THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

American Gas Association	)	Docket No. RM22-17
American Public Gas Association	)	
Process Gas Consumers Group	)	
Natural Gas Supply Association	)	

MOTION TO INTERVENE AND PROTEST OF
THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America ("INGAA") moves to intervene in this proceeding and submits the following comments in protest of the petition for rulemaking ("Petition") that the American Gas Association, the American Public Gas Association, the Process Gas Consumers Group, and the Natural Gas Supply Association (collectively, "Petitioners") filed with the Federal Energy Regulatory Commission ("Commission" or "FERC") on June 2, 2022.[1]

I. EXECUTIVE SUMMARY

For 23 years, shippers and their trade organizations, including, at times, Petitioners, have complained that the practice of offering multiple non-contiguous segments of capacity at auction is unjust, unreasonable, and unduly discriminatory.[2] For 23 years, "the Commission has repeatedly rejected arguments that the aggregation of bids is anti-competitive" and permitted "packaging non-contiguous segments of capacity, so long as shippers are not required to bid on segments of capacity that are not desired and therefore have an opportunity to obtain the portion of the capacity they seek."[3] This policy is consistent with the Commission's long-standing position that

[1] INGAA moves to intervene and comment pursuant to Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.214, and to the Notice of Petition for Rulemaking that the Commission issued on June 15, 2022. *See* Notice of Petition for Rulemaking, *American Gas Association*, Docket No. RM22-17 (June 15, 2022) ("Notice").

[2] *See e.g., Indicated Shippers v. Natural Gas Pipeline Co. of Am.*, 89 FERC ¶ 61,142, 61,417 (1999).

[3] *Transcontinental Gas Pipe Line Co.*, 172 FERC ¶ 61,258, PP 15-17 (2020) (affirming finding of *Indicated Shippers*).

"[m]aximizing revenue and the use of pipeline capacity will benefit all customers by increasing billing determinants and thereby lowering unit fixed costs in the next rate case."[4]

Despite the Commission's repeated affirmation of its policy over shippers' objections to its allegedly anti-competitive effects, Petitioners once again ask the Commission to revisit the issue and rescind the policy, this time based on allegedly "new evidence" regarding "the manner in which [the Commission's policy] has been implemented."[5] There is no "new evidence." The Petition only cites examples of some pipelines packaging non-contiguous segments of capacity consistent with the terms of their Commission-approved tariffs. This is not "new" nor is it unjust, unreasonable, or discriminatory. To the contrary, the Commission repeatedly has considered this practice and approved it as just and reasonable. Petitioners' only allegations of harm are hypothetical, generalized, unsupported, and rely on the same assertions regarding capacity markets that the Commission previously considered and rejected when determining its policy on capacity allocation. The Petition is a plain attempt to get yet another bite at the apple and falls far short of offering the substantial evidence needed to justify a drastic departure from a policy that the Commission has applied consistently for decades.

Petitioners' request is not only legally infirm, but poor policy. Congress passed the Natural Gas Act ("NGA") primarily to benefit "captive" shippers, typically shippers with long-term firm contracts and not releasing shippers in the short-term capacity market.[6] By allowing pipelines to structure packages of capacity in a way that maximizes revenue and the use of pipeline capacity, the Commission's policy benefits the entire pipeline system and the long-term firm capacity holders whose support built it, by, among other things, increasing billing determinants; avoiding,

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[4] *Northern Border Pipeline Co.*, 164 FERC ¶ 61,150, P 24 (2018).

[5] Petition at 2-3.

[6] *See* Order No. 712, *Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶ 61,286, PP 50, 53 (2008).

delaying, or deferring rate increases; attracting new shippers to the system; and maximizing the capacity made available to market. If the Commission were to abandon this holistic approach as Petitioners suggest, the change could force pipelines to increase rates for shippers in future rate cases as pipelines attempt to capture the cost of service for un- or underutilized capacity of their system as a whole. The cost shift will be felt disproportionately by captive customers.

Petitioners offer no basis for overhauling a sound policy that has effectively guided the Commission and the natural gas industry. The Commission should once again affirm its policy and reject the Petition.

II. MOTION TO INTERVENE

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 members represent the majority of interstate natural gas transmission pipeline companies in the U.S. INGAA's members, which operate approximately 200,000 miles of interstate natural gas pipelines, serve as an indispensable link between natural gas producers and consumers. Its members' interstate natural gas pipelines are regulated by the Commission pursuant to the NGA.[7]

The Commission should grant INGAA's timely motion to intervene because INGAA's members "may be directly affected by the outcome of the proceeding" and because INGAA's "participation is in the public interest."[8] Petitioners ask the Commission "to adopt a rule precluding natural gas pipelines from the practice of aggregating bids on non-contiguous segments of capacity in determining the highest value bid for the purpose of allocating capacity."[9] Some INGAA members currently engage in this practice, and so any rule that grants Petitioners' request

[7] 15 U.S.C. §§ 717-717w.

[8] 18 C.F.R. § 385.214(b)(2)(ii)-(iii).

[9] Notice at 1.

will affect their business. As the trade association representing the vast majority of the interstate pipeline industry, INGAA has a unique responsibility to protect its members' interests in allocating capacity, and an overarching perspective that is not shared by any individual pipeline company. INGAA's participation will ensure that the record in this proceeding reflects this unique perspective, and both the Commission and the public will benefit from the more fulsome record.

All correspondence, communications, pleadings, and other documents related to this proceeding should be addressed to the following representatives:

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III. COMMENTS

A. The Commission's Long-Standing Policy Benefits Customers and the Pipeline System by Permitting the "Packaging" of Non-Contiguous Segments of Capacity.

A "fundamental component of Commission policy governing the allocation of capacity" is to "assure[] that capacity will go to the shipper that values it the most," thereby "maximiz[ing] the value of the capacity to the pipeline."[10] A method for allocating capacity that "maximize[s] incremental revenue to the pipeline . . . create[s] 'the greatest economic benefit to the pipeline, and by extension benefits all customers, including existing customers.'"[11] The ability to maximize the value of capacity, and to reduce the amount of unsubscribed capacity, requires the ability to market

[10] *Northern Natural Gas Co.*, 108 FERC ¶ 61,044, P 11 (2004); *see also Natural Gas Pipeline Co. of Am.*, 82 FERC ¶ 61,036, 61,139 (1998) ("The Commission stresses from the outset its endorsement of the principle underlying section 5.1(c)(1), that Natural will award capacity to requests that collectively would generate the highest revenues under defined procedures. That principle reflects current Commission policy").

[11] *Texican N. La. Transport, LLC v. Southern Natural Gas Co.*, 129 FERC ¶ 61,270, P 69 (2009) (quoting *Tennessee Gas Pipeline Co.*, 94 FERC ¶ 61,097, 61,403 (2001)).

unused capacity effectively. Accordingly, the Commission has approved allocation practices which would "assure[] that the pipeline will have the maximum opportunity to market unused mainline capacity *and* that capacity will be acquired by the shipper that values it most."[12] The Commission has "repeatedly ruled" that "aggregat[ion] and select[ion of] a combination of smaller bids over one larger bid . . . is consistent with ensuring that the capacity is awarded based on the highest economic value."[13]

The rationale underlying this policy is simple: "Maximizing revenue and the use of pipeline capacity will benefit all customers by increasing billing determinants and thereby lowering unit fixed costs."[14] This is not the only benefit; "aggregat[ion of] bids to maximize returns" also "serve[s]" "several other policy goals . . . including 'maximizing incremental revenue to the pipeline, attracting new shippers to the system and maximizing the capacity made available to market, which in turn maximize the value of the system to all users.'"[15]

The practice of offering non-contiguous segments of pipeline capacity during auctions furthers the Commission's policy of maximizing the use of pipeline capacity and revenue. As the Commission explained, "the inclusion of non-contiguous segments in a capacity offering" might

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[12] *Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053, 61,193 (2000) (emphasis added); *see also Texican* at P 69 ("The Commission also noted that it is appropriate for a pipeline to maximize the opportunity to market unused capacity because by maximizing throughput the pipeline will have a greater number of units over which to spread its fixed costs in its next rate case."); *Tennessee Gas*, 94 FERC at 61,402 ("[P]ipeline[s] may suspend the right of existing shippers to change primary points during the period when bidding on available mainline capacity associated with specific points is taking place in order to assure that the pipeline will have the maximum opportunity to market unused mainline capacity.").

[13] *Natural Gas*, 82 FERC at 61,140.

[14] *Texican* at P 69; *see also Northern Border* at P 28 ("The Commission's policy is to permit a pipeline to use NPV to maximize both revenues and subscribed capacity on its system. This supports all users of the system by increasing billing determinants and lowering costs to customers."); *Tennessee Gas*, 94 FERC at 61,402 ("[A]n allocation method that maximizes throughput on the system will mean that . . . there will be a greater number of units of service over which to spread [the pipeline's] fixed costs. . . . [T]his benefits all [the pipeline's] shippers by allowing [the pipeline's] rates to be lower than they otherwise would be."); *Tennessee Gas Pipeline Co.*, 91 FERC at 61,193 ("The sale of the unsubscribed mainline capacity allows the pipeline to spread its recovery of fixed costs over more units of service, thus lowering the costs to all.").

[15] *Northern Border* at P 27 (quoting *Texican* at P 67).

"permit[] [pipelines] to sell more capacity than it otherwise would," thereby "benefit[ting] shippers in the long run."[16] The Commission *for decades* has permitted posting of a package of non-contiguous segments of capacity for an auction on this basis despite "shippers' characterization of the auction as forcing bidders to bid on undesired capacity in order to submit a winning bid."[17] The Commission has reaffirmed that its "policy does not preclude a pipeline from packaging non-contiguous segments of capacity, so long as shippers are not required to bid on segments of capacity that are not desired and thus have an opportunity to obtain the portion of the capacity they seek."[18] The Petition even begrudgingly acknowledges the Commission's well-established policy, conceding that "[t]he Commission previously held that customers would be protected from harm if the pipeline's tariff did not *technically require* bids on non-contiguous segments."[19]

The Commission has found correctly that this sole "technical[] require[ment]" is sufficient protection for consumers because of the numerous other safeguards in place to protect against exercises of market power in the primary capacity market. The Commission has made clear that "any . . . use of any aggregation methodology must . . . conform to the Commission's capacity allocation goals and policies."[20] Under these goals and policies, the "maximum recourse rate remains applicable to each segment of capacity included in a capacity offering."[21] Further, "[i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate—which is

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[16] *Northern Border* at P 24; *see also id.* at P 28 ("The Commission's policy is to permit a pipeline to use NPV to maximize both revenues and subscribed capacity on its system.").

[17] *Id.* at P 23 (discussing *Indicated Shippers*, 89 FERC at 61,416-17).

[18] *Northern Border* at P 23.

[19] Petition at 2 (emphasis added).

[20] *Texican* at P 71.

[21] *Northern Border* at P 24.

still applicable to the pipelines."[22] This prevents the creation of artificial scarcity through the deliberate withholding of capacity.

The Commission has long recognized that "the primary intended beneficiaries of the NGA" are "the captive shippers,"[23] and has structured its policies regarding the allocation of capacity in a way that, consistent with the NGA, benefits these customers. The ability to offer non-contiguous segments of pipeline capacity during auctions, given the protections established by the Commission's current rules and policies, in fact "benefit[s] *all* customers,"[24] not just large ones who may have competitive alternatives on multiple pipelines. The aggregation of bids, for example, is "an important means to allow small customers to compete for available capacity" in part because, by aggregating bids, "capacity may be awarded to the combination of bids that yield the highest NPV, even if neither successful bidder individually submits the highest value bid."[25]

B. Petitioners Request an Arbitrary and Capricious Departure from Longstanding Commission Precedent.

Petitioners acknowledge that this is not the Commission's first foray into the issue of offering non-contiguous segments of capacity during an open season. As the Petition explains, "the Commission's prior rulings . . . anticipated that this practice would benefit shippers" and "held that customers would be protected from harm if the pipeline's tariff did not technically require

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[22] *Interstate Natural Gas Association of Am. v. FERC*, 285 F.3d 18, 33 (D.C. Cir. 2002) (*INGAA*); *see also* Order No. 712 at P 48 ("[T]he Commission is continuing to protect against the possibility that, in an oligopolistic market structure, the pipeline and firm shipper will have a mutual interest in withholding capacity to raise the price because the Commission is continuing cost based regulation of pipeline transportation transactions. The pipeline will be required to sell both short-term and long-term capacity at just and reasonable rates. In the short-term, a releasing shipper's attempt to withhold capacity in order to raise prices above maximum rates will be undermined because the pipeline will be required to sell that capacity as interruptible capacity to a shipper willing to pay the maximum rate.").

[23] Order No. 712 at P 53.

[24] *Northern Border* at P 24 (emphasis added); *see also Texican* at P 69; *Tennessee Gas*, 94 FERC at 61,403.

[25] *Columbia Gas Transmission, LLC*, 148 FERC ¶ 61,218, P 46 (2014).

bids on non-contiguous segments."[26] The Petition seeks to evade application of the Commission's well-reasoned and well-established policy by portraying offers of non-contiguous segments of pipeline capacity during an auction as a novel or escalating threat.[27] But Petitioners offer *the same* arguments that the Commission has considered and rejected for over two decades,[28] and so provide no justification for the changes that they seek.

A comparison of the Commission's order in *Northern Border Pipeline Company* to the Petition illustrates how the Petition is nothing more than a rehash of old arguments which the Commission has considered and rejected:

***Northern Border Pipeline Company*, Docket No. RP18-1038**[29]	***American Gas Association*, Docket No. RM22-17**[30]
"Koch also suggests that failure to prohibit the pairing of non-contiguous capacity packages in a single auction removes the protection of the recourse rate and would permit a pipeline to collect an NPV for the value of capacity greater than the recourse rate."	"This practice forces shippers to bid an artificially inflated price for valuable capacity tied to unwanted capacity, thereby enabling a pipeline to collect revenue from shippers above the Commission approved maximum tariff rates for the high market value capacity."
"Koch objects to practices wherein valuable capacity is paired with 'worthless' capacity and claims that doing so creates a situation where a large customer will place an inflated bid for the worthless capacity in order to increase the NPV of its aggregate bid, and thereby win the auction."	"The harm to shippers arises when the tied capacity bids are for segments that are non-contiguous, and one of the capacity segments is valuable (*i.e.*, highly desirable capacity) while the other is not (*i.e.*, less desirable capacity)."

[26] Petition at 2.

[27] *See id.* at 2 (describing practice as "becoming increasingly commonplace"); *id.* at 14 (describing three-year effort to "gather[] information" on practice).

[28] *See, e.g.*, *Indicated Shippers*, 89 FERC at 61,417.

[29] *Northern Border Pipeline Co.*, 164 FERC ¶ 61,150, PP 21, 25 (2018).

[30] Petition at 2-3, 9-11, 14.

***Northern Border Pipeline Company*, Docket No. RP18-1038**[29]	***American Gas Association*, Docket No. RM22-17**[30]
"Koch states that when pipelines are permitted to pair capacity with wide variations in value together in a single auction, shippers are required as a practical matter to bid on both packages to obtain a pro rata share of the valuable package."	"The practical result of pairing valuable capacity in an auction with capacity that has little to no value is that shippers are effectively forced to bid on both segments to achieve a winning NPV."
"Koch predicts that a pipeline could achieve a market-driven value for the more valuable package."	"This excess payment is often equal to a large portion of the amount of the differential between the cost-based recourse rate for the valuable segment of capacity, and the market value of the same segment of capacity during a time of scarcity."
"Koch contends that combining non-contiguous or otherwise unrelated segments of capacity into a single package for purposes of an open season will have a discriminatory impact on small customers who cannot afford to pay for the unneeded capacity."	"[T]his practice of awarding capacity discriminates against certain shippers who do not have the resources to bid for capacity that they cannot utilize."
"Koch asks the Commission to provide guidance to the effect that tying non-contiguous packages of capacity together in a single auction is not permitted."	"Petitioners request that the Commission revise its regulations as necessary to prohibit this practice."

The Commission rejected these arguments in 2018 in a unanimous, bipartisan order. The Commission in fact "rejected" *in 1999* the central premise underlying the Petition: "the . . . characterization of [an] auction as forcing bidders to bid on undesired capacity in order to submit a winning bid" when "the pipeline's tariff required it to accept bids for portions of the package and aggregate bids for such portions."[31]

[31] *See Northern Border* at P 23 (discussing *Indicated Shippers*, 89 FERC at 61,416-17).

Not to be deterred, several parties—including Process Gas Consumers Group, one of the Petitioners here—advanced the same arguments that the Commission rejected in *Northern Border* in *Transcontinental Gas Pipe Line Company*:

***Transcontinental Gas Pipe Line Co.*, Docket No. RP20-1111**[32]	***American Gas Association*, Docket No. RM22-17**[33]
"NJR and EQT contend that Transco's proposal represents a tying arrangement, which is generally considered to present competitive problems because shippers are coerced into purchasing products that they do not need or want."	"This practice forces shippers to bid an artificially inflated price for valuable capacity tied to unwanted capacity, thereby enabling a pipeline to collect revenue from shippers above the Commission approved maximum tariff rates for the high market value capacity."
"PSEG and EQT assert that Transco's proposal could enable Transco to collect more than the maximum rate for a segment of capacity by combining desirable capacity with undesirable capacity that may have minimal value."	"The harm to shippers arises when the tied capacity bids are for segments that are non-contiguous, and one of the capacity segments is valuable (*i.e.*, highly desirable capacity) while the other is not (*i.e.*, less desirable capacity)."
"[Parties] state that such a proposal would permit Transco to combine non-contiguous and operationally unrelated parcels of capacity into one open season package, and, if approved, this could motivate shippers to purchase undesired capacity in order to have a better opportunity to obtain the capacity that the shipper actually does desire."	"The practical result of pairing valuable capacity in an auction with capacity that has little to no value is that shippers are effectively forced to bid on both segments to achieve a winning NPV."
"[PSEG] expresses concerns that Transco's proposal may allow a shipper bidding on both sets of capacity to inflate the bid of the desirable capacity above the maximum rate by bidding on the undesirable capacity. EQT states that the proposal creates a form of market-based rate service without the requisite Commission authorization to do so."	"This excess payment is often equal to a large portion of the amount of the differential between the cost-based recourse rate for the valuable segment of capacity, and the market value of the same segment of capacity during a time of scarcity."

[32] *Transcontinental Gas Pipe Line Co.*, 172 FERC ¶ 61,258, PP 9-17 (2020).

[33] Petition at 2-3, 9-11, 14.

***Transcontinental Gas Pipe Line Co.*, Docket No. RP20-1111**[32]	***American Gas Association*, Docket No. RM22-17**[33]
"PGC and TMG express concerns that this proposal may provide large shippers an advantage over smaller shippers with respect to bidding on capacity packages. . . . TMG avers that the prospect of smaller shippers being unable to win bids for capacity is a threat to the ability of these smaller shippers to serve their customers."	"[T]his practice of awarding capacity discriminates against certain shippers who do not have the resources to bid for capacity that they cannot utilize."
"Numerous parties protest Transco's proposed language that would provide Transco with the option to aggregate two or more bids for one or more bid packages in determining the NPV."	"Petitioners request that the Commission revise its regulations as necessary to prohibit this practice."

The Commission "agree[d]" with Transco that "the Commission has repeatedly rejected arguments that the aggregation of bids is anti-competitive and has stated it is consistent with ensuring that the capacity is awarded based on the highest economic value and maximizes the value of capacity to the pipeline."[34] The Commission went on to reject these arguments—again, on a unanimous, bipartisan basis—stating that

> [T]he pipeline's posting of a package of non-contiguous segments of capacity for an auction is permissible. Commission policy does not preclude a pipeline from packaging non-contiguous segments of capacity, so long as shippers are not required to bid on segments of capacity that are not desired and therefore have an opportunity to obtain the portion of the capacity they seek, understanding that a competing shipper willing to bid on all the elements of the aggregated package may provide a greater NPV and may therefore submit the winning bid. . . . Transco's proposal is not an impermissible tying arrangement as alleged by certain protesters but rather is a just and reasonable way to allocate system capacity that becomes available.[35]

Petitioners dismiss these "prior rulings" because they arose "only . . . within the narrow context of tariff filings by individual pipeline companies and not on a generic basis."[36] The

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[34] *Transcontinental Gas* at PP 16-17.

[35] *Id.* at PP 15, 17.

[36] Petition at 2.

Commission *should* only address concerns regarding capacity allocation in the "narrow context" of tariff filings, however, because those concerns must be considered in the context of specific tariffs and specific auctions. Petitioners concede (as they must) that the practice of offering non-contiguous segments of capacity during an auction is not problematic *per se*, and instead argue that "this practice has become unjust, unreasonable, and unduly discriminatory *in the manner in which it has been implemented*."[37] Each pipeline, however, "implement[s]" its capacity allocation process in a unique way. As the Commission has recognized, an inquiry into the idiosyncratic circumstances of each auction is best undertaken in individual proceedings rather than on a "generic basis."[38]

The Petition does not identify any fundamental changes that call into question the factual findings or reasoning on which the Commission has relied when repeatedly approving the practice of offering non-contiguous segments during auctions. Rather, the Petition only offers arguments that the Commission already considered and rejected on multiple occasions. Petitioners' "new evidence" merely shows that some pipelines offer non-contiguous segments of capacity, consistent with the terms of their Commission-approved tariffs, and that some shippers pay more for multiple

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[37] *Id.* at 2-3 (emphasis added); *see also id.* at 17 (requesting a rulemaking because "evidence contradicts [the Commission's] expectations . . . in approving this practice" and "due to the discriminatory results to-date").

[38] *See Transcontinental Gas* at P 17 ("While the protests contain hypothetical future harms, should the regime actually prove to be unduly discriminatory a party may file a complaint, or the Commission may initiate such proceeding *sua sponte*."); *Nat'l Energy & Trade, LP v. Texas Gas Transmission, LLC*, 121 FERC ¶ 61,064, P 62 (2007) ("We also dismiss, as inappropriate to this proceeding, Dreyfus' suggestion that the Commission initiate a generic inquiry into pipeline capacity allocation mechanisms and the capacity marketplace as a whole. This case appears to be *sui generis*, and turns on the judgment call of whether to add additional capacity to an already commenced bidding process."); *Tennessee Gas*, 94 FERC at 61,399 ("To the extent that a shipper believes that the pipeline has unreasonably refused to build new capacity in order to take advantage of its market power, the shipper may file a complaint. The Commission believes such case by case resolution of problems arising under the NPV capacity allocation method is preferable to an artificial term matching cap."); *Nat'l Energy & Trade* at P 59 ("The Commission takes seriously allegations of market manipulation, and reviews all such allegations *on a case-by-case basis*." (emphasis added)); *Indicated Shippers*, 89 FERC at 61,417 ("Natural's ability to 'shape' such packages and the manner in which Natural may 'shape' offers of capacity may be further discussed at the auction conference."); *see also Texican* at P 71 ("[W]e find that it is a reasonable step to allow pipelines to aggregate portions of bids to determine the highest NPV to the pipeline and award capacity accordingly. . . . [A]ny future use of any aggregation methodology must still conform to the Commission's capacity allocation goals and policies as discussed above.").

segments of capacity than they would for any single segment in the auction. This is basic economics and common sense; it is not the substantial evidence needed to justify a drastic departure from a policy that the Commission has consistently applied for decades.[39]

C. Petitioners' Purported "New Evidence" Is Insufficient to Carry Their Burden under NGA Section 5.

Petitioners style their Petition as a "Request for Rulemaking" but allege that there is a "practice" which "results in unjust and unreasonable rates . . . undue discrimination against industrial gas consumers, municipal gas systems and local distribution utilities, and higher prices for the ultimate gas consumers."[40] These allegations track the language of the NGA Section 5 almost exactly.[41] The Petitioners also seek quintessential Section 5 relief: the modification of existing tariffs to remove provisions that the Commission previously approved.[42] Because the Petition is a complaint under Section 5 in both form and function, the Commission should evaluate it under Section 5's substantial evidence standard and find the Petition insufficient.

It is irrelevant that Petitioners ask the Commission to effectuate these tariff changes through a regulation. Where an "order imposes . . . a completely new rate prescription, neither proposed nor previously used by the pipeline[,] [s]uch action is authorized only under section 5."[43]

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[39] *See La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897-99 (D.C. Cir. 1999) (remanding Commission determination where Commission failed to explain departure from its own precedent and relied only on its own conclusory statement to rebut contrary evidence in the record); *W.V. Pub. Servs. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 862-63 (D.C. Cir. 1982) (vacating decision where record did not contain "identifiable factual evidence" sufficient to justify "break with precedent and policy").

[40] Petition at 5.

[41] *See* 15 U.S.C. § 717d(a) ("Whenever the Commission . . . upon complaint of any . . . gas distributing company[] shall find that any rate . . . 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 . . . practice . . . affecting such rate . . . 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.").

[42] *See* Petition at 2-3 (acknowledging that FERC has "considered this issue within the narrow context of tariff filings" and asking for a "prohibit[ion of] this practice").

[43] *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

Indeed, "section 5 authority, *regardless of the context in which it is exercised*, may be pursued only in accordance with the requirements and constraints imposed by section 5."[44] Petitioners effectively ask the Commission to modify the tariffs of several pipelines to remove provisions that the Commission previously approved, something that the Commission could accomplish only through its Section 5 authority. Allowing Petitioners to circumvent Section 5's "requirements and constraints" because they styled their complaint as a request for rulemaking would render those requirements and constraints a nullity.

Petitioners' efforts to evade Section 5 is logical even if it is unlawful; they bear a heavy burden under the statute. "The proponent of the change . . . bears the burden of proof under section 5."[45] "Congress has not authorized the Commission to exercise its NGA § 5 powers based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence."[46] A party that "fail[s] to show, whether due to new evidence or any change in circumstances, a compelling reason" for its proposed change fails to carry its burden.[47]

Petitioners do not carry this burden, and their repeated failure over time to do so establishes that they cannot carry it. Petitioners claim that, "[s]ince 2019, [they] have been gathering information on the impact . . . of packaging non-contiguous capacity in open seasons,"[48] but, despite a *three year* investigation, Petitioners offer little in the way of facts. The Petition describes how some pipelines—consistent with their Commission-approved tariffs—have offered non-

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[44] *Id.* at 184 (emphasis added).

[45] *Id.*; *see also Nw. Pipeline Corp. v. FERC*, 61 F.3d 1479, 1488 (10th Cir. 1995) ("moving or complaining party bears the burden of proving that the previously established rate is unjust and unreasonable").

[46] *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010); *see also Sea Robin*, 795 F.2d at 187 (there must be "substantial evidence on th[e] record to show" that practice is "unjust or unreasonable").

[47] *KMC Thermo, LLC v. Dominion Energy Cove Point LNG, LP*, 165 FERC ¶ 61,166, P 32 (2018).

[48] Petition at 14.

contiguous capacity segments during open seasons and provides data to support the commonsense conclusion that the price for such packages might exceed the price that the pipeline could charge for each individual segment of capacity.[49] Petitioners' allegations of harm, however, rely on *ipse dixit*[50]—some of which is demonstrably false[51]—and vague generalizations.[52] Moreover, Petitioners' theory of harm assumes that a single auction will contain "valuable" or "highly desirable capacity" along with "less desirable capacity" and that the amount of the bid for both segments in excess of the recourse rate for the "valuable" capacity represents a premium for the valuable capacity rather than the bidder's estimation of the fair value of the "less desirable" capacity.[53] These assumptions are baseless; they rely on the existence of one, universal, objective "value" for each segment of capacity and on the "value" for one of the segments in the auction being less than the segment's recourse rate, but each shipper will value segments according to their business needs and outlook.

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[49] *See id.* at 14, Appendix A.

[50] *See, e.g.*, *id.* at 9 ("[I]t is inherently obvious that the packages are tied solely to increase the price that the pipeline can obtain for the valuable capacity."); *id.* at 10 (shippers are "virtually guaranteed" to lose required capacity unless bidding on multiple non-contiguous segments).

[51] Petitioners assert, for example, that, "as a result of this practice, these pipelines are not incentivized to build additional capacity that would be valuable to customers, contrary to Commission policy." Petition at 15. Pipelines have sought approval of several major projects in recent years. *See* FERC, *Approved Major Pipeline Projects (1997-Present)*, https://tinyurl.com/bdhx422t. There is no evidence that the Commission's capacity allocation policy, as opposed to increased litigation risk and regulatory uncertainty, have deterred pipelines' desire to add capacity. *See* Duke Energy, *Dominion Energy and Duke Energy cancel the Atlantic Coast Pipeline* (July 5, 2020) (announcing cancellation "due to ongoing delays and increasing cost uncertainty which threaten the economic viability of the project"), https://tinyurl.com/bvpt4kb6; Simon Casey and Gerson Freitas Jr., *PennEast Gas Project Halted in Latest U.S. Pipeline Casualty*, Bloomberg (Sept. 27, 2021) (stating project "encountered significant legal and regulatory obstacles" leading developers to "no longer believe the project can be efficiently completed"), https://tinyurl.com/5n95c2f8.

[52] *See, e.g.*, Petition at 7 (shippers are "effectively required" or "effectively forced" to bid on multiple non-contiguous segments); *id.* at 8 (non-contiguous segments "often have mismatched terms and volumes"); *id.* at 12 ("many shippers" lack capability to bid on multiple non-contiguous segments).

[53] *See* Petition at 11, 14-15.

The Petition's claims that pipelines will exercise market power or impose monopoly or scarcity prices absent Commission action similarly fail to reflect reality and provide insufficient justification for undoing a decades-old policy that the Commission affirmed less than two years ago. These hypothetical harms do not account for the protections already afforded consumers under the Commission's existing rules and regulations as well as fundamental characteristics of the primary and secondary capacity markets.

"[T]he basic premise of the NGA is the understanding that natural gas pipeline transportation is generally a natural monopoly,"[54] and so the Commission imposes controls on the primary capacity market to prevent pipelines from exercising market power that they naturally possess. Most importantly, the Commission generally imposes a "cost-of-service rate ceiling" in the primary capacity market that caps the amount pipelines may charge at a just and reasonable rate.[55] The Commission "has taken a conservative and cautious approach concerning the showing a pipeline must make in order to justify a finding that it lacks market power in its primary transportation market, *i.e.*, the pipeline's own sale of its transportation capacity," and that it should be permitted to charge market rather than cost-of-service rates.[56] This ceiling prevents pipelines from charging the monopoly rates that otherwise might exist under a natural monopoly. Further, the Commission requires pipelines to sell any unused capacity at their maximum rate, which prevents pipelines from creating artificial scarcity (and higher prices) by withholding capacity.[57]

Without a leg to stand on with respect to Commission policy concerning pipelines' sales of their own capacity, Petitioners point to unrelated Commission policy concerning release of

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[54] *INGAA*, 285 F.3d at 30.

[55] *See, e.g.*, Order No. 712 at P 48 ("The pipeline will be required to sell both short-term and long-term capacity at just and reasonable rates.").

[56] *Id.* at P 102, n.104 (quoting *Koch Gateway Pipeline Co.*, 89 FERC ¶ 61,046, 61,129 (1999)).

[57] *See id.* at P 48; *INGAA*, 285 F.3d at 33.

capacity on the secondary market.[58] The Commission has long-recognized—and the D.C. Circuit has affirmed—that the secondary capacity market is fundamentally different from the primary capacity market:

> [T]here seems every reason to suppose that releasing shipper ownership of such capacity (in any given market) is not so concentrated as that of the pipelines themselves—the concentration that prompted Congress to impose rate regulation in the first place. Here, the distinction between pipelines and other holders of unused capacity, based on probable likelihood of wielding market power, seems to us to pass muster.[59]

The D.C. Circuit concluded that the Commission made a "substantial showing that in this context competition has every reasonable prospect of preventing seriously monopolistic pricing."[60]

This fundamental difference between markets belies Petitioners' claim that the existence of "a prohibition against tying capacity" in the secondary market "to any extrinsic condition" requires modification of the Commission's policy with respect to capacity allocation in the primary market.[61] The Commission's prohibition against tying arose from concerns that "releasing shippers may attempt to add terms and conditions which will tie the release of capacity to other compensation paid to the releasing shipper."[62] The price controls that the Commission imposes on the primary market to protect against the exercise of market power already address this concern. Pipelines may charge—*at most*—a rate that the Commission determines is just and reasonable and must "sell the idle capacity as interruptible service to any taker at no more than the maximum

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[58] *See* Petition at 10-12.

[59] Order No. 712 at P 84 (quoting *INGAA*, 285 F.3d at 35 (alterations omitted)); *see also id.* at P 85 ("Unlike releasing shippers, the pipeline holders of primary capacity have a greater ability to exercise market power by withholding capacity and not constructing facilities.").

[60] *INGAA*, 285 F.3d at 35.

[61] Petition at 10.

[62] Order No. 636-A at 95-96, 60 FERC ¶ 61,102 (1992); *see also Statoil Natural Gas, LLC*, 128 FERC ¶ 61,240, P 17 (2009) ("[O]ne of the primary purposes for the implementation of the prohibition on tying releases to extraneous conditions was to ensure that releasing shippers did not place unreasonable restriction on the use of the capacity or require replacement shippers to purchase gas only from the releasing shipper.").

rate."[63] These protections do not exist in the secondary market, and so the Commission adopted a prohibition on tying. Simply put, Petitioners' "what's good for the goose is good for the gander" argument fails because the primary and secondary markets are entirely different beasts.

Shippers who chose not to purchase long-term, firm service in the primary market might not be able to obtain short-term capacity on specific segments of a pipeline at the volume, time, and price that they prefer under the Commission's policy because, "of course, . . . a competing shipper willing to bid on all the elements of the aggregated package may provide a greater NPV and become the winning bid."[64] That some shippers make that choice, with a full "understanding" of the risks entailed under the Commission's well-established policy,[65] does not demonstrate that the Commission's policy is unjust or unreasonable nor does it require an overhaul of the Commission's policy. The Commission's policy of permitting pipelines to offer non-contiguous segments of pipeline capacity during auctions properly places focus on what practices best benefit the natural gas pipeline system and the long-term shippers whose support built the system.

* * * *

The foregoing allegations are insufficient to carry Petitioners' burden. The Supreme Court has held that parties failed to even *plead* anticompetitive conduct where their allegations were "consistent with [illegality], but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"[66] Here, Petitioners bear the heavier burden of adducing substantial evidence to support their claim of unjust, unreasonable, and unduly discriminatory conduct and yet offer nothing more than the existence of

[63] *INGAA*, 285 F.3d at 33.

[64] *Northern Border* at P 23.

[65] *Id.*

[66] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

a practice *that the Commission already held was consistent with the public interest*. The Petition's Appendix A, which provides allegedly "illustrative" open season and capacity auction postings, does not carry the day for Petitioners; "[t]he mere fact that a rate charged was higher than another possible rate for capacity is not, by itself, sufficient evidence of deceptive or manipulative conduct."[67] Petitioners offer mere "labels and conclusions" and "have not nudged their claims across the line from conceivable to plausible"[68] and so fall far short of carrying their burden under NGA Section 5.[69] Petitioners' repeated failure to offer the evidence necessary to support their claims across several years and multiple proceedings demonstrates that they never will carry their burden. This alone justifies dismissal of the Petition.

D. Res Judicata and Collateral Estoppel Bar Petitioners' Request for Relief.

Res judicata and collateral estoppel provide an independent basis for rejecting the Petition. Petitioners do not hide the fact that the Petition is an attempt to obtain a another bite at the apple and instead acknowledge that the Commission "has . . . considered this issue," "anticipated that this practice would benefit shippers," and "previously held that customers would be protected from harm if the pipeline's tariff did not technically require bids on non-contiguous segments."[70] Petitioners cannot now relitigate on a "generic basis" issues that they did raise or could have raised in response to tariff filings by individual pipelines.[71]

The Commission has long recognized that collateral attacks on its orders are inappropriate, explaining that "[c]ollateral attacks on final orders and relitigation of applicable precedent,

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[67] *Nat'l Energy & Trade* at P 57.

[68] *Bell Atl.*, 550 U.S. at 555, 570.

[69] *See id.* at P 59 ("When a case is unsupported by facts and circumstances satisfying the elements of a bona fide manipulation claim as specified in Order No. 670, we will, as here, dismiss the complaint.").

[70] Petition at 2.

[71] *See generally McCulloch Interstate Gas Corp.*, 9 FERC ¶ 61,152, 61,305 (1979) (quoting *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 692 (3d Cir. 1977) (summarizing Commission's application of res judicata and collateral estoppel).

especially by parties that were active in the earlier case, impede the finality and repose in agency decisions that are essential to administrative efficiency, and are therefore strongly discouraged."[72] The doctrines advance the Commission's interest in "protection of litigants from the vexation and expense of repetitious litigation, protection of the courts from the burden of unnecessary litigation, promotion of respect for the judicial process and confidence in the conclusiveness of judicial decision-making, avoidance of disconcertingly inconsistent results, and securing the peace and repose of society."[73]

Shippers challenged the practice of packaging non-contiguous segments of capacity in individual tariff proceedings, lost their challenge, and now seek to relitigate *the same issue* on a generic basis through their trade organizations.[74] But the Petition "shows no reason why issues

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[72] *S. Co. Servs., Inc.*, 129 FERC ¶ 61,253, P 37 (2009).

[73] *Little Am. Refining Co.*, 40 FERC ¶ 61,270, 61,895 (1987) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366, 373 (D.C. Cir. 1985)) (alterations omitted).

[74] *Compare* Petition, Exhibit No. 0003 ¶¶ 2-3 (Affidavit of Mollie Giem, Northeast Gas Asset Optimization Lead, BP Energy Company) (stating "it has been my experience that in the context of open seasons where high value packages of capacity are marketed along with capacity with little or no market value, a bidder must bid on both transportation packages in order to have a bid with a high enough [NPV] to obtain some level of the more valuable package of capacity" and discussing Transco open seasons) *with* Comments of Indicated Shippers at 2, n.2, *Transcontinental Gas Pipe Line Co.*, Docket No. RP20-1111-000 (Sept. 1, 2020) (shippers, including BP Energy Company, arguing that "discretion to determine NPV and award capacity" "may enable pipelines to bundle or tie in a single open season a potentially valuable service or capacity to an unrelated service or discrete, non-contiguous capacity with little or no value, simply to force bidders to bid on both components of in order to obtain the valuable capacity"). *See also, e.g.*, *Northern Border* at PP 21, 25; *Transcontinental Gas* at PP 9-17; *see also* Petition at 2 (conceding that "the Commission's prior rulings" "considered this issue," "anticipated that this practice would benefit shippers," and "held that customers would be protected from harm if the pipeline's tariff did not technically require bids on non-contiguous segments").

Ironically, BP appears to recognize the wisdom of the Commission's current policy when it is in its commercial interest to do so:

> [A]s the Commission correctly points out in the August 30 Order in support of allowing Northern Border to market non-contiguous packages of capacity in a single auction, 'to the extent the inclusion of non-contiguous segments in a capacity offering permits Northern Border to sell more capacity than it otherwise would, this will benefit shippers in the long run. Maximizing revenue and the use of pipeline capacity will benefit all customers by increasing billing determinants and thereby lowering unit fixed costs in the next rate case.' The commercial value that this structure creates for captive customers applies equally to released capacity. . . . [S]ystemwide benefits to captive shippers result from both pipelines and releasing shippers being able to market their capacity more effectively. For the foregoing reasons, the Commission should clarify that neither pipelines nor releasing shippers are precluded from packaging non-contiguous segments of capacity on the

which were fully litigated . . . should now be relitigated."[75] Petitioners "do[] not argue that [they] w[ere] improperly denied the opportunity to make [their] case in the prior dockets"; they "only contend[] that the conclusions of . . . the Commission . . . were incorrect."[76] These circumstances clearly call for application of res judicata and collateral estoppel.

The individual tariff proceedings and this generic proceeding "involve the same cause of action" because the "rights or interests established in the prior judgment"—the pipelines' ability to package segments of capacity according to their tariffs—"would be destroyed or impaired by prosecution of the second action."[77] Further, the proceedings both "arise out of the same transactional nucleus of facts"—the pipelines' tariff filings and their open seasons—and so "substantially the same evidence [would be] presented in the two actions."[78] Because both proceedings involve the same cause of action and involve the same parties (*i.e.*, the Commission, the shippers, the pipelines, and, in some cases, the Petitioners here), res judicata and collateral estoppel bar Petitioners from relitigating any matters actually raised as well as any matters which could have been raised and litigated in the prior litigation over individual tariff filings, including the propriety of offering multiple, non-contiguous segments of capacity during an open season.[79]

> same or different pipelines, so long as shippers are not required to bid on segments of capacity that are not desired.

Motion for Clarification of BP Canada Energy Marketing Corp. at 6, *Northern Border Pipeline Co.*, Docket No. RP18-1038-000 (Oct. 1, 2018).

[75] *Nantahala Power & Light Co.*, 29 FERC 61,179, 61,374 (1984).

[76] *Id.*

[77] *Greensboro Lumber Co. v. Rayle Elec. Membership Corp.*, 40 FERC ¶ 61,283, 61,918 (1987) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1981)).

[78] *Id*.

[79] *See Pacific Gas and Elec. Co.*, 149 FERC ¶ 61,276, PP 62-65 (2014) (rejecting arguments as "an impermissible collateral attack on the Complaint Order"); *Greensboro Lumber*, 40 FERC at 61,918 ("Greensboro is prevented by the doctrine of res judicata from litigating in this docket issues that were or could have been litigated in the waiver proceeding"); *Nantahala Power*, 29 FERC at 61,374 (holding "collateral estoppel . . . precludes any party from relitigating identical issues decided against it" and granting motion for summary disposition).

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the Petition and once again affirm its policy of permitting a pipeline to package non-contiguous segments of capacity, so long as shippers are not required to bid on segments of capacity that are not desired and thus have an opportunity to obtain the portion of the capacity they seek.

Respectfully submitted,

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DATED: July 18, 2022

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2021), I hereby certify that I have this 18th day of July 2022, served the foregoing document on each person designated on the official service list compiled by the Secretary in this proceeding.

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