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

Enable Mississippi River Transmission, LLC and Enable Gas Transmission, LLC,	)	
Petitioners,	)	No. 18-1252 (consolidated)
v.	)	
Federal Energy Regulatory Commission,	)	
Respondent.	)	
SFPP, L.P.,	)	
Petitioner,	)	No. 18-1254 (consolidated)
v.	)	
Federal Energy Regulatory Commission and United States of America,	)	
Respondents.	)	

MOTION OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION TO DISMISS

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission hereby moves this Court to dismiss the petitions in Case Nos. 18-1252 and 18-1254 for lack of ripeness. The challenged Commission orders, *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, "Revised Policy

Statement on Treatment of Income Taxes," 162 FERC ¶ 61,227 (Mar. 15, 2018) (Policy Statement), and "Order on Rehearing," 164 FERC ¶ 61,030 (July 18, 2018), are not ripe for review because these orders, announcing agency policy, will not have "a sufficiently immediate and significant impact upon petitioners and because the record in this case is inadequate to permit meaningful judicial review." *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 35 (1974).

Petitioners have requested rehearing of Commission orders in other, case-specific Commission proceedings addressing the income tax allowance issues addressed in the Policy Statement. If aggrieved in those proceedings, Petitioners will have ample opportunity to seek judicial review, and this Court will subsequently have the opportunity to review the Commission's treatment of the income tax allowance if judicial review is sought. Moreover, in the event of future judicial review of those proceedings, a fully developed, case-specific record will assist this Court to review the Commission's orders.

BACKGROUND

Enable Mississippi River Transmission, LLC and Enable Gas Transmission, LLC petitioned for review in Case No. 18-1252 of the Policy Statement and the Order on Rehearing. SFPP, L.P. filed a petition in Case No. 18-1254 challenging the same orders.

The Commission initiated the generic inquiry that culminated in the challenged orders following this Court's decision in *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016), which held that the Commission failed to adequately explain why a double recovery did not result from allowing SFPP to recover both an income tax allowance and a return on equity based on the discounted cash flow methodology when setting rates for SFPP's West Line. When it initiated these generic proceedings, the Commission recognized the "potentially significant and widespread effect of [the *United Airlines*] holding upon the oil pipelines, natural gas pipelines, and electric utilities subject to the Commission's regulation," and therefore sought comment from participants in each of these industries. Notice of Inquiry, 157 FERC ¶ 61,210, at P 2 (2016). The Commission sought comment on "any proposed methods . . . to resolve any double recovery of investor-level tax costs for partnerships or similar pass-through entities." *Id.* P 19. In response to the Notice of Inquiry, the Commission "received 24 comments and 19 reply comments from customer, pipeline, and electric utility interests." Policy Statement, 162 FERC ¶ 61,227 at P 7.

On March 15, 2018, the Commission issued the Policy Statement, stating that "granting [a master limited partnership] an income tax allowance results in an impermissible double recovery." *Id.* P 45. Petitioners and other parties sought rehearing. Without reaching the merits of the rehearing requests, the Commission

dismissed them, finding that the Policy Statement is not a "binding rule" but instead an expression of "general policy intent designed to provide guidance by notifying entities of the course of action the Commission intends to follow in future adjudications." Order on Rehearing, 164 FERC ¶ 61,030 at P 6. Citing the aggrievement requirement in Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), the Commission found that no parties are aggrieved by the Policy Statement because it is not a final determination of any issues or rights. Order on Rehearing, 164 FERC ¶ 61,030 at P 7. In future adjudications, (1) parties will have the opportunity "to challenge or support the revised policy through factual or legal presentation and to present any issues and arguments regarding" the Policy Statement; and (2) the Commission "will have to fully support and justify the application of [the Policy Statement] in individual cases." *Id.* P 6. *See also id*. P 8 ("An entity such as [a master limited partnership] pipeline will not be precluded in a future proceeding from arguing and providing evidentiary support that it is entitled to an income tax allowance and demonstrating that its recovery of an income tax allowance does not result in a double-recovery of investors' income tax costs.").

In addition to the generic inquiry discussed above, the Commission also moved forward with specific proceedings following remand from the *United Airlines* court. The Commission considered comments on remand from SFPP and

its shippers, and subsequently determined, without reference to the Policy Statement, to implement the *United Airlines* remand "by removing the income tax allowance from SFPP's cost of service." *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, P 21 (2018). SFPP's rehearing request in that proceeding is pending.

ARGUMENT

This Court has "long held that [it] ha[s] jurisdiction to review only final orders of the Commission." *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995) (discussing Natural Gas Act section 19(b), 15 U.S.C. § 717r(b)) (citing *Public Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1376-77 (D.C. Cir. 1990)). The "strong presumption that Congress intends judicial review of administrative action . . . applies only to final agency action." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (internal quotation and citation omitted). "Final agency action is that which 'mark[s] the consummation of the agency's decisionmaking process.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its

effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

To distinguish a policy statement from a definitive rule subject to judicial review, this Court looks at (1) "the actual legal effect (or lack thereof) of the agency action in question on regulated entities"; (2) "the agency's characterization of the guidance"; and (3) "whether the agency has applied the guidance as if it were binding on regulated parties." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252-53 (D.C. Cir. 2014); *see Sierra Club v. Envtl. Prot. Agency*, 873 F.3d 946, 951 (D.C. Cir. 2017).

I. The Policy Statement does not have any actual legal effect on petitioners.

The Policy Statement does not change the Petitioners' rates. Rather, the Policy Statement "is merely an announcement to the public of the policy which the agency *hopes to implement in future rulemakings or adjudications*." *Pac. Gas & Elec.*, 506 F.2d at 38 (emphasis added).

The Policy Statement, which generically addressed Commission-regulated natural gas and oil pipelines, imposes no "obligations or prohibitions on regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 251. Instead, the relevant statutory provisions require rates for natural gas and oil pipelines to be just and reasonable in the circumstances presented. *See, e.g.*, *City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985) (holding that, under the Natural Gas Act, just and

reasonable rates "means rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital"). *See also* 49 U.S.C. app. § 1 *et seq*. (1988) (requiring oil pipeline rates under the Interstate Commerce Act to be just and reasonable).

The Policy Statement did not remove the income tax allowance from Petitioners' cost-of-service. In subsequent cost-of-service rate proceedings, the Commission must be "prepared to support the policy just as if the policy statement had never been issued." *Pac. Gas & Elec.*, 506 F.2d at 38. The Policy Statement had no "immediate and significant impact" on Petitioners, making the issues and record not suitable for immediate judicial review. *Id.* at 48 (citing *Abbott Labs.*, 387 U.S. 136; *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967)).

Finally, denying review of the Policy Statement will not prejudice the Petitioners and will not deny Petitioners the opportunity to seek judicial review of the Commission's treatment of the income tax allowance. Petitioners are both participants in specific proceedings before the Commission, *see infra* pp 9-11, where a factual record and the general principles discussed in the Policy Statement can be applied in a meaningful context. Importantly, Petitioners will have the opportunity to seek judicial review of final orders issued in those proceedings, where this Court, with the aid of a fully developed, pipeline-specific record, will

have the opportunity to review the Commission's treatment of the income tax allowance.

II. The Commission characterized the Policy Statement as a non-binding guidance document.

"When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy." *Pac. Gas & Elec.*, 506 F.2d at 39.

The Commission characterized the Policy Statement as a non-binding policy statement when it stated that the policy "will affect both oil and natural gas [master limited partnership] pipelines on a *going-forward basis*." Policy Statement, 162 FERC ¶ 61,227 at P 46 (emphasis added). In other words, the Policy Statement will not have an "immediate and significant impact," but will only have an impact when (and if) applied in future adjudicated rate cases. *Pac. Gas & Elec.*, 506 F.2d at 35; *see also Canadian Ass'n of Petroleum Producers v. FERC*, 487 F.3d 973, 974 (D.C. Cir. 2007) (acknowledging that earlier policy statement's lack of immediate and significant impact raises substantial ripeness issues).

In the Order on Rehearing, the Commission declined to address the issues raised in rehearing requests. Rather, the Commission stated that the Policy Statement does not "establish a binding rule," but instead expresses a "general policy intent designed to provide guidance by notifying entities of the course of

action the Commission intends to follow in future adjudications." Order on Rehearing, 164 FERC ¶ 61,030 at P 6 (citing *Pac. Gas & Elec.*, 506 F.2d at 38). The Commission therefore stated that "it will consider the issues and arguments raised in the rehearing requests in the context of specific cases in which they apply." *Id.* P 8. "The Commission emphasizes that *when applied in specific cases*, opportunity will be afforded to affected parties to challenge or support the revised policies through factual or legal presentation and to present any issues and arguments regarding the application of these policies to the entities at issue as may be appropriate in the circumstances presented." *Id.* P 6 (emphasis added).

III. The Commission has not applied the Policy Statement as if it were binding on regulated parties.

The Commission's treatment of the Policy Statement further demonstrates that the order was not intended to be (or treated as) binding.

A. On remand from this Court in *United Airlines*, SFPP has the opportunity to challenge all aspects of the Commission's income tax allowance policy in SFPP's case specific proceeding.

In the remand proceedings following *United Airlines* (FERC Docket No. IS08-390), the Commission "implement[ed] the *United Airlines* remand" for SFPP's West Line. *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 at P 21. Prior to the Commission's remand order, SFPP filed two sets of comments, and the Commission fully "considered [these] two separate filings by SFPP following the remand." *Id.* P 30. The Commission determined in the SFPP proceeding that

(1) granting SFPP an income tax allowance would result in double recovery, reasoning that the contrary finding would be inconsistent with this Court's *United Airlines* opinion, *id.* PP 22-24; (2) removing the income tax allowance would restore parity between corporations and partnerships, *id.* P 25; (3) granting SFPP an income tax allowance is not justified by Congressional intent, *id.* PP 26-27; and (4) the tax costs of partnership investors are not properly attributed to the regulated partnership entity, *id.* P 28-30. SFPP sought rehearing of these findings, which is currently pending. If SFPP or any other party is aggrieved after the Commission issues a final order on rehearing, this Court will have the opportunity to review the Commission's treatment of the income tax allowance in the context of a fully developed, case-specific record.

SFPP is also engaged in Commission proceedings with respect to rates on a separate portion of its system where the income tax allowance is likewise an issue. *See SFPP, L.P.*, Opinion No. 522-B, 162 FERC ¶ 61,229 (Mar. 15, 2018) (proceeding addressing rates for SFPP's East Line). Similarly, this Court's review of the income tax allowance issue will be best evaluated in a petition for review of case-specific orders issued in those proceedings.

B. In its rate proceeding under the Natural Gas Act, Enable Mississippi River Transmission has the opportunity to advocate in favor of an income tax allowance.

On July 31, 2018, the Commission issued an order addressing Enable Mississippi River Transmission's request pursuant to the Natural Gas Act, "propos[ing] significant rate increases, modifications to certain rate schedules, and various other changes to the terms and conditions of its FERC gas tariff." *Enable Mississippi River Transmission, LLC*, 164 FERC ¶ 61,075, at P 1 (2018). Enable Mississippi River Transmission filed its cost-of-service that included income tax expenses. *Id.* P 8. The Commission set much of the case for hearing, but also determined that Enable Mississippi River Transmission had "failed to justify the inclusion of an income tax allowance in its cost-of-service." *Id.* P 29. Although the Enable Mississippi River Transmission order cited the Policy Statement, *id.* P 31 n.25, the Commission's analysis primarily relied on this Court's *United Airlines* opinion, in addition to the SFPP remand order. *Id.* P 32.

As in SFPP's proceedings, Enable Mississippi River Transmission's rehearing request is pending, and, once resolved, will afford this Court the opportunity of review based on a fully-developed, pipeline-specific record.

IV. This Court has previously determined that a challenge to the Commission's tax policy statement raises substantial ripeness issues.

This Court has addressed the Commission's income tax policy in the context of specific rate proceedings. *See BP West Coast Products, LLC v. FERC*, 374 F.3d

1263 (D.C. Cir. 2004); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007); and *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016). When this Court had the opportunity to review a previous tax policy statement issued in 2005 similarly generic to the Policy Statement at issue here, this Court "acknowledge[d] that [the] facial challenge to the [2005] Policy Statement raises substantial issues of both standing and ripeness." *Canadian Ass'n of Petroleum Producers*, 487 F.3d at 974 (review of *Inquiry Regarding Income Tax Allowances*, "Policy Statement on Income Tax Allowances," 111 FERC ¶ 61,139 (2005), and "Order Dismissing Rehearing Requests," 112 FERC ¶ 61,203 (2005)). (The court ultimately determined, 487 F.3d at 974, that the issue had been resolved by *ExxonMobil v. FERC*, and thus dismissed the petition for review of the 2005 policy statement as moot.) Petitioners' challenge here is similarly premature.

CONCLUSION

For the foregoing reasons, the petitions for review in Case Nos. 18-1252 and 18-1254 should be dismissed. In the alternative, if this Court does not dismiss the petitions challenging the Policy Statement, the Commission agrees that the case should be held in abeyance as requested by Petitioner SFPP (*see* Motion to Hold in Abeyance of SFPP, L.P., filed October 17, 2018, in Case Nos. 18-1252 and 18-1254) until the Commission's policy is applied in future case-specific proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) because it contains 2651 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). I further certify that the foregoing complies with the requirements of Fed. R. App. P. 27(d)(1)(D)-(E) because it has been prepared in Times New Roman 14- point font using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of this filing will be sent by first class mail to parties that have not consented to electronic service as indicated below:

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