

139 FERC ¶ 61,002  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Transcontinental Gas Pipe Line Corporation

Docket Nos. RP06-569-007  
RP07-376-004  
(consolidated)

OPINION NO. 507-A  
ORDER ON REHEARING

(Issued April 2, 2012)

1. In this order, the Commission addresses a request for rehearing of Opinion No. 507<sup>1</sup> filed by Fortis Energy Marketing & Trading GP (Fortis)<sup>2</sup> and South Jersey Resources Group, LLC (South Jersey). In Opinion No. 507, the Commission reversed the Administrative Law Judge's (ALJ) decision<sup>3</sup> on the appropriate allocation of Transcontinental Gas Pipe Line Corporation's (Transco) cost of purchasing

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<sup>1</sup> *Transcontinental Gas Pipe Line Corp.*, Opinion No. 507, 130 FERC ¶ 61,043 (2010).

<sup>2</sup> In its rehearing request, Fortis states that, since the issuance of Opinion No. 507, it changed its name to BNP Paribas Energy Trading GP (BNPP Energy); however, for consistency with the orders at issue in the proceeding, BNPP Energy refers to itself in its rehearing request as Fortis. The Commission will also use this designation for consistency.

<sup>3</sup> *Transcontinental Gas Pipe Line Corp.*, 125 FERC ¶ 63,020 (2008) (*Initial Decision*).

approximately 3.3 million Dth of base gas<sup>4</sup> between historic and new shippers taking service under Rate Schedule Washington Storage Service-OA (WSS-OA). In the *Initial Decision*, the ALJ had rejected Transco's proposal to allocate the costs of the purchased base gas solely to new customers, holding that such costs should be shared equally between historic and new shippers. However, the Commission reversed this decision and determined that Transco's proposed incremental rate treatment for historic shippers and new shippers is just and reasonable and not unduly discriminatory. For the reasons discussed below, the Commission denies Fortis and South Jersey's request for rehearing of Opinion No. 507. In addition, the Commission directs Transco to modify section 8.3 of Rate Schedule WSS-OA to require that each time Transco purchases replenishment base gas, it either make a limited section 4 filing to recover the cost of that gas or make an informational filing detailing the volume of replenishment base gas purchased and the cost of that gas.

## **I. Background**

### **A. History of the WSS-OA Rate Schedule**

2. Transco's Washington Storage Service originated in the mid-1970s, before the Commission initiated its open access transportation program with the issuance of Order No. 436 in 1985.<sup>5</sup> On February 26, 1975, the Commission approved a settlement proposed by Transco and issued a certificate to provide individually certificated contract storage service at the Washington Storage Field under Rate Schedule WSS.<sup>6</sup> At that time, Transco faced severe supply problems, and its curtailment of service to its high priority industrial customers had "reached extraordinary proportions."<sup>7</sup> The Commission found that development of the Washington Storage Field was the best available means of providing extra volumes of gas during the winter heating season.

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<sup>4</sup> A base gas requirement is gas needed in storage to pressurize the reservoir to support top gas entitlements.

<sup>5</sup> *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 (1985).

<sup>6</sup> *Transcontinental Gas Pipe Line Corp.*, 53 FPC 628 (1975). Amendments to Rate Schedule WSS were subsequently authorized by the following orders: 56 FPC 1351 (1976); 58 FPC 1960 (1977); 1 FERC ¶ 61,172 (1977); 4 FERC ¶ 61,271 (1978); 6 FERC ¶ 61,232 (1979); 11 FERC ¶ 62,003 (1980); 12 FERC ¶ 62,287 (1980); 16 FERC ¶ 62,212 (1981).

<sup>7</sup> *Transco*, 53 FPC at 631.

3. The settlement provided that Transco's customers desiring WSS service would provide the base gas volumes necessary to support their top gas storage capacity entitlements.<sup>8</sup> As agreed to in the settlement, section 9.1 of the WSS Rate Schedule provided that Transco would inform each WSS customer of the quantity of base gas to be supplied by that customer for each increment of its storage capacity. Each WSS customer would then supply the required base gas volumes from volumes that would otherwise be available to it for purchase under Transco's then existing bundled firm sales rate schedules. The customers' firm entitlements to purchase gas would be temporarily reduced by the amount of base gas being supplied, coupled with a credit to their sales reservation charges. In addition, pursuant to the settlement, section 9.5 of Rate Schedule WSS provided that Transco would be the owner of the base gas injected into the Washington Storage Field (and incur the gas purchase cost), but the WSS customers would have the right to purchase their respective share of the base gas at historical cost from Transco at the time the customer terminated service from the field.<sup>9</sup>

4. Transco injected the original base gas volumes into the Washington Storage Field, consistent with these provisions of the 1975 settlement and the WSS Rate Schedule.<sup>10</sup> In addition, Transco expanded the capacity of the storage field several times between 1975 and 1981.<sup>11</sup> Shippers obtaining storage capacity in those expansions provided the required additional base gas pursuant to the same procedures described above. Transco rolled the costs of all its purchases of base gas into its rate base for purposes of determining the rates for its WSS service. Therefore, the WSS rates included a return on equity on the portion of the rate base financed with equity, as well as an income tax allowance. However, because the base gas is not considered to depreciate in value, the WSS rates did not include any depreciation allowance with respect to the base gas.

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<sup>8</sup> *Id.* at 630; *see also*, *Transcontinental Gas Pipe Line Corp.*, 87 FERC ¶ 61,184, at 61,704 (1999) (*1999 Conversion Order*).

<sup>9</sup> 53 FPC at 630. Ex. T-3 at 3-4. This base gas arrangement was listed in section 9.1 and section 9.5 of Transco's then existing WSS tariff on file with the Commission.

<sup>10</sup> Ex. T-3 at 3.

<sup>11</sup> A certificate for the final increase in top gas storage capacity was issued to Transco for the Washington Storage Field on September 30, 1980, increasing its capacity to 75 million Mcf. *Transcontinental Gas Pipe Line Corp.*, 12 FERC ¶ 62,287 (1980). The total top gas storage capacity, and thus the total base gas required to support that capacity, have remained unchanged since the completion of that expansion. Ex. T-4 at 8.

5. After its Order No. 636 restructuring proceeding, Transco continued to provide only an individually certificated, non-open access service at its Washington Storage Field until 1998. On September 1, 1998, Transco filed tariff sheets in Docket No. RP98-394 to implement a new Rate Schedule WSS-OA to accommodate requests by its shippers to convert from the existing Rate Schedule WSS firm storage service to open access service at the Washington Storage Field under Transco's blanket certificate and Part 284 of the Commission's regulations. Transco proposed that existing WSS shippers who convert to WSS-OA open access service would retain their right to purchase their respective share of the base gas at historical cost from Transco if they terminate service from the field. On October 28, 1998, the Commission approved Transco's proposed Rate Schedule WSS-OA, subject to conditions.<sup>12</sup> Among other things, the Commission required Transco to list in its tariff the specific volume of base gas that each converting customer will have a right to repurchase under the proposed WSS-OA Rate Schedule, as well as the volumes of base gas each remaining WSS customer has the right to repurchase. The Commission also found that Transco had failed to provide any mechanism to replenish needed base gas, if in the future a converting WSS shipper terminates its WSS-OA service and repurchases its share of the original base gas volumes. Therefore, the Commission required Transco to revise proposed section 8.1 of its WSS-OA Rate Schedule to clarify whether new WSS-OA customers will be required to provide replenishment base gas and, if so, propose a tariff mechanism stating how they are to provide replacement base gas.

6. On November 30, 1998, Transco filed revised tariff sheets in compliance with the Commission's directives. The Commission, in its initial review of the compliance filing, determined that additional information was necessary for a thorough evaluation of Transco's compliance filing, particularly whether Transco had correctly calculated the volume of base gas which each WSS customer, including those converting to WSS-OA service, would have the right to repurchase. Therefore, on February 10, 1999, the Commission issued a data request directing Transco to provide, among other things, a detailed narrative (as supported by Transco's accounting records) explaining the events leading to each of the base gas storage injections and withdrawals from the Washington Storage Field and an explanation setting forth the derivation of the storage base gas attributable to each Rate Schedule WSS customer.<sup>13</sup>

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<sup>12</sup> *Transcontinental Gas Pipe Line Corp.*, 85 FERC ¶ 61,119 (1998) (1998 Conversion Order), order on reh'g, 1999 Conversion Order, 87 FERC ¶ 61,184.

<sup>13</sup> 1999 Conversion Order, 87 FERC at 61,704 & n.6.

7. Based on the records received in response to the data request, the Commission held that Transco had correctly calculated the volumes of base gas which each historic WSS customer had supplied to Transco and thus would have the right to repurchase if it terminated service. The Commission stated that the information supplied by Transco showed that, during the various expansions of the Washington Storage Field, expansion customers that obtained additional top gas capacity entitlements were required to contribute additional base gas to support their increased entitlements.<sup>14</sup> In addition, each expansion increased top gas capacity by more than it increased the required volume of base gas. As a result, the ratio of base gas to shipper capacity entitlements declined with each expansion. This meant that each expansion caused WSS customers who did not increase their entitlements in the expansion to have “excess” base gas. Therefore, after each expansion, the non-participating shippers were permitted to purchase and withdraw their excess base gas, pursuant to section 9.5 of the WSS Rate Schedule.<sup>15</sup> Base gas withdrawn and sold to the non-participating customers offset exactly the volumes of the new base gas injected by the new expansion customers.<sup>16</sup>

8. In its filing to comply with the October 1998 order, Transco also clarified that the right to repurchase base gas upon termination of service was limited to the named historic WSS customers, and it revised section 9 of Rate Schedule WSS and section 8 of Rate Schedule WSS-OA to include the base gas volumes that each historic WSS customer would be entitled to repurchase if it terminated service under its respective rate schedule. New WSS-OA customers would not be required to supply base gas, but in turn, these shippers would not have the WSS base gas purchase rights that historic shippers would possess under the tariff.<sup>17</sup> Consistent with this intent, the Commission required Transco to further modify the first sentence of section 8 of Rate Schedule WSS-OA to limit the right to repurchase base gas to “Buyers who are former Rate Schedule WSS customers, that have converted to service under this rate schedule.”<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* 61,707-61,708.

<sup>18</sup> *Id.*

9. In order to clarify that new customers would not be required to supply base gas, the pipeline proposed amending section 8.1 of Rate Schedule WSS-OA to state: “At the time a Buyer [historic customer] exercises its right to purchase Base Gas, Seller [Transco] will be responsible for replenishment of that portion of the Base Gas in the Washington Storage Field.”<sup>19</sup> The Commission interpreted this language to mean that Transco accepted responsibility for providing additional base gas injections, if needed to support the entitlements of the WSS/WSS-OA customers. The Commission, however, did not consider Transco’s language to be explicit enough and accordingly, Transco was ordered to modify its proposed tariff language. Specifically, the Commission stated that:

Transco has an ongoing obligation to provide base gas sufficient to support the top gas entitlements of its customers under these rate schedules. But, Transco does not have an obligation to provide base gas if it is not necessary to support top gas entitlements of its customers. Therefore, simply because a former Rate Schedule WSS customer has terminated service and repurchased excess base gas under its rights grandfathered in that rate schedule, does not by itself trigger an obligation by Transco to inject base gas to replace or replenish the withdrawn volumes. Transco’s obligation to inject base gas arises only upon the sale of the top gas capacity entitlement to a different customer.<sup>20</sup>

Therefore, the Commission ordered Transco to further modify its tariff to provide that the pipeline is obligated to maintain sufficient base gas to support the total top gas requirements of its customers.

10. On June 14, 1999, Transco filed the revised tariff sheets in accordance with the Commission’s previous directives. On July 27, 1999, the Commission accepted Transco’s revised filing.<sup>21</sup>

#### **B. Transco’s Section 4 Rate Filing**

11. Three of Transco’s historic natural gas storage customers at the Washington Storage Field, Columbia Gas of Virginia (Columbia VA), PSEG Energy Resources and Trade (PSEG), and South Jersey Gas Company (South Jersey Gas) permanently released

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Transcontinental Gas Pipe Line Corp.*, Docket No. RP98-394-003 (July 27, 1999) (unpublished letter order).

their storage service rights under Rate Schedule WSS-OA. Columbia VA released its capacity to Entergy-Koch Trading LP (Entergy-Koch) on March 31, 1999. PSEG released its capacity to Fortis Energy Marketing & Trading GP (Fortis) (at the time Cinergy Marketing & Trading, LP) on March 31, 2005, South Jersey Gas released its capacity to South Jersey Resources Group, LLC (South Jersey), an affiliate of South Jersey Gas, on May 1, 2006.<sup>22</sup> At the time of the releases, the three historic customers exercised their right under Rate Schedule WSS-OA to purchase their respective shares of Washington Storage Field base gas. Columbia VA purchased 46,596 Dth of base gas, PSEG purchased 1,553,200 Dth, and South Jersey Gas purchased 1,653,046 Dth.<sup>23</sup> The historic storage service customers each paid the purchase price of approximately \$0.89 per Dth for the base gas; however, the market price of natural gas at the time was approximately \$6.00 per Dth, or significantly higher than the historic rate afforded to South Jersey Gas, Columbia VA, and PSEG.

12. Because Transco's WSS and WSS-OA rate schedules require that Transco maintain sufficient base gas quantities to support the total top gas capacity entitlements of its customers, Transco purchased approximately 3.4 million Dth of replacement gas for the Washington Storage Field. At the time of purchase, gas prices were significantly higher than the price of the original injected base gas.

13. On August 31, 2006, Transco filed a general rate case under section 4 of the Natural Gas Act (NGA). In its filing, Transco proposed to establish incremental rates for its historic WSS-OA shippers and its new shippers, including Fortis, Entergy-Koch, and South Jersey. It proposed to include the costs of the newly purchased base gas solely in the rate base used to calculate the three new shippers' rates, while the rate base used to calculate the historic shippers' rates continued to include only the lower cost base gas they had previously supplied to Transco before their conversion to open access service. As a result, the cost of service used to calculate the new shippers' rates included a higher overall return on rate base and tax allowance per unit of contract demand, than the cost of service used to calculate the historic shippers' rates. Transco contended that the replenishment base gas was purchased on behalf of the new shippers, and therefore, the costs associated with the newly purchased base gas should be allocated solely to the new shippers. Several parties intervened either protesting or supporting Transco's proposed incremental rates. On September 29, 2006, the Commission accepted and suspended

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<sup>22</sup> Ex. No. FS-12 at 1.

<sup>23</sup> *Id.*

Transco's tariff sheets to be effective March 1, 2007, subject to refund, conditions, and the outcome of the hearing established by the order.<sup>24</sup>

14. On November 28, 2007, the parties filed an uncontested Stipulation and Agreement of Settlement (Settlement) of the Docket No. RP06-569-000 rate case and another proceeding not at issue here. The settlement resolved all issues in the section 4 rate case, except for one issue. The settling parties agreed, *inter alia*, in Article VII of the agreement to reserve for resolution pursuant to hearing or further settlement the issue of Transco's proposal under NGA section 4 to establish incremental rates under Rate Schedule WSS-OA to recover Transco's cost of purchasing replenishment base gas (Reserved Issue). The settling parties further agreed to treat Entergy-Koch (whose interest was later transferred to Merrill Lynch) as a historic ratepayer under Rate Schedule WSS-OA. Finally, in remarks accompanying the agreement, Transco explained that proposed section 8.3 of Rate Schedule WSS-OA was being modified to provide that Transco would be allowed to submit a limited NGA section 4 rate case to recover only from new buyers any increase in the cost of service attributable to the replenishment of base gas to serve them when they contract for vacated capacity through a termination or a permanent capacity release by a terminating buyer.

15. The presiding ALJ certified the Settlement to the Commission on January 9, 2008. In his certification, the ALJ asserted that the sole issue remaining for consideration was Transco's proposal under NGA section 4 to establish incremental rates under Rate Schedule WSS-OA to Cinergy Marketing & Trading (and its successor Fortis) and South Jersey to recover Transco's cost of purchasing replenishment base gas. On March 7, 2008, the Commission approved the Settlement as in the public interest to become effective as proposed.<sup>25</sup>

16. Regarding the litigation of the Reserved Issue, the parties to the proceeding filed a stipulation. The stipulation provided that: 1) parties will base their testimony and exhibits on the fixed cost component (\$19.2 million) of the total Rate Schedules WSS/WSS-OA cost of service shown in Appendix B, Statement I, Exhibit No. T-1, page 30 of Transco's March 9, 2007 Compliance Filing; 2) Transco's restated direct testimony on the reserved issue will include an attached schedule reflecting its proposal, except that the incremental base gas purchases attributable to Entergy-Koch/Merrill Lynch and the associated billing determinants will be treated on a non-incremental basis; and 3) any compliance filing made by Transco to implement the outcome of the litigation of the Reserved Issue will be based on the WSS cost of service underlying the agreement.

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<sup>24</sup> *Transcontinental Gas Pipe Line Corp.*, 116 FERC ¶ 61,314 (2006).

<sup>25</sup> *Transcontinental Gas Pipe Line Corp.*, 122 FERC ¶ 61,213 (2008).

17. In addition to the Reserved Issue, Fortis and South Jersey raised in their prepared direct testimony the issue whether the base gas purchase option should be eliminated or whether the future sale of base gas should be deferred until abandonment is approved by the Commission.<sup>26</sup> Several of the parties to the proceeding filed motions to strike and objected to the testimony and issues as being outside the scope of the parties' Settlement. On May 19, 2008, the ALJ denied the motions and stated that he would reconsider the matter after parties have further delineated the issues in the proceeding.<sup>27</sup> On June 24, 2008, Transco filed, among other things, a joint statement defining the issues for consideration. These issues were:

(A) Whether Transco's proposal under section 4 of the NGA to establish incremental rates under its Rate Schedule WSS-OA to be applicable to Fortis and South Jersey to recover Transco's cost of purchasing replenishment base gas is just and reasonable.

(B) Whether Fortis and South Jersey have established that the existing base gas purchase option under section 8.2 of Transco's Rate Schedule WSS-OA is unjust and unreasonable.

(C) In the event that Fortis/South Jersey have carried their burden of proof regarding this issue, whether Fortis/South Jersey have demonstrated that their alternative proposal either to eliminate the existing base gas purchase options under Rate Schedule WSS-OA or to make the purchase options exercisable only if Transco has proposed and the Commission has approved a reduction to Transco's WSS-OA capacity as just and reasonable.<sup>28</sup>

18. On July 10, 2008, the ALJ held a one-day hearing on the Reserved Issue and the two additional issues.

19. On November 21, 2008, the ALJ issued a decision and certified this decision to the Commission. With regard to Transco's section 4 rate proposal, the ALJ ruled that Transco's incremental rate proposal was not a just and reasonable method to allocate

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<sup>26</sup> Fortis and South Jersey, April 10, 2008, Prepared Direct Testimony, Jones at 4.

<sup>27</sup> Administrative Law Judge, *Order Denying Motions to Strike* at 2 (May 19, 2008).

<sup>28</sup> See Transco, June 24, 2008, Joint Statement of Issues and Witness and Exhibit Lists at 2-4 (discussing the issues to be argued at trial).

costs for the replenishment of base gas at the Washington Storage Field. Specifically, the ALJ stated that the principle of cost causation supported the imposition of rolled-in rate treatment for the replenishment of the base gas for both historic and incremental customers receiving storage service for Transco's Washington Storage Field. The ALJ opined that Transco's incremental rate proposal violated section 4 of the NGA because it was unlawfully discriminatory against the replacement storage customers. The ALJ further stated that, to the extent the Commission's *Certification of New Interstate Natural Gas Pipeline Facilities*,<sup>29</sup> applied at all, it supported the imposition of rolled-in rate treatment for the replenishment of base gas at the Washington Storage Field.

20. With regard to the issues raised by Fortis and South Jersey, the ALJ determined that the parties in the Settlement explicitly preserved their right to have the Commission resolve the issues put forth by Fortis and South Jersey; therefore, these issues were ripe for consideration and resolution during the proceeding. In his decision of these issues on the merits, the ALJ ruled that Fortis and South Jersey had not met their burden of proof that the existing base gas purchase option under section 8.2 of Rate Schedule WSS-OA was unjust and unreasonable under a rolled-in rate scenario. In light of the above decision, the ALJ did not consider Fortis and South Jersey's specific alternatives to section 8.2's base gas purchase provision.

21. On December 22, 2008, the active parties to the proceeding filed exceptions to the ALJ's decision. Transco and WSS Customer Group filed exceptions to the decision stating that the Commission should reverse the ALJ's rulings that: Transco's proposed incremental rate treatment for its historic and incremental customers was not just and reasonable; and the settlement agreement makes clear that the parties preserved the right to have other issues besides Transco's rate proposal addressed in the proceeding. Fortis and South Jersey filed an exception to the ALJ's decision requesting that the Commission reverse the ALJ's ruling that Transco's existing base gas purchase option in section 8.2 is not unjust and unreasonable and consider its alternatives to Transco's existing section 8.2's base gas purchase rights. Commission Staff filed exceptions to the decision stating that the Commission should reverse the ALJ's rulings: that completely rolled-in rates are just and reasonable; and on the proper interpretation of the parties' Settlement.

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<sup>29</sup> 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (*1999 Certificate Policy Statement*).

22. On January 12, 2009, Fortis and South Jersey, Transco, and WSS Customer Group filed briefs on opposing exceptions, and on that same day, Transco Municipal Group (TMG) and the Municipal Gas Authority of Georgia (Municipal Gas) filed a brief on exceptions adopting certain exceptions filed by several parties to the proceeding.<sup>30</sup>

23. On January 21, 2010, the Commission issued Opinion No. 507, reversing the *Initial Decision*. The Commission stated that Transco's incremental rate proposal was not an unjust and unreasonable method to allocate costs for the replenishment of base gas at the Washington Storage Field.<sup>31</sup> The Commission further determined that Transco's rate proposal is not unduly discriminatory to replacement shippers of the Washington Storage Field because the replacement shippers and historic shippers were not similarly situated.<sup>32</sup> In addition, the Commission reversed the specific ALJ findings on cost causation; the *1999 Certificate Policy Statement*; and the interpretation of the parties' Settlement Agreement.

24. On February 22, 2010, Fortis and South Jersey filed a request for rehearing of Opinion No. 507. Fortis and South Jersey state that the Commission erred by failing to affirm the ALJ's determinations that: 1) Transco's decision to impose incremental rates upon Fortis and South Jersey is unjust, unreasonable and unlawfully discriminatory and preferential under section 4 of the NGA; and 2) fully rolled-in rates are just and reasonable and not unduly discriminatory or preferential. Fortis and South Jersey also allege that the Commission erred by failing to consider on the merits the "section 5" issue (Fortis and South Jersey's challenge to Transco's Rate Schedule WW-OA's base gas purchase rights) and failing to issue an order invalidating the base gas provision and implementing either of the suggestions offered by Fortis and South Jersey during the proceeding.

## II. Discussion

25. The Commission determines that the rehearing request does not contain any information or arguments that would cause us to reconsider our decision in Opinion No. 507. Therefore, we deny Fortis and South Jersey's request for rehearing for the reasons stated more fully below.

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<sup>30</sup> Specifically, TMG and Municipal Gas adopted: 1) exception nos. 1-3 filed by the WSS Customer Group; 2) exception nos. 1-2 filed by Transco; and 3) exception nos. 1-7 filed by Commission Staff.

<sup>31</sup> Opinion No. 507, 130 FERC ¶ 61,043 at P 19.

<sup>32</sup> *Id.*

**A. Decision to Reverse the ALJ's Ruling that Transco's Incremental Rate Proposal was Unjust, Unreasonable, and unduly discriminatory**

**1. Cost Causation and Discrimination**

**a. Opinion No. 507**

26. In Opinion No. 507, the Commission held that Transco had satisfied its burden to show that its incremental rate proposal was just, reasonable, and not unduly discriminatory. The Commission accordingly reversed the ALJ's decision recommending rejection of Transco's proposal.

27. The Commission first reviewed the ALJ's application of the ratemaking principle of cost causation to Transco's incremental rate proposal. In its analysis, the Commission stated the well-settled policy that, "all approved rates reflect to some degree the costs actually caused by the customer who must pay [for] them."<sup>33</sup> Applying this principle to the record in the proceeding, the Commission determined that "Transco has reasonably proposed to require the new shippers [Fortis and South Jersey] to pay rates reflecting the cost of the base gas [it] is required to supply to serve those shippers."<sup>34</sup> Therefore, the Commission reversed the ALJ's ruling that the principle of cost causation does not support the imposition of incremental rates for the replenishment of the base gas on new customers receiving service from Transco's Washington Storage Field.

28. The Commission stated that "[i]t appears the ALJ based his analysis on the premise that, since all base gas serves the top gas deliverability and capacity needs of all WSS/WSS-OA customers as a whole, it is not possible to attribute any portion of base gas to any customers other than *pro rata* according to each customer's top gas volume."<sup>35</sup> The Commission recognized that the interconnected nature of Transco's Washington Storage Field means that, once the replenishment base gas is in the ground, it supports the top gas needs of all customers. However, the Commission held that other factors also existed that it concluded were more conclusive and supported Transco's incremental rate proposal.

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<sup>33</sup> Opinion No. 507, 130 FERC ¶ 61,043 at P 20 (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (*KN Energy*)).

<sup>34</sup> *Id.* P 34.

<sup>35</sup> *Id.* P 31. The Commission also noted that the relationship between the level of base gas and the deliverability capability of a storage field is not linear.

29. The Commission explained that, in this case, PSEG and South Jersey Gas permanently exited Transco's Washington Storage Field with approximately 3.3 million Dth of base gas. South Jersey Gas and PSEG also contractually released their storage service rights at the field to Fortis and South Jersey. After Fortis and South Jersey became customers, Transco purchased approximately 3.3 million Dth of replacement base gas to serve their top gas capacity needs. The Commission found that this string of events is what caused Transco to purchase additional base gas; therefore, the imposition of costs on the new customers satisfies the principle of cost causation.

30. The Commission recognized that Transco's incremental rate proposal gives the historic shippers who converted from Rate Schedule WSS the entire benefit of the lower cost of the base gas injected into the Washington Storage Field before the establishment of Rate Schedule WSS-OA. However, the Commission found that was reasonable, because the historic shippers helped provide that base gas. As described above, during a period of severe gas shortages in the 1970s, the historic shippers agreed to a temporary reduction in their firm purchase entitlements in order to permit Transco to take gas, which the historic shippers would otherwise have been entitled to purchase, and to inject that gas into the Washington Storage Field as base gas. By contrast, the new shippers did nothing to help Transco obtain the lower cost base gas previously injected into Washington Storage Field. In these circumstances, Transco reasonably proposed to require the new shippers to pay rates reflecting the cost of the base gas Transco is required to supply to serve those shippers.

31. For the same reasons, the Commission held that Transco's proposal to charge incremental rates to Fortis, South Jersey and any other new shippers is not unduly discriminatory. The Commission reasoned that the new shippers were not similarly situated to the historic shippers of the Washington Storage Field, because historic shippers were required to provide the base gas used to serve them, whereas new shippers did not provide base gas.<sup>36</sup> Moreover, the Commission stated that, until conversion to open access service, section 9.1 of Rate Schedule WSS provided that:

The Base Gas shall be provided by Buyer from quantities otherwise available under Seller's CD, G, and OG [sales] rate schedules. Each Buyer shall be informed of the quantity of Base Gas to be supplied by such Buyer for each increment of Storage Quantity.<sup>37</sup>

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<sup>36</sup> *See Id.* P 51.

<sup>37</sup> *Id.*

The Commission also reasoned that historic shippers have a grandfathered right to repurchase the base gas that they supplied, if they terminated their WSS service under then section 9.5 of Rate Schedule WSS (now, section 8.2 of WSS-OA), and new shippers were not given this right. The Commission stated that this provision was enshrined in a Commission-approved settlement and later included in Transco's tariff.<sup>38</sup>

32. Finally, the Commission stated that it was not persuaded by the ALJ's claim that Transco's proposed amendment to section 8.3 of Rate Schedule WSS-OA (which allows Transco to make a limited section 4 rate filing to recover from new shippers any increase in the cost of service attributable to the replenishment of base gas to serve them) has the potential to allow for the disparate treatment of similarly situated customers.<sup>39</sup> Instead, the Commission ruled that this proposal actually treats similarly situated replacement shippers exactly the same as other replacement shippers.

**b. Fortis and South Jersey Argument**

33. Fortis and South Jersey argue that the ALJ properly found, after consideration of the evidence of the operational nature of Transco's WSS storage facility, that Transco's proposal to impose an incremental rate on Fortis and South Jersey was unjust and unreasonable based upon the principle of cost causation. Fortis and South Jersey state the ALJ held that "[s]ince all base gas as a whole serves the top gas capacity and deliverability needs of all customers as a whole, it is impossible to attribute any portion of base gas to any one or more customers in any way other than pro rata according to each customer's top gas volume."<sup>40</sup> Fortis and South Jersey state the ALJ further opined that Transco replenished its base gas after PSEG and South Jersey Gas withdrew their respective base gas entitlements because Transco needed to support the top gas capacity and deliverability needs of all customers, even if Fortis and South Jersey had not signed on as replacement shippers.<sup>41</sup> Accordingly, Fortis and South Jersey assert that the ALJ correctly ruled that the principle of cost causation supports the imposition of rolled-in rates for the replenishment of the base gas for all customers receiving service from Transco's Washington Storage Field.

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<sup>38</sup> *Id.* P 51-52.

<sup>39</sup> *Id.* P 54.

<sup>40</sup> Fortis and South Jersey, Rehearing at 5-6 (citing *Initial Decision*, 125 FERC ¶ 63,020 at P 129-130).

<sup>41</sup> *Id.*

34. Fortis and South Jersey allege that, although the Commission finds the ALJ's findings to be instructive, the Commission ignored those findings, considered other factors to be more conclusive and adopted a new "but/for" test where the incidence of benefits is completely removed from the calculus of cost responsibility. Fortis and South Jersey allege that the Commission's finding that PSEG and South Jersey Gas' purchases of their base gas, in conjunction with their capacity releases to Fortis and South Jersey, caused Transco to purchase additional base gas is contrary to the facts established at hearing. Fortis and South Jersey contend that, contrary to the Commission's analysis, Transco did not purchase approximately 3.3 million Dth of replacement base gas to serve their top gas capacity needs. Fortis and South Jersey argue that the facts proved that Transco needed to replenish the entire amount of base gas purchased by PSEG and South Jersey Gas in order to maintain the aggregate deliverability for all WSS-OA customers. Fortis and South Jersey allege that the Commission does not acknowledge this inconsistency nor does it explain why it is effectively reversing the factual determinations of the ALJ.

35. Second, Fortis and South Jersey argue that neither the Commission nor any of the incremental rate proponents cite to any precedent supporting the Commission's decision to ignore the benefits associated with the replenishment of base gas volumes in favor of the "but/for" test the Commission adopts here. Fortis and South Jersey state that ALJ found that a "but/for" test is contrary to the customary approach of ratemaking under the rule of cost causation, which requires that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.<sup>42</sup> Fortis and South Jersey allege that compliance with this doctrine is generally evaluated "by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party."<sup>43</sup> Fortis and South Jersey complain that the Commission contravened this test and ignored the ALJ's findings that:

But for arguments are appealing, but they tend to mask other important impacts that come between the alleged proximate cause and the allegedly injurious effect. Here, the allegation by Transco and WSS Customer Group of the proximate cause for the purchase of replenishment base gas glosses over a number of countervailing considerations. For instance, it is inaccurate to suggest that, "but for" Fortis and South Jersey having stepped into the shoes of PSEG and South Jersey Gas, Transco would not have purchased replenishment base gas. Doing so ignores the fact that when PSEG and

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<sup>42</sup> Fortis and South Jersey, Rehearing at 8 (citing *Initial Decision*, 125 FERC ¶ 63,020 at P 127 (internal citations omitted)).

<sup>43</sup> *Id.* 8-9 (citing *Id.* P 132).

South Jersey Gas left the [Washington Storage] Field and took their base gas option amounts with them, service to all customers remaining in the Field was degraded as a result.<sup>44</sup>

Fortis and South Jersey argue that the Commission does not acknowledge the ALJ's contrary analysis, nor does it attempt to explain why the ALJ's analysis is in error.

36. Finally, Fortis and South Jersey aver that the Commission's decision conflicts with its long-standing approach used in allocating cost responsibility for network upgrade costs associated with the interconnection of new electric generation. Fortis and South Jersey state the Commission considers the incidence of benefits resulting from the interconnection in deciding which parties must bear the associated network upgrade costs, and in what proportion. Fortis and South Jersey argue that, while these network upgrades would not be needed "but/for" the interconnection, the Commission does not directly assign network upgrade costs to the new interconnecting generator. Instead, Fortis and South Jersey explain that the Commission requires that "such costs be allocated to all network customers in recognition of the fact that the upgrade provides benefits to all users of the network."<sup>45</sup> Fortis and South Jersey posit that, while the Commission has permitted departures from this policy in certain circumstances involving independent system operators and regional transmission organizations, even in those instances the Commission "has consistently found that cost allocation for generator interconnection-related network upgrades must strike an appropriate balance between the entity that 'caused' the need for an upgrade (i.e., by deciding to interconnect a new generator) and the larger set of entities that will actually benefit from that upgrade."<sup>46</sup> Fortis and South Jersey state that these same factors are applicable here where the record evidence shows that the base gas replenishments were necessary to maintain the existing level of storage deliverability.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* 10 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007)).

<sup>46</sup> *Id.* (citing *Midwest Independent Transmission Sys. Operator, Inc. and the Midwest ISO Transmission Owners*, 129 FERC ¶ 61,060, at P 54 (2009)).

37. Fortis and South Jersey allege that, in defending its reversal of the ALJ's decision, the Commission suggests that the timing of Transco's gas purchases is determinative of how the costs of those purchases should be allocated. Fortis and South Jersey assert the Commission's statement that it is reasonable to give "the historic shippers. . . the entire benefit of the lower cost of base gas . . . because the historic shippers helped provide that base gas" is not sustainable because there is no record evidence that the historic shippers actually provided the base gas.<sup>47</sup> Fortis and South Jersey allege that the record is clear that Transco owned and subsequently injected all historic base gas volumes, that no historic customer ever had or gave up an ownership interest in those original base gas volumes, and that none of those customers was ever charged any fee for those volumes.

38. Fortis and South Jersey also claim that historic shippers have never reimbursed Transco for its original purchase costs of the base gas injections nor paid depreciation expense on such volumes. Therefore, Fortis and South Jersey aver that historic shippers have no reasonable claim to that base gas or to any special rate based on it so there is no basis for the Commission's ruling allowing historic customers to have exclusive right to 100 percent of the rate benefit of the lower-priced gas. Moreover, Fortis and South Jersey argue that a number of WSS-OA customers paying rolled-in rates are not the original WSS customers but are customers that have either acquired additional WSS capacity in subsequent expansions of the Washington Storage Field or have succeeded to the contracts of the original WSS customers.

39. Fortis and South Jersey aver that the Commission errs in its assertion that historic shippers "have grandfathered purchase rights enshrined in section 8.2 of Rate Schedule WSS-OA" because the section 8.2 base gas repurchase option is not a repurchase "right."<sup>48</sup> Fortis and South Jersey argue that, as established in the hearing, it is uncontroverted that historic shippers have no right to repurchase base gas because they never had any ownership interest in that gas. In fact, Fortis and South Jersey allege that the opposite is true because, as recognized by the ALJ, Transco supplied base gas for the historic and new shippers but only attempted to charge the new shippers the incremental rate. Fortis and South Jersey assert that Transco also granted the historic shippers a unique right to strip base gas from Transco's Washington Storage Field at a discounted rate while leaving the remaining customers to bear the costs of replacing that gas. Fortis and South Jersey assert that the ALJ correctly found that the base gas provision puts them at a disadvantage when compared to the historic customers. Moreover, Fortis and South

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<sup>47</sup> Fortis and South Jersey, Rehearing at 14-15 (citing Opinion No. 507, 130 FERC ¶ 61,043 at P 51).

<sup>48</sup> Fortis and South Jersey, Rehearing at 18-19 (citing Opinion No. 507, 130 FERC ¶ 61,043 at P 51).

Jersey add that the Commission makes no mention of the fact that this purchase option was negotiated as part of a settlement and therefore has no precedential value.

40. Fortis and South Jersey aver that the Commission states Transco's proposed section 8.3 of Rate Schedule WSS-OA bolsters its conclusion that historic storage customers are not similarly situated to Fortis and South Jersey. Specifically, Fortis and South Jersey cite paragraph 54 of Opinion No. 507, which states:

Finally, the Commission is not persuaded that Transco's proposed amendment to section 8.3 of the WSS-OA tariff will have the potential for widely different treatment of similarly situated customers. Transco's proposed amendment merely states that the pipeline will have the ability to make a limited section 4 rate filing to recover from new shippers any new increase in the cost of service attributable to the replenishment of base gas to serve them. This amendment actually treats similarly situated replacement shippers exactly the same. The amendment subjects all new replacement shippers to the same requirements as other replacement shippers. As stated previously, replacement shippers and historic shippers are not similarly situated already under section 8.2 of the WSS-OA tariff and this provision helps to clarify that difference with regard to the different rate treatment.<sup>49</sup>

Fortis and South Jersey argue that this analysis is also unsustainable because, as recognized by the ALJ, the plain language of section 8.3 permits, but does not require, Transco to seek recovery of base gas costs from new or replacement shippers. Furthermore, Fortis and South Jersey claim that the Commission fails to explain why the prospect of subjecting all future replacement customers to limited section 4 filings demonstrates that replacement customers are not similarly situated to historic customers for the purpose of allocating and recovering the costs of base gas.

41. Finally, Fortis and South Jersey allege that the ALJ correctly ruled that Transco's incremental rate proposal is discriminatory against Fortis and South Jersey because it forces them to reimburse Transco for a far greater proportion of the opportunity cost of the base gas than is recouped from its historic customers even though all storage customers are subject to the same rate design. Fortis and South Jersey state the ALJ concluded that "Transco's proposed incremental rates attempt to force Fortis and South Jersey to pay more of Transco's opportunity cost than the remaining customers pay for

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<sup>49</sup> Fortis and South Jersey, Rehearing at 20-21.

the exact same service, while not even coming close to making up for the shortfall in Transco's unrecovered opportunity cost or its replacement base gas purchase cost."<sup>50</sup> Fortis and South Jersey state the ALJ further ruled that Transco cannot penalize Fortis and South Jersey because its WSS-OA rate structure is not designed to address its economic needs. Fortis and South Jersey argue that the Commission did not factor this discussion into its decision-making; therefore, the decision is not reasonable.

**c. Commission Decision**

42. Fortis and South Jersey's arguments for reversal of the Commission's ruling on cost causation in Opinion No. 507 are not persuasive. As stated in Order No. 507, under the statutory scheme set forth in the NGA, the pipeline has the initiative through a section 4 filing to propose how it will recover its costs.<sup>51</sup> The courts have long recognized that there is no single just and reasonable rate but instead that various rates may be just and reasonable.<sup>52</sup> If the pipeline satisfies its burden under section 4 to show that its proposed rates are just and reasonable, the Commission must accept those rates, regardless of whether other just and reasonable rates may exist.<sup>53</sup>

43. In this case, Transco has proposed to charge different rates to two groups of shippers receiving the same storage service under its Rate Schedule WSS-OA. The first group of shippers is composed of the historic shippers who participated in the original project developing the Washington Storage Field and/or subsequent expansions of the capacity of that field, all of which were completed by 1981. The second group of shippers is composed of new shippers who obtain existing storage capacity in the Washington Storage Field either through a permanent capacity release from an original shipper or as a result of an original shipper's termination of its contract. Fortis and South Jersey are in the second group and obtained their capacity in 2005 and 2006. The Commission reaffirms its holding that Transco satisfied its burden under NGA section 4

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<sup>50</sup> Fortis and South Jersey, Rehearing at 23 (citing *Initial Decision*, 125 FERC ¶ 63,020 at P 178).

<sup>51</sup> *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985).

<sup>52</sup> *Tennessee Gas Pipeline Co.*, Opinion No. 406-A, 80 FERC ¶ 61,070, at 61,223-4 (1997) *aff'd*, *Consolidated Edison Co. v. FERC*, 165 F.3d 992 (D.C. Cir. 1999) (*ConEd*). See also *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir. 1984) (*Cities*); and *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

<sup>53</sup> *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-1579 (D.C. Cir. 1993).

to show that its proposal to treat these two groups of shippers differently is just and reasonable and not unduly discriminatory. Therefore, the Commission accepts Transco's proposal, regardless of whether other rate proposals might also be just and reasonable.

**i. Whether Proposal is Just and Reasonable**

44. Transco's proposal to charge higher rates to the new shippers than the historic shippers is based on its proposal to include the costs of the newly purchased base gas solely in the rate base used to calculate the new shippers' rates, while the rate base used to calculate the historic shippers' rates continues to include only the lower cost base gas the historic shippers had previously supplied to Transco before their conversion to open access service. Fortis and South Jersey contend that Transco should have rolled the costs of all its base gas purchases into a single, overall rate base used to calculate the rates of all WSS-OA shippers. They emphasize the ALJ's finding that "all base gas as a whole serves the top gas needs of all customers as a whole."<sup>54</sup> They point out that the court in *KN Energy* stated, "it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them."<sup>55</sup> Therefore, they argue, the ALJ's finding that all base gas serves the top gas needs of all customers requires the use of a fully rolled-in rate base.

45. However, the fact that a pipeline's facilities are integrated and thus used to perform service for all its customers does not, by itself, require a rolled-in rate base of the type Fortis and South Jersey seek. As the D.C. Circuit has recognized:

Whether the cost of a particular facility is more properly treated as a systemic cost and rolled-in to the rate base of all the customers, or as a segregated cost to a particular customer, which should be treated on an incremental basis, is frequently a difficult issue of fact presented to the Commission.<sup>56</sup>

As a result, the court in *ConEd* stated:

While incremental treatment may be required at one end of the rate-setting continuum, and rolled-in pricing required at the other, in between the

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<sup>54</sup> *Initial Decision*, 125 FERC ¶ 61,020 at P 129.

<sup>55</sup> *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (*KN Energy*).

<sup>56</sup> *ConEd*, 165 F.3d at n.19, quoting *Battle Creek Gas Co. v. FPC*, 281 F.2d 42, 47 (D.C. Cir. 1960).

two extremes lie a series of intermediate points in which both cost-recovery methods would satisfy section 4's just and reasonable test. At each of these places along the continuum, the pricing mechanism will essentially lie in the hands of the initiating pipeline.<sup>57</sup>

46. The facts in the instant case present a situation falling at one of the "intermediate points" in "the rate setting continuum" where both cost-recovery methods satisfy the just and reasonable standard, and therefore, Transco could reasonably choose incremental treatment of its base gas costs. The Commission has a policy of permitting rate differentials between "foundation" shippers who commit to purchase capacity on a new project before it is built and shippers that sign up for service later.<sup>58</sup> The Commission explained that such rate differentials may be justified, because "the contractual commitments by the foundation shippers to purchase capacity on the new projects provide essential support for the sponsor to proceed with the project."<sup>59</sup> Transco's proposed incremental treatment of the base gas costs at issue in this case is consistent with this policy.

47. The historic shippers provided essential support for Transco to proceed with the Washington Storage Field. Their support went beyond simply making contractual commitments to purchase capacity in the Washington Storage Field. As described above, during a period of severe gas shortages in the 1970s, the historic shippers agreed to a temporary reduction in their contractual rights to purchase gas from Transco in order to permit Transco to inject that gas into the Washington Storage Field as the base gas necessary to operate the storage field. Although Fortis and South Jersey allege that there is no record evidence that the historic shippers actually helped provide base gas to the Washington Storage Field, the record is replete with references to the origin of the base gas in the Washington Storage Field. The prepared answering testimony of Transco Witness Hutson contains a full summary of the origins of the field, including a summary of Docket No. CP74-33, which is the Commission proceeding on Transco's application for a certificate to construct and operate the field.<sup>60</sup> As witness Hutson described, the

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<sup>57</sup> *Id.*

<sup>58</sup> *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, FERC Stats. and Regs. ¶ 32,606, at P 98 (2006); *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, at P 65-70 (2006).

<sup>59</sup> *Id.*, FERC Stats. & Regs. ¶ 32,606 at P 98 (2006),

<sup>60</sup> *See* Transco Witness Hutson, Prepared Answering Testimony (Exhibit No. T-3).

Commission issued a certificate for the Washington Storage Field pursuant to an overall settlement between Transco and the historic shippers concerning how the field would be developed. Witness Hutson stated that, “the settlement provided that the Rate Schedule WSS customers would nominate the base gas volumes that would otherwise be available to them for purchase under Transco’s then-existing bundled firm sales Rate Schedules DC, G, and OG.”<sup>61</sup> Witness Hutson went on to explain that this event occurred during a period of severe gas shortages and curtailment. Witness Hutson stated:

It was during this period of curtailment that the firm sales customers nominated out of their firm sales entitlements the volumes of base gas necessary to support service at the WSS service. In essence, customers sacrificed their ability to purchase certain firm sales volumes at their city gate during a time of gas supply curtailment and instead nominated from their entitlements the required base gas volumes.<sup>62</sup>

48. Consistent with the settlement, section 9.1 of Rate Schedule WSS, which took effect on July 11, 1975, required that:

The Base Gas shall be provided by Buyer from quantities otherwise available under Seller’s CD, G, and OG [sales] rate schedules. Each Buyer shall be informed of the quantity of Base Gas to be supplied by such Buyer for each increment of Storage Quantity. On any day when Buyer desires to tender for injection a portion of its Base Gas obligation under this rate schedule, it shall give notice to Seller’s dispatcher specifying the quantity of gas it desires injected as Base Gas into storage on such day. Seller shall thereupon inject into storage the quantity of Base Gas so tendered, subject to the limitations set forth below in this Section.<sup>63</sup>

49. The ALJ’s Initial Decision also contains language regarding the contribution of the historic shippers to the Washington Storage Field. The ALJ writes, “[t]hese [repurchase] options were granted to these customers when the Field opened in 1976 because they were the original customers of the Washington Storage Field who

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<sup>61</sup> *Id.* 3.

<sup>62</sup> *Id.* 4.

<sup>63</sup> *Id.*

contributed their then-existing gas capacity entitlements to Transco” to establish the storage field and fill it with base gas.<sup>64</sup>

50. Fortis and South Jersey contend that the Commission erred in finding that the historic shippers helped provide base gas to the Washington Storage Field, because Transco owned all the base gas it injected into the field, continues to hold title to that gas, and never charged the historic customers a fee for that gas. Fortis and South Jersey also assert that the historic customers never had or gave up an ownership interest in the base gas. The Commission recognizes that section 9.5 of Rate Schedule WSS provided that Transco would be the owner of the base gas injected into the Washington Storage Field and incur the gas purchase cost. However, this fact is not contrary to our finding that the historic customers helped provide the base gas necessary to operate the field. While Transco purchased and owned that gas, Transco was contractually obligated under its sales Rate Schedules CD, G, and OG to resell that gas to the historic customers. Those customers gave up their contractual right to purchase that gas, so that Transco could, instead, inject it into the Washington Storage Field and use it to provide storage service to the historic customers. As described above, the historic customers’ agreement not to exercise their right to purchase the gas was instrumental in enabling Transco to obtain the base gas needed to operate the field, and the express language of section 9.1 of Rate Schedule WSS implementing the 1975 settlement clearly reflects the parties’ understanding that the historic customers were providing the base gas.

51. The fact Transco did not flow through to the historic customers its cost of purchasing the base gas reflected the fact that those customers had agreed not to exercise their right to purchase the gas at that time. The historic customers having agreed not to purchase the gas, there was no basis for Transco to charge them for the gas. In essence, those customers agreed to postpone their contractual right to purchase (and pay for) that gas, for so long as they continued to take the WSS storage service, with the right to exercise their purchase rights, and pay for the gas, at such time as they ceased taking the storage service for which they had supplied the base gas. However, the fact the historic customers did not have to compensate Transco for its cost of purchasing the base gas at the time it was injected into the storage field was not without financial cost to the historic customers. As Opinion No. 507 pointed out, Transco has included its cost of purchasing the base gas in the rate base used to calculate the WSS rates. Thus, the historic customers have been paying Transco rates which reflect a return on its investment in the base gas, for the entire time they have been taking the WSS service. Fortis and South Jersey suggest that this is of no moment, because the return “is merely a carrying charge on the

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<sup>64</sup> *Initial Decision*, 125 FERC ¶ 63,020 at P 124.

base gas cost balance.”<sup>65</sup> That is not correct. The overall return in the WSS cost of service includes a return on equity for the portion of the rate base financed with equity, and an associated income tax allowance. The return on equity represents profit for Transco’s investors, not simply carrying charges to compensate for the time value of money.

52. Fortis and South Jersey also contend that not all of the historic shippers participated in the original development of the Washington Storage Field, but received their capacity in subsequent expansions or succeeded to the contracts of the original shippers. Therefore, Fortis and South Jersey contend, such historic shippers did not help provide the original base gas volumes. Fortis and South Jersey also state that in all previous instances where Transco has bought additional base gas volumes, it has rolled in the costs of the base gas additions, and Fortis and South Jersey argue that there is no justification for treating the base gas purchases when they joined the system any differently.

53. These contentions do not undercut our holding that Transco has reasonably proposed to treat the historic shippers differently from Fortis and South Jersey for rate purposes. First, all of the historic shippers did help provide base gas volumes for the Washington Storage Field by nominating substantial volumes of gas out of their firm sales entitlements for use as base gas during the 1975-1978 period of substantial gas supply curtailment on Transco’s system. As stated in the Commission’s February 1975 order issuing the initial certificate for the Washington Storage Field, Transco planned to develop that field in three stages, with a top gas storage capacity of 15 Bcf to be achieved by November 1976, a top gas storage capacity of 22.5 Bcf by the end of 1977, and a full top gas storage capacity of 30 Bcf ready by the end of 1978.<sup>66</sup> In orders issued in August 1976<sup>67</sup> and May 1977,<sup>68</sup> the Commission authorized Transco to accelerate development of the field to reach the 30 Bcf top gas storage capacity by the end of 1977 and to increase top gas storage capacity to 40 Bcf by the end of 1978. In November 1977, the Commission authorized a further increase in the gas storage capacity

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<sup>65</sup> Fortis and South Jersey Rehearing Request at 15.

<sup>66</sup> *Transcontinental Gas Pipe Line Corp.*, 53 FPC 628, 630 (1975).

<sup>67</sup> *Transcontinental Gas Pipe Line Corp.*, 56 FPC 1351 (1976).

<sup>68</sup> *Transcontinental Gas Pipe Line Corp.*, 58 FPC 1960 (1977).

to 60 Bcf to be accomplished during the three years beginning in 1978.<sup>69</sup> In that order, the Commission stated:

Transco's gas supply posture has been one of the more seriously deficient among the pipeline companies. In the proceeding in Docket No. RP77-89, Transco has computed theoretical curtailments of approximately 20 percent of Priority 1 during November, December and January of 1977-78 with an average curtailment over the winter period of approximately 16 percent of Priority 1. Hence the storage gas is to be used for high priority requirements.<sup>70</sup>

54. During this 1975-1978 period, when the initial development of the Washington Storage Field occurred, all 28 historic shippers who still held capacity in that field under Rate Schedule WSS-OA at the time of the hearing in this case<sup>71</sup> provided base gas in the manner described above. Eighteen of the historic shippers made all their base gas contributions during that period.<sup>72</sup> As shown in the Appendix to this order, the remaining ten historic shippers all commenced providing base gas during this period, with four shippers making over 90 percent of their total base gas contributions during this period,<sup>73</sup> four shippers making between 56 and 73 percent of contributions during this period,<sup>74</sup> and only two shippers making less than 50 percent of their contributions during this

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<sup>69</sup> *Transcontinental Gas Pipe Line Corp.*, 1 FERC ¶ 61,172, at 61,456 (1977).

<sup>70</sup> *Id.* at 61,456.

<sup>71</sup> Exhibit No. FS-18 lists all the WSS-OA shippers with capacity in the field as of the date of the hearing. In addition to the 28 historic shippers, there were three non-historic shippers: Fortis, South Jersey and Merrill Lynch. As discussed further below, an uncontested settlement permits Merrill Lynch to be treated as if it were a historic shipper.

<sup>72</sup> Ex. No. FS-17 lists the base gas contributions of all the historical shippers by month. Based on that information, the Appendix to this order shows the total base gas contributions by each of the 28 historic shippers during the periods 1975-1978 and 1979-1981, and the percentage of overall contributions made during the 1975-1978 period.

<sup>73</sup> These were: Brooklyn Union - 98.85 percent; Piedmont - 92.64 percent; Pivotal - 94.70 percent; and PPL - 99.71 percent.

<sup>74</sup> These were City of Shelby - 73.11 percent; City of Union - 56.52 percent; ConEd - 59.62 percent; and KeySpan - 58.62 percent.

period.<sup>75</sup> On an aggregated basis, 88.85 percent of the overall base gas contributions of the historic shippers were made during the initial development of the Washington Storage Field from the period 1975-1978. Thus, all 28 historic shippers provided essential support for Transco to proceed with the Washington Storage Field by nominating the vast majority of their base gas contributions out of their firm sales entitlements during the period of worst gas supply curtailments on Transco's system.<sup>76</sup>

55. In September 1978<sup>77</sup> and September 1980,<sup>78</sup> the Commission authorized further increases in the top gas storage capacity of the Washington Storage Field from 60 Bcf to a total of 75 Bcf. These were the last expansions of the top gas storage capacity of the Washington Storage Field, and the historic shippers completed their final base gas contributions in September and October 1981 as part of the last expansion of that field. Thus, every base gas contribution made by the 28 historic shippers benefitting from Transco's incremental rate proposal in this case was made as part of the original project to develop the Washington Storage Field or a subsequent expansion, all of which were completed by the end of 1981.<sup>79</sup>

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<sup>75</sup> These were Chesapeake-DE and Chesapeake-MD, which each 28.4 percent of their contributions during this period.

<sup>76</sup> Fortis and South Jersey assert in their rehearing request (at 16) that some of the WSS-OA shippers with base gas purchase rights should not be considered original WSS shippers, because they "succeeded to the contracts of those shippers." However, they do not cite to any record evidence in support of this assertion or identify any specific current WSS-OA shipper as having succeeded to the contract of an original shipper. In any event, the fact certain original shippers may have undergone corporate reorganizations or been purchased by other corporations does not bar treating the current corporate owner as having provided the base gas provided by its corporate predecessor.

<sup>77</sup> *Transcontinental Gas Pipe Line Corp.*, 4 FERC ¶ 61,271 (1978).

<sup>78</sup> *Transcontinental Gas Pipe Line Corp.*, 12 FERC ¶ 62,287 (1980).

<sup>79</sup> See Ex. No. FS-17, showing that the most recent base gas contributions by the historic shippers were in October 1981. See also Ex. No. FS-15 at 3, in which Fortis and South Jersey's witness testified that all of Transco's base gas sales and purchases of replacement base gas were associated with expansions of the Washington Storage Field except for those in connection with the capacity releases by Columbia VA, PSEG, and South Jersey Gas.

56. In contrast to the historic shippers, Fortis and South Jersey did not provide support for the initial development or expansion of the Washington Storage Field. Fortis and South Jersey obtained their storage capacity in 2005 and 2006, over two decades after the last expansion of the Washington Storage Field. They made no sacrifice comparable to the historic shippers' agreement to reduce their purchase entitlements during a period of severe natural gas shortages to permit Transco to obtain base gas. Nor did the capacity releases through which Fortis and South Jersey obtained their capacity contribute in any way to increasing the capacity of the storage field. Fortis and South Jersey simply took over the existing capacity which Transco had previously used to serve PSEG and South Jersey Gas.

57. Fortis and South Jersey point out that Transco consistently rolled the cost of all historic shippers' base gas contributions into its rate base for purposes of calculating its WSS rates, despite the fact the historic shippers' later base gas contributions, particularly after 1979, cost substantially more than the earlier contributions. Thus, for example, the September and October 1981 base gas purchases made in connection with the final 1981 expansion to provide additional capacity to Brooklyn Union, ConEd and Piedmont cost \$2.8448 to \$2.9887, while the pre-1980 base gas purchases generally cost significantly less than a dollar. Fortis and South Jersey contend that Transco has provided no justification for treating the base gas purchases associated with their capacity releases differently.

58. The Commission disagrees. Rolling in the cost of the base gas purchases made in connection with the 1979-1981 expansions was reasonable, because those expansions provided offsetting financial benefits to the historic shippers who did not participate in them. As the Commission explained in the *1999 Conversion Order*,<sup>80</sup> each expansion increased top gas capacity by more than it increased the required volume of base gas. As a result, the ratio of base gas to shipper capacity entitlements declined with each expansion. This meant that each expansion caused WSS customers who did not increase their entitlements in that expansion to have "excess" base gas. Therefore, after each expansion, the non-participating shippers were permitted to purchase and withdraw their excess base gas, pursuant to section 9.5 of the WSS Rate Schedule. Base gas withdrawn and sold to the non-participating customers offset exactly the volumes of the new base gas injected by the new expansion customers. The *1999 Conversion Order*<sup>81</sup> also specifically found that at the time of the 1981 expansion, when Brooklyn Union, ConEd, and Piedmont contributed additional base gas at prices in excess of \$2.84, the non-participating historic shippers were sold excess base volumes at their original cost. Thus,

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<sup>80</sup> 87 FERC at 61,705.

<sup>81</sup> *Id.* at 61,706, 61,709-10

the 1981 expansion provided all the non-participating shippers the benefit of obtaining significant volumes of gas at prices that were one-third or less of the then prevailing market price.

59. By contrast, the base gas purchases Transco made in 2005 and 2006 in order to maintain its existing top gas storage capacity so that it could serve Fortis and South Jersey provided no financial benefit to the historic shippers. Unlike the earlier situations when new base gas was purchased as part of an expansion, Transco's base gas purchases to serve Fortis and South Jersey did not enable the historic shippers remaining on the system to purchase any of the base gas they had previously contributed. All of the base gas contributed by those shippers continued to be necessary to maintain the capacity of the field.

60. In fact, the only financial beneficiaries of the capacity release transactions enabling Fortis and South Jersey to obtain storage capacity were the participants in those transactions. South Jersey obtained its release from its affiliate, South Jersey Gas, a state-regulated local distribution company.<sup>82</sup> After South Jersey Gas released its capacity to its affiliate, it exercised its right under section 8.2 of Rate Schedule WSS-OA to purchase about 1.65 million Dth of base gas for a price of \$.8927 per Dth, at a time when the market value of the natural gas was over \$5.00 per Dth. This enabled the South Jersey corporate family to realize a net profit which may be estimated as in the neighborhood of eight million dollars.<sup>83</sup> Although no affiliate relationship was involved in the PSEG release through which Fortis obtained its capacity, that release enabled Fortis, a major natural gas marketer,<sup>84</sup> to obtain storage capacity at the Washington Storage Field which it could not otherwise have obtained. That is because Transco's services at that field are fully subscribed. In addition, PSEG benefitted in the same manner as South Jersey Gas by purchasing its share of the base gas at below market prices.

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<sup>82</sup> Both South Jersey and South Jersey Gas are subsidiaries of South Jersey Industries. South Jersey provides wholesale natural gas trading, sales, storage management, peaking services, transportation capacity and natural gas portfolio management services. Ex. No. WCG-2 at 12-13.

<sup>83</sup> Ex. No. WCG-2 at 13 -14.

<sup>84</sup> PSEG released its capacity to Cinergy, which Fortis purchased in October 2006 along with Cinergy Canada, Inc. Fortis' announcement of the purchase described Cinergy as a "marketing and trading platform operating in all key North American markets" and stated that Fortis "is now unique in its ability to provide a full service marketing and trading offering across North America." Ex. No. WCG-5 at 1.

61. Fortis and South Jersey also contend that Transco's incremental rate proposal improperly treats them differently from the one other WSS-OA shipper who has received its capacity pursuant to a capacity release from a historic shipper. On March 31, 1999, Columbia VA released its capacity to Entergy-Koch, and Columbia VA exercised its right under section 8.1 of Rate Schedule WSS-OA to purchase 46,596 Dth of base gas. Fortis and South Jersey assert that, contrary to its incremental rate proposal here, Transco rolled in the cost of the base gas it purchased to replace the base gas taken by Columbia VA, and Transco has charged the rolled-in rate to Entergy-Koch and its successor, Merrill Lynch.

62. Fortis and South Jersey are incorrect, to the extent they suggest that Transco's WSS-OA rates in effect before this rate case reflected a roll-in of the cost of base purchased to replace that taken by Columbia VA. While Columbia VA's release occurred in 1999, its purchase of base gas from Transco was not reflected on Transco's books until July 2003, when Columbia VA paid for that gas. Therefore, neither that transaction nor the 2005 and 2006 releases by PSEG and South Jersey Gas to Fortis and South Jersey were reflected in the test period for Transco's prior rate case in Docket No. RP01-245-000.<sup>85</sup> Accordingly, this is the first general section 4 rate case in which Transco has had an opportunity to address the rate treatment of its costs of purchasing replacement base gas. In its initial filing in this case, Transco proposed the same incremental rate treatment for the base gas it had purchased on behalf of all three replacement shippers, including Entergy-Koch/Merrill Lynch. However, in the Settlement, all parties agreed to rolled-in treatment for the relatively small amount of replacement base gas for Entergy-Koch/Merrill Lynch, while reserving for a merits determination by the Commission the issue of whether to accept Transco's proposal with respect to Fortis and South Jersey.<sup>86</sup> Having agreed to that Settlement, Fortis and South Jersey cannot now complain that the Commission's resolution of the reserved issue on the merits, may result in them receiving different treatment than Entergy-Koch/Merrill Lynch received under the Settlement. It is not appropriate to use settlement provisions in which parties presumably gave up some rights to get others as evidence in a litigated proceeding, because settlements are not precedential in any way.<sup>87</sup>

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<sup>85</sup> Ex. No. FS-3 at 1.

<sup>86</sup> Transco purchased about 1.55 million Dth of base gas to serve Fortis and 1.65 million Dth to serve South Jersey, but less than 50,000 Dth to serve Entergy-Koch/Merrill Lynch.

<sup>87</sup> See, e.g., *Transcontinental Gas Pipe Line Corp.*, 122 FERC ¶ 61,213, at P 11 (2008) (Commission approval of the Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.).

63. The Commission concludes, based upon the above discussion, that Transco's proposed incremental rate treatment of the costs of new base gas Transco purchased in connection with the capacity releases to Fortis and South Jersey is just and reasonable. The proposal reasonably takes into account the fact that the historic shippers provided essential support for Transco to proceed with the Washington Storage Field.<sup>88</sup> Because the historic shippers provided the base gas used to develop and expand the Washington Storage Field out of their gas purchase entitlements, it is reasonable to design their rates using a rate base reflecting the costs of that gas. Similarly, it is reasonable to design Fortis and South Jersey's rates using a rate base reflecting the costs of the base gas Transco had to purchase to replace that taken by the shippers who released their capacity to Fortis and South Jersey.

**ii. Consistency with Cost Causation Principle**

64. We disagree with Fortis and South Jersey's contention that Transco's use of an incremental rate base is contrary to the ratemaking principle set forth in *KN Energy* that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them."<sup>89</sup> As is generally true in cases involving a choice between incremental and rolled-in rates for integrated pipeline services, this case presents alternative methods of analyzing cost causation, depending upon whether the focus is on the pipeline's operations or on the events enabling each customer to join the system. As the ALJ found, because Transco operates the Washington Storage Field on an integrated basis, all base gas injected into the field serves the top gas deliverability needs of all WSS/WSS-OA customers, regardless of when each shipper joined the system.

65. On the other hand, PSEG and South Jersey Gas' permanent releases of their capacity to Fortis and South Jersey were the "most immediate and proximate" cause of Transco's need to purchase new base gas in 2005 and 2006.<sup>90</sup> Those releases enabled PSEG and South Jersey Gas to exercise their right under section 8.2 of Rate Schedule WSS-OA to purchase the approximately 3.3 million Dth of base gas attributable to them. At the same time, those releases obligated Transco to provide WSS-OA service to Fortis and South Jersey for the remaining terms of PSEG and South Jersey Gas' contracts.

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<sup>88</sup> *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, FERC Stats. and Regs. ¶ 32,606 at P 98; Order No. 686, FERC Stats. & Regs. ¶ 61,231 at P 65-70.

<sup>89</sup> *KN Energy*, 968 F.2d at 1300.

<sup>90</sup> *See Id.*, at 1302, stating that the Commission traditionally focuses on "the most immediate and proximate cause of the cost incurred."

Pursuant to section 8.1 of Rate Schedule WSS-OA, Transco must maintain sufficient base gas to support the total top gas requirements of its customers. Therefore, the capacity releases required Transco to replace the 3.3 million Dth of base gas taken by PSEG and South Jersey Gas so that it could serve the top gas deliverability rights transferred to Fortis and South Jersey.<sup>91</sup>

66. Because these alternative analyses of cost causation are both factually accurate, the relative weight to be given to each in resolving the rolled-in versus incremental rate issue turns on equitable factors and other public interest considerations. For example, Commission policy generally requires pipeline expansions which do not improve the quality of the existing customers' services to be priced on an incremental basis, despite the fact the expanded system operates on an integrated basis and the demands of both existing and expansion shippers caused the need for the expansion.<sup>92</sup> In that situation, the Commission has found that incremental pricing helps assure that the expansion is properly sized and the market finds the expansion project is economically viable. In addition, incremental pricing "protect[s] captive customers from rate increases during the terms of their contracts that are unrelated to the costs associated with their service."<sup>93</sup>

67. Although this case does not involve an expansion to which our *1999 Certificate Policy Statement* applies, nevertheless, as discussed above, there are comparable equitable factors supporting Transco's proposed incremental rates. These include the fact the historic shippers provided essential support for Transco to proceed with the Washington Storage Field by providing the necessary base gas out of their gas purchase entitlements during a period of severe gas shortages. In addition, PSEG and South Jersey Gas' capacity releases to Fortis and South Jersey did not improve the quality of the

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<sup>91</sup> Transco estimated that, if PSEG and South Jersey Gas had exited the system without any other shipper replacing them as customers, Transco would have had to purchase approximately 1.3 million Dth to maintain its service to the historic shippers, instead of the 3.3 million Dth it actually purchased in order to serve Fortis and South Jersey. However, the only way PSEG and South Jersey Gas could exit the system was by permanently releasing their full capacity to replacement shippers, because their contracts with Transco had not expired. Therefore, Transco's potential need to purchase new base gas when a customer leaves the system upon expiration of its contract leaving its capacity unsubscribed is not relevant in this case.

<sup>92</sup> *1999 Certificate Policy Statement*, 90 FERC at 61,392-3.

<sup>93</sup> *Id.* 61,393. See also *Transcontinental Gas Pipe Line Corp. v. FERC*, F.3d (D.C. Cir 2008).

historic shippers' service. The historic shippers received the same service before and after the base gas injections required by PSEG and South Jersey's exit from the system.

68. The fact PSEG and South Jersey Gas' permanent capacity releases to Fortis and South Jersey were the proximate cause of Transco's need to purchase replenishment base gas distinguishes this case from *KN Energy*. In that case, the Commission had sought to allocate some of the pipeline's take-or-pay settlement costs to individually certificated transportation customers who had never been sales customers of the pipeline. In contrast to the situation in this case, there was no theory of cost causation to justify allocating the take-or-pay settlement costs to individually certificated transportation customers. As the Commission recognized on remand from *KN Energy*, the pipeline incurred the take-or-pay costs under gas purchase contracts which it had entered into to serve its sales customers, not its transportation customers.<sup>94</sup> In addition, while the pipeline's offering of open access transportation service also contributed to the incurrence of take-or-pay costs by enabling shippers to purchase gas from other suppliers, the individually certificated transportation customers were not taking open access transportation service and therefore did not benefit from that service. Accordingly, the Commission concluded that there was "an insufficient nexus between" the individually certificated transportation customer and the pipeline's incurrence of take-or-pay settlement costs to justify allocating those costs to the individually certificated transportation customer.<sup>95</sup> By contrast, in this case, there is a clear nexus between Transco's incurrence of the replenishment base gas costs at issue here and its service to Fortis and South Jersey.

### iii. Undue Discrimination

69. The Commission also rejects Fortis and South Jersey's contention that the Commission erred in finding Transco's incremental rate proposal was not unduly discriminatory. As stated in Opinion No. 507, NGA section 4's requirement that rates not be unduly discriminatory does not require that rates must be the same for all customers or all customer classes. In fact, a "mere difference [in rates], however, is not discriminatory; there must also be a demonstration that the two classes of customers are similarly situated for purposes of the rate."<sup>96</sup> The Commission reaffirms its holding that Fortis and South Jersey are not similarly situated with the historic shippers.

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<sup>94</sup> *Williston Basin Interstate Pipeline Co.*, 63 FERC ¶ 61,171 (1993).

<sup>95</sup> *Id.* at 62,175.

<sup>96</sup> *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 452, n.9 (D.C. Cir. 1988); see also *Tennessee Gas Pipeline Co.*, 80 FERC ¶ 61,070, at 61,245 (1997).

70. As described in detail above, all 28 historic shippers provided essential support for Transco to develop and expand the Washington Storage Field by providing base gas out of their firm sales entitlements mostly during a period of severe gas supply curtailments on Transco's system.<sup>97</sup> In addition, the more costly base gas injections made in connection with the 1980-81 expansions for some historic shippers benefited the non-participating historic shippers by enabling them to purchase excess base gas at below-market prices, thus justifying rolled-in rates for all the historic shippers. By contrast, Fortis and South Jersey did not provide support for the initial development or expansion of the Washington Storage Field, and the base gas purchases required to serve them provided no offsetting financial benefits to the historic shippers.

71. In addition, Fortis and South Jersey assert that Transco has permitted replacement customers to succeed to the rights of historic WSS-OA customers at the rolled-in rate and that this practice "destroys the ability to argue that a storage customer's status as a replacement customer justifies discriminatory rate treatment."<sup>98</sup> However, as already discussed above, Entergy-Koch/Merrill Lynch is the only replacement shipper other than Fortis and South Jersey to whom a historic shipper has released its capacity, and Fortis and South Jersey agreed to the Settlement pursuant to which Entergy-Koch/Merrill Lynch is receiving rolled-in rates. Fortis and South Jersey do not identify any other non-historic shipper receiving rolled-in rates in their rehearing request.

72. Fortis and South Jersey contend that the Commission erred in rejecting its contention that Transco's proposed amendment of section 8.3 of Rate Schedule WSS-OA will have the potential for widely different treatment of similarly situated customers. That amendment permits Transco to make a limited section 4 filing to recover from new shippers any increase in the cost of service attributable to the replenishment of base gas to serve a new shipper. Fortis and South Jersey contend that, because this provision does not require Transco to make such a limited section 4 filing, it gives Transco discretion to treat new customers differently.

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<sup>97</sup> Fortis and South Jersey point out that the historic shippers helped provide base gas for the development of the Washington Storage Field and received their base gas purchase rights pursuant to a settlement, and Fortis and South Jersey state that the Commission fails to acknowledge that such a settlement has no precedential value. While settlements have no precedential value, settlement agreements serve to bind the parties to the actual agreement because they are contracts. *See Ameren Services Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (*Ameren*). Therefore, the historic shippers' obligations under the 1976 settlement are relevant to determining whether Transco's current incremental rate proposal is unduly discriminatory.

<sup>98</sup> Fortis and South Jersey, Rehearing at 21.

73. In this proceeding, we have held that Transco's proposal to charge historic shippers a lower rolled-in rate than new shippers such as Fortis and South Jersey is not unduly discriminatory, because the class of historic shippers is not similarly situated with the class of new shippers. In this order, we do not decide any issue concerning whether rate disparities among shippers within the new shipper class could be unduly discriminatory. We recognize that Transco proposed to charge somewhat different incremental rates to Fortis and South Jersey based on the different costs of the replenishment base gas purchased when each joined the system.<sup>99</sup> However, while Fortis and South Jersey oppose Transco's proposal to charge them incremental rates, they have not contested Transco's proposed design of the incremental rates if its incremental rate proposal is accepted. Therefore, in this order, we accept Transco's proposal to charge different incremental rates to Fortis and South Jersey, because that aspect of Transco's proposal is unopposed.

74. In order to address Fortis and South Jersey's concern about the fact section 8.3 of Rate Schedule WSS-OA does not require Transco to make a limited section 4 filing every time it purchases replenishment base gas, we direct Transco to modify section 8.3 to require that each time Transco purchases replenishment base gas, it either make a limited section 4 filing to recover the cost of that gas or make an informational filing detailing the volume of replenishment base gas purchased and the cost. When Transco makes such a filing, the Commission can consider whether all new shippers should be subject to the same rate reflecting the cost of all replenishment base gas purchased since 2005.<sup>100</sup>

75. Fortis and South Jersey also contend that the Commission failed to address the ALJ's finding that the fact Transco paid more to buy replacement base gas in order to serve Fortis and South Jersey than it paid for its earlier base gas purchases does not justify charging them different rates from other WSS-OA customers. The ALJ explained that Transco does not charge any of its storage customers its actual cost of purchasing base gas, either in the form of a bill for that cost or by including depreciation of that cost in its WSS/WSS-OA rates. Rather, Transco only charges the WSS-OA customers the opportunity cost of keeping the base gas in the ground (in the form of a return on equity), rather than selling it. The ALJ reasoned that for purposes of compensating Transco for opportunity costs, as opposed to base gas purchase costs, Fortis and South Jersey are

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<sup>99</sup> Currently, Fortis' incremental demand charge is \$0.05262 and South Jersey's is \$0.04744. Transco's FERC NGA Gas Tariff, Fifth Revised Volume No. 1, Rate Schedule WSS-Open Access, section 3.1, 2.0.0.

<sup>100</sup> The issue of the appropriate design of the WSS-OA rate applicable to new WSS-OA shippers may also be addressed in the general section 4 rate case which Transco is required to file no later than August 31, 2012.

similarly situated to the historic customers. Therefore, the ALJ concluded that Transco's incremental rate proposal is discriminatory because it forces Fortis and South Jersey to reimburse Transco for a far greater share of the opportunity cost of the base gas.

76. The Commission does not find the ALJ's distinction between the actual purchase cost of the replacement base gas and a return on the investment in that base gas to be persuasive. Transco's inclusion of the cost of purchasing base gas in its rate base without any accompanying depreciation allowance is consistent with the Commission's ratemaking practice with respect to base gas costs. Unlike a pipeline company's physical plant, such as the pipeline itself, base gas does not depreciate over time. Therefore, it is not appropriate for the pipeline to include in its cost of service any depreciation allowance for base gas. However, the pipeline's cost of purchasing the base gas does represent an investment in an asset necessary for the performance of the pipeline's jurisdictional storage service. It follows that it is appropriate for the pipeline to include that cost in rate base, and earn a return on equity on the portion of rate base financed with equity. It is the higher cost of the replacement base gas purchased to serve Fortis and South Jersey, \$6.00 per Dth, versus the price of the historic base gas, \$0.89 per Dth, which increased the value of the rate base of the Washington Storage service, which in turn increased the return and taxes included in the cost of service. Therefore, the Commission does not deem it discriminatory that Transco proposed to charge Fortis and South Jersey an incremental rate based on its actual investment in the base gas it purchased to provide service to Fortis and South Jersey.

77. Finally, Fortis and South Jersey also suggest that the Commission's approval of Transco's incremental rate proposal in this case is inconsistent with the Commission's policy concerning interconnection of new electric generation resources to the existing transmission network. They argue that the Commission does not directly assign to the new generator network upgrade costs needed to accommodate the interconnection. Instead, Fortis and South Jersey explain, the Commission requires that "such costs be allocated to all network customers in recognition of the fact that the upgrade provides benefits to all users of the network."<sup>101</sup> The Commission's policy concerning interconnections of new electric generators to the electric transmission network is not relevant to this case. As discussed above, the resolution of this case turns on equitable considerations arising from the unique circumstances concerning the development of the Washington Storage Field during a period of severe gas shortages.

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<sup>101</sup> *Id.* 10 (citations omitted).

## 2. Certificate Policy Statement

### a. Opinion No. 507

78. In Opinion No. 507, the Commission ruled that the *1999 Certificate Policy Statement* is inapplicable to the facts of this proceeding. The Commission stated that the purpose of the *1999 Certificate Policy Statement* was to provide the natural gas industry with guidance as to the analytical framework the Commission uses to evaluate proposals for certificating new construction.<sup>102</sup> The Commission asserted that the *1999 Certificate Policy Statement* established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest.<sup>103</sup> The Commission noted that the goal of the policy is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.<sup>104</sup>

79. The Commission also stated that, in this proceeding, there was no “construction” or “expansion” because Transco only replenished base gas at an existing facility; therefore, Transco’s actions did not fit under the parameters of the *1999 Certificate Policy Statement*. Finally, because the Commission held that the *1999 Certificate Policy Statement* had no application to the facts of the proceeding, it reversed the ALJ’s ruling that the *1999 Certificate Policy Statement* weighs against the showing that Transco must make that its incremental rate proposal is just and reasonable.<sup>105</sup>

### b. Fortis and South Jersey Argument

80. Fortis and South Jersey argue that Transco, Trial Staff, and the WSS Customer Group relied heavily on the Commission’s decision in the *1999 Certificate Policy Statement* for their respective litigation positions. Fortis and South Jersey allege that Transco and the WSS Customer Group claimed the *1999 Certificate Policy Statement* mandated that Fortis and South Jersey be charged with all of the costs of the replacement base gas; Fortis and South Jersey state that Trial Staff argued the decision requires that a

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<sup>102</sup> See Opinion No. 507, 130 FERC ¶ 61,043 at P 62-63.

<sup>103</sup> See *Vector Pipeline, LP*, 117 FERC ¶ 61,018, at P 9 (2006).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

portion of the base gas be charged to Fortis and South Jersey and the other portion should be rolled-in to all WSS-OA customers. Fortis and South Jersey insist that they argued before the ALJ that the *1999 Certificate Policy Statement* was facially inapplicable to the facts of the case but if it did apply, the decision supported rolled-in rate treatment. Fortis and South Jersey assert that the ALJ considered each of the three factors of the *1999 Certificate Policy Statement* and rejected the arguments of the WSS Customer Group, Transco and Trial Staff finding that neither proposed rate structure was just and reasonable.

81. Fortis and South Jersey argue that, although the Commission correctly determined that the *1999 Certificate Policy Statement* was inapplicable to the facts of this proceeding, it inexplicably reversed the decision of the ALJ by stating, “we reverse the ALJ’s ruling that the *1999 Certificate Policy Statement* weighs against Transco’s showing that its incremental rate proposal is just and reasonable.”<sup>106</sup> Fortis and South Jersey state the Commission held that the *1999 Certificate Policy Statement* was never intended to be used a tool to evaluate the proper rate treatment of a preexisting facility which had not been upgraded, enhanced or expanded.<sup>107</sup> In so doing, Fortis and South Jersey allege that the Commission actually ratifies the same analysis by the ALJ:

As explained above, the concerns about price signals voiced by the Commission in the *1999 Certificate Policy Statement* are not present here because the replenishment base gas purchased for the Washington Storage Field is not an “expansion facility.” It is merely a component of an existing facility; no “expansion” whatsoever has occurred under the facts of this case. The Commission’s *1999 Certificate Policy Statement* aims at making customers who require gas pipeline facility expansions pay the full cost of those expansions under the principle of cost causation and sparing existing customers who do not need the expansions in order to continue the same level of service. It does not aim at allowing existing customers to avoid paying for their fair share of the ordinary costs on non-expanding facilities. Accordingly, to the extent that the incremental rate proposed here is premised on the notion that it sends a more appropriate “price signal” than a rolled-in rate would, it is misplaced and must be rejected.<sup>108</sup>

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<sup>106</sup> Fortis and South Jersey, Rehearing at 24 (citing Opinion No. 507, 130 FERC ¶ 61,043 at P 62-63).

<sup>107</sup> Fortis and South Jersey, Rehearing at 24.

<sup>108</sup> *Id.* (citing *Initial Decision*, 125 FERC ¶ 63,020 at P 153).

82. Fortis and South Jersey argue that the Commission's holding is unnecessary and unsupported. Fortis and South Jersey contend the ALJ never ruled that the *1999 Certificate Policy Statement* was applicable to the facts of this proceeding. Instead, Fortis and South Jersey argue the ALJ held that, if the *1999 Certificate Policy Statement* applies, then it weighs against the showing that Transco must make that its incremental pricing proposal is just and reasonable.<sup>109</sup> Fortis and South Jersey aver that the Commission never examined the evidence and the basis the ALJ employed in reaching this ruling. For these reasons, Fortis and South Jersey contend that the Commission's decision to reverse the ALJ's ruling that the *1999 Certificate Policy Statement*, to the extent it applies, militates against Transco's incremental rate proposal and fails the test of reasoned decision making. Therefore, Fortis and South Jersey state the Commission should grant rehearing and affirm the ALJ's ruling.

**c. Commission Decision**

83. Fortis and South Jersey's arguments regarding the Commission's reversal of the ALJ's ruling on the *1999 Certificate Policy Statement* are not persuasive. Although Fortis and South Jersey assert that the Commission correctly ruled -- along with the ALJ -- that the *1999 Certificate Policy Statement* did not apply to the facts of this proceeding; they also contend that our reversal of the ALJ's ruling that, to the extent the policy applies, it weighs against Transco's rate proposal was erroneous. The ALJ's ruling on the *1999 Certificate Policy Statement* was conditional and supported his determination -- reversed in Opinion No. 507 -- that Transco's incremental rate proposal was not just and reasonable. The Commission was not reversing the ALJ's ruling that the *1999 Certificate Policy Statement* did not apply to the facts of the proceeding; instead, the Commission was reversing the ALJ's holding regarding the just and reasonableness of Transco's rate proposal. As for Fortis and South Jersey's suggestion that the Commission never evaluated the ALJ's analysis he employed on the *1999 Certificate Policy Statement*, the Commission previously held that the policy had no application to the proceeding. Accordingly, analysis of the ALJ's discussion of the application of the *1999 Certificate Policy Statement* was unwarranted after this determination had been made.

**3. 1999 Conversion Order**

**a. Opinion No. 507**

84. In Opinion No. 507, the Commission also stated that its decision on cost causation was amplified by the Commission's previous analysis in the *1999 Conversion Order*,

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<sup>109</sup> *Id.* 25.

which established Rate Schedule WSS-OA for Transco's Washington Storage Field.<sup>110</sup> The Commission asserted that, in the *1999 Conversion Order*, it opined that the termination of service of an historic shipper does not, by itself, require Transco to replenish base gas at the Washington Storage Field.<sup>111</sup> Instead, the Commission asserted the *1999 Conversion Order* held that Transco's obligation to inject base gas into the storage field only arises when Transco resells the top gas capacity entitlement to a different customer.<sup>112</sup> Based on the above language in the *1999 Conversion Order*, the Commission reasoned that, during that proceeding, the addition of new storage customers was considered to be an important trigger leading to Transco's purchase of replacement base gas for the Washington Storage Field.<sup>113</sup> Therefore, the Commission contended that it was entirely reasonable that Transco propose to charge the incremental rates and that the new storage customers be considered the cost causers in this instance.

**b. Fortis and South Jersey Argument**

85. Fortis and South Jersey allege that the Commission erroneously attempts to defend its reversal of the ALJ's decision on Transco's incremental rate proposal by discussing the Commission decision in the *1999 Conversion Order*. Fortis and South Jersey argue that the Commission's analysis is inconsistent with the factual record developed at the hearing on Transco's incremental rate proposal. First, Fortis and South Jersey avow that, contrary to the Commission's claim that the *1999 Conversion Order* supports Transco's rate proposal, the order did not discuss any cost allocation methodology at all. Further, Fortis and South Jersey argue that Transco's obligation to inject gas into the storage field arises, if it arises at all, only when base gas is withdrawn from the field. Fortis and South Jersey maintain that even in the same paragraph containing the passage cited above in Opinion No. 507, the *1999 Conversion Order* states, in pertinent part:

Transco has provided tariff language in Section 8 which states that, 'At the time a buyer exercises its right to purchase Base Gas, Seller will be responsible for replenishment of that portion of the Base Gas in the Washington Storage Field.' The Commission interprets this language to mean that Transco agrees to be responsible for providing any additional base gas injections if needed in the future to support the entitlements of the Rate

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<sup>110</sup> Opinion No. 507, 130 FERC ¶ 61,043 at P 33.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing *1999 Conversion Order*, 87 FERC at 61,707-08).

<sup>113</sup> *Id.*

Schedule WSS-Open Access and WSS-Access-R customers. However, the proposed language is imprecise. Transco has an on-going obligation to provide base gas sufficient to support the top gas entitlement of its customers under these rate schedules. But, Transco does not have an obligation to provide base gas if it is not necessary to support top gas entitlements of its customers. Therefore, simply because a former Rate Schedule WSS customer has terminated service and repurchased excess base gas under its rights grandfathered in the rate schedule, does not by itself trigger an obligation by Transco to inject base gas to replace or replenish withdrawn volumes. . . Transco is obligated to maintain sufficient base gas to support top gas capacity entitlements of its customers.<sup>114</sup>

Thus, Fortis and South Jersey contend, in contrast to the Commission's statements that the *1999 Conversion Order* recognized that the addition of new customers was an important trigger for purchasing additional base gas, this order was in fact acknowledging that the addition of new customers would not necessarily trigger Transco's obligation to make base gas purchases.

86. In addition, Fortis and South Jersey argue that the above passage from the *1999 Conversion Order* clarifies that the Commission viewed Transco's obligation to provide base gas to be the same for historic WSS-OA customers and their replacement customers under the WSS-OA Rate Schedule. Fortis and South Jersey add that this section also shows the Commission recognized in 1999 that total base gas levels supported the aggregate WSS-OA customers' entitlements, including those of the historic WSS-OA customers and of WSS-OA replacement customers. Fortis and South Jersey argue that this ruling confirms the findings made by the ALJ with respect to the benefits and obligations associated with base gas replenishments.

**c. Commission Decision**

87. Fortis and South Jersey's rehearing arguments against Opinion No. 507's analysis of the *1999 Conversion Order* are not convincing. In the quoted passage from the *1999 Conversion Order* included in their rehearing request, Fortis and South Jersey deleted an essential sentence, which was used by the Commission in its analysis of the ALJ's cost causation discussion. With the deleted sentence included, the last part of the quoted passage from the *1999 Conversion Order* actually reads:

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<sup>114</sup> Fortis and South Jersey, Rehearing at 12-13 (*quoting 1999 Conversion Order*, 87 FERC at 61,707 (emphasis provided)).

Therefore, simply because a former Rate Schedule WSS customer has terminated service and repurchased excess base gas under its rights grandfathered in the rate schedule, does not by itself trigger an obligation by Transco to inject base gas to replace or replenish withdrawn volumes. **Transco's obligation to inject base arises only upon the sale of the top capacity entitlement to a different customer.** Transco is obligated to maintain sufficient base gas to support top gas capacity entitlements of its customers.<sup>115</sup>

88. This language, when read with the Commission's statements immediately preceding it, does suggest that the Commission considered the addition of new customers to be an important factor in the need to replace base gas, as opposed to the purchase and withdrawal of base gas from the storage field by historic customers. Further, we note that the discussion of Transco's proposed change to section 8.1 of Rate Schedule WSS-OA transpired because in the *1998 Conversion Order*, the Commission required Transco to revise that section to clarify whether replacement Rate Schedule WSS-OA customers (not the historic shippers) were required to provide base gas injection requirements.<sup>116</sup>

89. Fortis and South Jersey are correct that the *1999 Conversion Order* did not address the cost allocation methodology for replenishment of base gas. But, it is not, as Fortis and South Jersey suggest, unreasonable for the Commission to examine the record of Rate Schedule WSS-OA to determine the regulatory context of the development of the tariff, especially since Transco's proposed allocation methodology for service under this schedule is the central issue in the proceeding. In addition, the *1999 Conversion Order* was also used by the parties during their arguments in the proceeding. This historical examination, however, was not our sole consideration in deciding whether Transco's proposed incremental rate is just and reasonable; our decision was based on the record of the proceeding and the statutory requirements set forth in section 4 of the NGA. Based on the above, we found then and affirm now that Transco's bifurcated rate proposal for replacement shippers and historic shippers is a just and reasonable method to allocate costs for the replenishment of base gas at the Washington Storage Field.

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<sup>115</sup> *1999 Conversion Order*, 87 FERC at 61,707 (emphasis provided).

<sup>116</sup> *See 1998 Conversion Order*, 85 FERC at 61,432.

**B. Decision that Consideration of Fortis and South Jersey's Challenge to the Section 8.2 Base Gas Purchase Provision of Rate Schedule WSS-OA was Barred by the Provisions of the Settlement**

90. The parties' joint statement of the issues to be considered at the hearing included not only the issue of whether Transco's incremental rate proposal should be accepted, but also the following two issues identified as Issues B and C;

**Issue B:** *Whether Fortis and South Jersey have established that the existing base gas purchase option under section 8.2 of Transco's Rate Schedule WSS-OA is unjust and unreasonable.*

**Issue C:** *In the event that Fortis/South Jersey have carried their burden of proof regarding Issue B above, whether Fortis/South Jersey have demonstrated that their alternative proposal either to eliminate the existing base gas purchase options under Rate Schedule WSS-OA or to make the purchase gas options exercisable only if Transco has proposed and the Commission has approved a reduction to Transco's WSS-OA capacity is just and reasonable.*

91. Parties other than Fortis and South Jersey contended these issues were beyond the scope of the reserved issues and therefore were not properly before the ALJ. The ALJ held that the issues could be considered at the hearing. However, he held that Fortis and South Jersey had not shown the provision to be unjust and unreasonable, so long as Transco rolled in the cost of all its base gas purchases consistent with his rejection of Transco's incremental rate proposal.

**1. Opinion No. 507**

92. In Opinion No. 507, the Commission held that Issues B and C were beyond the scope of the issue reserved for hearing by the Settlement. The Commission stated that in Article VII of the Settlement, the parties agreed as follows:

**Section A: Reserved Issue** – The parties have agreed to reserve for resolution pursuant to hearing or further settlement the issue of Transco's proposal under NGA section 4 to establish incremental rates under Rate Schedule WSS-OA to Cinergy Marketing & Trading (and its successor Fortis Energy Marketing & Trading) and South Jersey Resources Group, LLC to recover Transco's cost of purchasing replenishment base gas.

93. The Commission found that this language only reserves the issue of the reasonableness of Transco's proposal under NGA section 4 concerning its recovery of the cost of purchasing replenishment base.<sup>117</sup> It makes no reference to the separate issue of whether the historic customers' existing right to purchase base gas should be modified under NGA section 5.

94. The Commission held that the ALJ's reliance on the "reservations clause" in Article X of the Settlement was misplaced.<sup>118</sup> The reservations clause states, in pertinent part:

Neither Transco, the Commission, its Staff, nor any other party or person shall be prejudiced or bound hereby in any proceeding except as specifically provided herein. Neither Transco, the Commission, its Staff, nor any other party or person shall be deemed to have approved, accepted, agreed or consented to any concept, theory, or principle underlying or supposed to underlie any of the matters provided for herein.

. . . [E]xcept as expressly provided by this Agreement, the other parties hereto [other than Transco] preserve their rights under the NGA.

Except as otherwise provided by this Agreement, nothing herein is intended to limit, supersede, or otherwise affect the resolution of issues not expressly resolved hereby.

95. The Commission opined that the reservations clause was boilerplate language, and it was doubtful that the parties used such a vehicle to nullify an explicit provision of the Settlement binding them to litigate only the Reserved Issue.<sup>119</sup> The Commission noted that, although the ALJ relied on the reservations clause as proof that the parties explicitly asserted their right to have the issues put forth by Fortis and South Jersey resolved at trial, no party, not even Fortis and South Jersey, raised this as an argument to the ALJ in support of the consideration of Issues B and C.

96. Finally, the Commission distinguished the cases cited by the ALJ in support of his ruling to consider Issues B and C from the current proceeding.<sup>120</sup> Specifically, the

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<sup>117</sup> *Id.*

<sup>118</sup> *See* Opinion No. 507, 130 FERC ¶ 61,043 at P 77-80.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* P 80.

Commission reasoned that the cases cited by the ALJ were not ones in which all the parties agreed and stipulated to the sole issue for consideration in a settlement agreement, which was later approved by the Commission as being in the public interest.<sup>121</sup>

## 2. Fortis and South Jersey Argument

97. Fortis and South Jersey argue that the Commission's conclusion that Issues B and C were outside the scope of the Reserved Issue constitutes error. Fortis and South Jersey contend that the Reserved Issue is not, as the Commission stated, "the reasonableness of Transco's proposal. . . ."<sup>122</sup> Rather, Fortis and South Jersey claim that Article VII clearly states that the issue is "Transco's proposal under NGA Section 4 to establish incremental rates under Rate Schedule WSS-OA. . . ." Fortis and South Jersey argue that this is a broader inquiry than the Commission's interpretation of the provision, which limited the parties to addressing only the incremental rates themselves. Fortis and South Jersey aver that the language of this provision puts into play Transco's decision to establish the incremental rate structure. Fortis and South Jersey claim that this issue allows a broader inquiry as it permits parties to address not just the unjust and unreasonable impact of the incremental rates, but also to examine alternative remedies as well as the validity of the section 8.2 mechanism that generated the unlawful rates.

98. Fortis and South Jersey allege that the ALJ recognized that an inquiry into the lawfulness of Transco's proposal to establish incremental rates necessarily includes an examination of the mechanism that created the proposal. Specifically, Fortis and South Jersey state the ALJ found:

As Fortis and South Jersey correctly point out, the purchase provision has already had the immediate consequence of increasing Transco's storage rates by inflating the embedded costs of base gas, and, thus, the return and tax component of the WSS-OA rates. If left in place, the provision will over time result in higher rates that are not reflective of service enhancements. . . . ***This prospect necessitates examining the justness and reasonableness of the purchase provision itself as a determinant of the justness and reasonableness of its allocation.***<sup>123</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> Fortis and South Jersey, Rehearing at 27 (citing Opinion No. 507, 130 FERC ¶ 61,043 at P 78).

<sup>123</sup> Fortis and South Jersey, Rehearing at 28 (citing *Initial Decision*, 125 FERC ¶ 63,020 at P 220 (emphasis provided)).

Fortis and South Jersey argue that, in Opinion No. 507, the Commission does not address or refute this aspect of the ALJ's rationale for entertaining Fortis and South Jersey's section 8.2 challenge.

99. Fortis and South Jersey aver that the Commission's assertion that a challenge to section 8.2 of Rate Schedule WSS-OA is a NGA section 5 issue and outside the scope of the single reserved hearing issue is hypercritical. Fortis and South Jersey argue that they have no power over the statutory nature of the relief sought and that these labels are not determinative of whether the issue is ripe for consideration by the ALJ. Rather, Fortis and South Jersey contend that it is the nature and character of the issue that is determinative. Moreover, Fortis and South Jersey contend that the ALJ's designation was a trial designation to facilitate the orderly conduct of the hearing.

100. Fortis and South Jersey allege that, in refusing to recognize that their challenge was within the scope of the reserved issue, the Commission failed to acknowledge the practical realities facing ratepayers challenging unlawful activities by pipelines. Fortis and South Jersey argue that intervenor "section 5" NGA issues in rate cases are first joined to the hearing when Commission Staff and the intervenors file their first round of testimony. In addition, Fortis and South Jersey state that considering their section 8.2 challenge does not violate any provision of the settlement, and the Commission fails to acknowledge that neither Transco nor any other incremental rate proponent has ever identified any provision of the settlement which precludes such consideration. Further, Fortis and South Jersey contend that, because of language in the settlement, the Commission did not consider the fact that the parties' bargain would not be disturbed by Fortis and South Jersey's section 8.2 challenge. Fortis and South Jersey state that, because the Settlement Agreement precludes Transco and any non-contesting party from challenging "the Settlement Cost of Service, Reservation and Throughput Quantities, Cost Classification, Cost Allocation and Rate Design, Resolution of Rate Sharing, Tariff and Other Matters" during the term of the Docket No. RP06-569 Rate Period, granting section 8.2 relief would not implicate any of the identified Settlement matters.

101. Fortis and South Jersey contend that neither Article VII nor any other provision of the Settlement precluded Fortis and South Jersey's challenge of the Section 8.2 base gas provision as part of their challenge to Transco's proposed rate increase. Therefore, Fortis and South Jersey allege that there was no need for them to raise this argument with the ALJ. Fortis and South Jersey further allege that there was no need for them to raise this argument with the ALJ because they have consistently contended (and the ALJ agreed) that the Section 8.2 base gas challenge was within the scope of the issue reserved for hearing by Article VII.

102. Finally, Fortis and South Jersey state the Commission distinguished cases cited by the ALJ which addressed his authority to consider issues during the hearing on Transco's incremental rate proposal. Fortis and South Jersey assert the Commission stated that the "cases cited by the ALJ were not ones in which all the parties agreed and stipulated to the

sole issue for consideration in a settlement agreement that was later approved by the Commission.”<sup>124</sup> Fortis and South Jersey contend that the parties did not agree or stipulate to a single issue, nor did they settle on a single issue for trial. Rather, Fortis and South Jersey allege that the Settlement itself did not preclude consideration of the Section 5 challenge because the challenge is reasonably within the scope of the issue reserved for hearing. Consequently, Fortis and South Jersey argue that the cases cited by the ALJ do in fact support his determination that it was within the ALJ’s power to entertain Fortis and South Jersey’s Section 8.2 challenge.

### **3. Commission Decision**

103. The Commission rejects Fortis and South Jersey’s arguments on rehearing that Issues B and C were within the scope of the issues reserved for trial by the Settlement. Fortis and South Jersey argue that the Commission’s reading of the Reserved Issue was too narrow. However, Fortis and South Jersey’s reading of the issue is overly broad and tailored to fit its decision not only to oppose Transco’s section 4 incremental rate proposal at the hearing but also to pursue a section 5 challenge to the historic shippers’ existing base gas purchase option in section 8.2 of Transco’s Rate Schedule WSS-OA. While Fortis and South Jersey allege that its tariff challenge was “reasonably within” the scope of the issue reserved for hearing, this argument conflicts with and is barred by the explicit terms of the language of the Settlement itself. By its terms, Article VII, section 7 of the Settlement only reserved “the issue of Transco’s proposal under NGA section 4 to establish incremental rates under Rate Schedule WSS-OA.” That issue does not encompass a section 5 challenge to a preexisting provision of Rate Schedule WSS-OA which Transco did not propose to change. As stated by the Commission in Opinion No. 507, the plain language of Article VII, section A shows that the parties to the Settlement narrowed the issues for trial and limited the litigation to Transco’s proposal under NGA section 4 to establish incremental rates under Rate Schedule WSS-OA for Fortis and South Jersey to recoup Transco’s cost of purchasing replenishment base gas.<sup>125</sup> Fortis and South Jersey did not contest that provision of the Settlement and the Commission approved the Settlement as uncontested.

104. Fortis and South Jersey state that, by failing to recognize its section 8.2 challenge, the Commission does not understand the practical realities facing ratepayers challenging unlawful activities by pipelines. This argument rings hollow. First, the Commission notes that section 8.2 of Transco’s Rate Schedule WSS-OA is hardly an “unlawful

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<sup>124</sup> Fortis and South Jersey, Rehearing at 31, (citing Opinion No. 507, 130 FERC ¶ 61,043 at P 80).

<sup>125</sup> Opinion No. 507, 130 FERC ¶ 61,043 at P 78.

activity” as it is listed in a Commission-approved tariff. Moreover, this particular provision of the tariff (or its predecessor) has been in existence since the mid 1970’s when the Washington Storage Field was certificated by the Commission. Therefore, Fortis and South Jersey should have known of its existence long before entering into the Settlement Agreement. If Fortis and South Jersey desired to preserve their ability to raise this section 5 issue at the hearing in this proceeding, they should have sought to do so in settlement negotiations.

105. Because the declared purpose and intent of the Settlement was to resolve all issues in the Transco rate case with the exception of the sole reserved issue, the Commission felt it was improper to permit additional and unreserved section 5 proposals to be litigated when the parties had previously agreed otherwise.<sup>126</sup> As noted in Opinion No. 507, settlement agreements are contracts; the Commission must abide by the unambiguously expressed intent of the parties to the settlement.<sup>127</sup> A contract is considered ambiguous if it is “reasonably susceptible of different constructions or interpretations.”<sup>128</sup> Moreover, when the plain language of a settlement is unambiguous, the Commission must give effect to the parties’ intent as expressed in the agreement, and the fact that the parties might later disagree on its meaning does not render the contract ambiguous.<sup>129</sup> Therefore, the Commission honored the contract entered into by the settling parties by upholding their expressed desire to limit consideration of the issues to Transco’s rate proposal and holding that Issues B and C were barred from consideration at trial.

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<sup>126</sup> See *Tennessee Gas Pipeline Co.*, 45 FERC ¶ 61,208 (1988) (public policy strongly favors the finality of settlement agreements); see also *El Paso Natural Gas Co.*, 120 FERC ¶ 61,170 (2007) (preserving the bargains of the parties to the greatest extent possible encourages settlements and parties would be hesitant to resolve their disputes by settlement if the Commission did not honor these agreements to the greatest extent possible.); *Texas Eastern Transmission Corp. v. Federal Power Comm’n*, 306 F.2d 345 (5<sup>th</sup> Cir. 1962) (settlement agreements should be enforced as drafted).

<sup>127</sup> See *Ameren*, 330 F.3d at 498; see also *Dominion Transmission, Inc., v. FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008) (*Dominion*) (If the settlement agreement is unambiguous, the language of the agreement controls for the Commission must give effect to the unambiguously expressed intent of the parties).

<sup>128</sup> *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985); see also *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979).

<sup>129</sup> See *Dominion*, 533 F.3d 852; see also *Office of Consumers Counsel v. FERC*, 783 F.2d 206, 235 (D.C. Cir. 1986).

The Commission orders:

(A) Fortis and South Jersey's request for rehearing of Opinion No. 507 is hereby denied.

(B) Within 30 days of the issuance of this order, Transco must file revised tariff records modifying section 8.3 of Rate Schedule WSS-OA to require that each time Transco purchases replenishment base gas, it either make a limited section 4 filing to recover the cost of that gas or make an informational filing detailing the volume of replenishment base gas purchased and the cost of that gas.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

## Appendix

	<b>Purchases 1975-1978</b>	<b>Additional Contributions 1979-1981</b>	<b>Total Purchases 1975-1981</b>	<b>Percentage Pre-1979</b>
<b>Company Name</b>			Col D = B+C	Col B/Col D
Column A	Column B	Column C		
1 Atlanta	2,644,798		2,644,798	
2 Atmos	175,774		175,774	
3 Brooklyn	8,419,017	97,671	8,516,688	98.85%
4 Danville	112,655		112,655	
5 Laurens	37,997		37,997	
6 Shelby	8,057	2,963	11,020	73.11%
7 Clinton-Newberry	293,000		293,000	
8 ConEd NY	3,580,205	2,425,189	6,005,394	59.62%
9 Delmarva	815,525		815,525	
10 Chesapeake Delaware	17,260	43,570	60,830	28.37%
11 Chesapeake Maryland	4,003	10,103	14,106	28.38%
12 Fort Hill	88,160		88,160	
13 Greenwood	26,448		26,448	
14 KeySpan Long Island	1,113,227	785,927	1,899,154	58.62%
15 Municipal Gas Authority (Monroe)	13,224		13,224	
16 Owens Corning	549,375		549,375	
17 Patriots South Carolina	478,886		478,886	
18 PECO	1,570,480		1,570,480	
19 Philadelphia	1,420,742		1,420,742	
20 Piedmont Natural Gas Co.	4,406,725	350,160	4,756,885	92.64%
21 Pivotal	1,353,817	75,775	1,429,592	94.70%
22 Public Service Co. of NC	1,254,945		1,254,945	
23 South Carolina Electric - SCPL	253,614		253,614	
24 Southwestern VA	11,461		11,461	
25 PPL Gas Utilities - Union Gas Co.	219,750	650	220,400	99.71%
26 Union, City	11,461	8,817	20,278	56.52%
27 Virginia Natural	308,560		308,560	
28 Washington Gas Light	1,087,792		1,087,792	
<b>Total Volumes and Percentage</b>	30,276,958	3,800,825	34,077,783	88.85%

Source Documents: Exhibits FS-17 and FS-18