing Alabama-Tennessee's argument that the Commission can and should find that municipalities may be subject to its jurisdiction under the NGA by means of the "in connection with" language of NGA sections 4 and 5 as explained by the court in *Northern Natural Gas Company v. FERC*.<sup>13</sup> In this regard, Alabama-Tennessee thinks that the Commission's jurisdiction over Decatur's project under NGA sections 4 and 5 is a legitimate extension of the authority it has in connection with Tennessee's jurisdictional services and facilities.

Alabama-Tennessee further argues that the Commission incorrectly concluded that Alabama-Tennessee's reliance on *Northern Natural* is misplaced because that case is factually distinguishable from this proceeding. Alabama-Tennessee contends that the distinctions are immaterial for purposes of applying the Commission's "in connection with" jurisdiction.

#### *Commission Response*

We are not persuaded by Alabama-Tennessee's arguments. In *Northern Natural*, the court held that, based on the "in connection with" language, the Commission could assert jurisdiction over gathering rates charged by an interstate pipeline for gathering performed over its own facilities even though gathering is explicitly excluded under NGA section 1(b).<sup>14</sup> Alabama-Tennessee argues that even though that case addresses the gathering exemption rather than the municipality exception, there are significant parallels between the proceedings to enable the Commission to rely on *Northern Natural* to extend jurisdiction over Decatur.

In the first place, as we noted in the November 18 order, the court in *Northern Natural* specifically stated that it was not deciding whether gathering performed by entities exempt from Commission jurisdiction is "in connection with" interstate transportation. In this proceeding, Alabama-Tennessee asks the Commission to exert jurisdiction over an entity exempt from Commission jurisdiction. The parallel between the cases then would suggest that *Northern Natural* leaves open rather than decides the issue of "in connection with" jurisdiction over exempt entities.

Further, in subsequent proceedings before the Commission regarding its jurisdiction over gathering, the Commission stated that neither NGA sections 4 and 5 nor *Northern Natural* support the view that the Commission has jurisdiction over rates for gathering services that are "in connection with" interstate gas transportation if those services are not provided by a "natural gas company."<sup>15</sup> The Commission further stated that "companies that perform only a gathering function, whether they are independent or affiliated with an interstate pipeline, are not natural gas companies, because they neither transport natural gas in interstate commerce, nor sell such gas in interstate commerce for resale [as required by NGA section 1(b)]."<sup>16</sup> Therefore, neither independent nor affiliated gatherers' rates are subject to Commission jurisdiction.

Similarly, as we explained in the November 18 order, municipalities are not natural gas companies under the following linking definitions in the NGA. Section 2(6) defines "natural gas company" as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Section 2(1) defines "person" to include an "individual" or "corporation" and section 2(2) excludes "municipalities" from the definition of "corporation." Since a municipality is not an individual and cannot be a corporation under NGA section 2, it cannot be a person and thus cannot be a natural gas company. Therefore, since we have found that, notwithstanding that gatherers provide services "in connection with" services by natural gas companies (i.e., interstate pipelines), we have held that this relationship is insufficient to invoke our jurisdiction since gatherers are not natural gas companies as defined by the NGA. Since municipalities also are not natural gas companies for purposes of

<sup>13</sup> 929 F.2d 1261 (8th Cir. 1991), cert. denied, 112 S.Ct. 169 (1991).

<sup>14</sup> *Id.* at p. 1273.

<sup>15</sup> See, e.g., *Mid Louisiana Gas Co., et al.*, 67 FERC ¶ 61,255, at pp. 61,852-853 (1994); *Arkla*

*Gathering Services Co.*, 67 FERC ¶ 61,257, at p. 61,871 (1994).

<sup>16</sup> *Mid Louisiana Gas Co., et al.*, 67 FERC at pp. 61,852-853 and *Arkla Gathering Services Co.*, 67 FERC at p. 61,871.

the NGA, it would be entirely inconsistent with our gathering decisions to find that section 4's "in connection with" language gives us any jurisdiction over municipalities. Thus, if our analysis regarding gatherers is correct, it must be correct with respect to municipalities and other entities that do not fall within the NGA's definition of natural gas company. As explained above, the court in *Northern Natural* specifically declined to reach this issue. Therefore, *Northern Natural* does not support Alabama-Tennessee's position, and our own precedent interpreting that decision's holding must prevail.

4. *Public Service Co. of North Carolina, Inc. v. FERC*

Alabama-Tennessee argues that the Commission wrongly held that the court's decision in *Public Service Company of North Carolina, Inc. v. FERC (PSC of North Carolina)*<sup>17</sup> is not controlling in this proceeding. In *PSC of North Carolina*, the State of Texas had issued gas leases covering state-owned land to Superior Oil Company, a producer of gas, and retained a royalty interest in the gas. Pursuant to Superior's Commission-issued certificate, all the gas produced by Superior, including that attributable to Texas' royalty share, was then sold in interstate commerce to Natural Gas Pipeline Company (NGPL). Subsequently, Texas agreed to sell its royalty share to the PSC of North Carolina. The Commission required the parties to obtain section 7(b) authority to abandon the sales of the royalty gas to NGPL before the transaction could take place. The court upheld the Commission's position.

Alabama-Tennessee contends that the Commission afforded insufficient consideration to the fact that the court in that case deemed the State of Texas' exempt status under NGA section 2 to be irrelevant because of the "convergence of three factors—(1) interstate transmission by a natural gas company, (2) Commission certification, and (3) the ... acquiescence [of the entity otherwise exempt under NGA section 2] in (1) and (2) that gives rise to a continued service obligation."<sup>18</sup> Alabama-Tennessee maintains that all three factors are present in this proceeding. It submits that Decatur, although an otherwise NGA exempt entity, is actively seeking to interconnect its facility to a tap for which Tennessee seeks certification and which will serve as Decatur's direct access to Tennessee's interstate system.

*Commission Response*

Alabama-Tennessee's attempt to conform the facts in this case to the three factors in *PSC of North Carolina* is not availing. An analysis of

Alabama-Tennessee's application of the three-factor test demonstrates that the test is inapplicable to the facts in this proceeding. In *PSC of North Carolina*, the second factor, Commission certification, related to the certificate that governed the royalty gas owned by the state. It was that certification to which the state had previously acquiesced. The Commission certificate factor Alabama-Tennessee asserts is present in this case is Tennessee's certificate authorizing construction of a tap to deliver gas to Decatur. These two Commission certification factors are not analogous. In this proceeding, there is no certificate which governs Decatur's activities and so no certificate to which Decatur can acquiesce. Tennessee's certificate does not regulate Decatur's proposed activities as Superior's certificate did the state's royalty gas in *PSC of North Carolina*.

The unreasonableness of Alabama-Tennessee's extension of the three-factor test also is evident from the fact that it would be impossible to apply Alabama-Tennessee's formulation of the three-factor test without violating long-established precedents. For example, under the interpretation advanced by Alabama-Tennessee, when an interstate pipeline seeks certification to connect its system to an LDC at the LDC's request, the LDC, an otherwise exempt entity, would be required to obtain an NGA section 7 certificate prior to constructing facilities to accomplish the interconnection. There would be no local distribution of gas except that transported by an LDC from local production located within the same state as the LDC. For that matter, an industrial end-user under the same circumstances would be required to obtain a certificate to construct any required facilities under Alabama-Tennessee's interpretation of the three factor test in *PSC of North Carolina*. We do not find *PSC of North Carolina* to be controlling in this proceeding.

B. *Tennessee's Request is Premature*

Alabama-Tennessee argues that Tennessee's request is premature because three affected property owners are seeking a permanent injunction to prevent Decatur from constructing its pipeline. Alabama-Tennessee contends that since this could result in years of delay the Commission should reject or hold in abeyance Tennessee's application until the legal issues are resolved in Decatur's favor. At a minimum, Alabama-Tennessee submits, the Commission should condition its approval to require a prior affirmative showing that Decatur has the legal right to proceed with its project. Alabama-Tennessee states that any of these results would avoid unnecessary environmental dam-

<sup>17</sup> 587 F.2d 716 (5th Cir. 1979), cert. denied sub nom *Louisiana v. FERC*, 444 U.S. 879 (1979).

<sup>18</sup> *Public Service Co. of North Carolina*, 587 F.2d at 720.

age if ultimately Decatur cannot continue with its project.

*Commission Response*

As this project is structured, Decatur is obligated to reimburse Tennessee for one hundred percent of Tennessee's construction costs. Decatur would be unlikely to reimburse Tennessee for a delivery point that Decatur cannot use and thus Tennessee is unlikely to proceed without assurances that Decatur is legally able to begin construction. Because the possibility that Tennessee would construct its proposed facilities without such assurances is so remote, we will not grant Alabama-Tennessee's request.

*C. Environmental Review*

Alabama-Tennessee argues that the Commission erred by failing to undertake a full environmental review of Decatur's plans. It expresses concerns that Decatur's ability to avoid state or federal environmental compliance provides Decatur with an unfair competitive advantage over interstate pipelines. Alabama-Tennessee alleges that the Commission's assumption that Decatur is subject to a comprehensive environmental review by the Alabama Public Service Commission (APSC) and the Alabama Department of Environmental Management (ADEM) is false. Alabama-Tennessee maintains that APSC's jurisdiction is limited to compliance with state statutes governing pipeline safety. ADEM's review, according to Alabama-Tennessee, is limited to matters related to the National Pollutant Discharge Elimination System.

Further, Alabama-Tennessee argues that the Commission's application of the second factor of its four-factor test used to determine whether the Commission must perform an environmental review of non-jurisdictional facilities is flawed.<sup>19</sup> The second factor asks whether there are aspects of the non-jurisdictional facility in the immediate vicinity of the regulated activity which would affect the location and configuration of the regulated activity. Alabama-Tennessee argues that if the three property owners are successful in challenging Decatur's right to construct and operate its pipeline along the right-of-way for U.S. Highway 72, this would have a significant effect on the location and configuration of Tennessee's tap.

*Commission Response*

Contrary to Alabama-Tennessee's arguments, the Commission's decision that it is not required to undertake a full environmental review of Decatur's project is not based on the

assumption that the project would be subjected to a comprehensive environmental review performed at the state level. This is not a consideration under the four-factor test. The test is used to determine whether there is sufficient federal control and responsibility over the project as a whole to warrant environmental analysis of the non-jurisdictional portions of the project. In the November 18 order, we applied the four-factor test as required and found that there is no significant federal control over Decatur's pipeline.

Alabama-Tennessee's argument regarding the second factor implies that the second factor alone would be sufficient to support the Commission's environmental review of Decatur's nonjurisdictional pipeline. This is not true. There simply is insufficient federal control and responsibility over this private action to make it a federal action. The Commission has stated that if the only aspects of the project in the immediate vicinity of the nonjurisdictional facilities would be the point of connection between two pipelines, environmental concerns raised by the second factor would rarely come into play. That the ultimate point of connection may not be at the initially proposed location does not change the limited environmental consequences of a point of interconnection between two pipelines.

Furthermore, there is nothing about the configuration of Tennessee's delivery point that has been uniquely influenced by the location of Decatur's 37-mile-long pipeline. Of course, Tennessee's delivery point has been designed in a manner to provide Decatur with the required amount of gas. However, Tennessee's construction of the delivery tap is subject to all of the regulations and conditions governing pipelines' construction of facilities under their blanket certificates. Therefore, while the delivery point potentially may be located at any point along Tennessee's system in this area, it may be constructed at a particular location only where Tennessee can satisfy all of the regulations' environmental conditions. This fact is supported by the change in the tap location between the original prior notice filing and Tennessee's supplement. Tennessee could dictate where the connection will be located - proof that this factor rules against Commission review.

We reaffirm our analysis of the project and our application of the four-factor test. We will deny Alabama-Tennessee's rehearing request that the Commission perform a full environmental review of Decatur's pipeline.

<sup>19</sup> See *Algonquin Gas Transmission Co.*, 59 FERC ¶ 61,255, at p. 61,935 (1992).

**D. Evidentiary Hearing**

Alabama-Tennessee states that the Commission concluded in the November 18 order that no issues of material fact had been raised and therefore there is no need for an evidentiary hearing in this proceeding. Alabama-Tennessee argues that a hearing is required because the Commission did not address adequately four issues of material fact. Alabama-Tennessee submits that the Commission did not address the facts that (1) Decatur is seeking to transport for other customers; (2) other municipalities are seeking to bypass Alabama-Tennessee; (3) the project is just as likely to harm competition as to enhance it; and (4) there is no record support for the finding that Decatur's project enhances competition.

**Commission Response**

We will deny Alabama-Tennessee's request on rehearing for an evidentiary hearing. It is not material whether Decatur's proposed line

may be used to transport gas for other customers located along its pipeline or another municipality, since we have determined that we lack jurisdiction over Decatur even if it uses its line for such purposes. Also, Alabama-Tennessee provides no evidence to support its speculative assertion that Decatur's project will minimize, rather than increase, competition. Further, we responded above to Alabama-Tennessee's arguments regarding competition and need not repeat the discussion here. Alabama-Tennessee has raised no issues of material fact which require additional inquiry by the Commission. As we stated in the November 18 order, we find that sufficient facts upon which to base a decision in this matter are set forth in the parties' filings.

**The Commission orders:**

Alabama-Tennessee's requests for rehearing and clarification are denied.

**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to D.C. Cir. R. 25(c), service of the foregoing will be made electronically via CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated this 25th day of October, 2016.

*/s/ Joshua L. Menter* \_\_\_\_\_

Joshua L. Menter  
McCarter & English, LLP  
Twelfth Floor  
1015 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 753-3438  
jmenter@mccarter.com

*Attorney for City of Clarksville, Tennessee*